

Defamation, Celebrities, and the Internet

By the very nature of their positions, celebrities in both the sports and entertainment spheres generate significant public attention and discussion. While the discourse will frequently be positive, inevitably many such conversations will result in negative, or even slanderous, remarks being made regarding such individuals. However, with the proliferation of the Internet and social media, many of these exchanges are now occurring not at the water cooler or in the schoolyard, but rather published online for a potentially wide audience to view. In fact, individuals are likely to exercise less restraint online than they would in a personal interaction, as they are protected, to varying degrees, by a veil of anonymity, and thus may be prone to making even more extreme statements. Defamation law is clear that individuals are held to the same standard for what they say online as offline, but as of yet there have been no known lawsuits that have proceeded through the legal system, all the way to damage calculations, for online libel. This article will provide recent examples of celebrities being involved in such cases, whether as the plaintiff or the defendant, and the difficulties that plaintiffs face in attempting to prevail in an online defamation lawsuit.

Anonymous Defendants

Brian Burke, the current general manager (“GM”) and president of the National Hockey League’s (“NHL”) Calgary Flames, as well as the former GM of the Toronto Maple Leafs, the Anaheim Ducks, the Vancouver Canucks, the Hartford Whalers, and the US men’s hockey team at the 2010 Winter Olympics in Vancouver, received substantial press about a year ago for a lawsuit he filed in the Supreme Court of British Columbia (“BC”). The suit is targeted at eighteen individuals who, through a variety of message board posts, blog posts, and comments to blog posts, allegedly made defamatory statements regarding Burke. While this case is no longer generating heavy media coverage, its implications are nevertheless still salient in our increasingly cyber world.

In January 2013, a few months prior to filing the suit, Burke was terminated from his position as the GM of the Maple Leafs. The timing was curious, as news of the firing came three days prior to the end of the 2012-2013 NHL lockout, following a prolonged offseason where Burke remained in control of the club. While the termination was arguably justifiable solely on the basis of the team’s performance, speculation of alternative explanations began to proliferate. This speculation ultimately culminated in Burke’s filing of the lawsuit, on April 26, 2013¹. From behind the veil of aliases such as “Kanada Kev,” “Slobberface,” “Poonerman,” “Ncognito,” “Sir Psycho Sexy,” and “Steve,” individuals on fora ranging from prominent hockey message boards, team fan sites, and personal blogs to even message boards for golf fanatics and escort service reviews began postulating that the real reason for Burke’s termination was an extramarital

¹http://www.scribd.com/fullscreen/138175829?access_key=key-mdrj0oicew547he95t5

affair.² In particular, it was alleged that Burke had impregnated Toronto sportscaster Hazel Mae, who is also married.³

While Burke does not deny that running a professional hockey team is a task that invites tremendous scrutiny and criticism, particularly in the hockey craved market of Toronto, and he accepts that negativity directed towards his performance in a professional capacity comes with the position, he draws the line when it comes to his personal life.⁴ Rather than merely working behind the scenes to get the comments in question taken down, Burke chose to go on the offensive. In the words of Burke's lawyer Peter Gall: "A lot of people think they can with impunity say whatever outrageous things on the Internet and nobody's ever going to be able to find them or hold them accountable. Brian's going to hold them accountable."⁵

As would be expected, tracking down these individuals, particularly ones such as "Steve" who made their comments without a registered account, has proven to be difficult. However, Burke quickly secured his first legal victory. Master MacNaughton of the BC Supreme Court, finding it impracticable for Burke to personally serve "Message Board Defendants" without knowing their identities or locations,⁶ applied the procedural rule that "[i]f it is impracticable to serve a document by personal service . . . the court may . . . [grant] permission to use an alternative method of service."⁷ This ruling extended to seven of the eighteen defendants, for whom Burke was allowed to serve notice of the proceedings through the use of private messaging on the respective message boards on which these defendants made their slanderous statements.⁸ This is a direct attempt to pierce the veil of anonymity behind which Internet commenters hide, to try to hold them responsible for their remarks.

Despite that minor victory, Burke still faces tremendous hurdles in locating the remaining defendants, as well as getting the "Message Board Defendants" to come forth and reveal their identities, even after being served. While there is an individual who left his blog post available to be perused ("isolatedcircuit"),⁹ and a journalism student who has revealed his identity ("THEzbrad"),¹⁰ Burke also has to attempt to locate individuals such as "Steve" and "Ncognito," who left their remarks in the comments section of blog posts that do not require one to be a

²*Id.*

³*Id.*

⁴http://www.thestar.com/sports/2013/11/12/brian_burke_on_sports_lawsuits_and_the_sochi_olympics.html

⁵http://www.thestar.com/news/canada/2013/04/26/former_toronto_maple_leafs_gm_brian_burke_files_defamation_lawsuit_over_internet_lies.html

⁶<http://canlii.org/en/bc/bcsc/doc/2013/2013bcsc964/2013bcsc964.html?searchUriHash=AAAAAQAWQnVya2Ugdi4gSm9obiBEb2UgMjAxMwAAAAAB>

⁷<http://canlii.org/en/bc/laws/regu/bc-reg-168-2009/latest/part-2/bc-reg-168-2009-part-2.html>

⁸<http://canlii.org/en/bc/bcsc/doc/2013/2013bcsc964/2013bcsc964.html?searchUriHash=AAAAAQAWQnVya2Ugdi4gSm9obiBEb2UgMjAxMwAAAAAB>

⁹<http://isolatedcircuit.wordpress.com/2013/01/31/brian-burkes-suspected-reason-for-being-released/>

¹⁰http://www.thestar.com/news/crime/2013/04/30/young_target_of_exmaple_leafs_gm_brian_burkes_lawsuit_wonders_why_is_it_a_big_deal.html

registered user to do so.¹¹¹² Despite the lack of cooperation from message board and website administrators,¹³ Burke and his team have made progress over the past year. While there is no indication that the civil trial is actually imminent, Burke's lawyers have been able to locate several of the defendants (for example, Kanada Kev¹⁴), expose their real identities, and force them to retract their statements.¹⁵

Famous Defendants

On this side of the border, Courtney Love, the former frontrunner of the band Hole and widow of Nirvana lead singer Kurt Cobain,¹⁶ has been involved as the defendant in several defamation lawsuits over comments she made on Twitter and other social media. The first such case was filed in March 2009 by Dawn Simorangkir, a fashion designer who created five outfits for Love.¹⁷ Love had accused Simorangkir of theft on several occasions through her Twitter account, as well as implied that Simorangkir held a criminal background.¹⁸ The case was to be the first in which a jury would decide whether a celebrity's Twitter posts could be considered libel, but the case was settled pretrial for \$430,000.¹⁹

Next, Love was sued by her former attorney Rhonda Holmes, who had been hired to deal with a fraud case against the administrators of Cobain's estate.²⁰ Holmes filed a defamation suit against Love for a tweet that read, in part, "I was f---ing devastated . . . when Rhonda J. Holmes esq. of san diego was bought off."²¹ The case is believed to be the first trial in the United States involving allegations of defamation on Twitter.²² Because of Holmes' association with Love, she is deemed a "limited-purpose public figure,²³" such that she needs to show that Love acted with "actual malice."²⁴ In her testimony, Love claimed that she meant for the tweet to be a direct private message, and that she removed the tweet as soon as she realized it was made public.²⁵ She also claimed to have honestly believed the statement to be true when she made it.²⁶ The trial

¹¹<http://fourhockeyfans.blogspot.ca/2013/01/igned-sealed-and-delivered-from-fucking.html>

¹²<http://www.hockeyinsideout.com/news/training-camp-notes-on-gomez-leblanc-and-galchenyuk>

¹³http://www.thestar.com/sports/hockey/2013/05/29/brian_burke_lawsuit_bc_court_grants_him_permission_to_sue_online.html

¹⁴http://www.jambands.ca/sanctuary/showtopic.php?tid/262944/tp/2/fbb_session_id/ff4cc012244c5bc31ebc48295aaa40bd/

¹⁵<http://www.cknw.com/2014/03/13/former-vancouver-canucks-gm-winning-legal-battle-to/>

¹⁶Ellyn M. Angelotti, *Twibel Law: What Defamation and Its Remedies Look Like in the Age of Twitter*, 13 J. High Tech. L. 430 (2013)

¹⁷*Id.*

¹⁸*Id.*

¹⁹*Id.*

²⁰<http://www.hollywoodreporter.com/thr-esq/highlights-courtney-loves-testimony-at-673647>

²¹*Id.*

²²<http://www.hollywoodreporter.com/thr-esq/courtney-love-wins-twitter-defamation-673972>

²³<http://www.hollywoodreporter.com/thr-esq/highlights-courtney-loves-testimony-at-673647>

²⁴*New York Times Company v. Sullivan*, 84 S.Ct. 710 (1964).

²⁵<http://www.hollywoodreporter.com/thr-esq/courtney-love-wins-twitter-defamation-673972>

²⁶*Id.*

took place over eight days, and ultimately the jury, on January 24, 2014, determined that Holmes had not established by “clear and convincing evidence” that Love “knew her statement to be false or doubted the truth of it” and thus did not prove actual malice to be sufficient to prevail for defamation.²⁷ Thus, while this case was a trailblazer for Twitter defamation lawsuits, it did not provide any insight regarding how a jury may reward damages for such a suit, in the age of social media.

However, such insight could still emerge from the most recent case involving Love. Simorangkir has filed a new suit for new comments that Love made toward her, on Pinterest as well as in an interview given to Howard Stern.²⁸ In her interview with Stern, Love claimed that she has learned her lesson, but went on in the interview to assert that Simorangkir is a thief, and insinuate that she had engaged in prostitution.²⁹ On Pinterest, Love commented that Simorangkir “stole 36 bags of clothing” and stole, and is continuing to use, Love’s designs³⁰. The suit claims that Love has “mounted a malicious campaign to not only terrorize Simorangkir, but to ruin and destroy her reputation and livelihood.”³¹

Comparing Defamation Laws

While Love’s victory in court over Holmes may bode well for Internet commenters in the US, given the difficulty of proving actual malice, the defendants in the Burke case are not similarly lucky. Canadian defamation laws differ significantly from American defamation laws, to the extent that the former are considered the most plaintiff-friendly defamation laws in the English speaking world, while the latter is considered the most defendant-friendly.³² In 1995, the Supreme Court of Canada expressly rejected the actual malice test from *New York Times v. Sullivan*, citing criticism of it both within the United States and in other countries.³³

Actual malice is defined in the defamation context as “knowledge (by the person who utters or publishe[s] a defamatory statement) that a statement is false, or reckless disregard about whether the statement is true.”³⁴ A public figure seeking to recover for defamation must prove that the defendant purposefully lied, and that the lie resulted in actual, material harm for the plaintiff. Love prevailed against Holmes because the court classified Holmes to be a public figure, and Holmes could not prove that Love’s statement was a purposeful lie. In Canada,

²⁷*Id.*

²⁸<http://www.hollywoodreporter.com/thr-esq/courtney-love-hit-defamation-lawsuit-630423>

²⁹*Id.*

³⁰*Id.*

³¹*Id.*

³²<http://kellywarnerlaw.com/chart-differences-between-united-states-and-canadian-defamation-law/>

³³*Hill v. Church of Scientology of Toronto*, 2 S.C.R. 1130 (S.C.C. 1995)

³⁴<http://kellywarnerlaw.com/what-is-actual-malice/>

however, intent is presumed, and so it is not necessary to show that the defendant intended to defame.³⁵

Canadian libel laws have been criticized as being arbitrary, capricious, absurd, and otherwise illogical, in addition to being antiquated.³⁶ Burke is likely to prevail against his online defamers because under Canadian law, plaintiffs do not have to prove falsity, malice, or special damages to win a defamation suit.³⁷ In fact, defendants are considered prima facie liable until they can prove their innocence; the burden of proof is thus on the opposite party as compared to American law.³⁸ While Canadian law does not allow defendants to be held liable for libel for opinions, inferences, neutral reporting, good-faith research, or statements of truth,³⁹ none of these descriptions applies to the statements made alleging an extramarital affair between Burke and Mae. In either jurisdiction, there is no difference to defamation law as it applies to statements made online and offline.⁴⁰

However, in addition to issues that Burke will face in locating the defendants, he may also face hurdles in attempting to collect damages awarded by the court. While many of the online fora where the defendants were found specialize in content for Canadians, there remains the possibility that some of the defendants may be American citizens. This is significant as, based on judicial decisions,⁴¹ which were subsequently codified in 2000 into the SPEECH Act, American citizens are largely protected from having to pay defamation damages awarded in international jurisdictions that provide defamation standards that are less friendly to free speech than American law.⁴² Any decision in Burke's favor handed down by the BC Supreme Court would thus likely not be enforceable against American defendants unless an American court would also have found the statements libelous, which may be difficult under the "actual malice" standard.

The Aftermath

Ultimately, it is unclear what the effects of these lawsuits will be on the court system or Internet interactions going forward. It is clear that courts can and will hold defendants to the

³⁵<http://www.insidecounsel.com/2011/06/09/litigation-some-key-differences-between-civil-liti>

³⁶<http://www.lawyersweekly.ca/index.php?section=article&articleid=371>

³⁷<http://kellywarnerlaw.com/chart-differences-between-united-states-and-canadian-defamation-law/>

³⁸*Id.*

³⁹*Id.* See also <http://cbabc.org/For-the-Public/Dial-A-Law/Scripts/Your-Rights/240>

⁴⁰<http://allenmendelsohn.com/2013/05/some-thoughts-on-online-defamation-because-apparently-i-am-an-expert-now/>

⁴¹See e.g. *Matusevitch v. Telnikoff*, 877 F. Supp. 1 (D.D. C. 1995) (holding that an Englishman succeeding on a libel suit in English court against an American is not entitled to have his judgment enforced in Maryland because British libel law did not provide the same level of protection for free speech as American law). Note that much of the existing Canadian libel law is derived from the British libel law.

⁴²<http://kellywarnerlaw.com/chart-differences-between-united-states-and-canadian-defamation-law/>

same standard for statements they make online as well as offline. This alone may have deterrence effects on individuals on the Internet, as they come to realize that they can be held liable for their statements despite their assumed anonymity. However, the Burke case shows though that there are significant barriers for plaintiffs seeking to recover from defendants online in situations where the defamers are hidden behind some level of anonymity, such as on message boards or Twitter. Given the nature of the Internet and social media, this means that any deterrent effect of potential liability for such defendants will be low, as they are likely to escape capture, and may be judgment-proof even if they are found.

Even in situations where the individual making the libelous statements is known, recovery may be difficult under the “actual malice” standard. To be required to prove that someone knowingly made a false statement with the specific intention, and effect, of harming one’s reputation is a heavy burden to bear, and one that may be even more difficult to prove for comments made online. Love was able to prevail on the basis that she was found to not have knowingly made a false statement, and Burke would likely struggle to prove actual damages, given that the audiences of his defendants were limited, and the likelihood that the rumor would reach a magnitude so as to actually impact his reputation is trivial.

One thing that is as of yet unknown is how courts will rule on damages in Internet defamation lawsuits, as Love was able to first settle a case, and then prevail on a second one, not requiring precedent to elucidate a court’s reasoning. This situation will be one to watch, as potential instances of defamation occur frequently on the Internet, likely to the magnitude of millions of such statements being made daily. Courts are thus wise to be mindful of the precedential effects of any rulings they make, so as to not provide incentive for individuals to file petty lawsuits in the hopes of obtaining a large judgment. The threat of overwhelming judicial resources is very real in such a situation. Compound this issue with the fact that courts may be reluctant to find libel on a forum where many believe their statements to be free speech, and set precedents restrictive to speech, and it seems unlikely that suits against Internet commenters will succeed, or be profitable even if damages are awarded.

While society is likely on the precipice of a groundbreaking defamation case based on statements made on the Internet, these reasons, and more, provide reason to believe that the success rate will be extremely limited. So, for entertainers and athletes, defamatory statements to their reputations will remain largely unpunished, and come as one of the unavoidable downsides of their positions in the public eye.