

Slander and Libel

- Under the common law, there was a major distinction:
 - Slander was oral defamation.
 - Damages were not presumed unless it fell into a slander per se category.
 - Libel was written or communicated to a large audience.
 - Damages were presumed and usually larger than in slander actions
- Under the common law, libel could be criminal or civil.
 - Today, however, it is only a civil issue.
 - A criminal libel statute today would have to be couched in terms of a “fighting words” or “incitement” crime and would probably be unconstitutional in any case!
- Today, “defamation” includes both libel and slander.

General Requirements in a Defamation Action

- Plaintiff must be living at the time of the defamation
 - But not necessarily at the time of the lawsuit
 - Businesses and organizations can also sue for defamation
 - However, the government or a unit thereof CANNOT
- Elements of the tort of defamation:
 - Defamatory language
 - About an identifiable person or entity
 - “Publication” to any third party
 - Damages
 - Fault
 - Only necessary in some cases
 - Falsity
 - Always necessary, but only needs to be proven by the plaintiff in some cases

What Statements are Defamatory?

- Commissions of a crime
 - A statement that someone committed a crime, especially one involving “moral turpitude,” is inherently defamatory.
- Occupation: Anything tending to degrade the person’s skills, competence, or product is inherently defamatory
- Businesses: Anything about a business putting out a poor product or service is inherently defamatory. This can include:
 - Product disparagement
 - Trade libel
- Loathsome disease: A statement that someone has a serious illness is inherently defamatory.

Malice

- There are two types of “malice” that are relevant to defamation law:
 - Common Law Malice: This means intent to harm
 - (like the colloquial definition of the word “malice”)
 - Actual Malice: this means:
 - Knowledge that the statement is false; OR
 - Reckless disregard for the truth
- Malice is relevant:
 - Under the common law, in a product disparagement lawsuit, the plaintiff has to show at least one type of malice.
 - As we’ll see later, actual malice is needed in many cases involving defamation suits against the media.

Other Statements that May be Defamatory

- A statement about practically anything can be defamatory, depending on the context.
- To be defamatory, a statement has to tend to make a person scorned, hated, or less respected in the community.
- These can include statements about a person's
 - Character
 - Habits
 - Especially things like sexual habits, even if nothing illegal is involved
 - Obligations
 - Mental stability

Statements that are Usually Not Defamatory

- Statements about the following are usually not defamatory:
 - Political views
 - Race
 - Religion
 - (but they can be under certain circumstances)
- Subjecting someone to humor or ridicule by making fun of the person is not defamation unless a lie is implied or told.
- Ambiguous statements that can be interpreted in more than one way are generally interpreted to not be defamatory
 - Although, innuendo or implication can be the basis of a defamation action if it's clear enough.
- Photos, cartoons, etc.
 - Can be defamation if taken out of context etc.

Issues in Other Elements of Defamation

- Must identify an individual
 - This is satisfied if it's clear whom it references
- The statement must reference a small enough group of people so that each person can be said to be individually affected (150 people is probably too many)
- Publication
 - This means any statement, oral or writing, made to any third party
 - Including a foreseeable eavesdropper
 - Publication includes newspapers or TV stations who run ads that defame someone.
 - Beware of the “single publication” rule though.
 - ISPs are generally not liable for 3rd party internet postings that they have no notice of and that they generally do not control.

Seditious Libel - a History

- Historically, under the common law, press figures publishing criticism of the government could be prosecuted for libel, even if the statement was true.
- Some landmark cases helped put a halt to that, including:
 - The William Penn trial in England
 - The John Peter Zenger trial in New York
- Early in US history, the Federalist government passed the “Alien and Sedition Acts,” which punished certain criticism of the government. People were convicted under these acts.
 - However, these expired in 1801 and were not renewed.
 - These acts would certainly be held unconstitutional today.

New York Times v. Sullivan and The Requirement of Fault

- In this landmark case, the US Supreme Court held, for the first time, that the First Amendment gives extra protection for political criticism of government officials.
- The extra protections are that when a government official sues for defamation:
 - The burden is on the plaintiff to prove falsity
 - The standard of proof is “clear and convincing evidence”
 - The plaintiff must show “actual malice” to prevail
- Who is a public official?
 - Government employees responsible for public policy making
 - Law enforcement officers
- For this rule to apply, the defamation has to be something relevant to public policy.

Public Figures and Public Issues

- The Supreme Court, after NY Times, extended the “actual malice” rules to all “public figures,” not just public officials.
- For a time, this was also extended to any issue of public interest.
- However, in Gertz v. Robert Welch and subsequent cases, the Supreme Court:
 - Confirmed that the NY Times rule applies to public figures
 - Ruled that the rule does NOT apply to private figures
 - However, private figures suing based on statements regarding issues of public concern must show actual malice to recover punitive or presumed damages!
 - Some level of fault is required for all such defamation suits

What is a Public Figure?

- General Purpose Public Figures
 - People who are “household names” are considered public figures for all NY Times purposes. This means more than just known or famous, it means VERY famous; Examples:
 - Johnny Carson, William F. Buckley, Carol Burnett, former Presidents, very famous athletes and actors, etc.
- Limited Purpose Public Figures
 - These plaintiffs need only prove actual malice if the defamation:
 - Involves a public controversy;
 - Involves an issue that the plaintiff has voluntarily publicly participated in that issue; and
 - The plaintiff has voluntarily thrust himself into the spotlight regarding the issue.