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COVID-19 News Defamation Claims Are Unlikely To Succeed

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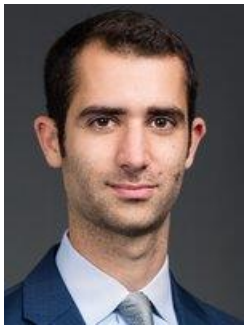

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(May 4, 2020, 4:57 PM EDT) - On April 3, the owners of a restaurant in New Haven, Connecticut, sued the city's mayor for claims including defamation per se based on the mayor's allegedly false statements that the establishment was violating the city's social distancing orders.

Similarly, in March, a website falsely reported that Pope Francis had tested positive for COVID-19. Defamation claims arising from allegedly false assertions about the virus are therefore emerging.

One potential target of such claims are media organizations — organizations that play a pivotal role in providing information to the public about where the virus is spreading and what measures are being taken to stop it and that, in recent years, have become the subject of numerous frivolous defamation claims.

President Donald Trump's campaign, for instance, has sued a number of media organizations — including, most recently, suing an NBC affiliate for allegedly false reporting about the president's response to the coronavirus. It is likely, then, that media organizations will face the same type of defamation claims arising out of allegations of false reporting.

In this article, we explain that claims against media organizations arising from reporting on COVID-19, although subject to some wrinkles in the law, are highly unlikely to succeed.

We discuss how COVID-19's status as a highly contagious disease can affect claims brought under the doctrine of defamation per se — if reporting turns out to be inaccurate — and describe the substantial defenses media organizations have against such claims, which should ultimately render such claims futile.

Elements of Defamation

When a plaintiff pleads a cause of action for defamation, she must prove that the defendant published a false statement with the requisite degree of culpability and that the plaintiff suffered damages.

Defamation per se makes a plaintiff's case easier than it would be to assert a garden-variety defamation claim — often called defamation "per quod": Typically, a plaintiff asserting a defamation claim based on a statement that is defamatory per se is presumed to have suffered reputational damages and therefore need not plead or prove either reputational damages or any special damages (meaning the loss of pecuniary value) in order to obtain a recovery.[1]

Relevant here, statements are defamatory per se where they (1) tend to injure one's trade or profession; or (2) impute to another a "loathsome disease."[2]

Trade or Business Injury

False allegations that a person or business failed to take adequate preventative measures to protect employees or customers from COVID-19, or that an employee contracted the virus — like those alleged in the New Haven suit — may raise issues concerning the injury to business or trade prong of defamation per se.

Individuals and businesses may argue that such allegations cause reputational damage, insofar as customers may be less inclined to frequent a business that puts its employees or the public at risk of such an infectious disease, or whose employees have tested positive — particularly in industries such as food preparation.

Whether a false statement that an individual or business is failing to take COVID-19 preventative measures is injurious to one's profession or trade likely turns on the nature of the false statement and the nature of the business. But false statements qualifying as injurious to a business or one's profession must typically impute some misconduct tethered to the specific function, products, or services offered by the individual or entity.[3]

The allegation that a grocery store owner is failing to take appropriate COVID-19 preventative measures such as reducing the number of people permitted within the store at any given time is likely not sufficiently tethered to the owner's professional duties to justify a cognizable defamation per se claim.[4]

Loathsome Disease

Similarly, although a party may allege that a false report that she was COVID-19 positive was defamation per se on the grounds that COVID-19 is a loathsome disease, such a claim is likely to fail. The purpose of the loathsome disease doctrine is to protect individuals from being falsely associated with characteristics that society tends to shun, like having contagious diseases associated with "socially repugnant conduct."[5]

Courts applying the loathsome disease category (albeit infrequently in modern times) have therefore generally done so in the context of leprosy or venereal diseases like syphilis and gonorrhea.[6]

Recently, in Nolan v. New York, an appellate court in New York placed more importance on the ostracizing impact of being associated with a disease.[7] That court held that a false imputation that a person was HIV-positive was defamatory per se, falling "under the traditional 'loathsome disease' category," because "it can still be said that ostracism is a likely effect of a diagnosis of HIV," even though it is not necessarily now associated with "socially repugnant" conduct.[8]

COVID-19 is almost certainly not the type of medical condition qualifying as a loathsome disease under the case law. It is widely understood that COVID-19 has caused a global pandemic that spreads through everyday interactions — not "socially repugnant" conduct. Nor does the disease subject its victims to the type of ostracism or social stigma that has characterized conditions courts have previously found loathsome.

It is not a condition for which society "has been too slow in understanding that those who have [it] are entitled to equal treatment under the law."[9] Just the opposite: There is widespread sympathy for — and a helping hand extended toward — COVID-19 victims, including because those who are most at risk of contracting it are the heroes on the front lines delivering medical care and essential services necessary for our society to function.

A court would likely refuse to recognize COVID-19 as a loathsome disease under the doctrine of defamation per se.

Strong Defenses for Media Organizations

Even in the unlikely event that a court were to accept the COVID-19 defamation per se theories that have been asserted or suggested in recent weeks, media organizations still have a multitude of best practices and legal protections that should limit the risk of liability for such claims.

For suits brought by public figures or public officials against the media, the First Amendment requires plaintiffs alleging statements that are defamatory per se to prove, by clear and convincing evidence, that the defendant acted with actual malice in order to sustain a claim.[10]

Proof of actual malice — that is, that the defendant acted with knowledge that the statement was false, or with reckless disregard as to whether it was false — is notoriously difficult for a plaintiff to muster, and media organizations can avoid the risk of being found to have acted with actual malice by taking efforts to employ accepted reporting standards, such as conducting independent fact checking, and using credible sources.[11]

Accordingly, even in the most plaintiff-friendly jurisdictions, public figure suits brought against reputable news organizations under these COVID-19-based defamatory per se theories discussed above are unlikely to result in liability. That said, because actual malice is often a fact-intensive question, it is possible that media organizations will have to proceed through expensive discovery before ultimately prevailing.[12]

For suits brought by private figures against the media, a plaintiff alleging defamation per se must still establish, at the very least, that the defendant was negligent in its reporting, which claim can often be combatted by the same accepted reporting standards noted above.[13] And where private figures bring suits about matters of public concern, presumed damages — including the presumed reputational damages at issue for defamation per se claims — are constitutionally prohibited altogether.

Private plaintiffs must always, at a minimum, prove reputational harm, and some states further require proof of special harm in order to recover damages.[14] Some states, moreover, apply the actual malice standard to private figure suits about matters of public concern.[15]

Do media reports that a particular individual has contracted COVID-19, or that a business is failing to take adequate measures to protect its employees or customers from the virus, constitute matters of

public concern? While the U.S. Supreme Court has noted that the contours of matters of public concern are not well-defined, the court has also explained that a statement concerns the public when it is "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of defamation."[16]

In light of COVID-19's global but uneven spread, deadly nature, contagiousness, and apparent contraction through interpersonal interactions, by surface contact, and through the air, the media has a strong argument that reports of new confirmed cases, even of nonpublic figures, or of lax preventative practices are newsworthy to the general public because of its interest in preventing the spread (or, in the future, a resurgence) of the virus.

Consequently, the matters-of-public-concern doctrine may well provide even further protection for media organizations facing COVID-19 defamation claims.

In sum, although certain false statements about COVID-19 may result in defamation per se claims, the important First Amendment protections properly afforded news organizations and public health considerations favoring the public's access to robust information on the spread of the virus, should render those claims dead-on-arrival.

Media organizations that have hewed to accepted reporting standards and nevertheless face COVID-19 defamation claims of the kinds discussed in this article should ultimately be able to prevail.

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[1] See, e.g., Zherka v. Amicone, 634 F.3d 642, 645 (2d Cir. 2011) ("New York law has long recognized that '[w]hen statements fall within' established categories of per se defamation, … the law presumes that damages will result, and they need not be alleged or proven."); Republic Tobacco Co. v. North Atlantic Trading Co., Inc., 381 F.3d 717 (7th Cir. 2004) ("If a statement qualifies as defamatory per se, under Illinois law, it is unnecessary for a plaintiff to demonstrate actual damage to reputation. Statements that fall within per se categories are thought to be so obviously and materially harmful to a plaintiff that injury to the plaintiff's reputation may be presumed."). A plaintiff seeking to recover special damages, however, would still need to prove them. See, e.g., DeVito v. Schwartz, 784 A.2d 376, 381–82 (Conn. App. 2001).

[2] See, e.g., Liberman v. Gelstein, 80 N.Y.2d 429, 435 (1992); Cornell Cos., Inc. v. Borough of New Morgan, 512 F. Supp. 2d 238, 271 (E.D. Pa. 2007); Yoakum v. Hartford Fire Ins.,129 Idaho 171, 180 (1996); Ravnikar v. Bogojavlensky 438 Mass. 627, 629–30 (2003). To be sure, the common law further distinguished between statements that were deemed slander per se as opposed to libel per se. Under common law, all statements that were libel were considered actionable per se (i.e., without proof of actual harm), whereas slanderous statements were deemed actionable per se only where they fell into the traditional categories. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-350 (1974); Restatement (Second) of Torts §§ 569-574; 2 Rodney Smalla, Law of Defamation §7.9 (2d ed. 2019). Many courts have since abandoned this distinction, however, referring generally to statements as being either

"defamatory" per se or per quod. See infra note 2.

[3] See, e.g., Virginia Citizens Defense League v. Couric, 910 F.3d 780, 784-85 (4th Cir. 2018).

[4] Cf. Kalimantano GmbH v. Motion in Time, Inc., 939 F. Supp. 2d 392, 419-21 (S.D.N.Y. 2013).

[5] See, e.g., Restatement (Second) of Torts § 572 (comment c) (1977); Sarah A. Maguire, A Misplaced Focus: Libel Law and Wisconsin's Distinction Between Media and Nonmedia Defendants, 2004 Wis. L. Rev. 191, 228 (2004).

[6] See, e.g., Restatement (Second) of Torts § 572 (comment b) (citing cases).

[7] Nolan v. State, 158 A.D.3d 186, 188 (1st Dep't 2018).

[8] Id. at 197.

[9] Id.

[10] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[11] Harte-Hanks Comms., Inc. v. Connaughton, 491 U.S. 657, 667-669 (1989); Stern v. Crosby, 645 F. Supp. 2d 258, 285 (S.D.N.Y. 2009); Reuber v. Food Chem. News, Inc., 925 F.2d 703, 716 (4th Cir. 1991).

[12] Scott M. Matheson, Jr., Procedure in Public Person Defamation Cases: The Impact of the First Amendment, 66 Tex. L. Rev. 215, 245 (1987) (noting the extensive discovery triggered by the actual malice standard).

[13] Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-350 (1974).

[14] Id.; see also Dun & Bradstreet, Inc. v Greenmoss Builders, Inc., 472 U.S. 749, 762 (1985); 12 Bus. & Com. Litig. Fed. Cts. § 123:24 (4th ed. 2019).

[15] See, e.g., Durando v. Nutley Sun, 209 N.J. 235, 250 (2012).

[16] Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011).