

## WHAT DID YOU SAY ABOUT MY HORSE?

By Chris E. Wittstruck, Esq.



Chris E.  
Wittstruck, Esq.

The old adage, “sticks and stones may break my bones but names will never hurt me” constitute fine words to live by when verbal aspersions are recklessly hurled. While none of us want to be called fat, ugly or stupid to our face, much less to others behind our backs, it’s wise to remember that such indictments are always a window into the tattered soul of the accuser, and never represent a plausible account of any attribute of the recipient. If we suffer fools gladly, and allow their condemnations to figuratively roll off our backs, it is we who are

much the better for it.

That all sounds nice, until somebody starts trash talking with the potential to cost the target of his invectives some money. Imagine that your prized mare is in the breeding sale of a major auction house. If I want to get my hands on the girl cheaply, an effective way to do it would be for me to start talking noisily about how you, “filled her with tons of kryptonite before she paced all those sub-150 miles!” I simply spread the word that she outraced her pedigree because, “she never met a dose syringe she didn’t like!” I follow it up with something like, “...and you *know* how kryptonite affects them down there; you better get some good barrenness insurance!”

Is the defamation of a horse actionable? As with most legal issues, the answer is a definite maybe. First, it’s necessary to get a handle on just what constitutes defamation and some of its kissing cousins in the law.

Defamation is a tort. Well, what’s a tort? A tort is a civil wrong other than a contractual wrong for which there exists a remedy at law. If I accidentally drive through a stop sign and broadside your car, I’m guilty of the tort of negligence. What I did was wrong, but it wasn’t intentional. On the other hand, defamation is always either intentional, or committed with such reckless disregard that it might as well have been intentional.

Defamation requires an utterance. When the utterance is written, it’s called libel; when it’s verbal, it’s called slander. Whether libel or slander, to be defamatory, the statement must be made to a third party. If I tell you I think you are a thief, even if you are hurt by such a declaration, that statement is not defamatory unless I also communicate it to a third party. Moreover, if I make the statement, “That guy’s horse, *Undecided N*, is a pseudo-hermaphrodite,” while possibly unpleasant, is not defamation if a veterinarian checked the horse out and it’s true. In fact, when it comes to defamation, truth is an absolute defense to a lawsuit since the publisher possesses an absolute privilege to tell the truth.

Further, the statement, “Joe’s pacer ain’t worth a bag of beans; he’s slow as molasses” is not really defamatory either. Opinions regarding a horse’s value or lack of speed, no matter how outrageous, are protected. In the real world, ill statements about public figures (politicians, actors, etc.) are made all the time. They are protected so long as the statements were not made with such spiteful intent as to be considered “actual malice.” This concept, known traditionally as “fair comment” is thus a qualified privilege, as opposed to the absolute privilege in the defamation realm.

Other qualified privileges, and hence defenses to libel and slander, arise in situations where the relationship between all the parties and the content of the subject matter is such that such statements are to be expected as a duty or obligation of the speaker. For example, think about that poor performance report your supervisor gave you last year; he’s not defaming you to the big boss. What he is doing is his duty by giving the boss an evaluation that is in the context of mutual interest, since everybody works for the same company. All these defenses are the product of attempts to reconcile the potentially harmful act of denigration of character with the free speech guarantees of the First Amendment.

So... can you defame a horse? The answer to that question is clearly no! Once you get beyond the potential for truth, fair comment and other privileges, the question arises as to how a *horse* can suffer any damage. In our broodmare example, it’s not like the other horses in the pasture will render her a social outcast because they think her lifetime mark was chemically enhanced. Moreover, horses have a difficult time being plaintiffs. They can’t readily pay a lawyer, and have serious trouble signing the verification to a complaint.

As to the question, however, of whether the defamation of a horse is “actionable,” meaning that some type of lawsuit can be brought, the answer to that question is yes, provided certain conditions are met.

In our example, if it can be proven that the statements made had the effect of driving bidders away from the mare’s hip number, causing her hammer price to be deflated, the communicator of the falsehoods can be sued by the mare’s consignor and owner. The cause of action is not for defamation; rather, it sounds in “tortious interference with prospective business relations,” and “tortious interference with contract.” In plain terms, these causes of action allege that the person made disparaging statements with the intent of causing economic harm to the target of the innuendos.

Consider the scenario where a disgruntled customer blocks the entrance to an appliance store and shouts profanities about the store’s management, calling them rip-off artists and the like. In such case, the customer is preventing the business from entering into relationships and contracts with potential customers. Defamation might be tricky for the store to prove, especially if the dishwasher they sold really does profusely leak and they refused to refund the customer.

Whether false fact or true opinion, the place and manner in which the utterances occur leads to the conclusion that the irate customer is doing more than just simply exercising his freedom of speech. Speech is one thing, using speech to intentionally scare away innocent folks who might want to buy a dishwasher is quite another. The door of the courthouse is the proper place for customer to take his grievance; not the door of the appliance store.

One way or another, talking trash can have its consequences. While many insurance policies make exception for defamation, the carriers generally will not defend you against intentional torts. Tell somebody just one more bad thing about my stallion, and you might get a summons for a tort for which your insurance company will disclaim coverage, meaning they will refuse to defend the lawsuit, or pay if you lose. In the end, was all that name calling worth it? Grow-up already!

**Chris E. Wittstruck, an attorney and Standardbred owner, is the founder and coordinator of the Racehorse Ownership Institute at Hofstra University, New York and a charter member of the Albany Law School Racing and Gaming Law Network.**