TEMPLARS

ONLINE DEFAMATION: JUST BEFORE YOU POST IT!

The general harm caused by defamation is identified as ridicule, shame, hate, scorn, belittlement or being held in contempt by others, and which lowers him/her in esteem of a reasonably prudent person, due to the communication of the false statement.

In this age of social media interaction and massive online existence, lots of things are said and posted on daily basis that it is practically difficult to draw a distinction between what is offensive or not, what is morally acceptable or not, and what crosses the societal code of tolerance.

As with every other topical issue, the law assumes a definite posture which almost always stands in contrast with what is generally considered as the popular or usual opinion. Thus, whilst the everyday blogger or online enthusiast sees an online post or comment as a 'funny skit' or some harmless jab or even a simple verbal attack on a public figure, the law usually views those scenarios differently and fixes a certain degree of responsibility on the maker and the effect it will have on the target when read by others. This is the bane of the 21st century internet usage and its rippling implications.

So just before you post or repost a seeming sensitive material, you may need to double-check that no one is being defamed. No doubt, certain elements must co-exist for online defamation to occur, hence the need to understand where the law stands on the issue.

Generally, defamation is the act of injuring a person's character, fame or reputation by false and malicious statements.[1] Defamation is the general term that is commonly categorized as either libel and slander. Libel is a written defamation while slander is verbal defamation.

It falls under the Law of Tort and a broader legal definition of the concept refers to false statements about a person communicated as fact to one or more other persons by an individual or entity (such as a person, newspaper, magazine or political organization), which causes damage and does harm to the target's reputation and/or standing in the community. The general harm caused by defamation is identified as ridicule, shame, hate, scorn, belittlement or being held in contempt by others, and which lowers him/her in esteem of a reasonably prudent person, due to the communication of the false statement.

[1] Blacks Law Dictionary 10th Edition

The effect and description of the generic defamation are the same with online defamation. It simply means defamation through online activity where false statements are written or published through online mediums with the aim of harming the target's reputation or standing online. The written words are usually negative and generally false. The striking feature here is that other online users on the internet may see the messages or publication and could spread the word faster than if the perpetuator spoke the information to just a friend or crowd. Thus, this specie of defamation could cover a wider range of locations and areas of the country or world than a usual defamation claim.

Defamation through online use and spreading false statements through web content has become a problem in the age of the computer. When a person is able to, from the comfort of his/her computer or smart phone, write a false detail about another person or entity without any intermediary or censorship, such ease and speed of communicating to a limitless number of the online populace can best be described as 'wild fire' that can seldomly be contained, hence the term 'viral'. Nonetheless, with the advent of such problem, comes the innovation of the law to check-mate the rising menace of online defamation. Although this concept is novel in Nigerian jurisprudence, with very few cases ever getting to be decided on this point, in other common law jurisdictions, the concept has garnered numerous legal pronouncements that have become very persuasive for Nigerian courts and legal practitioners.

However, despite the jurisdictional issue, the position of the law generally remains the same and the golden rule of '*netiquette*' applies across board, which is that it is expected that good manners are deployed in online communication and the need to avoid the use of improper web conduct that one would not appreciate from others.

When does online defamation become actionable?

There are three key factors to consider when deciding whether a defamatory statement is actionable or not –

1. The online defamatory statement must be a lie:

Often, people confuse every negative comment about them to mean defamation. Unfortunately, not all negative statements are defamation. Modern governments around the world all have a right to free speech which is not without limit. When someone communicates, either in writing or verbally, a statement that is not true, they step beyond the bounds of their right to free speech and may become subject to civil liability.

In cases where the person simply expresses an opinion, it becomes an issue of whether the opinion is a legitimate one – in which case it is protected free speech – or whether the opinion is outrageous or designed solely to harm the reputation of the person the opinion is purportedly about – in which case it is can be defamation. The test of ascertaining the difference is the evidential examination of the statement made to determine whether it is false. It must therefore be proven that the statement was indeed a lie to ground an action for defamation.

In ***Wilson v. Bauer Media Pty Ltd***[2], Australian-born actress Rebel Wilson brought an action against Bauer Media, the publishers of the Women's Day magazine. The complaint concerned articles published by Women's Day claiming Wilson lied about her name, age, upbringing and life events. Wilson made a claim for general and special damages for loss

[2] [2017] VSC 521 (Australia)

of business opportunities from May 2015 until the end of 2016. Ruling in her favour, Dixon J. awarded Wilson $650,000 general damages and $3,917,472 special damages. In doing so, the court noted the presence of multiple aggravating factors including substantial loss of business. The court's findings were premised on the fact that Wilson had proved that the lies published by the magazine were sufficient to give rise to a reasonable cause of action for defamation.

2. There must be actual harm:

Legal reviews have revealed that so often, people who have been defamed are more angry than actually injured. For example, if your neighbor, Mr. X, starts telling everyone that you eat rotten and disposed food, you might be hurt, but unless anyone actually believes him, you have no harm. Indeed, even if another neighbor believes Mr. X and thinks that is why her trash can keeps getting tampered with, so she starts casting dirty looks at you but takes no other action, you still probably have not really been injured. How would you quantify your injury for a dirty look from a crazy neighbor? Did you lose business? Were you fired from your job? Did you have a heart attack? Probably not. These are the questions that must be answered under the law, and where the answers are not positive, no harm will be deemed to have occurred and as such no cause of action arisen.

Alternatively, what if Mr. X starts telling people you are a domestic abuser who beats his wife. What if he makes a website with your personal information on it right beside his allegations. What if it costs your company business, your boss decides to let you go, and you end up having so much stress from the false statements that you suffer a heart attack. Those are actual injuries that can be addressed and quantified in an actionable manner.

In the case of ***Wilson v. Bauer Media Pty Ltd (supra)***, it was clear that the false publication by the magazine occasioned a loss of business and income for Wilson and this was instrumental in the court's findings in her favor.

In ***Lachaux v. Independent Print Ltd***[3], C, a French national working in the UAE, brought five separate actions against three publishers in respect of a series of articles published between 20 January and 10 February 2014. The articles recounted events in the UAE, including proceedings against C's British ex-wife for allegedly 'kidnapping' their son. The articles also contained allegations made against C by his ex-wife, including of domestic abuse. There was a trial of preliminary issues including meaning and reference for certain articles like 'serious harm' and the son's abuse.

The judgment clarified the application of the serious harm test to defamation cases stating that it pertinent for the Claimant to prove "serious harm" to their reputation, a higher threshold than the previously applicable standard of "substantial harm", otherwise no reasonable action for defamation can be founded in law.

3. There must be evidence:

A person can defame another person all day long but unless those who witness the defamation are willing to testify or the alleged defamatory statements are recorded, it becomes a "he said/she said" situation.

Generally, for online defamation, recorded statements are easier to preserve for trial but they will not be entirely useful unless there is information regarding who wrote the statement and who read, accessed or downloaded it. This point is so pivotal that it can actually rob the court of territorial jurisdiction to entertain the matter where such is lacking.

In other words, the mere fact that the alleged defamatory statements were made towards a targeted individual is not sufficient if a third

[3] [2017] EWCA Civ 1334 (England)

party does not see or read it and is available to testify about it. Thus, the Claimant is under a burden to show that the words complained of were published to identifiable and an identified party. In **Giwa v. Ajayi**[4], the Court of Appeal held that there was no evidence as to whom the alleged defamatory matter was published and since the Plaintiff did not lead evidence on this very important aspect, the court was entitled to conclude that there was in law and in fact no publication of the alleged defamation.[5]

Proof of online defamation:

The three factors examined above determine when online defamation is actionable, i.e. when it can go to court. Thereafter, the basic issue that follows is how can one prove online defamation?

As stated above, not every 'negative' publication made online amounts to defamation. The allegation of defamatory publication within the context of online publication is hinged on the fact that the party claiming defamation must prove or show that the defamatory material was actually accessed and downloaded by identifiable persons within the jurisdiction of the court. Thus, the law will not presume that the words were actually read.[6]

In the English case of ***Mohammed Hussein Al Amoudi v. Jean Charles Brisard and Another***[7], the Plaintiff sued the Defendants over two reports uploaded on a website in Switzerland which he alleged accused him of terrorist funding and which he pleaded had been published to a substantial and unquantifiable number of readers in the jurisdiction, the Defendant denied that the words had been published in the jurisdiction. The Plaintiff applied to strike out that part of the Defence or alternatively sought summary judgment upon it. He contended that, where a Plaintiff complained about an item on an internet site open to general access, he could rely upon a rebuttable presumption of law that substantial publication of that item had taken place within the jurisdiction of the Court, that is, that the publication on the internet had been published to a substantial but unquantifiable number of people within the jurisdiction.

In rejecting the Plaintiff's contention on presumption, the Court, per **Honourable Mr. Justice Gray** restated the position thus:

"A Plaintiff in a libel action on an internet publication was not entitled to rely on a presumption of law that there had been substantial publication within the jurisdiction... the Plaintiff bears the burden of proving that the words complained of were read or seen by a third party. From that proposition it would appear to follow that, in the case of an Internet libel, it would be for the Plaintiff to prove that the material in question was accessed and downloaded."

The Court further held that:

"It is well known that some facts are capable of direct proof, whereas others may properly be proved by inference. Thus, publication of the items complained of in the present case to a particular individual could be proved by calling that individual to say that he or she accessed the items and downloaded them within the jurisdiction. A wider publication may be proved by establishing a platform of facts from which the tribunal of fact could properly infer that substantial publication within the jurisdiction has taken place... I think that further assistance on the question which I have to decide can be derived from Jameel v Dow Jones Inc (2005) QB 946, (2005) 2 WLR 1614. That was another claim in respect of a libel on a Saudi businessman in respect of an article published on an internet website which was said on behalf of the Plaintiff to be available to between 5,000 (five thousand)

[4] (1993) 5 NWLR (Pt. 294) 423
[5] See *Omo-Agege v. Oghojafor (2011) 3 NWLR (Pt. 1234) at 341* and *Zabusky v. Israeli Aircraft Ind. (2008) 2 NWLR (Pt. 1070) at 109.*
[6] *King v. Lewis (2004) EWCA Civ1329 Case No. A2/2004/0380*
[7] *(2006) 3 All ER 294*

and 10,000 (ten thousand) subscribers within the jurisdiction. The Plaintiff in that case invited the inference to be drawn that a substantial number of readers of the main article would have read the page to which the hyperlink led. The defendant publishers adduced evidence that only five subscribers within the jurisdiction had been able to access the alleged libel via the hyperlink. Of those five, three were members of the Plaintiff's "camp". The Court of Appeal struck out the claim as an abuse of process on the ground that the extent of the publication within the jurisdiction was minimal and did not amount to a real and substantial tort. It appears to me to be of some significance that there was no suggestion made on behalf of the Plaintiff in the context of that case that he could rely on any presumption of publication. The fact that the Court of Appeal struck out the claim provides some support for the view that an argument in favour of the existence of a presumption of publication would not have found favour with the court.

For the above reasons I am unable to accept that under English law a Plaintiff in a libel action on an Internet publication is entitled to rely on a presumption of law that there has been substantial publication…"

This case clearly draws the distinction on the elements that must exist to prove online defamation, which are –

a. The alleged defamatory material must have been read or accessed by a third party to constitute substantial tort; and

b. The said material must have been accessed and downloaded within the court's jurisdiction.

It is a basic ingredient of online defamation that substantial and real publication of the alleged defamatory material must first be proved. This is so because publication cannot be inferred solely by reason of the mere fact that defamatory allegations have been accessible on the internet.[8]

It is worth stating that in order to establish and prove an online defamation claim, it is generally immaterial whether the defamatory statement is deliberate or not. It is also of no moment that the online post in question was fired off in anger or even an innocent repeat of a third party's defamatory statement. As long as it is published, read and reputational damage suffered, it is sufficient to prove the defamatory claim.

Arguably, there has been the question of how do you measure reputational damage in proving an online defamatory claim? Defamation is not simply a numbers game, but generally the more readers the offending post has, the greater the likelihood of reputational damage. Damage may increase further, and additional claims arise, if the defamatory statement is republished elsewhere. Conversely, if the level of readership is low then a defamatory claim may very well fail unless it can be established on evidence that the posting has caused or is likely to cause serious reputational harm.

The case of **Monroe v. Hopkins**[9] is very relevant on this point, a defamation claim arose from social media platforms in 2017 between a popular food writer Jack Monroe against journalist Katie Hopkins. The case concerned two tweets made by Hopkins in May 2015 which accused Monroe of desecrating a war memorial. Monroe was awarded £24,000 in damages, which were exacerbated by the continual harm caused to Monroe's reputation by the tweets that went viral and read by a lot of people.

[8] Jameel v. Dow Jones Inc; Al Amoudi v. Brisard [2007] 1 WLR 113

[9] [2017] EWHC 433 (QB)

Remedies and Exceptions:

The usual remedies that exist in online defamation as with other civil causes include general, exemplary and aggravated damages depending on the peculiar facts of each case and the cause of action before the court.

These damages are intended to compensate the Plaintiff for the damage and injury done to his/her reputation and in certain cases, which must be proved, compensation for loss of business, earnings and profits as a result of the defamatory statement.

There are also injunctive reliefs handed down by the courts which can forbid or ban the publication or continued publication of the offending statement prior to conclusion of the substantive action for defamation.

It must be noted however that such injunctions are rarely granted if the Defendant claims the statement is true or in the existence of some other good defence. It is also unlikely that the court will grant an injunction if it is proven that the publication sought to be restrained has already been published, which simply means that there is actually nothing to restrain as it were and as such the court will not be willing to grant an injunction over a completed act.[10]

Furthermore, there is the constitutional issue of violating the right to free speech and the desire of modern courts not to infringe on that right by granting an injunction. This was the fervent reasoning of the English Court of Appeal in ***Bonnard & Anor. v. Perryman***[11] where the Court opined as follows –

"But it is obvious that the subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong committed; but on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions."[12]

It is clear from these authorities that despite the claims of the publication of defamatory materials, the court will be wary of granting an injunction until the allegation of defamation is proven. To grant an injunction, a court need to be convinced that the Defendant has no realistic prospect of success. This reflects the importance the courts place on free speech.

No doubt, there are several schools of thought that oppose this reasoning of the courts but the proponents in support thereof have found solace in the fact that the court sees the publication of defamatory materials as a case which no less requires substantial proof, otherwise there will be no need for unnecessary restrictions.

Again, there is the salient point that it is almost impossible to classify a publication as defamation until the court has read same or received evidence relating to the circumstances of its publication. The implication therefore is that to grant an injunction in libel cases at an interlocutory

[10] Ideozu v. Ochoma (2006) 4 NWLR (Pt. 970) 364 at 384 – 385, 392. See also Ochudo v. Oseni I (1998) 13 NWLR (Pt. 580) 103 at 121.

[11] (1891-4) All E.R. Rep. 965 at 968

[12] See the case of Coulsin & Sons v. James Coulson & Co (1887) 3 TLR 846 where the English Court of Appeal reversed an interim injunction granted by the trial court for infringing on the Appellant's right to free speech which is guaranteed until the alleged defamatory statement has been proved. See also Quartz Hill Consolidated Gold Mining Company v. Beall (1882) 20 Ch. D. 501; Manson v. Tassauds Ltd. (1894) 1 QB 671.

stage essentially means that the court would have taken it for granted that the alleged publication is defamatory even before hearing the defence.

In the case of ***Registered Trustees of AMORC v. Awoniyi***[13], **Oguntade JCA** (as he then was) brilliantly explained as follows:

"That aside, there is an even more fundamental reason why the injunction sought by the applicant cannot be granted… I am asked to restrain the respondents from publishing a book which I have never read. I do not know if indeed it contains material defamatory of the applicants. I would be right to restrain the respondents only from publishing a defamatory book; conversely, I would be wrong in restraining the respondents from publishing a book not defamatory. There is an inherent error of principle in asking the court to restrain a publisher from publishing an article that has not yet been pronounced to be defamatory of another. If I grant the order and the same is flouted, I would be disabled from punishing for contempt without first ascertaining if the book published is defamatory. That will be a situation of putting the cart before the horse – a mockery of procedure as I know it. The principle involved is 'the court does nothing in vain' or 'the court does not make an order that it cannot enforce'.

As always, there are exceptions and defenses to online defamation and they generally include:

1. Fair comment – this refers to a statement of opinion which was arrived at based on accurate facts, which do not allege dishonourable motives by the person about whom the statements were made;

2. Statements made about a public person (political candidates, governmental officeholder, movie star, author, celebrity etc.) are usually exempt, even if they are untrue and harmful. This is due to their status as public persons. However, if they were made with malice – with hate, dislike, intent and/or desire to harm and with reckless disregard for the truth – the public person may have a cause of action.

3. Minor errors in reporting, such as publishing a person's age or title inaccurately or providing the wrong address;

4. Governmental bodies due to the premise that a non-personal entity cannot have intent;

5. Public records are also exempt from claims of defamation;

6. Truth – where it is proven that the communication was true.

Conclusively, and in reiterating the earlier point made regarding the golden rule of 'netiquette', there is the need for all internet users to adopt good internet manners and culture. Despite the letters of the law and the test of proving whether a material is defamatory or not, it behoves on human beings, as creators and users of online technology, to self-regulate the fair mode of usage in order to prevent all forms of damage and wrongs for a sane and better society.

[13] (1991) 13 NWLR (Pt. 178) 245

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