

# Delimiting Defamation

## Pennsylvania Supreme Court Protects Reputation From Freedom of Speech Defense

**D**efamation law, for the past half-century or so, has focused on the clash between one person's First Amendment right to speak freely and another person's ability to protect his or her reputation from the damage that abusive free speech can cause. The United States Supreme Court has cast itself in the role of the First Amendment's bodyguard, and has roughed up and shoved back state defamation laws whenever they have edged too close to freedom of speech's hallowed ground. Beginning with its landmark *New York Times v. Sullivan* decision in 1964, the Supreme Court, in that bodyguard role, has imposed various federal constitutional restrictions on the ability of states to penalize speech through defamation lawsuits.

In the last few years, the Pennsylvania Supreme Court has decided to take on the antagonist role as the protector of reputation against assaults from abusive speech. A recent series of defamation decisions has revealed the Pennsylvania Supreme Court's conviction that the U.S. Supreme Court has pushed the pendulum far enough, or even too far, in favor of freedom of speech and to the detriment of a person's right to protect his or her reputation. So the Pennsylvania Court is now pushing back.

The Pennsylvania Supreme Court's defense of reputation has a constitutional basis, but it is not to be found in the U.S. Constitution, which makes no mention of reputation. Instead, it is Pennsylvania's state Constitution that expressly elevates reputation to the same plane as that of freedom of speech. The drafters of Pennsylvania's charter did not bury reputation on the back page or in fine

print. Instead, Article I, Section 1 of Pennsylvania's Constitution declares that "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." While reputation gets top billing along with constitutional stalwarts like life, liberty, property, and the pursuit of happiness, Pennsylvania's Constitution relegates free speech to a less-prominent position in Article 1, Section 7, and even then cautions the free speaker that he or she shall be "responsible for the abuse of that liberty." The



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Pennsylvania Supreme Court appears bound and determined to give renewed force to the Pennsylvania constitutional right to protect reputation, and to save that right from falling any farther beneath the exalted status that the U.S. Supreme Court has afforded to the right of free speech. While it is not flouting or ignoring the U.S. Supreme Court's

First Amendment decisions and rules, the Pennsylvania Court, in light of the state constitutional emphasis on reputation, shows no inclination in its recent decisions to give speech any more breathing room than federal law requires.

The state Supreme Court has issued four important defamation decisions since mid-2004: *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899 (Pa. 2007); *American Future Systems, Inc. v. Better Business Bureau*, 923 A.2d 389 (Pa. 2007); *Bochetto v. Gibson*, 860 A.2d 67 (Pa. 2004); *Norton v. Glenn*, 860 A.2d 48 (Pa. 2004). In each case, the court came down on the side of reputation and refused to expand freedom of speech beyond the scope mandated by the U.S. Supreme Court. With those decisions, the state court, by placing a person's right to protect his reputation "on the highest plane," has made Pennsylvania law as accommodating to defamation claims and as hospitable to defamation plaintiffs as the federal constitution permits.

In *Norton v. Glenn*, for instance, the Pennsylvania Supreme Court refused to adopt a new defense to defamation claims, concluding that the U.S. Supreme Court's *New York Times* decision had already provided free speech all the breathing room it needed. In *Norton*, Glenn made certain incendiary statements about Norton and Wolfe, who were public officials, but Glenn made those statements, at least in part, outside of any official government proceedings. A balanced newspaper article reported that Glenn made the statements, but did not suggest in any way that the statements were accurate, and also included a response from Norton. Norton and Wolfe nevertheless sued the newspaper for defamation. The trial court held that the "neutral reportage privilege" applied and protected the newspaper from liability.

The Pennsylvania Supreme Court disagreed, and held that Pennsylvania law does not recognize a "neutral reportage privilege." The Supreme Court determined that the *New York Times* "actual malice" requirement — which demands proof that the defendant

knew the statement at issue was false or acted with reckless disregard to the truth — provides all of the free speech safeguards mandated by the federal Constitution and the U.S. Supreme Court. The Pennsylvania Supreme Court was wholly unwilling to go any farther in the direction of free speech and to the detriment of reputation protection, because, to do so, would, in the opinion of the court, tip the “seesawing” balance too far in the direction of free speech at the expense of reputation protection.

Similarly, in *Bochetto v. Gibson*, the Pennsylvania Supreme Court took a very narrow view of a defense to a defamation action, and thereby blocked any further erosion of the right to protect reputation. At issue in *Bochetto* was the scope of the “judicial privilege,” and the court went out of its way to limit the availability of that defense. The judicial privilege is an absolute privilege that protects speech by immunizing from a defamation action any statement made during judicial proceedings. Thus, for instance, a litigant (or attorney) cannot be held liable for defamation based on a statement made in a pleading, on the witness stand, or during a closing argument. In *Bochetto*, Gibson, a lawyer, filed a medical malpractice action

on behalf of his client. Gibson then faxed a copy of the complaint to a reporter, who published a story about the suit. Bochetto, the doctor accused of malpractice, sued Gibson for defamation. Both the trial court and the Superior Court held that the judicial privilege applied and barred Bochetto’s suit.

The Pennsylvania Supreme Court disagreed, again coming down on the side of the plaintiff and reputation, at the expense of the defendant and freedom of speech. The court held that the judicial privilege’s applicability was strictly limited to statements made in the regular course of judicial proceedings. Sending the fax to the reporter “was an extrajudicial act” and therefore was beyond the scope of the privilege.

In 2007, *American Future Systems* presented the Pennsylvania Supreme Court with the opportunity to put some teeth back into Pennsylvania’s common law conditional privilege defenses. Defamation law, which historically permitted a plaintiff to recover without proof of fault on the part of the defendant, did provide certain non-absolute defenses when a defendant made an offending statement in a privileged context. In turn, however, a pre-*New York Times*

defamation plaintiff in Pennsylvania could overcome a conditional privilege defense with proof that the defendant abused the privilege through negligence or greater culpable conduct.

Then the U.S. high court intervened and, in the interests of protecting free speech, held that, in order for a defamation plaintiff to establish even a *prima facie* case, the plaintiff had to prove, at a minimum, negligent conduct by the defendant. Due to that federally mandated elevation of the plaintiff’s initial burden of proof to the level of fault formerly necessary to demonstrate abuse of a privilege, Pennsylvania’s conditional privilege defenses “lost their significance” because, if a defamation plaintiff succeeded in establishing a *prima facie* case with its requisite proof of the defendant’s negligence, the plaintiff “has by that very action proved any possible conditional privilege was abused.”

The *American Future Systems* defendant invited the Pennsylvania Supreme Court to reinvigorate Pennsylvania’s conditional privileges by requiring a plaintiff to prove more than negligence in order to overcome a privilege. The court refused to do so because the imposition of another increased

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burden on a defamation plaintiff, when not mandated by the U.S. Constitution, would do harm unnecessarily to the Pennsylvania constitutional right to protect reputation. According to the Pennsylvania Supreme Court, "reputational interests occupy an elevated position within our state constitution's system of safeguards" and, as a result, the court refused to give even an inch more to freedom of speech than principles of supremacy required.

Finally, in *Weaver v. Lancaster Newspapers, Inc.*, the Pennsylvania Supreme Court appears to have reduced greatly the practical benefits to defamation defendants of the *New York Times* "actual malice" standard. Weaver, a police officer, argued that Brownstein defamed Weaver in a letter to the editor, and did so with actual malice. In response to Brownstein's *New York Times*-based motion for summary judgment, Weaver, as evidence of actual malice, pointed to Brownstein's decision to republish the original defamatory letter even after Weaver had filed his original complaint. The trial court granted Brownstein's motion based on a lack of evidence of actual malice. The Superior Court affirmed, holding that the

republishing of the letter was not relevant to the actual malice issue.

The Pennsylvania Supreme Court reversed and, in so doing, indicated that, in a defamation case in Pennsylvania, the most minimal evidence of actual malice will defeat a motion for summary judgment. The court held that evidence of Brownstein's republishing of the letter was relevant because Brownstein's willingness to republish the defamatory statements, even after Weaver filed suit alleging that they were false, could possibly indicate that Brownstein's original publication was made with disregard for the truth.

While it refused to declare categorically that "summary judgment is inappropriate in all defamation cases" on the issue of actual malice, the Pennsylvania Supreme Court strongly suggested that, in the vast majority of cases, it would indeed be inappropriate to grant a defendant's motion for summary judgment and deprive a jury of the opportunity to determine if a defendant acted with actual malice.

The Pennsylvania Court noted that the U.S. Supreme Court "expressed its doubts" about granting summary judgment on the

issue of actual malice because that issue "calls a defendant's state of mind into question and does not readily lend itself to summary disposition." The Pennsylvania Court held that even if there is only "one fact" relevant to actual malice in dispute, even one as seemingly tenuous as an after-the-fact republishing, summary judgment is not appropriate.

With this recent series of decisions, the Pennsylvania Supreme Court has counseled, almost chided, Pennsylvania's lower courts that, "in the area of the law where defamation actions and free expression intersect, the courts cannot focus myopically on the preservation of free expression." The state high court appears to have concluded that the U.S. Supreme Court myopically has assigned reputation to the backseat. The Pennsylvania Supreme Court wants reputation up front, riding shotgun alongside freedom of speech. ■

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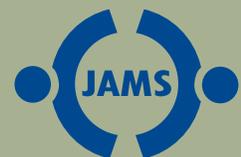


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