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INTERNET DEFAMATION AND CYBER SMEAR: LEGAL ISSUES AND CONSEQUENCES

Introduction

The remarkable growth and development of the Internet – **Facebook, Twitter, LinkedIn, Web Blog, WhatsApp, Instagram**, etc. have provided people with the opportunity to express their feelings, thoughts or opinions through various forms of publications and social networking sites. Nonetheless, the ease of accessibility and publication in this online world has created several risks as these digital platforms are prone to be exploited by online enthusiasts in the name of freedom of speech and expression. As users can publish and disseminate information through these social networking sites, defamation has become a subject of concern. With the rise of so-called trends of sharing or posting information or pictures on certain social networking sites and commenting on them have increased the risk of '**Internet Defamation and Cyber-Smearing**'.

As with every other topical issue, the law assumes a definite posture, which 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 poster and the effect it will have on the target when read by others. This is the bane of 21st century internet usage and its rippling implications. So just before you post or repost a seemingly sensitive material, you may need to double-check that no one is being defamed. No doubt, certain elements must coexist for cyber defamation to occur, hence the need to understand where the law stands on the issue.

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Internet Defamation may give rise to criminal prosecution or a right of action in civil or tortious claim or even both. In its civil form, internet defamation seeks to protect a man during his lifetime, the untainted possession of his reputation and good name. It is therefore a wrongful act in the eyes of the law for a man to directly impress in the mind of another person a matter that is not only untrue but is likely in the ordinary and natural course of things to substantially injure the reputation of a third party. This is what is called civil defamation and in tort may attract the award of damages in favour of the person wronged. In its criminal form, internet defamation seeks to prevent a situation in which defamation assumes a tendency to arouse angry passion, provoke revenge and set the society ablaze in a way that public peace is endangered. **Section 373-376 of the Criminal Code and Section 24 of the Cybercrime (Prohibition, Prevention) Act 2015** criminalize internet defamation. Under Section 375 of the Criminal Code, any person who publishes any defamatory matter is guilty of misdemeanour and is liable to imprisonment for one year; and any person who publishes any defamatory matter knowing it to be false, is liable for two years imprisonment. However, any person who publishes or threatens to publish any defamatory matter with intent to extort money or other property is guilty of felony and is liable to imprisonment for seven years. **See Section 376 of the Criminal Code.** The punishment for internet defamation under **Section 24 of the Cybercrime (Prohibition, Prevention) Act 2015** is three years imprisonment or a fine of not more than Seven Million Naira Only or both fine and imprisonment.

This article clarifies some legal issues bordering on internet defamation and cyber smear, while highlighting the defences and exceptions, as well as remedies available to the plaintiff.

The Concept of Internet Defamation

Defamation is the general term that is commonly categorized as either libel or slander. Libel is a written defamation while slander is verbal defamation. The 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.

The description of the generic defamation are the same with internet defamation. Internet defamation means through cyber space or online activity where false statements are written or published through online mediums with the aim of harming the target's reputation. 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

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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 smartphone, 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. However, in other common law jurisdictions, the concept has garnered numerous legal pronouncements that have become very persuasive for Nigerian courts and legal practitioners.

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.

Few Foreign Judicial Pronouncements

In the case of **Forces-Vives Inc. v. Comeau, 2021 NBBR 59,** the New Brunswick Court of Queen's Bench awarded $2,000 general damages and $1,000 aggravated damages to the plaintiff, a residential care operator, over a defamatory Facebook post which was automatically shared to all of the defendant's friends and which prompted 14 comments. The Court also granted a permanent injunction.

In the case of **Marion v Louie 2021 BCSC 424**, the British Columbia Supreme Court awarded the plaintiff $20,000 general damages and $10,000 aggravated damages over defamatory allegations made in private text messages to the plaintiff's business partner and letters critical of the plaintiff sent to the board of directors of an administrative body of which the plaintiff was a member. The Court's decision to award aggravated damages was influenced by the Court's findings that despite being served with a cease and desist letter and the filing of this lawsuit, the defendant continued to post things online which were disparaging of the plaintiff.

In the case of **Quebec Inc v. Quiment 2020 QCCS 3472**, the Quebec Superior Court awarded the plaintiff company $5000 special damages and $12,000 punitive damages over defamatory posts on private and public Facebook group pages which denigrated the training offered by the plaintiff in micropigmentation. The posts on the private Facebook group (46 members) explicitly named the plaintiff. The posts on the public Facebook page, which had 5,287 members, did not specifically name the plaintiff but contained pointers, which identified the plaintiff company

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and included a copy of a cease and desist letter served by the plaintiff's lawyers. The Court noted there were 2 shares and 33 comments on the public page. The defendants were commercial competitors. The Court also ordered a permanent injunction and required the defendants to post a retraction and apology on Facebook.

The Quebec Superior Court also awarded $10,000 unliquidated damages to the plaintiff landlord over defamatory statements by the defendants (commercial tenants) on Facebook and to a journalist and $79,346.11 representing overdue rent in the case of **Labrecque v. Boudreault 2020 QCCS 2017**. In the case of **Skafo Ltd v. Abdalla 2020 ONSC 136**, the Ontario Superior Court of Justice granted summary judgment for defamatory remarks published on social media by the defendant Abdalla and awarded nominal damages of $1,000 to the corporate plaintiff, which operates a restaurant. The defamatory remarks occurred after a dispute arose between the plaintiffs and the defendant over the former's sponsorship of a festival. The Court also awarded $8,000 general damages to the plaintiff Yagloui and $6,000 to the plaintiff Yacoub, who owned the plaintiff corporation. The individual defendant posted defamatory comments on Facebook, in a WhatsApp group, and on Twitter. The court noted: *"No one who was proferred as a witness on behalf of the plaintiffs felt that the reputation of the individual defendants (sic) had been diminished in their minds. This does not mean the plaintiffs are disentitled to damages, because in defamation actions damages are presumed, but it may demonstrate there is little basis for a significant damages award." The Court also noted that "the Facebook postings were transitory and were deleted" and the "WhatsApp posting was by and large to a group of 60 people who may be regarded as festival insiders."*

In the case of **Rook v Halcrow, 2019 BCSC 2253**, the British Columbia Supreme Court awarded the plaintiff $175,000 general damages, $25,000 aggravated damages and $29,870 US special damages for defamatory publications on Instagram and on other websites by an ex-girlfriend following the termination of their relationship. The Court also granted the plaintiff an injunction. In his reasons, the trial judge stated: *"The courts have recognised that the internet can be used as an exceedingly effective tool to harm reputations. This is one such case."*

In **Scheff V Bock – Florida USA, 2006, Case No. CACE03022837**, a Florida woman won an $11.3 million award from a Florida jury over online defamation. Scheff was attacked on an Internet website and labeled as a "crook," "con artist," and "fraud." The defendant's anger and misguided postings stemmed from a previous interaction where she sought Scheff's assistance. In **Wilson v. Bauer Media Pty Ltd [2017] VSC 521**, 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 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.

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In **Monroe v. Hopkins [2017] EWHC 433 (QB)** an online defamation claim was filed by a popular food writer Jack Monroe against journalist Katie Hopkins concerning 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.

Anonymous Post and Liability of the Internet Service Providers and other Intermediaries

The primary question to be determined from the outset of internet defamation is to consider who the defendant is. Many people who post defamatory content online believe that web anonymity is a speech right or that it makes them immune from prosecution.

The digital age and its open invitation to publish, presents not only an entirely novel opportunity for the creation and dissemination of content by vast multitudes who were never before able to do so, but also a difficulty in arriving at who actually posted a particular piece. Tracking an individual that has posted a defamatory piece can prove very difficult. At common law, persons who intentionally or negligently participate or otherwise authorize the publication of defamatory material are as potentially liable as if they were the original author. This means that in a newspaper publication for example, the author, publisher, and editor of a defamatory statement may all be liable. These individuals are easily identifiable, however, with regards to an internet publication, the publishers are not easily identifiable and their geographical location may even prove to be most difficult to locate.

Whilst the anonymous author of a defamatory message published on the internet can be held liable for defamation, so can the Internet Service Providers (ISPs) and other intermediaries such as the provider, administrator and manager of a website on the internet. Given that user anonymity is often the norm in internet forums, ISPs or other intermediaries make attractive defendants as they are more readily identifiable and would generally be perceived as having deeper pockets. In the case of **Oriental Press Group Limited & Others v Fevaworks Solutions Limited (HCA 2140 of 2008)**, the Hong Kong High Court found the host of a popular online forum liable for failing to remove defamatory statements posted by its subscribers. Also, in the case of **Cohen v. Google 25 Misc. 3d 945 (2009)**, the plaintiff found herself the object of vicious attacks by an anonymous blogger. The blogger posts featured photos of Cohen along with captions describing her as a "skank", "skanky", "ho," "psychotic, lying, and whoring skank". Due to the defamatory nature of the statements, US Supreme Court granted her prayers and ordered goggle to provide her with the name of the so-called "Skank Blogger".

Defence of Innocent Dissemination

The defence of innocent dissemination is intended to protect people such as newsagents, booksellers, librarians and

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ISPs who unwittingly publish defamatory matter without negligence on their part. The defence applies in circumstances where the ISPs was not the originator of the alleged defamatory material but simply facilitated its public dissemination without being aware of the content.

The defence of innocent dissemination may be relied on by ISPs and other internet intermediaries to escape liability if the following can be established;

- No knowledge that the document contains the libel complained of;
- No knowledge that the document was of a character likely to contain a libel; and
- The want of knowledge was not due to any negligence.

There have been cases that explore the issue of the defence of innocent dissemination. Recent cases have held that an operator of an online search engine can be considered a secondary publisher of defamatory material, even though the operator may not have known that the material was defamatory in nature until it was brought to their attention. See the cases of **Google Inc v Duffy (2017) 129 SASR 304], and Defteros v Google LLA [2020] VSC 2019**.

Jurisdiction relating to Internet Defamation

The issue of jurisdiction relating to internet defamation cannot be firmly determined without discussions on the issue of publication. Publication is the heart of defamation action, as it is trite law that for a plaintiff to succeed in a defamation suit, the defendant must have published the defamatory material.

The issue of jurisdiction and choice of law to be applied in internet defamation cases has been laid to rest in the case of **Dow Jones & Co Inc v. Gutnick, (2002) HCA 56**. In this case, the court held that in the context of material on the internet, the place where the material is downloaded is the place of publication. It follows therefore that the place to institute internet defamation suit would be the place where the defamatory content is downloaded or published and not where the defamatory content was uploaded.

When does online defamation become actionable?

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

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

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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.

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 Mr. X starts telling everyone that Mr. Y is a rapist, Mr. Y might be hurt, but unless anyone actually believes him, Mr. Y does no harm. There are several 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 arose.

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 hearsay 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 party does not see or read it and is available to testify about it. Thus, the plaintiff is under a burden to show that the words complained of were published to identifiable and an identified party. In **Giwa v. Ajayi (1993) 5 NWLR (Pt. 294) 423**, 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. See also the cases of **Omo-Agege v. Oghojafor (2011) 3 NWLR (Pt. 1234) at 341 and Zabusky v. Israeli Aircraft Ind. (2008) 2 NWLR (Pt. 1070) at 109.**

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, downloaded and read by identifiable persons within the jurisdiction of the court. Thus, the law will not presume that the words were

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actually read.

It is a basic ingredient of Internet 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. 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 internet 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 internet defamation 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.

Defences to Internet Defamation

There are exceptions and defenses to online defamation and they are

Hyperbole and 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.

Absolute Privilege

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, hate, intent and/or desire to harm and with reckless disregard for the truth, the public person may have a cause of action.

Minor errors

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

Public records

Public records are also exempt from claims of defamation

Truth

Truth is an absolute defence to a defamation suit. If the statement that is the subject of the suit is true, and the defendant can prove it, the court may dismiss the plaintiff's claim. No one is punished for speaking the truth, even if it is an ugly truth.

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Qualified Privilege

Qualified privilege is a defence to a defamation action. Sometimes, even if a statement is not absolutely privileged, the context in which it was made means that it should be privileged anyway.

Matters of public interest

Innocent dissemination

Remedies

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

Conclusion

The natural transfer of data and information over the internet has made it a critical hotspot for defamation. Although, there are laws in place which prohibit people from posting such content online, most people are not aware of the same or are too negligent to realize whether such content is defamatory or not. At times, when free speech runs contradictory to a person's reputation it becomes pertinent for the State to establish a boundary, otherwise, that free speech becomes a weapon in the hands of certain people. There is a dire need of a system, which educates and makes people aware of what to do and what not to do, what is wrong and what is right and what is defamatory and what is not defamatory on social media. Further, the intermediaries, which provide such an open platform should monitor the content posted on it and take appropriate actions against such users who post such defamatory content in order to avoid repetition in the future.

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