

Calculation of economic damages in defamation cases

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(August 19, 2024) - Sameer Somal of Blue Ocean Global Technology examines the roles that damages calculations and expert witnesses play in defamation disputes like the one between actors Johnny Depp and Amber Heard.

Who can forget *Depp v. Heard*, the 2022 lawsuit that was live-streamed and tried in the court of public opinion alongside a Virginia court of law?

For those unfamiliar with the case, the actor Johnny Depp sued his ex-wife, actress Amber Heard, for defamation over an op-ed in which Heard accused Depp of domestic abuse. It became by far the biggest news story in the United States, garnering more headlines than other big names in the news at the time — beating out Joe Biden and Elon Musk — and even major issues like abortion and Russia's invasion of Ukraine.

Depp was seeking \$50 million in damages; Heard filed counterclaims for \$100 million. Depp, Heard, and all that money took over social media. The story broke the internet.

Depp filed the lawsuit to attempt to prove Heard's allegations were false and clear his name. He claimed that Heard's comments were incorrect and damaging to his reputation.

In many circumstances, defamation of this sort is seen as cruel, unreasonable, and discriminatory, and can often damage a person's entire livelihood.

In a case such as this one, calculating damages can be a complicated process. It is by no means black and white and there can be little precision in determining damages, considering how difficult it is to assign a value to a person's well-being.

Types of economic damages in defamation cases

Calculating economic damages in defamation cases is never a clear-cut process. The first step in removing ambiguity is assessing the

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damages by type, into these categories.

Actual damages

These are damages that are quantifiable financially and fact-based, for harm that has a solid monetary value attached. For instance, a job loss because of defamation has a direct and measurable correlation to loss of income. Therefore, these damages can be factually and accurately assessed and documented.

Special damages

Special damages also come with a number attached; they are measurable and objective. One particularly harmful example is a plaintiff's reduced earning ability. If an employee is fired because of defamatory comments, these comments have a direct impact on the employee's ability to earn a living.

Presumed damages

Presumed damages, on the other hand, tend to be more. This category falls back on personal reputation. If you are known as a top-notch professional for your work, chances are your colleagues see you in a positive light. When this reputation takes a hit, however, colleagues may start to look at you differently and even dislike you, which could be damaging to anybody's well-being, but not in a way that is easily quantifiable.

Factors affecting economic damages calculation

In categorizing how economic damages take their toll, the next item on a case's checklist is calculation. The numbers must be checked because they provide reliable evidence in the overall assessment. The severity of defamation is best viewed on a spectrum that evaluates the extent of damage caused, whether financially or personally.

Timelines for settling a defamation case are also a factor and tend to vary because all cases are different. Rather than stamping the amount of time that it *should* take to settle a case, we must use an investigative approach, which could take some time.

Lawyers must first do their part in the investigation by gathering details of the defamatory statements and assessing both the nature and proof of damages. They will then negotiate a settlement or, if that falls short, file a lawsuit.

From this point, the discovery process begins, and a scheduling order is issued by a judge, setting hard deadlines and allowing both parties to gather additional evidence. If the lawyers cannot reach a compromise through mediation or negotiation, the case goes to trial.

Expert witnesses and their role

Expert witness testimony ¹ plays a crucial role in determining the outcome of a trial, especially given the credibility of these experts and their qualifications for providing valid reasoning. What makes these witnesses more credible than other witnesses is their degrees and credentials, experience, fact-based methodologies, and expertise on specific subject matter.

Reports and testifying may include meticulous analyses of damages ² and the application of fact-based methodologies to determine financial implications accurately. Furthermore, experts contribute their specialized knowledge to craft custom approaches that address the intricacies of each case, providing a well-rounded and strategic approach.

Valuation process and how expert witnesses are involved

Back to *Depp v. Heard* — consider Dr. Shannon Curry, PsyD, who formally diagnosed Amber Heard with borderline and histrionic personality disorders, feeding the possibility that Heard was playacting by overdramatizing events and had been doing so since her op-ed — in the process greatly impacting Depp's reputation and his artistic work as an actor.

Dr. Curry's involvement in this case proved powerful, as she used her expertise in psychology to prove Heard's "theater" was harming Depp's reputation, using both income and cost-based approaches to calculate economic and presumed damages. This is an example of how expert witnesses take responsibility in the calculation process by way of utilizing three different types of valuation approaches.

Income approach

The income approach bases damages on all sources of income that may have been affected by the defamation. This approach determines a value based primarily on the amount of income the defendant has earned in the past.

Market approach

The market approach differs in that it depends more on the valuation of a certain business or organization and its overall revenue. This method estimates what a business would sell for if immediately placed on the current market. In a defamation lawsuit, this applies to an organization that has taken a hit financially because of false accusations.

Cost approach

The cost approach seems fairly pragmatic but also somewhat ambiguous. It takes into consideration the estimated cost of the defamation that has transpired, widely based on how much it would cost to reproduce any assets.

This could mean the cost of an employee's job loss, the cost of a business losing its loyal customers, or the estimated cost of a former employee's damaged reputation, which could be based on any expenses they had to pay as a result of losing employment.

Case study

A case that can help us understand the factors that affect calculating damages is *Steed v. St. Paul's United Methodist Church* (1999).³

Reverend Odell Simmons, the church's pastor, was awarded damages of \$90,000 after being accused of sexual harassment by his church's choir director, Marian Steed. This defamatory accusation forced Rev. Simmons to relocate and try to find work elsewhere as the case continued since just filing it did not stop the ongoing reputational damage.

What often gets overlooked in cases such as these is just how long the harm continues. From start to finish, the *Steed v. St. Paul's United* case lasted eight years from when the accusations were first made in 1991 to when they were settled in 1999.

Future trends and developments

While *Steed v. St. Paul's United* took place many years ago, we ask ourselves what the future holds. Society and legislation have always strived to protect the Constitution, but have evolved in ways that more holistically respect the dignity of all people. To strike a balance, multiple facets must be considered: the utmost truth as the standard of all public discourse; the freedom of expression, both in words and in actions; and the right to the pursuit of happiness.

In addition, with technology continually advancing, its influence on

the calculation of damages will likely grow. In much honesty, artificial intelligence (AI) such as chatbots and social media, or the malignant nature of hacking and cyberbullying, tend to compromise the scope of defamation law ⁴ because defamation, at its core, is not a technical issue, but an interpersonal one. With the evolution in technology, defamation law has become much more technical since a vast majority of "social" interactions take place online.

Conclusion

At the end of the day, there are ramifications for every word spoken and every action taken. As the saying goes, *anything you say can and will be used against you in a court of law*, a notion that would fare well in our day-to-day interactions with others. Despite the importance of freedom of speech, our words have the power to do great harm.

One lesson to be learned from defamation is that damage to someone's reputation cannot be completely repaired; it remains despite damages for recovered income, expenses, and efforts to repair the harm. While these damages may be recovered in the financial sense, people will always remember dirty laundry, whether it's warranted or not.

Notes:

1 <https://bit.ly/4dr5vRZ>

2 <https://bit.ly/3YJCov3>

3 <https://bit.ly/46OF464>

4 <https://bit.ly/3WH992I>

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