

# Defamation in the Era of #MeToo:

## An Introduction to Defamation Claims Related to Sexual Harassment



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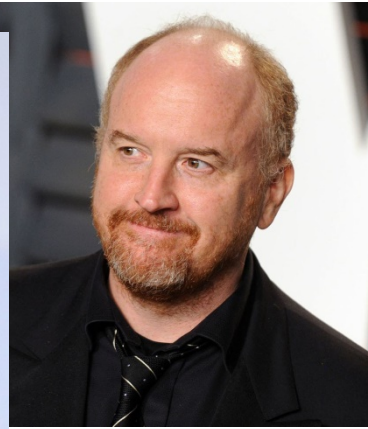
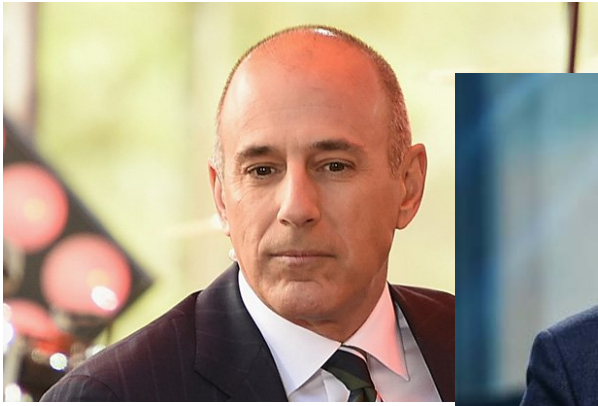
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# Why are we here?

Just to name a few...



# What Does Sexual Harassment Have To Do With Defamation?

- There is an increasing trend in the filing of defamation lawsuits pertaining to allegations of sexual misconduct.
  - Ratner v. Kohler (D. Haw.)
  - Elliott v. Donegan (E.D.N.Y)
  - Unsworth v. Musk (C.D. Cal.)
  - McKee v. Cosby (1<sup>st</sup> Circuit)
  - Zervos v. Trump (N.Y. Sup. Ct.)
  - Stormy Daniels v. Trump (C.D. Cal.)
- The changing political climate toward the freedom of the press has also given rise to recent defamation lawsuits.
  - Palin v. New York Times (S.D.N.Y)

# What is Defamation?

A publication of or concerning a third party that ...

- Contains a false statement of fact,
- Carries a defamatory meaning, and
- Is made with some level of fault.

# Types of Defamation

## Libel v. Slander

“Libel and slander are both methods of defamation; the former being expressed by print, writing, pictures or signs; the latter by oral expressions or transitory gestures.”

# Libel *Per Se*

- The four established “per se” categories are statements
  - Charging a plaintiff with a serious crime;
  - That tend to injure another in his or her trade, business or profession;
  - That a plaintiff has a loathsome disease; or
  - Imputing unchastity to a woman

# What is a “Publication”?

Classic publications:

- Books
- News articles
- Opinion columns
- Advertisements & billboards
- Oral communications

# What is a “Publication”?

But how about ...

- Blogs?
- Tweets?
- Facebook posts?
- Instagram pictures?
- Online comments?



*Instagram*





# What is “Of” or “Concerning”?

- The statement is “of and concerning” the plaintiff when it “designates the plaintiff in such a way as to let those who knew [the plaintiff] understand that [he] was the person meant. It is not necessary that all the world should understand the defamation.”
- New York courts have held that “[i]t is not necessary that [the plaintiff] be named in the publication, if the allusion is apparent.”

# What is a “False Statement of Fact?”

- A false statement of fact is, as it sounds, a false statement that is not grounded in truth.
- A false statement of fact is sine qua non of a defamation claim.
- Without falsity, a libel action must fail.

# What is Not a “False Statement of Fact”?

- The First Amendment “provides protection for statements that cannot ‘reasonably [be] interpreted as stating actual facts’ about an individual.”
- That is, where a statement is so imprecise or subjective that it is not capable of being proved true or false.
- For example, opinion, hyperbole, invective

# What is “Defamatory Meaning”?

- A statement is “defamatory” if it “tends to injure the plaintiff in his trade, profession, or community standing, or lower him in the estimation of the community.”
- The statement must make the plaintiff appear “odious, infamous, or ridiculous.”

# What is the “Level of Fault”?

- The law recognizes two levels of fault: negligence and actual malice
- If Plaintiff is a private figure: must show negligence
  - Failing to act with reasonable standard of care
- If Plaintiff is a public official, public figure, limited purpose public figure: must show actual malice
  - Knowledge of falsity or reckless disregard of the truth

# Affirmative Defenses and Privileges

- Truth/substantial truth
- Opinion
- [Lack of] Actual Malice
- Fair report privilege
- Litigation privilege
- Not “of or concerning” the Plaintiff

# Truth or Substantial Truth

- Truth is an absolute defense against defamation.
- Statement need not be accurate in every conceivable way.
- Some false statement protected if “substantially true.”
- Substantial truth protects minor factual inaccuracies provided that they do not materially alter the substance or impact – the “gist.”

# Opinion

- Alleged defamatory statement or implied premise must be “verifiable.”
- “Pure opinions” are not defamatory.
- But beware of opinions that imply underlying defamatory facts.
- Context is key.



# Opinion

The factors New York courts use to differentiate statements of opinion from fact are whether:

- specific language in issue has a precise meaning which is readily understood;
- statements are capable of being proven true or false; and
- either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances signal that what is being read or heard is likely to be opinion, not fact.

# Common Interest Privilege

- A communication concerning a matter in which the recipients are interested
  - For example, to further a public discussion
- Or, if statements are made out of moral or social duty
  - For example, to protect other women from a predator

# Damages

- Where plaintiff cannot show defamation *per se*, must plead “special damages.”
- Special Damages are economic or pecuniary losses.
- They must flow directly from the injury caused by the defamation.
- They must be fully and accurately stated with sufficient particularity to identify the actual losses.

# Other General Considerations

- Single Publication Rule
- Republication Rule
- Anti-SLAPP Statutes
- Retraction Statutes
- Neutral Report Privilege

# #MeToo Defamation: How is it Different?

- Who defines what is harassing to establish truth or falsity?
- It's personal and private
  - Cases publicly reveal events that are often sexual in nature
- Discovery concerns
  - Abusive discovery efforts to expose sexual history or potentially embarrassing facts
- It's expensive
  - Stormy Daniels was ordered to pay \$300,000 in legal fees and \$1000 sanction
- Even if someone wins, everyone loses

# A Claim is Filed – Now What?

- Anti-SLAPP (Strategic Participation Against Public Participation) law exist in some states but vary greatly.
- Anti-SLAPP laws protect defendants against baseless suits filed to silence or harass them.
- Current states with statutes:
  - Arizona, Arkansas, California, Colorado, Connecticut, Delaware, DC, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington

# Discussion: Defamation Trends, Applications, and Moving Forward

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# Questions?

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