

# Actual Malice

## This Requires:

- Knowledge of Falsity
  - This includes knowing that there is no basis for the story.
- Reckless disregard for the Truth
  - If the defendant believed that a statement was true, there is generally no actual malice even if the mistake is unreasonable.
  - However, actual malice can be present if:
    - There are such obvious reasons to doubt the story that it's a matter of bad faith to believe the story
    - The story is completely unverified by any form of reliable source
- Although ill intent or malicious feelings are unnecessary, they could be used as a factor in this analysis.

# The General Requirement of Fault

- As discussed earlier, the courts have eliminated strict liability for defamation in most cases, especially when a media outlet is involved.
- Therefore, some level of negligence is required (in terms of not realizing that the statement was false). There is a split in jurisdictions in terms of what level of negligence is required:
  - Some jurisdictions require ordinary negligence (lack of due care)
  - Some jurisdictions require gross negligence
  - Some jurisdictions require full “actual malice,” even in cases where that standard is not required by the Constitution.

# Republication and Wire Services

- Re-selling an already published book or paper is not another tort of defamation.
- In addition, when a newspaper publishes a story received from a wire service (like the AP), it will not be liable for defamation unless the story was so implausible or unlikely that the paper was not justified in relying on the wire service.
  - In other words, you get some level of protection from relying on a wire service, but it is not absolute.
- Many states do not allow a broadcaster to be liable for comments made during live broadcasts by callers or guests.
  - Although some states do allow such liability if the station didn't take adequate precautions to censor defamatory statements.

# Falsity

- In cases where NY Times actual malice standard applies, the burden is definitely on the plaintiff to prove that the statement is false.
- The Supreme Court has also ruled that, even if the plaintiff is a private party, if the subject matter is of public interest, the burden is on the plaintiff to prove falsity.
- Many states require the plaintiff to prove falsity in all defamation actions.
  - However, this is not required by the Constitution and may not be true in all states, even when a media outlet is a defendant.

# What is a Matter of Public Concern?

- There has not been a clear answer to this very important question.
- Some examples of what has been considered a public concern:
  - State licensing of a chain of stores
  - Police campaign against obscenity
  - Investment reports sent to 200,000 people
  - Publicly broadcasted comments on product reliability
  - Criticism of the officiating of a public sporting event
- Example of what has NOT been considered a public concern:
  - Private credit report issued by a credit agency

# Damages in Defamation Actions

- Presumed Damages
  - These are damages that are assumed even if economic harm cannot be proven.
    - They are usually applicable to libel or *slander per se*
    - NY Times said you can't collect these without actual malice where that standard applies to punitive damages
- Actual Compensatory Damages
  - These are for proven loss of good name, humiliation, etc.
- Special Damages
  - These are for economic losses caused by the defamation.
- Punitive Damages
  - Grossly excessive awards are unconstitutional.

# Defenses Against a Defamation Action

- Truth
  - This is usually a question of fact
  - Who has the burden of proof is as discussed earlier
  - This works as long as the story is “substantially true,” even if not true in every detail
  - Reporting of comments made by someone else has a truth defense, even if the comments themselves are untrue
- Statute of Limitations
  - Usually two years, although it varies in different states
  - The “clock” starts from when it’s published initially, even if it’s re-published later on (“single publication rule”)
    - For most publications, this is the date of its initial release

# Opinions

- Opinions in editorials (or in main articles, for that matter) are generally not defamation because an opinion cannot be false.
  - In addition, there are strong First Amendment reasons not to punish the expression of opinions.
- Exaggerations or obvious hyperbole are not defamation if it's clear it's just an opinion expressed in exaggerated facts; e.g.,
  - “He’s an idiot.”
  - “That’s the most ridiculous decision I’ve ever seen.”
- Anything too vague to connote facts is not defamation.
- However, an opinion is not protected if it requires knowledge and assertion of specific facts, which would be defamatory.
  - e.g., “he’s a burglar” or “he’s a child molester”

# Privileges

- Absolute Privileges
  - Government officials acting in their official capacities
    - This include legislatures in committee hearings, etc.
  - Consent of the “victim” of the defamation
    - This can be express or implied
  - Broadcasts of political candidates
    - If the candidate libels another candidate, the network is not liable
- Qualified Privileges
  - Self-Defense
    - i.e., I had to say that, to counter what you were saying about me
    - Communications made in good faith regarding employment qualifications, business ventures, etc.

# Reporters' Privileges

- Reporters get qualified privileges for reporting things said in official proceedings that turn out to be false, if:
  - The story is presented fairly and accurately; and
  - It is done without malice or ill will
- This applies to stories about what happened in
  - Legislative sessions
  - Community hearings
  - Zoning board discussions, etc.
  - Executive branch decisions
- In some jurisdictions, this applies even to informal remarks made by public officials.

# Journalistic Concerns

- Alleging untrue facts, even about matters of public concern, are actionable.
  - So, saying someone was “arrested” when they were only brought in for questioning, could be defamation
- The fact that the word “alleged” is tacked on to the front of a sentence does not necessarily insulate the reporter from a defamation action!
  - Rather say “It was charged that...”
- Reporting any aspect of what goes on in a judicial proceeding is privileged, but not if it’s:
  - presented in a misleading manner
  - Irrelevant to the situation being covered

# Reporters' Privilege - Effect

- In cases where the privilege applies, the reporter will not be held liable for defamation if:
  - The story is presented accurately and fairly.
  - The source is attributed correctly.
  - (some states) It is based on the source itself, and not just other media reports of what the source said.
    - i.e., if the other reports turned out to be wrong
  - (some states) There is no common law malice or ill will.
    - i.e., there cannot have been an improper motive
- Neutral Reportage Rule
  - Repeating another media outlet's charge against a public figure is protected in some states if done in a neutral manner.

## Other Facts About Defamation Suits

- Sometimes, a public official or government (etc.) files a lawsuit against a speaker even though it will never win, just to keep the speaker quiet and tie him/her up in court.
  - This is sometimes called a SLAPP suit
    - (Strategic Lawsuit Against Public Participation)
  - The defendant in a SLAPP suit can countersue for abuse of process.
- Most defamation suits turn out to be governed by questions of law based on the NY Times rules, etc.
  - 82% of defamation lawsuits that aren't settled are dismissed
  - But, of those that go to the jury, 75% are found liable
- A retraction is not an inherent defense to a defamation action, but is often part of a settlement and can mitigate damages.