

Depp Case Shows Public Square's Perils: Enter If You Dare

By **Cara Salvatore**

Law360 (June 3, 2022, 10:14 PM EDT) -- Johnny Depp's \$15 million defamation victory against ex-wife Amber Heard could chill participation in public discussions, including by lawyers who attack their clients' accusers in the media, First Amendment experts say.

A Virginia jury awarded the "Pirates of the Caribbean" star \$10 million in compensatory damages and \$5 million in punitive damages on June 1 for his three defamation claims. It found actual malice by Heard involving a trio of statements in her 2018 Washington Post op-ed implying Depp abused her. The punitive damages will likely be heavily reduced under a Virginia cap.

Heard won one of her three counterclaims regarding a 2020 Daily Mail article in which Depp lawyer Adam Waldman stated that events surrounding police and 911 calls made by Heard were "a hoax." Waldman's statement included the words, "They set Mr. Depp up by calling the cops, but the first attempt did not do the trick," and so Heard and her friends "spilled a little wine and roughed the place up, got their story straight" and then called 911. The jury awarded Heard \$2 million in compensatory damages.

Depp's victory will encourage more people to sue over commentary they don't care for, experts told Law360.

"The handful of statements at issue in the case relayed objectively true facts — that Heard spoke up against sexual violence and became a public figure representing domestic abuse," said Mary Anne Franks of the University of Miami School of Law, a First Amendment expert who is working on a book called "Fearless Speech."

"Powerful men from former President Donald Trump to Supreme Court Justice Clarence Thomas have made clear that they are eager to expand defamation law to impose liability on any entity they deem insufficiently respectful," Franks said. "This verdict will further embolden abusers to use the law to coerce, control and silence vulnerable individuals."

Lawyers will be taking note of the verdict as well in light of the jury's finding on the Waldman statement, according to Heather Heidelbaugh, leader of the defamation, libel and slander practice at Leech Tishman Fuscaldo & Lampl LLC in Pittsburgh.

"This is huge for lawyers. This is a thing I think people are going to be talking about at bar associations," Heidelbaugh said.

Waldman's agency for Depp was far from clear-cut, Heidelbaugh said. In a public media statement — as opposed to a courtroom or more formal setting — it's not definite that a lawyer would have been considered to be acting as an agent for a client. But the judge found before the trial as a matter of law that Waldman was acting as an agent in his statements.

Jeff McFarland, an entertainment litigator at McKool Smith with defamation litigation expertise as well as experience representing entities like movie studios, expressed deep concern about the verdict's effect on the public square, especially since Heard never mentioned Depp's name in her article and the piece focused on legislative reforms and the actress' new status as an ambassador for the American Civil Liberties Union.

What's troubling, McFarland said, is how forcefully this outcome sends the message "that you can't say anything about your own experience without being sued."

Given the trial's outcome, defamation claims represent a new threat to ordinary people, he said. "That's the concern, is, it's going to chill people," McFarland said. That "everyday folks or businesspeople that experience something similar [and] talk about it could end up in the same position is, to me, the concerning aspect of it. There was no mention of his name."

Heidelbaugh said she has been in practice for decades and has seen a dramatic rise in defamation cases within the last eight to 10 years. The Depp verdict could help continue that trend.

"I'm attributing that as a parallel result of our increased ability to communicate beyond our family," Heidelbaugh said. "I can send out a tweet and the whole world will see it. ... People have gotten careless."

"On a global scale, people were watching this," Heidelbaugh said. "And they are fully cognizant that you better be careful what you say. It should be the truth, especially if you're accusing people of crimes. Because you can be brought to court and really face the wrath of a jury."

One of the findings against Heard was based on a tweet she sent on the day the op-ed was published, linking to the online version. Twitter automatically then adds the text of the headline into users' Twitter feeds. It was undisputed that Heard did not write the headline, which included one of the three contested statements, but Depp's team said, and the jury agreed, that the tweet, which also included some additional text by Heard above the link and headline, counted as a "republication."

Depp claimed at trial that the contested statements were clear and life-destroying references to him, and called Heard a habitual liar.

Heard argued that the First Amendment protects her statements and brought copious evidence to trial of alleged addiction-driven storms of violence by Depp. Heard's lawyers told the jury the lawsuit itself is part of Depp's promised and delivered "campaign of global humiliation" to destroy the actress' reputation and career. She said the relationship was marked by emotional and physical abuse driven by Depp's out-of-control alcohol addiction.

Observers are now looking ahead to an expected appeal by Heard. The finding of Waldman's agency as a matter of law before trial could be addressed on appeal, according to Heidelbaugh.

McFarland believes the case has a high likelihood of settling before an appeal is decided, but that if there is an appeal, it will doubtless involve First Amendment issues that "ought to be looked at very, very closely."

Franks said an appeal could examine whether the trial should have happened at all. "On its face, his claim seems frivolous," she said. "Other issues include the judge's decision to allow the trial to be livestreamed, which, combined with her decision not to sequester the jury, effectively ensured that the case would be a trial by social media."

Depp is represented by Benjamin Chew, Camille Vasquez and Jessica Meyers of Brown Rudnick LLP.

Heard is represented by Elaine Charlson Bredehoft of Charlson Bredehoft Cohen Brown & Nadelhaft PC and J. Benjamin Rottenborn of Woods Rogers PLC.

The case is Depp v. Heard, case number 2019-02911, in the Circuit Court for the County of Fairfax, Virginia.

--Additional reporting by Lauren Berg, Hannah Albarazi and Bonnie Eslinger. Editing by Jill Coffey.