

Internet Defamation, Reputation Management, and the Law in the Internet Age

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"Reputations are everything."

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1. Abstract

Defamation is legally defined as the act of communicating false statements about an entity or person that directly or indirectly harms its reputation. The proliferation of the internet created a new legal chapter focused on online defamation. Internet defamation lawsuits can be complex, resource intensive, and ambiguous to navigate. This results from both the fact that this is a relatively new legal discipline and reputations are intangible. Consequently, the value of a strong reputation or a lost one is inherently subjective.

As an expert witness and professional focused on solving digital crisis and subsequent reputation repair issues, I understand the amalgam of defamation, reputation, and the internet. I authored this paper to educate lawyers help them make the most informed decisions when representing plaintiffs and defendants. Including the relevant case law examples cited, I hope this whitepaper provides a resourceful framework for counsel, while also reinforcing the value of proactively building a positive online reputation to inoculate you or your business against reputation risk.

2. Introduction

Every human being is born with intrinsic rights and liberties. As philosopher Immanuel Kant said,

“There is only one innate right, freedom (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law.”¹

Kant further explains that this innate right to freedom

“belongs to every human being by virtue of his humanity.”²

One of the most fundamental human rights, guaranteed in virtually every jurisdiction around the globe, is freedom of speech and expression. However, people sometimes go too far in the course of exercising this right and can violate another person’s right to privacy, and share information that can harm that person’s reputation. When such a situation escalates to the degree that legal action is taken, the alleged violation is referred to as defamation. Defamation cases are actionable as a private wrong of tort under civil law.

Defamation cases can be complex to litigate, and this white paper will unravel some of those complexities. The first section will provide a fundamental definition of defamation and a breakdown of its elements, types, and forms, including the concept of innuendo.

The second section will address the concept of reputation, which is central to defamation cases. It will examine what reputation is and the impact a damaged reputation can have on an individual or entity. It will then explore why safeguarding an individual or entity’s reputation against attack is important, and how modern reputation management practices can provide protection in the internet age.

1. Immanuel Kant, *The Metaphysics of Morals* (Cambridge: Cambridge University Press, 2017), 237.

2. Kant, 237.

The third section will deal with the concept of internet defamation as an advanced form of defamation. That discussion will include the forms defamation can take and will highlight the difference between internet defamation and defamation in the real world. The latter part of section two will contrast freedom of speech and expression with an individual's right to privacy, with a brief exploration of international principles that balance these rights. The section will conclude by addressing the effect of social media on defamation cases and how defamation differs for individuals and businesses in the internet age.

The fourth section of this white paper will analyze different strategies used in internet defamation cases and will deconstruct these strategies from the perspective of both the person or entity whose rights have been infringed and the party accused of wrongdoing. It will also weigh the two options available in these cases, namely, to take legal action or to pursue a remedy outside the courtroom.

The fifth section will assess the importance of expert witnesses in a defamation suit when the case is at trial in a court of law. It will specifically address who should be eligible to serve as an expert witness, what one can expect an expert witness to offer, and how the witness can help the party subject to the suit as well as the court and judge who have the responsibility of weighing the matter in dispute.

The sixth section will explore the unique challenges involved in maintaining a positive online reputation, compared to one's reputation in the real world. It will also introduce the principles of online reputation management, breaking its best practices down into four strategic activities.

The seventh section will offer a study of landmark defamation and internet defamation cases in major jurisdictions around the globe. It will discuss cases from seven countries, the issues raised in each case, and the decisions of the courts involved.

Finally, the author will provide a balanced summary of all the concepts, strategies, and cases examined.

3. Defamation in General

According to the Oxford Advanced Learner's Dictionary, defamation is

“the act of damaging someone's reputation by saying or writing bad or false things about them.”

The Merriam-Webster.com Dictionary definition differs only slightly

“the act of communicating false statements about a person that injure the reputation of that person.”

In simpler terms defamation refers to damage done to a person or entity's reputation when a second party says or writes an untruthful or false statement about them. Defamation is not a criminal offense; it is considered a civil wrong or tort. A person who has suffered loss of reputation due to a defamatory statement can sue the person who made the statement under the defamation laws of the country with jurisdiction.

The Five Elements of Defamation

For any act to be considered defamation, the following constituent elements must be present³

- There must be a statement of fact.
- The statement must be published i.e communicated by a third party.
- The statement must cause injury to the reputation of someone.
- The statement must be false.
- The statement must not be privileged.

3. Michelle Seidel, "How to Win a Defamation Lawsuit," Legal Beagle, (December 24, 2019), <https://legalbeagle.com/8325716-win-defamation-lawsuit.html>.

All five of these elements, which this paper will examine in detail in a later section, must be proved in an internet defamation case. Put simply, however, courts deem defamation to have occurred when a person has knowingly published an alleged statement of fact (rather than a statement of opinion) that is false, and when the statement has subsequently caused damage to the subject's reputation among a class of people or the public at large.

Defamation Subtypes

Defamation is inflicted in one of two ways: in speech or in written content. Defamation has two subtypes.

Slander is defamation via spoken words. The two types of slander are: slander and slander per se. In cases of slander, an aggrieved person can successfully prove that the wrongdoer made a defamatory statement to at least one person and that this act resulted in actual loss or damage to the person.⁴ For example, Person A makes a statement that Person B, a restaurant owner, sells contaminated food to their customers, and Person B subsequently loses customers and money.

Slander per se differs in that no proof of special damage is needed because a certain category of defamatory statement is involved that is presumed to be damaging to the aggrieved person. These categories vary according to time and place.⁵ An example of slander per se would be Person A incorrectly stating that Person B has a specific communicable disease. Such a claim would presumably cause damage to Person B's reputation.

4. Coulter Boesch, "Defamation Law: Legal Elements of Libel and Slander," AllLaw, <https://www.alllaw.com/articles/nolo/civil-litigation/defamation-libel-slander.html>, (accessed May 15, 2020).

5. Boesch.

Libel is defamation that occurs when a false statement about someone is published in written form, such as in a newspaper or magazine, on a website or web portal, or anywhere else in the public sphere, and causes damage to the person about whom it is written.

Defamation Per Quod and Defamation Per Se⁶

6. Aaron Larson, "Defamation: Libel and Slander," ExpertLaw, (May 8, 2018), https://www.expertlaw.com/library/personal_injury/defamation.html

From a legal perspective, the principal difference between defamation per se and defamation per quod is the burden of proof required from the plaintiff that they incurred damages from the defamatory act. In a case of defamation per se, the damage is apparent because of the character of the defamatory statement. The opposite is true in a case of defamation per quod, for which the defamatory character of the alleged statement is not immediately apparent, and the plaintiff must present facts to the court to prove they suffered damages because of it. Thus, a case of defamation per se involves proving only the elements of defamation, whereas a case of defamation per quod involves proving those elements as well as the damage sustained.

In the Scottish case of Morrison v. Ritchie and Co.,⁷ the plaintiffs—a couple—claimed that a false and defamatory statement had been published about them, saying that the wife had given birth to twins on a specified date. Claiming that someone gave birth to twins is not defamatory per se, but because the date specified was just a month after the couple's wedding, the statement was found to be defamatory. This is an example of defamation per quod. The plaintiffs in this case were required to present documentation of their marriage to the court to prove that the published statement harmed their reputation, especially that of the wife.

7. SLR 39_432., [1902]

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