

Module 18: Transactional Torts

Fraud

The Elements:

1. Material misrepresentation by defendant
2. Scierer
 - (at least recklessness; it's a lie)
3. Intent to induce reliance
4. Causation
 - (victim must be deceived; actual reliance)
5. Justifiable reliance
6. Damages

Intentional Economic Interference

The Elements:

1. Valid contract or economic expectancy between plaintiff and third party (not defendant!)
2. Defendant's knowledge of contract or expectancy
3. Intent to interfere
4. Actually caused interference
5. Damages (to plaintiff, not third party)

NOTE: Wide ranging, nebulously defined "justifications" are the key defense.

Intentional Economic Interference

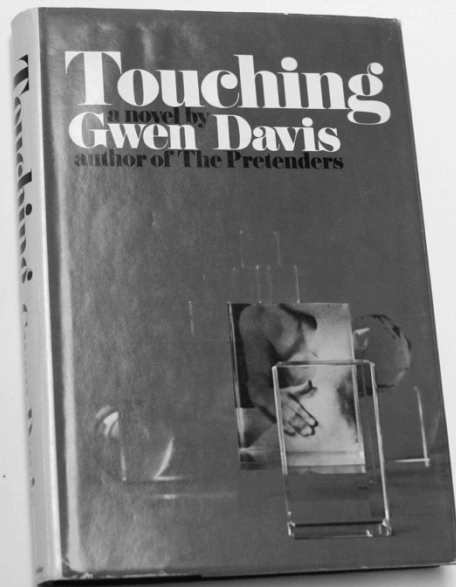
The Elements:

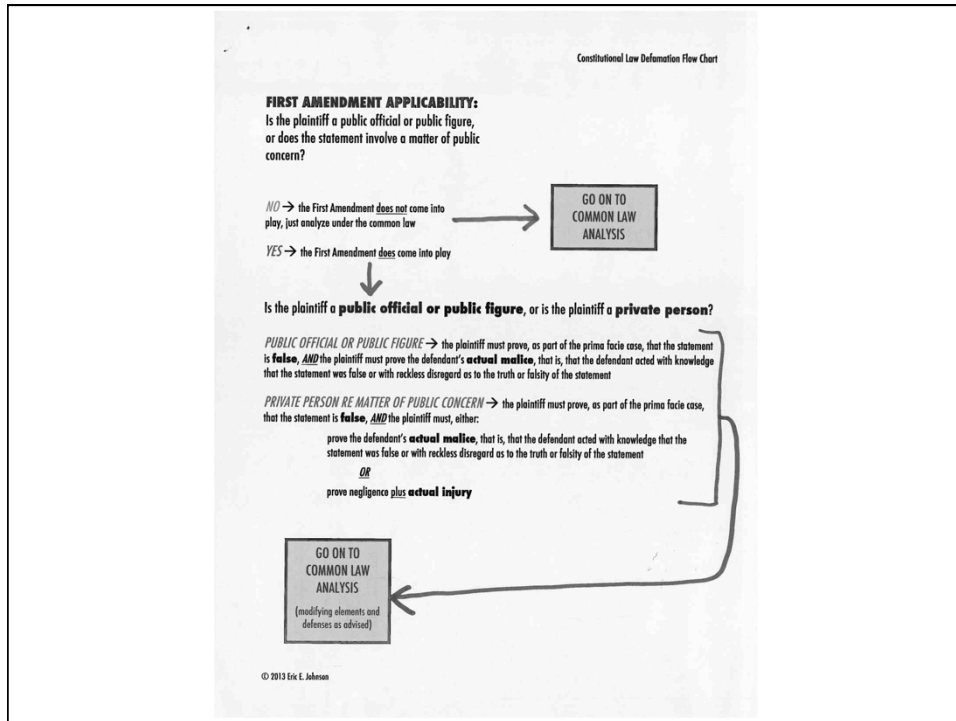
1. Valid contract or economic expectancy between plaintiff

Too gross!

NOTE: Wide ranging, nebulously defined "justifications" are the key defense.

Module 19: Defamation





Realotheticals...

Public official?

- U.S. naval officer, rank of captain, skipper of a destroyer escort
- **Yes.**
Arnhiter v. Random House (9th Cir. 1978)

Public official?

- Police officer with duties as a “normal street patrolman” of the lowest rank in a town of 30,000
- **Yes.**
Gray v. Udevitz (10th Cir. 1981)

Public official?

- Police informant who received no salary, but was reimbursed some expenses
- **No.**
Jenoff v. Hearst (4th Cir. 1981)
- But noting: “We do not rely solely on Jenoff’s lack of formal government position for our conclusion that he is not a public official. It is conceivable that an individual holding no formal public position, and standing in no employment or even contractual relationship with government, nevertheless may participate in some governmental enterprise to such an extent that the policies underlying *New York Times Co. v. Sullivan* ... would demand that he or she be classified a public official.”

Public official?

- Financial aid director at a public college
- **Yes.**
Van Dyke v. KUTV (Utah 1983)



Realotheticals...

Public figure?

- Bose - makers of the heavily advertised Bose Wave Radio
- **Yes.**
Bose v. Consumers Union (Consumer Reports magazine) (U.S. 1984)



Public figure?

- Telemarketer of subscriptions to newsletters employing 500 telephone representatives and reaching 15,000 customers per week
- **Yes - limited-purpose public figure.**
American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania (Pa. 2007)

Public figure?

- Government contractor that provided civilian interrogators for U.S. Army intelligence brigade
- **Yes.**
CACI Premier Technology, Inc. v. Rhodes (4th Cir. 2008)

Public figure?

- Larry Klayman, founder and former chair of Judicial Watch, a public-interest law firm; frequent guest on TV, cable, radio; and has "celebrity status within the non-profit legal/political community"
- **Yes - general-purpose public figure.**
Klayman v. Judicial Watch (D.D.C. 2009)

Public figure?

- Rev. Norwood Thompson, Jr., pastor of the First Zion Baptist Church in New Orleans, civically active, and the subject of some local media coverage regarding his activities
- **Yes - general-purpose public figure.**
Thompson v. Emmis Television Broadcasting (La. App. 2005)

Public figure?

- Local television news reporter who broadcast more than 1,000 stories, participated in at least four public charitable events and considered herself a local celebrity.
- **No.**
Wayment v. Clear Channel Broadcasting (Utah 2005)

Public figure?

- Owner of business that customized jetskis who posted to internet news group rec.sports.jetski and who was interviewed by *SPLASH* magazine
- **Yes - limited-purpose public figure.**
Hibdon v. Grabowski (Tenn. App. 2005)
- Court noted that rec.sport.jetski is an internet site that “is accessible worldwide.”

**IMPORTANT NOTE:
confusing ≠ confused**

**Defamatory
Meaning**

Defamatory meaning

- “A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”
Nuyen v. Slater (Mich. 1964)

Per se categories

- adverse to one’s profession or business
- loathsome disease
- guilt of crime involving moral turpitude
- lack of chastity

Beyond per-se categories

Held defamatory to represent

- Mental illness
- Substance abuse
- Criminal acts
- Sexual impropriety, extra-marital affairs
- Bankruptcy, financial irresponsibility
- Dishonesty

Beyond per-se categories

Courts “take the world as it is” when deciding what is defamatory, even if it might be considered wrong thinking

Status as a victim of rape

- Defamatory according to some courts

Gay, lesbian, or bisexual orientation

- Defamatory in most courts as of a few years ago, but the strong trend is toward finding this not reputation harming.

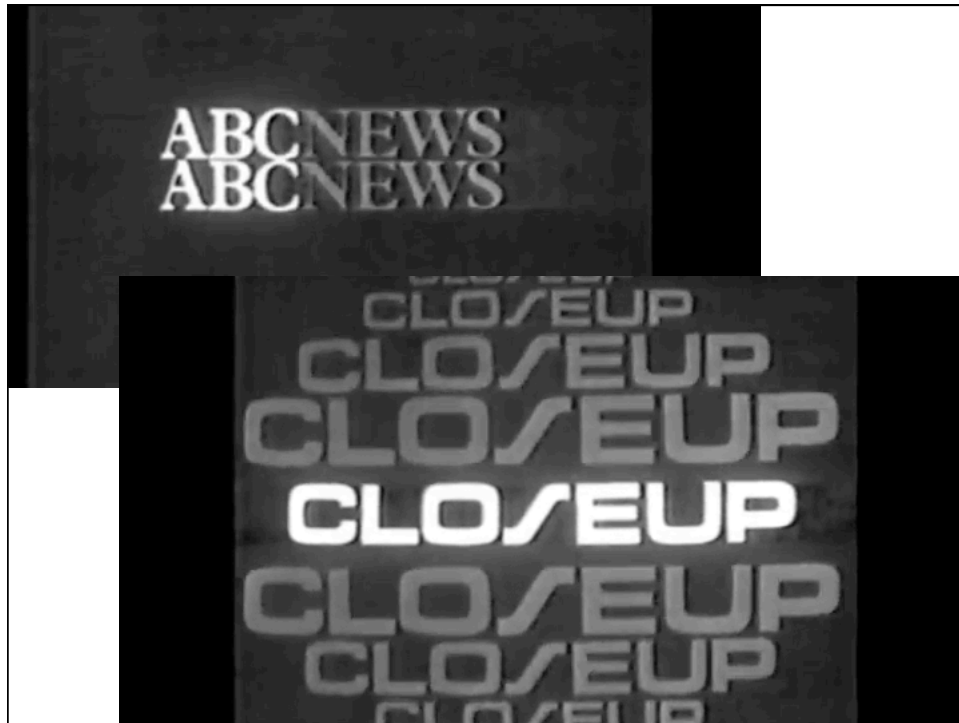
Beyond per-se categories

Being a Communist

- Generally not considered defamatory during World War II
- Generally considered defamatory during Cold War

Accident or implication

- Defamatory statements can be made by implication. An explicit statement is not necessary.
- Defamation can happen accidentally by juxtaposition - especially of words and images - creating perceived meaning unintended by the author.



Clark v. ABC

- “The Broadcast was reasonably capable of two meanings, one defamatory and the other non-defamatory. Consequently, it was for the jury to decide whether the Broadcast was understood as being defamatory.”

Of and Concerning the Plaintiff

Of and concerning the plaintiff

- Explicit identification suffices.
- Identification can also be implicit.
- Identification can even be accidental.

Realotheticals...

Fawcett Publications v. Morris

True magazine

Of and concerning the plaintiff?

- Magazine story implies that the Oklahoma University football team uses stimulant drugs. More than 60 people, including plaintiff are on the team.



Of and concerning the plaintiff?

- Magazine story implies that the Oklahoma University football team uses stimulant drugs. More than 60 people, including plaintiff are on the team.
- **Yes** - every member of the Sooners football team was defamed.
Fawcett Publications v. Morris (Okla. 1962)

Neiman-Marcus v. Lait

U.S.A. Confidential

Of and concerning the plaintiff?

Regarding the Neiman-Marcus store in Dallas:

"The sales girls are good, too – pretty, and often much cheaper – twenty bucks on the average."

382 female sales employees

→ No. Suit dismissed.

"Neiman's put in a men's store. ... [M]ost of the sales staff are fairies, too."

25 male sales employees

→ Yes. Suit permitted.

Neiman-Marcus v. Lait (S.D.N.Y.1952)

Stanton v. Metro Corp.

Boston Magazine

“The Mating Habits of the
Suburban Teenager”

- Boston Magazine published “The Mating Habits of the Suburban Teenager,” reporting an increase in teenage casual sex.

- An accompanying photo depicted five students at a high school dance.

- A disclaimer said: “The photos on these pages are from an award-winning five-year project on teen sexuality taken by photojournalist Dan Habib. The individuals pictured are unrelated to the people or events described in this story. The names of the teenagers interviewed for this story have been changed.”

“It's all pretty random. We just get together in small groups of kids and drink a lot and then hook up with whoever.” Christine, a curly-haired pixie in the under-90 weight range, chimes in. “Sometimes we'll hook up for two or three months at a time with one person. But no one really ever goes steady. Dating is just really uncommon. No one wants that kind of responsibility, you know? Most of us just go out and get drunk and whatever – hook up at someone's house.”
- *from the article*



Photo used with Boston Magazine story, by Dan Habib.

Of and concerning the plaintiff?

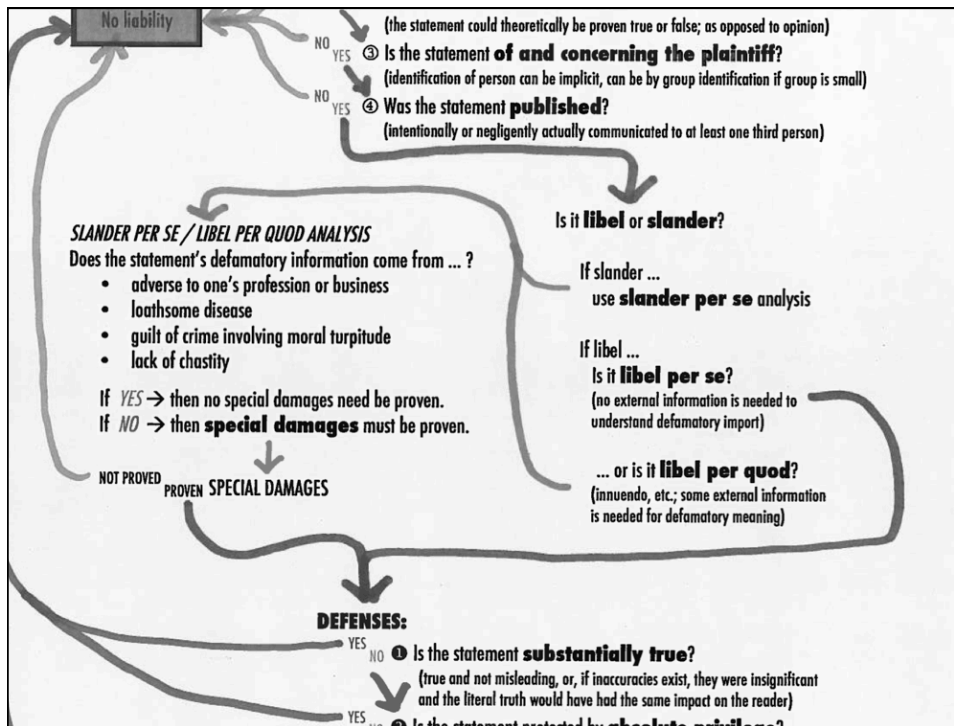


- ~~No. The disclaimer avoids identification. Suit dismissed.~~
Stanton v. Metro Corp. (D. Mass. 2005)
- **Reversed!**
- **Yes.** The reasonable reader might miss the second sentence of the disclaimer.
Stanton v. Metro Corp. (1st Cir. 2006)

Slander Per Se, Libel Per Quod, Libel Per Se

Libel vs. Slander

- It's all "defamation."
- Why does it matter whether it is "libel" or "slander"?
 - It's the first step in the analysis to see if there is an extra element of special damages that is required as part of the prima facie case.



Libel vs. Slander

- The distinction between libel and slander differs among jurisdictions.
- A generalization:
 - slander is an oral utterance
 - libel is a more permanent expression, such as a writing, illustration, or photo
- Another generalization:
 - sound → slander
 - sight → libel

Libel vs. Slander

Here's a close question
that actually matters:

- Radio or TV broadcasting -
is that libel or slander?

Jurisdictions vary.

Television and radio broadcasting

California → slander if by radio

New York → libel

Alabama → libel

Georgia → “defamacast”
(per se, so essentially libel)

Texas → libel if from a script,
slander if ad-libbed

Libel vs. Slander

Here's another close question that actually matters:

- Something posted on the internet - is that libel or slander?

Largely unanswered.

Online

California → libel

New Jersey → libel

Unresolved and debated in many places elsewhere

Libel vs. Slander

No distinction between the two in some states:

- Illinois
- Louisiana
- Virginia

The Per Se Categories

- Adverse to one's profession or business
- Loathsome disease (syphilis, leprosy)
- Guilt of crime involving moral turpitude
- Lack of chastity

Some examples of crimes that have been considered to be “of moral turpitude”

- murder
- voluntary manslaughter
- theft offenses
- forgery
- kidnapping
- mayhem
- rape
- fraud
- spousal abuse
- child abuse
- driving under the influence

Lack of Chastity

- By statute, includes male and female plaintiffs in Michigan

Falsity

Fact vs. opinion

- Only statements of purported fact can be defamatory.
- Opinion is protected.
- What counts as non-actionable opinion can be a close issue.

Fact vs. opinion

- In considering whether a statement is a factual/actionable one, courts will consider:
 - The context
 - Whether the statement is provably false
 - Precision and specificity of language
 - Words of apparency, cautionary language
 - The medium
 - The intended audience

Realotheticals...



Fact vs. Opinion

Snively v. Record Publishing Co. (Cal. 1921)

Political cartoon suggested the chief of the LAPD was secretly receiving money for illegal purposes.

Factual? No.

The cartoon was protected as fair comment. Political cartoons get “running room” from courts, as the it is intrinsic to the genre that facts are stretched and exaggerated for the purpose of advancing a pointed commentary.

Obsidian Finance Group v. Cox

(D. Or. 2011)



Fact vs. Opinion

Obsidian Finance Group v. Cox

(D. Or. 2011)

Cox's blogged allegations against Padrick included money laundering, perpetrating "fraud on the courts," and engaging in various "illegal activity."

Cox blogged that Padrick was a "Thief," a "CRIMINAL," and a "Corrupt Attorney."

Obsidian Finance Group v. Cox

(D. Or. 2011)

Defamatory?

No.

Moldea v. New York Times

(D.C. Cir. 1994)



Moldea v. New York Times
(D.C. Cir. 1994)

“But there is too much sloppy journalism to trust the bulk of this book's 512 pages – including its whopping 64 pages of notes.”

- *from the article*

Is this a factual assertion?

Yes.

**Defamation:
Privileges**

