Boston Bar Journal
A publication of the Boston Bar Association
September/October 2005

By Dave Kluft

By Word or Deed

The SJC Recognizes Defamation by Physical Acts

Dave Kluft is an associate in the Litigation Department at Foley Hoag LLP. He is a former SJC law clerk and graduate of Boston University School of Law.

Defamation law has a bad reputation, probably well-deserved, for tenacious adherence to ancient rules which frequently reflect nothing more than "centuries of haphazard, Byzantine and often baffling evolution developed according to no particular aim or plan."[1] The historical categories of libel and slander, that is, defamation by written and spoken words, typify such evolution. When the political crime of libel and the ecclesiastically-based offense of slander were joined under the jurisdiction of the common law courts, they came to function not only as two definitions of defamation, but also as strict boundaries limiting the types of human activity that can be, as a matter of law, defamatory. In other words, for centuries, if it wasn't spoken or written, it wasn't actionable. Although this limitation derives from historical accident, in many states it is still the law.

Myriad wordless injuries to reputation, including reputational harm caused by physical actions, have by and large fallen through the cracks of defamation law. In 1729, Jonathan Swift implicitly identified this lacuna when he wrote:

> "Nor do they trust their tongue alone, But speak a language of their own;
>
> Can read a nod, a shrug, a look, Far better than a printed book;
>
> Convey a libel in a frown, And wink a reputation down."

In the modern context, the regular interaction of individuals with large institutions, particularly their employers, occurs not only through written and spoken words, but also through wordless physical activity on factory floors and in mazes of cubicles. Can and should such conduct, if it harms another person's reputation, be the subject of a defamation suit? In a recent opinion addressing workplace defamation, the Massachusetts Supreme Judicial Court answered in the affirmative and took a step towards bridging this centuries-old gap left by libel and slander.

Phelan v. May Department Stores [2]

Michael Phelan worked in the accounting department of May Department Stores (also known as "Filene's"). In 1998, Filene's discovered that someone was engaging in improper (but non-criminal) accounting practices. As part of an inquiry into this activity, several employees were interviewed. For whatever reason, the investigation came to focus on Phelan.

The morning after these interviews, Phelan was directed by his supervisors to wait in an office. The company ordered a security guard named Johnny Guante to keep Phelan in the office and away from the phone. Guante wore a Filene's-issued ensemble similar to that worn by other company security personnel: a blazer, tie, dark pants and black shoes. For the next seven hours, Guante guarded Phelan, shuffling him between various rooms, in view of co-workers with whom Phelan was prevented from speaking. Guante also accompanied Phelan to the cafeteria and into the restroom. Meanwhile, auditors interviewed Phelan's subordinates. At the end of the day,

© Boston Bar Journal 2005. Reprinted with permission. All rights reserved.

Phelan was escorted from the building. His employment was subsequently terminated. Throughout Phelan's ordeal, no defamatory words were spoken or written.

Phelan sued Filene's for defamation and false imprisonment. The record at trial reflected that not only was Phelan probably not responsible for the accounting irregularities, but that he had tried to warn his employers about them in the past. A jury found in his favor and awarded him $1,500 for false imprisonment and $75,000 for defamation. The Superior Court granted Filene's motion for judgment notwithstanding the verdict, on the grounds that Guante's conduct was not sufficient evidence of a defamatory publication. The Appeals Court reversed and reinstated the jury verdict. The court (Mills, J.) concluded that not only was physical conduct by itself capable of amounting to a defamatory statement, but also that the particular wordless conduct in this case was capable of conveying the false and defamatory meaning that Phelan had engaged in criminal wrongdoing.[3]

The Supreme Judicial Court (Spina, J.) agreed with the Appeals Court on the general principle, and pointed to the Restatement, which declares that a defamatory communication can be made by "written or spoken words or otherwise," and that communication simply means that "one person has brought an idea to the perception of another."[4] The court concluded that, even though no prior case law in Massachusetts had directly addressed the issue, physical action can constitute a "statement" for the purposes of Massachusetts defamation law.

However, the SJC did not agree with the rest of the Appeals Court's analysis. In Massachusetts, the court decides as a threshold issue whether a statement is reasonably capable of defamatory meaning; if the court can't decide because the statement is ambiguous, it goes to the jury. As to the "statements" made by Filene's about Phelan, the SJC concluded that the physical actions of following Phelan and transferring him from room to room were ambiguous, and very much unlike "chasing, grabbing, restraining, or searching such as would have conveyed a clear and commonly understood meaning." Because Guante's actions did not necessarily import defamatory meaning, and because Phelan failed to offer evidence to the jury that his co-workers interpreted Guante's conduct to be defamatory, a unanimous SJC reversed the Appeals Court and reinstated the JNOV.[5]

Two Types of Wordless Defamation

Phelan addresses two types of wordless defamation. The first is known as "transitory gesture" defamation. Here, the defendant uses hand gestures, facial expressions, and other body movements to substitute for words; for example, by pointing to the plaintiff in response to the question, "Who stole the money?" Although some courts still reject transitory gesture defamation, today it is widely accepted. The Pennsylvania Supreme Court once wryly observed that failure to recognize the doctrine would render users of sign language immune to liability for slander.[6] Massachusetts has recognized transitory gesture defamation at least since 1853. In *Leonard v. Allen*,[7] the defendant, through gestures, vocal intonations and facial expressions indicated to third parties that the plaintiff had committed arson. The SJC found it uncontroversial that a defamatory statement could be made by "gestures and signs" alone. Although the facts of *Phelan* did not exactly fit this mold, both the Appeals Court and SJC cited *Leonard* with approval, thus rejuvenating transitory gesture defamation in Massachusetts.

A second form of wordless defamation addressed by *Phelan* is "defamation by conduct," sometimes called "defamation by act." Unlike transitory gestures, these are physical actions of the defendant that are seen by third parties and, while not intended to substitute for words, nonetheless convey a defamatory message to anyone watching. Perhaps the first American recognition of this doctrine was the 1913 Wisconsin case of *Schultz v. Frankfort Marine, Accident & Plate Glass Insurance Co.*,[8] in which the defendant insurance company engaged investigators to "shadow" the plaintiff, and their presence soon became common knowledge in

© Boston Bar Journal 2005. Reprinted with permission. All rights reserved.

the community. The court reasoned that a cartoon showing the plaintiff being followed, and implying that he had done something criminal, would have been libelous; therefore, it made sense that the same conduct, if it occurs and is witnessed in real life, should also be recognized as libel. While a few jurisdictions have explicitly rejected defamation by conduct, a growing number of states have followed Wisconsin's lead in cases involving the escorting, searching or restraining of employees and suspected shoplifters. Although *Phelan* was a matter of first impression for Massachusetts state courts,[9] the U.S. District Court in Massachusetts had already touched upon the doctrine. In *Simas v. First Citizens' Federal Credit Union,*[10] the court concluded that where a defendant employer suddenly forced an employee to pack up his belongings and escorted him from the premises in view of co-workers, these actions, "separate from any written or spoken statements," were sufficient grounds for a defamation claim to be sent to a jury, at least where the defendant had not previously handled employee terminations in such a manner.

The Meaning of Phelan

Phelan represents a striking expansion of the range of human activity for which defamation plaintiffs can recover in Massachusetts. The court formally accepted, and expanded upon, defamation by conduct. The notion that a physical action can be defamatory is not new. But the court also itemized "chasing, grabbing, restraining, or searching" as actions that are "obvious" and commonly understood to impute criminality, a list which other plaintiffs will no doubt attempt to expand over time.

By concluding that the actions of Filene's towards the plaintiff were not equivalent to or among those itemized, the court may have been indicating that it will construe physical actions narrowly. However, after *Phelan,* employers and others should know that how they act can get them in to as much trouble as what they say. In addition, if the actions in question are "commonly understood" as unambiguously defamatory, the plaintiff's burden will be simpler: the inferential step from a physical action to a defamatory statement will not require the interpretive testimony of third parties. As to those actions that fall outside the SJC's list, the next plaintiff in Phelan's shoes must be prepared to present evidence that third persons witnessed the physical conduct of the defendant *and* understood that conduct to be defamatory. *Simas*, which was cited with approval by *Phelan*, indicates that a key battle ground will be consistency. In *Simas,* the court noted that even if the escort itself was not unambiguously defamatory, there was testimony by witnesses who interpreted the employer's actions to impute criminality because such escorts were "unprecedented." This suggests that the meaning of a physical act can be controlled by, and ought to be interpreted with reference to, the history of physical acts that preceded it.

One hopes that security-conscious employers will not feel the need to escort every terminated employee under armed guard in the name of consistency. Reasonable judgments by employers should still merit the protection of the common interest privilege, known in the employment context as the employer's conditional privilege. In addition, another privilege may come into play. The Restatement notes that a person may be privileged to utter a defamatory statement if she reasonably believes it is necessary to protect a range of legitimate interests, including bodily security. This privilege is rarely invoked,[11] but where an employer, shopkeeper, or anyone else, in good faith suspects that there is a need to escort, or to "chase, grab, restrain or search" someone in order to protect others, it makes sense that a defamation claim based on such physical activity should have to overcome a reciprocal privilege based on physical safety.

The Future of Phelan

As the SJC noted, the Restatement postulates that a defamatory communication can consist of virtually anything by which "one person has brought an idea to the perception of another." Even though *Phelan* addressed only physical

© Boston Bar Journal 2005. Reprinted with permission. All rights reserved.

activity witnessed by third parties, this statement is broad enough to encompass activity beyond immediate physical acts. All wordless defamation requires some inferential step; e.g. we must infer that grabbing or chasing signifies "thief." But what if we add another layer of inference? For example, how would the court treat human manipulations of technological and administrative machinery, where a third party witnesses the result of physical activity, but not that activity itself?

In *Wallace v. Skadden, Arps LLP*, [12] an associate at a large law firm arrived in the crowded lobby of her building one morning to find that she could not get inside because her electronic access key-card had been deactivated. This was not a technical glitch; the plaintiff was, in fact, being terminated. The firm had previously only deactivated the key-cards of employees who had committed theft, insider trading and child molestation. The D.C. Court of Appeals opined that such circumstances could give rise to a defamation by conduct claim.

Rather than directly witnessing the defamatory act as in *Phelan*, a co-worker of Wallace who witnessed her inability to enter the building first would have to infer the physical action of deactivating a key-card, and then infer defamatory meaning from that action. The difference between *Wallace* and *Phelan* is really one of mere circumstance. If the associate had been denied access to her building by a person instead of an electronic system, immediate physical actions such as those in *Phelan* would have been at issue. The SJC, confronted with only the immediate physical activity of Guante, has left these issues of attenuation for another day.[13]

For now, *Phelan* clearly adds two items to the checklist of practitioners confronted with defamation by physical conduct. First, is the need for third party witness testimony obviated by the "unambiguous" nature of the conduct in question either because that conduct was on the SJC's "list," or because there is a good argument that it should have been? Second, if the conduct was not unambiguous in its own right, was it understood by third party witnesses to convey a defamatory statement? For ambiguous physical actions, the witnesses' understanding of the context, including the relationship of the parties and the historical consistency of the physical actions by the defendant, will be important areas of inquiry. ■

Endnotes

[1] W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 111 (5th ed. 1984).

[2] 443 Mass. 52 (2004). The Appeals Court decision is published at 60 Mass. App. Ct. 843 (2004).

[3] JNOV was also granted, and then reversed, on the grounds that the conduct was privileged. The privilege issue was not reached by the Supreme Judicial Court. The defendant did not appeal the false imprisonment verdict.

[4] Restatement (Second) of Torts §§ 563 comment a & 559 comment a (1977).

[5] The court did not ultimately address whether Guante's lack of a badge, gun or formal uniform was important to its decision. See *Jones v. Johnson & Johnson*, 1997 WL 549995, 1997 U.S. Dist. LEXIS 13050 (E.D. Pa. 1997) (absence of uniform rendered guard's conduct non-defamatory).

[6] *Bennet v. Norban*, 396 Pa. 94, 97(1959)

[7] 65 Mass. 241 (1853).

[8] 141 Wis. 537 (1913).

[9] Arguably, in *Carter v. Papineau*, 222 Mass. 464 (1916), the SJC rejected defamation by conduct when it concluded that a priest's act of passing over a parishioner during Holy Communion was not sufficient to constitute a defamatory statement, even though such conduct signified that she was an "open and notorious evil-liver."

[10] 63 F. Supp. 2d 110, 116 (D. Mass. 1999) (applying Massachusetts law).

[11] A rare example is *Johnson v. Queenan*, 12 Mass. L. Rep. 461 (Mass. Super. Ct. 2000), where the

© Boston Bar Journal 2005. Reprinted with permission. All rights reserved.

Superior Court found that a defamation defendant's report of the details of an alleged sexual assault to friends was privileged because it was reasonably calculated to protect her own physical well-being.

[12] 715 A.2d 873 (D.C. App. 1998).

[13] Compare *Jorgensen v. Massachusetts Port Authority*, 905 F. 2d 515 (1st Cir. 1990) (where plaintiff pilots sought damages for harm to their professional reputations by defendant's negligent maintenance of an airport runway which resulted in a deadly crash, opining that "[b]ecause the defendant's conduct was one step removed from the alleged injury to reputation, there arguably was no communication," and therefore no defamation), with, Krolikowski v. Univ. of Mass. Mem'l Med. Ctr., 2002 WL 1000192, 2002 U.S. Dist. LEXIS 8984 (D. Mass. May 16, 2002) (denying summary judgment on a defamation claim based on the administrative act of refusing to lift a suspension from work).

© Boston Bar Journal 2005. Reprinted with permission. All rights reserved.