

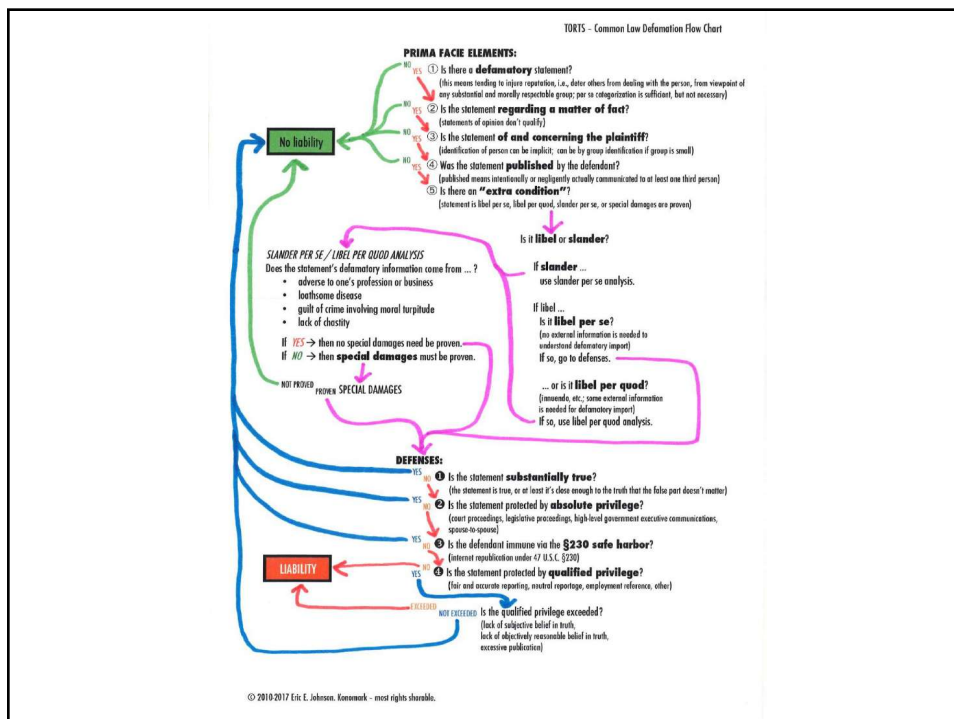


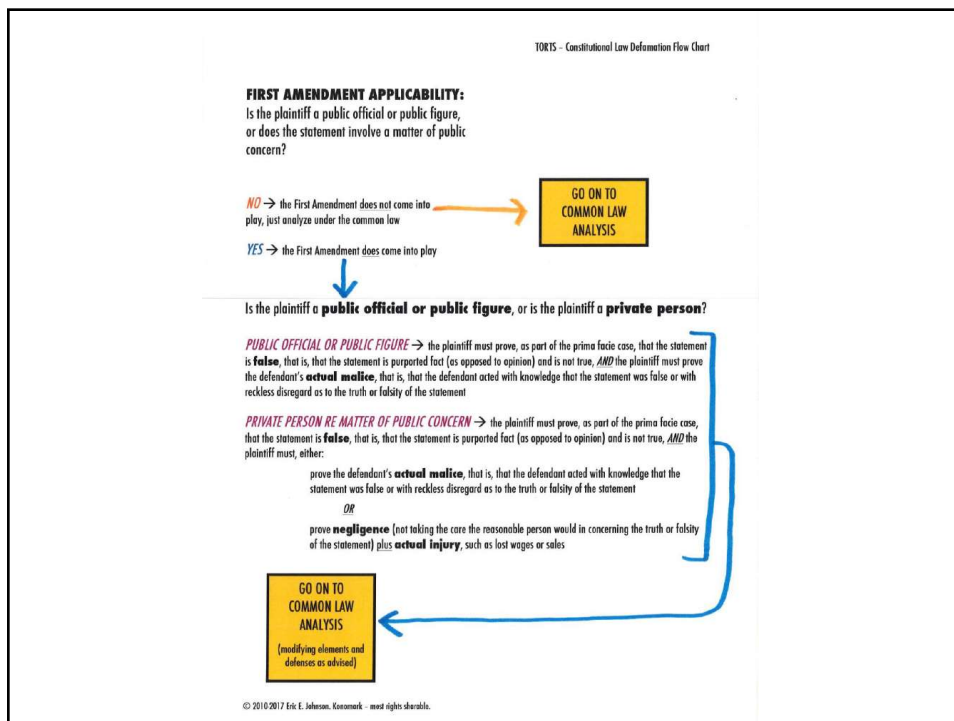
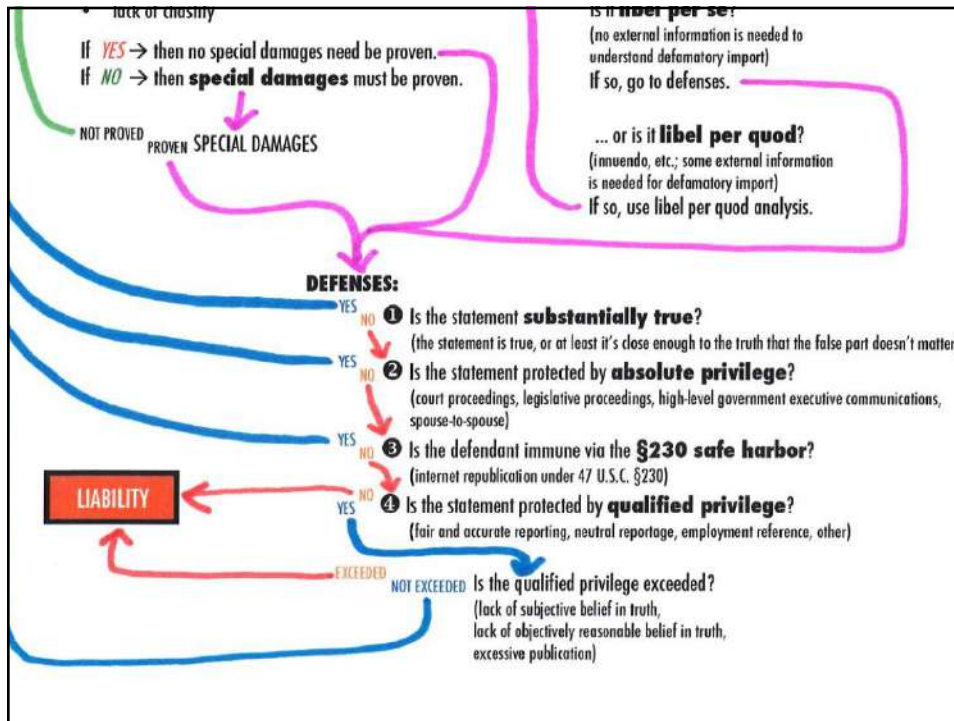
Defamation 6: Falsity and Substantial Truth

Torts
Eric E. Johnson
ericejohnson.com



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FIRST AMENDMENT APPLICABILITY:

Is the plaintiff a public official or public figure, or does the statement involve a matter of public concern?

NO → the First Amendment does not come into play, just analyze under the common law



GO ON TO
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ANALYSIS

YES → the First Amendment does come into play



Is the plaintiff a **public official or public figure**, or is the plaintiff a **private person**?

PUBLIC OFFICIAL OR PUBLIC FIGURE → the plaintiff must prove, as part of the prima facie case, that the statement is **false**, that is, that the statement is purported fact (as opposed to opinion) and is not true, **AND** the plaintiff must prove the defendant's **actual malice**, that is, that the defendant acted with knowledge that the statement was false or with reckless disregard as to the truth or falsity of the statement

PRIVATE PERSON RE MATTER OF PUBLIC CONCERN → the plaintiff must prove, as part of the prima facie case,

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PRIVATE PERSON RE MATTER OF PUBLIC CONCERN → the plaintiff must prove, as part of the prima facie case, that the statement is **false**, that is, that the statement is purported fact (as opposed to opinion) and is not true, **AND** the plaintiff must, either:

prove the defendant's **actual malice**, that is, that the defendant acted with knowledge that the statement was false or with reckless disregard as to the truth or falsity of the statement

OR

prove **negligence** (not taking the care the reasonable person would in concerning the truth or falsity of the statement) **plus actual injury**, such as lost wages or sales

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(modifying elements and
defenses as advised)



- In the present-day United States, there's no defamation liability for saying something that's true—even if it is reputation harming.
 - It doesn't even have to be perfectly, literally true. It just has to be substantially true.
- In every defamation case, either falsity is a prima facie element or substantial truth is a potential affirmative defense.
- But which is it? It depends.
 - Any given jurisdiction could, of course, make falsity a prima facie element.
 - But everywhere, the First Amendment requires falsity to be the plaintiff's burden in certain circumstances.

Element or defense—who has the burden of proof?

- **Falsity as prima facie element:**
 - If the plaintiff is a public official or public figure, or if the defamatory statement is regarding a matter of public concern, then the First Amendment says the plaintiff has the burden of proving the statement false.
 - I/o/w, falsity is a prima facie element.
- **Substantial truth as an affirmative defense:**
 - If the case isn't constitutionalized, then the general default common-law rule is that substantial truth is a defense.
 - I/o/w, defendant must prove substantial truth.

“substantial”

What’s not true but is “substantially true”?

- If the published statement carries the same sting as the exact truth, then, in general, it will be considered “substantially true.”
- Ex: “Priya stole a car on Tuesday” is substantially true if Priya stole the car on Monday.
- Ex: “Phineas robbed the First National Bank of Kanbraska” is substantially true if Phineas robbed the Kanbraska Farmer’s Bank & Trust.
 - (Although if that makes people think Phineas robbed two banks instead of one, then maybe Phineas will succeed in arguing that the sting is greater.)

Literal truths with embedded falsehoods

- A literally true statement that carries within it a falsehood can be actionable.
- I/o/w, wrapping a defamatory falsehood in a truth does not avoid liability.
- Ex: “Our newspaper was planning on printing a front-page story about how Paulo embezzled funds from his church, but at the last minute the editor pulled it.”
 - If Paulo didn’t embezzle, then this can be actionable, even if it is literally true that that the newspaper planned to do this.