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Fair or Foul: When Does Media Accusation of Performance Enhancing Drug Use Become Tortious?

Abstract

The Steroids Era in baseball refers to the recent period in the MLB where many players and trainers have been found guilty or been implicated in the use of performance enhancing drugs which leads to sharp increases in player talent. The stigma associated with PED use, and also any other form of cheating, has proven to be a fast track to shame in the world of Major League Baseball. This article addresses the current state of defamation law in New York and the Federal Courts by analyzing the recent statement made by Skip Bayless concerning use of Performance Enhancing Drugs by Yankees' Shortstop Derek Jeter and the possibility that such statements could create tort liability. The article also considers the possible future paths of defamation law by comparing the level of protection the media enjoys today and the level of protection it may expect in the future.

Keywords

steroids, performance enhancing drugs, baseball, sports reporting

FAIR OR FOUL: WHEN DOES MEDIA ACCUSATION OF PERFORMANCE ENHANCING DRUG USE BECOME TORTIOUS?

Richard T. Ward III^{*}

The American mainstream professional sports industry prides itself on hosting the premier stage for competition in many sports. Perhaps most prevalent among those sports is baseball, also known as America's pastime. Major League Baseball ("MLB") which boasts the largest baseball market worldwide includes talented athletes drawn from countries around the world competing for teams located almost exclusively in American cities (the exceptions are the two Canadian cities: Montreal and Toronto). It is practically undisputable that the MLB provides competition between the most talented baseball players in the world and on the biggest stage in baseball. However, the legitimacy of the level of talent and competitive integrity that players in the MLB are committed to maintain is, conversely, among the most and perhaps the most, disputable assertion in all of professional sports.

This dichotomy is due almost exclusively to the fact that many MLB players have been found guilty of use of Performance Enhancing Drugs ("PEDS"). The players that have been caught, or those who have come forward and confessed, have stated they are not the only ones using PEDS, not by a long shot. In fact, Eric Gagne, a well-known pitcher and Cy Young award winner, who has competed throughout venues in the MLB, stated that during his time playing for the Los Angeles Dodgers, he and approximately 80% of his clubhouse were actively using

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PEDS.¹ Many baseball fans had hoped to move on from what is known as the “Steroid Era”² but the claim by Gagne along with a slew of players caught using PEDS in the 2012 MLB season are proof that the darkest era of baseball is not over yet.

With the stage now set, let us shift into the main focus of this particular article, the MLB players and their reputations. MLB competition offers some of the most dramatic competition in sports, drawing millions of fans around the globe that create real emotional connections to their favorite teams and the players that make up those teams. Those very connections also lead fans to develop a hatred for what I will call, the “crooks”, or the players who rob the game of its integrity. In early baseball history, Pete Rose is probably the most recognized “crook” as he was banished from the MLB for life after being caught gambling on games while managing MLB teams.³ Today, the prevalence of steroid use, coupled with an unbelievable string of MLB record breaking performances by PED users, has created an environment where the new “crooks” are players that attempt, and often succeed, in gaining an advantage through the use of PEDs.

PED use is one of the most covered topics by the sports media, especially in baseball. Any player that has made a decent name for himself in the MLB can see that name destroyed by a positive PED test and the subsequent media coverage, and perhaps rightly so. But here lies the crux of our issue: In a climate where PED use has become more commonplace, how much is too much in terms of media coverage of PED use? It is irrefutable that if a player admits guilt or fails

¹ Richard Durrett, *Reactions to Eric Gagne's PED Claims*, ESPN GO (September 27, 2012), http://espn.go.com/dallas/mlb/story/_/id/8429871/adrian-beltre-others-react-eric-gagne-ped-claims).

² The Steroid Era refers to the modern trend in baseball where players have become more and more likely to be caught and penalized for PED use. A surge in offensive statistics and records led to closer scrutiny of athletes and the implementation of mandatory drug testing of players. See *The Steroids Era*, ESPN.GO.com, http://espn.go.com/mlb/topics/_/page/the-steroids-era (last visited Apr. 18, 2013) for a fuller summary of the steroids problem in baseball.

³ Steve Hartley, *Will Pete Rose Ever Get Into the Hall of Fame?*, THE SPORTING GOODS (December 29, 2012), <http://the-sporting-goods.com/baseball/will-pete-rose-ever-get-into-the-hall-of-fame/>.

a drug test, the media would have every right to cover the story once the facts are verified. But what occurs when the media takes its coverage a step further and begins to hold itself out as an accusatory authority on which players are using PEDs? Those accusations can plant the seed of doubt in the minds of the MLB's emotional fan base and tarnish the players' reputation. This may lead to a reduction in the marketability of players who are undeserving of such treatment. Where is the line drawn between good reporting and defamatory libel and/or slander when a reporter writes an accusatory story or makes a live accusatory statement that a player is using PEDs?

JETER VS. BAYLESS: A POTENTIAL DEFAMATION CLAIM?

The current climate in the MLB and the resulting media coverage has provided a perfect opportunity to discuss the issue of drawing a line between media defamation and good reporting. On August 23, 2012, Skip Bayless, a well known ESPN analyst made live statements that were subsequently covered in a published story on ESPN's website linking Derek Jeter, one of the most loved, hated, and above all famous and respected players in the MLB, to PED use.⁴ While his statements were not an outright accusation, in fact Bayless explicitly stated that he was not accusing Jeter "of anything", he did attempt spark a debate over whether Jeter is using or should use in the future.⁵ Bayless relied on the simple fact that Jeter had one of his best statistical years in history in the 2012 season, his 17th in the MLB.⁶

This article will attempt to identify the most important factors for media defamation in order to determine the potential liability of reporters by using a hypothetical suit, "Jeter vs.

⁴ Wallace Matthews, *Derek Jeter: Maybe Test Skip*, (August 23, 2012), http://espn.go.com/new-york/mlb/story/_/id/8294309/derek-jeter-laughs-skip-bayless-ped-use-insinuation.

⁵ *Id.*

⁶ *Id.*

Bayless”. The analysis will begin with Bayless’s actual statements concerning Jeter and then to pinpoint where on the spectrum of good reporting to tortious reporting they fall. Subsequently, I will change the facts of the hypothetical in certain ways to analyze liability in those situations to determine what potential for liability exists. After analyzing these hypotheticals, it will be clearer what factors seem to be most important, what factors seem to not matter, and the equalizing effect that some factors may have over the others. The goal is to examine the balance of media rights versus players rights and determine if current defamation law is sufficient, or deficient, for the purposes of either the players or media figures.

DEFAMATION LAW

This article will use the case of McNamee v. Clemens, 762 F. Supp.2d 584 (E.D.N.Y. Feb 2001) as a lens in order to analyze the issue of where to draw the line. The court’s holding and the particular facts of this case provide both a fairly current basis in New York Defamation Law and will allow for a unique change in perspective when analyzing the potentiality of legal recourse for Derek Jeter against Skip Bayless.

The facts in Clemens developed around the time when many of baseball’s greatest players were first being accused of steroid use. The BALCO investigations that took place as PED use became more apparent in MLB led government officials to the Plaintiff, Brian McNamee.⁷ He was offered immunity from prosecution for his involvement in the distribution of PED’s in exchange for any truthful statements he could deliver concerning the government’s PED investigation.⁸ This information ultimately led to Clemens being named in the investigatory

⁷ McNamee v. Clemens, 762 F.Supp 2d. 584, 589 (E.D.N.Y 2001).

⁸ *Id.*

⁹ *Id.*

reports known as the “Mitchell Report”⁹ named after its drafter Senator George Mitchell, as one of 89 MLB players that had been found to be using PED’s during the government’s investigation.¹⁰

Clemens vehemently denied the findings of the “Mitchell Report” and the connected statements of McNamee.¹¹ He subsequently filed a suit for defamation against McNamee but that suit was dismissed for a lack of personal jurisdiction.¹² In *Clemens* the district court found McNamee’s statements had absolute immunity since the information was gathered during a federal investigation and therefore Clemens had no viable claim against McNamee.¹³

Clemens made further attempts to clear his name through a collection of statements that alleged McNamee had lied in his statements during the government investigation, McNamee had manufactured false evidence against Clemens, McNamee is extorting Clemens, and McNamee has a mental disorder.¹⁴ McNamee subsequently brought a defamation claim against Clemens based on those statements.¹⁵

The court in McNamee v. Clemens laid out the elements of a defamation claim and other considerations that play an important role in the analysis.¹⁶ The basic elements required for a successful defamation claim are: “1. a false statement, 2. that was published without privilege or

¹⁰ *Id.* at 590.

¹¹ *Id.*

¹² *Clemens v. McNamee*, 615 F.3d 374, 380 (5th Cir. 2010).

¹³ *Id.* at 378.

¹⁴ *McNamee*, *supra* note 7, at 590-591.

¹⁵ *Id.* at 599.

¹⁶ *Id.* at 600.

authorization to a third party, 3. constituted fault as judged by, at a minimum, a negligence standard, and 4. either caused a special harm or constituted defamation per se”.¹⁷

The first element is multi-faceted as the plaintiff must first prove that a factual statement was made and then prove that the statement was in fact false.¹⁸ Also, “rhetorical hyperbole” or “vigorous epithet” will not suffice.¹⁹ Examples of such statements include Clemens use of colloquial phrases such as “shake down” or “crawling up your back” which are not actionable because of their classification as “loose” statements which do not reasonably convey the specificity that would suggest that Clemens or his agents were seriously accusing McNamee of committing the crime of extortion.²⁰

The second element is fairly straightforward requiring the statement was published without permission of the plaintiff by a third party. Such a third party would, for our purposes, be the ESPN website where articles are published, and the media outlet where the actual statements were made.

The third element requires that the statement was a fault based on the applicable standard. In our case, a media outlet is publishing a story to be read by the public. A trier of fact will review the facts under the standard of “actual malice” which is required for a successful defamation claim against a media source.²¹ In general, “actual malice” means knowledge of falsity or reckless disregard of truth or falsity.²²

¹⁷ *Id.* at 599-600.

¹⁸ *Id.* at 600.

¹⁹ *Id.*

²⁰ *Id.* at 604.

²¹ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

²² 40 A.L.R.6th 231 (Originally published in 2008).

The fourth element requires a special harm, or a statement that is defamatory per se. A statement that injures another in respect to their trade, business or profession is defamatory per se.²³ Allegations of PED use undoubtedly have far reaching negative effects on an athlete's trade or business.²⁴

The proper analysis requires two steps. First, the court must make conclusions of law concerning the actionability of the statements. This analysis asks "whether the statements complained of are **reasonably susceptible** of a defamatory connotation, thus warranting submission of the issue to the trier of fact" (emphasis added).²⁵ The actual standard applied by the court is whether the average person hearing the statement would take it to be opinion or fact.²⁶ In the context of a media statement, The New York Court of Appeals adapted a three-factor test for differentiating statements of protected opinion from those asserting or implying actionable facts:

1) whether the specific language in issue has a precise meaning which is readily understood; 2) whether the statements are capable of being proven true or false; and 3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to "signal ... readers or listeners that what is being read or heard is likely to be opinion, not fact."²⁷

²³ *Fuji Photo Film U.S.A. v. McNulty*, 669 F.Supp.2d 405, 411 (S.D.N.Y. 2009).

²⁴ A positive PED test can ruin a career. Even a hint of use can tarnish reputation greatly. It only takes a small spark to ignite public scrutiny of athletes. Sports and media are so intertwined that the effect on a career can be tremendous. An organization that has dealt with PED use won't want to touch an athlete that has a questionable public image as they have already felt the repercussions of allegation proving true. On the other side of the coin, an organization that has not felt the repercussions may not want to risk their squeaky clean image or risk the chance that a player in their organization may garner tons of media attention for the wrong reasons. Thus, an allegation of steroid use can be a factor in marketability if not a death sentence to the career of innocent and guilty athletes alike.

²⁵ *McNamee*, 762 F.Supp 2d. at 600.

²⁶ *Id.* at 600.

²⁷ *Id.* at 601 citing *Gross v. New York Times Co.*, 623 N.E.2d 1163 (1993).

If the court believes that this test is satisfied, then the facts will be submitted to the jury to decide whether the average and ordinary reader would understand the statements in a way that damaged the plaintiff.²⁸

The law of defamation in New York, as laid out above, is vast; however, some of the legal issues that exist may be more important to the analysis of the *Jeter v. Bayless* claim than others. In particular, the focus will turn on, from the court's standpoint, the three-prong test employed in *Gross v. New York Times* and the "actual malice" standard first posited in *New York Times Co. v. Sullivan*.²⁹

DEFAMATION LAW HAS HISTORICALLY MOVED TOWARDS INCREASED PROTECTION FOR MEDIA SOURCES

Since its inception with *New York Times Co. v. Sullivan*, media defamation jurisprudence has moved towards a great level of protection for media sources. In particular, the decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*³⁰ distinguished between media and non-media defendants and imposed the burden on the plaintiff against a media outlet to prove falsity of the published statement. Subsequently, in *Philadelphia Newspapers, Inc. v. Hepps*³¹, recovery for public figures became even more unlikely when the statements of the media were of "public concern" while statements of "private concern" did not enjoy such a protection.

Fast-forward a quarter of a century and defamation jurisprudence has jumped to immense protection provided by the powerful media privilege, usually mobilized through "media shield laws." In fact, there is support for a wide-reaching federal media shield law that takes first

²⁸ The jury analysis is only required in cases of an ambiguous statement susceptible of more than one obvious meaning. If there is no ambiguity, the trial court can resolve the issue. *See Curry v. Roman*, 217 A.D.2d 314 (N.Y. App. Div. 1995).

²⁹ *McNamee*, 762 F.Supp 2d. at 600.

³⁰ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

³¹ *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

amendment rights to new heights.³² Such a law even has the support of Barack Obama among other political luminaires.³³ However, the Supreme Court has yet to approve such a broad media shield law even though attempts to enact such an absolute privilege have been around for nearly half a century.³⁴

The debate continues without resolution, but it is the author's view that it may be useful to keep in mind the climate of the defamation realm as you read this article. The fact that a federal media shield law has been considered, and is a very real possibility, it could remove the vast amount of liability that may accrue based on otherwise tortious reporting.

ASSESSING TORT LIABILITY IN THE POTENTIAL CASE OF JETER V. BAYLESS

The author's view is that the strategy of a changing hypothetical analysis will be an asset in terms of reporter tort liability. Thus, this section will begin with a statement of the pertinent facts surrounding the potential defamation claim. Next, an analysis of the hypothetical *Jeter v. Bayless* case by summarizing the facts and analyzing liability using a scale. Finally, working with those facts in order to assess the claim on the same scale, producing a reference guide for reporter's tort liability.

The following facts appear to be very important to the analysis based on the rules set forth above: What was actually said, who made the comments, what was the forum, about whom were the comments made, what evidenced the truthfulness of the comments, when was the statement made (i.e. context), how was it made or the tone of the comments, and what is the audience's likely perspective on the comments?

³² Shari Albrecht, John P. Borger, Patrick L. Groshong, Ashley Kissinger, Joseph et. al., *Recent Developments in Media, Privacy, and Defamation Law*, 47 TORT TRIAL & INS. PRAC. L.J. 359, 382 (2011).

³³ *Id.* at 383.

³⁴ *Herbert v. Lando*, 441 U.S. 153, 169 (1979) ("according an absolute privilege to the editorial process of a media defendant in a libel case is not required, authorized, or presaged by our prior cases, and would substantially enhance the burden of proving actual malice, contrary to the expectations of *New York Times*, *Butts*, and similar cases.").

The following are Bayless' direct quotations about Derek Jeter:

(1) "I am shocked by what I'm seeing from Derek Jeter right now... this man has turned 38 years of age in June and already he has more hits than he had last year. ... I'm seeing a whole new guy this year from last year ... You would have to have your head in the sand or your head somewhere else not to at least wonder, 'How is he doing this?'"

(2) "I am not saying he uses a thing..."

(3) "Within the confines of his sport, it is fair for all of us, in fact you are remiss, if you don't at least think about this."³⁵

The nature of Bayless' statements are important with regard to analyzing liability. First and foremost, one realizes that Bayless never outwardly makes any claim about Jeter's PED use but merely insinuates that conclusion. Yet, Bayless' own need to qualify his statement by stating, "I am not saying he uses a thing", shows that his comments are clearly susceptible to being seen as an allegation at least in his own opinion.³⁶

Coming from Skip Bayless, these comments have more clout than a just any reporter or media figure. Bayless has his own following that relies on his statements to shape their own opinions. Also, Bayless has been given a prestigious position on the ESPN program "First Take"³⁷ making his opinion appear ever more reputable both as a part of the ESPN network and as a national television figure. ESPN has a reputation for being an accurate information source for American Sports news and especially MLB news. Bayless also chose to take a very serious and even negative tone in his statements. The statements were sincere and clearly were meant to, in the least, spark a debate concerning Jeter and the alleged PED use.

Bayless also chose to make his allegations against Derek Jeter, which is not unimportant to our analysis. It is the author's opinion that Jeter is loved and hated by many because of his

³⁵ Matthews, *supra* note 4.

³⁶ *Id.*

³⁷ "First Take" is an ESPN program where analysts and sports reporters discuss relevant issues in professional sports. The program has a tendency to deal with "hot-button" issues and controversial topics.

team and the role he has played in his MLB career. But it is also common knowledge that MLB players have widespread respect for Jeter as a “class act”³⁸. Thus, Jeter is likely more concerned with his good reputation than salary damages. Bayless’ comments could be seen as a direct assault on that reputation. Yes, Bayless stated an evidentiary purpose for his allegation, citing Jeter’s extraordinary numbers in the 2012 season and thus he placed his statements on a firmer footing; but, the real issue is whether it may be strong enough evidence to allow him to make his statements?

An important part of the analysis is understanding the time in baseball history when the comments were made. Baseball has been battling PED use for around a decade or more at this point, and more players are being caught and implicated every day.³⁹ The commonality of PED users in recent baseball history means that any allegation is likely to be seen as more believable than it would have been before the steroid era began. Perhaps, the public may even revel in the chance to see a PED user “get what was coming to him” and create an even more dangerous climate where allegations based on shoddy evidence lead to tortious injury where there is in fact no guilt.

In summary, Bayless made a serious allegation when he insinuated PED use by an athlete with an elite salary and reputation. He did so during a national television program, on a respected network, during a period of heightened scrutiny in terms of player PED use, and he provided only the player’s statistics as evidence of his position.

³⁸ Roger Rubin, *For Derek Jeter, Sacrifice is the Ultimate Contribution to the Yankees*, DAILY NEWS (August 29, 2009, 9:10 PM), <http://www.nydailynews.com/sports/baseball/yankees/derek-jeter-sacrifice-ultimate-contribution-yankees-article-1.401116#ixzz2QmnoL9u7>.

³⁹ Durrett, *supra* note 1.

In this hypothetical case, it seems unlikely that Bayless would accrue any tort liability for his statements. The circumstances of his comment indicate that it is simply an opinion and not necessarily a fact thus failing the third prong of the *Gross v. NY Times* tests.⁴⁰ Driving this conclusion is the fact that Bayless openly stated he was not claiming Jeter had done anything wrong but simply opening up the issue for discussion. However, it is important to realize that in the current historical context of baseball, one of the factors mentioned in *Gross v. NY Times*, insinuations may be more easily read as fact than in other circumstances.⁴¹ Therefore, had Bayless not clarified his position with a disclaimer, it seems more likely that he could have accrued some tort liability to a defamation claim. The issue comes down to whether the context outweighs the full circumstances of the communication in relation to what the readers and listeners are likely to understand.⁴² Whatever the outcome may be, the point to take away is that a statement made without a disclaimer will come closer to creating liability, if it does not do so, than a statement followed by a disclaimer.

The default case also seems to come short of tort liability based on the malice standard set forth in *NY Times v. Sullivan*. The disclaimer is not unimportant in this analysis either because that statement shows that Bayless has some regard for the actual truth of his statements and is not recklessly making factual assertions. But, it is certainly arguable that Bayless has at least a reasonable belief that his claims are false. This is because of the role Derek Jeter plays in baseball history as an exemplary figure of sportsmanship and legitimate competition. Jeter's response to Bayless's comments show the lack of plausibility in his assertions.⁴³ Once again, the

⁴⁰ *Gross v. New York Times Co.*, 82 N.Y.2d 146, 153 (N.Y.1993).

⁴¹ *Id.* at 155.

⁴² *Id.* at 153.

⁴³ Matthews, *supra* note 4.

clarifying disclaimer of Bayless seems to be the best defense he has to liability in a defamation suit.

Thus, the historical circumstances of the recent PED use problems in the MLB have left the industry ripe for defamation claims. Reporters will argue that it is their job, and their professional duty to bring questions like Jeter's PED use to light. Certainly, players will suffer injuries to reputation and earning potential, whether rightly or wrongly, as these questions are brought, especially now as the game is surrounded by failed PED tests and player's claiming how rampant PED use actually is. Unfortunately, in the struggle between media and player, the player finds himself at a disadvantage because the reporters may use the disclaimer as a shield against tort liability. Although a media shield law is not in existence yet, it appears that reporters have a nearly *per se* defense to defamation claims as long as they remember to make a proper disclaimer.

CONCLUSION: DEFEMATION LAW IS HEADING IN A DANGEROUS DIRECTION IN TERMS OF PLAYERS RIGHTS

The current situation in professional baseball, and indeed most professional sports, is ripe for the occurrence of accusations of PED use. In fact, this kind of accusatory behavior is actually encouraged as a white light in the battle to legitimize the athletes. But the line must be drawn somewhere. It appears that the law draws this line at malice, reckless disregard for truth or knowledge of falsity. But that line, accompanied with other opinions on the topic, appears to give reporters a get-out-of-jail-free card that will allow them to make basically any accusation they like as long as it is done "correctly". If this is so, then is a federal media shield law a good thing when such a high level of protection for media sources already exists? It seems easy enough to say, "Hey, that person is a professional athlete, they should have to deal with media types, it is

part of the job.” But, a culture that allows this type of media action, coupled with the fact that many people may forget to take what they hear with the proverbial grain of salt, could lead to very serious injuries to the careers of professional athletes, even in the case of completely innocent players. Ultimately, current defamation law places a large amount of power and discretion in the hands of media members and provides a relatively microscopic opportunity for players to battle allegations that may cripple their futures.