

Defamation Without a Lie? Exploring The Law Of Defamation By Implication – Justin Kelton Article in New York Law Journal

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Can a statement that is literally true be defamatory? While “traditional” defamation claims require a statement that is factually false, New York also recognizes defamation-by-implication—where a statement that is technically true conveys a false and defamatory suggestion or implication. This article examines the nuances of defamation by implication in New York.

Twisting The Truth: Words May Be Actionable Even If Literally True.

It is often said that truth is an absolute defense to a claim of defamation. But there is more to it than that. While truth is a powerful shield against defamation claims, New York law recognizes that even a statement that is “literally true” can be misleading enough to cause harm. *Satanic Temple, Inc. v. Newsweek Magazine LLC*, 661 F.Supp.3d 159 (S.D.N.Y. 2023).

Statements that are true may nonetheless be actionable if they imply a defamatory meaning. Defamation by implication “is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements.” *Armstrong v. Simon & Schuster*, 85 N.Y.2d 373, 380–81 (1995). Thus, a claim of defamation by implication is based on a false message “contained not in the statement’s literal wording but rather its innuendo.” *Kavanagh v. Zwilling*, 997 F. Supp. 2d 241, 248 (S.D.N.Y.), *aff’d*, 578 F. App’x 24 (2d Cir. 2014).

Not surprisingly, this is a difficult burden to meet. Given the strong protections of the First Amendment, courts closely scrutinize defamation claims based on statements that are literally true, requiring plaintiffs to meet an especially rigorous standard before such claims can proceed. In *Stepanov v. Dow Jones & Co*

., 120 A.D.3d 28, 37 (1st Dep't 2014), the Appellate Division, First Department set the following standard for evaluating implied defamation claims: "To survive a motion to dismiss a claim for defamation by implication where the factual statements at issue are substantially true, the plaintiff must make a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference."

The *Stepanov* test is an "objective" standard, which "asks whether the plain language of the communication itself suggests that an inference was intended or endorsed." *Satanic Temple, Inc.*, 661 F. Supp. 3d at 170. It is intended to "strike the appropriate balance between a plaintiff's right to recover in tort for statements that defame by implication and a defendant's First Amendment protection for publishing substantially truthful statements." *Stepanov*, 120 A.D.3d at 37. Thus, courts will not allow a claim of implied defamation to proceed if it is premised on "an unjustifiable leap." *Satanic Temple, Inc.*, 661 F.Supp.3d at 171.

So when can a plaintiff succeed in pursuing a defamation claim even though the defendant's statements were technically accurate? The Second Circuit in *Herbert v. Lando*, 781 F.2d 298, 307 n.4 (2d Cir. 1986) gave the following often-cited hypothetical illustration of how defamation by implication can arise:

If, for example, a newspaper account of a rash of neighborhood thefts also reported that a public figure had recently moved into the neighborhood, purchased tools commonly used in burglaries, and had been seen near a number of homes where burglaries had occurred, a reader would be led to believe that the individual described had committed the crimes. Such a deductive inference might well be actionable if there is proof the article was published with actual malice. While each individual statement alone might be literally accurate, in the aggregate they give rise to a false and defamatory inference.

Herbert v. Lando, 781 F.2d 298, 307 n.4 (2d Cir. 1986).

In Analyzing Claims Of Implied Defamation, The Author's Intent Is Paramount

Importantly, even under scenarios like the one described in *Herbert*, a case-by-case analysis is necessary to determine whether the statements, taken as a whole, create a false and defamatory implication. Thus, in *Biro v. Conde Nast*, 883 F. Supp. 2d 441, 466–67 (S.D.N.Y. 2012), Judge J. Paul Oetken cautioned that context matters, and that the *Herbert* scenario could go either way depending on how the author's intent is perceived. He noted that "[i]t is possible that the article reported on several unrelated recent events of local interest. Perhaps the statement about the public figure moving into town appeared toward the beginning of the article, in a section about recent arrivals to town, and the statement about the rash of thefts appeared in a different section of the article that recounts recent criminal activity in town. Although a reader could conceivably infer from the reporting of the two sets of facts that the public figure was the thief, the article would likely not be actionable, because there is nothing to suggest that the author endorsed such an inference. On the other hand, an article that linked the key statements together, with the obvious (albeit unstated) insinuation that the public figure committed the crimes, would potentially be actionable."

As explained by the Southern District in *Satanic Temple*, "[t]here is nothing defamatory about accurately reporting signs of smoke even if there is no proof of fire." 661 F. Supp. 3d at 170. Thus, in analyzing claims of implied defamation, courts look beyond what inferences a reader might draw, and focus on what

suggestions or implications the author intended to endorse in publishing the statements.

Conclusion

Under appropriate circumstances, a plaintiff can pursue a defamation-by-implication claim even if the defendant's words were literally true. But even where “[i]t is possible that a reader might connect” statements into a false or misleading implication, the plaintiff must show that the defendant “intended or endorsed that implication.” *Satanic Temple, Inc. v. Newsweek Mag. LLC*, 661 F. Supp. 3d 159, 170 (S.D.N.Y. 2023).

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