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Internet Defamation - A Primer

by John P. Campbell



She's "a psychotic, lying. . . skank." Yikes!

This vile phrase was recently the subject of a claim alleging Internet defamation in New York, a jurisdiction in which I practice. Words like these can hurt as much as sticks and stones. As a result, more and more claims of Internet defamation are filed each week.

School-aged children airing their grievances on Facebook are not the only potential defendants for this tort. Any host of an online discussion group, anyone opining about another business on a consumer site, and plenty of professionals and individuals are susceptible to claims of online defamation. This article discusses this growing tort and provides a brief review of the elements, an initial jurisdictional issue to consider, an absolute defense and recent trends in the law.

The Elements

People and businesses have been making nasty statements about others for centuries, and the tort of defamation has its roots in English common law. An eighteenth century English court found that "if any man deliberately or maliciously publishes any thing [in] writing concerning another which renders him ridiculous, or tends to hinder mankind from associating . . . with him, an action well lies against such publisher."

Now, to establish a *prima facie* case of defamation, a plaintiff must demonstrate that: (1) the defendant published a defamatory statement; (2) the defamatory statement identified the plaintiff to a third person; (3) the defamatory statement was published to a third person; and (4) the plaintiff's reputation suffered injury as a result of the statement. A defamatory statement has been defined as a communication that tends to harm the reputation of another, as to lower him in the reputation of the community or to deter third persons from associating or dealing with him. Publishing the statement online is what turns this centuries old tort into a new body of law.

Personal Jurisdiction

Before a defendant need consider whether his online statements make him liable, he must consider procedural defenses. Given the nature of nationwide and global online communications, it is highly likely that any defendant may have a personal jurisdiction defense available to him thus avoiding the lawsuit in the court where it was initially filed. Courts have noted that the Internet possesses no "territorial boundaries," and therefore, they are grappling with how this boundless field should be measured with respect to personal jurisdiction.

In New Jersey, our courts have determined that long-arm jurisdiction should not be used as a mechanism to attract Internet defamation cases into the state and therefore adopted an "effects" test articulated in *Goldhaber v. Kohlenberg*, 395 N.J. Super. 380 (App. Div. 2007). In *Goldhaber*, the Court held that "jurisdiction may be posited based upon where the effects of the harassment were expected or intended to be felt." It is insufficient that the plaintiff feels the effect of the defendant's tortious conduct in the forum because the plaintiff is located there. Successful arguments to have a case dismissed based upon lack of personal jurisdiction must establish that the defendant's statements were neither targeted at nor intended to have "effects" in New Jersey.

Therefore, it is prudent to perform immediate research when you receive your next case with this claim to determine what personal jurisdiction test your court will perform. At the very least, you may have arguments to make regarding the underlying principles of personal jurisdiction, minimum contacts to invoke jurisdiction, and the traditional notions of fair play and substantial justice discussed in *International Shoe Co.*

An Absolute Defense

Section 230 of the Communications Decency Act, 47 U.S.C. § 230 (hereinafter "Section 230"), prohibits the imposition of liability under state law on any user or provider of an "interactive computer service" for publishing content provided by another. Your client may fall squarely within the protection of this statute. Section 230 provides, in pertinent part, that

[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

Emphasizing that this provision creates a "grant of immunity" from liability under state law, Section 230 expressly states that "[n]o cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3). A defendant qualifies for protection under the CDA if: (1) it is a provider or user of an interactive computer service; and (2) the claims against it assert that it is liable for publishing information provided by another information content provider.

An interactive computer service is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically, a service or system that provides access to the Internet." 47 U.S.C. § 230(f)(2). An information content provider is "any person or entity that is responsible,

in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3).

Therefore, if you are representing a business, school, municipality, or individual who maintains a website, blog, or another type of communications forum, then that defendant may very well be immune from any online defamation suit if the alleged defamatory statements were made by another "information content provider." However, as discussed below, some states appear to be proposing legislation that seeks to place a burden with some types of interactive computer services.

Trends

Anonymous speakers are beginning to lose their anonymity. One significant hurdle to plaintiffs bringing these Internet defamation suits in the first place is that they cannot always tell who is publishing the statements. In August 2009, a New York judge ordered Google to identify a woman who operated a blog called "Skanks in NYC." On the blog, the plaintiff was referred to as a "psychotic, lying, whoring . . . skank" and an "old hag." The plaintiff subpoenaed Google, who hosted the blog, to obtain her critic's identity for the purposes of filing a claim for defamation. Google provided the blog operator with notice of the subpoena, giving her an opportunity to anonymously challenge the subpoena in court. Ultimately, the Court found that the plaintiff demonstrated sufficient claims for the defamation lawsuit and ordered Google to comply with the subpoena disclosing the blogger's identification. In a recent local newspaper article, various New York plaintiffs' attorneys were quoted indicating that this decision has increased calls from clients inquiring about similar circumstances.

Moreover, growing interest in increasing Internet safety for children may impact defendants in online defamation suits. New Jersey is considering the enactment of a "Social Networking Safety Act" to provide penalties for sexually offensive communication or harassing communication through social networking sites. Other states across the nation are considering or have passed other legislation aimed at Internet safety which may impact online defamation claims. The New Jersey legislation has been proposed as a part of the state's Attorney General's initiative concerning Internet safety and the protection of children online. However, the proposed legislation may also place a significant burden on social networking sites. Many commentators believe any such legislation would be attacked considering the Communications Decency Act, but this article will only refer to the proposed legislation. As currently considered, a social networking site would be required to do the following to stay in compliance with the "Social Networking Safety Act": (1) conspicuously display an icon or link that enables the reporting of sexually offensive or abusive communication; (2) conduct a review, investigation, and possible referral to law enforcement of user complaints regarding sexually offensive or abusive communication; and (3) block communications from third parties whom users allege have transmitted a sexually offensive or abusive communication.

Young defense lawyers are expected to know more about all things Internet than their colleagues just a few years older. Hopefully this article has presented you with the start to understand a growing online tort.

John P. Campbell is an associate with Schenck, Price, Smith & King, LLP in Morristown, New Jersey. He defends clients in various product liability, general negligence, insurance coverage, and contract disputes. John serves on the Publications Subcommittee of the Young Lawyer's Committee, and his articles have appeared in various DRI publications. He doesn't have a potty mouth.