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Statements imputing gang membership not actionable

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Many believe identifying a false accusation of committing a crime is a black or white determination. Asserting that “John robbed the bank on Sept. 20 at 2:30 p.m.,” when he was watching the Cubs at Wrigley Field instead, is plainly a false statement. It holds John committed a crime.

However, as in most areas of law, issues are often more gray than black and white. And the gray areas have caused legal controversies in defamation cases for decades.

Recently, however, the Illinois Appellate Court clarified this important point involving one of the categories of defamation per se. In *Hardiman v. Aslam*, 2019 IL App (1st) 173196, an on-air teaser for an upcoming television newscast stated: “A former gang member who was once accused of beating his wife wants to be your governor.”

As it turned out, candidate Tio Hardiman was not a former gang member. He had, however, pleaded guilty to domestic violence years before, but claimed that his record had been expunged.

Hardiman sued for defamation and false light invasion of privacy, alleging that the broadcast falsely charged him with the commission of a crime, both with respect to the gang member and domestic violence components of the teaser.

The court first disposed of the domestic violence portion of Hardiman’s claims, finding the statement was substantially true. Truth remains a complete defense to a charge of defamation.

Even if Hardiman had expunged his prior criminal conviction, which was not shown in the court record, he had, in fact, been convicted of domestic violence. Therefore, the domestic violence component of the statement was not a basis for a defamation action.

The court then examined the “former gang member statement” and found it did not fit into any per se category of defamation. What is actionable per se is a false statement that a plaintiff committed a crime, not a statement that he associates with people who allegedly commit crimes. This is an important but oft-overlooked distinction.

There are multiple reasons why a statement merely charging an association with criminals or a criminal enterprise cannot support an action for defamation per se: To be actionable, the statement must not only charge the plaintiff with the commission of a crime, the crime must be indictable, involve moral turpitude and be punishable by death or imprisonment.

Thus, a false statement that someone had been “arrested” for an offense is properly found not to state a per se cause of action, since such a statement merely asserts that the individual had been accused of committing a crime, not of actually committing one.

Similarly, a statement that an individual was “under investigation” for a crime is not the equivalent of having committed an offense and does not satisfy the threshold for a per se cause of action.

Nor is a news story describing subjects as being “in the Mafia.” Cases across the country have determined that such a report is not equivalent to charging those subjects with having committed crimes.

Like the “former gang member” statement at issue in *Hardiman*, the “in the Mafia” statements, at most, charge the subjects with associating with a group, not with engaging in specific conduct. Accordingly, a charge of criminal association, in and of itself, is insufficient to support a defamation per se action.

In this regard, it is also important to note that Illinois is one of a handful of jurisdictions that applies the “innocent construction rule.” That doctrine provides that if a statement is reasonably capable of an innocent (nondefamatory) interpretation, the innocent construction precludes a per se cause of action.

Therefore, in “criminal association” cases, a reasonable, innocent construction should necessarily preclude a per se cause of action.

Consider an action involving a member of a professional society who, in a public statement, had referred to a political rival in the society as being part of the “Irving Park Mafia.” The rival, who had a practice in the Irving Park neighborhood, filed a defamation per se action, claiming that the speech falsely charged him with having committed a crime.

Consistent with case law, the defendant argued that associating with a group was not the equivalent of the commission of a crime, and that “Mafia” could reasonably and innocently be construed, as recognized in the dictionary, to refer to a group having a particular and controlling interest on a subject.

Yet, the judge, who was well-regarded and experienced, denied a motion to dismiss, simply stating: “You shouldn’t be able to say things like that.”

The judge’s instinctual ruling serves as a reminder to defamation litigants that the law often isn’t black or white.

Fortunately, at least with respect to the criminal association issue, the *Hardiman* decision lends some needed clarity.

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