Understanding defamation in the era of social media and the internet (Part 1): What is defamation?

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Recognizing the importance of an individual’s standing in the community, the law has long provided a means for individuals and businesses to protect their reputation: actions in defamation. Defamation (libel, written defamation; or slander, spoken defamation) has featured prominently in the news recently, largely due to a lawsuit involving allegations that Courtney Love committed libel on twitter; aka “Twibel”. The suit involving Courtney Love was the first Twibel case to go to trial. Courtney Love was sued by her former lawyer after one of her tweets suggested the attorney had been “bought off.” The case proceeded to trial when the judge rejected an argument by Love’s attorneys that the nature of Twitter and social media generally, where hyperbole and sensationalism are par for the course, are such that statements on those platforms cannot and should not be held to the same standard as statements made through more traditional media outlets, including newspapers. Although the judge rejected Love’s legal arguments, the jury returned a verdict in her favor.

Courtney Love is not in a unique position. A 2009 study found that between 2006 and 2009 there was a 216% increase in the number of defamation actions. In fact, many commentators have cited anecdotal evidence for the proposition that there has been a significant increase in the number of defamation suits being filed. Many of these suits defy traditional norms; in the past, defamation actions usually targeted mass media organizations such as newspapers and television stations. Now, plaintiffs in defamation actions are bringing suit against individuals, often because of online postings.

The increase in defamation actions against individuals likely has been driven by a number of factors. Two factors, in particular, stand out:
1. People do not spend as much time on their online postings as they do on more formal writing and, as a result, they are less careful with their language and often do not think before they post;¹ and
2. The discovery that many home-owners’ insurance policies contain coverage for defamation actions.

Combined, these factors have created a fertile breeding ground for defamation actions, providing the basis for lawsuits and the deep pockets necessary to pay attorneys’ fees and damages.

This article (Part 1 of a 2-part series) addresses some important foundational matters by describing what defamation is and explaining the burdens of proof a plaintiff will face in bringing an action for defamation. Part 2, which will follow in several weeks, picks up where this article leaves off and explores whether the current definition of a public figure, one of the most important aspects of defamation law, continues to apply in the context of social media. In addition, Part 2 explores other important questions, including possible liability for re-publication of defamatory material and the question of whether opinion can be defamatory.

What is defamation?

Legally speaking, defamation is defined as the utterance of a

¹ The informality of internet postings, along with the hyperbole and sensationalism that often permeates online discussions may distinguish online posts from traditional media outlets. However, based on the judge's decision in the case involving Courtney Love, such distinctions may not be enough to justify a change in the law of defamation.
i. False and defamatory statement of fact
ii. Concerning another
iii. In a communication to a third party (the communication need only be made to a single person, there is no need for there to be widespread dissemination of the statement).²

These three factors are relatively straightforward. The issues become a little more complex, however, when it comes to the question of a defendant’s state of mind. Beyond proving that a false and defamatory statement of fact has been made, a party seeking damages for reputational harm through an action for defamation must also show that the defamer, i.e., the person making the defamatory statement, was either:

i. Negligent, when he/she made the defamatory statement; or
ii. If the party bringing the action is a public figure, he/she must prove that the statement was made with actual malice. The standard to be applied depends on the status of the person bringing the defamation action.

**What do these standards really mean?**

Simply put, the key factor in any defamation action is whether the plaintiff, i.e., the person suing for the allegedly defamatory statement(s), is a public figure. If the plaintiff is a public figure, then the burden of proof is much more difficult to overcome and the plaintiff is much less likely to succeed.

² While the publication need only be to one person, defamation actions are usually brought where there has been a publication to a large audience.
Actual malice will be proven if the plaintiff can show that the defamatory statement was made by the defendant with knowledge that it was untrue or if the defendant showed a reckless disregard as to the truth or falsity of the statement that he/she made. In essence, the plaintiff must show that the defendant knew or had good reason to suspect that his/her statement was untrue, but published it anyway.

Part 2 of this article will be available in our next publication.