DEFAMATION LAW — DISCOVERY — MARYLAND COURT OF APPEALS SETS OUT PROCESS REQUIRED BEFORE COURT MAY COMPEL IDENTIFICATION OF ANONYMOUS INTERNET DEFENDANTS. — *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. 2009).

Anonymous speech has a long and important history in the United States.[1] The widespread availability of the internet and the common practice of using pseudonyms to post on websites and other internet fora have allowed anonymous speech to flourish in recent years. The frequency of anonymous postings has created an interesting problem in defamation jurisprudence as courts struggle to balance the First Amendment right to anonymous speech with the rights of plaintiffs who allege harm at the hands of anonymous posters.[2] Recently, in *Independent Newspapers, Inc. v. Brodie*,[3] the Maryland Court of Appeals adopted a five-step framework for trial courts to employ before issuing an order compelling the disclosure of identifying information about anonymous defendants in a defamation action. A plaintiff is first required to make a prima facie case for defamation and must then satisfy a balancing test that weighs the strength of her case against the defendant's right to anonymity. Yet First Amendment doctrine already includes balancing to protect the most important type of anonymous speech — speech regarding matters of public concern. Because the *Brodie* framework incorporates this protection in the prima facie case requirement, the final balancing test is unnecessary. The court's approach is also potentially overprotective of anonymous speech and may encourage more hurtful speech by decreasing accountability.

In May 2006, businessman Zebulon J. Brodie filed a defamation complaint in Maryland state court against Independent Newspapers, Inc. and three John Doe defendants known only by their usernames.[4] The complaint alleged that the John Doe defendants authored defamatory posts that were published on a web-based forum maintained by

---

[1] *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 343 & n.6 (1995). A well-known early example is the *Federalist Papers*, which John Jay, James Madison, and Alexander Hamilton published under the pseudonym "Publius." *Id.*

[2] This comment uses the term "anonymous posters" to refer to individuals who employ pseudonyms to mask their identity when posting comments to websites, message boards, and other internet fora. As a technological matter, these pseudonymous posters are not actually anonymous, because identifying information about them is usually known to and recorded by the networks on which they operate, allowing the authors to be discovered with relative ease in most instances. *See* DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 146 (2007) (describing this phenomenon as "[t]raceable anonymity"). For a discussion of the evolution of anonymity on the internet, see generally LAWRENCE LESSIG, CODE 45–59 (2d ed. 2006).

[3] 966 A.2d 432 (Md. 2009).

[4] *Id.* at 442.

Independent Newspapers.[5] The posts commented negatively on local businesses maintained by Brodie and on his involvement in the development of a local farm property.[6] Independent Newspapers moved for dismissal or alternatively for summary judgment,[7] and it also requested a protective order that would shield the company from having to disclose the John Doe defendants' identities.[8] In November 2006, the trial court dismissed the claims against Independent Newspapers but denied the protective order.[9] On motion for reconsideration, Judge Ross noted that "the piety of the First Amendment requires ensuring that Plaintiff has stated a valid claim of defamation."[10] He then dismissed the cause of action related to the local farm property[11] but confirmed the order compelling disclosure of information that would identify the John Doe defendants who made negative comments about a Dunkin' Donuts owned by Brodie.[12] Brodie's attorney identified the authors of these comments as users employing the pseudonyms "RockyRacoonMD" and "Suze,"[13] neither of whom had been named as a defendant in the initial complaint.[14] The final subpoena served to Independent Newspapers requested information that would identify these two posters as well as the three John Doe posters named in the initial suit, despite their lack of participation in the comments about the restaurant.[15] Independent Newspapers again moved for a protective order to preserve the anonymity of these posters, but the court denied the order in February 2008.[16]

---

[5] *See id.* at 442 & n.11.

[6] *Id.* at 442.

[7] *Id.* at 443.

[8] *Id.* at 444–45.

[9] Brodie v. Indep. Newspapers, Inc., No. 17-C-06-11665, slip op. at 6 (Md. Cir. Ct. Queen Anne's County Nov. 21, 2006) (order granting motion to dismiss and denying requested protective order). Judge Ross invoked § 230 of the Federal Communications Decency Act, 47 U.S.C. § 230 (2006), to dismiss the claims against Independent Newspapers. *Brodie*, No. 17-C-06-11665, slip op. at 4–6. This provision prevents providers of an "interactive computer service" from being "treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

[10] Brodie v. Indep. Newspapers, Inc., No. 17-C-06-11665, slip op. at 7 (Md. Cir. Ct. Queen Anne's County Mar. 12, 2007) (order granting in part and denying in part requested protective order).

[11] *Id.*, slip op. at 8. Judge Ross noted that these comments "were not 'of and concerning' [the] Plaintiff" and thus could not be the basis of a defamation cause of action. *Id.*

[12] *Id.* These comments alleged that Brodie maintained a "dirty and unsanitary-looking food-service place[]" and that trash from his restaurant was "wafting into the river that runs right alongside." *Brodie*, 966 A.2d at 446.

[13] *Brodie*, 966 A.2d at 446.

[14] *Id.* at 449.

[15] *Id.* at 447.

[16] *Id.*

The Maryland Court of Appeals reversed and remanded to the lower court with instructions to grant the protective order.[17] In a relatively short section of the majority opinion, Judge Battaglia[18] reasoned that while Brodie initially sued the three John Doe defendants, none had made the allegedly defamatory comments about Brodie's restaurant. Hence, no claim of defamation could lie against them.[19] Maryland's one-year statute of limitations for defamation claims barred a suit against the two posters who had actually made the actionable comments about Brodie's Dunkin' Donuts.[20] Accordingly, with no valid cause of action against any of the five posters named in the final subpoena, the court concluded that the trial court had abused its discretion by ordering Independent Newspapers to disclose identifying information about any of them.[21]

Turning from the case at hand, Judge Battaglia used the rest of the opinion "to provide guidance to the trial courts in defamation actions, when the disclosure of the identity of an anonymous internet communicant is sought."[22] The court acknowledged that it needed to balance the "First Amendment right [of posters] to retain their anonymity and not to be subject to frivolous suits for defamation brought solely to unmask their identity" with the rights of plaintiffs to pursue "viable causes of action[] for defamation."[23] The court then reviewed decisions from other jurisdictions.[24] Many courts required the plaintiff to attempt to notify the anonymous poster to ensure an opportunity to defend against the disclosure request.[25] Additionally, courts typically made an assessment of the defamation claim's viability in order to ensure that untenable, harassing claims were thrown out before the identities of anonymous posters were revealed.[26] However, courts varied in the standard they deployed to assess viability,[27] ranging from requiring

---

[17] *Id.* at 447–49.

[18] Judge Battaglia was joined by Chief Judge Bell and Judges Harrell and Greene.

[19] *Brodie*, 966 A.2d at 448–49. The court agreed that comments made by the John Doe defendants regarding the farm property were not sufficiently related to Brodie to be actionable. *See id.*

[20] *Id.* at 448 n.18, 449.

[21] *Id.* at 449.

[22] *Id.*

[23] *Id.* An extended discussion of the right to anonymous speech is beyond the scope of this comment, but the right is well established in First Amendment jurisprudence and is discussed early in the Maryland court's opinion. *See id.* at 439–42.

[24] *Id.* at 449–56. The court reviewed, inter alia, *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), and *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

[25] *Brodie*, 966 A.2d at 450–51.

[26] *See id.* at 450–56.

[27] *See id.*; *see also* Ashley I. Kissinger & Katharine Larsen, *Shielding Jane and John: Can the Media Protect Anonymous Online Speech?*, COMM. LAW., July 2009, at 4, 5.

only a "good faith basis" for making a defamation claim[28] to requiring that the plaintiff plead facts sufficient to withstand a summary judgment motion.[29]

Viewing the New Jersey Superior Court's decision in *Dendrite International, Inc. v. Doe*[30] as having achieved the "most appropriate[]" balance,[31] Judge Battaglia adopted a five-step process for a court to use before compelling disclosure of an anonymous poster's identity. First, the plaintiff must try "to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, including posting a message of notification of the identity discovery request on the message board."[32] Second, the plaintiff must allow a "reasonable opportunity to file and serve opposition to the application."[33] Third, the plaintiff must "identify and set forth the exact statements purportedly made by each anonymous poster, alleged to constitute actionable speech."[34] Fourth, the court must "determine whether the complaint has set forth a prima facie defamation . . . action against the anonymous posters."[35] Fifth, the court should "balance the anonymous poster's First Amendment right of free speech against the *strength* of the *prima facie* case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity."[36]

Judge Adkins concurred[37] but expressed concerns about the final two steps adopted by the court. She agreed that the first three steps were beneficial and offered her support for the requirement of a "prima facie showing."[38] But she opined that the court should have done more to clarify the requirements of this showing and whether "mere allegations of fact are sufficient" or some sort of affidavit, deposition, or oath is required.[39] Judge Adkins also criticized the final balancing test as "unnecessary and needlessly complicated" in light of existing balancing tests in defamation law.[40] She was particularly concerned that allowing trial courts to dismiss a cause of action that satisfies all

---

[28] *Brodie*, 966 A.2d at 451–52 (quoting *In re* Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26, 37 (Cir. Ct. 2000), *rev'd sub nom.* Am. Online v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001)) (internal quotation marks omitted).

[29] *Id.* at 450 (citing *Cahill*, 884 A.2d at 460).

[30] 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

[31] *Brodie*, 966 A.2d at 456.

[32] *Id.* at 457.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] Judge Adkins was joined by Judges Murphy and Barbera.

[38] *Brodie*, 966 A.2d at 457 (Adkins, J., concurring) (emphasis omitted).

[39] *Id.*

[40] *Id.* at 458.

of the traditional defamation elements could create a "'superlaw' of internet defamation that [could] trump the well-established defamation law."[41]

Scholars have described the internet as a unique, participatory "marketplace of ideas" that enhances public discourse by allowing anyone to become a publisher.[42] Accordingly, some commentators worry about the chilling effect on free speech caused by some internet libel suits, such as those brought by wealthy corporate interests intended to harass private citizens.[43] Yet, the rise of the internet has arguably led to an increase in libelous comments, as individuals hide behind the veil of pseudonymity to make hurtful claims that they probably would not make if their identities were readily known.[44] The challenge for courts "is to strike a balance between free speech and the preservation of civility."[45] Anonymous posters have an expectation of anonymity that could be irrevocably lost if courts compel discovery. Courts must balance this potential intrusion with the right of individuals to protect their reputations and dignity against baseless, harmful attacks. First Amendment doctrine already includes significant balancing with regard to important speech — particularly speech about public figures and matters of public concern. *Brodie* implicitly incorporated this balancing through its requirement that the plaintiff make a prima facie case for defamation, which provides robust protection for defendants whose speech touches important public issues and renders *Brodie*'s final balancing step unnecessary. Moreover, the establishment of a "superlaw" of internet defamation threatens to create problematic incentive effects that could inhibit accountability for harmful anonymous comments and thereby undermine online discourse.

The *Brodie* court could have omitted the final stage balancing test and relied instead upon the balancing already inherent in First Amendment defamation doctrine. In *New York Times Co. v. Sullivan*,[46] the Supreme Court recognized the Founders' commitment, enshrined in the First Amendment, to ensuring that "debate on *public issues* should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp at-

---

[41] *Id.* at 459.

[42] Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 893 (2000); *accord id.* at 893–95.

[43] *See, e.g.*, *id.* at 857–61.

[44] *See Brodie*, 966 A.2d at 458 (Adkins, J., concurring) ("I would venture to guess that on the Internet, defamation occurs more frequently and is broadcast to more people than via any other medium, past or present."); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 64 (2009) (discussing "the growth of anonymous online mobs that attack women, people of color, religious minorities, gays, and lesbians").

[45] Lidsky, *supra* note 42, at 903.

[46] 376 U.S. 254 (1964).

tacks on government and public officials."[47] Relying on this desire to protect speech about matters of public concern, the Court required public officials alleging defamation to show "actual malice" — that the defendant made a statement "with knowledge that it was false or with reckless disregard of whether it was false or not."[48] Accordingly, the constitutionally required legal elements of a defamation claim differ based upon whether the plaintiff is a private or a public figure — a distinction made even more nuanced with the advent of the middle category of limited-purpose public figures.[49] The Court has similarly sought to protect speech about public issues by protecting anonymous speakers from prior restraints requiring identification. Its decisions have focused on the importance of allowing pamphleteers, other political communicators, and religious groups to speak anonymously in order to protect themselves from reprisal, thereby encouraging expression of minority viewpoints.[50]

Although the *Brodie* court did not mention the public/private distinction in its decision, the five-part process the court put forward does incorporate the distinction at the fourth step: the requirement that the plaintiff make out a prima facie case. The prima facie standard requires the plaintiff to show "(1) that the defendant made a defamatory statement to a third person, (2) that the statement was false, (3) that the defendant was legally at fault in making the statement, and (4) that the plaintiff thereby suffered harm."[51] The distinction between public and private figures is included in the third prong, requiring a plaintiff to show that the defendant was "legally at fault." After *Sullivan*, a defendant is legally at fault for defaming a public figure only if the plaintiff can demonstrate actual malice. By contrast, there is no actual malice requirement if the plaintiff is a private individual.[52]

---

[47] *Id.* at 270 (emphasis added).

[48] *Id.* at 280.

[49] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974) (describing the situation in which "an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues").

[50] *See* Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150, 166–67 (2002); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

[51] *Brodie*, 966 A.2d at 448 (quoting Offen v. Brenner, 935 A.2d 719, 723–24 (Md. 2007)) (internal quotation marks omitted).

[52] *See Gertz*, 418 U.S. at 348 ("Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability . . . on a less demanding showing than that required by *New York Times*."). Maryland courts already recognize that the requirements for making out a prima facie case differ depending upon the status of the plaintiff as a public or private figure. *See* Samuels v. Tschechtelin, 763 A.2d 209, 242 (Md. Ct. Spec. App. 2000) (defining the prima facie standard "when the plaintiff is not a public figure," and noting that "[t]he 'fault' element of the calculus may be based *either on negligence or actual malice*" (emphasis added)); Peroutka v. Streng, 695 A.2d 1287, 1292 (Md. Ct. Spec. App. 1997) (defining the prima facie standard "[i]n a case involving a plaintiff who is not a public figure" (quoting Shapiro v. Massengill, 661 A.2d 202, 216 (Md. Ct. Spec. App. 1995))).

The inclusion of the public/private distinction at the legal fault stage results in even stronger protection to anonymous internet speakers who discuss public figures online than the already robust protection provided to known speakers. If the plaintiff is deemed a public figure,[53] then the plaintiff will have to make a prima facie showing that the defendant acted with actual malice. Since the malice standard "rests on the defendant's state of mind at the time of publication,"[54] it would be difficult to make a prima facie showing that the defendant knowingly lied or showed reckless disregard for the truth without knowing her identity.[55]

Regardless of the plaintiff's status, the final balancing test of the *Brodie* process need not be applied because defendants are adequately protected by the prima facie case requirement. The concurrence's concern about the establishment of a "superlaw" of internet defamation suggests a problematic conclusion stemming from the majority's holding — namely, that all anonymous internet speech is entitled to greater First Amendment protection than is speech by a known person. Granting this protection creates incentives that discourage revealed authors and encourage the use of pseudonyms, thereby undermining attempts to preserve online civility. The problem principally arises from *Brodie*'s balancing test at the fifth and final step, which compares the strength of the prima facie case against the necessity of disclosure and the First Amendment rights of the anonymous author.

Suppose student Kelly Known writes a letter to a student newspaper falsely alleging that Private Plaintiff is a misogynist who made specific derogatory comments about women in class. Then suppose student Ursula Unknown makes substantially identical claims using the pseudonym "ProtectedSpeech" on an internet message board maintained by the same student newspaper. Plaintiff then files suits against Known and Jane Doe (ProtectedSpeech) and seeks an order compelling the newspaper to reveal the Internet Protocol address of the anonymous poster.[56] After *Brodie*, Maryland courts would treat the two

---

[53] It is possible that the defendant will want to contest the plaintiff's designation as a private individual. This issue is frequently litigated in the traditional defamation context. *See* Tracy A. Bateman, Annotation, *Who Is "Public Figure" for Purposes of Defamation Action*, 19 A.L.R.5TH 1 (2009) (listing cases). In such instances, the court should allow the defendant's attorney to argue the matter while preserving the secrecy of his client's identity.

[54] Batson v. Shiflett, 602 A.2d 1191, 1214 (Md. 1992).

[55] Proving malice is already difficult when the defendant's identity is known. *See* SOLOVE, *supra* note 2, at 126 (noting that "most plaintiffs who have to prove [actual malice] lose their cases"). In fact, it might be so difficult to show actual malice at the prima facie stage that the court would be forced to articulate a less stringent standard based on negligence if it wished to allow suits by public figures ever to proceed against anonymous posters.

[56] The Internet Protocol (IP) address is the information most frequently sought in attempts to link pseudonyms with actual users. While this method is not foolproof, it is commonly effective. *See* SOLOVE, *supra* note 2, at 146–47.

suits quite differently. The suit against Known would proceed in a traditional fashion. However, the suit against Jane Doe might not get off the ground if the judge determines that Plaintiff has failed to state a prima facie case or that his case is too weak in light of the anonymous poster's First Amendment rights. Unknown might need a lawyer to contest disclosure, but she might be spared the considerable expense of defending discovery, additional motions, and trial. Her anonymous internet speech, regardless of its value, benefits from additional, poorly defined legal safeguards simply because of its anonymity.[57] Furthermore, Plaintiff would likely incur additional expense if he litigated the discovery issue against Jane Doe, making him less likely to bring suit against the anonymous poster in the first place.[58] Thus, the incentives that *Brodie* created encourage more people to hide behind pseudonyms when making negative comments about others, since an anonymous commenter will be less likely to face an expensive lawsuit and accountability for her comments.

Commentators have raised concerns about the chilling effect on speech created by expensive defamation lawsuits, but one might also focus on the chilling effect created by cyber-bullies who hide behind the veil of pseudonymity to unleash vicious personal attacks.[59] "Sunlight is . . . the best of disinfectants";[60] increasing the likelihood that anonymous commenters will be held accountable for their defamatory words will discourage hurtful speech about private individuals. Eliminating the final balancing test would reduce the potential differences between the "superlaw" of anonymous internet defamation and traditional defamation. The prima facie case requirement alone would adequately preserve both the important right to anonymous public commentary and the right to freedom from malicious personal attacks, thereby protecting the internet as a robust forum for the exchange of ideas and information.

---

[57] The flexibility inherent in the *Brodie* process could lead a judge to conclude that identifying information should be revealed on a minimal showing by the plaintiff. But the ill-defined hurdles may nevertheless terminate some lawsuits that would otherwise proceed against known authors.

[58] In addition, higher discovery litigation costs might discourage plaintiffs because of the risk that anonymous defendants will turn out to be judgment-proof or untraceable. *See, e.g.*, Doe v. Ciolli, 611 F. Supp. 2d 216, 218 n.2 (D. Conn. 2009) (noting that nearly two years after the plaintiff in the case filed an initial civil complaint for libel and other torts "[d]efendant 'kibitzer' has yet to be identified but remains a pseudonymous defendant").

[59] *See, e.g.*, Citron, *supra* note 44, at 64 ("[Anonymous internet] assaults terrorize victims, destroy reputations, corrode privacy, and impair victims' ability to participate in online and offline society as equals.").

[60] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).