



Contrary to what most legal experts believed, Roger Clemens has now filed a defamation lawsuit against his former trainer and friend Brian McNamee. Lawyers for both sides had been posturing for weeks with McNamee's lawyers stating several times that McNamee was actually contemplating suing Clemens for defamation. McNamee's lawyers have already indicated they will object to jurisdiction in the recent lawsuit filed by Clemens and will attempt to move the case to federal court in Brooklyn. Where the trial is actually held could prove the deciding factor if the case ever makes it to a jury.

Clemens has repeatedly denied steroid use. He appeared on *60 Minutes* the same day the lawsuit was filed and denied that he has ever used steroids. The next day he held a press conference where he once again angrily denied any steroid use. Clemens's preemptive act of filing a defamation lawsuit has clearly shown he is not going to sit idly by and wait for this matter to resolve itself. He clearly drew a line in the sand when he filed the lawsuit. McNamee will now have to answer the Clemens lawsuit and will most likely file a counter-claim against Clemens alleging Clemens defamed him. Once the parties have filed the initial pleadings McNamee's lawyer will attempt to have the case moved to New York to be heard by a New York jury. The discovery phase of the lawsuit should produce some interesting results. Both parties to the litigation will have to give a deposition which is sworn testimony but not in the presence of a jury or judge. Deposition testimony is treated just as the same if the witness is testifying in front of a judge or jury. Clemens will be questioned by the lawyers for McNamee and Clemens's lawyers will question McNamee. Both parties to the lawsuit will certainly be subject to hours of intense questioning by opposing lawyers in the lawsuit.

A trial may be more than two years away and there are many possible land mines for both parties along the way. Litigation always has surprises for the parties in the form of a new found witness or document. Whatever court the case ends up in will certainly require the parties to attempt to mediate their dispute and try to settle the case. Most plaintiffs in a defamation case seek damages to recover for loss of reputation but it is uncertain and probably doubtful if McNamee is a collectable defendant if the matter ever ended in a verdict for Clemens for money damages. If McNamee files a counter-claim and a jury finds in his favor then he might be able

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to collect damages from Clemens. Other likely deponents during discovery could include former Yankees manager Joe Torre, Andy Pettitte, former Clemens's teammates and anyone who may have knowledge about whether Clemens allegedly used steroids. Former Senator George Mitchell might even be required to give a deposition if the matter is not settled prior to the discovery phase of the lawsuit.

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Richard Emery, one of McNamee's lawyers, has clearly stated he thinks the lawsuit has no merit:

"I think it's dismissible on its face. I think it's a press release for Clemens and his career. The case is shoddy at best. The prosecutors acted completely professionally in this case..."

It is strategic that Clemens filed the lawsuit on the same day he appeared on *60 Minutes*. Filing a lawsuit does not necessarily mean however, that he will pursue it to a jury verdict. He could always agree to dismiss the lawsuit at later date or the parties could settle their dispute and agree that the terms of any agreement be kept confidential. Interestingly, Clemens did not sue Major League Baseball only McNamee. He might have argued that MLB published the report and therefore, damaged his reputation as well. Maybe Clemens's thought better of it. Clemens's lawyer Rusty Hardin was very clear in stating in the press conference on January 7, 2007 that the lawsuit in no way reflected poorly on George Mitchell or his investigation. He stated several times that the former Senator's credibility and character was impeccable.

The fourteen page lawsuit alleges that McNamee's statements that he injected Clemens with steroids are "false and defamatory *per se* because they are not true, and they injured Clemens's reputation and exposed him to public hatred, contempt, ridicule, and financial injury. McNamee made the allegations with actual malice, knowing they were false." (Plaintiff's Petition Paragraph 34).

The Clemens lawsuit has summarily stated:

"Though McNamee's allegations comprise only eight pages of a 409-page report, they captured the attention of the nation, fueled rampant speculation, and irreparably tainted the reputation of

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one of baseball's hardest working and most talented pitchers." (Plaintiff's Petition Paragraph 7).

The lawsuit lists fifteen alleged statements made by McNamee to federal investigators all of which Clemens claims are "untrue and defamatory." The lawsuit alleges that during an interrogation by federal law enforcement authorities in June 2007, "McNamee told others that he repeatedly denied that Clemens had used steroids or HGH." (Plaintiff's Petition Paragraph 26). The lawsuit further alleges that McNamee was facing the threat of federal prosecution so he agreed to speak with the Mitchell Commission. He then stated he injected Clemens with steroids.

Interestingly, Clemens also notes in his lawsuit that McNamee was once a suspect in a rape investigation in Florida. (Plaintiff's Petition Paragraph 20). This will certainly present itself as a credibility problem for McNamee in the Clemens lawsuit. Lawyers for Clemens will clearly want to note that McNamee has difficulty telling the truth during that investigation. Clemens says he stopped training with McNamee after the 2001 season when he learned McNamee was a suspect. No formal charges were ever brought against McNamee although Clemens alleged in his lawsuit that McNamee lied to the police in Florida and "refused their requests for evidence in a situation when he denied any wrong-doing..." (Plaintiff's Petition Paragraph 20). Sports Illustrated has reported that the St. Petersburg Police has stated McNamee lied to them during the rape investigation. *Sports Illustrated*, [Police say McNamee lied in 2001](#) , **January 8, 2008** . Clemens states that McNamee's dismissal from the Yankees organization and from Clemens as well left him "embittered". (Plaintiff's Petition Paragraph 20). Clemens further alleges in his lawsuit that although "McNamee's explanation was totally at odds with the conclusion of the police officers conducts the investigation," {sic} Clemens did not know any of these facts so he re-hired McNamee once again. (Plaintiff's Petition Paragraph 21).

The tort of defamation consists of both libel, defamation by words written or print, or slander, communication by spoken words. Defamation of character involves wrongfully hurting a person's good reputation. The law does impose a general duty on all persons to refrain from making false, defamatory statement of facts about others. In Texas, where the case is currently pending, to prove a case for defamation a plaintiff must prove:

1. That the defendant *published* a statement. In this case publication would mean communication to a person other than the defamed party.
2. That the statement was defamatory.
3. That the defendant acted with "actual malice."

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An individual who is deemed a “public figure” under the law must prove “actual malice” to prevail in a defamation lawsuit. Public figures generally have some access to a public medium for responding to defeat false statements; private individuals generally do not have such access. Clemens would most certainly be considered a public figure under the law. To prevail he will have to prove that McNamee “acted with a knowledge of falsity or with a high degree of awareness of probable falsity of the publication at issue”, to prevail on his claim. *New York Times, Inc v. Isaacks*, 146 S.W. 3d 144, 165 (Tex. 2004). It will be a difficult burden for Clemens to prove. McNamee’s defense will be that he is telling the truth. If a jury believed he was telling the truth then Clemens’s lawsuit against him will fail.

In a rather odd twist between the two old friends and new litigants, a seventeen minute phone conversation occurred between Clemens and McNamee on Friday, January 4, 2007. During the rather emotional conversation McNamee asks Clemens several times “what do you want me to do.” Clemens noted during the guarded conversation between the two that he just wanted the truth to come out. Clemens’s lawyers were in the room during the conversation and he was being very careful not to tell McNamee what to say.

The Mitchell Report was a bombshell and linked many baseball stars to steroid use. Some stepped forward and admitted use including Clemens’s good friend and teammate Andy Pettitte. Clemens chose to take the offensive and file a lawsuit. He has demanded he is innocent and says he should get the benefit of the doubt. Clemens has now become the face of the Mitchell Report. Add to the Mitchell Report and the lawsuit a congressional investigation. Clemens has said he will voluntarily testify in front of Congress. Andy Pettitte’s lawyer, Jay Reisinger recently said it is “premature” to say whether Pettitte will testify in front of Congress. McNamee has also said he will testify before Congress as well.

Where does this existing lawsuit go from here? Could the lawsuit actually end in a jury trial with a parade of star witnesses such as Clemens, Pettitte, George Mitchell, and Barry Bonds testifying? It is highly improbable that the lawyers or the parties to the lawsuit desire such an outcome. Lawsuits however have ways of getting a life of their own and when pride becomes a factor for the parties or the lawyers they tend to drag on with no resolution. The next move is McNamee’s. It is certainly a tormented dilemma for two very close friends who are now locked in a legal battle in the midst of one of baseball’s ugliest scandals.

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