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Social Media Tort Claims in Divorce: Targeted Harassment, or Just Venting?

By Bari Weinberger

In 2020 it may feel like Facebook and Twitter have been around forever. However, when looked at through a legal lens, it's clear that statutory laws and case law around social media—and the related issues of social media harassment and defamation—are still very much new and evolving.

This may be no more true than in divorce, where social media often serves as a tool for revenge-seeking exes. The good news: When a vindictive spouse's problematic actions on social media rise to the level of criminal behavior, New Jersey has some of the strictest laws on the books. The not-so good news: Civil remedies related to bad

behavior on social media, including proving damages in related marital tort claims, continue to tread in uncertain waters.

Identifying Social Media Related Harassment

To understand the availability of different laws, and continued legal challenges, let's consider a hypothetical divorce scenario: After their separation, an angered husband begins posting expletive-filled rants on Facebook detailing his wife's drug use and infidelity, as well as claiming the wife is an unfit parent. The husband, in his rage, goes so far as to post nude photos of the wife, photoshopped

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with the word “slut.” The husband tags the wife and the wife’s family members for maximum visibility. The husband also sends a non-stop barrage of private messages to the wife ominously stating that he is watching her every movement.

Legally, what can happen here? In New Jersey, actions such as creating offensive posts or tweets, sending disturbing messages, or posting private content online may not be brushed away as just “venting.” In the scenario above, it is possible that four criminal statutes could be implicated: harassment, cyber-harassment, stalking, and criminal invasion of privacy.

Harassment (N.J.S.A. §2C:33-4) is an encompassing statute that can refer to any communication made “anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm.” Cyber harassment (N.J.S.A. §2C:33-4.1) specifically takes place when one person communicates online via electronic device or through a social networking site with the purpose to harass another person through posts, comments, requests, etc., that propose “any lewd, indecent, or obscene material to or about a person with the intent to emotionally harm a reasonable person or place a reasonable person in fear of physical or emotional harm.”

Stalking (N.J.S.A. §2C:12-10), a close offshoot of harassment, is generally defined as following, monitoring, observing, surveilling, threatening, or communicating to or about, another person.

Non-consensual publication of nude photographs (aka “revenge porn”) can constitute cyber-harassment or criminal invasion of privacy (N.J.S.A. § 2C:14-9). An invasion of privacy has occurred when the party, knowing that he is not licensed or privileged to do so, “discloses any photograph, film, videotape, recording or any other reproduction of the image of another person

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whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure.”

Criminal sanctions for these offenses range from fines to jail time. The courts take online harassment matters seriously. For example, in *State v. JPC* (NJ App. Div. 2018; unpublished), a defendant and a victim consensually recorded themselves being sexually intimate while in a romantic relationship. After their relationship ended, the defendant posted some of these revealing images without the victim’s knowledge or permission on a Facebook profile the defendant created, as well as several pornographic websites. A detective backed up testimony by the victim that the defendant had harassed her on two or more occasions. The defendant also violated a restraining order. He was charged with cyber harassment, stalking, and invasion of privacy. His application to the New Jersey Pretrial Intervention Program (PTI), which provides certain offenders with opportunities for alternatives to traditional criminal prosecution, was denied due to the severity of his actions. The appellate court affirmed this denial, as well as the denial of a motion to dismiss the invasion of privacy charge.

It bears noting that the majority of cases based on harassment and

cyber-harassment statutes are domestic violence cases in which the plaintiff is seeking a restraining order as the primary remedy.

Civil Tort Claims and the Complexities of Proving Damages

The criminal statutes discussed above do not specifically provide for civil relief. So when seeking damages for a marital tort, for example, a number of civil claims can be considered. In the hypothetical divorce scenario described previously, possible civil claims could include: intentional infliction of emotional distress; defamation (libel); a privacy claim known as “false light”; and invasion of privacy with photographs, films or videotapes.

In helping your clients decide if damages giving rise to tort claims in divorce are present, be aware that most of these civil claims have statutes of limitation ranging from one or two years, depending on the specifics of the acts.

Also be aware that meeting the threshold required for showing damages can be difficult, especially when claiming intentional infliction of emotional distress. A guiding case in this area is *Juzwiak v. Doe* (NJ App. Div. 2010) 2 A.3d 428, in which a teacher sued an internet provider seeking disclosure of the identity of an anonymous sender of

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group emails which referred to the teacher's "evil ways" and urged people not to support his continued employment.

Juzwiak claimed that the emails severely disrupted his life, causing deep anger, depression and insomnia, and impairing his ability to concentrate and function effectively. He further claimed physical manifestations of the emotional stress, such as back problems and weight loss. He stated that his symptoms persisted in spite of several medications, and he had thoughts of hurting himself.

In considering the matter, the court set out four required elements of a claim for intentional infliction of emotional distress, as required by the 1988 New Jersey Supreme Court decision in *Buckley v. Trenton Savings Fund Society*:

1. The plaintiff must prove that the defendant acted either intentionally or recklessly. Proving intentionality requires showing both an intention to do the act and an intention to produce emotional distress. Recklessness requires deliberate disregard of a high degree of probability that emotional distress will result from the acts.

2. The defendant's conduct must be so extreme and outrageous as to go beyond all possible bounds of decency. This requires conduct that would be considered atrocious and utterly intolerable in a civilized community.

3. The defendant's intentional or reckless conduct must have been the proximate cause of the plaintiff's emotional distress.

4. The distress must be so severe that no reasonable person could be expected to endure it.

The court observed that the author of the emails was clearly angry with the plaintiff and that the plaintiff was upset by the comments, but these factors were not enough to make the comments "extreme and outrageous" or "beyond all possible bounds of decency." The court also noted that the plaintiff did not submit any expert support for his claims of severe emotional distress.

Regarding the plaintiff's claim for "harassment," the court stated that it was not clear that a separate civil cause of action for damages for harassment existed, but that it was not necessary to answer this question directly because previous cases establish that a claim for harassment is not sustainable if a plaintiff fails to establish the prima facie elements of a claim for intentional infliction of emotional distress.

Civil claims for damages for defamation can face similar hurdles. Defamation (libel) is a written or published false assertion of fact to a third party or audience, which subsequently causes damage or injury to another party's reputation. Certain types of assertions are exempt from the usual requirement of showing special (monetary)

damages because they fall within one of four recognized categories of per se defamation, by imputing: (1) commission of a crime, (2) contraction of a loathsome disease, (3) occupational incompetence or misconduct, or (4) unchastity of a woman. (*Ward v. Zelikovsky*, (NJ S.Ct. 1994) 643 A.2d 972.) When a statement could be interpreted in either a defamatory or nondefamatory way, the question goes to the jury.

Would accusing someone of drug use and infidelity or calling them a slut on social media be defamatory? This would depend on a number of factors.

A guiding decision on defamation was handed down long before the days of social media, but is still relevant. In *Romaine v. Kallinger* (NJ S.Ct. 1988) 537 A. 2d 284, Flora Schreiber (author of the renowned book *Sybil*) was sued by the sister of the murder victim described in another of Schreiber's works, *The Shoemaker*, on the grounds of defamation (libel) and a "false light" privacy violation, among other claims.

The plaintiff focused on a sentence in *The Shoemaker* that described how the victim came to be at the scene of the crime. The controversial statement mentions seeking news from a friend "about a junkie they both knew who was doing time in prison." The plaintiff felt the statement falsely attributed that her sister was a drug addict, thus defaming her, and in essence, painting her in a "false light."

In its decision, the trial court found, and the Appellate Division agreed, that only the most contorted reading of the language could lead to the conclusion that it accused the plaintiff's sister of illegal drug use or criminal associations; at most it could be read to imply that plaintiff knew a junkie, who was perhaps a criminal, which is not defamatory. The court further found that the language, when read in context, actually described the plaintiff as a compassionate person. There was therefore no defamation, nor false light finding.

All the civil claims discussed have high thresholds for proving damages, with one notable exception. Invasion of privacy with photographs, films or videotapes (N.J.S.A. §2A:58D-1) specifies that remedies for damages can include actual damages, but not less than liquidated damages computed at the rate of \$1,000 for each violation of this act, among other guidance.

What's Next?

Given how entrenched social media has become in our culture, divorce attorneys may want to give more consideration to establishing social media non-disparagement agreements between divorcing parties.

As the saying goes, "an ounce of prevention is worth a pound of cure." At minimum, these agreements could provide one way to make angry and upset exes "count to 10" before hitting post. ■