# 'Bad to the Bone' - The Libel-Proof Plaintiff Doctrine*

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Defendants in defamation lawsuits have a myriad of available defenses. One of them, the libel-proof plaintiff doctrine, holds that even if the defendants made false statements, the plaintiff may not recover more than nominal damages because such statements had minimal effect on the plaintiff's already sullied reputation. Importantly, the libel-proof plaintiff doctrine provides authors and publishers with a defense that, in appropriate circumstances, can dispose of defamation claims in pre-trial proceedings, thereby avoiding expensive and unpredictable discovery and trial.

The doctrine has developed along two pathways. The first—the "issue-specific" approach—bars relief for a plaintiff whose reputation related to a specific subject matter is so tarnished that he or she cannot be further injured by allegedly false statements on the matter. The second— the "incremental harm" doctrine—bars relief where the challenged statements harm a plaintiff's reputation far less than unchallenged statements in the same article or broadcast. This article will highlight the issue-specific approach.

Under the issue-specific approach, plaintiffs with notorious past criminal behavior are the most likely to be found libel-proof, particularly when the allegedly defamatory statements relate to criminal conduct. For example, a Texas Court of Appeals found a plaintiff libel-proof as to allegedly false statements that he was a methamphetamine dealer and leader of a burglary ring where his criminal record spanned twenty-five years and showed two drug convictions and six convictions for burglary and theft. Likewise, a Tennessee Court of Appeals found a plaintiff libel-proof related to a report that he was suspected of committing additional crimes, including murder, where the plaintiff had already been convicted of multiple violent felonies.

Importantly, the issue-specific doctrine is not limited to plaintiffs with criminal records, but can also apply to a plaintiff complaining of libelous statements in a solely civil or professional context. A Michigan Court of Appeals, for example, dismissed a defamation suit brought by Jack Kevorkia, finding that Kevorkian was libel-proof because his celebrity and reputation as a well-known proponent of assisted suicide meant that the effect of "more people calling him either a murderer or a saint is de minimis." And the Second Circuit found that a plaintiff was libel-proof as to the subject of adultery because magazine and newspaper articles, as well as the plaintiff's own testimony, showed wide dissemination of the information that the plaintiff was living with another woman while still married.

A recent New York case illustrates a crossover between the two—a plaintiff with past criminal behavior, but also general public notoriety for the types of conduct contained in articles that he later claimed were libelous to him. In *Lenny Dykstra v. St. Martin's Press*,[1] former New York Mets centerfielder Lenny Dykstra alleged that his former Mets teammate Ron Darling's 2019 book, *108 Stitches: Loose Threads, Ripping Yarns, and Darndest Characters from My Time in the Game*, contained a defamatory description of Dykstra's behavior directed at Boston Red Sox pitcher Dennis "Oil Can" Boyd in Game 3 of the 1986 World Series. In his book, Darling reported that Dykstra ("one of baseball's all-time thugs") launched into a "foul, racist, hateful" rant at Boyd (who is

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Black) from the on-deck circle that included “the worst collection of taunts and insults I’d ever heard,” surpassing “anything Jackie Robinson might have heard [during] his first couple times around the league.” Dykstra, who is white, alleged that Darling’s description “forever branded him a racist,” and that it was “maliciously stated to attack him and his abilities as a professional athlete, person, and ability to earn a living going forward.”[2]

Pointing to three decades of media coverage, books and articles – some by Dykstra himself – detailing Dykstra’s criminal convictions and penchant for violence and bigotry, Darling and the publisher defendants moved to dismiss Dykstra’s lawsuit, urging that Dykstra was the “classic” libel-proof plaintiff whose reputation is so bad that he simply could not be defamed. The Court agreed, finding it significant that Dykstra had “undisputedly never brought a libel lawsuit” against any of the individuals or media outlets reporting his misconduct, or against Darling himself after Darling’s 2017 book reported the same incident in “eerily similar” detail. Ultimately, the Court concluded that there was “no legal basis for why it should use its very limited time and resources litigating whether Dykstra engaged in yet another example of bigoted behavior over thirty years ago in a court of law.”

One important and common thread to note in all of these cases is the requirement that there be publicity or the plaintiff’s notoriety for the type of conduct at issue. As the Supreme Court of New Hampshire noted:

> Publicity is part and parcel of the damage to a reputation necessary to trigger the issue-specific version of the libel-proof plaintiff doctrine. Indeed, it is often the means by which such damage occurs and the most effective evidence of that damage. In other cases where courts have most persuasively applied the doctrine and deemed plaintiffs libel-proof, both the publicity surrounding the crimes and the attendant level of notoriety are quite high.

In the absence of evidence of that publicity or notoriety, the libel-proof plaintiff defense will likely fail. For example, the Sixth Circuit reversed a summary judgment for defendants where it found genuine issues of material fact as to whether statements on a “20/20” episode could have further damaged the plaintiff’s reputation. Although some local residents knew the plaintiff as an occasionally violent criminal, there had been no popular nationwide program or other publicity portraying the plaintiff as a “hitman” for a corrupt judge or a “muscleman.”

Importantly then, the libel-proof plaintiff doctrine is not a panacea for all defamation defendants. Some courts have yet to adopt it, while those courts that have repeatedly “caution[] that the libel-proof plaintiff doctrine is to be applied sparingly, as it is unlikely that many plaintiffs will have such tarnished reputations that their reputations cannot sustain further damage.” This is particularly true when the allegedly libelous statements take on a different and more egregious character. A California federal district court, for example, rejected the defendants’ contentions that country singer Blake Shelton was “libel proof” as a matter of law against all statements regarding his excessive drinking. That case involved a cover story in In Touch magazine bearing a headline that said “REHAB for Blake” and several related sub-headlines and statements suggesting he had hit “rock bottom.” The Court easily distinguished between statements regarding “excessive drinking” and the magazine’s statements suggesting that Mr. Shelton sought treatment in rehab, finding that even if Mr. Shelton were “libel proof” as to the former, defendants could not make false assertions regarding the latter with impunity.

While the libel-proof plaintiff doctrine is a defense to keep in mind, particularly when the plaintiff has celebrity or notoriety, one should always analyze the appropriate jurisdiction’s treatment of the doctrine to determine whether it might apply in a particular case.

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* With apologies to GEORGE THOROGOOD AND THE DESTROYERS, *Bad to the Bone*, on BAD TO THE BONE (EMI American Records 1982).

[1] *Lenny Dykstra v. St. Martin's Press, et al.*, Civil Action No. 153676/2019, 2020 WL 2789913 (N.Y. Sup. May 29, 2020).

[2] Darling's book did not identify the particular racial epitaphs allegedly used by *Dykstra* in his pre-game rant. Dykstra, 2020 WL 2789913 at *3 (the "stuff coming out of Lenny's mouth was beyond the pale. Unprintable, unmentionable, unforgettable.").

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