

# Make It Make Cents

*How Defamation Sorts Disability Disparagement by Who Monetizes the Identity*

Say it about one person and the law calls it an injury. Say it about five million and the law says nobody was spoken to at all.

## TWO VERSIONS OF ONE SENTENCE

# Only the second one can be sued over

A speaker stands in front of a hall and announces that not one person present actually has attention deficit hyperactivity disorder, that the label is a passing trend, and that anybody claiming it is putting on a show.

Then the speaker stops, picks out one person in the third row, and says it to her directly. Same words. Same falsehood. The woman in the third row has now heard the accusation twice.

Only the second version supports a claim, and that is not an accident of how somebody drafted the pleading.

## TWO FILTERS, RUNNING IN ORDER

# What the tort asks before it asks whether anybody was hurt

### Was it about you?

A defamatory statement has to be of and concerning the person suing. Where the group insulted is big enough, the law holds that nobody inside it was spoken about at all. Disparaging a disability is aimed at the category by necessity, since nobody claims a named individual lacks a diagnosis. The claim is that the category is invented.

### Can you put it on a ledger?

Then the plaintiff has to locate the harm somewhere countable. The old rules presumed damage only inside a short list of situations, and the one still doing reliable work is injury to trade, business or profession. What is left is a tort that notices damage to a reputation most readily when the reputation was earning.

The first filter removes the disability claim before the second is ever reached. On the rare occasions somebody clears it, the second sorts people by whether they make money from the identity rather than by what was done to them.

## THE RESULT

# The advocate has a case. The worker with the same diagnosis does not.

A person whose income comes from talking and advising about a condition can say that being accused of faking went to the root of her career. That pleading is entirely orthodox and the claim stands up.

Somebody with the identical diagnosis and no public role has nothing comparable to allege, and frequently absorbs the worse of the two injuries. A workplace that has come to treat a condition as invented is a workplace where adjustments turn negotiable and the person asking for them becomes a suspected fraud.

So the tort guards the reputation that produces revenue and leaves the reputation that produces only dignity to look after itself.

# The Ascertainability Filter

*and the case everybody cites for a rule it never stated*



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Two opinions, seventy years of misquotation, and a line no judge has ever been able to draw.

## THE RECEIVED ACCOUNT IS WRONG

# There were two rulings, and neither says what everybody quotes it for

The case cited everywhere for the proposition that group size decides who may sue is usually described as permitting nine models and twenty-five salesmen to proceed while barring 382 saleswomen. That description is a blend of two rulings and matches neither on its own.

In the first, the judge dismissed all the individual claims, models and salesmen and saleswomen together, and did it because of how the complaint was drafted rather than because of how many people were in any group. On the group question the opinion offers only that numbers have always been relevant, which tells you they matter without telling you how.

The numbers appear in the second ruling, on the amended complaint and by a different judge: nine models making up the whole group, fifteen salesmen out of twenty-five, thirty saleswomen out of 382. The salesmen went forward. The saleswomen were dismissed as a matter of law.

THERE WAS NEVER A NUMBER

# Twelve doctors get in. Twelve parking operators do not.

## Barred, in the same opinion

Among the failures the judge collected is a suit for the downtown parking lot owners of Washington, which he himself puts at ten to twelve people. Alongside it sit every taxi driver in the same city, the officers of a union covering a whole state, and the membership of a clan. Ten proved too many in that instance.

## Permitted, in the same opinion

On the other side of the page he collects four coroners, twelve hospital doctors, twelve radio editors and a posse. Twenty-five was few enough in the case before him. A rule that lets in twelve physicians and shuts out twelve parking operators is doing something other than counting.

The judge was alert to it. In a footnote he remarks that if the defendants have effectively conceded the models' claims, it is hard to see a principled difference between saying some of the models were prostitutes and saying most of the sales staff were homosexual. The man deciding the case could not find the line either.

## THE MODERN TEST, AT ITS STRONGEST

# Ask how heavily suspicion falls, and the disability claim still dies

Seventy years of decisions have not been spent counting either. Oklahoma let a fullback sue over an accusation that a squad of sixty or seventy men used amphetamines, since he had established who he was inside it. A New York court allowed more than fifty officers from a force of over seventy and refused outright to fix an upper limit.

Oklahoma later reduced the whole thing to two propositions, neither of them arithmetic. Numbers alone settle nothing, and the question is how intensely suspicion falls on this particular plaintiff. That is a more honest test than the counting story and deserves to be stated at full strength.

It still does not save the disabled claimant, and it fails for a deeper reason than size. Suspicion has to land on somebody. Saying a diagnosis is fictitious spreads it evenly over everyone holding that diagnosis and concentrates it nowhere, which is exactly the distinction courts draw between an impersonal reproach aimed at an indefinite class and a statement about an identifiable few.

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**SOURCES** Fawcett Publ'ns v. Morris, 377 P.2d 42 (Okla. 1962); Brady v. Ottaway Newspapers, 84 A.D.2d 226 (N.Y. App. Div. 1981); McCullough v. Cities Serv. Co., 676 P.2d 833 (Okla. 1984); Excellus Health Plan v. Tran, 287 F. Supp. 2d 167 (W.D.N.Y. 2003).

## THE SENTENCE THAT DECIDES EVERYTHING

# Underneath the size rule is a claim about how people listen

*“No reasonable man would take the writers seriously and conclude from the publication a reference to any individual saleswoman.”*

The judge dismissing the saleswomen, 1952. No evidence was taken. None was thought necessary.

That sentence is the whole engine. It is not a judgement about what the law ought to protect, and it is not an inference from earlier cases. It is a factual assertion about how audiences handle statements aimed at categories, announced from the bench and carried forward ever since. Part Five goes back to it.

# The Economic Filter

*which door opens, and what has to be on the ledger to open it*



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Of the four old categories, the survivor is the one denominated in earning capacity.

## THE FOUR OLD CATEGORIES

# Three have worn away. One does the work.

## 1 Imputing a crime

Still available, and it overlaps almost entirely with claims that would succeed anyway.

## 2 A loathsome disease

Constructed around infectious venereal illness back when there was no cure, and largely stuck there.

## 3 Unchastity in a woman

A category the modern Restatement declined to carry forward in its original form.

## 4 Conduct incompatible with a business, trade or office

The one plaintiffs actually plead and the one courts actually sustain. Outside these, a claimant must plead special damages, defined as harm of a material or pecuniary nature.

## WHAT THE CONSTITUTION DID TO IT

# The doctrine came out of its narrowing standing firmest on commercial ground

One decision confined private figure claimants to compensation for actual injury unless they can show the speaker knew the statement was false or did not care. Courts reading it have taken the message to be that presumed damages and per se categories are out of favour even where they remain constitutional.

A later decision kept damages that need no proof, and punitive ones, available where the speech concerns a wholly private matter. That case was about whether a commercial credit report was accurate.

So the surviving safe harbour for damage that need not be proved sits on business ground, and everywhere else a claimant has to show something that happened.

## AN OBJECTION THAT HAS TO BE MET

# None of this is spoken, so does the economic filter reach it at all?

The categories just described belong to slander. A post, a broadcast, a book, whatever a chatbot prints out: all of it is published, so all of it is libel, and libel has never taken those categories on the same terms.

One line of authority hands the plaintiff everything. Wisconsin held that damage is conclusively presumed from publication itself, allowing substantial compensation with no allegation that anything was lost. On that view there is no economic filter for written words at all. The other line imports the requirement wholesale, and Maryland's court traced how it happened: one phrase carried two different meanings in slander and in libel, and the first got grafted onto the second.

What closes the gap is not the common law. Since presumed damages are barred for private figure claimants absent knowledge of falsity or reckless disregard, no state may presume harm from the fact of publication alone. A requirement to show real injury now sits over the whole of it, slander and libel alike. The old split survives in form. Its consequences do not.

### A QUALIFICATION THAT MUST BE STATED

# Dignity is compensable. The trouble is who gets through the door.

The same decision says plainly that actual injury is not confined to money out of pocket, and that the usual harms include damage to standing in the community, humiliation and mental anguish. Dignitary injury can be recovered.

The claim here is narrower and survives that intact. This filter has nothing to do with how damages get calculated. It works at the entrance, deciding whether a sentence is capable of being defamatory in the first place and whether it falls into one of the situations where nobody has to prove harm. Once inside, humiliation can be paid for. The question is who is let inside, and that turns on whether the reputation had been bringing in money.

A dissenting Justice in the same case put the mechanism in a sentence. Where the statement is not actionable in itself and special damage must be shown, proving reputational injury is not enough; show a financial loss, however, and damages to general reputation become recoverable.

## THE TORT NEXT DOOR

# Where the qualification is removed, the shape is unmistakable

Injurious falsehood, known also as trade libel and as business disparagement, makes somebody liable where a false statement costs the claimant money, and it has always asked more than defamation does about falsity, about fault, and about proving that anything was lost. Financial loss has to be proved, and the personal components of damage, distress among them, are struck out by name.

That is this filter with the softening removed. Defamation lets dignitary harm into the measure of damages once liability exists. Its neighbour makes money the definition of the injury and deletes the dignitary part explicitly.

What is being argued here is that defamation has slid toward its neighbour at the entrance while continuing to talk like itself at the point of payment. A Colorado court showed what that costs. Falsely calling a teacher homosexual, at work, with her professional standing in view, did not get her through. Nothing in the reports sits closer to the disability case than that.

# The Inversion

*why this particular insult can only be made about a category*



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Widen the audience for this particular insult and you place it further beyond reach.

**IT CANNOT BE SAID ANY OTHER WAY**

# You cannot deny that a category is real by talking about one member of it

Insults aimed at a disability hardly ever come in the one-person shape this area of law was designed for. What gets said instead is that the condition is a trend, a construct, a by-product of modern living, or a badge people pick up because it pays.

It is said about the category because there is no other way to say it. The job the sentence does is to deny that the category is real, and no such denial can be carried out one person at a time.

The grammar has a legal consequence. The statement is aimed at everyone holding the diagnosis, a population Congress put at some 43,000,000 Americans and expected to grow, and described as a discrete and insular minority with a history of purposeful unequal treatment. By Part One, speak to a class of that size and you have spoken to no one.

## CONGRESS ALREADY BANNED THIS REASONING

# The statute forbids the exact inference the insult depends on

Disability includes being regarded as having an impairment, and a person meets that limb by showing something forbidden was done to her on account of an impairment she has or is thought to have, regardless of whether anything is limited or thought to be. Coverage is to be read broadly to the fullest extent the statute allows.

Whether a limitation is substantial gets assessed without regard to the helpful effects of measures taken to manage it, and the list of such measures expressly includes reasonable adjustments and learned behavioural or adaptive neurological modifications. An impairment that comes and goes still qualifies if it would substantially limit somebody when active.

Put together, those provisions take the accusation apart. Arguing that somebody managing well is therefore not disabled is the very reasoning the rule about coping measures rules out, and the coping is itself listed in the statute as something a decision-maker has to see past. Arguing that perception is beside the point because the condition is made up is the very thing the regarded-as limb shuts down. Both manoeuvres were anticipated and legislated against. Nothing in defamation does the same.

## THE SECOND GATE SORTS BY THE WRONG VARIABLE

# One person loses bookings. The other loses the presumption of good faith.

Suppose a claimant somehow clears the first gate, by being one of a small named panel. The person whose livelihood is speaking and consulting about a condition can now plead conduct incompatible with a business or profession, with damage presumed and lost engagements provable. Somebody carrying the same diagnosis with no public position has nothing of the sort available to plead.

The practical injuries run the opposite way. The advocate loses bookings, which is a loss the law can see and often recover. The worker loses something harder to name. A workplace that has taken on the belief that a condition is invented is one where a request for adjustment reads as a manoeuvre, where paperwork gets scrutinised rather than processed, and where the person asking acquires a reputation for working the system.

The second injury weighs more, is harder to reverse, and falls on whoever can least afford it. Only the first one shows up in the law. None of this means the law does not care about dignity. It means there is no entrance category dignity on its own can get through.

# The Relationship Gate

*the one place the law does reach statements about a whole class*

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A manager saying it can be sued. Software saying it to nine million people cannot.

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**WHERE CLASS-DIRECTED SPEECH IS ALREADY ACTIONABLE**

# Harassment law asks nothing about how many people are in the class

Harassment law is precisely a scheme where what somebody says about a protected class can be sued over though nobody named the claimant. A manager telling a department that the diagnosis is made up and that adjustments are a scam has named no one, and what he said is still evidence of unlawful discrimination against every member of that class in the room, and may amount to it by itself.

The same shape appears in employment, in education and in housing, with the standard borrowed across all three. Conduct severe or pervasive enough to make an environment objectively hostile and subjectively abusive. Harassment so severe, pervasive and objectively offensive that it costs somebody access to education. Unwanted behaviour bad enough, or frequent enough, to spoil somebody's use of their home.

Not one of the three treats the head count of the protected class as an ingredient, an answer, or anything a judge has bothered about. Being one of many is no defence, and nobody has to be identifiable.

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**SOURCES** Mattioda v. Nelson, 98 F.4th 1164 (9th Cir. 2024); Harris v. Forklift Sys., 510 U.S. 17 (1993); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999); 24 C.F.R. § 100.600(a)(2); Quigley v. Winter, 598 F.3d 938 (8th Cir. 2010).

## WHAT FOLLOWS FROM THE CARVE-OUT

# The rule exists because the common law would not reach the conduct

First, whatever justifies the size rule, it cannot be some universal fact about how audiences take in speech aimed at groups, since the civil rights statutes assume the reverse and nobody thinks them muddled for doing so.

Second, those statutes had to be written. Judge-made law would never have caught this conduct, which is why the legislation exists, and courts trace the disability harassment claim to a deliberate borrowing of the employment statute's wording rather than to any ancestor in the older law.

What the statutes require in exchange is a relationship. Employment, education, housing, federally funded programmes and public accommodations are covered. Everything else is not. Hear it from a manager and there is a claim. Hear identical words from a broadcaster, a platform, an influencer or a chatbot and there is none, since no relationship exists for the statute to fasten onto and the older law has already thrown the sentence out for being aimed at too many people.

# The Untested Premise

*what the research says about listening to statements about categories*



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Even the study most sceptical of this literature found the effect the legal rule denies.

## THE KIND OF PROPOSITION IT IS

# A factual claim about audiences, announced without evidence in 1952

Go back to the sentence that decided the case. No evidence was taken on it. None was thought necessary. It was treated as the sort of thing a court simply knows.

But it asserts something about how minds work, namely that saying a thing of a category leaves untouched what listeners believe about the people in it. Everything the size rule accomplishes rests on it.

If people do draw conclusions about individuals from what is said about groups, then somebody suing out of a large class has suffered the very thing this area of law was built to repair, and has been told, on a fact a judge made up, that nothing happened to her.

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**THE LITERATURE, INCLUDING THE PART THAT DISAGREES WITH ITSELF**

# Hearing a property of a category transfers it to a member nobody has met

The relevant research concerns statements predicated of a kind rather than of a person. In the founding study, children and adults heard a storybook about an invented social category, described either in that general form or in matched statements about one member. The general form led four year olds and adults alike to treat the category as marking a fundamentally distinct sort of person. Later work found the same effect held whether the described property was biological or cultural.

That line is contested, and the contest deserves stating plainly. One study using the same design found no such essentialising at all, and a recent review collects the pressure now bearing on the whole claim.

The contest is survivable because this argument does not need essentialising. That is a claim about beliefs in underlying natures. The judge's premise is about reference and inference, and the matching finding is generalising, meaning that a quality described gets carried over onto others in the group. The sceptical study found precisely that. Adults generalised more after the general form than after statements about one member, and did so in the same experiment that found no essentialising at all.

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FROM THE REVIEW MOST HOSTILE TO THE STRONG CLAIM

## The weak version is the version the legal rule denies

*“Hearing that members of a novel category sleep in tall trees led participants to believe that a new, previously unencountered member of that category also sleeps in tall trees.”*

The 2025 review, describing the findings of the study that failed to replicate essentialising.

Moving from something said about a group to a belief about a person nobody has ever encountered is precisely what the 1952 ruling declares no sensible reader does. What the researchers are arguing about is the powerful version of the effect. The modest version turns up on both sides of the argument.

## TWO RESULTS ABOUT ADULTS, AND ONE LIMITATION

# The form is the variable, and correction does not fully undo it

In a study of 423 adults from the general population, average age near forty-nine rather than the children and undergraduates this field usually recruits, general labels rather than specific ones raised how much of a coherent group the category seemed to be, along with stereotype content and how essential the described behaviour looked.

Framed that way, remarks about how good a social group is at something made individual members perform worse, and did so even where the remark was complimentary. The effect outlasted the speaker, surviving a handover to somebody who had no idea what had been said. Narrowing a general statement to one individual limits the belief that the category explains its members, but correction left beliefs about heritability unchanged and had mixed effects on inference.

One limitation belongs in the open rather than in a footnote. A great deal of this research studies children, whereas the legal test speaks of a sensible adult reader. The adult samples are what carries the argument, and the work with children is here to explain how the effect operates rather than to answer the judge directly.

## WHAT DOES NOT FOLLOW

# None of this shows that insulting a whole group ought to be suable

There are reasons for the rule that have nothing to do with how audiences think, and one of them is grave. Laws of this kind have repeatedly ended up aimed at the very minorities and dissenters they were supposed to shield. That is the best case for leaving the whole area untouched, and it is what has kept the doctrine upright while the reason given for it fell away.

What follows is narrower and enough. Where the defence of a rule rests on a factual claim that turns out untrue, some other defence is required, and it has to be put into words and tested instead of taken for granted.

Courts applying the size rule today are reciting a justification the evidence does not support.

# Objections, and What Comes Next

*including the one this whole arrangement was never built for*

VI

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The two doctrines most likely to end such a case early both fit badly. The two examined here fit perfectly.

## THE TRADITION, AND WHY IT IS UNAVAILABLE

# A dissenting Justice drew this exact distinction in 1952

American law did once reach group disparagement. A criminal statute of that kind was upheld by five votes to four, and two things about that decision matter here.

The first is usually missed. The dissent draws precisely the line this argument is about: whatever the state law was, it was not the criminal libel recognised time out of mind, because that offence punished false and malicious charges against individuals rather than against huge groups. The asymmetry was visible to a dissenting Justice seventy years ago, stated as the reason the majority had gone wrong, and left unexamined since.

The second is that the ruling did not last, even though nobody has ever formally buried it. One Justice called for overruling it within a decade. The Eighth Circuit thought it extremely doubtful the statute would now be sustained. The Seventh found later cases indisputable evidence that libel law required substantial rewriting. The Ninth put it most bluntly, quoting the conclusion that subsequent decisions had so washed away the foundations that it could not be treated as authority.

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**SOURCES** Beauharnais, 343 U.S. at 272 (Black, J., dissenting); Garrison v. Louisiana, 379 U.S. 64, 82 (1964) (Douglas, J., concurring); Tollett v. United States, 485 F.2d 1087 (8th Cir. 1973); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978); Dworkin v. Hustler Mag., 867 F.2d 1188 (9th Cir. 1989).

TWO OBJECTIONS, ANSWERED

# What is being claimed, and what is not

## This proposes no new regime

There is a large literature arguing the law should reach speech aimed at groups and an equally large one arguing the opposite, including on the ground that schemes of that sort end up used against those they were written to shield. This argument takes no side and needs none. The complaint is an internal one. Two filters run, one of them stands on a fact the research contradicts, and between them they hand out remedies in inverse proportion to the damage done. Anybody who thinks such laws are a terrible idea still has that inconsistency to explain.

## Fact, opinion, and what is heard

The stronger objection is that none of this states a fact at all. Calling a diagnosis a construct is a disputed scientific and moral position, and it is difficult to imagine a jury ruling on whether it is false. That is right as far as it reaches. Telling the world that a named person is acting out a condition she has not got so as to get something is different. It accuses one human being of lying, and a medical file can settle it. People who hold the diagnosis hear the first sentence as the second.

Nothing here depends on the general sentence being suable. All that is needed is that the damage be genuine and that the excuse for disregarding it be untrue. Both stand whether or not anyone could ever bring a case on the words that did the damage.

## THE CONDITION THAT NO LONGER HOLDS

# One assertion, composed separately for each of millions of people

The arrangement was tolerable, if never coherent, while delivering an insult about a class to an enormous audience stayed expensive and the number of actors able to do it stayed small. That is over.

A chatbot can put the same general claim about a protected class in front of millions of separate people, one private conversation at a time, each shaped to whoever is reading. It is general in form, which puts it outside the tort under Part One. It turns up nowhere near a job, a school, a tenancy or a public accommodation, which puts it beyond the statutes in Part Four.

And the delivery is individual in a way nobody in 1952 imagined. Whoever receives it is not sitting in an audience catching a sweeping remark. She is mid-conversation, hearing something said about a group she is part of.

## THE TWO EXITS THAT USUALLY END SUCH A CASE

# Both were built for a different shape of event

## Counting it as one publication

The rule that folds a mass communication into one claim applies, on its own wording, only to something bundled: a single edition, a single broadcast, a single message reaching two or more people at once. The default in the same provision runs the other way, treating each separate communication by one speaker as its own publication. Software writing a fresh answer for every user is not an edition, and nothing about it happens at once. It is the reverse of what the rule was drafted for.

## Platform immunity

The shield runs to a service that is not itself responsible, in whole or in part, for creating or developing the content, and a defendant forfeits it by making a material contribution to whatever rendered the content unlawful. Neutral tools keep the protection. A model that composes the sentence is not an obvious candidate for being called a neutral tool, which makes the provider an unpromising claimant for the immunity that has absorbed most claims arising online.

There is at least a signal on the other side. In a wrongful death action against a chatbot company, a trial judge refused, at the earliest stage, to rule that what a model produces counts as speech for constitutional purposes, and allowed claims in product liability and negligence to continue. What follows is not that a defamation claim becomes available. The opposite, and more usefully: where the output is not speech, whatever damage it does is not damage done by speech, and the rules that could not reach it were never the right rules to open.

**SOURCES** Restatement (Second) of Torts § 577A(1)–(3) & cmt. b; 47 U.S.C. § 230(c)(1), (f)(3); *Fair Hous. Council v. Roommates.Com*, 521 F.3d 1157 (9th Cir. 2008); *Garcia v. Character Techs.*, No. 6:24-cv-01903 (M.D. Fla. May 21, 2025).

## WHERE THIS LEAVES US

# A statement damaging five people supports five claims. Damaging five million, it supports none.

The two filters produce one structural result. Remedy runs inversely to the size of the injured class. Inside whatever remnant survives, recovery sorts by whether the damaged reputation was earning, so the claim is available to the professional who sells an identity and not to the person who simply has one, while the greater everyday damage falls on the second of them.

Left standing is a product that dependably produces claims about a class, an audience shown to draw conclusions about individuals from claims put that way, and a group of injured people this area of law has counted out of existence.

Disability legislation already works on the footing that what people believe is what counts. Protection attaches when something forbidden is done on account of an impairment somebody is thought to have, whether or not anything is actually limited or thought to be. The one extra thing the legislation asks for, which the older law would not, is a relationship.

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