OMG! "Twibel" Claims? R U 4 Real?

CHARLES D. TOBIN

Can you imagine trying to tweet an argument supporting a motion to dismiss in a defamation action brought by, say, a restaurateur?

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> *Pltf hz no COA. Opinions r protected if they dont contain verifiable fact. So in* Sager v. Stewart *the court held the phrase "Ur golf swing is as graceful as an elephants" wasnt actionable; pachyderms dont hit the links. Likewise here saying the restaurants "pot roast tastes like dogfood" cant be verified—unless u really want to gross out a jury. Therefore my client wins.*

All through school we were taught to make our writing concise. Winnow out excessive use of adjectives. Make each point once, then move on to the next one. Active voice is better than passive voice.

Even now, CLE seminars are laden with tips to help lawyers discipline themselves to write with both force and brevity. And just look at the trend among professional groups, especially the ABA, which jams our e-mail inboxes with dozens of communications a week.[1]

Legal scholarship and commentary, as much as mainstream journalism, is clearly headed in the direction of shorter, faster, more mobile.

Are the courts ready for tweet briefs? Do we need any more than a series of 140-character messages to get a cohesive legal thought across? Can we capture the essence of the case law on opinion from *New York Times v. Sullivan* through *Milkovich v. Lorain Journal Co.* in a pithy SMS text?

Probably not. At least not for the judicial audiences that we hope to persuade. They need to see the background facts, enough convincing precedent to steer the court, a well-worded poke to pierce through our opponent's thin logic.

We are conditioned to think that a solid argument is built on a foundation of lots and lots of context. Heck, some of us strain to live within our jurisdiction's five- or ten-page limit for reply briefs, even when the document is pure rehash much of the time.

Perhaps this is why lawsuits brought against Internet publishers provide unique challenges for defamation courts and defense counsel. The growth of the Internet media means more access to more audiences for more speakers. But not all posters have the time to hone their writing. Not all of them have the technical skill. Not all of them are linear thinkers. Not all of them provide context when they write.

Many lawyers reading this column will remember the dial-up days of the 1990s, when we had to explain phrases such as *Internet* and *World Wide Web* in our briefs. It's been fascinating to watch as judges, now themselves as familiar with the online world as we are, grapple to apply old defamation models to new media.

For me, a defining moment in Internet libel jurisprudence came with my advance sheet containing the Fourth Circuit's unpublished opinion in *Agora, Inc. v. Axxess, Inc.*, 2001 WL 339021 (4th Cir. 2001). The court of appeals affirmed a district court's ruling that an online publisher's review of a ratings agency was not defamatory, as the offending statement was "based on disclosed or readily available facts."

This reasoning, of course, recites garden-variety fair comment privilege law. But the precise location of the "disclosed or readily available facts" made this decision stunning. The court found them by clicking on a hyperlink in the defendant's publication. And it did this in ruling on a motion to dismiss, where judges typically look only to the four corners of the publication and the plaintiff's complaint.

Wow. Now there's a group of judges who really appreciated the vision of the Internet as a tool for building a shared community of human thought.

The social media community presents different challenges for courts and different opportunities for media counsel. Twitter, Facebook, and Linked-in are not always part of the seamless web. They provide forums for random untethered thoughts, often posted by speakers in multitasking moments on the go, with no embedded links and few building blocks of reasoning.

So far, "twibel" cases—lawsuits arising from communications on Twitter—have met with mixed results:

- A Chicago judge last year dismissed a libel lawsuit brought by a property company against a tenant who tweeted that the landlord "really thinks its OK" if she sleeps "in a moldy apartment." According to a newsreport, the judge ruled that expression was too vague to support a defamation claim.
- Singer Courtney Love in March paid $430,000 to settle a libel lawsuit arising out of her tweet calling a fashion designer a "nasty, lying, hosebag thief."
- The creator of the so-called cookie diet weight loss program has sued Kim Kardashian, whose sole claim to fame is being famous, for tweeting that he was "lying" and "falsely promoting" that she was on his diet.

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- And in October, faced with an anti-SLAPP motion, a Lake Oswego, Oregon, doctor dismissed his lawsuit against a woman who described on Twitter his 2001 official reprimand for inappropriate dealings with a patient as "attempting to trade treatments for sex."

In at least two aspects, libel-by-tweet and the like may pose less of a risk than claims involving other expressive media. As one author has pointed out,[2] most social media audiences are finite groups of followers or friends. The scope of a libel plaintiff's alleged reputational injury therefore may be easier to define than with a newspaper article or a TV broadcast. And if defendants post retractions on the same social medium as the offending publication, they will almost certainly demonstrate that they have reached the identical audience as the original posting.

But as we scale down our expressions on the Internet, do we also risk downsizing our First Amendment freedoms?

IDK 4 sure.Do U?

Endnotes

1. The ABA will let you opt out of receiving ABA e-mails: https://apps.americanbar.org/esubscription/home.cfm. I have yet to figure out how we are all supposed to know this. But at least those of you who see this footnote will. (*Ur welcome BTW*).

2. *See* http://verdict.justia.com/2011/10/03/should-the-law-treat-defamatory-tweets-the-same-way-it-treats-printed-defamation

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