



Defamation, Privacy Torts

Torts
Eric E. Johnson
ericejohnson.com



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TORTS - Constitutional Law Defamation Flow Chart

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
COMMON LAW
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, 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

GO ON TO
COMMON LAW
ANALYSIS

(modifying elements and
defenses as advised)

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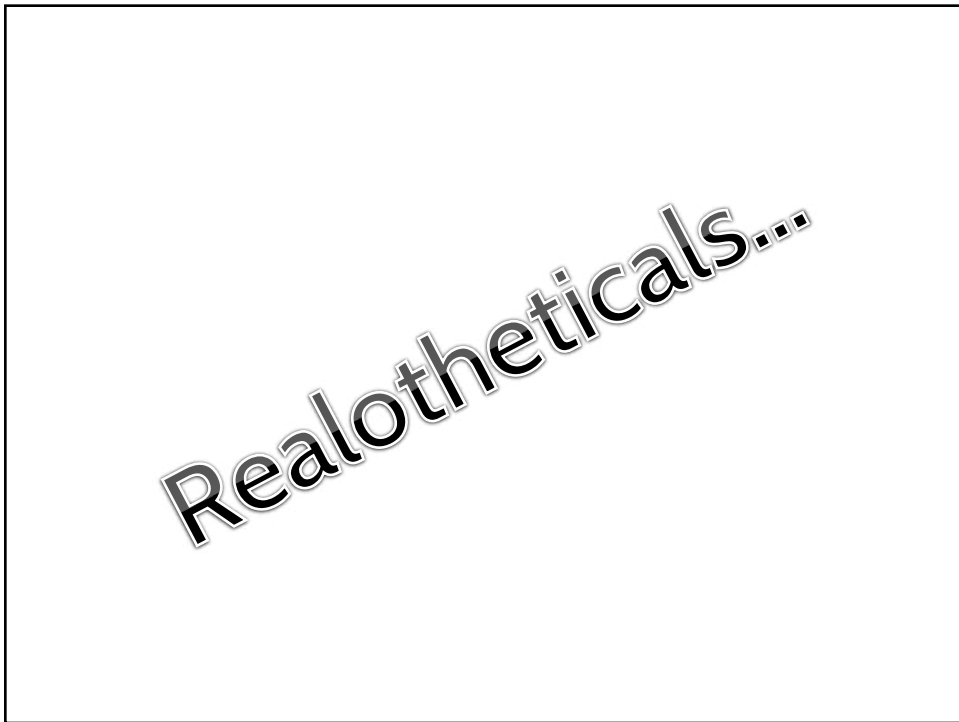
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Public official?

- U.S. naval officer, rank of captain, skipper of a destroyer escort
- Yes.
[Arnheiter 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)



Public figure?

“Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures.”

Gertz v. Robert Welch, 418 U.S. 323, 342 (1974)

Public figure?

The designation of public figure “may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.”

Gertz v. Robert Welch, 418 U.S. 323, 351 (1974)

Public figure?

General-purpose
public figure

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Gertz v. Robert Welch

Limited-purpose
public figure

Public figure?

The designation of public figure:

"Generally, an individual can become a limited purpose public figure only through his own actions."

Biro v. Condé Nast (S.D.N.Y. 2013)

Individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions."

Gertz v. Robert Welch

Limited-purpose public figure

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?

- 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.”

"Hibdon himself knowingly and consciously sought publicity for his jet ski business by his initial postings on rec.sport.jetski. The controversy began following Hibdon's posting on the news group of the success of his jet ski modifications, prior to the publishing of the defamatory statements made by the Defendants. The controversy was "public" due to the international reach of the Internet news group rec.sport.jetski, the national circulation of SPLASH Magazine, as well as the significance of the claims being asserted by Hibdon ["builder of some of the fastest jet skis on planet Earth"]."

Hibdon v. Grabowski (Tenn. App. 2005)

IMPORTANT NOTE:

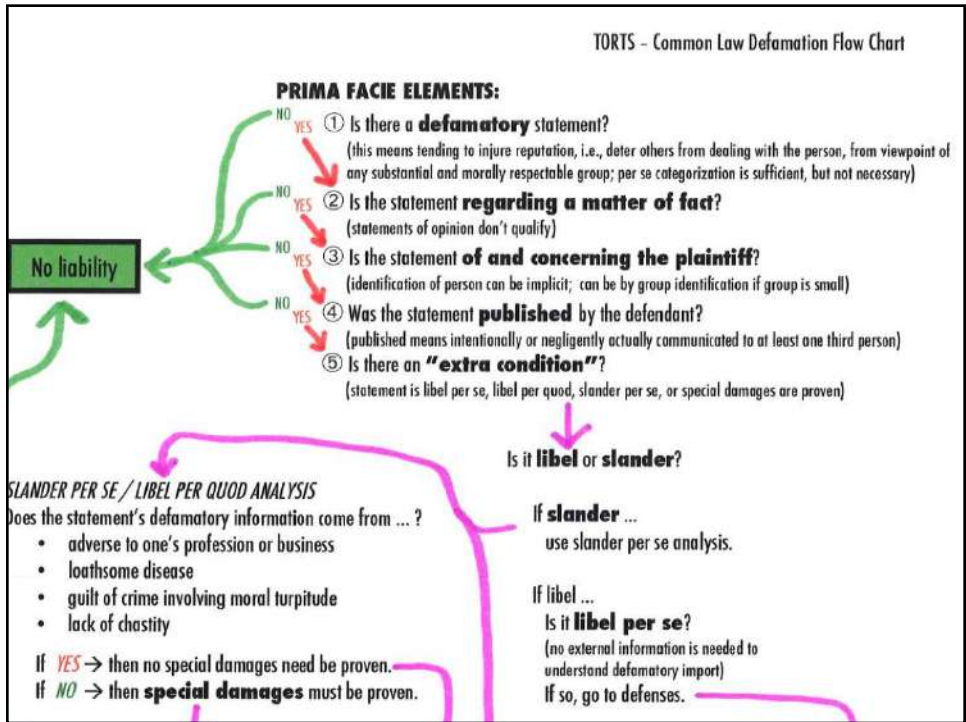
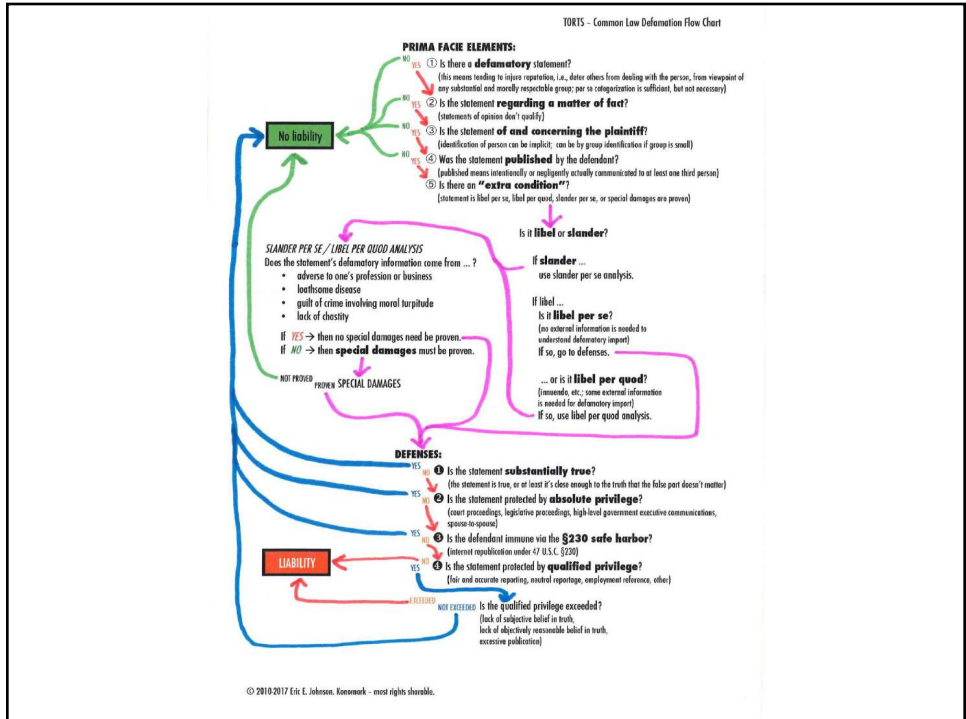
confusing to you
≠ you are confused

The doctrines and their application are themselves foggy, fluid, and fuzzy.

Remember: If you find it all confusing, it doesn't mean you are confused; it's actually a leading indicator that you understand. 😊

Public figure?

- Religious sect leader who leads “an ongoing public conversation on religion, addressing Internet users on a frequent basis from her own Verified Twitter account, which has 17,221 followers,” “produced dozens of publicly accessible online video teachings which have been viewed over 143,000 times,” and “makes her public teachings available to her followers through the Buddhist KPC website which she founded.”
- Yes – “an easily identifiable public figure.” *U.S. v. Cassidy* (D. Md. 2011) (criminal stalking context rather than defamation)



Defamatory Statement

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

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

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

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.”

Regarding a Matter of Fact

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

Realothenicals...

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 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)



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)

Factual assertion?

No.

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



Fact vs. Opinion

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.

Of and
concerning
the plaintiff

Who can be a
defamation
plaintiff?

Who can be a defamation plaintiff?

- Any natural living person
 - If you've heard "You can't defame the dead," that's actually true.
- Non-natural persons (e.g., corporate entities) can be defamed. (This is often called "trade libel.")
 - But various doctrines make it more difficult for these entities to win defamation suits.

**Has the
plaintiff been
identified?**

Of and concerning the plaintiff

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

Realothenicals...

Fawcett Publications v. Morris

True magazine

Of and concerning the plaintiff?

- Magazine story implies that the University of Oklahoma 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

Note: While this is a leading case, it involves language and content that is offensive and bigoted.

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

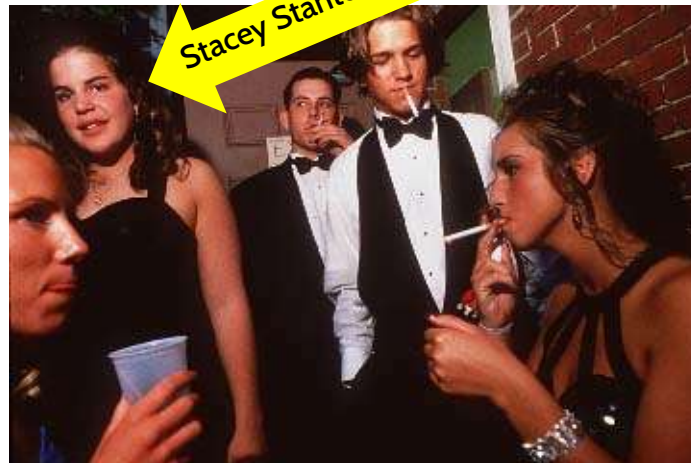


Photo used with Boston Magazine story, by Dan Habib.

Of and concerning the plaintiff?



- **No. The disclaimer avoids identification.
Suit dismissed.**
Stanton v. Metro Corp. (D. Mass. 2005)

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)

*Why'd the
author do that?*

from your casebook ...

Why'd the author do that?

For an example of libel per se, suppose this is printed in the newspaper: "Ozella Grantham Clifton of Upper Larnwick, a noted methamphetamine addict, is a bankrupt spendthrift." This is libel per se because it is libel (as opposed to slander), it is reputation-harming, and no external information is needed to understand its defamatory meaning. Thus, it won't matter that the facts attributed to Ozella Grantham Clifton don't fall into any of the per se categories. This statement will be actionable as libel per se.

Why did the author of your casebook use "Ozella Grantham Clifton of Upper Larnwick" for the example?

- Because it sounds funny?
 - Nope!
- It's to avoid defaming a real person!
 - (What are the odds there's someone with that name, much less from a town that adopts that name?)



“Ozella Grantham Clifton”

About 2 results (0.32 seconds)

It looks like there aren't many great matches for your search

Try using words that might appear on the page you're looking for. For example, "cake recipes" instead of "how to make a cake."

Need help? Check out [other tips](#) for searching on Google.

[31. Defamation - Eric E. Johnson](#)

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PDF

newspaper: “**Ozella Grantham Clifton** of Upper Larnwick, a noted methamphetamine addict, is a bankrupt spendthrift.” This is libel per.

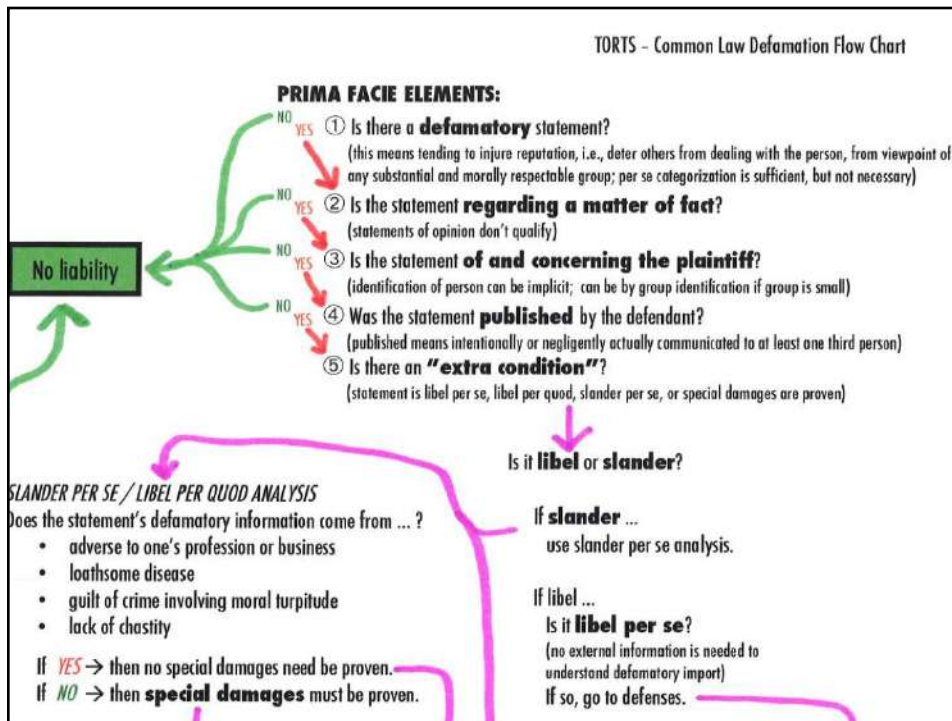
[Torts: Cases and Context, Volume 2 - Eric E. Johnson](#)

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DOC

For an example of libel per se, suppose this is printed in the newspaper: “**Ozella Grantham Clifton** of Upper Larnwick, a noted methamphetamine addict, ...

Publication



Publication

- Communication to one third party is all that is necessary.
- That's all there is to the rule, you just have to believe it!

Quick Quiz!

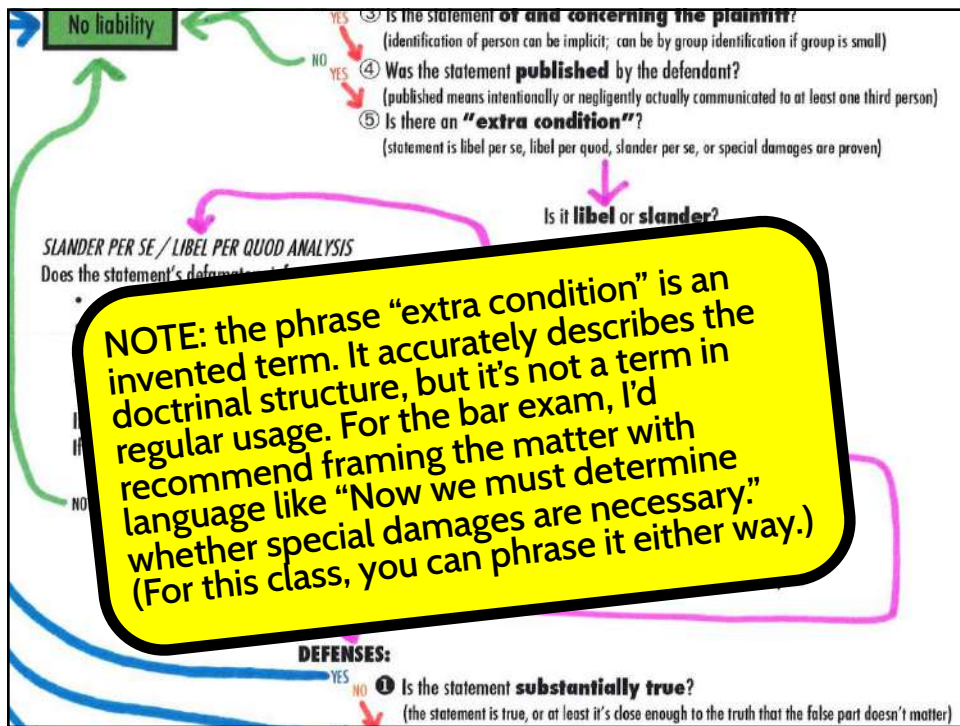
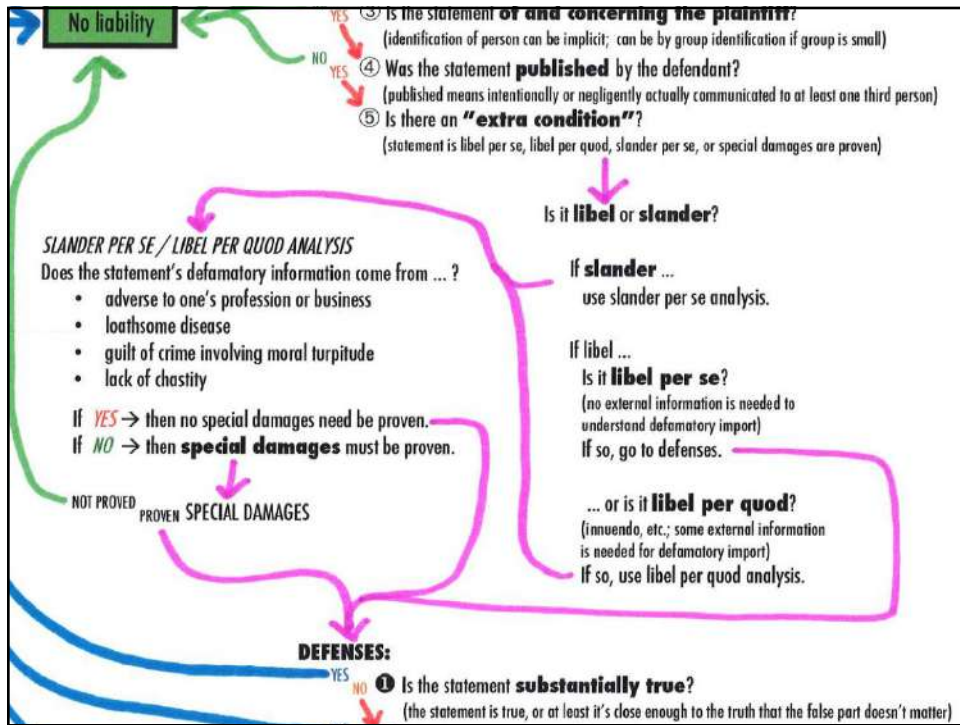
Is it published?

- If you make a defamatory statement in the forest and no one is around to hear it?
– No.
- If you "self-publish" a book, using your own money, and sell one copy to a stranger on eBay?
– Yes.
- If you communicate it only to the allegedly defamed plaintiff?
– No.
- If you say but not write it, and people hear it?
– Yes.

**Are special
damages needed?
(Slander per se, libel
per quod, libel per se)**

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.



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.

Television and radio broadcasting

California → slander if by radio

New York → libel

Alabama → libel

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

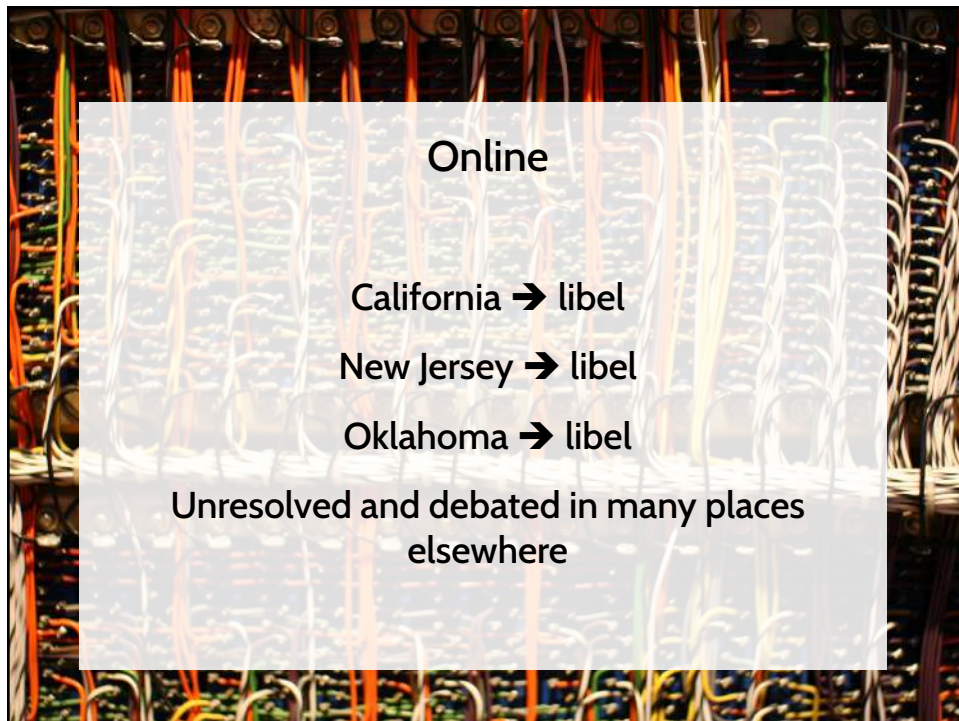
Texas → libel if from a script,
slander if ad-libbed

Libel vs. Slander

Here's another close question that actually matters:

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

Libel in some places;
unanswered other places.



Falsity and Substantial Truth

Falsity & Substantial Truth

- 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 & Substantial Truth

- **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.

Quotations

Falsity & Substantial Truth

The issue of substantial truth in quotations ...

Masson v. New Yorker (U.S. 1991):

- Rejected district court's ruling that all of the quotations in the article "were either substantially true, or were "one of a number of possible rational interpretations" of a conversation or event that "bristled with ambiguities," and thus were entitled to constitutional protection."
- Rejected circuit court's ruling that "an altered quotation is protected so long as it is a 'rational interpretation' of an actual statement."
- "[R]egardless of the truth or falsity of the factual matters asserted within the quoted statement, the attribution may result in injury to reputation because the manner of expression or even the fact that the statement was made indicates a negative personal trait or an attitude the speaker does not hold."

“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.

Privacy Torts

Privacy Torts

- Intrusion 
- Public Disclosure 
- False Light
- Right of Publicity (Appropriation)

Intrusion

The Elements:

1. Physical or other intrusion
2. Into a zone in which the plaintiff has a reasonable expectation of privacy
3. Which is highly offensive to the reasonable person

Disclosure

The Elements:

1. A public disclosure
2. Of private facts
3. That is highly offensive to the reasonable person

False Light

- This is a strange tort that's not even recognized some places.
- It's a lot like defamation, except that it can be used against a non-defamatory yet embarrassing public statement – such as one that is reputation-*enhancing*.
- How much does that come up? Probably not much.

Some general notes about false light, disclosure, and outrage:

- These are available for natural, living persons only – not for corporations
- The First Amendment can substantially limit any of these torts
 - State action hurdle overcome a la NYT v. Sullivan
- § 230 applies as a defense
- Much of defamation doctrine can apply
 - especially for false light (identification of plaintiff, fact vs. opinion, substantial truth as a defense)

Think about these together!

They often travel in the same fact patterns!

- Intrusion
- Public Disclosure
- False Light
- Appropriation / Right of Publicity
- IIED (Outrage)
- Defamation

The Indignancy Matrix

The Indignancy Matrix

	Communicated to how many?	Communicated statement is true or false?	Must it be highly offensive?	State-of-mind requirement?	Cause of action after death?
Intrusion					
Disclosure					
False light					
Defamation					
IIED					
Right of publicity					

**See the Defamation Flowchart.*

The Indignancy Matrix

	Communicated to how many?	Communicated statement is true or false?	Must it be highly offensive?	State-of-mind requirement?	Cause of action after death?
Intrusion	<i>N/A</i>	<i>N/A</i>	yes	intent	
Disclosure	public	true	yes	intent	
False light	public	false	yes	actual malice	
Defamation	one person	false	no <small>(instead, must be reputation harming)</small>	<i>[it's complicated!*</i>	
IIED	<i>N/A</i>	<i>N/A</i>	yes+ <small>(extreme & outrageous)</small>	intent or recklessness	
Right of publicity					

**See the Defamation Flowchart.*