For questions, call Larry S. Kowalczyk
(312) 540-7616

Querrey & Harrow

ILLINOIS LAW MANUAL

CHAPTER VII
INTENTIONAL TORTS/DEFAMATION

D. LIBEL/SLANDER (DEFAMATION)

1. Basic Law

Libel and slander, also collectively known as defamation, comprise one of the most complex, fact-specific and unsettled areas in Illinois law, with considerable disagreement between the appellate districts regarding various issues. The common law distinctions between libel (printed defamatory statements) and slander (oral defamatory statements) have been largely abolished, and the rules regarding defamation apply equally to both libel and slander. Rosner v. Field Enterprises, Inc., 205 Ill. App. 3d 769 (1990). Despite the technical abandonment of these distinctions, however, many cases still use the historical terminology of "libel" and "slander" when discussing the various types of defamation.

Defamatory statements are classified as *per se* and *per quod*. Statements are *per se* defamatory when the defamatory character of the statement is apparent on its face; that is, when the words used are so obviously and materially harmful to the plaintiff that injury to his reputation may be presumed. Bryson v. News American Publication, 174 Ill. 2d 77 (1996); Tuite v. Corbitt, 224 Ill.

2d 490 (2006). In Illinois, there are five categories of statements that are considered defamatory *per se*:

(1) words that impute the commission of a criminal offense;

(2) words that impute infection with a loathsome communicable disease;

(3) words that impute an inability to perform or want of integrity in the discharge of the duties of one's office or employment;

(4) words that prejudice a party, or impute a lack of ability, in his or her trade, profession, or business; and

(5) words stating false accusations of fornication or adultery.

Van Horne v. Muller, 185 Ill. 2d 299 (1999); Bryson v. News American Publications, Inc., 174 Ill. 2d 77 (1996); Tuite v. Corbitt, 224 Ill. 2d 490 (2006).

A cause of action for defamation *per quod* may be brought in two circumstances. First, a *per quod* claim is appropriate where the defamatory character of the statement is not apparent on its face and extrinsic evidence is necessary to demonstrate its injurious meaning. Bryson v. News American Publications, Inc., 174 Ill. 2d 77, 103 (1996). To pursue a *per quod* action in such circumstances, a plaintiff must plead and prove extrinsic facts to explain the defamatory meaning of the statement. Kolegas v. Heftel Broadcasting Corp., 154 Ill. 2d 1 (1992). Second, a *per quod* claim is also appropriate where a statement is defamatory on its face, but does not fall within one of the limited categories of statements that are actionable *per se*. Bryson, 174 Ill. 2d at 103. Generally, a complaint for defamation must set forth the words alleged to be defamatory "clearly and with particularity. This rule allows the defendants to properly formulate their answers and affirmative defenses". Krueger v. Lewis, 342 Ill. App. 3d

467 (2003).

2. Damages

Generally, all persons who cause or participate in the publication of libelous or slanderous matters are potentially liable for such publication. Van Horne, 185 Ill. 2d 299 (1999). If a defamatory statement is actionable *per se*, damages are presumed and the plaintiff need not plead or prove actual damage to his or her reputation to recover. Bryson v. News American Publication, 174 Ill. 2d 77 (1996). Presumed damages are based upon the rationale that it is often extremely difficult, if not impossible, to present evidence to support an award of compensatory damages based upon the actual harm sustained. Gibson v. Philip Morris, Inc., 292 Ill. App. 3d 267 (1997). Illinois follows the Restatement (Second) of Torts and allows recovery for economic loss, damages for mental suffering and resulting bodily harm, personal humiliation, and impairment of personal and professional reputation and standing in the community. Bryson v. News American Publications, Inc., 174 Ill. 2d 77, 87-88 (1996); Gibson v. Phillip Morris, Inc., 292 Ill. App. 3d 267, 278 (1997).

If a statement is *per quod* defamatory, the plaintiff must plead and prove that he or she sustained actual damage of a pecuniary nature. Adams v. Sussman & Hertzberg, Ltd., 292 Ill. App. 3d 30 (1997). In other words, when a claim of defamation *per quod* is made, damages are not presumed. Moreover, general claims of damage to an individual's health or reputation, economic loss, or emotional distress are insufficient to support a claim of defamation *per quod*.

Punitive damages are recoverable in connection with some claims of defamation. For example, where the evidence establishes that a defamatory statement was made with actual malice, punitive damages are recoverable. Gibson v. Phillip Morris, Inc., 292 Ill. App. 3d 267, 279 (1997). A statement is made with "actual malice" when the defendant makes the statement with knowledge

that the statement is false, or with reckless disregard for whether the statement is true or false. Dubinsky v. United

Airlines Master Executive Council, 303 Ill. App. 3d 317 (1999).

3. Exceptions/Defenses

Illinois courts have developed certain defenses and exceptions to defamation actions.

a. Truth

That an allegedly defamatory statement is proved true serves as a complete defense to a defamation action. Cianci v. Pettibone Corp., 298 Ill. App. 3d 419 (1998). A defendant need only establish that the statement is substantially true or, stated another way, that the "gist" or "sting" of the defamatory material is true. Id. at 424. While substantial truth is normally a question for the jury, where no reasonable jury could find that substantial truth had not been established, the question is one of law and may be decided by the court. Gist v. Macon County Sheriff's Dept., 284 Ill. App. 3d 367

(1996).

b. Absolute Privilege

In Illinois, there is an absolute privilege for any statements made during any step preliminary to or necessary for a judicial or quasi-judicial proceeding. Lykowski v. Bergman, 299 Ill. App. 3d 157 (1998); Gardner v. Senior Living Systems, Inc., 314 Ill. App. 3d 114 (2000). The privilege is predicated on the tenet that, although the defendant's conduct might otherwise be actionable, the communication is protected and no liability will attach because he is acting in furtherance of some interest of social importance. W. Prosser, Torts § 114, at 776 (4th ed. 1971). The privilege provides

a complete bar to any claim alleging defamation, regardless of the speaker's motive or the unreasonableness of his conduct. Golden v. Mullen, 295 Ill. App. 3d 865, 870 (1997). This assures that individuals are in no way discouraged from lodging complaints with the appropriate courts or disciplinary authorities. Lykowski v. Bergman, 299 Ill. App. 3d
157, 165 (1998) (The court ruled that defamatory statements made to the Attorney Registration and Disciplinary Commission about an attorney's alleged professional misconduct were absolutely privileged).

c. Qualified Privilege

A qualified privilege may attach to certain defamatory statements because of the occasion on which it is made or the circumstances surrounding it. Cianci v. Pettibone Corp., 298 Ill. App. 3d 419, 425 (1998). To determine whether a qualified privilege exists, a court will look to the occasion and determine as a matter of law and general policy whether it created some recognized duty or interest requiring application of the privilege. Kuwik v. Starmark Star Marketing & Admin., Inc., 156 Ill. 2d 16 (1993).

Generally, the law recognizes three conditionally privileged occasions:

(1) situations that involve some interest of the person who publishes the defamatory matter (i.e., a parent's report of defamatory information about another for the purpose of protecting a child's well being; a call to police to report a belief that one's car has been stolen);

(2) situations that involve some interest of the person to whom the matter is published or of some third person (i.e., a citizen's report to a police officer

concerning the belief or suspicion that another intends to kill, rob, or commit some other serious crime against a third person); and

(3) situations that involve a recognized interest of the public (i.e., a report of poor conduct by an employee to a supervisor in order to remove or discipline for neglect of duty or malfeasance).

Kuwik, 156 Ill. 2d at 29 (examples taken from Restatement (Second) of Torts Sections 594, 595, 598 (1977)).

Even if a qualified privilege exists, the communication can still be actionable if the privilege is abused. Kuwik, 156 Ill. 2d at 24-25. To prove an abuse of the qualified privilege, a plaintiff must show that the statement was made with a direct intent to injure him or a reckless disregard of the plaintiff's rights and the resulting consequences. Id. at 30. Acts constituting a reckless disregard of a plaintiff's rights include the failure to properly investigate the truth, the failure to limit the scope of the material, and/or the failure to publish the material only to the proper parties. Id., see also Cianci, 298 Ill.

App. 3d at 426.

d. Innocent Construction

Even if a statement falls into one of the categories of words that are actionable *per se*, it is not defamatory if it is reasonably capable of an innocent construction. Kolegas v. Heftel Broadcasting Corp., 154 Ill. 2d 1, 11 (1992). The Illinois Supreme Court has ruled that an allegedly defamatory publication is not actionable *per se* when the statement may reasonably be innocently interpreted, giving the words and their implications their natural and obvious meanings. Anderson v. Vanden

Dorpel, 172 Ill. 2d 399 (1996). Illinois courts follow the minority rule and, as a result, a defamation action filed in Illinois will not survive a motion to dismiss if there is any reasonably innocent interpretation of the language. Chicago City Day School v. Wade, 297 Ill. App. 3d 465 (1998). At the same time, when a defamatory meaning is clearly intended and conveyed, a court will not strain to interpret allegedly defamatory words in their mildest and most inoffensive sense in order to apply the innocent construction rule. Bryson v.

News American Publications, Inc., 174 Ill. 2d 77, 94 (1996). The question of whether language is susceptible to an innocent construction is a question of law for the court.

Bryson v. News American Publications, Inc., 174 Ill. 2d 77, 90 (1996).

e. Opinion

Prior to 1990, the Illinois Supreme Court perceived a fundamental distinction between statements of fact and statements of opinion for purposes of the First Amendment to the United States Constitution. Statements of opinion were held to be protected by the First Amendment and not actionable in a defamation action. Mittelman

v. Witous, 135 Ill. 2d 220 (1989). However, the United States Supreme Court reexamined the law of defamation within the context of the First Amendment and rejected what it called "the creation of an artificial dichotomy between 'opinion' and fact." Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990). The court held that there is no separate First Amendment privilege for statements of opinion, and that a false assertion of fact can be libelous even though couched in terms of an opinion. Id. at 18. Thus, a statement is constitutionally protected under the First Amendment only if it cannot be "reasonably interpreted as stating actual facts." Id. at 20. If a statement viewed in its specific context is obviously an exaggeration rather than literal fact, the statement is considered

rhetorical hyperbole and is not defamatory. Kolegas v. Heftel Broadcasting Corp., 154 Ill. 2d 1, 15 (1992) (citing Greenbelt Cooperative Publishing Assoc. Inc. v. Bresler, 398 U.S. 6 (1970)).

4. Standard of Conduct Required for Recovery – First Amendment Constitutional Considerations

a. Public Official/Public Figure

In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the United States Supreme Court held that the First Amendment's guarantee of freedom of the press prohibited a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he could prove that the statement was made with actual malice; that is, with knowledge that it was false or with reckless disregard of its truth. Later, the Supreme Court extended the actual malice requirement to defamation actions brought by persons who were candidates for public office and by persons who, although neither officials nor candidates, were in some sense public figures. St. Armant v. Thompson, 390 U.S. 727 (1968). The court later explained that the "reckless disregard" variant meant more than a failure to investigate, and required "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." Id. at 731.

b. Private Individual

In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the United States Supreme Court considered First Amendment implications in defamation actions brought by private individuals. The Supreme Court ruled that the individual states were free to impose liability on some less rigorous basis in cases involving defamation of a private individual, at least where the defamatory statement in

question was such that it made a substantial danger to reputation apparent. Gertz, 418 U.S. at 348. Liability cannot, however, be imposed without fault, and recovery of punitive damages is not allowed absent actual malice. Id. at 348-51. Moreover, recovery is limited to compensation for actual injury suffered, including impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering to the extent that these elements are supported by competent evidence. Id., see generally Troman v. Wood, 62 Ill. 2d 184 (1975) (court discussed First Amendment implications of defamation actions involving both public and private individuals).