

Plaintiff's status is germane to any defamation case

By Megan C. Deluhery

One of the key considerations for any lawyer or judge in a defamation case is whether the plaintiff is a public figure/official, a limited-purpose public figure, or a private person. That determination sets the standard of care, which is often outcome-determinative.

A public figure/official and a limited-purpose public figure must prove the publisher acted with New York Times constitutional malice — knowledge or recklessness with regard to the truth or falsity of the statements at issue — by clear and convincing evidence, whereas a private individual must prove negligence by a preponderance of the evidence.

In *Marinova v. Boston Herald, Inc., et al.*, tried to a jury verdict in favor of our client, Joanna Marinova, earlier this year, the issue was hard-fought on both sides. Ultimately, Superior Court Judge James F. Lang determined that Marinova was a limited-purpose public figure for certain purposes, but that the newspaper article was not germane to her status.

As a result, although the jury ultimately also issued an advisory malice finding in favor of the plaintiff, she was legally entitled to the negligence standard and the

traditional civil burden of proof.

The rarely cited element of germaneness is the last exit off the road to constitutional malice. Even if a plaintiff is otherwise a limited-purpose public figure, the statements at issue must be germane to the pre-existing controversy and the plaintiff's role in it, otherwise the "limited-purpose" descriptor loses all meaning.

The germaneness element arises from *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which created the limited-purpose public figure construct and required that courts focus on the plaintiff's "participation in the particular controversy giving rise to the defamation" to determine his status. 418 U.S. at 352.

Naturally, one asks what is the controversy "giving rise" to the statements in question, and does that controversy align with the activities of the plaintiff? The D.C. Circuit made the germaneness issue more explicit in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980): "[T]he alleged defamation must have been germane to the plaintiff's participation in the controversy. . . . Misstatements wholly unrelated to the controversy [] do not receive the New York Times protection." *Id.* at 1298.

The issue is somewhat confused by discussion in the case law of certain qualities of a public official plaintiff being "germane" to her fitness for office. For example, in *Stone v. Essex County Newspapers, Inc.*,



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367 Mass. 849 (1975), the Supreme Judicial Court observed that a public official is rightly subjected to the malice standard for reporting about a criminal charge as it is relevant to the official's fitness to serve. *Stone*, 367 Mass. at 863.

That provides justification for the rule, but the rule remains that a public official must always meet the consti-

tutional malice standard for all statements. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964).

Germaneness is also irrelevant to a so-called "all-purpose" public figure who is subject to the heightened standard for all speech. *Gertz*, 418 U.S. at 342. Similarly, those plaintiffs who aspire to hold some public post that would "entail[] control over matters of substantial public concern," even if they fall short of being a public official, may be subjected to the higher standard for statements germane to their qualifications for the post they seek. *Pendleton v. City of Haverhill*, 156 F.3d 57, 69 (1st Cir. 1998).

A line of Massachusetts cases takes that a step further, addressing the plaintiff who holds or is running for a union office. For example, *Lyons v. New Mass Media, Inc.*, 390 Mass. 51 (1983), and *Bowman v. Heller*, 420 Mass. 517 (1995), both addressed whether such a person may be a limited-purpose public figure: in *Lyons*, yes; in *Bowman*, no.

For their part, the union cases do not translate well to other contexts, since the

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analyses there likened the situation to someone running for public office where the heightened standard always applies.

What we do know from *Bruno & Stillman, Inc. v. Globe Newspaper Company*, 633 F.2d 582 (1st Cir. 1980), is that the concept arising in the union cases, that any defamatory statement impugning character might be germane, appears to be limited to the election context — be it elections for public office or prominent union positions. *Id.* at 592.

What of the private person who involves herself in a public controversy, but is not seeking any elected office? Once you stray from the public official or election context, it is not enough merely to state that a defamatory statement relates to a person's character or honesty generally.

In *Dawe v. Corrections USA*, No. S-07-1790-LKK (E.D. Cal.), *aff'd* 506 Fed. Appx. 657 (9th Cir. Feb. 1, 2013), for example, the trial court had initially decided at summary judgment that the plaintiff, who had been involved in controversies regarding privatization of prisons, was a limited-purpose public figure. After the evidence was presented at trial, the court reversed itself and decided the statements at issue — regarding the plaintiff's alleged mismanagement of his own private prison services company — were not germane to his role in the public controversies.

In another case, statements regarding the plaintiff's affiliation with a prostitution operation were not germane to a controversy regarding mismanagement of

public funds. *Durham v. Cannon Comms., Inc.*, 645 S.W.2d 845, 850-51 (Tex. Ct. App. 1982).

By contrast, a professional photojournalist who had accused Time magazine of staging photographs was a limited-purpose public figure for a report that he had tried to convince a pimp to claim he was involved in staging the photos. *Ellis v.*

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Time, Inc., No. 94-1755 (NHJ), 1997 WL 863267 (D.D.C. 1997).

In *Ellis*, the statements at issue did not merely speak to the plaintiff's honesty but were germane because they related directly to the veracity of the position the plaintiff was advocating in the controversy. *Id.* That distinction is critical.

In *Marinova*, the Boston Herald argued that the defamatory statements were germane because they spoke to the plaintiff's honesty generally and would lead the public to question whether the plaintiff's position in the identified controversy was credible.

We argued for the plaintiff that that effectively would wipe out the limited-purpose part of the definition and eliminate any distinction between limited- and all-purpose public figures.

The court found the plaintiff was a limit-

ed-purpose public figure based on her involvement in certain controversies relative to prison oversight and reform issues, but went on to hold that the statements at issue were not germane because the article made no mention of any such controversy or the plaintiff's role in it.

The court stated: "Most alleged defamatory statements malign the plaintiff's character in some manner because, as by definition, they hold the plaintiff up to scorn, ridicule, or contempt and lower her in the estimation of a respectable segment of the community. If the fact that the statements have done so made them germane ... the plaintiff is, effectively, an all-purpose public figure."

When assessing germaneness, the lawyer or judge might begin with the statements themselves and the controversy they address. Then the question becomes, did the plaintiff sufficiently involve herself in that controversy prior to the publication at issue?

In *Marinova*, the article reported that a state legislator had snuck the plaintiff, who was previously "bagged" and "written up" for engaging in "sexual acts" with an inmate, into the prison to see her inmate-boyfriend.

The court held that those statements were not germane to the controversies in which the plaintiff had attained some limited public figure status. In *Marinova*, the plaintiff was entitled to take that final exit and benefit from a negligence standard.

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