

Libel, Slander - Outline

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3:04 PM

- I. Overview - Element of Defamation
 - a. A **statement** that has a **defamatory** meaning
 - b. That is **published**
 - c. That is an **objectively verifiable** statement of fact
 - d. That is **false**
 - e. That is **of and concerning** the plaintiff
 - f. That is published with the requisite **degree of fault**
 - g. That causes actual injury
 - h. To a defamable plaintiff
 - i. That is not **privileged**
- II. Substantive Law
 - a. Type:
 - i. Libel = written, anything memorialized in some form
 - ii. Slander = oral, including broadcast "in air", must prove what was said (difference from libel)
 - b. **Defamatory Meaning** - lowers opinion of your reputation to others, time & community define, subject to reasonable person standard
 - i. STEP 1: ISOLATE the statements
 - ii. Per se vs Per Quod
 - 1) **Libel Per Se** - defamatory without further explanation, "on its face"
 - a) **Slander Per Se** - categories defined by statute, but expanded by case law to be essentially the same thing as libel per se
 - 2) **Libel Per Quod** - additional facts needed to determine defamatory meaning
 - a) **Valentine v CBS** - "Hurricane" Bob Dylan song case
 - b) **Forshey v Bugliosi** - 900 pg book about Manson trial, mentions F in connection w/ lawyer disappearance, no defamatory meaning
 - c) Libel by Implication - slightly different, statement or series of statements implies something defamatory, but might not require extra information about P to understand
 - iii. Rhetorical Hyperbole & Context
 - 1) Epithet or rhetorical Hyperbole NOT serious attempt to attribute a particular trait to a person ("scab" = not defamatory)
 - a) **Cohen v Google** - judge ruled "skank" was defamatory to 31yr old model b/c it implied poor hygiene
 - 2) Blackmail - sometimes defamatory depending on context (**Greenbelt Corp v Bresler**)
 - iv. **Of and Concerning** - must be nexus between what is said, and who is alleged to have done it
 - 1) **Group Libel Rule** - group of people w/ loose affiliation can't bring defamation claim
 - a) NO EX: **Oprah/Meat Industry Case** - entire industry can't sue for defamation
 - b) YES EX: **Church of Scientology v Flynn** - accusing specific branch F had been "litigating with" of trying to kill him was "of and concerning" plaintiff
 - 2) Fictional Works:
 - a) **Bindrim v Mitchell** - doctor easily identifiable b/c of "nude marathon therapy" he invented
 - 3) Omission NOT a basis for defamation (**Blatty v NY Times** - book not included on best-seller list = not of and concerning)
 - v. Defamable Plaintiff Issues:
 - 1) **Libel-Proof Plaintiff Doctrine** - reputation is so low, impossible to bring defamation claim (aka: OJ Rule), no one found to be liable-proof plaintiff yet
 - 2) **Incremental harm doctrine** - more defamatory statements in publication that you don't assert cause of action on might negate lesser defamatory statement
 - c. **Opinion** - can't be proven true or false (**Milkovich v Lorain Journal** - USSC did NOT create opinion)

privilege), discuss in defamatory meaning OR objectively verifiable SOF elements

- i. Basic Test:
 - 1) Language Used
 - 2) Context language used in - would a reasonable person interpret these statements as statements of fact that can be proven true or false?
- ii. Totality of Circumstances Test (CA) - language used + context
 - 1) **Baker v Los Angeles Herald Examiner** - critique of documentary in editorial = opinion
 - 2) **Moyer v Amador Valley** - "students terrorize Moyer" + "worst teacher in HS" appearing in student newspaper = opinion **CHECK THIS CASE**
- iii. Ninth Circuit Three-Factor Test (Federal)
 - 1) Broad Context - look at the "big picture"
 - 2) Specific context
 - 3) Susceptibility of being proven true or false
 - **Unelko v Rooney** - RainX case, statements made by Andy Rooney that product "didn't work" could go past opinion stage, but not false b/c product didn't work for him
 - **Sagan v Apple Computer** - "butt head astronomer" = opinion, no way to prove T or F
 - **Partington v Bugliosi** - lawyer that defended husband in husband + wife murder of couple, book written about case was opinion, can't prove incompetent lawyer
- d. **Truth & Falsity**
 - i. Scope
 - 1) **Garrison v State of LA** - can't punish someone if statement is true, regardless of motive
 - ii. Burden of Pleading falsity - usually P's burden:
 - 1) Three factors:
 - a) Whether the defendant is media or non-media defendant
 - b) Whether P is public or private person
 - c) Whether issue is public or private concern - most important factor, looser standard, no formal test
 - i) Media Ds, Public Issues = P has burden
 - 2) **Philadelphia v Hepps** -
 - iii. Substantial Truth Doctrine - affirmative defense
 - 1) Two different tests:
 - a) "*gist and sting*" - the substance, gist, or sting of the statement can be justified
 - b) "*different effect*" - statement not considered false unless it would have different effect on mind of reader from what the truth would have produced
 - 2) Quotation mark issue - implies a direct quote, and thus reasonable person would think it is true, but may still be able to argue substantial truth depending on facts
 - iv. Inaccurate or Distorted Quotations & Juxtaposition
 - 1) Basic test - does the statement leave you with a **materially different** impression than the original statement?
- e. **Constitutional Fault**
 - i. Public or Private Person?
 - 1) Public Officials - someone who holds public office, gov't official
 - a) Analysis:
 - i) Does person work for gov't?
 - ii) What impact do they have on policy? Look to specific job responsibilities
 - 2) Public Figures
 - a) **General Purpose Public Figure** - instant name recognition
 - b) **Limited Purpose Public Figure** - must be nexus between subject matter of the article and what you're famous for
 - i) Voluntary - inject themselves into public issue and are public figure for that issue only
 - ii) Involuntary - questionable doctrine, must be unusual set of circumstances (air traffic controller on duty during plane crash ex)
 - iii) **Factors:**

1. Pre-existing Controversy? Broader controversy defined, more likely it pre-existed defamatory speech (Reality Bites case ex)
 2. P's Amount of access to media
 3. Degree of public divisiveness of controversy - if no competing views, then possibly no controversy
 4. Effect of controversy on non-participants - does controversy affect a large group of people outside of it?
 5. Level of voluntary involvement by P
 6. Prominence of P in controversy
 7. Attempts by P to influence resolution of controversy
 8. Timing - during a series of stories, P's status can change depending on their level of involvement/ response
 9. Geographic & institutional relationship - might be public figure in certain area or field
- iv) **Hutchinson v Proxmire** - receiving gov't grant funding not enough for public figure, can't create public controversy by defamatory speech
- 3) Private Figure - negligence standard (reasonably person knew or should have known)
- ii. Actual Malice - knowledge or reckless disregard for truth or falsity of publication
- 1) 4 "Pillars" of Actual Malice:
 - a) **NY Times v Sullivan** - USSC created actual malice standard P must show w/ **convincing clarity**
 - i) Failure to retract = NEVER actual malice
 - ii) Contradictory information = NEVER actual malice
 - b) **Curtis Publishing Co v Butts** - extends actual malice standard to public figures
 - c) **Gertz v Welch** - what standard applies to what person in what circumstance

<u>Plaintiff</u>	<u>Issue</u>	<u>Legal standard</u>
Public Figure/ Official	Public Concern	Actual Malice
Public Figure/Office	Private Concern	? (negligence is floor) Actual malice in most states
Private Figure	Private Concern	?set by states

- d) **Dunn v Bradstreet** - actual malice not required for private figures
- 2) **Factors:**
- a) Reliance on sources and tips - most litigated & important factor
 - b) Purposeful avoidance of the truth - circumstantial evidence of subjective doubt
 - c) Publication in the face of contradictory information
 - d) Failure to investigate
 - e) Failure to check obvious sources
 - f) Editorial process
 - g) Subjective doubts (knowledge = hard to prove, D won't admit)
 - h) Deadline pressure
- 3) Case Examples
- a) YES Actual Malice EXS:
 - i) **Kaelin v Globe Communications** - "headline case" - headline "Cops think Kato did it" was too far removed from story, editor admitted SUBJECTIVE DOUBTS (rare)
 - ii) **Khawar v Globe Communications** - JFK assassination theory case, Globe should have doubted truth of book, no deadline to publish, no attempt to verify improbable claims of book, issue already fully investigated
 1. Something inherently improbable puts you on notice as publisher
 - iii) **Harte Hanks Communication** - if key witness identified on BOTH sides of issue, and publisher fails to interview = purposeful avoidance of the truth
 - iv) **Robertson v McCloskey** - putting publisher on notice of knowledge of falsity won't establish actual malice alone, but it helps
 - b) NO Actual Malice EXS:

- i) **Hatfill v NY Times** - anthrax suspect articles gradually identified P, NY Times didn't identify him until other news outlets did, FBI confirmed him as suspect
 - ii) Eastwood Case **CHECK THIS**
 - iii) **Lerman v Flynt** - no duty on part of national distributor to verify error in one magazine
 - iv) **Jackson v Paramount Pictures** - host of radio program had several reliable sources, London newspaper already reported, DA believed in existence of tape
 - 4) Assume you have to prove actual malice in EVERY case - states have statutes that require it for public issue, or punitive damages, or D will argue it on appeal and if facts aren't in evidence of actual malice, P will lose
 - 5) Negligence - can argue journalist deviated from professional standards (what reasonable, credible, legitimate journalist would do) which is evidence of actual malice
- f. **Publication**
 - i. When is something published? - when statement is available to public in area where P lives (not necessarily date on article)
 - 1) Actual Malice ENDS at date of publication
 - ii. **Uniform Single Publication Rule** - only 1 cause of action for each publication, can't have separate cause based on multiple copies
 - iii. Republication
 - 1) New Editions - look at extent to which 2nd edition reached a new audience
 - a) **Kanarek v Bugliosi** - paperback edition of book was NOT deemed to be republication
 - 2) By Another Source - can argue no actual malice if original source was reputable
 - iv. Who is a publisher?
 - 1) Traditional - magazine, newspaper
 - 2) Internet - *Communications Decency Act* deems ISPs NOT publishers, also not liable for missing something based on internal policy of "policing" cite
 - a) Interactive sites can be deemed publishers (Internet CONTENT providers vs SERVICE providers)
- g. **Privileges** - no liability if statement is privileged
 - i. **Absolute**
 - 1) **Official Duty Privilege** - anything someone says in discharge of their official duty
 - 2) **Legislative Proceedings Privilege** - anything said in legislative proceedings that is relevant to official duty as legislators
 - 3) **Judicial proceedings privilege** - statement related to or in furtherance of judicial proceeding, or in anticipation of judicial proceedings
 - 4) **Other Official proceeding** (ex: choosing board of trustees of public university)
 - 5) **Fair Report Privilege** - applies to trials, public forums, public events (protests) etc.
 - a) Analysis:
 - i) Is there some official proceeding that reporter is reporting on?
 - ii) Is this a FAIR and TRUE report?
 - 1. Gist & sting arg - is what was going on in proceedings the "gist and sting" of article? Some editorial license allowed
 - 6) **Neutral Report Privilege** - media should be able to report on newsworthy story as long as they do it neutrally, not every jx adopted this
 - a) 4 relevant districts:
 - i) 9th circuit - never addressed
 - ii) Northern District of CA - privilege applies to public figures
 - iii) Central District of CA - privilege applies to public figures
 - iv) CA state courts - declined to extend to private figures & haven't recognized
 - b) Elements:

- i) Defamatory statement made by a party in the controversy
 - ii) Must be about a public figure
 - iii) New organization must be neutral and accurate
- ii. **Qualified** - can rebut by showing malice (unclear what kind)
 - 1) **Common interest privilege** - statement made without malice to a person interested in the communication by someone who:
 - a) Is also interested OR
 - b) Stands in such a relation to the person so as to afford a reasonable ground for supposing the motive to be innocent OR
 - c) Is requested by interested person to give the information

h. Damages

- i. **General** - reputation + emotional distress
 - 1) Corporations - only reputation damages b/c they don't have "feelings"
- ii. **Presumed** - hard to prove long-term effects, allows jury to "presume" damages, not all states allow, allowed for *per se* defamation ONLY
- iii. **Special** - specific and quantifiable losses
 - 1) must prove specific damages if you only have *per quod* defamation
 - 2) If you don't demand retraction, only allowed special damages
- iv. **Punitive** - must prove actual malice in most states even for private P, cannot stand alone
 - 1) Common Law malice - must prove to get to punitive damages phase in CA
 - 2) Limitations:
 - a) USSC - between 1-9 times general damages
 - b) States - NV no more than 3X

III. Procedural Issues

- a. **Retraction** - must demand in "media case" and specify exactly what was false, or can only get special damages (makes case worthless)
 - i. Media Case - any claim against media defendant that arises out of 1st amendment (blogger is questionable)
 - ii. Republication - broadcast that is republished elsewhere (internet, etc) requires 2 retraction letters
 - iii. Proper retraction - must be published in same location, size font, etc as original story
 - iv. Deadline -
 - 1) P: 20 days after P learns or should have learned about publication
 - 2) D: 3 weeks after they receive retraction notice
- b. **Statute of Limitations** - begins of first day of publication of defamatory material, 1 yr in CA
 - i. Other States - can be longer SOL (4 yrs in NH & NM)
 - 1) **Borrowing Statute** - state may have one that "borrows" law from P's state and thus claim is barred (not in NH or NM)
- c. **Reporters Privilege**
 - i. **Reporter's Shield Law** - in most states, can't hold reporters in *contempt* if they fail to disclose sources if they are 3rd party to claim (no Federal shield law)
 - ii. **Common Law Reporter's Privilege** - protects any confidential information journalist collected while writing story (anything that didn't make it to print)
 - 1) QUALIFIED - **Mitchell Test** (CA):
 - 1. Nature of litigation and whether reporter is party (does P really NEED this info, easy to satisfy in defamation case)
 - 2. Info sought goes to heart of P's case (usually actual malice)
 - 3. Exhaustion of all other reasonable sources
 - 4. Importance of confidentiality in particular case (source in danger?)
 - 5. Ability of plaintiff to show falsity (some courts say this isn't requirement, but tips the balance)
 - 2) **Shoen Test** (Fed):
 - 1. Whether information sought is relevant, material, and non-cumulative (like "heart of the case" prong above)
 - 2. Whether the information is crucial to maintenance of P's claims

3. Exhausted all other reasonable alternative means of getting info
- d. **Jurisdiction & Choice of Law**
 - i. Innocent Construction Rule (ILL) - if there is a reasonable reading that is NOT defamatory, then case dismissed
 - ii. 3 Choice of Law Tests:
 - 1) **Place of the Injury** (lex-loci) - where is P's reputation most damaged?
 - 2) **Substantial relationship test** - "center of gravity"; what is the state that has most relationship to case?
 - 3) **Governmental interests test** (CA) - look at all forums, is law different? If so, what jx has stronger interest in having their law apply?
 - iii. Advantages/Disadvantages
 - 1) Fed:
 1. Advantages - subpoena anyone in country easily, more professional proceedings, case heard quickly, judges follow rules
 2. Disadvantages - unanimous jury required, Erie conflicts (SLAPP only)
 - 2) State:
 1. Advantages - unanimous jury not required
 2. Disadvantages - can't subpoena anyone in country easily
- e. **Communications Decency Act** - gives ISPs immunity for content published on website
- f. **Anti-SLAPP Statute** - basically summary judgment motion w/ fee shifting, filed at BEGINNING of case (60 days)
 - i. SLAPP = "Strategic Lawsuit Against Public Participation"
 - ii. SLAPP vs Motion to Dismiss - SLAPP is more powerful
 - 1) Motion to Dismiss - limited to "4 corners of complaint", no fee-shifting
 - iii. Analysis:
 - 1) Does the statute apply? Categories:
 1. Written or oral statement or writing made **before legislative, executive, or judicial proceeding** or any other official proceeding authorized by law
 2. Statement made in connection with an issue **under consideration or review by legislative, executive, judicial** branches
 3. Statement made in place **open to the public or public forum** in connection with issue of public interest
 4. Catchall - **any conduct in furtherance of exercise of constitutional right of petition or free speech** in connection with public issue or issue of public interest
 - i) **ISSUE OF PUBLIC INTEREST** - most litigated, ask what is the subject matter surrounding the topic giving rise to the claim? (Paris Hilton greeting card = yes, Realty Bites guy = no)
 1. **Seelig v Infinity Broadcasting Corp** - rejected contest on "Who Wants to Marry A Multimillionaire" non-appearance on radio talk show WAS issue of public interest
 - ii) Right of Petition = automatically issue of public interest (lawsuit, police report, letter in congressional record, etc)
 - iii) BOP = party filing motion
 - 2) If so, does P's case have merit? Must prove "probability that P will prevail at trial" (mini-trial phase)
 1. BOP = party opposing motion
 2. Discovery
 - i) State court: specified discovery can be ordered "for good cause" (high specificity required)
 1. D can stipulate to certain elements (like actual malice) for purposes of SLAPP motion only, and thus defeat discovery requests
 - ii) Fed Court: different result due to Erie, automatically entitled to special discovery, don't have to make special showing as opposed to state court
 - iv. Attorney's fees - D makes special motion after defeating SLAPP, and must justify fees

IV. Privacy Torts - "invasion of privacy" - damages based on "hurt feelings" not reputation, requires proof of

D's conduct being "**highly offensive to reasonable person**"

- a. **False Light** - embodied w/in defamation (some states won't allow action for both), only difference - can only collect damages for emotional distress, larger group required for publication (not just 1 person)
 - i. **Solano v Playgirl** - Baywatch actor put on cover of magazine, didn't pose nude, successful false light claim
- b. **Publication of Private Facts** - not claiming falsity, just private matter w/ no newsworthy component
 - i. Elements:
 - 1) Public disclosure
 - 2) Of a private fact
 - 3) Act of publication of facts is highly offensive to a reasonable person
 - 4) Issue cannot be newsworthy
 1. Factors for "newsworthiness":
 - i) Social value of facts published
 - ii) Level of intrusion
 - iii) Extent to which person who's facts being disclosed assumed notoriety voluntarily
- c. **Intrusion** (MTV Aston Kutcher Pilot case)
 - i. Elements:
 - 1) Highly offensive to reasonable person
 - 2) Reasonable expectation of privacy
 - ii. Hidden Cameras - many states have statutes governing these
 - iii. Federal Wiretap Statute - cannot record someone without their consent
- d. **Right of Publicity** - expanded, whether or not you can use someone's name, likeness, or image in media

Questions

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1. Liable-proof plaintiff/increment harm doctrine - organization question, where would this go? Under "defamatory meaning" analysis?
2. Other state approaches to libel and slander important?
3. Any difference between libel per se and slander per se?
4. Is Libel by implication the same as Libel per quod?
5. Is establishing issue of public concern for determining BoP on falsity the same definition as issue of public concern for SLAPP purposes?
6. Substantial truth doctrine - does using quotation marks, and thus implying a direct quote negate any substantial truth defense?
7. Standards set up in Gertz - the ones they didn't define, are they set by state law? (public figure/official & private issue, etc)?
8. Must you prove actual malice to get punitive damages for private individual?
9. Actual Malice Q- if story is not published yet, and P contacts D denying story (putting D on notice of falsity) - does this go to actual malice? What if P does this after the story is published? Does this enter into analysis at all?
10. Common interest privilege - are ALL elements required for it to apply or is it an "or" situation?
11. Fair Report Privilege - only for "official proceedings", gov't stuff? Is this the flip-side of official, legislative and judicial privileges?
12. "Gist and Sting" - both for substantial truth doctrine and fair report privilege? Basically same arg?
13. Is neutral report privilege absolute or qualified?
 - a. Not recognized in CA state courts yet?
14. Only qualified privilege we care about is common interest privilege?
15. Special damages = specific damages for purposes of libel per quod?
16. Retraction - when broadcast is republished elsewhere in printed form, does it matter if it's two different companies, or the same company? Do you still need to send 2 retraction notices in either case?
17. Retraction - is the deadline for the defendant to retract the story 3 weeks AFTER they receive retraction demand?
18. Privacy torts - how much are these going to be on the exam? We didn't really go over them fully, I don't even have all the elements for some of them - are we going to be expected to do a full analysis in an essay?
19. Damages - what is difference between presumed & special damages vs general & special damages?
 - a. Seems like special damages encompass some of general damages - damages to reputation, but how does general differ from presumed then?