



ONLINE PUBLICATIONS AND THE CHALLENGES OF COMBATING CYBER DEFAMATION IN NIGERIA

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Abstract

The advent of internet has made communication between persons living in different parts of the world a lot easier and faster. This has also made the commission of both civil and criminal offences easier. With this, it is also easier to publish defamatory publication on the cyber space, especially through the use of social media and other online spaces. Although there is in existence in Nigeria, a legal framework to regulate cybercrime, it is inadequate in addressing cyber torts, such as defamation. This paper analyses the role of online publications in facilitating cyber defamation and the challenges which make it difficult for a nation like Nigeria to address same. Through doctrinal research methodology, the paper finds that though there is a legal framework on cybercrime and to some extent, cyber defamation, it is not adequate in addressing the numerous challenges of cyber defamation in Nigeria. It is also observed that challenges such as choice of law, jurisdiction barrier and difficulty in identifying posters of defamatory materials on the cyberspace under a pseudonym, have not been properly addressed by the legal framework. It is therefore, recommended that Nigeria should upgrade the legal framework on cybercrimes and defamation by adopting the position in other jurisdictions such as China and United States in order to comprehensibly tackle the tort of cyber defamation in Nigeria.

Keywords: Online publications, cyber tort, legal framework

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Introduction

The institution of internet has made the flow of information easier across international borders without much hindrance. This development made information to fly faster than ever imagined by people who inhabited the world over one hundred years ago. It is not in doubt that this development has made it easier for people to communicate and pass messages without going through the traditional means of communication or transportation that were in use even among urban dwellers. This development has in a way made certain media of communication such as Post Office less relevant. Although this has brought a positive development through which people communicate with each other, there is a negative side to it. This manifests in the manner by which the same people use social media platforms, such as the Facebook, to share information about others which may be defamatory in nature, without considering the legal implication. The most unfortunate thing is that where such defamatory statements are made against someone, it might be difficult for that person to seek redress through courts of law because of some legal bottlenecks and other challenges. The paper therefore, analyses the implication of publications made online on the law of defamation in Nigeria. The paper appraises the existing legal framework on defamation *vis-a-vis* the various challenges which may hinder a victim from successfully claiming damages for defamation on the internet especially where the defamer uses a pseudonym or even lives outside jurisdiction.

Conceptual Clarification of Key Terms

Discussing issues bordering on internet or cyber defamation involves certain terminologies that are ordinarily not found in cases of defamation in the traditional sense. Since most of the concepts dealt with in the traditional sense are already familiar ones, there might be no need to discuss them in this paper unless where such discussion would assist in clarifying some grey areas associated with them.

Cyberspace

The term cyberspace was first introduced by one William Gibson in 1984 in a book he wrote with the title, *Neuromancer*.¹ It refers to “the virtual computer world or electronic medium that is used to facilitate online communication”.² According to encyclopaedia Britannica, cyberspace is a supposedly virtual world created by links between computers, internet-enabled devices, servers, routers and other components of the internet’s infrastructure”.³ The term has also been defined by the Computer Security Resource Centre (CSRC), an agency of the United States Government, as “a global domain within the information environment consisting of the interdependent network of information systems infrastructures, including the internet, telecommunications networks, computer systems and embedded processors and controllers.”⁴ Fundamentally, the cyberspace may be described as a virtual or an abstract environment which allows the relay or communication of information among different persons in the world through the use of computers and other electronic devices.

Cyberspace mostly involves large computer networks made up of numerous worldwide computer sub-networks that assist in communicating and exchanging data.⁵ As opposed to the internet itself, cyberspace is the environment produced by the linkage of various computers and other electronic devices that are connected virtually without recourse to any particular nation-state.⁶ In essence, the internet is only one component of the cyberspace that helps in communicating information to an array of computers and other devices. Cyberspace in the main, “is an interactive and virtual environment for a broad range of participants which allows users to share information, interact, swap ideas, play games, and engage in discussions on social media forums, conduct businesses”.⁷ Communication among various participants on the social media today is therefore made possible by the cyberspace through the use of the internet and other links.

Cyber attack

¹ <<http://www.technopedia.com>>, visited on 29/06/2022

² *ibid*

³ <<http://www.brittanica.com>>, visited on 29/06/2022

⁴ <<http://www.csrc.nist.gov>>, visited on 30/06/2022

⁵ <www.technopedia.com> *ibid*

⁶ <www.brittanica.com> (n. 3)

⁷ <<http://www.technopedia.com>>, (n. 3)



According to cisco computer networking, a cyber-attack “is a malicious and deliberate attempt by an individual or organization to breach the information system of another individual or organization.”⁸ It may also be defined to mean, “any attempt to gain unauthorized access to a computer, computing system or computer network with the intent to cause damage”.⁹ Cyber-attack generally aims to incapacitate, disrupt, destroy or control computer systems, or alter, block, delete, manipulate or steal the data contained in the computer system of an individual or group.¹⁰ In other words, cyber-attack is any act made to distort the computer, computing system or any device belonging to another, with the intent to destroy, steal, delete or tamper with information kept therein.

Cyber Security

The increase in possibilities and sophistication in cyber-attacks, sometimes by unknown persons to the computers of defence departments and even financial institutions makes it imperative to heighten the level of cyber security across the world. The UK government defines cyber security to mean “the application of technologies, processes and controls to protect systems, networks, programmes, devices and data from cyber-attacks.”¹¹ Cyber security may also be referred to “anything that is done to protect the intrusion of the cyber space by unauthorised persons. It is a process or an application that protects computer systems and networks from unauthorised theft, access or damage to hardware, data or software.”¹² The purpose of cyber security is to protect critical infrastructure and sensitive information from bad actors or users.¹³ Cyber security may also involve the process of defending computers, services, mobile devices, electronic systems, networks and data from malicious devices.¹⁴ Therefore, anything that is done to protect the cyberspace and devices from unauthorised use may be termed as cyber security. Cyber security in

⁸ <<http://cisco.com>> accessed on 15/09/2023.

⁹ Mary K. Pratt. *The Ultimate Guide Cybersecurity Planning for Businesses*, available at <<http://techtarget.com>>, accessed on 15/09/2023

¹⁰ *ibid*

¹¹ <<http://www.itgovernance.co.uk>>, accessed on 29/06/2022

¹² <<http://www.robotshadow.com>>, accessed on 29/06/2022

¹³ *ibid*

¹⁴ <<http://www.kaspersky.com>>, accessed on 29/06/2022



essence works to protect a device, whether in the form of hardware or software, which could be the subject of cyber-attack, such as computers, data, mobile phones, et cetera.

Cyber Torts

Tort in simple terms refers to any civil wrong which constitutes the breach of a legal duty that affects the interest of individual to a degree which the law regards as sufficient to allow that individual to complain in his or her own account rather than as a representative of the society as a whole.¹⁵ It may also mean “a civil wrong which arises when a person breaches a legal duty owed to another”.¹⁶ Whichever way, the two definitions above, are virtually the same and both point to the fact that tort is a wrong which allows an individual to sue in his own right as against the representative of the state and seek redress in the form of monetary compensation. Cyber tort is substantially the same with the traditional tort, the only distinction being that the latter is committed on the cyber space through the use of the internet. In defining cyber tort, the major thing to note is that it is an internet or cyber-based wrong. It has therefore been defined as “a civil wrong committed online through the use of computer and other devices, which has access to the internet and is able to modify the information or post anything online.”¹⁷ Any wrongful use of computer, mobile phone or other electronic devices to post damaging information on another person’s or institution’s computer amounts to a cyber-tort. Also, any wrong committed through the use of computer either as an instrument, target or methods for sustaining further violations is a subject of cyber tort.¹⁸ Defamation which is one of the torts that could be committed on the cyber space is also the subject of cyber tort. Computers and other devices may be used as either a tool for committing or the target of cyber tort. The computer or another device may be used as a tool for committing cyber tort in financial crimes, sale of illegal articles, pornography, online gambling or even publication of defamatory statements.¹⁹ In the same vein, the devices may also be used as the target of cyber tort (in the form of cyber-attack), by way of unauthorised access, information theft,

¹⁵ Anthony M. Dugdale (ed), *Clerk and Lindsell on Torts*, (Sweet and Maxwell, London, 2012, 1)

¹⁶ B.M. Gandhi, *Law of Torts: With Law of Statutory Compensation and Consumer Protection* (4th Edition), (Eastern Book Company, Lucknow, India, 2011, 5)

¹⁷ Aditya Durbey, posted on <<http://www.blog.ipleaders.in-de>>, accessed on 29/06/2022

¹⁸ Unknown at <<http://www.juscorpus.com>>, accessed on 29/06/2022

¹⁹ <<http://www.legalservicesindia.com>>, accessed on 26/06/2022



et cetera.²⁰ A cyber tort is therefore said to be committed where a computer or any device is used either as a tool or as a target of a wrong on the internet.

Cyber Defamation

Cyber or internet defamation refers to any form of defamation committed on the cyberspace through the use of the internet. Any publication of a defamatory material against another person with the help of a computer or internet is referred to as cyber defamation.²¹ This could be with the use of computer or any form of electronic device to post something in any of the social media in existence today, such as Facebook, tiktok, twitter or snap chat. Publications made by online newspapers or by conventional newspapers on the internet that are defamatory in nature may be tantamount to internet or cyber defamation.

The Concept of Defamation

The tort of libel and slander collectively make the tort of defamation. The objective of this tort is to protect the reputation of people, which at the same time serves as a limitation to the constitutionally guaranteed freedom of expression under S.39. This tort is however, without prejudice to the rights of individual to criticise governments and other public figures with justification. This tort is committed where a defamatory statement is uttered or written against someone. For a defamation to be compensated, it must be in the form of a statement, “which tends to so harm the reputation of another as to lower him in the estimation of the community or deter third person or persons from dealing with him”.²² Defamation may also consist in the publication of a false, defamatory and unprivileged statement to third person or persons.²³ A statement could only be defamatory where the statement is not privileged and without any form of exception as allowed by law. The court in Nigeria has defined a defamatory statement to mean:

²⁰ *ibid*

²¹ <<http://www.telaganatoday.com>>, accessed on 29/06/2022

²² Section 558, Third American Restatement on Tort, 1976

²³ Peter N. Amponsah, *Libel Law, Political Criticism and Defamation of Public Figures: The United States, Europe and Australia* (LFB Scholarly Publishing, LLC, New York, 2004, 17)



A statement which if published, concerning a person is calculated to lower him in the estimation of right thinking members of the society, cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him, his office, profession, calling, trade or business.²⁴

Defamatory statements may, based on the above definition, be committed against persons, natural or artificial. It is worthy of note that the definition provided by the Court of Appeal on what constitutes defamation did not make any distinction as to whether such a statement could be libel or slander. That notwithstanding, such publication (as shall be seen in due course) is simply so regarded when it communicates the defamatory statement to third parties.

The purpose of a defamation action according to the High Court of England in the case of *Carson v John Fair Fax & Sons*, “is the consolation for the personal distress and hurt caused to the appellant by the publication, reparation for the harm done to the appellant’s personality and (in some cases), business, reputation as well as vindication of the appellant’s reputation.²⁵ From this, it is clear that though the action for defamation may not wholly salvage the reputation of the person defamed and damaged, but that action, it serves as a consolation to him.

Distinction between Libel and Slander

Libel is defamation in a permanent form while slander is transient. In other words, libel is to the eye, slander to the ear. Libel is actionable *per se*-without proof of actual damage; it may take the form of writing, painting, cartoon, caricature etc. In libel, once the defamatory material is published, damage is presumed.²⁶ Slander on the other hand, refers to defamation in a transient form; it is only actionable on proof of actual damage. Here, the plaintiff must prove some financial

²⁴ Per Aboki JCA in *Chief Arthur Nzeribe v Chief Anyim Pius Anyim* [2009] All WLR (pt. 488) 379 at 395

²⁴ [2010] 15 NWLR (PT. 1215) 114

²⁵ [1993] 178 CLR, 44, 60-61

²⁶ Per Bello S.P.J. in *Nthenda v Alade* [1974] 4 E.C.S. L.R. 470



loss or material disadvantage suffered as a consequence of the slander.²⁷ Therefore, where a published writing exposes the claimant to hatred, contempt or ridicule, he can claim damages without necessarily proving that he has suffered any material damage to his reputation.²⁸ This is against spoken words which exposed the claimant to the same negative treatment in which case he must prove specific damage unless where certain exceptions are allowed by law.²⁹ But it is instructive to note that what mainly distinguishes libel from slander is that the former is in permanent form while the latter is transient. On this, it is safe to say that where spoken words are documented, they by virtue of this rule become libel. Although proof of damage is generally required for an action in slander to succeed in a claim for defamation, there are exceptional situations where slanderous statements can be actionable *per se*. This occurs in circumstances where the words spoken impute a crime punishable with imprisonment, impute certain diseases naturally excluding the patient from sexual intercourse, such as impotence, words spoken of a person following a calling, which imputes to him, unfitness or misconduct in that calling, or imputation of being unchaste or adultery to a woman or girl³⁰

Although libel and slander have enjoyed separate lives over time, there are some academics and jurists who hold the view that the distinction between the duo with respect to commencing an action should not exist in modern times. The court in England in the case of *Thorley v Lord Kerry*³¹ disclosed its dissatisfaction with the age-long distinction between libel and slander, adding that “it makes no sense but it has become well established for it to be removed from common law.”³² In the case of *Thorley*, the claimant (*Thorley*) received a letter from *Lord Kerry* (the defendant) which partly reads: “*Thorley* under the cloak of religious and spiritual reform, hypocritically and with grossest impurity, deals out his malice, uncharitableness and falsehood.” The claimant in the wake of these statements brought a libel suit against the defendant and the court found in the claimant’s

²⁷ *Odikanwa v Iheanacho* [2010] all NWLR (pt.549_) 1179 It was also held that defamatory words must be specifically pleaded.

²⁸ Paul Mitchell, *The Making of the Modern Law of Defamation*, (Hart Publishing, Portland and Oregon, USA, 2005, 3)

²⁹ *ibid*

³⁰ *Vanguard Media Ltd v Olafisoye* [2011] 14 NWLR (pt. 1267) 2007 and *Kerry V Kennedy* [1942] 1 K.B 109

³¹ (1812) 4 Taunt 355

³² {Unknown} at <<http://www.eofalondonlawstudent.com>>, accessed on 25/06/2022



favour, after which the defendant appealed. In arriving at the decision of the court, Mansfield CJ, held the opinion that: “if the words were for the first time to be decided at this day, I should have no hesitation in saying that no action could be maintained for written scandal which could not be maintained for the words had they not been spoken.”³³

Despite the misgivings expressed by the court towards continued demarcation between libel and slander as the twin sons of defamation, the court could not but accept the trend for historical purpose albeit reluctantly. That notwithstanding some writers and commentators continued to push for the assimilation of libel into slander and make defendants liable once defamatory statements are made, without proof of special damage, irrespective of whether they were written or spoken.³⁴ The opinion of these commentators to some extent influenced the court in some jurisdictions like Scotland, to accept their opinion. In the case of *Brownlie v Thomson*, it was held that all defamatory words (whether written or spoken) can give rise to an action (without proof of damage).³⁵ The court in Nigeria, per Aboki JCA (as he then was), somehow took the same approach of assimilating libel into slander when he posited that, “defamation, spoken or written, is always actionable if damage is proved; and even if it is not, the law will infer the damage needed to found the action when: the words are written or printed, the words spoken imputes a crime punishable with imprisonment...”³⁶

The implication of the above statement is that defamatory words remained defamation in whichever form they may have been uttered and there is no need to distinguish between libel and slander. Also, that once the statement made has been adjudged to be defamatory, the law automatically infers damage without necessarily proving it and irrespective of whether the statement is written or spoken.

Elements Necessary for Proving the Tort of Defamation

³³ *Thorley v Lord Kerry*, (n. 28)F at 366

³⁴ Among them is Annon who wrote under the title, “*The Law of Libel*,” quoted by Paul Mitchell, *The Making of the Modern Law of Libel*, (n.25), at 10

³⁵ [1859] 21 D 480

³⁶ *Vanguard Press Ltd v Olafisoye*, (n. 27) at 2008

Defamation is generally committed once the statement made is adjudged to be defamatory, but for there to be liability, certain elements are required to be present for the claimant to succeed in his claim. The court has enumerated these elements in *Concord Press (Nig.) Ltd v Olutola*, where it was held that for defamation to be committed the following must be established:

- I. The words uttered or written must be defamatory
- II. The words must refer to the plaintiff (by name or by description)
- III. The defamatory words must be published
- IV. The words must not be true of the plaintiff (uttered out of malice).
- V. There must be no legal justification for the publication of the words complained of.³⁷

Words must be Defamatory:

Determining whether words used are defamatory or not, is a question of fact to be judged by the court through the use of a reasonable man's test³⁸. A reasonable man may be a person who is not so lax, nor so cynical that he would think none the less of a man, whatever was imputed to him.³⁹ In this regards, a reasonable man may be a person who lives in the society where the defamatory statements were made and who looks at such statements objectively without any form of bias or mindset. But for there to be defamation, the words must not only discredit the plaintiff in the eyes of a special class of people, but must be viewed as such by the generality of the people.⁴⁰

The Words must refer to the Plaintiff:

The Plaintiff must not necessarily be referred to by name; it is enough to ground an action once the words, drawings, cartoons, etc. are understood by reasonable people to refer to him. The most important thing is that the statement must identify him either by name or any form of description. A defendant may however, be liable in defamation if in trying to defame someone, he defames

³⁷[1999] 9 NWLR (pt. 620) 578

³⁸*Lewis v Daily Telegraph Ltd* [1964] AC 234 at 256

³⁹ *ibid*

⁴⁰ *Tottley v Fry & Sons Ltd* [1931] AC 333 @ 339



another, who is perfectly described by the words or illustration he used, who may not even be known to him.⁴¹

The Words must be published to third Parties

Publication means transmission of the defamatory material to a third party. Where the material is in a permanent form, it must have been seen by another person who is not the subject of the defamation. Where it is in words or transient form, it must have been heard by a third party. The word publication as used here does not bear its ordinary English meaning; it suffices if the defamatory material is transmitted to a third party who reads or views and understands it. In any action for defamation the name of the person to whom the delivery was made must be pleaded.⁴² Although for a representation to amount to defamation, it must have been communicated or transmitted to third parties, could this in any way be different from where publication occurs online? The answer to this poser is in the affirmative because publication whether online or offline presupposes communicating the defamatory material to a third party.

The words must not be true

By this it means where words published are no more than fabrication made by the defendant. Where this happens to be the case, it is conclusive that the words are defamatory because they cannot be justified. In other words, there must be no legal justification for the publication of the words complained of. This means there is no truth in the statement made. Justification may be a defence to the claim of defamation if the defendant can prove to the court that the statement he made which the plaintiff claims is defamatory, can be justified because it has happened.⁴³

Absence of malice

According to Merriam Webster dictionary, malice means the desire to cause pain, injury or distress to another; or the intent to commit an unlawful act or cause harm without legal justification or

⁴¹ *Newstead v London Express Newspapers Ltd* [1940] 1 K.B 377

⁴² *NEPA v Inameti* [2002] FWLR (pt. 130) 1695; *Offoboche v Ogoja Local Government* [200] FWLR (pt.68) 1051

⁴³ *Michelin Tyre Services Ltd v Akinwunmi* [2010] ALL FWLR (pt. 120-5)1113



excuse.⁴⁴It may also mean “the intentional commission of wrongful act, absent justification, with intent to cause harm to others; conscious violation of the law that injures another individual”.⁴⁵ Any action done with the intention or state of mind to cause harm to another person without any form of legal justification could be said to have been done maliciously. Malice may be proved where the statement cannot be justified. But where it can be justified, it is conclusive evidence that the statement was not actuated by malice, as in *Michelin Tyre Services Ltd v Akinwunmi*⁴⁶

An Overview of Defamation on the Internet/ Cyber Defamation

Any defamatory statement or representation made on the cyber space is generally referred to as internet or cyber defamation. The growth in technology led to the emergence of new trends in internet which allow people access to information and an easier platform to transmit ideas. The emergence of the internet has brought with it certain complexities, especially with respect to publication, which could take effect at the same time in different parts of the world through sharing and transfer of information.⁴⁷Although the internet and other social media platforms are a great thing for people and society in general, they also brought with them some unique and effective breeding ground for potentially libellous publications.⁴⁸ The opportunity on the internet therefore, provides an avenue for people to either intentionally or accidentally post defamatory comments against others on the net.⁴⁹ The advent of the internet, though positive, is froth with certain problems and challenges with respect to identifying the culprits and bringing them to book. Although some countries may have a robust legal framework on internet defamation which hold culprits accountable for their actions, countries like Nigeria are still grappling with the absence of

⁴⁴ (Unknown) at <<http://www.merriam-webster.com>>, accessed on 108/07/2022

⁴⁵ (Unknown) <<http://www.legal-dictionary.thefreedictionary.com>>, accessed on 207/07/2022

⁴⁶ Id

⁴⁷ Jerca Kramberger, Jurisdiction in Online Defamation and Violation of Privacy: In Search of a Right Balance, *Lexonomica* (8) (2) (87-108, Dec. 2017), available at <<http://www.researchgate.net?publications>>, accessed on 29/06/2022

⁴⁸ David Goguen, *Social Media and Online Defamation: Understanding Key Legal Issues Related to Defamation on Facebook, Blogs, Twitter and Elsewhere*, retrieved from <<http://www.wurinolo.com/legal/encyclopedia>>, accessed on 22/06/2022

⁴⁹ ibid

such frameworks. This presents challenges where someone has defamed another in the cyberspace, as there is no comprehensive legal framework for seeking redress.

Cyber Defamation in Nigeria and the Challenges of Identifying Online Defamers

In Nigeria, as stated above, defamation is still in its traditional form as it was inherited under the common law and till date, no meaningful effort has been made to move it to the next level to address infringements made on the cyber space. In fact, publications are made online, especially on the social media such as twitter and Facebook, spreading lies and hate speeches as well as defaming the character of government officials, politicians and senior public servants, without any form of remedy. Also, the country at the moment has no detailed legal framework which particularly addresses the tort of defamation committed in the cyberspace. This is notwithstanding the fact that the Cybercrimes (Prohibition, Prevention, etc) Act has addressed part of the problem.

The Act provides that:

Any person who knowingly or intentionally transmits or causes the transmission of any communication through a computer system network containing any threat to harm the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, to extort from any person, firm, association or corporation, any money or other thing of value, commits an offence under this Act, and shall be liable for a term of 5 years imprisonment and/or a minimum of fifteen million naira.⁵⁰

Although the above Act deals substantially with cybercrime, the foregoing provision gives a clue that cyber defamation may be the subject of the Act since it has mentioned injury to reputation as something which may come under the purview of the Act. It is therefore submitted that a victim of cyber defamation may lay a claim under Section 24 (c) of the Cybercrime Prohibition and Prevention Act. The only problem which a claimant may encounter while claiming under the

⁵⁰ Section 24 (2) (c), Cyber Crime (Prohibition, Prevention, etc) Act, 2015 (hereinafter referred to as the Act)

provision is that the section only makes provision for punishment without mentioning damages, which is the ideal compensation in cases of violation of civil rights. However, in the absence of a specific legal framework that focuses solely on cyber defamation, the Act could be used as an alternative, where there is a threat to harm one's property, reputation or business.⁵¹ Though the Cybercrime Prohibition Act could be used to claim for internet defamation in the absence of a comprehensive legal framework, the Act could not provide a one hundred per cent remedy to a victim of defamatory publication on the internet. This is partly due to the problem of identifying the defendant where he is anonymous, place of publication of the statement or even the jurisdiction of court where action is brought, in the event he lives outside jurisdiction. The era of social media compounds this problem because some people are carefree on the content and effects of their post, comments and publications.⁵² In view of this, there are some criteria, which must be followed to determine when a publication is made online and whether it is defamatory or not. For a statement to be defamatory, it must have been published and publication means communicating the information to a third party. In online publication, where the material is displayed online or delivered through electronic communication, the publisher must have sent the material to another person who reads and comprehends it.⁵³ Where however, the receiver of the message did not open the message to read it or could not open the message because the message is corrupted by a virus, publication has not taken place since transmission alone will not make the sender of a message liable, without it being and understood. Worthy of note is the fact that in internet defamation the place where the material is downloaded is the place of publication not the place of making the statement.⁵⁴

In summation therefore, a successful claim for defamation on the internet is dependent on the fact that the statement made against the claimant was untrue as it was held in the US case of *Wilson v Bauer Media Property Ltd*.⁵⁵ In that case, it was held that where false publication was made by the

⁵¹ Where business reputation is affected this could take the form of trade libel

⁵² Bridget Edokwe, *An Exposition of the Consequences of Online Defamation in Nigeria*, available at <<http://www.barristering.com>>, accessed on 02/07/2022

⁵³ *Defamation Law-Online Publication*, available at <<http://artslaw.com.au>> accessed on 06/06/2022

⁵⁴ Aladokiye Emmanuel Gabriel-Whyte, *Towards Developing a Legal Framework for Internet Defamation*, *International Journal of Humanities and Social Sciences*, (May 2015) (4) (3) 94

⁵⁵ *Wilson v Bauer Media Property Ltd* [2017] VSC 521



defendant magazine against the claimant, it made her to lose business and income. The claimant must present evidence before the court that he had suffered real damage to his reputation/and or business.⁵⁶

Challenges to the Enforcement of Online Defamatory Publications in Nigeria

Online defamation takes place in Nigeria on a daily basis on the social media such as Facebook and twitter but the culprits who publish the defamatory materials against others get away with them, leaving the victims without any form of redress. This is either due to the absence of a comprehensive legal framework to handle internet defamation, issue of jurisdiction or absence of the wherewithal necessary to track those who use pseudonym to defame others. The cyberspace in Nigeria, faces numerous challenges which dwell on infringements on the internet by users, as all infringements on the internet, as highlighted by the Executive Vice Chairman of the Nigeria Communications Commission, Professor Garba Dambatta, include:

- a. Absence of a comprehensive and reliable demographic database, insufficient expertise in the area of cyber and security infrastructure;
- b. Insufficient inter-agency regional and international collaboration
- c. Lack of effective and functional forensic laboratories, techniques and manpower to match the speedy, anonymous and fleeting nature of evidence in cybercrimes investigation.⁵⁷

The above challenges though are general in nature, yet in some way, affect defamation on the internet, especially when it comes to unveiling the identity of someone who defames another using a pseudonym. However, cyber torts in Nigeria, being an evolving area of law is faced with some challenges. The following are specific challenges:

Absence of a Legal Framework that Specifically Addresses Internet Defamation

In Nigeria today, there is not in existence a legal framework that specifically addresses the tort of defamation committed on the internet or in the cyberspace. This constitutes a major stumbling

⁵⁶ *Cohen v Google Inc*, 25, MISC. 3D, 945, 887

⁵⁷ The Executive Secretary was speaking at the 4th Edition of Security Experts Association of Nigeria yearly Conference, reported by Vanguard Newspaper, available at <<http://www.vanguardngr.com>>, accessed on 23/06/2022

block in addressing breaches to people's reputation and business interests through internet defamation. In fact, the coming into existence of the internet, especially the social media has given users an easy platform to say unsavoury things about others, especially politicians and other public figures all under the guise of exercising the right freedom of expression guaranteed under the Constitution.⁵⁸ In fact, the unique challenges of the social media make it difficult to tame defamatory publications through the use of traditional elements of defamation.⁵⁹ This is perhaps true where the place of posting a defamatory material and place of download or viewing have different legal framework on the matter. This becomes more difficult with the absence of a comprehensive legal framework that specifically addresses the issue of defamation in the cyberspace. At the moment, only Section 24 of the Cybercrime (Prohibition, Prevention, etc) Act that partly addresses something relevant to cyber defamation. Without a clear legal framework, the court may have resort to other jurisdictions for support. But this may not always provide a way out in view of variation in culture, tradition or even geographical location.

Problem of Choice of Law in Cyber Defamation Cases

Choosing the appropriate law of tort to use in internet defamation cases sometimes becomes a problem in view of the unique nature of the infringement, especially where it is done on the social media and other related platforms. Where the defamer lives in a jurisdiction outside that of the claimant but within Nigeria, this may not present much of a problem. This is due to the fact that the law regulating defamation in the entire country is substantially uniform, having derived their origin from the received English Law.⁶⁰ Problem may however arise where the defamer lives outside Nigeria, in which case it will be an issue of inter-state conflict of laws, which has not been comprehensively provided where defamation takes place on the internet under Nigerian laws. Inter-state conflict of laws arises where a court is faced with the problem of applying the law,

⁵⁸ Section 39 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), hereinafter referred to as CFRN

⁵⁹ Hadley M. Dreibelbis, *Social Media Defamation: A New Legal Frontier Amid the Internet Wild West*, available at <<http://www.law.duke.edu>>, accessed on 07/07/2022

⁶⁰ This was made possible through the various English laws applicable in England as at 1900



recognising or enforcing a judgment obtained from another jurisdiction; or assuming jurisdiction with respect to persons residing in that jurisdiction.⁶¹

Cyberspace to some theorists is a place characterised by the speed in communication which culminates in somehow making the internet autonomous of physical location.⁶² In other words, the internet is seen as a borderless community which may not be subject to any form of regulation as it is the case in traditional cases of defamation. However, determining whether or not, defamation has been committed on the internet is not precise and this is governed by two rules, one of which is supported in Australia while the other is supported in the US⁶³. According to the first rule which is supported in Australia, the law to apply is that of the place where the reputation of the claimant has been harmed, which means the place where the defamatory material was downloaded into a computer of the person who used his browser to bring the material out of the web server⁶⁴ The second rule is the ‘single publication rule’ which was first enunciated in the United States of America, to the effect that the law of the place of publication of the material should be applied.⁶⁵ In the case of *Dow Jones v Gutnick* a businessman whose personality and business activities were spent mostly in Victoria got his reputation harmed on a news website published by Dow Jones Inc, a company incorporated in Delaware with an editorial office in New York but with a server maintained in New Jersey. It was held by the court in USA that the law of the place of publication is the applicable law.⁶⁶ This is contrary to the decision of the Australian court which held the law of the place where the harm was done to the claimant that could be the applicable law.⁶⁷ These two contradicting theories have to some extent, confused the law further as each has its own strength and weaknesses. While the first seem to subject Internet Service Providers (ISPs) to endless liability the second somehow tilts towards protecting the interest of the publisher.⁶⁸

⁶¹ I.O Agbede, *Themes on Conflict of Laws*, (Princeton 7 Associates Publishing Co. Ltd, Lagos, Nigeria, 2018, 7)

⁶² Goldsmith Jack, *The Rise of Law in Space*; *Stratford Law Review*, (1998) (65) 199, available at <<http://www.temple.edu.ng>>, accessed on 26/06/2022

⁶³ Proomitr Sookdripaisarakit, *A Common Law Position for Choice of Law in Internet Defamation: The Case for Hong Kong*; *International Journal Of Commercial Law and Technology*, (2014) (9) (3), available at <<http://www.rm.coe.int>>, accessed on 07/07/2022

⁶⁴ *ibid*

⁶⁵ *Dow Jones & Co. Inc. v Jones Gutnick* [2010] 210 CLR 575

⁶⁶ *ibid*

⁶⁷ [2002] HCA 56, 210

⁶⁸ (n. 60)



Despite the imprecise nature of choice of law in internet defamation cases, the court must be objective in choosing the applicable law without bias⁶⁹

The above author's suggestion seems to be more or less in consonance with the proper law approach and may be adopted even by countries like Nigeria which as of today is bereft of a comprehensive legal framework that regulates internet defamation. Another author also provides an additional guide to determining the applicable choice of law which is the plaintiff's habitual residence.⁷⁰

Jurisdictional Barrier

Jurisdiction is another problem which makes prosecuting those who defame others on the internet difficult. Jurisdiction simply means the authority which a court possess to decide matters litigated before it or to take cognisance of matters presented in a formal way for its decision.⁷¹ Addressing the issue of jurisdiction is fundamental if they are to succeed in any matter they bring before the court. In cases of internal conflict of law the matter has already been settled by the various High Court Civil Procedure Rules in Nigeria.⁷² Therefore, for a claimant to prove online defamation he must prove to the court that the defamatory material was accessed and downloaded by identifiable persons within the jurisdiction of the court.⁷³ Though cases are rare or somewhat unfounded in Nigeria on how to treat the issue of jurisdiction on the internet, the court in the United Kingdom, has provided a leeway in the case of *Mohammed Hussein Almoudi v Jean-Charles Brisard & Anor*⁷⁴, where it held that, "the Plaintiff bears the burden of proving that the words complained of were read or seen by a third party". Although the decision by the English court seem to have settled the matter with respect to jurisdiction in internet defamation cases, the court in India presents a rather complex or somehow confusing position, when it decided that "territorial jurisdiction does

⁶⁹ (n. 60)

⁷⁰ (n. 60)

⁷¹ *Enugwu v Okefi* [2000] 3 NWLR (pt. 650) 620

⁷² See Order 4 Rule 4 *Lagos State High Court (Civil Procedure) Rules*, 2019, and Order 3 Rule 4, *FCT High Court (Civil Procedure) Rules*, 2018

⁷³ O.M. Atoyebi, *Online Defamation: Emerging Jurisdictional Issues*, available at <<http://www.omaplex.com.ng>>, accessed on 07/07/2022

⁷⁴ [2006] 3 All ER 294



not remain confined to the place of actual defamation...the jurisdiction would be at both places-at the place where the actual defamation takes place and the place where such defamatory material is transmitted (published),through website, telecast, etc”.⁷⁵ The problem with this position when adopted is that it will open the floodgate for forum shopping, hence, discouraged. The House of Lords in *Lankesh v Shirvappa* asserted that “the test for the jurisdiction of the court in online defamation cases is whether such statement has been downloaded by an independent third party. The mere fact that the defamatory statement was posted on the internet does not in itself mean that defamation has occurred, it must fulfil the conditions.”⁷⁶ On this, the position is similar to the one adopted in the United States of America.

Problem of Identifying Posters of Defamatory Material on the Internet under Pseudonym

Publications made by people on the internet which seem to defame others are normally made with hidden identities using pseudonyms.⁷⁷ This is attributable due to lack of respect for international borders normally associated with internet users who uses the platform to spread huge amount of data through the use of international connectivity.⁷⁸ Even though it is generally not always easy to identify what anonymous people post on the internet let alone bring them to the realm of justice, it is believed that the cyberspace is not such a special place that could not be regulated through the use of traditional methods such as litigation. In the same vein, just as defamation can be regulated where it is committed through traditional means such as radio, television and newspapers, it can at the same time be regulated when committed on the internet using the same traditional means. However, the convergence of the internet and other media of mass communication in the commission of the tort of defamation may create some difficulties when handling such cases.⁷⁹ The fact that the identity of publishers of defamatory statement on the internet is mostly hidden

⁷⁵ *SMC Pneumatics v Jogesh Kwatra*, [Suit No. 1279/2001] District of Delhi

⁷⁶ [1996] 1 ALT Cri, 231

⁷⁷ Sarudzai Chitsa, *Name Calling on the Internet: The Problem Faced by Victims of Defamatory Content in Cyberspace*, available at < <http://www.connell.edu.ng>>, retrieved on 19/06/2022

⁷⁸ *ibid*

⁷⁹ Roger S Magrusun, *Freedom of Speech in Australian Defamation Law: Ridicule, Satire and other Challenges in: Torts Law Journal* (2009) (9), 274

has always been the stumbling block which shield victims of internet defamation from obtaining justice or redress.⁸⁰ Where the identity of the defendant in an internet defamatory case happens to be anonymous, especially as it happens in the case of postings on the social media, only the Interactive (ISPs) could unveil such identity. Unfortunately, however, the laws in jurisdictions such the United States of America and the United Kingdom, have provided immunity from prosecution to the ISPs. In the United States of America for example, Section 230 of the Communications Decency Act 1996 provides immunity to operators of websites for third party content. By that provision “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”.⁸¹ The provision also provides that :no provider of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable, whether or not such material is constitutionally protected.⁸²

As clearly seen from the wordings and perhaps the spirit of the above provision of the US code, the protection given to ISPs is all-encompassing. By this, no one has the right to challenge the action of any ISP which allows a user to post any defamatory material on the internet whether or not, his identity is known. In the event the poster is anonymous, the ISP is not under any duty to reveal such identity and no court has the power to compel it to do so, or to even grant an injunction to take down such material.⁸³ In acceding to the request of a victim of internet defamation to compel the ISP to take down such material, the court in most cases imposes certain high standard for such request to be granted.⁸⁴This could involve asking the victim to produce information to identify the defendant who is responsible for posting the defamatory material.⁸⁵ This trend when looked critically, could spell injustice to the victim where the defamatory material was posted by

⁸⁰ Sarudzai Charista, (n. 74)

⁸¹ Section 320 (c) The Communications Decency Act, US Code, 1996

⁸² (n. 78)

⁸³ Derek D. Lick, *Protecting Client's Business Reputation: The Challenges of Litigating Anonymous Internet Defamation*, available at < <http://www.sulloway.com/news>>, retrieved on 29/06/2022

⁸⁴ Ibid

⁸⁵ (n. 80)



an anonymous person or who lives outside the jurisdiction of the court. In the United Kingdom, there is similar immunity given to the ISPs under the 1996 Defamation Act⁸⁶. By the provision of the Act, defamatory publication made online by a third party will make an ISP liable unless where it can show that it was neither the author nor editor; that it took reasonable care in relation to the publication and that it did not know and had no reason to believe that what it did caused or contributed to the publication of the defamatory statement.⁸⁷

The major distinction between the UK and US legislations is that while in the US the immunity is absolute, in the UK it is qualified. It is qualified in the sense that the ISP is liable for a defamatory statement made by a third party unless it can show to the court that it was not responsible for the publication and did not know, contribute or had reason to know of the existence of the defamatory material, on the condition that such lack of knowledge was not due to negligence. The approach adopted by the UK is synonymous to the approach of the common law with respect to innocent dissemination of defamatory material by for example, newspaper vendors and libraries.

China on its part has an approach that is similar to that of the United Kingdom with respect to defamation on the internet. In China, ISPs are required to, by the Ministry of Public Security, look for defamatory content posted on their electronic boards and if such publication is found, it should be removed immediately, failing which it will be liable for any damage caused by that publication.⁸⁸ The same penalty applies even where the ISP simply quoted the defamatory statement to another.⁸⁹ To avoid liability where a defamatory material is published by a third party, just like in the UK, the ISP must also show that it had no reason to know that the content was defamatory.⁹⁰ As against the United States of American and the United Kingdom, China's approach is more or less geared towards compelling ISPs to be extra careful in not allowing their platforms to be used as a carrier for publishing defamatory statement by monitoring all postings made by third parties.

⁸⁶ Section 1(1) Defamation Act (UK), 1996

⁸⁷ *ibid*

⁸⁸ *Max Station v Wang Hong Life Times & PC World*, Case No. 1438 (Beijing, No. 1, Intern People's Court, 2000)

⁸⁹ *ibid*

⁹⁰ David Wright, *China Extends Protections for Privacy and Reputation to the Internet, Heightens the Risk of Lawsuits Against Online Publishers*, available at <<http://www.lexicology.com>>, accessed on 05/07/2022



In Nigeria, issues of online defamation are still at the evolving stage as there is at the moment no clear legal framework that regulates cyber defamation. In fact, all defamation cases in Nigeria today are regulated and settled through the traditional system. Where however, an anonymous person defames another through an online publication, especially on the social media, addressing such issue by the court may be somehow difficult, unless it is a newspaper that is published online in Nigeria, whose editors and reporters are known and can be tracked and apprehended if there is the need to do so. This is unlike in the United States of America where the law despite its shortcomings has advanced to certain level of precision. In this regard, the Supreme Court of the State of Hampshire had long resolved the issue of cyber defamation committed by an anonymous person, in the case of *Mortgage Specialists Inc. v Implode-Explode Heavy Industries Inc.*⁹¹ One of issues settled in the above case is that a defamed claimant cannot ask the court to force a defamatory statement made against him removed but may subpoena the person who posted under a pseudonym. This is on the condition that the author's decision to remain anonymous is also protected by the court through the First Amendment, just as the speech is protected.⁹² It was also held that courts must balance the right to anonymity against the right of a party to protect its reputation by making defamation claim against anonymous internet poster.

From the above it is clear that the court accords priority to protecting individual's right to freedom of speech than protecting the reputation of another individual. This can be seen in the fact that, the law has put an onerous task on a claimant who is seeking protection and compensation for dragging his name and reputation in the mud by an online poster. Also, the court just as it is under the Defamation Law in the US, is still shielding ISPs from liability or to some extent, litigation. The best a claimant can do where he is defamed by another on the internet is to subpoena that person and drag him to court. Where the defendant is anonymous, it is the responsibility of the person defamed to identify him not that of the Interactive Computer Service Provider.

Identifying the poster of defamatory material on the name and address is the first step towards putting up a successful claim against a defendant, what then will happen where the identity is not known, especially in cases where defamation is committed on the social media? The answer to this

⁹¹ 999, A, 2d [NH 2010]

⁹² *ibid*



question might not be as easy as it looks, in Nigerian context. The only way this could be possible is for the court to order the ISP to use its technical expertise to track the identity of the defamer and bring him before the court. But just as it is the case in the United States of America, for the court to give such order, the claimant must provide sufficient evidence to support each claim of his cause of action on a *prima facie* basis.⁹³ Therefore, if identifying the identity of an online poster is met with some challenges that require certain procedure to reveal, there is more to be expected Nigeria, where sometimes people could hide under the absence of a comprehensive legal framework on internet defamation to avoid liability.

Conclusion and Recommendations

From the foregoing it has been shown that defamation on the internet has brought new challenges on how to approach the tort of defamation. These challenges are more pronounced in Nigeria where the concept of internet defamation is still new. The paper finds that there are four major challenges to the successful claim for defamation committed on the internet. These include the absence of a comprehensive legal framework on internet defamation, choice of law dilemma, jurisdictional barrier and the problem of identifying unknown persons who hide under pseudonyms to defame others on the social media and blogs. In view of these, the paper makes the following recommendations:

1. Nigeria's legislative body (National Assembly), develop a comprehensive legal framework to regulate internet defamation as it is the case in other jurisdictions.
2. The judiciary should also bring out a comprehensive approach on how to address the choice of law challenge in internet defamation. On this, the court must be objective in its approach putting into consideration, place of publication (as it applies in cyber defamation), place where the harm is done and habitual residence of the claimant.
3. On the issue of jurisdiction of court in internet defamation, the provisions in the various High Court Rules may not be sufficient to address such a novel challenge. It is therefore, recommended that the court in Nigeria should borrow leaf from countries to address the

⁹³ Derek D. Lick, (n 51, p. 12)



matter. But the court in making such a step should not give room for forum shopping as it is the case in India.

4. On revealing the identity of persons who hide under pseudonym to defame others, there should be a clear provision in our laws which will compel ISPs to track internet defamers in order to reveal their identity and bring them to justice. This is irrespective of their right to freedom of expression guaranteed under the Constitution which they ought to have exercised within the ambit of the law in the first place.