Torts II Outline

DEFAMATION

Definition: Generally, defamation is a false & unprivileged statement of fact that is harmful to someone's reputation and published "with fault," meaning as a result of negligence or malice.

- State laws often define defamation in specific ways.
- **Libel = Written** defamation (generally but not always)
- **Slander = Spoken** defamation (spoken or non permanently recorded form)

I. Elements of a Defamation Claim

(1) False statement of fact; and
(2) Understood as being "of and concerning" the plaintiff; and
(3) Tending to harm the reputation of plaintiff; and
(4) Publication to one other than the person being defamed; and
(5) Damages

- Libel = Damages are presumed if you prove the other 4 elements, you don't have to prove the linkage.
- **Slander** = You must prove **special damages**, unless it fits within one of the 5 per se defamation categories.

- **5 Categories of Per se Defamation (automatically defamatory)**

(1) Accusing someone of **committing a serious criminal offense.**
(2) Attributing a **loathsome, communicable disease** to someone.
(3) Want of integrity in the discharge of duties of one's office or **employment.**
(4) Lack of ability in person's **trade, profession or business** (incapacity to do the job they are hired to do).
(5) False accusations of **sexual misconduct** (fornication and adultery).

- Casting aspersions on someone's character (i.e. calls Joe a liar) is not one of the per se categories, unless you specify what the lie is about & it ends up being about one of the categories. If you say Joe was seen at 10th & Grand going into the corner building, it's ok, until you bring in the fact that the building is a whorehouse.Now sounds defamatory

(1) False statement of fact

Plaintiff has to prove that defendant asserted a false statement of fact, which must be (have to analyze each statement/assertion one by one, P can't just provide a general description of what was said):

(1) A statement of FACT that is provable as true or false; AND

(i) This is a yes or no question, like an on/off switch.
(ii) Statements of opinion are generally not actionable.
(iii) Calling someone an epithet like 'asshole' is not provable as T or F, so it can't be defamatory.

- Even epithets that are potentially factual (Bastard) are often not made under circumstances which are understood as factual assertions.

(iv) If the meaning of a statement is not clear, take the **fair & natural meaning which will be given to it by a reasonable person of ordinary intelligence.**

- Make reasonable inferences from the context.
- Even if you take a word that has a sexual connotation (like slut or bitch), in a different context it might not mean that. **So to show something is a false statement of fact, P has to assert the meaning P is complaining about** (for example: slut has different meanings like hussy, brazen, sexually loose etc, so it has to be used in context, as sexually loose, to be defamatory).
    - Professor jokingly calling guy in class a slut is not defamation b/c we know it's a joke so nobody believes it.

(v) Hyperbole & parody are NOT actionable.

- Saying false things about someone in a satiric way that is clearly satire is not an assertion of fact. It is not being asserted for the truth of the matter, so it is not defamatory.
- SNL & Daily Show can't be sued for defamation b/c we know it's a joke
- To determine if something is a joke or not, use the same reasonable person standard + look at the context.

(2) Is False.

- ***Vogel:*** Plaintiff's H&W ran for office & lost to D. D posted on internet his top 10 list of DumbAsses w/ Ps at #1&2. It was a publication; was of & concerning P b/c it mentioned them by name; it harmed their reputation; but it was not a statement of fact provable as T or F therefore it was not defamatory.

- ***Bryson v. News America:*** Article published in "fiction section" of magazine says plaintiff Bryson was a slut, but it referred to P by last name only & identified where she lived. There is publication b/c printed in magazine; it probably did harm her reputation b/c slut was bad back then, esp. in high school. Issues:
    (i) Is "slut" a statement of fact provable as T or F?
        - Court says yes in this context b/c article talked about P at bonfire w/ multiple guys, but if there were no sexual connotation/context then slut would not be a statement that is provable as T or F. So P has to assert the context she's complaining about.
    (ii) Is it of & concerning the P?
        - P identifies 25 characteristics that are similar between P & the person named in the article, but weird thing is that P never acknowledges that she knows the author.

- ***Cherrie Sisters*** (vaudeville act): Iowa newspaper had line in a review of their performance saying "the mouths of their rancid features opened like caverns & sounds like the wailing of damned souls issued therefrom." Court held not libel b/c statement is not provable as T or F. This guy might not like them, but someone else may. It's an opinion b/c you can't prove it as true or false. The factual part is that they sang & there are 3 of them in the group, but it is not factual that they have rancid features.

(2) Understood as being "of and concerning" the plaintiff

(a) To be actionable, the **statement must be understood to refer to the plaintiff**

- "Every student in Nockleby's class cheated on their torts exam?"
  -No this is probably too broad, no defamation.
- "All the students who went to USC are cheaters and liars?"
  -No, too broad.

- **Nebulous Statements:** If you say the chief of police is a liar, there is some ambiguity in that b/c there could be many different chiefs of police in different cities, so plaintiff has to establish that this is pertaining to him. Also bearded man w/ briefcase example.

(b) Group Defamation: A false statement against a small group may harm all members of the group & each may have a cause of action under doctrine of group defamation.

(i) Group must be sufficiently identifiable

- This means the group should be between **12-25 people,** if it's larger then that's too broad & is not defamation.
- **Neiman Example**: Book says some NM store models (9) were call girls, sales girls (30/382 filed suit) are cheaper, & male staff are fairies (15/25 filed suit). Court said men could sue b/c their group was small enough, but female saleswomen could not sue b/c their group was too large.
    - We **look at the number in the group, not the number who filed suit.**

(ii) But even in group defamation context, you have to show that the statement was about you, so must take some extra steps to prove that its about you.

(3) Tending to harm the reputation of plaintiff

This means **diminishing someone's standing in the community.**

(i) Harm to reputation is <u>automatically assumed</u> if it is one of the 5 categories of per se defamation.

(ii) Which Community's Judgment Controls?: Someone calling you a snitch might hurt your reputation in the mob or in a gang, but we don't take weird subgroups like that into account, rather, we take into account whether the language affects you in the larger community (like where you live, work etc).

- Language is changing so being called a slut or a homosexual nowadays is not really going to be very harmful to your reputation.

(4) Publication to one other than the person being defamed

Publication means you have said it or published it to at least <u>one other person</u> than the person being defamed. It does not have to be widespread circulation, just 1 other person is enough.

(i) Publication within a Corporation: When employees of a corporation talk to other employees, the **corporation is communicating with itself** & that is not considered a publication to a third person. **But the communication has to be within the ordinary course of business.**

- CEO dictating letter to secretary = no publication
- But CEO saying defamatory things about 1 employee in front of 300 other employees is not in the ordinary course of business = publication

(ii) Other types of things that qualify as publication

- Telephone conversation (or walkie talkie conversation)
- Handwritten note passed to neighbor

- Whispered conversation where speaker knows hes being overheard by 3rd party
- Radio or TV broadcast
- Billboard or picket sign paraded in public / Bumper sticker

(iii) Republication: Anyone who takes a defamatory statement & **republishes it is liable to the same extent** as though they were the original publisher (or the original author), **EXCPET internet service providers** who are protected by Communication Decency Act

- If it's a statement in a book = the author of the book is liable & so is the publisher.
- If it is a statement on the internet = b/c of CDA Section 230, if you're the author & you're posting to the internet you are responsible, but anyone else, like the ISP & everyone else down the technology chain **(it's very broad & includes all "interactive computer services")**, is not going to be treated as the publisher or speaker of the original information (even intranet systems are not treated as publishers). So its only the original author who is responsible for the defamation.
    - But this ONLY applies to postings on the internet.

(iv) Distributor is the guy who takes the newspapers around & drops them off to people:

- If **print** distributor is told that the thing has defamatory content (its pointed out to the distributor), then the **distributor is liable as a republisher of information.**
- **But Internet/Online Distributors are IMMUNE from liability** b/c of CDA.

- In sum, **PRINT publishers & republishers** have liability for what they publish, even if it is written by someone else (e.g. an op-ed), but print distributors only bear liability if they have actual notice that the content is defamatory.

Mims: Employee of corporation (plaintiff) gets fired & asks his state senator to find out why he got fired. Senator inquires & CEO writes letter to Senator (by dictating it to his secretary) telling him P got fired b/c he was inefficient & unproductive. P sues claiming statements in letter are defamatory. Court holds no publication b/c senator is acting as P's agent b/c P asked him to inquire on his behalf so the senator is not considered a third party.

- No slander when dictating letter to secretary b/c of corporation exception.
- **What if republication?:** Assume senator published the letter online to show she cares about constituents. That would be libel on part of the senator b/c senator re-published it. Corporation would not be responsible. Anybody who takes a defamatory statement & republishes it is liable to the same extent as though they were the original publisher, so the senator is liable.

(5*) Constitutional Privileges Based on Status of Plaintiff

Professor recommends inserting this analysis here (see below for long explanation of this stuff)

(i) Public Official

- Must prove actual malice; and
- Must prove statement was about him (not about just his agency in general)

(ii) Public Figures

- Must prove actual malice

(iii) Private Figures

- No need to prove actual malice as long as statement is made with some level of fault (not SL). This gets you only compensatory damages.

- BUT if you want **punitive damages,** then as a private figure you must prove actual malice.

(6) Damages

(a) Distinguishing Between Libel & Slander

- Traditionally: Libel = Written & Slander = Spoken
- Today: Distinction between oral & written has gone away & instead we focus on **permanent or semi-permanent** forms of representations **VERSUS those which are more temporary or elusive.**
    - If what you say is recorded, the spoken statement is slander, but since it was recorded, it becomes permanent & so its libel. Other examples:
        - Things written on bathroom wall are libel even if it's washed off by janitor
        - TV and recordings are libel

(b) Damages Rules for Libel versus Slander

(i) Libel = Damages are automatically presumed if you prove the other 4 elements, you don't have to prove the linkage.

(ii) Slander = You must prove special damages, **unless** it fits within one of the 5 per se defamation categories.

- **SPECIAL DAMAGES** are actual **economic damages** that you can directly link to the defamation (i.e, they go to causation). They are something you can put an economic price tag on.
    - You have to prove that you suffered some pecuniary loss in addition to reputation loss.
    - Special damages do NOT have to do w/ diminishment of your reputation

- **Other examples:** If you lose all of your friends b/c of D defaming you, those are not special damages b/c you can't put a monetary price tag on losing friends.
    - If school suspends you b/c of that defamation & doesn't give tuition money back, that IS special damages b/c you can put an economic price tag on it.

Standifer: Manager of building makes following oral statements about Plaintiff tenant & P sues for slander. Statements are published b/c spoken to 3rd person; are of & concerning P b/c P is named; & harm P's reputation. Are they false statements of fact that are provable as T or F?

- **Troublemaker:** This means P causes problems & trouble. Arguable whether this is provable or not. It most likely is provable.
- **Not a fit tenant:** This is provable as T or F b/c as a tenant you can't waste **(waste means to destroy the house**). So you are a fit tenant if you pay rent & don't waste. Therefore, this is provable as true or false.
- **Cussed people out:** This is provable as true or false b/c either you cussed someone out with curse words or you did not (harassing is a little more ambiguous).

Since it was oral it's slander, so P has to prove special damages unless it fits into one of 5 per se categories (it doesn't fit into the 5 categories). P loses b/c she can't prove special damages, she argues she suffered economic loss b/c she had to move as a result of the statements, but she found out about the statements AFTER she moved out, so no causation, meaning no liability for defamation.

II. Defenses to Defamation (two types:non-constitutional & constitutional)

Non-Constitutional Defenses (i.e., Common Law Defenses)

(1) Truth-this is an absolute defense. Burden is on the defendant.

(2) Consent-if you consent to it or ask someone to repeat a defamatory statement in public (i.e., if you say "what did you just say about me?" in public then you consented to making it public so you can't sue for it b/c it's not the right type of publication). This is an absolute defense.

(3) Privilege-there are two types of privileges

(A) Absolute Privileges-absolute privileges are a complete defense, they are not defeasible. There are a few different types of absolute privileges:

(1) Legislative Privilege-When members of Congress are on the floor (in legislative chambers), they have this privilege & can say what they want, they won't be called into court for it. Even if they lie while speaking about official business, they have an absolute privilege to do so and you can't sue them for it. Even if your business gets ruined because of this, you have no recourse.

- Federal level: Protected by Constitution Art. 2 (speech & debate clause).
- State level: Each state has the equivalent either in the state constitution or legislatively enacted.

(2) High Government Officials-When high government officials are **performing the duties of their office,** no matter where they are, they have this privilege & can't be sued. The main limitation is that it **has to be spoken in the context of their duties (matters within the ambit of their position).** It does not have to be said on the legislative floor, it can be anywhere.

- Example:If governor of CA is being interviewed & says the city of LA & it's mayor are corrupt people, and I know this b/c they're incapable of balancing their budget, so the mayor & city have to be doing something wrong if not illegal--b/c governor is a high government official performing the duties of his office, he has this absolute privilege & can say this.
- But this doesn't extend to lower officials like teachers.
- However, the mayor does have this privilege too.

(3) Judges, witnesses, lawyers in judicial proceedings-This privilege is given to judges, lawyers, witnesses & other participants in judicial proceedings to **speak freely in court or in court papers without fear of liability** for defamation.

- If you call your witness to the stand & he says John Nockleby is a liar/thief & all of these things are false, Nockleby can't do anything b/c witness is immune since he said it in court.
- However, if you the lawyer, take this statement of your witness (or your witness himself goes out & says it) and read it to the press outside, you are republishing the statement so the privilege no longer applies to you & you can be responsible for it.

- Judges also have absolute privilege as long as they are performing their official duties (i.e., they say it in open court). That is for judges' actions and statements, even if they are illegal. So no matter what the judge says about you in open court, you can't sue them for defamation.

(4) Officials who make reports (e.g., arresting officers) in the context of their official duties-For example, you are arrested & officers say erroneous things about you in their report, or OSHA/health inspectors say erroneous things about you in the course of a health inspection, all of these things are privileged, you can't sue the inspector for a report.

(5) Spouse-Married couples (or other legally recognized relationships) have an absolute privilege, **in the context of a marital relationship, to speak ill of anybody else, even if everything they are saying about that person is false.** This is not what you say ABOUT your spouse, its about what you say TO your spouse (i.e., complaining to your spouse about someone else, even if you made up the story, that communication is privileged).

(B) Qualified Privileges-These privileges are qualified, meaning they can be defeated. To defeat them, P has to show privilege was abused (b/c of common law or actual malice)

(1) Common Interest Privilege-Two people discussing their common interest have a privilege to do so without threat of being accused of slander or libel, unless they abuse the privilege [e.g. making the statement out of common law malice or constitutional actual malice] against the subject.

- The CI privilege is about **anybody you have an association with** (i.e., law students gossiping about students, teachers, judges, is all okay & protected).
- ***Lieberman:*** One tenant told another that landlord paid off cops to allow landlord to park in a certain space. Court held convo was privileged b/c tenants shared a common interest as tenants who park. So even though case meets all elements for slander (publication b/c said to 3rd person; false statement of fact b/c you either paid off cop or didn't; & fits into one of 5 categories b/c accusing P of crime of bribery so no need to prove special damages even though its slander) P still loses b/c D was privileged in saying it.
  - Essentially, CI is about gossip. If person to whom he was speaking was not a tenant & lived somewhere else, CI privilege would NOT apply if these people had no other relationship w/each other or to the subject.
  - It does not necessarily mean that you have to belong to the same organization to have a CI. But if one of the tenants did not park and did not care about this then there would be no CI here.
  - **But it is not enough that the two people just know the person being gossiped about to create a CI between then. You have to have some other particular interest.**
    - But for example, it is sufficient for CI if you are just a resident of a city and you are interested in the corrupt cops in your city.

(2) Report of Official Proceeding or Meeting- When the press covers the government in its operations, then it is covered by this privilege. **So for anything said during that government meeting, even if a defamatory comment is made during the meeting, the press has a privilege to cover it and explain it**.

(i) Privileged if the **report is accurate & complete or a fair abridgment of the occurrence reported**

a. **Privilege extends to when the press reports on information in public records, as long as it is a fair rendition of what is going on in those public records**. See *Medico.*
b. Privilege is one of general publication & is not limited to publication to any person or group of persons.
c. Privilege exists even though publisher himself does not believe the defamatory words he reports to be true.

(ii) Policy justification for this privilege is to have a better informed public. Public needs to have information about what happens in official proceedings & public meetings in order to keep govt officials in check.

(iii) So abuse of the privilege takes place when the publisher does not give a fair & accurate report of the proceeding.

- ***Medico v. Time:*** Time mag published article about Congressman & his friend, the president of Medico, saying President was an organized crime boss/capo. President sued Time for defamation & Time claimed fair report privilege. Specific statement of fact is "Medico is a capo." It's published; it harms reputation; it is 1 of 5 per se categories (crime); & it probably is capable of being proven as T or F b/c either you are the head of the mob or you're not. But the statement was not from a "meeting," it was from a written FBI report that was summarizing what happened at an FBI meeting, but that was enough for Court to say it was an official proceeding. Privilege extends to when press reports on info in public records, as long as its fair rendition of what is stated in those public records (meaning it is in the public space even if it was not intended by the FBI to be made public {report here was marked confidential}).

(3) Fair Comment (i.e., restaurant, hotel reviews)-Reviewers and critics have a qualified privilege & can make comments about these things, **as long as they are commenting based upon their experiences (i.e., upon facts).**

- Must be doing it in good faith.

(C) Defeating a Qualified Privilege (i.e., abuse the privilege)

Can defeat a qualified privilege (i.e., Part B. 1-3) with **<u>either</u>** Common Law malice or Constitutional Actual Malice:

(1) Common Law Malice = Uttered with Spite or ill will (hate).

(i) You actually hate the guts of the person & that is why you are saying bad false things about them.

(2) Constitutional Actual Malice = Knowing the statement is false or recklessly disregarding whether it is true or not.

(i) This means knowing the truth or falsity of the statement.

(ii) Actual malice is term of art created by *NY Times v. Sullivan*. Its a statement uttered where the person speaking either knows its false or utters it w/ reckless disregard to whether it is true or not. It's about your state of mind vis a vis the statement.

- **Example:** If I say Joe is a liar, I might not know if he is a liar or not (I have no info on it at all), so I don't know that the statement I'm saying is false. But if I say it w/o knowing anything about him, then I say it with reckless disregard.
- **Example 2:** Heir to Graff diamonds, Zeta Graff, was dating Paris Hilton's ex. Two women say things to each other at a club, then Paris calls her publicist & tells him to tell people that Zeta grabbed the diamonds off her neck & screamed at her. All of this was false. Paris hated Zeta. Zeta sued Paris for defamation. Paris claimed qualified privilege (to her publicist b/c they had a common interest). Court holds Paris had both common law malice (b/c she actually hated Graff) & constitutional actual malice (b/c Paris knew the statements she was making were false).

(iii) Scienter for Actual Malice

- Know a statement is false
- Suspect a statement is false
- Know someone knows, but don't ask that person. Deliberately not knowing & willfully not investigating (but failure to investigate on its own is not enough for bad faith).
- Changing Quotations: Even deliberately & falsely attributing words to a person does not by itself satisfy the "actual malice" standard **unless the alteration results in a material change** in the meaning conveyed by the statement.

Constitutional Defenses (i.e., Constitutional Privileges)

- Constitutional defenses are a two step analysis. First step always is to define the status of the Plaintiff (NOT the Defendant), b/c that **affects what level of obligation we are going to impose on the P in terms of proof structure**.

Step 1: Status of a Plaintiff

Supreme Court divided the world of plaintiffs into 3 possible categories so every P is one of the 3 kinds below, so the first thing you have to do is define which one your P fits into (not the D):

(1) Public Officials

Rule: A public official P must prove that the statement was uttered with **actual malice** **(in addition to the other prima facie elements for defamation: this is like adding an**

extra element). This means the speaker D either knew it was false or uttered it w/ reckless disregard as to whether it was true or not. *NY Times v. Sullivan*

(a) Who is a public official: A public official is defined as someone who is **currently working for the government (or just finished the job), and usually has or appears to the public to have substantial responsibility for, or control over, governmental affairs.**

- All elected officials like governors, senators, heads of departments (even local ones like chief of police & town managers).
- Candidates for office.
- Former officials (for purposes of commenting on their performance while in office).
- Social workers are PO's b/c wield power over kid's lives due to job.
- Does **NOT include** staff & secretaries.
- Courts are spit on the issue of public school teachers.
- Police officers are b/c they exercise state granted power in the performance of their duties.

(b) Reason we have this category is b/c people have lots to say about elected officials & if you're a public official you have to take it. **Same standard applied to a PO plaintiff regardless of whether the defamatory statement is about the context of their duties or if it is about something else entirely.**

- ***NY Times v. Sullivan:*** Advertisement placed in NY Times by civil rights leaders making claims about public official Sullivan (head of Police for Montgomery). He sues people who put ad in paper & NY Times itself. Ad said when people were demonstrating they were abused by police & police were engaging in "wave of terror." Sullivan was never mentioned by name but, he as the plaintiff, met the "of & concerning P" element b/c 6 people testified that they understood "they" to refer to him AND **b/c Alabama had a legal presumption that an attack on a government department is an attack on the head of the department.** This presumption is why he was able to meet this element. Supreme Court held state can't have this presumption where defamation about an organization is inferred to refer to head of the organization:
  - Public official has to prove statement is about him specifically (either named him or was just about him), not about his organization (i.e., "of & concerning P").
  - A public official suing for defamation has to prove actual malice.
  - Rationale: (1) when there are disputes like civil rights movement, we want to make it harder for public officials to sue & (2) hard to draw lines between truth & falsity, and statements of fact & opinion, so we need breathing room for the First Amend.
  - Illustrated SCOTUS' willingness to use 1st Amendment to come down on the side of those who needed maximum speech rights to be heard by the rest of society.
  - By forcing every state to adhere to new First Amendment standards, SC started defamation law on road to greater uniformity across the states & opened up a new avenue of appeal for defamation cases directly to the SC, whereas before it was strictly a matter of state law.

(2) Public Figures

Rule: Public figures must also prove **actual malice** in addition to the other prima facie elements. There are 3 kinds of public figures:

(1) General Public Figures: Someone who is notorious in society

- Mitt Romney, Tom Cruise, actors, talk show hosts, former PO's.
- Famous general in the military (Colin Powell) = general public figure. Not a public official b/c he hasn't been in office for long time but he's still famous.
- Coach of a state university (John Wooden) = general public figure.

(2) Limited Public Figure: A person who has **voluntarily inserted themselves into a public debate about some issue**. It is your own activity, where you are attempting to insinuate yourself into a public dispute, that makes you a limited PF.

(i) Distinction between general public figures & limited public figures is that general public figures are very widely known, whereas limited public figure is someone who is public for purposes of a particular dispute.

(ii) The standard of proof changes based on statement. For example, president of Heal the Bay is a limited public figure for issues involving pollution & president of Planned Parenthood is a limited public figure for issues of women's health. **For these people, in this context, for defamation they have to prove actual malice.**

- 'President of Heal the Bay dumps oil in ocean.' For defamation suit President of Heal Bay, must prove actual malice for that statement.
- But if defamatory statement about president of Heal the Bay is that he got in a car crash & didn't pay the damages, that statement has nothing to do w/ Heal Bay, so for that statement he is private figure.
- It's possible that different things are said about the same person, and for some of those statements they have to prove actual malice and for others they don't have to prove actual malice.

(iii) Other Examples Distinguishing Between General & Limited PF

(a) If you're a regular person & go to Vons & hold protest signs in the parking lot about their pesticide infused produce, then you become a limited public figure for that purpose (union organizers)

(b) *Firestone*: Firestone was socialite in Florida & was reported on in the press. Husband was heir to Firestone fortune. She decides to divorce him, files for divorce & holds a few press conferences about it outside courthouse. Time published defamatory statement about her. Court held she was **not a limited public figure for purposes of her divorce**, b/c she didn't interject herself into the press for purposes of the divorce. To get a divorce she had to file in court this way, so **(1)** fact that she filed for divorce is not enough, and **(2)** fact that her name had appeared in the social pages was also not enough for divorce purposes to make her a limited PF.

- But Tom Cruise is a **general public figure for all purposes** (and always has to prove actual malice), even for things like his private divorce (so Tom would not be like *Firestone*).
- But just being a prominent citizen of the community is not enough to make you a public figure.

(c) Milkovich as a wrestling coach in a town where wrestling was a big deal, was arguably a limited public figure.

(3) Involuntary Public Figure: This is a small category & references people who were in the wrong place at the wrong time.

- Like the guy who was shot outside the empire state building.

(3) Private Figures

Rule: Per the Supreme Court, a private figure does not have to prove actual malice, it is left to the states to decide what standard they want to use as long as its not Strict Liability

(a) Standard for Defamation: States may define for themselves (as long as it is not Strict Liability) the appropriate standard of liability for a publisher of defamatory falsehood injurious to a private individual. So states can use whatever they want as long as it is not strict liability b/c you still need to show some fault, so it can be negligence, recklessness, or even as high as actual malice.

(b) Damages: However, states may not permit presumed or punitive damages without proof of actual malice. *Gertz*

- Court has not decided whether it will allow presumed or punitive damages without proof of actual malice for an issue of *private concern*. Gertz was about an issue of public concern, so we know what the rule is there, but we don't know if this is true for issues of private concern.

- ***Falwell:*** Jerry Falwell was very famous right wing religious figure who ticked off the left, including his nemesis Hustler magazine publisher Larry Flint. Flint's magazine had a section that poked fun at famous figures & in one issue poked fun at Falwell, saying his first time was in outhouse w/ his mother. Falwell sues & wins in state court (for IIED, not defamation).
  (i) Supreme court says Falwell is a **public figure who has to prove actual malice** for COA for defamation (it was a publication, was about him, harmed his reputation, but was NOT a false statement of fact b/c it was a parody, so no assertion of fact was actually made b/c nobody would believe this statement). Since parody is immunized from defamation suits, Falwell sued for IIED.
  (ii) IIED elements: outrageous + done intentionally & recklessly+results in severe emotional distress. Issue for IIED came down to whether it was outrageous conduct. SCOTUS says no, **in a case involving language, no matter what the cause of action is** (even if its IIED), **you have to prove there was a false statement of fact (an assertion of a fact).**

- ***Gertz:*** Gertz was a lawyer who was representing a client that claimed police abused him. Right wing organization published article about Gertz in a newspaper & lied about him (all false statements). Court held that Gertz the lawyer was a PRIVATE figure & private figures don't have to prove actual malice.
  (i) Not a *general public figure* b/c he hadn't thrown himself out into the news, he didn't try to become famous, he was just a regular lawyer doing his job.

(ii) Maybe argue *limited public figure* b/c he represented himself as someone suing cops, there were some articles about the case, etc. But court said no, that was not enough to call him a limited public figure, so he was a private figure.
(iii) SC held that newspaper or broadcaster publishing defamatory falsehoods about a private individual may not claim a constitutional privilege against liability on the ground of a privilege protecting discussion of any public issue w/o regard to the status of a person defamed therein.

Step 2: Fact versus Opinion

(a) The Problem: There is the potential for couching all "facts" in form of an "opinion" to try to avoid liability for defamation.

- In my opinion, Dana plagiarized her paper by downloading it from internet.

(b) <u>There is no separate constitutional rule protecting opinion.</u> *Milkovich*

(i) That means, just stating a statement of fact by saying "In my opinion X" is not enough to avoid defamation liability for statements of fact.

(ii) Since opinion is not constitutionally privileged, **it is up to state courts to determine how they want to treat opinions based on state law.**

- Dispositive question is whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of FACT.

(c) Nonetheless, several protections are in place in cases like *Milkovich:*

(i) A statement on matters of **public concern** must be provable as false before there can be liability under state defamation law.

- In my opinion Mayor Jones is a liar = Actionable
- In my opinion, Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx & Lenin = Not actionable.

(ii) Reasonably stating actual facts about someone. *Falwell*

- Note that *Falwell* protects parody & in effect protects at least some form of "opinion."

- ***Milkovich:*** Fight at wrestling match, authorities determined coach was responsible & sanctioned him & said team could not participate in next year's match. Parents & coach get the sanction overturned by appealing. Journalist writes that only reason it got overturned is b/c coach lied in court (perjury) & anyone who was at the meet knows he lied. Coach sued & journalist's defense was that its his opinion, so its constitutionally privileged. Supreme Court says **opinion is not constitutionally privileged, so its up to state courts to determine how they want to treat opinions based on state law.** The state can then go on to say that opinion is privileged under state law (under the state constitution).
  - If you are asserting something as a fact, its not immunized merely by saying in my opinion.
  - But remember parody (i.e., John Stewart) does get constitutional protection b/c its not a false statement of fact, he's just saying something funny, nobody thinks what he's saying is true.

PRIVACY TORTS

- History: Warren & Brandeis write about right to privacy, which is of recent origin. Concerned w/ technologies like photography & saw public sphere & private life (home, friends, family) as two very different things & wanted to keep them separate. There is always a tension in the privacy torts between the two following things:

(1) Property Rationale: Protect people's privacy b/c its an aspect of their property. Looked to IP, copyright & trademark law.
(2) Personality Rationale: Protect people's personality (as their human dignity). Looked to defamation law b/c it protected people's psyche & injuries to their psyche.

- Overview: Privacy Torts
  (1) Publicity Placing Person in False Light
  (2) Publicity Given to Private Life
  (3) Intrusion Upon Seclusion
  (4) Appropriation of Name or Likeness
  (5) Breach of Confidence

Publicity Placing Person in False Light (False Light)

(a) RULE (Rest2d): One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy, if:

(a) The false light in which the other was placed would be highly offensive to a reasonable person; **and**

(b) The actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

(b) Elements: Parsing the rule into its elements:

(1) Publicity

- **Publicity requires broadcasting it to many people** (more than a couple of people). If you only tell 2 people then you haven't committed tort (10-12 enough).
- Different from *publication* in defamation which only required one other person.

(2) Placing Another in a False Light

- This is a gestalt tort, so we are **looking at the big picture and have to look at the entire context to see if there is falsity (**about the general **"gestalt"** of the statement). It was the opposite in defamation, where we looked at a single statement that was provable as true or false.
- Plaintiff need not prove that the false light harmed her reputation, just that it portrayed her to the public in a false position. It's like putting someone in a position that makes it look like they are doing something wrong even though the thing itself might be true like in chic thrills. **Examples:**

  (i) Putting churchgoing woman's picture in a pornographic magazine via photoshop is clearly placing someone in a false light.

  (ii) ***Braun v. Flynt*:** "Chic thrills" is a feature in a hard core porn magazine. Picture showed woman feeding a pig underwater w/ a bottle & it was placed in the middle of other pornographic pictures. Picture itself was not doctored in any way. She sued for false light. Court held that false light is satisfied where the portrayal is in **"overall context" of sexual exploitation and disparagement of**

women. Jury could find that ordinary reader would form an unfavorable opinion about plaintiff. Case is a perfect example of false light.

(iii) Contrast w/ ***Dempsey*****,** where a pilot fell out of a plane & National Enquirer wrote article about it. He sued saying a mere association w/National Enquirer was itself highly objectionable to a reasonable person. Court said that is not enough, just mere association w/a publication you don't like is not enough.

(3) Highly offensive to a Reasonable Person

- Comment to Rest §652E: Perfect accuracy is seldom attainable by any reasonable effort & most minor errors, such as a wrong address for his home, or a mistake in date when he entered employment or similar unimportant details of his career, would not in the absence of special circumstances give any serious offense to a reasonable person. Plaintiff's privacy is not invaded when the unimportant false statements are made, even when they are made deliberately. Its only when there is such a major misrepresentation of his character, history, activities, or beliefs that serious offense may be taken by a reasonable man in his position.

(4) Actual Malice (actor knows or recklessly disregards) [JD's are split on this issue]

- Falsity of the Publicized Matter; and
- The false light in which the other would be placed.
- Jurisdictions are split on the issue of whether a **private figure plaintiff** must prove constitutional **actual malice** for a false light claim. Some courts require actual malice & some do not, but the supreme court in *Cantrell* assumed it was required.
- Public officials & public figures MUST prove actual malice.

(c) Defenses: False light is the only privacy tort to allow **truth as a defense.**

(d) Distinguish False Light From Defamation

- Defamation P must prove specific false statements that harm reputation.
  --False light P proves falsity in overall portrayal (gestalt). The interest affected is injury to the inner person.
- In Defamation, P must prove only publication (one person sufficient).
  --False light plaintiff must prove publicity (requires WIDESPREAD disclosure).
- In Defamation, PO or PF P must prove actual malice but private figure P doesn't have to.
  --False light, some courts require private figure P to prove actual malice & some do not.

- ***Cantrell:*** Article by Esterhouse about aftermath of bridge disaster. He interviews kids of family whose husband died in bridge collapse, but never interviewed wife. Describes family as very poor, kids wearing clothes w/holes, says mom will not talk about what happened, but he never actually interviewed the mom. Family sues for false light. The false light was not that they were poor b/c they were poor, it was the portrayal of their impoverishment & claim that mom refused to talk about it. Family says b/c of the false light they were placed in, it subjected them to ridicule in their community. They could not win on a defamation claim b/c he never said anything false. **But when you look at the whole of the portrayal, the gestalt of it, it does place them in a false light.** Trial court found that P

did not establish common law malice. The Supreme Court held that common law malice was different from constitutional actual malice & that what happened in this case was enough to show actual malice.

Publicity Given to Private Life (Public Disclosure of Embarrassing Private Facts)

(a) Policy Issues

- **For invasion of privacy tort, there does NOT need to be a false statement.**
- Tension between constricting publicity to protect privacy & free communication. This is about the tension between keeping things private versus the First Amendment.
- There is tension with the First Amendment here, b/c the First Amendment wants to protect truth, so how can you punish someone who is telling the truth. Instead of addressing this tension between privacy & truth head on, Posner in *Haynes* says here we have someone whose life was not private.

(b) RULE: One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that:

(a) Would be highly offensive to a reasonable person, **and**

(b) Is not of legitimate concern to the public (newsworthiness).

(c) Elements:

(1) Publicity (same as in false light); and

(2) Concerning the private life of another

(i) Things that happen in public are usually NOT protected.

- ***Daily Times v. Graham:*** Woman at 1964 state fair in Alabama steps out of fun house & fake wind that blows up her skirt, photog snaps her pic & puts it in newspaper. She sues for giving publicity to private affairs & wins. Court said this would be embarrassing to an ordinary person of reasonable sensitivity. But pic was captured in a public space & usually things captured in public are not actionable. How to reconcile?
  - Court acknowledged that who is part of a public scene may be lawfully photographed as an incidental part of that scene in his ordinary status, but the court created an exception for those in which the subject is *unwittingly posed in a "status embarrassing to an ordinary person of reasonable sensitivity."*
  - **This is probably not how this case would have come out today.** But it remains good law in its own realm & suggests that certain kinds of activities taking place in public space are going to be treated as private.
- ***Gill v. Hearst:*** Married couple is snuggling in a market. Photog takes a pic & publishes it. Court holds they did this in public so it's their problem, anyone walking by could have seen it, so it's not protected and could be published.
- ***McNamara:*** Soccer player's genitalia comes out of his shorts during a public soccer game, photog captures & publishes it. Court holds no violation, photog can publish it.
- ***Neff:*** Male sports fan at Steelers game was hamming it up for photogs, pic of him w/his pants unzipped was taken & published in Time. He sued for violation of privacy. Court held no violation b/c it was taking place in a public space & photography in public space is permitted so you are the one at risk.
  - No cause of action where factually accurate photo is published even if the photo is "offensive to ordinary sensibilities."

(3) Highly offensive to a reasonable person

(4) Not of legitimate concern to the public (not Newsworthy)

(i) Newsworthiness focuses on a judgement by the media as to whether some particular kind of information is of sufficient importance to let the world know about it. It is frequently contrasted w/ the notion of privacy itself. Many people think stuff about Tom Cruise & his scientology faith is newsworthy b/c he is a famous person.

- ***Sidis:*** Child prodigy was built up in press but flamed out & became a recluse. 20 years later, New Yorker published profile on him called April Fool. Article was described as a "ruthless exposure of a once public character," who had since sought the seclusion of private life. He sued & court said it was newsworthy (he was a person of great notoriety at the time so society was interested in him), & he loses b/c the question as to whether Sidis fulfilled his early promise remained a question of public concern.

- ***Sipple***: Main Case. Sipple is former marine who stops woman from shooting president. Newspaper publishes article about him saying he is gay. Community knew he was gay but his family did not. He sued the newspaper. He lost b/c he had become a public figure on account of his heroic action saving the president. His family disowned him. Interesting b/c he was involuntarily exposed in this way & article about him was actually very positive & said that gay people can be heroic just like everyone else.
  - Court held: **there can be no privacy with respect to a matter which is already public or which has previously become part of the public domain. Once the information is released, unlike a physical object, it can't be recaptured & sealed.**

(d) IMPORTANT NOTE: For this tort, Posner says that you as a plaintiff **can lose either b/c the tort elements are not satisfied; OR <u>even if all the elements are satisfied, there is a countervailing interest in the First Amendment</u> to speak the truth.** SO always possible to make an alternative First Amendment defense argument.

- <u>GENERALLY</u>: Press can publish truthful information about a matter of public significance even if it publicly discloses private facts, protected by the First Amendment. [i.e. even if π meets all four elements, π can still have a 1A defense]

- **First Amendment Takeaway:** Since it is about language it triggers first amendment scrutiny.
  - ***COX:*** If info is **from a public proceeding** you can't penalize for the publication of it.
  - ***Daily Mail:*** If newspaper **<u>lawfully obtains truthful information about matter of public concern,</u>** can't punish unless there is a compelling state interest which is very hard to show (court has never found anything to be a compelling state interest)
    - If it's about <u>private concern</u>, that is still an open question. BUT private concern is the only thing that is left of the tort after Bartnicki, so if that is gone too then the tort can't be used for anything.
  - ***Bartnicki:*** Private convo was illegally obtained & broadcast on radio by Vopper who knew it was a result of an illegal interception. Court says you can't punish broadcaster even if he knew it was illegally obtained b/c **(1)** he played no part in the interception **(2)** he lawfully obtained access to the tape **(3) subject matter of convo was a <u>matter of public concern</u>**
    - **Hypo:** What if it were a matter of private concern? Would Bartnicki still control? Court didn't decide whether truthful publication can ever be punished without running afoul of the First Amendment.

(i) *Haynes v. Alfred Knopf:* Book written about African American migration framed around story of Dorothy & her husband Luther Haynes. Haynes is described as drunk scoundrel. He sues for libel & publicity to private matters. Libel charge about: (1) He left children alone at night when he was supposed to watch them; (2) Lost job b/c of drinking; (3) Spent money on car when he should've bought kid shoes.

- Posner says we would have to have a trial about whether they were true or not, but these statements were substantially true in a general sense; the fact that there are details that are off does not matter, therefore the libel action is appropriately dismissed.
- For invasion of privacy tort, there is tension w/ 1st Amend which protects truth, so how can you punish someone that's telling the truth. Instead of addressing this tension between privacy & truth head on, Posner says here we have someone whose life was not private, other people knew about his drinking, knew about his car, etc. **But elements satisfied:**
  (1) Publicity – this is a best selling book read by thousands
  (2) Private life of another – Stumbling into a room w/bottle in your hand, ready to get busy, is not sufficiently sexual in nature to be "that kind of" private. Although home is arguably private.
  - Posner: private are things that are either sexual acts, or going to the bathroom
  (3) "Highly offensive" – glossed over
  (4) Newsworthy – yes b/c there is a great public interest in telling the migratory story.
- You lose either b/c the tort elements are not satisfied; or even if all the elements are satisfied, there is a countervailing interest in the First Amendment to speak the truth.

(ii) First Amendment Limitations on Disclosure Tort: There is a 1st Amend right of people to speak freely on any subject unless it fits into a very narrow circumscribed arena.

Cox Broadcasting

- Press obtained the name of a rape victim from a judicial proceeding (indictment) & records that by law were open for public inspection. Charged w/ violating the state statute prohibiting publication of rape victims names. Objected saying they had a First Amend right to publish something in a public government document.
- **Court agreed & newspaper won.** Press publication protected by First Amend.
  - Key rationales: Information was disclosed in a public, judicial proceeding; the source was available to any member of the public; & press has an important function to check judicial process.

Daily Mail

- If a newspaper **lawfully obtains truthful information** about a matter of public significance (?) then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.

BJF

- Through an error, the name of this rape victim was posted in the police department, in a public place, where press members were allowed to be there.
  - Key, operative fact for the Court: Police posted B.J.F.'s name on the wall.
  - White in dissent says that signs were posted everywhere in the room stating that rape victims' names could not be published
- **Court holds newspaper had a First Amendment right to publish it.**
  - "We hold only that where a newspaper publishes *truthful information which it has lawfully obtained*, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and

that no such interest is satisfactorily served by imposing liability under the state statute here.

- What happened to "lawfully obtains truthful information about a matter of public significance"?

- Defendants sought a rule that the press may never be punished—civilly or criminally—for publishing truth.
  - ***Court rejects this absolute rule.***

(iii) Does Telling My Story Invade Your Privacy (right of privacy vs. right to express herself)

(i) Susana Kaysen tells all about her failed relationship w/ Bonome & gives lots of sexual detail. He sues.

- Does Bonome's right to privacy outweigh her right to express herself?
- Court held = there is a sufficient nexus between those private details & the issue of public concern.
- Also, she has an interest in telling about these things that happened to her, in telling her story (even though she's writing about things Posner said were private like sex).

(ii) Jessica Cutler was a staffer on the hill who had an anonymous blog about her sexual exploits w/other staffers identified by their initials. She also writes that men on the hill are paying for her living expenses (she identifies one of them as RS and says other sexual things about him). RS & she are outed. He sues Jessica saying she exposed our private details and it is an invasion of my privacy.

Intrusion Upon Seclusion

(a) Rule (Rest652B): One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

- NOTE: Not necessary to record information to be "intrusive." Tort is complete with the intrusion. No publicity required for the tort.

(b) Elements:

(1) Intentional

- It must be intentional, it can't just be negligent.
- Requires knowledge w/substantial certainty that your acts would result in intrusion

(2) Intrusion

- This doesn't have to be a physical intrusion, it can be any kind of action that results in intrusion like snooping through email, hacking into email, identity theft, misrepresenting yourself to a bank to get someone's information.
- **No intrusion where the information "is open to the public" or has been voluntarily revealed to others.**

(i) Posner says if you show up at someone's house under false pretenses (e.g. saying you're a meter reader, but you're actually spying) then that is

an intrusion even if you voluntarily let the person in b/c you're consenting under false pretenses.
(ii) Couple finds video camera behind wall in their apartment & even though it never recorded anything, its being there was enough for intrusion

(3) Solitude/seclusion/private affairs of another-These 3 all mean different things:

- **Solitude** = a person's desire to be left alone (they have gone off into a quiet place). A person can intrude on solitude if they track someone else into the woods.
- **Seclusion** = means someone has set themselves aside (either with a physical or metaphorical space they have created for themselves).
- **Private affairs** = are your books and records, financial matters, medical records, relationships with other people that you are trying to keep quiet.

(4) Highly Offensive to a Reasonable Person

- Judgement call by the jury. E.g. climbing a tree to get a good view of the neighbor's backyard to video what neighbor is doing. (Restatement's example).

- NOTE ***Bartnicki v. Vopper*** **Rule:** Case suggests that there is no publicity tort available if the matter on which **publicity is given is a matter of <u>public concern</u> AND**
  (1) you had nothing to do w/ intercepting the info
  (2) you didn't obtain it illegally &
  (3) it's a matter of public concern (so no one has a right to privacy if they are speaking about a matter of public concern)

(c) Public v/ Private (SEE Bartnicki v. Vopper)

- Tort requires court to distinguish between that which is "public" & that which is private.
  - Only intrusions in to private affairs will trigger liability.
- The distinction rests on culturally contingent understandings that may change from one time or place to another.
- Widespread deployment of surveillance cameras is not really privacy concern b/c its public safety issue + people are in public so no expectation of privacy.
- Someone in hospital having IVF = disclosing that info is publishing a private matter
- ***Kubach***- He disclosed his HIV status to his coworkers & family & a colleague told other people. Court held that was a violation b/c it was about his medical concern.

(d) Compare Intrusion Tort w/ Publicity Tort

Both involve distinctions between private life of another & highly offensive to RP.

Comparison	
Intrusion tort	**Public disclosure tort**
Intentional	
Intrusion	Publicity
Solitude/ seclusion / private affairs of another	Private life of another
Highly offensive to a reasonable person	Highly offensive to a reasonable person

	Not of legitimate concern to public (not newsworthy)

(e) Cases

- ***Nader v. GM:*** GM did following to Nader b/c they didn't like him & wanted dirt on him.
  (1) Interviewed his acquaintances/neighbors-**Court holds interviewing his acquaintances is not an intrusion into his affairs** b/c he doesn't have a right to prevent people from interviewing his acquaintances (this would hinder the freedom of the press greatly).
  (2) Kept him under surveillance in public places (followed him into a bank & saw denomination of bills he was getting)- Court said if all you are doing is **following him in public in the ordinary course of the day, that is not a invasion of privacy. But if it were comprehensive, close surveillance (at every turn so that he could not go anywhere without being followed), that might potentially be an intrusion.**
    - So following him outside is not an intrusion, but once he gets into bank it changes. If Nader takes out his money & openly counts in so other people can see, then there is no intrusion. But if he is trying to count his money privately, then it IS an intrusion to peer over his shoulder & try to see the denominations.

  (3) Accosted him with girls-Not an invasion of privacy is girls are outside house.
  (4) Harassing phone calls to his house-Court held this was **not an invasion of his privacy b/c merely calling someone where you have their phone number is not an invasion** of privacy.
  (5) Tapped his phone-Court holds this **IS an invasion of privacy** (also a violation of federal law).

- ***Schulman:*** News crew gets into a medical helicopter &films rescue of woman as its happening. Filmed both at the accident scene & inside the helicopter. Helicopter had pilot, medic, a nurse wearing a microphone, & cameraman. Issue is whether they invaded her privacy as they were trying to get story
  - **Filming the accident scene = NOT** an intrusion b/c it was something open to the public, anyone passing by could have seen & heard what was going on. She had no right to not be photographed under these circumstances.
  - **Filming inside the helicopter = WAS** an intrusion b/c that is like being in an ambulance, the victim has a reasonable expectation of privacy in an ambulance.
  - **Putting a microphone on the nurse & recording the conversation = WAS** considered intrusive even though passersby could hear what she was saying.

- ***Bartnicki v. Vopper:*** Private cell phone conversation was intercepted by unknown third parties in violation of state & federal wiretapping law. Federal law prohibits both the interception & disclosure of that information. It is 2 separate violations. This illegal recording is left in the mail box of head of the local tax payer's organization. This guy gives the recording to a local radio host Vopper, who airs it to the world. Person who actually intercepted the conversation is never found (he would clearly be liable). Elements of intrusion tort are met b/c of the intrusion on a private phone convo & the public disclosure tort would have prohibited the giving publicity to the private conversation. This case is being brought under a federal statute, but both torts are represented in the statute. Problem is that Vopper did not commit the interception of the call (so he had nothing to do w/ the intrusion). Plaintiff argued Vopper knew the conversation was illegally intercepted & is liable for knowingly airing it. **Court holds that the radio host can't be held liable (nor may he be prosecuted despite violating the federal law or the equivalent tort)**. Court gives 3 reasons why radio host had a First Amend right to broadcast it:
  (1) He had nothing to do with the illegal interception.
  (2) The radio host lawfully obtained access to the tapes, even though the information itself was intercepted unlawfully by someone else. If the radio host had paid for the tapes it would be a different story.
  (3) The subject matter of the conversation was deemed a **matter of public concern.**
  - Even if interceptor had just handed the recording to Vopper, instead of going through a third party, Vopper would still have no liability.

Privacy Hypo's

(1) TV network secretly videotaped a news producer's conversation w/ a potential source as the two stood at the source's doorstep. Network aired 5 second excerpt of the videotape, even though the source had declined an on-camera interview. The source was in full public view from the street while speaking with the producer, & network filmed her from a public place across the street. Violation of the giving publicity to private affairs tort? **[**News producer goes up to guys house & guy stands on his doorstep & says I don't want to be filmed. They film him from across the street and air it. Does it violate the intrusion tort?]

--Probably not b/c there is no audio recording here, its only video. There is no intrusion here, he was standing in his doorway, anyone from the street could see him talking to the producer so there was no intrusion. It would be a difference if there were audio recording here.

--Does it violate publicity tort?

-No. There is nothing private here. He could have closed the door & refused to talk but instead he came out and spoke to them on the street.

(2) An undercover reporter obtained a job as a "telepsychic" & secretly videotaped her conversations w/ her coworkers. Did the reporter intrude upon the coworkers' seclusion?

-Yes this is an intrusion. Court held that conversations occurring in the workplace still have an expectation of privacy around them (the mere fact that other people can hear it is not enough).

(3) TV news broadcast about a judge who was given the lowest rating possible in a poll of attorneys included video footage of him leaving his home. Does he have an intrusion claim?

-No intrusion.

(4) Did the *wife* of a heart attack victim have a valid intrusion claim against a TV news crew that entered her home w/o her consent to videotape unsuccessful attempts by paramedics to save her husbands life?

-Yes it is a trespass onto her land b/c they enter w/o her consent. And its also an intrusion b/c they tape the husband (so even though she was not the target she still had an intrusion claim).

- But if in *Schulman,* if the husband had been standing there next to the injured wife, he would have no intrusion claim. So the wife's claim here is b/c she is inside their home.

Appropriation of Name or Likeness

(a) This is like taking someone's name & slapping it on a product to sell it w/o permission. It encapsulates a tension between privacy & property interests. This tort has 2 different rationales:

(1) Invasion of privacy: she didn't want her image plastered on the cereal box

(2) Property interest in it: they were making money off of her image

(b) Rule: Rest 652(c): One who appropriates to his own use or benefit the **name or likeness** of another (can be someones voice too) is subject to liability to the other for invasion of his privacy.

(i) Appropriation is an unwanted, unpermitted use, usually of an ordinary person (not a celebrity).

- EX: Cereal company puts picture of woman on their box w/o her permission.

(ii) Own Use or Benefit-is taking something for the use of oneself for an economic way. **Has an economic connotation (which is a required part of it).**

---EXCEPTION: News is ALWAYS protected. You cannot sue a magazine that plasters a bad picture of a celeb on the cover to sell magazines if it is newsworthy.

- ALL critique of contemporary icons IS news (even if it is not commenting on events currently taking place--i.e. Berry Bonds making lots of money is news).
- **ALWAYS possible to have First Amendment Defense Argument.**

Cardtoons v. Major League Baseball: Case is built around the right of publicity statute in Oklahoma which parallels appropriation tort. Cardtoons created funny baseball cards making fun of players w/o their permission. MLB objected b/c they were getting nothing out of the sale of the cards. Court said the cards are merchandise & don't fit into any of the exceptions.

- Can argue cards were news b/c they critiqued famous people. Professor says if same thing had been in the newspaper in the traditional form then whole case would come out differently. Court is stuck in 19th century version of news where it has to be in a magazine or newspaper & is limited to reporting on current affairs as opposed to critiquing cultural iconography. So professor would have used the news exception and not gone on to do First Amendment Analysis.
  - **Court holds cards do violate the statute BUT there is a 1st Amendment defense/exception to this.** The court is saying the 1st Amend protects this parody even if it doesn't fit in the news exception b/c First Amend is not confined to news, it is about any kind of expression.

- MLB argues there is a different level of protection for commercial speech (commercial speech is advertising). Court rejects this b/c commercial speech is an advertisement designed to make you buy a product and these cards are not themselves an advertisement. Therefore, these cards are deemed regular speech and are protected under the balancing test b/c MLB players interests don't outweigh the expression in the cards.

(d) Other Examples of What Works and What Doesn't

(i) Porta Potty manufacturer called their product "here's Johnny." Johnny Carson sued & won b/c it was a phrase associated w/ him and it was used for an economic purpose attached to a product. The court said it was an appropriation and ruled for Carson.

(ii) Celebs sue for magazines publishing unflattering pics of them. Courts say no you can't sue for that b/c it is not an appropriation.

(iii) Vanna White Case: This is a case in the middle of the two above. Samsung parodied Vanna by using a robot caricature of her in a commercial & caption read "longest running game show 2012" to insinuate that it's running far into the future. Vanna sued & won.

- Kozinski Dissented & said this was a bad decision b/c people want to poke fun at American cultural icons & problem w/recognizing her claim is that we are using this tort to stifle free expression. Celebrities produce meaning in culture & need to be subjected to critique. Too much protection under these privacy torts are impeding free discourse in society. His dissent is more popular than the holding itself. So this is still an active dispute and professor sides with the dissent.

(iv) Billboard in NY showing Obama wearing a coat manufactured by Weatherproof. Company is trying to use an association to sell their product. If Obama sued he would win b/c they are using his image to impliedly endorse the product. Same is true if Madonna were shown on a billboard in the same circumstances. But selling a product is very different from critiquing a person. So this Obama case is distinguishable from the Cardtoons case and is distinguishable from the Vanna White case.

(v) Woody Allen is dressed as a hasidic jew in a movie. American apparel takes that image & uses it in an ad. Only thing the ad says is american apparel. He sued b/c they're selling something even though he's not wearing their product & won for appropriation.

Breach of Confidence

(a) Elements: A claim for breach of confidence typically requires proof that:

(1) The defendant owed plaintiff a duty of confidentiality; and

(i) This is a different duty than what we learn in torts about duty of reasonable care. The regular negligence duty does not suffice here.

(ii) An affirmative duty must be established, it is not presumed. To find that duty, you must have either:

(1) A relationship (where there is an implied obligation not to disclose confidential information like lawyer/client); **OR**

(2) A statutory duty of confidentiality.

(2) The defendant learned of information of a confidential nature; and

(3) Which was communicated to defendant in confidence; and

(4) Defendant disclosed the information to the detriment of the claimant.

(b) Nockleby's Note

(i) So there's a duty that is created by the relationship, a passing of information & breach

(ii) Establishing breach of confidentiality **depends on proving the existence and breach of a duty of confidentiality.** Courts in the US look at the nature of the relationship between the parties. Most commonly, breach of confidentiality applies to patient-physician relationship but it can also apply to relationships involving banks, hospitals, insurance companies and many others.

- ***McCormick v. England:*** Physician is the family doctor. Parents are getting divorced & doctor (who had private info disclosed to him during his care) is asked to provide a letter. He writes a to whom it may concern letter which is offered in evidence in court for the dad to get custody of kids. Letter refers to the mothers alcoholism, depression & other medical problems that were all disclosed in confidence. It also says kids were at risk b/c of these things associated w/ the mom.Mom sues doc for breach of confidence

  (i) First step is to **find a duty of confidentiality (what is the source of the duty)**. That stems from the relationship between doctor and patient.

  - Different from doctor patient privilege b/c that only allows you to stop doc from testifying about you. Here doc wrote letter on his own disclosing info. Doc has a duty to not violate her confidentiality & not tell anyone about her problems. So the relationship is the first step

  (ii) What doc was really saying is that kids r at risk. Don't we want him to be able to disclose that?

  - **<u>Although court creates this tort, they also graft this exception on to it:</u> You are privileged to break the confidence in order to protect someone else (i.e, the kids).** They recognize that there will be exceptions where the confidentiality can be/must be (i.e., *Tarasoff*) broken. They remand for the lower court to figure it out.

ECONOMIC TORTS

1. **Inducing Breach of Contract**
2. **Intentional interference with prospective economic advantage**
3. **Unfair Competition / Misappropriation**
4. **Misappropriation of Trade Secrets**
5. **Injurious Falsehood**
6. **Fraud & Misrepresentation**
7. **Negligent Misrepresentation**

Inducing Breach of Contract

(a) History: Origins from Statute of Laborers (1350) which barred enticement of another's servant. Then in *Lumley v. Wagner*, opera singer was contracted w/ Lumley to sing but she got a better deal w/someone named Guy. Lumley sued her for breach of K for specific performance. Court refused to grant specific performance b/c can't force someone to perform a personal services K b/c its like enslaving them. So Lumley then sued Guy for enticing Wagner to breach the K. So why create this tort allowing Lumley to sue Guy when there is a basis in contract for him to sue Wagner for damages (not for specific performance)?

- To disincentivize people from breaching contracts.
- To create alternative remedy to be able to recover from another party if the breaching party has no money to pay.
- To protect the integrity of contracts. This has a moral dimension to it b/c we like contracts & want people to engage in them & perform them + **we want to eliminate alternatives for Wagner to be able to perform elsewhere**.

On the flip side/critique of this tort:

- **Efficient Breach** is the counter economic argument to the moral claim that if you have a K you should perform it.
    - If Wagner gets payed more $ & can compensate Lumley for his losses, then social welfare is increased by allowing her to breach her K without penalty. She should be allowed to & there should be no moral sanction on it, which is what this tort is.
- Underlying K w/ Lumley might not be fair to Wagner, but if we do not allow Wagner to escape the K, then we will never know if it was fair or not.
- Discourages competition.

(b) Elements for Inducing Breach of Contract

(1) A valid contract existed between plaintiff and a third party

- i.e., a valid K between Lumley &Wagner

(2) The defendant knew of the existence of this contract

(3) Without justification, the defendant intentionally engaged in acts or conduct which induced the third party to breach the contract with plaintiff

- This means you intended to act.

(4) The defendant intended to induce a breach of such contract

- Means you sought to induce the breach, you are acting knowingly that your acts are resulting in breach, it is not that you merely though it would happen.
- Negligence is NOT sufficient here. SEE *Imperial Ice.*

(5) The contract was in fact breached

(6) The acts & conduct of the defendant which induced the breach caused damage to the plaintiff.

(c) Defenses: Types of "Justification" for element 3: These are the types of things you are allowed to induce breach of K for without liability:

(1) To protect your own contract

- A has contract w/ B to supply it w/ gas at X price & quantity. A also has a K w/ C for the same thing. If A's have too many such contracts w/ people there may not be enough gas to go around and C is allowed to convince A that A should sell to him (C) and not to B, so that C gets his supply.
- After hurricane you restaurant owner are allowed to ask your supplier to deliver to u even if you're disrupting his K w/ someone else, b/c doing it to protect your own K.

(2) Where enforcement of the underlying contract is against morals or health or safety (e.g., persuading boxer to an unregulated match not to fight).

- You are allowed to convince someone to not do something that he has contracted to do if it is against morals or health or safety.

(3) (Peaceful) Labor strikes to induce customers not to shop; or others not to deal; or other workers not to labor. (Violence or illegal activity not okay).

- Labor union is striking & part of their objective is to encourage others not to do business w/ their employer (i.e., others who have a contract w/ their employer, like a supplier) as an economic tool for the employer to feel the pressure. That is considered adequate justification.

(4) Advertising lower prices without deliberate effort to cause person A to abandon a contract with person B.

- If a store knows you have a K w/ someone, they send you an ad with lower prices so you can go to them, that is okay even if you told them you're w/ someone else.

- ***Imperial Ice v. Rossier:*** Buyer purchases ice business from popular ice guy & sale K includes covenant not to compete & not sell ice in that area (santa monica). Ice guy starts selling ice in SM & has another supplier who is helping him screw the buyer. Buyer plaintiff sues ice guy for breach of K + sues supplier b/c supplier wanted ice guy back in business & gave him a good deal to get him back in business to the detriment of buyer. Court gives several justifications for recognizing this tort:
  - **Ensure the stability of contract:** A person is not justified in inducing a breach of K simply b/c he is in competition w/ one of the parties to the K & seeks to further his own economic advantage at expense of the other. Contractual stability is more important than competitive freedom.
  - **Competition is not enough justification** to induce others to breach their contracts.

Important Things to Note:

- Supplier has to intend to interfere w/ the contract BUT supplier does not need to intend to put that other person (i.e., the buyer) out of business.
- Supplier has to do the acts intending the ice guy to actually sell in SM (intending the K be breached) just knowing he might sell in SM is not enough.
- If supplier told ice guy "I don't want you to sell in SM, I just want you to sell in Marina Del Rey" & ice guy violates it b/c they are so geographically close, then the **supplier would NOT be held liable b/c it is not a material enough breach.**

Intentional Interference with Prospective Economic Advantage

This tort involves a relationship that has not been reduced to contract yet (its a *prospective* economic advantage). Problem w/ tort is that its very broad b/c it covers all kinds of behavior we engage in on a day to day basis + **difficult to distinguish it from legitimate competition.**

(a) Elements:

(1) An economic relationship between the plaintiff & another, containing a probable future economic benefit or advantage to plaintiff (includes regular customers)

(2) Defendant's knowledge of the existence of the relationship

(3) Defendant intentionally engaged in [wrongful] acts or conduct designed to interfere with or disrupt the relationship. (Plaintiff has BOP to show D was wrongful)

(i) Interfering act must be wrongful, just mere interfering is not enough.
Wrongful was added to narrow type of conduct that can be punished by the tort.

- Mere Negligent interference is NOT sufficient (i.e. accident).

(ii) *Della Penna* suggests wrongfulness may:

(1) Lie in the method used (things that are **outside the realm of legitimate business transactions** like coercion, firing guns, throwing rocks at windows); OR

(2) By virtue of an **improper motive.**

- But professor says motive is not a helpful description b/c its too vague & broad. So it's impossible to use motive as a touchstone, you have to look at the things people do not the reasons they do them.
  - Banker in small town disliked the barber, so banker set up a competing barber shop across street & charged less $ & kept reducing prices until barber was forced to shut down (b/c he could not reduce prices any more). Banker then shut his barber shop down b/c purpose was just to put barber out of business. This looks like an improper motive but that is how things work in America; however, court is worried about cases like this.

(4) Actual Disruption; and
(5) Damage to the plaintiff as a result of defendant's acts.

(b) Should *Wrongfulness* be the Standard?

Problem with using wrongfulness as the standard is that it is too broad, we don't know what type of conduct it entails b/c it's amorphous and undefined. Court never says what "wrongful" means but they discuss conduct that is higher & lower than the wrongful standard so use it to compare. Possible standards are (becoming broader as it goes down):

(1) Illegal Conduct: If the tort were only triggered by illegal acts or conduct then it would be defined & very narrow (i.e., firing cannons at slave ships trying to buy slaves in order to deter the slave trade). Professor would be okay with it.

(2) Independently Tortious Conduct: This means you have to first prove an underlying tort to get the damages associated w/ it. However, then this tort would be redundant except this would allow recovery for economic losses.

- Example: I'm competing w/ another grocery store & I know that store has the best manager & my store would do so much better if that manager were out of business, so I hire someone to break his knees, then I've committed an independently tortious act which affects their ability to compete & that is enough to trigger this.
- Professor thinks this should be the standard instead of wrongful.

(3) Wrongful Conduct: This means we don't like what you did. But this is a problem b/c its so broad, what does wrongful mean (broad & amorphous & undefinable).

(4) Improper Conduct: This is even broader & lots of conduct could be challenged under it if it were the standard.

- ***Della Pena v. Toyota:*** Toyota wanted to introduce Lexus in US at a lower price & keep price high in Japan. They sell Lexus to US dealers & include clauses in the K w/dealers saying they cannot reexport the cars back to Japan & sell them there. Mr. Della Penna buys Lexuses from the US dealers & re-exports them to Japan b/c he was not bound by this K. Toyota tells dealers they can't sell to him or else they are going to cut the dealers off. Della Penna has no supply K w/ these Lexus dealers, all he has is an ongoing relationship w/ them & he argues that is enough to sue Toyota for this tort.
    - **Professor would say Toyota is acting to protect its own agreement, it's own economic interest (to keep enough cars in US), which is a valid defense.** Court doesn't do that.

- ***DP Tek v. AT&T:*** Venture sends out a request for a proposal for 3 things: software, hardware & ISP. Venture then enters into "master contract" w/ DP Tek, refers to potential orders & has a confidentiality agreement. A master K is something that sets out how things might work out between the parties later, but the only part of it that becomes binding (b/c it said potential orders, not actual binding ones) on them is the confidentiality agreement. Venture orally told DP Tek that it won the hardware K. Venture also told NCR that it won the ISP K. But no contracts were actually signed. NCR is the defendant & DP Tek is the plaintiff. Venture is the third party. In the meanwhile, NCR asked to see DP Tek's prototype for the hardware & their engineers took it apart & figured out how it worked. NCR also refused to share the source code w/ DP Tek. NCR told Venture that DP Tek's prototype is bad & came up w/ its own proposal which was accepted. DP Tek sues NCR for interference w/prospective economic advantage. What did NCR do that was "wrongful?" Must look at all the behaviors one by one:
    - **NCR saw the prototype =** Most likely a violation b/c DP Tek had a confidentiality agreement. DP Tek can argue that NCR, by soliciting to see the prototype, was causing Venture to breach the confidentiality agreement. Court holds that what NCR did here (asking to see the prototype & disassembling it) was not wrongful.
    - **Refusal to Share Source Code =** Not wrongful for NCR to refuse to share the code. It hurt DP Tek but that does not matter b/c they are in competition &NCR owed them nothing.
    - **NCR tells Venture DP Teck's Hardware is Bad** = Not wrongful for NCR to trash DP Tek's design b/c they are in competition & competitors are always going to be puffing their product (whether you puff up our own product or downplay the other guys).
    - Court holds that what NCR did was not wrongful, so DP Tek loses.

Unfair Competition

Unfair competition is the kitchen sink tort, it encompasses many things & is like a catch all category. If there is bad conduct by someone in the marketplace, it can be labeled as unfair competition so need to look at precedent to figure it out.

- It is a weak claim when listed by itself & should always be listed last in a complaint. Many types of conduct have been moved into different torts.

(a) Elements:

(1) Unfair; and
(2) Competition.

(b) Practices that fall into the area of unfair competition include:

(1) False advertising
(2) Bait and switch selling tactics (delivering payless shoes when you bought prada)
(3) Unauthorized substitution of one brand of goods for another
(4) Breach of a restrictive covenant
(5) False representation of products or services (i.e., knockoff watches)

(c) Policy:

(i) **Basic Conflict**: Two competing ideals in our economic system that are always in great tension with one another (property like interest vs. competition). Two approaches to protecting rights:

(1) Protecting <u>Property Like Interest</u>-when people work hard and create a business, we want to encourage these job creators and protect them from interference.

- McDonalds was first to develop idea of fast food & standardize something all across the country. People thought this was a good idea & competitors started springing up. If you take a property approach to this issue, then you want to protect McDonald idea & not let other competitors do it.

<u>versus</u>

(2) Ensuring vigorous <u>Competition</u>-we allow competition to destroy the property like ideals. We allow people to set up enterprises in competition with others.

- If you protect against a defendants **<u>behavior</u>** then competition against McDonalds is allowable (i.e., you can take away their business & crush them) unless competitors engage in **bad behavior** (like spreading false rumors, throwing nails into parking lot, hurting their customers). So as long as competitors get McDonalds' customers through enticements like lower prices, better tasting, food, etc then it is allowed.

(ii) So when we are regulating the marketplace through litigation, we have to decide whether we are interested in **protecting property** OR **regulating bad behavior**. Conflict among justices in ***INS*** & Brandeis as to which standard we look at:

- Look at both the underlying "property-like" claim made by the Plaintiff

and

- Look at the "behavior" defendant engaged in (Brandeis says look only at this one).

INS: INS copied the content of newspapers published on the East Coast by AP, rewrote the copy & telegraphed it to West Coast beating AP to the punch. AP charged INS with doing 3 things:

(1) INS bribed AP's agents to get the information

- This is bad behavior and an injunction was issued against them

(2) INS induced the AP employees to violate their confidentiality agreements.

- INS was interfering w/ contract & engaging in bad behavior by doing this. So this could be defined as unfair competition.

(3) AP agents would post news articles in bulletin boards in cities on the east coast. INS guys would write down the info on these bulletin boards and telegraph it to the west coast & beat AP to the punch. Whole issue in the case is, can INS do that?

- Court held you CAN prevent INS from transmitting the very ideas contained in those posted articles (i.e., the news) on the bulletin boards.
- There is a **property interest** in this information (i.e. in the news) **b/c it has <u>value</u>**.
  - Has value b/c it is **exchangeable**: in the marketplace it has value both to the **person who produced** it & to the one who can **misappropriate it**. So court is saying that merely b/c it (the news) has value, it can be protected as a property interest. **Court deems it to be quasi property.** But professor says that cannot be true now (the idea itself cannot be property). NOT GOOD LAW.
- **Brandeis DISSENT:** Says you can't treat the news as property, must approach it as a question of competition: is what they did unfair?
  - Mere fact that they're engaged as competitors should allow them to take advantage of whatever means are available to engage in competition as long as its not bad behavior. Fraud, violence, bribes, are all bad behaviors that are not allowed. But copying & selling info is not bad behavior, its our system.

(d) The Law Today

- ***Cheney Brothers***: Someone was designing seasonal patterns for dresses & it was not feasible to protect them under copyright b/c they didn't know which pattern would take off. Someone copied a popular pattern. Plaintiff creator sued the person who copied him. The copier did not sell it as a knockoff.
  - **Court held it was not protected.** Judge Learned Hand says you can't protect that design without statutory protection. He says *INS* was not intended to create a common law protection for things that are not designed to be protected by statue.

- ***NFL v. Delaware***: NFL objected to a football lottery ran by state of Delaware (as to who would win a particular game). Delaware said we are building a lottery around dates of games. NFL said you are using our creation to make money & using our property interest.
  - **Court held this was not protected,** did not constitute actionable misappropriation.

- All these cases culminate in the Restatement, **which says that *INS* is confined to its facts only b/c it was over broad, it would hinder competition in our society way too much.** So *INS* needs to be limited to its facts, but the idea--that you need to figure out which approach you start with & that it changes the analysis--is still valid.

Misappropriation of Trade Secrets

(a) Elements (P must prove the following elements):

(1) That a **trade secret existed** in which plaintiff had ownership rights when defendant committed the acts complained of by plaintiff; and

- **Trade Secret = anything associated with a business enterprise as long as it is kept a secret.** Showing that you have a trade secret is difficult to do.
  - Standard for whether a trade secret exits = **reasonableness under the circumstances standard** (not an absolute standard).
- P has to have taken significant steps to protect the information from disclosure, keep it under lock and key, keep it on a need to know basis. When you let it out of the bag you no longer have a trade secret.

(i) A customer list could be a trade secret.

(ii) A particular way that a salon applies color can be a trade secret as long as they keep it secret, if it is easily observable it is not a secret.

(iii) A process could be a secret (the way Mcdonalds puts burgers on the buns or if it cooks food at a certain temp which it never reveals to anyone (not to employees either) then that is a trade secret even though others might cook food at that temp)

(2) That defendant **acquired the trade secret**; and

(a) Through improper means (MAIN one we are focusing on); OR

- **Improper Means:** Reverse engineering is NOT improper means as long as item is not protected by patent law. If you can take something apart & figure out how it was produced, then you can produce identical thing & sell it as long as you don't pass it off as the original product.
  Example: Coke formula is not patented, so if you can deconstruct & reproduce it you can sell it.
  - Can reverse engineer processes too, like seeing the way a supermarket is set up and copying it (go to whole foods & see why it makes people feel good). **As long as what you are doing is not improper (i.e., illegal) & the thing is not patented or copyrighted, you can do it**.

(b) Through plaintiff's disclosure of the trade secret to defendant in a *confidential relationship* (confidential relationship issue is not litigated much b/c those relationships are often secured through contractual agreements); OR

(c) Under other circumstances in which defendant owed a duty not to use or disclose the trade secret (this is a big exception-we are not going to focus on this).

(3) That defendant **used or disclosed** the trade secret without plaintiff's permission; and

(4) That

(a) Plaintiff suffered harm as a direct and proximate result of defendant's use or disclosure of plaintiff's trade secret (you P have to show you lost something); **OR**

(b) Defendant gained from such use or disclosure (show that D gained something)

Rockwell Graphics: Rockwell manufacturers printing presses. They have to supply piece parts for these machines & use subcontractors to do it. Subcontractors need to know how to make these specific parts & to do that you need to know the design specifications for it. Rockwell had these design specification drawings for piece parts. Issue is whether piece part drawings are trade secrets? Drawings are not patented or copyrighted & can't be reverse engineered.

- Rockwell has thousands of these drawings that are locked in a secure location w/ a security guard. Their engineers have to sign them out when they want to use them. But they can make copies of the drawing & distribute it to the rest of their group. Engineers are supposed to destroy these copies but they don't enforce that policy.
- Also, their subcontractors are also given copies of the drawing to manufacture the pieces, those subcontractors give copies to their vendors who might place bids on them. Vendors are supposed to give the copies back but that policy is not enforced. So although the originals are all locked up, there are thousands of copies roaming around.
- **Holding:** Lower court granted SJ to defendant b/c Rockwell had not sufficiently protected it as a trade secret, they were too sloppy. Posner reverses SJ b/c standard for whether trade secret exits is a reasonableness standard so its reasonable to allow your employes to get the trade secret if they need it to do their job; it's also reasonable to give it to sub manufacturer as long as you protect it w/ confidentiality agreements (**reasonable to give drawings to people who need it to perform job).**

Injurious Falsehood (i.e., defamation for products)

Disparagement of plaintiff's property, products, business or services which affects their marketability.

(a) Elements (<u>Plaintiff</u> has ONUS of proving):

(1) D made <u>false statements of fact</u>

- Must be provable as true or false AND have to be proven as false.
- Not talking about opinions or suggestions about a product that its no good. This is the opposite of puffing, it is verifiably false statements.

(2) There is an **injury**

(3) Publication (statement must be published)

(4) Statement is **of and concerning the product**

- i.e., derogatory to the Plaintiff's business in general or of a specific product.
- A plaintiff or its products normally must be identified by name in the impugned publication, but identification by implication may be sufficient, such as where the plaintiff enjoys almost exclusive dominance of the market

(5) P must prove **special economic damages** (this is **injury to pecuniary/economic interests**, same special damages that we talked about in defamation); and

(6) Malice. 3 possible malice standards here:

(a) Intent to cause harm (not just intent to act which causes harm, it must be intent to cause injury), OR

(b) Recklessness, knowledge of falsity **(i.e, actual malice),** OR

- Negligence is not enough.

(c) Spite or ill will (essentially same as intent to harm so it is kind of redundant)

(b) Key Issues with Injurious Falsehood

- Difficulty with this tort lies in separating healthy competition from underhanded tactics.
- Therefore policy discourse is particularly useful in *applying* the rule.

Testing Systems v. Magnaflux: Company makes 2 disparaging statements about competitor. Court held both statements are provable as true or false & they are actually false.

(1) Their products don't work, they are no good; &
- Actionable b/c its more than just a comparison since it suggests they did not perform the service at all.

(2) The government is throwing them out.
- Actionable b/c it suggests product is no good. But if there were only the first statement in this case (no statement about govt), it would be much closer case.

(c) What you CAN & CAN'T say. What is *acceptable competition* is typically key issue:

- **D MAY:**

(1) Puff his own products
- "our product is worth 10X what you'll pay for it"
- "you won't be sorry you hired us"
- "our vacuum will clean better than any you've used before"

(2) Say general words of comparison
- "better than X"
- "X doesn't perform as well as mine"
- "you won't like dealing with X"
- "X isn't very useful when you get right down to it" (can say apple computers work better than dell).
- "Papa Johns pizza tastes like cardboard"
- "PJ's pizza was preferred in a national survey" (but if you say this you have to actually have had a survey).
  - Compare: "PJ's pizza is 40% better" = no need for survey

(3) Speak harshly in a general way about competitor
- "he's unfair in dealings"
- "that guy is an unfair businessman, he doesn't treat people right"

(4) Say my product is more healthful than yours.

- **D may NOT:**

(1) Publish materially false statements about competitor's products or services (slight misrepresentations are okay).

(2) Raise questions about competitors financial viability unless true.

Fraud / Intentional Misrepresentation

(a) Elements:

(1) False representation or misrepresentation

(2) Made with **scienter** (as to the falsity of the misrepresentation)

(i) Scienter is about your knowledge about a particular thing (your knowledge about the truth or falsity of the representation) **AT THE TIME YOU MADE THE STATEMENT.**

(ii) For intentional misrepresentation, must have one of the following three:

(1) Knowledge (know what you're saying is false); or

(2) Recklessness (reckless disregard as to whether it is true or false); or

(3) Gross Negligence (many courts won't accept this one for *intentional* misrepresentations)

(3) With the **intent to induce** Plaintiff (P) to act or refrain from acting

(4) Which **caused the P to act** (or not act/refrain from acting)

(a) Cause in fact/materiality (i.e.but for cause); AND

- This is an objective reasonable person standard.
- P must show that the **misrepresentation was material** to his decision to act (i.e., if these statements were not uttered I would not have acted).

(b) Proximate Cause

- Directness/Privity (privity NOT required for *intentional* misrep); and
- Limited Class (all "known 3rd parties"); and
- Anyone who is **Reasonably Foreseeability** (very broad, many people can sue under this).

(5) In **justifiable reliance** upon the false misrepresentation

- P has to prove that he was justifiable in relying on the false representation.

(6) Resulting in **Pecuniary Damages** to the P (this is economic loss)

- Note: The economic torts are an exception to the economic loss rule

(b) False Representation Checklist (ELEMENT 1)

For it to be a false representation that satisfies element 1 it has to be one of the following things:

(1) False Statement of Fact

- Not puffing (can't establish a CAO for false statement of fact for puffing, i.e. Presidio)

(2) Opinion: Opinions are Not Actionable Except

(1) Where speaker knows they're not true OR is reckless; **AND**

(2) Speaker has Special Knowledge (*Presidio*)

(i) Special knowledge includes people with training on which they can give an opinion (lab results or a professional appraiser giving you FMV on a piece of property) If an appraiser tells you a house is worth $5 million

you can rely on that special knowledge that he has. That is no longer a prediction, you should be able to rely on it.

- If appraiser lies about it's worth or is very reckless in making the statement (contrast with scenario where you are bad at your job & are negligent) & the difference in the numbers in material, then it is actionable (i.e., when you know it's worth $3 million but for some reason you say its worth $5 million)

(ii) Special knowledge exception applies to the opinions of specialized experts such as jewelers, lawyers, physicians, scientists, and dealers in antiques, where their opinions are based on concrete specific information and objective verifiable facts.

(3) Statements About Future Events

Statements About Future Events (species of opinion) are Not Actionable Except If:

(1) Speaker had no intention of performing when the promise was made; **OR**

(2) If, at the time, speaker knows the statement is false.

(4) Law: Law Not Actionable Except if **Lawyer who has special knowledge**

- Means you **can't be sued for a misrepresentation of law unless you are a lawyer who has special knowledge.**
- Example: You represent a creditor client & someone else (debtor) comes & asks you the lawyer if he really has to pay the creditor after he files bankruptcy. If you lie to him & say yes, that is actionable b/c you are a lawyer with special knowledge.

(c) False Representation Checklist: NONDISCLOSURE (i.e., omissions)

A nondisclosure is simply where I have information & I'm not telling you (say nothing about it).

(1) General Rule: No Affirmative Duty to Disclose

- If I'm selling a car on craigslist & I know it burns a lot of oil, I have no duty to tell the buyer about that.

(2) Exceptions (where you do have to disclose)

(1) Fiduciary Relationship: A fiduciary has a duty to disclose all material facts to the other person.

(2) Active Concealment of a Material Fact: Anyone who is actively concealing must disclose, the act of concealing triggers a duty to disclose.

- If you have a house full of termites & try to paint over it & hide it, that is active concealment of a material fact.
- If you have a car accident with structural damage & sell the car to a dealer, the dealer paints it over, rolls back the odometer & puts it back on the lot as a used car, that is active concealment of a material fact.

(3) Incomplete Statement or Intentional Ambiguity: When you create an ambiguity or give an incomplete statement, as in when you start to speak (not like mere nondisclosure where you don't say anything) you have a duty to disclose all **material** facts. Can't speak & give an incomplete statement & leave material things out.

(4) New Information Contradicting Prior Statements: Once you create reliance on your original statement, you have to go back and correct whatever statement people relied on if things change.

- In *Lacher,* developer might first have decided to build 1 story building, but once they started building their idea changed & they decided to build a 2 story, even though they told people only 1 story earlier.

(5) And where the court creates a "duty to disclose"--*Ollerman*

- This is like what happened in ***Ollerman*** where court created a duty to disclose for experienced sellers dealing w/ inexperienced buyers.

- ***Weighers of grain:***15th century case about a grain weigher who would siphon off a cup from each barrel but still report that amount in the final weight. Held to be fraudulent reportage b/c it was a misrepresentation of weight.
- ***Pasley:*** Authenticating person lies about someone else & says he is very credit worthy. Lenders loaned the money to that person & he skipped town. Lenders sued the third party who gave them reassurance. Even though these two parties were not in a privity relationship with each other, the court allowed lender to sue him anyway & thereby abolished the privity requirement for intentional misrepresentation.

- ***Lacher v. Court:*** Developer wanted to build building so it met w/ potential neighbors & made certain representations to them (built on existing grade, set back from street 25 feet, won't exceed 1 story). Based on these representations, plaintiff neighbors **acquiesed** to construction. Based on that the city approved it. Then developer started construction & did not abide by any of the promises they made to neighbors. Going through the intentional misrepresentation elements:

  (1) Scienter: P must prove that the statements were false at the time the developer made them, to establish scienter requirement.

  - P must show that at the time D made the statement, **D had either knowledge** (he knows at the time that they are not going to build like this) **or recklessness** (he recklessly disregards the truth or falsity of the statement). Some courts also say gross negligence can be used here but professor says that is not widely accepted.
    - Lets say D did intent to do everything it promised (true when statement was made) but 2 years later circumstances change & D wants to violate one of the promises, then D must go back & get approval again from the residents based on these new conditions.

  (2) Intent: Requires intent to induce P to act or refrain from acting.

  - D made these statements to P b/c wanted P to not oppose their plans. So at the time that D was making these statements, D's intent was to elicit support or acquiescence from P

  (3) Causation: P has to show that whatever was said to him was material to his decision to act).

  - P must show the particular statements are what made a difference to the P (if these 3 statements were not uttered I would not have acted).
    - If the height ended up being 26 feet (instead of 25 as promised in the statement), even if developer admitted that it knew it was going to be 26 all along but told P 25 b/c though P would prefer that, **Court would say that is not material.**
      - So even if causation (i.e. P saying it was that 1foot that made all the difference to me) &all of the other requirements were met, that is not a material difference, so it

would not work. Materiality is judged on a reasonable person standard **(if this were an example where 1 foot made a big difference then it might be actionable).**

- Second causation issue: **P has to show that P's acquiescence led to the approval from the city planning commission.** So P has to bring in testimony from the commission to show that, otherwise there is no causation in this case.

(4) Justifiable Reliance: P must have justifiably relied upon the developers misrepresentations.

- P has to say I trusted these guys & D has to say you shouldn't have. D will show that there were other ways P could've checked it out (like go & look at the public architectural plans)

(5) Pecuniary Loss: Easy to show. P will say homes are now worth less b/c of loss of the view.

- ***Presidio v. Warner Brothers:*** Movie studio (WB) opened bidding to movie theaters for Swarm film which was to be a big hit according to WB. Presidio theatre bid on it w/o seeing it & ended up being a flop so Presidio sued. Going through the statements made by WB:

(1) Summer of 1978 blockbuster

- This statement is predictive; predictions are about the future.

(2) One of greatest adventure survival movies of all time.

(3) Most want to see movie of the year.

P makes 2 arguments: they are statements of fact; or alternatively if they are not facts, they are statements of opinion that we relied on.

- Court holds these are not statements of fact, they are just very good puffing &opinion and theatre should not have relied on that. Plus studio did not have special knowledge so that exception doesn't work. **If studio had said we have done a survey & everyone we surveyed wanted to see the movie, then those would be facts.**

Negligent Misrepresentation

Elements similar to intentional misrep. Only changes: scienter(2) & proximate cause/privity (4b).

(a) Elements

(1) False [Mis]representation

(2) Made with ~~Scienter~~ (as to the falsity of the misrepresentation)

- Scienter requirement here is that = D made the representation without any **reasonable ground** for believing it to be true (negligence).
- Statement made not with full knowledge that it is false, but merely with a lack of reasonable care to ensure its accuracy.

(3) Representation was made with the **intent to induce** P to act or refrain from acting

(4) Which Caused the P to Act (or refrain from acting)

(a) Cause in fact/materiality; and

(b) Proximate cause **(PRIVITY requirement)**--See *Bily*

(5) P justifiably relied upon the false misrepresentation

(6) Resulting in Pecuniary Damages to P

(b) Privity Requirement for NEGLIGENT misrepresentation

Privity Rule (Restatement)**: You owe a duty & liability for that duty is limited to loss suffered**

(a) By the **person OR** ***one of a limited group of persons*** (this is the term of art to use instead of near privity or reasonably foreseeable) for whose benefit & guidance he intends to supply the information ***OR knows that the recipient intends to supply it;*** **AND**

- Translation = Class of persons for whose guidance the information was supplied

(b) Through reliance upon it in a transaction that he intends the information ***to influence or knows that the recipient so intends*** or in a substantially similar transaction.

- Translation = Class of persons whom the purveyor of the misstatement knows the original recipient intends to provide with the information.

- ***Ollerman:*** Buyer purchases land to build a house & afterward finds a well under the land. He sues seller for not telling him about the well. Seller was experienced developer, buyer was inexperienced & new to the area. Buyer said he would not have bought it if he knew it was there & sues for both intentional & negligent misrep. Court holds that seller had a duty to disclose (court creates the duty).
  - If seller knew about the well & did not disclose it = intentional misrepresentation b/c it would be scienter (he has knowledge of it).
  - If seller did not know about the well = COA would have to be negligent misrepresentation. The allegation is that even if he didn't know, he should have known (a reasonable seller should have known about it).
  - We can read the holding narrowly or broadly, but courts are moving toward the direction of requiring disclosure of material information where there is a sophisticated seller & unexperienced buyer, in significant consumer transactions (not just real estate, all ***significant*** transactions).
  - Note sophisticated *buyer* never has to disclose (i.e., know you're buying a picasso at yard sale)

- **Business College Hypothetical:** College of Engineers, a small, unaccredited private college located in a seaport community placed ad in local paper to attract students to a new course, "Mechanical Maintenance on the Waterfront." Ad stated students would be trained to become "Waterfront Mechanic" in the longshore industry & there were "plenty of such jobs available" at "high salaries" for those who took appropriate training. In fact, at the time College took out the advertisement, no such jobs were available in the locality & longshore industry had suffered many layoffs. Frederica saw the ad and signed up for the course b/c of her hope to land a job on the waterfront & escape the grind of her fast food job.She quit her job, paid $5,000 to take the course& received a certificate of completion. If she sues College for fraud, what is the likely result & why?

  Answer: Statement at issue is "Plenty of such jobs available at high salary for those who took appropriate training." Going through the fraud elements:

  - **Element 1 Misrepresentation:** Argue this is not a statement of fact (not a false representation), it is just puffery b/c they never give concrete facts, its not specific enough, they don't say jobs are available in their specific area. Counterargument by P is that college wanted people to make the inference that these jobs available are local b/c college is located in a seaport community; plus there were cutbacks in these jobs & college said there were plenty of jobs.
    - Alternatively, P can try to argue that it was a **statement of opinion** where the **(1)** speaker knows they are not true or is acting w/ reckless disregard as to its truth or falsity AND **(2)** had special knowledge. For special knowledge, if P can show that the college proclaimed itself as having expertise in this industry, then they would have special knowledge not available to other people. But the college would counter argue that they are not within the category of professionals who have a particular kind of skill (that requires the mixing of opinion with measurement of some kind), who have special knowledge (not a doctor or lawyer), they are just a college. Also argue that since the college is not accredited, they do not have special knowledge. This opinion argument is a stretch but you can try.
    - Alternatively, we can argue the college made a **nondisclosure** (where they made an incomplete statement or intentional ambiguity).
  - **Element 2 Sceinter:** College acted w/ scienter, they knew the state of affairs of the job market.
  - **Element 3 Intent:** They are getting P to act by buying their course.
  - **Element 4 Causation:** P has to show that the representation caused her to quit her own job.
  - **Element 6 Pecuniary loss:** Pecuniary loss here is $5000.

- ***Bily v. Arthur Young:*** Company gets an audit & investors buy stock based on audit. Company tanks & shareholders said we relied on the audit prepared by the audit company to invest in this company. Audit company screwed up audit b/c it said they are making money when they were losing money & said company was following proper procedures when it wasn't.
  - A business gets an audit for: potential investors, lenders, their own board of directors, the government, shareholders, competitors, the public, customers. If auditors screw it up any of these people might have a cause of action if they acted in reliance on the audit. Court thinks that's too broad & says the rule is the Rest rule. But other possibilities could've been
    - ***Ultrameres* (very limited rule):** Must be in privity to sue auditor for negligent audit (so no reasonably foreseeable, only those in privity can sue).
      - Only exception was **near privity,** where for example bank tells the auditor we need your audit to determine if we will give them money (so in 'near privity' the auditor knows who the beneficiaries of the audit are).
    - **Reasonably Foreseeable (very broad rule)**: Anyone who was reasonably foreseeable to the auditor can sue the auditor for negligence. Too broad, floodgates problem.

  - There are 3 causes of action in this case:
    (1) Negligence (i.e., auditor malpractice): Only party that can sue for negligence/ professional malpractice are parties in privity, so company being audited is the only one who can sue for this.
    (2) Intentional Misrepresentation/Fraud: Anybody that the auditor knows (you intended for that person to rely or had reason to know he was going to rely) is going to rely on the misrepresentation can sue the auditor for an ***intentional misrepresentation*** (i.e., this is using the broad reasonably foreseeable rule).
    (3) Negligent Misrepresentation: Only the limited class of persons in Restatement can sue.

  - **Holding:** Auditor owes no general duty of care regarding the conduct of an audit to persons other than the client. An auditor may, however, be held liable for negligent misrepresentations in an audit report to those persons who act in reliance upon those misrepresentation in a transaction which the auditor intended to influence. Finally, an auditor may also be held liable to reasonable foreseeable third persons for intentional fraud in the preparation & dissemination of an audit report.

ECONOMIC LOSS RULE

General rule of tort damages is that we want to put people back in the position they would have been in but for the injury (i.e. compensatory damages). Economic loss rule is an exception to that b/c **we do not make whole people who only suffer economic losses.**

(a) Economic Loss Rule: The person whose damages consist only in economic losses may not generally recover them in tort:

(1) Unless the economic loss is **accompanied by property loss or personal injury; OR**
- People who suffered personal injury also have economic losses like lost wages, etc and since they have had personal injury, they **CAN recover economic losses.**
- This is not a rule about non-recovery generally, it's a rule about non-recovery of certain types of losses in tort.

(2) When there is a **separate economic tort** (i.e, fraud, misrepresentation, conversion, inducing breach of contract, interference with prospective economic advantage).
- So this is an exception which allows for recovery of economic losses when there is a separate economic tort that happens.

(b) Other Exceptions to Economic Loss Rule where economic recovery IS allowed

(1) Special Relationship Between Parties: (e.g., Negligent transmission of telegraph message, you have a special relationship with them so they are liable to you).

(2) Negligent Failure to Obtain Proper Attestation of a Will: (i.e., legal malpractice--beneficiary can sue you for economic loss b/c you screwed up the will & he can't take under it).

(3) Negligent performance of profession (bankers, real estate agents, accountants, surveyors, analysts, insurance brokers, doctors, architects, attorneys, bailees).

(4) Maritime & admiralty law has created some exceptions

(5) Pollution of a stream by D: Swimming pool operator permitted to recover b/c his public pool had to shut down.

(6) Recovery by fisherman for negligent diminution of aquatic life b/c they were *particularly foreseeable*. SEE *Union Oil.*

- Defendant owes a duty to commercial fishermen to conduct their drilling in a **Reasonably Prudent** manner so as to avoid the negligent diminution of aquatic life (i.e., to avoid negligently causing economic injury to P's). Therefore P in this case may recover their economic damages for the loss of fishing
- Standard = P's who are **Particularly Foreseeable**. So analogize to fishermen case.

(c) Hypotheticals

Hypo 1: Your Prius has malfunctioning brakes & b/c of your prius brakes failing there is a 3 car collision. but it was no fault of your own. There is property damage to each vehicle & personal injury to each driver. As long as they have one of those things (personal injury or property damage) they can recover in tort for their economic losses.

Hypo 2: There is no car accident. Prius gets brakes replaced at the shop & brakes are **negligently installed** backwards. Person driving the vehicle can't get to work and loses wages.

- This is a failed installation of a product (a failed negligent service) not just a failed product.
- If the damage to the brakes is considered "property damage," then you can recover economic losses for your lost wages. But if the brake damage is not "considered property damage" then you can't recover economic losses for your lost wages.
    - **ANS**: Damage to the brakes technically is property damage, but the **legal system has characterized it as an economic loss. If he sued in tort he would be booted out b/c it is only economic losses.** But it is not just economic loss b/c there was no injury, its b/c the injury was to the product itself only.

Hypo 3: A bridge to an island is destroyed & there is lost business to a merchant on the island.
--ANS: Can't recover under economic loss rule.

Hypo 4: A power supply is cut off when defendant negligently cut a power line and a printing business has to shut down for a while. ANS: Can't recover under economic loss rule.

Hypo 5: During rush hour a bridge suddenly collapsed w/ many vehicles on it. State's 5th busiest bridge. Killed 13 people & injured 145. NTSB says cause was likely design flaw. Assuming the design was negligent may neighboring businesses recover lost income from responsible parties?

(1) Property Damage or Personal Injury: Damage to the vehicles ruined by the collapsing bridge is recoverable in tort.

(2) Economic Losses: Not recoverable by neighboring businesses for lost profit. If the damage causes an inconvenience to many people who used to use it for their commute, they can't recover. Employes of those business who are all now out of a job can't recover

(d) What are economic losses?:

Generally, there are 2 contexts where this arises:

(1) The loss of something that is the subject of a contract; or

(2) Loss of Profits

(i) The loss of something that is the subject of a contract *(Transamerica Deleval)*

Rule: Economic loss rule provides that where a party sues for purely economic losses **as a result of a failed product**, the plaintiff may recover, if at all, **only in contract** (i.e., the person who suffers only economic losses may not generally recover them in tort).

- **Takeaway:** When something is defective & just destroys itself (like the turbine itself), the economic loss of the ship being out of commission is NOT recoverable. If turbine malfunctions & destroys the rest of the ship, then answer is not clear in that situation whether you can recover or not.
    - Similarly in Prius example, if your brakes malfunction b/c of the bad installation & it causes your tire to blow out, the answer would be the same as whatever the answer would be in *Transamerica.* But if the the brakes cause you to crash into another car & your car gets damaged, then you can distinguish it & it probably will be recoverable.

- ***East River Steamship v. Transamerica Delaval:*** TD agrees to build tanker ships for Seatrain. TD screws up the building so that one of the turbines failed & destroyed the engine. In the meanwhile, the ship owner leases the ship to plaintiff East River to use it for delivery of oil. East River loses money on a daily basis each day that they can't use the ship to deliver oil. East River sues TD in tort for products liability (defect in the product that caused harm) for their economic losses. But TD& East River did not have a contract w/ each other so they couldn't sue them for breach of contract. Court held **P may not recover their economic losses from D who negligently built the tanker** they had chartered. 2 reason the court held this way:

  (1) Using economic loss rule to police the distinction between contract & tort. If you could recover economic loses in tort, that would allow the ship owner to recover their economic losses in tort too. Court does not want to transform every K breach for defective products into tort action

  (2) Its a way of limiting losses from wrongful behavior, a way of reducing instances where people can sue merely b/c they lost profits on account of other people's behavior. Limiting tort system.

(ii) Lost Profits

Rule: Where a person suffers ***only*** **economic injury** [i.e., no personal injury or property damage] as the result of another's tort, **that person may not recover his economic losses in tort.**

Union Oil: Oil spill in Santa Barbara causing huge damage (Union oil platform 6 miles off coast blows out). Oil spreads 800 miles due to wind. Fishermen living & fishing in the area for their living sued Union. Union's platform ruptured b/c of inadequate protective casing.

- Fishermen had an expectancy in the fish but they did not have any "property" that was destroyed b/c the fish in the ocean didn't belong to them. Fishermen sued for interference with prospective economic advantage (purely economic loss) from the loss of fish in water.
- **Issue:** Whether D owed a duty to plaintiffs (commercial fishermen) to refrain from negligent conduct in their drilling operations, which conduct reasonably & foreseeably could have been anticipated to cause a diminution of aquatic life in the area & thus cause injury to P's business.
    - Union's argues economic loss is not recoverable in tort. Fishermen say yes that is true generally, but this case falls within an exception to that rule. Court agrees w/ P.
- Parties enter into a stipulation (a binding K whereby you don't dispute the issue) where each side agrees that: we will give *legally compensable damages* from a *legally cognizable injury* & recovery *will not exceed such amount* as what they would have gotten for *negligence* (this means **we Union we will give you everything you are entitled to under a negligence recovery theory**). Union did this strategically b/c it would completely eliminate punitive damages, it would be less litigation & less bad press.

MISUSE OF LEGAL PROCEDURE

Three torts we study here are:

(1) Malicious Prosecution
(2) Wrongful Civil Suit
(3) Abuse of Process

Malicious Prosecution

(a) Policy

- Policy Reasons to Recognize the Tort
  (1) To deter frivolous complaints/criminal prosecutions
  (2) Unfair to make successful criminal D bear costs of criminal prosecution (monetary + harm to reputation + lost future opportunities)
  (3) To protect institutional integrity.

- Reasons not to recognize the tort:
  (1) Chill people from brining valid complaints that are justified
  (2) Protect the officials who are involved (prosecutors, police, witnesses, judges)
    - We have dealt with this issue by giving these officials immunity ***against the tort of malicious prosecution***:
      - **Judges:** Absolute immunity
      - **Witnesses who testify in court:** they have immunity from the tort of malicious prosecution (but no immunity for perjury)
      - **Lawyers**: Can't be charged if they are a lawyer in the action from either side.
      - **Police:** who just do their job and don't initiative it have a good faith immunity.
        - TORT has been narrowed so that the complaining witness initiating the prosecution is not one of the people listed above.
  (3) Multiplies Litigation--no finality

(b) Elements for Tort of MP:

(1) D initiates or procures criminal prosecution

What does it mean to procure/initiate?

- Filing a criminal complaint is sufficient, but it has to be the but for cause of the prosecution (so if cops do an investigation and find new stuff then procuring witness is not the but for cause).
- Just providing information is not enough for procuring (you've been robbed & say I think X would have motive to do it--that is not enough & is not procuring).
- Mere testimony at trial is not enough to be the initiator.

(2) Without probable cause; AND

- Not the same PC standard as the 4th Amendment.
- Means you did not have a "**reasonable basis"** for making the allegation/ information for initiating it **at the time you initiated the prosecution** (this is the time we judge it at).
- For example, store security guard sees a shoplifter, that is a reasonable basis.
  - If guard merely sees a person who looks out of place, that is not enough for PC for shoplifting.
  - If third person comes to a security guard and tells him he saw someone put a bottle in their coat pocket, and the guard acts on that basis. This is a tough one and is probably not enough for PC. *But it is also not enough to sue under the tort b/c they had some basis for assuming thief* stole alcohol.

(3) Primarily for purpose other than bringing an offender to justice (malice?)

- Hatred, spite, ill will.
- To coerce someone to do something else (i.e., sue someone to get them to sell property) is enough for this.

(4) Proceedings terminated in accused's favor

- Things that are enough to satisfy this include:
  - acquittal
  - refusal of magistrate to hold trial
  - refusal of grand jury to indict
  - voluntary dropping of case by prosecution
  - Basically anything that has the effect of ending this particular proceeding & requiring a new process or other official action to commence a new prosecution.
- Things that are not enough to satisfy:
  - Plea bargain

(5) Damages

- As long as you can establish some damages that is enough (can be harm to reputation, attorney's fees, lost time defending yourself, etc).
- **JD Split:** Minority asks for special economic injury, but its not generally followed.

- ***Skaggs:*** Woman writes two bad checks to supermarket but she didn't know husband took the money out of her account. She gives the money to the store but the store says our policy is to prosecute anyone who writes a bad check. Police call store & employee says they insist on prosecuting her. So even after they are paid their money, they initiate a prosecution. She sues the store for malicious prosecution & wins b/c they had insufficient PC to initiate prosecution at the time they initiated it b/c they had already been paid so it seemed like they just wanted to punish her.

Wrongful Civil Suit

(a) Same idea as malicious prosecution, just brought by a civil litigant. **Elements of <u>Wrongful Civil Suit</u> are almost the same as MP:**

(1) D initiates or procures **<u>civil</u>** proceedings
(2) Without probable cause; and
(3) Primarily for purpose other than bringing an offender to justice (malice?); and
- Looking for motive like malice. Bad motive other than to legitimately state a claim against another party.

(4) Proceedings terminated in accused's favor; and
(5) Damages (same damages as in MP & same JD split issue here)

- Can you bring a case for wrongful civil suit for 1dismissed claim (from a case where the other claims in the suit were upheld)?

  ANS: Yes, you can bring a wrongful civil suit for 1 dismissed claim even though the rest of the claims were good. But this does not apply to cases of first impression. Professor doesn't like this result b/c it hinders zealous representation from lawyers.
  - Tort might chill zealous representation of clients & chill civil rights lawyers from advocating for changed laws. It would be detrimental to society b/c attorneys should be encouraged to further as many COA as possible & zealously advocate on part of client, but this tort discourages that.

Abuse of Process

(a) Elements: Any person who misuses a particular legal process may be subject to this tort.

(1) Misuse; and
(2) Improper Motive (aka ulterior purpose)

- Example: Subpoena someone to a depo in an inconvenient location & time when you know they have other obligations &you refuse to change it. Your objective is not to achieve justice, you are just trying to use the system to coerce. Examples:

  --Bringing in D's to the lawsuit that have nothing to do with it.
  --Subpoenaing people to depositions that have nothing to say & you are doing it just to scare them.
  --Threaten to file a lawsuit in another JD

Exam Tips

- 15 minute question = 2 paragraphs max
- At least one question will be repeated
- Follow timing allocations b/c they correspond to how many points its worth
- Might have word limit
- Use case names (or say accountant case) and precedent as analogy.
- **CAN refer to the elements of the rule, don't have to state the entire wording of restatement.**