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Presumed damages in age of social media defamation

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In the 15th century, the printing press revolutionized communication. Literacy rates climbed dramatically as ordinary people—not merely the wealthy few—gained access to the written word. With the ascendancy of social media, another revolution is in progress now.

Today, the average person is likely to regularly carry a device almost unimaginably more powerful than the printing press—one that can spread communications instantly and connect to a massive global audience.

And virtually nothing requires those communications to be well-considered or factually accurate. Once introduced into the never-ending stream of global conversation, social media provides users with a remarkable power to share and rebroadcast communications, reaching ever-expanding audiences. Salacious and inaccurate communications are particularly likely to find broad distribution. A recent study documented that false information spreads faster on the internet than the truth. See https://www.popsci.com/fake-news-spreads-faster.

Evolutions in communication technology are occurring at a pace much more rapid than the development of defamation case law. In fact, much of Minnesota's formative defamation precedent comes from a pre-internet world in which the printing press was still the dominant method of spreading written communications. But did Minnesota Supreme Court precedent from long-past decades perhaps anticipate and provide a powerful tool to plaintiffs in libel cases? The answer may well be yes. And if it is, plaintiffs in written defamation cases (which arguably would encompass much of social media) may have a powerful weapon in their arsenal.

Defamation per se

Defamation claims come in two varieties: libel (written defamation) and slander (spoken defamation). Both claims have, historically, been relatively rare in Minnesota courts. One factor limiting their frequency has likely been that proving defamation damages can be difficult. Harm to reputation frequently lacks the obviousness of a physical injury and can be difficult to demonstrate on a financial statement. Defendants in such cases—even those whose conduct has been deliberate and outrageous—frequently take the position that the plaintiff has not suffered any damage and see dismissal of the claim on that basis.

Many lawyers know that such motions are denied where the defamatory statement was "defamatory per se." Becker v. Alloy Hardfacing & Eng'g Co., 401 N.W.2d 655, 661 (Minn. 1987). These are categories of statements considered so inherently harmful that damages are presumed as a matter of law. They include statements "that "(1) affect a person in his or her business, trade, or profession; (2) accuse the person of having a loathsome disease; (3) charge a crime; and (4) accuse the person of committing sexual misconduct." Hooser v. Anderson, A14-1055, 2015 WL 1959898, at *4 (Minn. Ct. App. May 4, 2015) (citing Anderson v. Kammeier, 262 N.W.2d 366, 372 (Minn. 1977)).

As a practical matter, this typically means that plaintiffs get beyond summary judgment and can present their cases arising from defamation per se to juries, who then have broad discretion to calculate damages without reference to any particular formula or measured amount of quantified "actual" damages.

A recent application of this law can be found Maethner v. Someplace Safe, Inc., a case that the Minnesota Supreme Court has accepted for review. 907 N.W.2d 665 (Minn. Ct. App. 2018), review granted (Apr. 25, 2018).

In that case, the plaintiff argued that he was defamed by social media posts, press releases, a newsletter, and other statements (published in part by Someplace Safe, a domestic-abuse support organization) which he claimed inaccurately portrayed him as a perpetrator of domestic violence, abuse, and stalking. 907 N.W.2d at 675. The Minnesota Court of Appeals reversed the Otter Tail County District Court's grant of summary judgment, which had been based, in part, on the plaintiff's failure to present evidence of actual damages. Id.

The Court of Appeals held that the plaintiff had presented evidence of emotional damage, which was sufficient, and further that the statements fell into a defamation per se category and thus were "actionable without proof of damages." Id. The case has been taken up for review by the Minnesota Supreme Court, which is wrestling with whether a limited privilege should apply under the circumstances, or whether the plaintiff should be required to show actual damages. https://minnlawyer.com/2018/10/12/supreme-court-wrestles-with-libel-case/.

But what if every defamation claim arising from statements on social media—indeed every case arising from a written communication—is, under longstanding but seldom-cited Minnesota precedent, actionable without the need to prove actual damages regardless of whether it falls into one of the specified categories of defamation per se?

Longstanding Minnesota precedent suggests that this is the state of the law in Minnesota. The Minnesota Supreme Court's clearest and most recent articulation of this rule came in Advanced Training Sys., Inc. v. Caswell Equip. Co., Inc., where the court noted that "[c]ourts at common law presumed damages from any libel" and then stated that the clearest statement of Minnesota law was that: "[w]ritten publications calculated to expose one to public contempt or ridicule, and thus induce an ill opinion of him, and impair him in the good opinion and respect of others, are libelous . . . and are actionable without any allegation of special damages.'" 352 N.W.2d 1, 9 (Minn. 1984) (quoting Byram v. Aikin, 67 N.W. 807, 808 (Minn. 1896)).

Secondary sources have agreed. Michael Steenson, Presumed Damages in Defamation Law, 40 Wm. Mitchell L. Rev. 1492, 1505–06 (2014) (noting that the Minnesota Supreme Court has not overruled Advanced Training, which "leaves all libels subject to the presumed damages rule, along with slander that falls within one of the per se categories"). The rationale for this rule dates back to English common law, which held libel was presumed to cause damages because "it is accompanied by greater coolness and deliberation, indicates greater malice, and is in general propagated wider and farther than oral slander." Pollard v. Lyon, 91 U.S. 225, 235 (1875). This rule is sufficiently well supported that it appears in Minnesota's jury instructions guide, "[u]nder the Minnesota approach, all libels are actionable per se." 4 Minn. Prac., Jury Instr. Guides--Civil CIVJIG 50.20 (6th ed.)

Despite this precedent, the notion that every libel claim is actionable per se does not enjoy universal acceptance. Those of us who litigate defamation cases know that judges may well have the same default expectation as most attorneys that statements qualify for treatment as defamatory per se based on their content, without regard to whether they were written or spoken. And attorneys arguing for that position have ample authority to cite. Minnesota courts have not infrequently examined written statements to determine whether they fall within a defamation per se category (which Advanced Training would suggest is an unnecessary exercise) or have broadly referred to defamation per se, as opposed to slander per se, which can confuse the issue. See Steenson, at 1505–06 (noting that courts using the term "defamatory per se" "may actually obscure the impact of the presumed damages rule").

Moreover, while Advanced Training is not ancient case law, its ruling has not yet been applied in the context of social media by a Minnesota appellate court, likely because the issue has not been directly presented to the court or it has been unnecessary to rule upon because the written statements at issue have also fallen within a defamation per se category. But ultimately, given the Advanced Training ruling, a strong argument can be made that damages are presumed for every defamatory written statement on social media, permitting cases to go to juries with broad freedom to calculate harm to reputation, mental distress, humiliation, and embarrassment. See CIVJIG50.50Presumed Damages, 4 Minn. Prac., Jury Instr. Guides--Civil CIVJIG 50.50 (6th ed.)

Whether the old common law holding that all libel is actionable per se should apply to all social media posts is a fair subject for debate. Does a social media post, like a written communication prepared on a printing press a century ago still reflect the "greater coolness and deliberation" of the written word and indicate "greater malice?" Or perhaps does the rapid, expansive, and editor-free nature of social media communication suggest that providing plaintiffs with stronger tools to pursue defamation claims is critically important? Regardless of the answers to these questions, the common law rule reflected in Advanced Training has not yet been reversed and no exceptions to it have been recognized in the context of social media. Accordingly, a strong argument can be made that all defamation cases arising from written communications are actionable per se in Minnesota—thus making plaintiff-side cases far more viable, especially in the context of social-media defamation, and providing yet another reason as to why people should think twice before posting about somebody on social media.

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