



BY: **RUSSELL D. MAYER, ADV.**

SUBJECT: **DEFAMATION ON SOCIAL MEDIA**

DATE: **MARCH 2020**

In this modern age of technology, social media is at the forefront of our lives and a significant part of our day to day communication, including the sharing of criticism and negative reviews. Social media is an effective means for promoting the freedom of speech that is anchored in the Basic Law: Human Dignity and Liberty, but it also presents many risks relating to liability for defamation and slander. The Defamation Law, 5725-1965 (hereinafter: the “**Law**”) states that defamation is defined as something whose publication may humiliate, degrade, or harm a person because of his/her actions, behaviors, or attributes in light of his/her race, nationality, religion, place of residence, age, gender, sexual orientation, or disability.

The Law also refers to the interpretation of what form of “publication” is required according to Section 1 of the Law, and states that a publication may be made in various forms: orally, in writing or in print, and by any other means, on the condition that it is publicized to at least two other people, besides the subject. Considering these conditions, the prohibition of defamation undoubtedly applies to publications made on social media. As a remedy to such defamation, the Law allows for monetary compensation of up to NIS 70,000+ to be awarded to victims of defamatory material, without requiring proof of damages. If it is proven that the publication was made with malicious intent, the defamed party may be entitled to up to NIS 140,000+ without having to prove actual damages [both amounts being linked to the Consumer Price Index] - proven damages can be awarded in excess of these amount.

Despite the existence of the Law, the public is often unaware of the applicability of the Law to social media “comments” and wrongly assume that there are no restrictions on freedom of speech in social media. It is likely that mistaken impression is due to the physical detachment created by social media – publications are made online and not face-to-face with the recipient of the communication. This impression of having distance, along with the unfamiliarity of the legal implications, may lead to false news, shaming and prohibited defamation.

While most people believe that informal or minor online publications, including negative reviews and shaming of a business after being unsatisfied or dissatisfied with services/products received, are not considered defamation, that is NOT correct. Defamation claims, even if true, walk a fine line between balancing the protection of free speech with the protection of reputations. Although there may be protection of truthful speech (albeit negative), it should be noted that to

Livnat, Mayer & Co.



the extent that the publication does not constitute a legitimate review but rather is intended to shame or disgrace an individual or to cause him/her harm, as stated in Sections 1(1) and 1(3) of the Law, sharing the observation will be deemed as actionable defamation. Therefore, even publications on social media fall under the restrictions of the Law and are not necessarily protected.

The issue is amplified when relating to publications that concern public figures. Various court rulings indicate that many judges severely regard defamatory publications posted on social media, as evidenced by the high compensation awarded in favor of plaintiffs. Conversely, the courts also recognize the public's right to obtain information, especially if the publications are found to be truthful and made in good faith. For example, insofar as the publication is deemed to be the poster's legitimate opinion, the greater the protection of freedom of speech it may be granted. On the other hand, if the publication is not representing truthful information, greater protection will be granted to the good name and reputation of the public figure, especially when the poster did not bother to confirm the allegations. In another case, Israel's Supreme Court even ruled that an opinion, rather than a statement of fact, may be considered defamatory.

The identity of the subject of the post also impacts the way the post is viewed – if the subject concerns a “regular” individual, the publication may be deemed to be more offensive, and greater protection from defamation will be granted to the subject of the publication; however, if the publication relates to a public figure, the protection will be granted to the poster as someone who is expressing a legitimate concern through free speech. The Israeli approach is at odds with the accepted U.S. stance, which is stricter when relating to the protection of freedom of speech. The U.S. courts determined in a landmark ruling that publications against public figures are not deemed to be defamation (except in cases of malice and when made with intent to harm the public figure).

As mentioned, Israel recognizes the possibility of publications made against public figures rising to the definition of defamation; however, the determination is contingent upon the publication not fulfilling the protections listed in the Law and those granted by virtue of freedom of speech. This dichotomy arises in various court decisions, which creates uncertainty in the social media sphere of how certain publications will be regarded by the courts.

Israel recognizes the possibility that publications against public figures may be considered defamatory, subject to the protections determined by Law and while preserving freedom of speech. These conflicting ideals are reflected in the varying case law that exhibits even the court's uncertainty of how to consistently address defamation on social media. For example, in *Yigal Sarna v. Binyamin Netanyahu*, the defendant (the appellant in this case) publicized a post on Facebook depicting an event where the Prime Minister violated security guidelines because of his wife's “whims and cries.” In response to the post, the Prime Minister filed a defamation case against the defendant. The claim was awarded, and the defendant was instructed to pay NIS 100,000 in compensation. The defendant appealed to the District Court, and his appeal was denied. The defendant then filed a motion to appeal to the Supreme Court, and that motion was also denied. This case demonstrates the strict approach and interpretation of the Law that the courts, at all levels, take against defamation on social media.



Contrary to the previous case, in *Dr. Juli Nudelman v. Natan Sharansky*, criticism was expressed about MK Sharansky and his political party. The District Court recognized the sharp and hurtful statements made vis-à-vis Sharansky and his party as a founded grounds of a civil tort in a defamation suit and awarded Sharansky, himself, compensation of NIS 900,000, and NIS 75,000 to the party. Dr. Nudelman filed an appeal to the Supreme Court which determined that proper weight should be ascribed to the value of freedom of speech and criticism of public figures, while also upholding deterrents that enforce the Law. In light of this, and considering the fact that the defendant was a private person with limited financial means, the compensation was reduced to “only” NIS 500,000.

The issue is compounded in relation to re-publishing comments that have already been posted by either pressing “like” or “share” on defamatory posts. The Courts have expressed the view that mere “sharing” of a comment made by someone else can be considered a publication that is defamatory by Law. The Supreme Court has distinguished “liking” and “sharing” and that only the latter is defamatory. This approach has its shortcomings, as it allows for “double” prosecution of both the original poster and those who share the post.

Another concern of social media defamation suits is that they can be deemed to be “selective claims” – in the event that there were many participants and only a few are prosecuted for sharing the original post. This selection often occurs due to the plaintiff’s inability to locate the original poster (due to online anonymity), and sometimes due to the post having been “shared” from a post that was already “shared” multiple times such that it is difficult to determine which is the original post. Additionally, there may be a concern that this is a “Slapp suit” that may cause a “chilling effect” on legitimate publications. In other words, people will be afraid to share publications that are legitimate, out of fear that they may be unjustly sued. Lastly, concerns arise about the expansion of the potential range of defendants and flooding of Courts with nuisance suits.

The solution to these issues is the doctrine of prohibiting the misuse of court proceedings and the establishment of procedural obstacles to block potential plaintiffs who are not acting out of good faith (which could result in the dismissal of the claim outright and assessment of the defendant’s legal fees). These tools are implemented in several steps:

1. In the preliminary stage, it is necessary to examine whether the plaintiff took extra care in selecting the defendants, which may signal the plaintiff’s personal agenda and a lack of good faith. This can be reflected in the number of times the plaintiff was exposure to the original publication, compared to the exposure to the shared versions, as well as the number of “shares” who were not chosen as defendants. However, there is an opportunity for the plaintiff to lay out the reasoning for his/her choices in an effort to prove their legitimacy.
2. Notwithstanding the above, there is an acknowledgment that there are certain instances when the original publication deals with an issue that is in public discourse or is of public and moral importance. In such a case, there is great relevance to Section 15(2) of the Law, which results in a more lenient examination of the publication or the sharing of such a publication.



3. If the plaintiff successfully passes the preliminary stage, the Courts will review the level of compensation, subject to the relief provided for in Section 19 of the Law. For example, if the defendant merely reiterated what was previously publicized and noted the original source, after being convinced of the truth of the original post, and/or if the defendant did not intend to harm the plaintiff or if the defendant apologized to the plaintiff for any harm that may have been caused. These are all considerations that are taken into account when determining the compensation awarded by the Court.

In another case, the Courts determined that publications on Facebook cannot be considered a legitimate opinion in the event that they are maliciously intended to humiliate another person, in a publication that was presented as fact and may expose the subject of the post to criminal prosecution. Therefore, epithets can be considered to be defamatory by Law and are not protected from prosecution. In the case at hand, compensation was awarded to the plaintiff in the amount of NIS 90,000, in addition to legal fees.

The rulings reviewed above are prime examples of a long list of other rulings that are evidence of legal discrepancies relating to defamation on social media and the attempt to adapt the outdated Law to today's changing reality, where information and thoughts can be shared more easily and frequently. It is therefore advisable to consider carefully the content posted on social media and ensure that it is truthful.

Lastly, we will note that even if you are completely correct and you are able to defend a claim of defamation, the time and expense which you incur in defending that claim can lead to financial ruin.

Bottom line: we recommend not communicating anything defamatory to two or more people, and certainly not on social media, such as Facebook. The only people who will benefit if you do, are the lawyers.

* * * *

*This memorandum is not to be considered as a legal opinion.
For legal advice, we suggest you contact legal counsel directly.*

R.D.M.