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Is “Per Se” Getting in the Way? Use of That Term in Defamation Law

The twin branches of defamation consist of libel and slander. Libel is defamation by written words or by the embodiment of the communication in some tangible or physical form. Slander consists of the communication of a defamatory statement by spoken words or transitory gestures.

Although attorneys, and even courts, sometimes refer to “defamation per se” as a third category of defamation, such reference is incorrect as it misunderstands the term “per se” in the defamation context.

Properly understood in the context of slander, the phrase “per se” refers to four highly specific accusations that have traditionally been considered so clearly damaging to reputation that the damage element of the tort is deemed satisfied by the very utterance of the words:

- (1) accusing another of having committed a criminal offense
- (2) accusing another of having a loathsome disease
- (3) accusing another in a way that affects his/her business, trade, profession, or office
- (4) accusing a woman of being [unchaste](#)

As to categories (3) and (4), the New Jersey Appellate Division later recharacterized them, respectively, as “accusing another of engaging in conduct, or having a condition or trait, incompatible with his or her business” and “accusing another of having engaged in serious sexual misconduct.”

In the context of libel, “per se” refers to a writing that is defamatory on its face, without resort to any extrinsic facts, as opposed to libel “per quod,” which refers to a writing that is defamatory solely in light of extrinsic facts.

An example of libel “per se” is the statement, “Joe and Mary are cheating on their spouses.” On its face, this statement is defamatory to both Joe and Mary. Contrast that statement with the libel “per quod” statement, “I saw Joe and Mary holding hands in the

park,” which is not defamatory until the revelation of the extrinsic facts that Joe is married to Katie and Mary is married to Bob. Of course, a determination of whether language is defamatory on its face rests with the court.

Thus, while a plaintiff may have a cause of action arising out of spoken words that fall within one of the “slander per se” categories, or written words that are defamatory on their face and constitute “libel per se,” that cause of action is appropriately labeled defamation. There is no independent cause of action for “defamation per se.”

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