A Long, Broken Arm
Internet Defamation & Personal Jurisdiction
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Just a few short years ago, if you wanted to say something nasty about someone in print, there were certain barriers. You had to convince a newspaper or magazine to hire you as a columnist, reporter, or editor and you had to convince your editor (a gruff, cigar-smoking character with an affinity for suspenders) that the statement was not libelous. You could also write a letter to a news outlet and convince one of those same editors that your statement would not fetch a lawsuit. Or you could have written a book (also usually edited but by a more genteel type). Or, presumably, you could have rented a billboard or a skywriting plane and said the darnedest things.

While this is an oversimplification, there were certainly significant barriers to publishing false written statements that harmed another's reputation. But things have changed. It takes less than a minute to sign up for a social media account, and depending on the seductiveness of one’s broken, abbreviated prose, photo shop skills, and/or meme construction, one can be up and anonymously defaming folks or businesses in tucker time. Add to that toxic mix, the proliferation of online news platforms (including a raft of dubious news sites from around the world) along with websites and apps that allow anyone anonymously to rate restaurants, stores, workplace environments, products, other reviewers, and (really) anything, and we find ourselves in an environment that looks nothing like the world in which good old fashioned defamation law arose. Burr might have called Hamilton to the duel for impugning his character,2 but how does one call out Spazzy915@EriksHous.Biz for leaving a false and damaging review about one’s workplace?

While this new defamation-friendly world raises scads of issues, some of which will be covered in future articles, we now focus on one issue (really one and a half issues). But—warning—the primary focus of this article (personal jurisdiction) is not for most people the sexiest issue in the world. And, while personal jurisdiction issues have been litigated for the better part of a century, the Supreme Court has been addressing personal jurisdiction issues frequently in recent years3—though it has not yet directly tackled the tricky issues associated with personal jurisdiction and the Internet.4

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3 During this pandemic-effected term, the Court is set to hear Ford Motor Company v. Montana Eighth Judicial District Court. See https://www.scotusblog.com/case-files/cases/ford-motor-company-v-montana-eighth-judicial-district-court/. And in recent years, the Court has considered to additional major cases on personal jurisdiction. See Walden v. Fiore, 571 U.S. 277 (2014); Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017).

4 Walden, 571 U.S. 277, n. 9 “this case does not present the very different questions whether and how a defendant’s virtual ‘presence’ and conduct translate into ‘contacts’ with a particular State. ... We leave questions about virtual contacts for another day.”
Does it Matter? But first ... a brief digression into a bigger question. Does it matter? There is libel and then there is libel! When thinking about whether to write a threatening letter or pursue a claim about a particularly odious remark about yourself or your company, you should stop to consider, does it matter, and, if so, how much?

One of the side benefits of the broad content cesspool that oozes all around us is that there is so much of it that certain eddies and tributaries do not matter very much. The front page of the New York Times is a whole lot different than a Twitter user with thirty followers. The latter does not really have much of a platform; so even if she writes something terribly false about You or YouCorp, you have to determine whether it is worth the effort to draft (or get a lawyer to draft) a letter demanding that the falsehood be removed and threatening a lawsuit. And actually filing suit in such a circumstance may well be significant overkill and not the best use of resources. So, after you have cooled down from your initial reaction (no-one ever likes to have libelous things said about them), consider: What is the platform? Who is the source? How big is the audience? How harmful is the false claim? Has the false claim started to spread? Will pursuing a remedy be worse than the injury itself?

But if the answer is that it does matter and that it matters enough to pursue it, there are still dozens of issues to address, but a fundamental one is where can you sue this dirty rotten scoundrel? Your preference (and mine) would be to sue them in my local court (either my state trial court or the federal court in my district). It is easier for me to wander over to the courthouse, the judge may know me or my client, and the jury is going to be made up of (broadly speaking) my home town peers. But can I sue them at home or do I have to go elsewhere?

A thirty second primer on personal jurisdiction. A court can only adjudicate a case against a defendant if the court has “personal jurisdiction” over that defendant, meaning (essentially) that it is “fair” to sue someone in that court. While this is a bit of an oversimplification, this means that the defendant either lives there (in which case there would be “general” personal jurisdiction over the defendant) or (and this is the one we care about) the defendant has a) sufficient “minimum contacts” with the state, b) the claim against the defendant arises out of those contact, and c) the exercise of jurisdiction is “reasonable.” This is specific personal jurisdiction.

While that all sounds simple, every state has its own “long arm” statute and case law that (together) determine whether the court can, indeed, exercise personal jurisdiction over the defendant. The real action is in the first requirement (whether there are sufficient minimum contacts). Depending on the state and the circumstances, courts typically apply one of two analyses to determine whether an out of state defamation defendant has sufficient contacts to the forum, the Calder “effects” test or the Zippo “sliding scale” test. The problem, as we will see, is that courts apply these tests differently and do not necessarily reach the same results.

The Effects Test. The Calder “effects test” comes from the Supreme Court decision in Calder v. Jones, 465 U.S. 783 (1984). Under the Calder test, there is jurisdiction over the defendant where the defendant a) committed an intentional act, b) expressly aimed at someone or something in the forum state, c) causing harm that the defendant knows is likely to be suffered in the forum state. As recently interpreted by the Supreme Court, “The crux of Calder was that the reputation-based ‘effects’ of the alleged libel connected the defendants to [the forum state], not just to the plaintiff.” Walden v. Fiore, 571 U.S. 277, 287 (2014)
Sliding Scale of Interactivity Test. One of the most influential cases for personal jurisdiction during the Internet era is a twenty-three year old case from the Western District of Pennsylvania. Zippo Manufacturing v. Zippo Dot Com,5 a trademark infringement case regarding the “Zippo” trademark. The sliding scale tests examines the “interactivity” of a website to determine whether it is “interactive,” “middle ground,” or “passive.” “Interactive” websites are typically those through which a defendant “provides goods and services” and “repeatedly transmits computer files to other states”. Id. Websites that can be classified as “middle ground” fall short of providing goods and services, only allowing for the transfer of information between the use and the defendant website. With regards to “middle ground” websites, courts determining whether exercising jurisdiction is proper by “examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.”6 “Passive” websites, by contrast, are simply sites that make information available to users.

A thirty second primer on defamation. For a statement to be defamation in the United States, it must be a 1) false, 2) statement, 3) communicated to others, that is 4) harmful to someone’s reputation; is 5) not privileged; and 6) made with the correct degree of fault (negligence or actual malice). Defamation is a tort that has some interesting features when it comes to personal jurisdiction because words written in one state can injure someone in another state, and when that happens, it is possible (though not necessary) that that second state—the home of the plaintiff—can have specific jurisdiction over the defendant.7

Personal Jurisdiction and the Internet. Because we both work in New York City, we will use New York as our primary example—though we have handled defamation and related cases throughout the country. New York, which is one of the country’s centers of traditional publishing, offers a very narrow avenue for personal jurisdiction over an out-of-state defendant.8 Absent additional connections, just posting defamatory material on the Internet, even if it is about a New York person or business, is not, without more, enough to confer personal jurisdiction over the defendant because it does not—in and of itself—constitute “transacting business” in New York for the purposes of New York’s long-arm statute.9 This is in

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8 Under New York’s “long arm” statute, the only basis for long arm jurisdiction for a defamation claim is where the defendant “transacts business” within New York. New York specifically carved out defamation claims from the rest of its “long arm” statute. NY CPLR 302 (a) provides that jurisdiction over non-residents is appropriate where the relevant defendant “1) transacts any business within the state …; or 2) commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or 3) commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act; or 4) owns, uses, or possesses any real property situated within the state.” (Emphasis added).
9 In order for an out of state defendant to be subject to New York jurisdiction based on a defamation claim, the defendant must have not only published a defamatory statement, but “transacted business in such a way that it constitutes ‘purposeful activity,’ which is defined as ‘some act by which the defendant purposely avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefit and protection of its laws.” See Gary Null & Assoc., Inc. v. Phillips, 29 Misc. 3d. 245, 248 (2010). See also Best Van Lines Inc. v. Walker, 490 F.3d 239, 249 (“New York Courts do not interpret “transacting business” to include mere defamatory utterances sent into the state.”).
keeping with Calder’s progeny focusing the jurisdictional inquiry on a defendant’s contacts with the forum, not with the defamed plaintiff.10

In Zoni Language Centers v. Glassdoor, Inc.,11 Zoni Language Centers (“ZLS”) brought an action in New York state court against Glassdoor and anonymous individuals who had posted allegedly defamatory statements about ZLS on Glassdoor (a website that allows employees and former employees to rate their workplaces). ZLS was trying to start the litigation and then use the discovery process to find out who the anonymous posters were. The court, however, found that it lacked personal jurisdiction over Glassdoor. The court applied the Zippo test and found that because Glassdoor operated as an online review platform, it could neither be classified as an “interactive” nor a “passive” website. It did not provide goods or services, but it also did more than merely provide information to users. Because the website prompted some level of interactivity from its users, the court found that Glassdoor was in the “middle ground” category. The court then found that Glassdoor’s internet activity did not “constitute transacting business for the purpose of New York’s long-arm statute” due to the defendant’s lack of participation in the creation and publishing of the reviews that were ultimately posted. Id. at *7. (“Although the website invites New York employers and users to use the site to learn about companies in New York, respondent does not participate in the content of these reviews. The exchange of information is only between users rather than with respondent.”) Based on this rationale, the court found that it lacked personal jurisdiction over Glassdoor.12

By contrast, in Intellect Art Multimedia, Inc. v. Milewski,13 the plaintiff, a company that operated a college-level summer program, brought an action against defendant Xcentric Ventures, LLC, which owned and operated a website known as the “Ripoff Report.” Plaintiff’s defamation claim was based on a post on the website allegedly authored by a disgruntled former student, Milewski. The relevant post included accusations that plaintiff was “a bait and switch company” that made “false promises” and was “being run by two incompetent people.” In arguing that defendant Xcentric Ventures LLC, should be subject to the court’s jurisdiction in relation to its defamation claim, plaintiff argued that the Ripoff Report was in fact an “interactive” website. Specifically, plaintiff claimed that the defendant “makes money by soliciting business from the companies and individuals who have had negative posts made against them.” Plaintiff further alluded to both the defendant’s Terms of Service, which gave Xcentric LLC “rights” over every review posted on its website, and the editorial liberties that the defendant took with regards to the review at issue. In finding that it had personal jurisdiction over Xcentric LLC, the court highlighted the website’s “high level of interactivity” between users, including “Xcentric’s alleged role in manipulating user’s information and data,” and “Xcentric’s solicitation of companies and individuals to ‘resolve’ the complaints levied against them on Ripoff Report.”

10 See, e.g., Amini v. Bezsheiko, 2020 WL 1911212 (D. Ariz. Apr. 20, 2020) (publishing an online article about an Arizona resident insufficient to confer personal jurisdiction in Arizona); Burdick v. Superior Court of Orange County, 183 Cal. Rptr. 3d 1 (Cal. App. 4th Dist. 2015) (finding publication of social media post defaming California resident was insufficient to confer personal jurisdiction on out-of-state defendant).
12 There is a separate issue of Internet publishers’ liability and immunity that is addressed by Section 230 of the Communications Decency Act.
13 899 N.Y.S.2d 60 (N.Y. Sup. Ct. Sept. 11, 2009)
While there are certainly differences between Glassdoor and the Ripoff Report, it is important to note that jurisdiction was found in one case—but not the other—based largely on the plaintiff’s allegations—not a full hearing on the merits of how “interactive” each site was. That is important because a plaintiff may be able to allege things in a complaint, e.g., that the defendant’s website is “highly interactive” that may not turn out to be true. But those allegations could go a long way for determining whether the court—in the first instance—has personal jurisdiction over the defendant. The fact that costly litigation in a foreign forum can result from artful pleading may turn out to be problematic.

On the other hand, there is a lot of internet activity that is entirely unrelated to sites like Glassdoor and Ripoff report—straight up defamation that a user posts on Twitter or any other social media platform. And the Zippo test may be an ill fit for those types of cases.

**Conclusion**

As the Internet edges out traditional forums for speech and becomes the preferred platform for the erudite, the vulgar and the straight-up defamers, the law will have to adapt. And the procedural laws that arose technological eons ago may need to be reconsidered and readjusted to reflect the realities of the new world. There also may be an appetite for more uniformity among jurisdictions as Internet speech blurs lines between states and countries. The Supreme Court has indicated an interest in revisiting some of the legal issues surrounding jurisdiction and the Internet, and we will certainly be watching these developments closely.