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Jabs and SLAPPs

A $5 million defamation verdict against Donald Trump was upheld by a Federal Appeals Court in December.

Viability of defamation actions in California

By Jack Bollier

Defamation is having a moment. Maybe it always has, but it seems to be dominating the news with much more frequency. In recent memory, Johnny Depp, Alex Jones, Rudy Guiliani, George Stephanopoulos, Donald Trump, and their fame have served to put a spotlight on the law of defamation and perhaps remind the public that their words can have consequences.

As attorneys, our clients may encounter defamation in the workplace or business and in their personal lives. Individuals with a public platform in government or who champion controversial causes, where tempers run hot, may be more likely to encounter attacks on their character. This is also true for public figures whose celebrity makes them an easy target.

Whole treatises have been written on the topic of defamation. This article will serve as a primer to springboard into the legal research based on the facts of your case.

Part one of a two-part article on defamation and its relationship to the Anti-SLAPP statute.

Defamation, generally

"Defamation is the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or that causes special damage." (*Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 486.) "Publication need not be to the 'public' at large; communication to a single individual is sufficient." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645.) Statements which carry a defamatory *implication* may be actionable. (*Issa v. Applegate* (2019) 31 Cal.App.5th 689, 707.) "A 'totality of the circumstances' test [is used] to determine whether a statement is fact or opinion, and whether a statement declares or implies a provably false factual assertion; that is, courts look to the words of the statement itself and the context in which the statement was made." (*Id.* at 703.)

Defamation is categorized into either libel or slander. (Civ. Code, § 44.) In their most basic forms, libel is in writing or other "fixed representation" while slander is as an oral utterance. (See Civ. Code, §§ 45, 46.) It has been observed that modern technology with electronic communications and publications makes the distinction between libel and slander increasingly obsolete. (*Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 551, fn. 9.) Consider that the controlling jury instructions do not make a distinction between libel and slander, but instead focus on defamatory "statements." (CACI 1700-1706 ("[t]he word 'statement' in these instructions refers to any form of communication or representation, including spoken or written words or pictures or [other] audible or visual representations.")

Per se v. per quod

A statement is defamatory "*per se*" or on "on its face" when the statement pertains to certain subject matter concerning the plaintiff. (See Civ. Code, § 44 [charging plaintiff with a crime, an infectious disease, injuring them in their profession or business, or imputes to them want of chastity].) In such situations of obviously defamatory statements,

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plaintiff is under no obligation to prove damages, which are assumed. (See *Jarman v. Rea* (1902) 137 Cal. 339, 345; *Burrill v. Nair* (2013) 217 Cal.App.4th 357, 384-385.)

A statement is defamatory "*per quod*" when it does not fall within the categories of Civil Code, section 46, and generally some additional extrinsic evidence is needed to provide context to the statement in order to convey its defamatory meaning. (*Bartholomew v. YouTube, LLC* (2017) 17 Cal.App.5th 1217, 1231.) Plaintiff must also plead and prove special damages. (*The Nethercutt Collection v. Regalia* (2009) 172 Cal.App.4th 361, 367.)

Defamation damages

For statements that are defamatory *per se*, the jury must award damages for harm to reputation or shame, mortification, or hurt feelings, even in the absence of any substantive evidence supporting their existence.

In addition to assumed or nominal damages for statements that are defamatory *per se*, a plaintiff may also plead and prove actual damages, which may include:

- Harm to property, business, trade, profession, or occupation;
- Expenses had to pay as a result of the defamatory statements;
- Harm to reputation; or
- Shame, mortification, or hurt feelings.

Punitive damages are available to the plaintiff that can prove malice, which, depending on the subject and content of the statement, requires some combination of increased fault ("*New York Times* malice," discussed *infra*) and/or malice, oppression, or fraud as those concepts have been defined under California law.

Burden of proof

Even if explicitly defamatory, plaintiff is obligated to prove some level of fault on the part of the speaker. Plaintiff's burden here can shift depending on
(1) the subject matter uttered by the alleged defamer and whether the matter was of public concern; or (2) the identity of the defamed party and whether they are a public official or public figure.

If the topic is a matter concerning a private figure, plaintiff need only prove negligence. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016.) Negligence is a simple showing of the failure to use reasonable care to determine truth or falsity. (CACI 1704.)

If the topic concerns a matter of public concern, the plaintiff carries a heavier burden if they wish to recover assumed/nominal damages which do not require evidence of harm. In such instances, the plaintiff must prove "*New York Times* malice" which is "clear and convincing evidence that the defendant realized that [their] statement was false or that [they] subjectively entertained serious doubts as to the truth of [their] statement." (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 275 [based on the holding in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254].)

A statement is a matter of public concern "[i]f the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy." (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 845.) However, "the mere act of publishing material in the mass media creates public interest in its contents …" (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 752.)

But public *interest* is not the test. "It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.'" Whether the speech involved is of public concern is determined by analyzing its "'content, form, and context … as revealed by the whole record.'" (*Varian Medical Systems, Inc. v. Delfino* (2003) 113 Cal.App.4th 273, 299.)

If the plaintiff is a public official or public figure, they must also prove *New York Times* malice in order to establish liability. The rationale for a higher burden of proof is that public officials and figures have greater access to the media whereby they can rebut falsehoods. Arguably, this higher burden should not apply if the plaintiff is a public official and the statement does not concern their official duties. "[T]he Constitution [does not] protect[] defamatory statements directed against the private conduct of a public official …"(*New York Times, supra*, 376 U.S. 254, 301 (J. Goldberg, concurring).)

Evidence of defamation

Defamatory words are "operative facts," and their publication can be proved by what would otherwise be hearsay evidence. (*Russell v. Geis* (1967) 251 Cal.App.2d. 560, 571.) "There is a well-established exception or departure from the hearsay rule applying to cases in which the very fact in controversy is whether certain things were said or done and not as to whether these things were true or false, and in these cases the words or acts are admissible not as hearsay but as original evidence." (*Id.* (*citing* Witkin, Cal. Evid. [2d. ed. 1966] § 463, p. 425).)

Damages for loss of reputation, shame, mortification, and hurt feelings (i.e., general damages) can be established through plaintiff's own testimony (See *Time Inc. v. Firestone* (1976) 424 U.S. 448; *Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d 991), and the testimony of friends, fellow workers, relatives, and those providing medical treatment for mental suffering, as long as the evidence is limited to the reputation and emotional harm that the plaintiff suffered directly and personally from the defamation. (Cal. Tort Damages (Cont. Ed. Bar 2d ed. 2021) Defamation, § 8.13.)

What is not defamation

Many people believe that defamation is not actionable if it concerns matters of opinion, but that is only partially true.

> Though mere opinions are generally not actionable, *a statement of opinion that implies a false assertion of fact is* . . . . Thus, the inquiry is not merely whether the statements are fact or opinion, but whether a reasonable fact finder could conclude the published statement

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declares or implies a provably false assertion of fact.

(*Issa, supra,* 31 Cal.App.5th 689, 705-706 (original emphasis, citations omitted).)

By statute, there are also several categories of topics presumed to encompass privileged statements that are not actionable. (See Civ. Code, § 47.) These privileges apply in certain contexts, like legislative and judicial proceedings, and section 47 should be carefully reviewed to determine whether it applies to the facts of your case.

Conclusion and caution

The above should provide a basic framework to evaluate the merits of a defamation action. However, this article does not tell the whole story. Before filing any action for defamation, you should carefully consider the possibility that it may be met with an anti-SLAPP special motion to strike, which, if successful, can put your client at risk for the moving party's attorney's fees. This topic will be discussed in the next edition of this magazine.


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