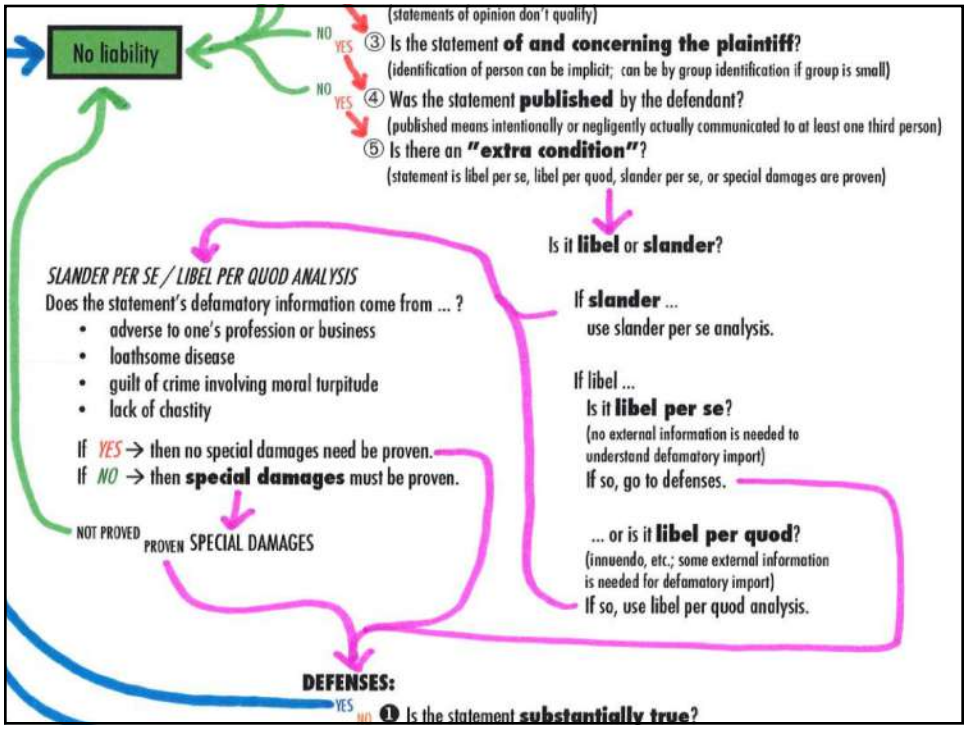
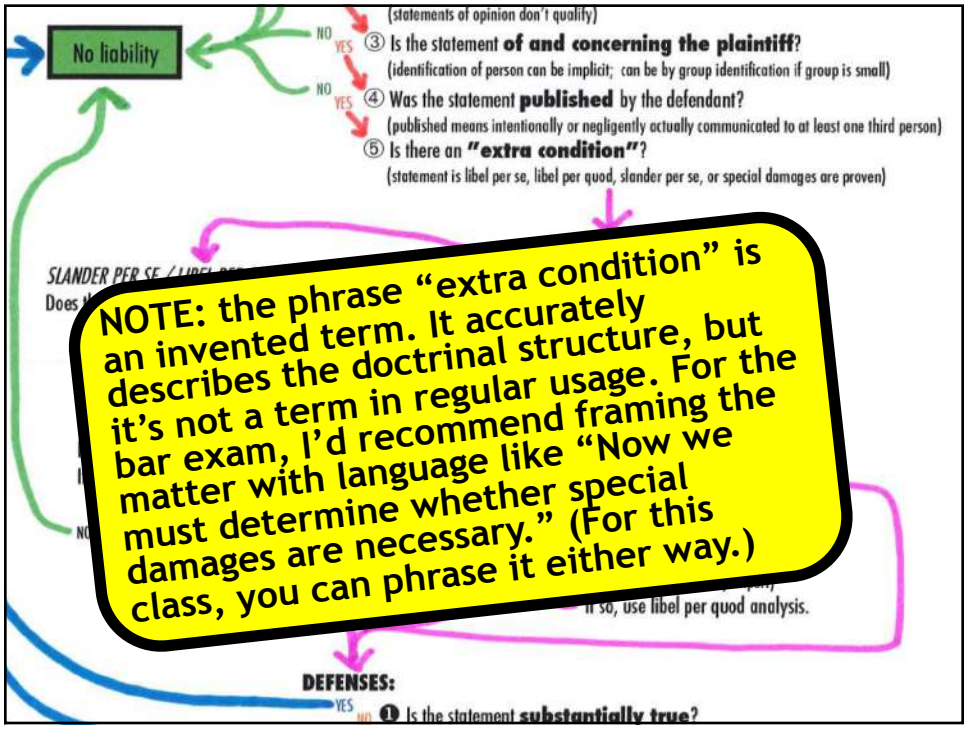
Defamation 6: Slander Per Se, Libel Per Quod, Libel Per Se (Are Special Damages Necessary?)

Torts
Eric E. Johnson
ericejohnson.com

NOTE:

This slideshow contains some statements about law in particular states. These are examples meant to illustrate trends or diversity among jurisdictions. But I don't constantly cite-check this slideshow, so it's possible state-specific statements are out of date because of overruling cases, superseding statutes, or repeal.


No liability
(statements of opinion don't qualify)
NO
YES ③ Is the statement **of and concerning the plaintiff**?
(identification of person can be implicit; can be by group identification if group is small)
NO
YES ④ Was the statement **published** by the defendant?
(published means intentionally or negligently actually communicated to at least one third person)
⑤ Is there an **"extra condition"**?
(statement is libel per se, libel per quod, slander per se, or special damages are proven)
Is it **libel** or **slander**?
SLANDER PER SE / LIBEL PER QUOD ANALYSIS
Does the statement's defamatory information come from ... ?
• adverse to one's profession or business
• loathsome disease
• guilt of crime involving moral turpitude
• lack of chastity
If *YES* → then no special damages need be proven.
If *NO* → then **special damages** must be proven.
NOT PROVED
PROVEN SPECIAL DAMAGES
If **slander** ...
use slander per se analysis.
If libel ...
Is it **libel per se**?
(no external information is needed to understand defamatory import)
If so, go to defenses.
... or is it **libel per quod**?
(innuendo, etc.; some external information is needed for defamatory import)
If so, use libel per quod analysis.
DEFENSES:
YES
NO ❶ Is the statement **substantially true**?


No liability
(statements of opinion don't qualify)
NO
YES ③ Is the statement **of and concerning the plaintiff**?
(identification of person can be implicit; can be by group identification if group is small)
NO
YES ④ Was the statement **published** by the defendant?
(published means intentionally or negligently actually communicated to at least one third person)
⑤ Is there an **"extra condition"**?
(statement is libel per se, libel per quod, slander per se, or special damages are proven)
NOTE: the phrase "extra condition" is an invented term. It accurately describes the doctrinal structure, but it's not a term in regular usage. For the bar exam, I'd recommend framing the matter with language like "Now we must determine whether special damages are necessary." (For this class, you can phrase it either way.)
If so, use libel per quod analysis.
DEFENSES:
YES
NO ❶ Is the statement **substantially true**?

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 a writing, illustration, or photo
- Another generalization:
  - sound ➔ slander
  - sight ➔ libel

Libel vs. Slander

Here's a good question:

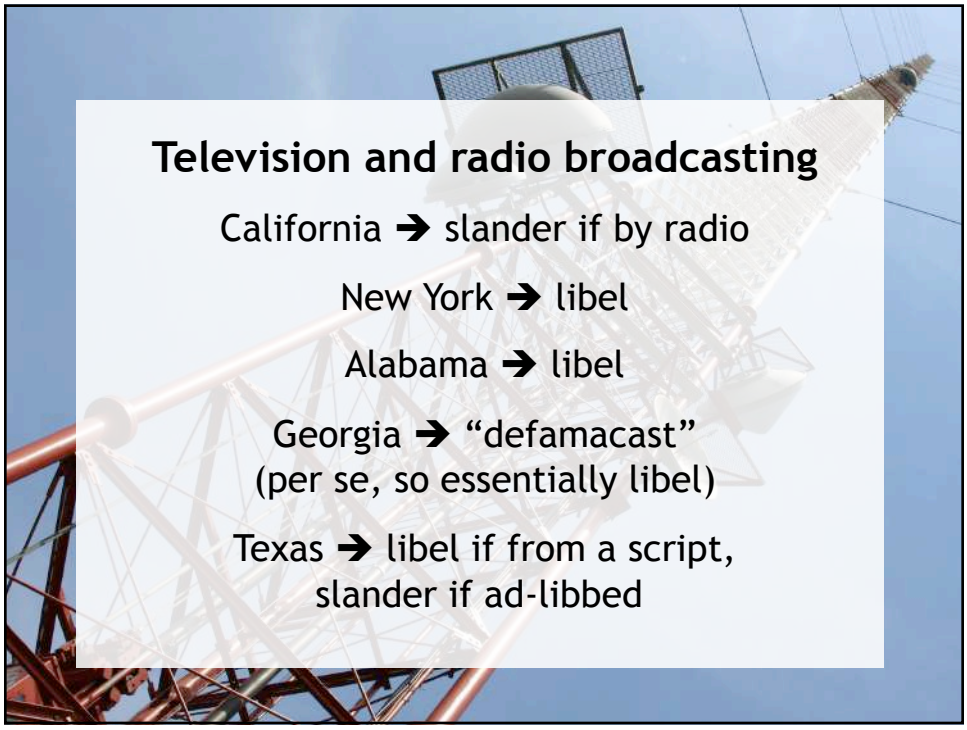
- A message written in sand on the beach – is that libel or slander?

Libel vs. Slander

Here's a close question that actually matters:

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

Jurisdictions vary.

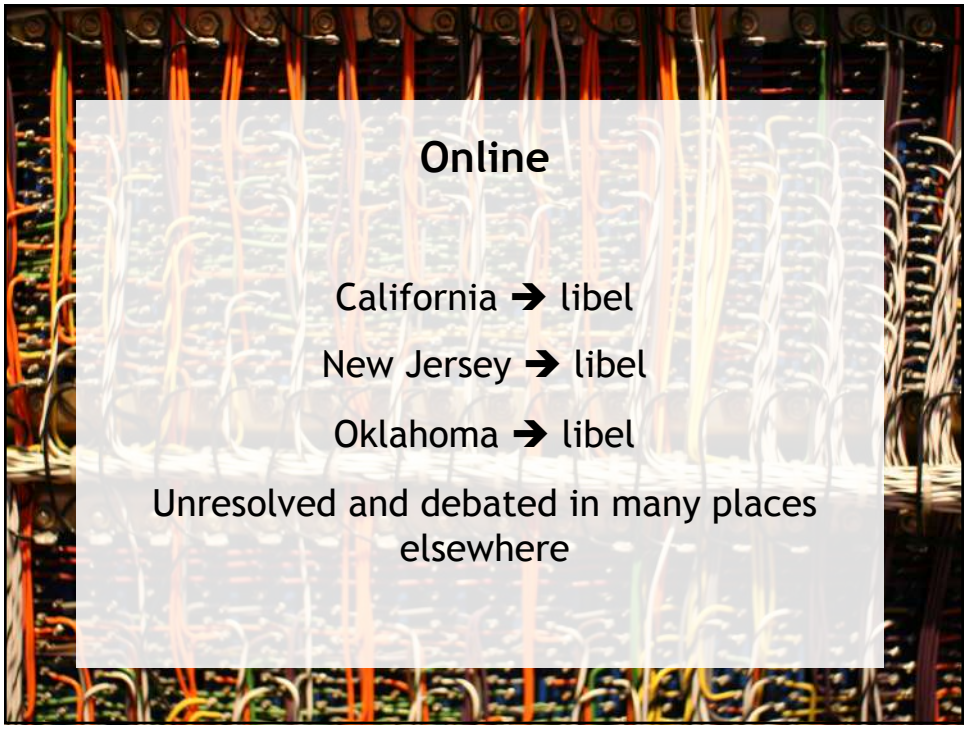


Libel vs. Slander

Here's another close question that actually matters:

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

Libel in some places; unanswered other places.



Libel vs. Slander

No distinction between the two in some states:

- Illinois
- Louisiana
- Virginia

Per se categories

Re-run

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

Re-run

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

Re-run

Lack of chastity

- Chastity is:
  - If unmarried, abstinence from sex
  - If married, abstinence from sex outside of the marriage
- Historically, this doctrine was explicitly gender-based, grounded in societal norms about separate roles of women and men, and thus applied only to female plaintiffs.
- Modern courts have tended to include male plaintiffs.

Let's do the Check-Your-Understanding Questions ...