**Defamation**

**Traditional Rules on Defamation**

Now, let's talk about defamation. There are two sets of rules regarding defamation claims. The first set of rules consists of the classic, common-law elements of a defamation claim. This video covers the common-law rules. The next video will set forth how the Supreme Court's interpretation of the First Amendment has affected virtually every defamation analysis, and then will synthesize the two sets of rules together.

The basic elements of a classic defamation claim are: (1) The defendant published (2) defamatory material (3) of and concerning the plaintiff, (4) which caused damages.

Now, let's analyze these basic elements one at a time, starting with publication.

**I. Publication**

The term publication, as used in defamation, has a much broader meaning than the conventional understanding. While the term includes printing in a book or magazine for mass distribution, it also includes virtually any kind of verbal communication, written or oral, whether made to one person or a hundred million people. A publication, then, is any communication to someone who understood the statement. The defendant must at least negligently caused the statement to be published. The term negligently does not mean that the negligence element relates to whether or not the statement is defamatory; rather, the defendant must at least negligently have caused the defamatory statement to be communicated, without regard to whether the defendant knew or should have known that the statement was defamatory. What matters is whether the person or people who heard the statement could reasonably have understood it to be defamatory, not whether the defendant had any such knowledge, since with respect to the defamatory character of the statement, common-law defamation is essentially a strict-liability or no-fault tort. Previously, if a defamatory statement was published in a book, newspaper, or a similar medium, each separate reproduction of the work containing the statement was considered a separate act of defamation--meaning that the statute of limitations could sometimes be extended for years. Nowadays, if mass media publications are involved, the string of separate publications tends to be treated as one tort.

A. Repeater’s Rule

Now, let's discuss the repeater's rule. Someone who hears a defamatory statement, and repeats it, commits an independent act of defamation, without regard to the single publication rule. Someone who affirmatively repeats the defamatory statement is liable, in the person’s own right, as a primary defamer, including for the increased damages caused by the republication. Someone who merely secondarily distributes something that might have defamatory content, like a store selling books and newspapers, is only liable if the party or should have known of the defamatory content.

**II. Defamatory Material**

So, what is defamatory material? Basically, defamatory material: (1) Is false; (2) tends to injure the plaintiff's reputation, such as by arousing animosity, mockery, or disdain for the plaintiff, or tending to lower the plaintiff's esteem in the community; (3) which is based on specific express or reasonably inferable facts and not mere opinion. Examples of defamatory material include: implications that the plaintiff has engaged in misconduct; that the plaintiff commits unorthodox sexual behavior, such as promiscuity or strange sexual fetishes; the plaintiff is incompetent in his or her work, or that the his or her work is of low quality; allegations of domestic problems, health problems, mental problems, or character blemishes.

A. Falsity

Now, let's discuss falsity. Previously, if a statement was proven to be defamatory, it would be presumed false, effectively putting the burden on the defendant to prove the statement was true. Nowadays, in the vast majority of cases, the burden shifts to the plaintiff to prove falsity. Also, bear in mind that it is not necessarily the statement itself that has to be false; rather, it is the defamatory aspect of the statement that has to be false. Suppose that Bruno truthfully says that Jill said Jack cheats on his wife and eats babies, but that Jack is not, in fact, a person who cheats on his wife and eats babies. Bruno's statement is true--Jill really did say those mean things about Jack; however, the defamatory aspect of the statement, that Jack cheats on his wife eats babies, is not. Thus, under these facts, Bruno is liable as a repeater for re-publishing the defamatory material that Jill initially published. As the Restatement (Second) of Torts puts it, a plaintiff can’t recover in a defamation claim for a true statement of fact. This is true even if the statement was made for the sole purpose of harming the plaintiff.

B. Opinions

Mere name-calling is not defamatory, but is more akin to opinion, which is not defamatory unless it is based on express or necessarily implied facts. Thus, the statement that Jack is a jerk is not defamatory because it's just name-calling and opinion. However, the statement that Jack is a jerk because he eats babies is defamatory, even though it has name-calling, because it also makes reference to facts. Similarly, the statement that Jack has poor character seems more likely to be characterized as opinion. However, a statement that a person doesn’t think Jack can be trusted with access to the school's premises implies that the publisher knows of facts indicating Jack is not fit to be around children; thus, it is defamatory, because it implies reputation-harming facts about Jack. Some statements are couched as statements of fact, but in light of the context can only reasonably be understood as insults and verbal abuse and therefore cannot be taken literally, nor give rise to liability for defamation, since they are on the order of mere name-calling and insults. According to the Second Restatement of Torts, early common law used to permit defamation suits even based on pure opinion, but this view has been abandoned in the modern era and thus will not be discussed at length here.

C. Extrinsic Evidence

Now, let's talk about the role of extrinsic evidence. Some statements are defamatory on their face. For example, the statement that Jack stomps kittens to death is defamatory on its face. Other statements are not expressly defamatory, but require reference to extrinsic facts to prove their defamatory character. For example, suppose that Bruno says that Jill has three kids, and nothing else. However, Jill sues him for defamation, pointing out that it is generally known she is not married, so that the statement about her having three kids implies that she is sexually promiscuous outside marriage, which could ruin her reputation. Under these facts, the statement was defamatory, but Jill had to use facts that were extrinsic to the statement in order to establish its defamatory nature.

**III. “Of and Concerning” the Plaintiff**

So, what does it mean to say that the statement must be of and concerning the plaintiff? In essence, the statement must be about the plaintiff. Extrapolating from the Restatement, a statement is made of and concerning the plaintiff if the recipient of the statement correctly, or incorrectly but reasonably, understands it to refer to the plaintiff.

A. Statements About a Group of People

If the statement is about a small, identifiable group of people of whom the plaintiff is a member, then the statement is of and concerning the plaintiff if it is of and concerning the group. A statement referring to all women who live in Brooklyn does not include such a group; it is much too big for anyone to identify a plaintiff readily as a member of the group to whom a particular statement referred. A statement referring to all women who belong to Local Seamstress Union 32 in Brooklyn is a much smaller, more readily identifiable group, and the answer to whether the plaintiff belongs to the group can be ascertained fairly quickly and easily. Common sense is the key here: It makes sense to let Local Seamstress Union 32 in Brooklyn sue for defamation, but not all women in Brooklyn.

B. Specific Reference Not Required

Otherwise, the statement does not need to refer to the plaintiff expressly in order to be of and concerning the plaintiff, if it can be established through extrinsic evidence that a reasonable person hearing the statement can make the connection and figure out that the statement is referring to the plaintiff. Be careful; a statement can be of and concerning someone, even though that person is not directly mentioned at all in the statement. Remember, all that is needed for a statement to be of and concerning the plaintiff is that the recipient of the statement reasonably understand the statement to refer to the plaintiff. If a statement actually refers to someone other than the plaintiff, but then the overall circumstances give rise on the part of the recipient to the reasonable inference that the plaintiff is implicated in the statement, then the statement is of and concerning the plaintiff.

**IV. Damages**

Finally, let’s discuss damages. The traditional rule in defamation is that the plaintiff must prove damages consisting of actual harm to the plaintiff’s reputation. Under traditional defamation law, the two overarching types of damages are general damages and special damages.

A. General Damages

General damages cover nonmonetary harm arising from defamation, such as harm to reputation or mental anguish. In some cases, general damages may be presumed, meaning the plaintiff doesn’t have to prove damages as part of her prima facie case of defamation. General damages, however, are presumed only if the defamation constitutes either libel or slander per se.

1. Libel

Put simply, libel is written defamation, as in a book, newspaper or website article, and other mass-media communications. If the defamation constitutes libel, most courts will presume general damages on the theory that mass-media defamation is apt to be longer-lasting and more widespread than mere spoken defamation to a small audience.

2. Slander Per Se

Slander is defamation through spoken words. If the defamation constitutes slander, then general damages typically won’t be presumed unless the defamation falls within one of four special categories of slander per se. Slander per se includes statements that accuse the plaintiff of committing a crime; indicate that the plaintiff is afflicted with a loathsome disease, such as a sexually transmitted disease or maybe leprosy; impute to the victim characteristics that are incompatible with the victim’s profession or occupation, such as a statement that a physician lacks medical training; and a statement accusing the victim of sexual misconduct, such as adultery or promiscuity.

B. Special Damages

Special damages, on the other hand, compensate for monetary injuries flowing from the defamation, for instance, lost business. Special damages are never presumed. For the plaintiff to recover special damages, there are two steps. First, general damages must be either presumed or, if not presumed, proven. Second, the plaintiff must offer sufficient evidence of special damages in addition to the general damages.

**Defamation in the Modern Era**

The rules discussed in the previous video still very much apply, even today. Nevertheless, now it's time to discuss the various First Amendment requirements that the Supreme Court has superimposed upon the common law defamation rules.

**I. *New York Times Co. v. Sullivan***

The Supreme Court first started imposing First Amendment restrictions on common-law defamation suits in the landmark case of *New York Times Co. versus Sullivan*. The basic rule that came out of *Sullivan* was that a public official cannot recover damages for defamation related to official conduct unless the public official proves that the statement was actually false, and that it was made with actual malice.

A. Actual Malice

Actual malice means that the statement was made either with knowledge that it was false, or with reckless disregard as to its truth or falsity. Reckless disregard, in turn, refers to unreasonable disregard of a high probability or risk of falsity, or to the fact that the publisher of the defamatory remark had serious doubts as to truthfulness, or a high degree of awareness of probable falsity. Actual malice does not mean mere negligent failure to investigate, nor does it necessarily involve spite, ill-will, or dislike.

**II. Public Officials v. Public Figures**

In later cases, the Supreme Court expanded the *Sullivan* rationale to embrace not only public officials, but also public figures. Thus, the requirements of falsity and actual malice apply to any defamation suit by a person who is either a public official or a public figure, if the subject matter of the defamatory remark is sufficiently linked to or connected with the person's public stature.

So, who is a public official or public figure? A public official means just what it sounds like—a governmental official, such as a police commissioner, mayor, legislator, or judge. The term public official does not mean every public employee, but only those whose positions are subject to public scrutiny and discussion of the position-holder. It doesn’t refer to public scrutiny of the particular controversy at issue. It also applies at least to those governmental employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. The actual malice rules apply to anything that affects the official's fitness for public office, even if it also implicates the official’s private character.

The definition of a public figure is a little trickier; it includes: (1). Those who achieve such pervasive notoriety that they should be treated as public figures for all, or at least for most, purposes. (2). Those who, though they might otherwise be private figures, thrust themselves into the middle of a public controversy, and thereby become known.  These are generally treated as public figures only with respect to the particular issue into which they have injected themselves. (3). There is a third general class of public figures, consisting of those who are thrust into a public controversy through no action or fault of their own--though the courts may be less stringent with the actual malice requirement with these plaintiffs, since they have not voluntarily thrust themselves into the public eye, and since they lack the same access to avenues of effective communications as what true public figures enjoy. Careful: Even though someone may be active on local civic groups and professional organizations, and may publish books and articles on a particular topic, such as law, and thereby achieve some notoriety in certain circles, this does not necessarily mean that the person is a public figure, which requires a more general notoriety in the community, or a public office.

**III. Private Individuals**

The last category of defamation plaintiffs consist of private individuals—those who are not public figures or officials. For the most part, the bare common law rules apply to defamation suits by private individuals, but there are still two big changes worth noting. First, the plaintiff must prove that the defamatory statement was false. Second, even a private individual must show that the publisher of the defamatory statement was at least negligent with respect to the falsity of the statement, although otherwise the states are free to craft the precise scienter for themselves.

**IV. Damages**

Unlike the common law, in the vast majority of modern cases, damages can no longer be presumed in defamation, and punitive damages cannot be awarded, unless the defendant spoke with actual malice. If the plaintiff is a private person, actual malice is required for presumed or punitive damages, even if negligence may be the standard for liability, unless the subject matter of the defamatory statement is of solely private concern and not of public concern. This is the case even if the defamation is libel or slander per se. If the plaintiff is a public figure, actual malice is required even to make out the prima facie case for defamation; however, if a public figure proves actual malice and the other elements, the plaintiff can recover punitive damages or perhaps have damages presumed.

**V. Summary of Principles**

We've covered a lot of ground, so now let's back up and try to synthesize these principles in a workable way: If the defamation plaintiff is a private person:

(1). The plaintiff must prove the traditional, common-law elements of defamation. (2). The plaintiff must prove that the defamatory statement was actually false. (3). The plaintiff must prove that the defendant was at least negligent with respect to whether or not the statement was false at the time of publication. (4). If the subject matter of the defamatory statement is of private concern, it is at least possible that damages may be presumed, and punitive damages awarded, for slander per se and libel.

(5). If the subject matter of the statement is of public concern, the plaintiff must prove that the statement was made with actual malice in order to have damages presumed or to recover punitive damages. If the plaintiff is a public figure or a public official: (1). The plaintiff must prove the traditional, common-law elements of defamation. (2). The plaintiff must prove that the statement was false. (3). The plaintiff must prove that the defendant made the statement with actual malice. (4). Once all of this is done, the plaintiff may recover presumed and punitive damages.

# Privileges and Defenses to Defamation

Now that we've gone through the elements of a prima facie case for defamation, let's talk about privileges and defenses to defamation.

If a valid privilege applies, the defendant is not liable for defamation, even if the defendant’s conduct meets every element of the tort as discussed previously.

**I. Privileges**

There are two basic kinds of privileges to defamation.

A. Qualified Privilege

The first kind is a qualified privilege, which only immunizes a defendant from liability for defamation if it is exercised reasonably, and for a proper purpose, and hence can be lost if abused. Qualified privileges include the following: First: Accurate reports about public proceedings. Public proceedings include legislative, administrative, and judicial proceedings if some kind of official action is taken, but it might also include non-governmental proceedings of significant public interest. Public proceedings also include some things which you might not naturally consider as falling under that rubric; for example, an arrest by the police is an official action, and hence a public proceeding for purposes of this privilege. A public proceeding also includes meetings, assemblies, and other gatherings which are open to the general public for the purpose of discussing things concerning the public. Accurate does not mean that the report must get every infinitesimal detail right; rather, the report must be a fair abridgment of what took place at the public proceeding and is substantially correct. The term fair also means not too one-sided or unfairly skewed to make one party or side of a dispute look good at the expense of the other. If the report is considered fair, the privilege may not apply.

A second qualified privilege consists of statements in the public interest. These statements are generally made by a defendant who reasonably or correctly believes that the information impacts an important public interest, and the interest requires that the defamatory matter be communicated to someone who is authorized to act if the defamatory statement is true. As comment to the Second Restatement of Torts section 598 puts it, the privilege applies to, quote, defamatory communications to public officials concerning matters that affect the discharge of their duties, unquote. Statements in the public interest can also include fair comment and criticism upon a matter of general public interest, such as movie reviews or criticism of governmental action or policy.

A third another qualified privilege applies if the defendant reasonably believes that the publication of the defamatory information in the statement is necessary to protect an important interest of the defendant, the recipient of the statement, a third person, or a definable group of people having a common interest in a particular thing if one of them has a right to know the information. The important interest should be an interest to which the law affords some degree of protection, and not one that is bound up in illegality. Whether the interest is important enough for the privilege to apply involves a balancing of the nature and likelihood of the advantage that will accrue to the publisher, or whoever's interest is implicated, from publication of the defamatory against the nature and likelihood of harm that will accrue to the plaintiff from such publication. If the statement is made to protect the interests of the recipient or a third person, as opposed to the definable group, it must be the case that the statement is appropriate under general standards of decent conduct. Important factors in the decent conduct analysis are whether the defendant volunteered the information gratuitously or in compliance with a request, and whether some relationship exists between the defendant and the person whose interests are sought to be protected, and a balancing of the nature and likelihood of harm to the plaintiff versus the benefit to the person whose interests are sought to be protected. Moreover, as for the recipient of the statement, it must be the case that the defendant reasonably (even if incorrectly) believes that the recipient is willing and able to be of some service in protecting the interest sought to be safeguarded or aided by the communication.

1. Abuse of a Qualified Privilege

So, what does it mean to abuse a qualified privilege? Two sets of rules govern whether abuse has occurred, depending on what particular qualified privilege the defendant seeks to invoke. the special rules cover the privilege to report accurately about a public proceeding. The general rules cover all qualified privileges except for the privilege to report accurately about a public proceeding.

a. General Rules

We'll start with the general rules. Under the general rules, a qualified privilege is generally abused if: first, it is made with actual malice, unless the particular privilege invoked is the privilege covering accurate reports of public proceedings; with respect to that particular qualified privilege, a statement can be privileged even though the reporter believed or knew it was false. Second, it is published for some purpose other than the vindication or protection of the interest that the privilege was meant to protect--or, stated differently, the statement goes beyond the scope of the privilege. Third, the statement is made to someone whom the defendant does not reasonably believe to be a person to whom communication is necessary to effectuate the purpose of the privilege--usually, this means excessive publication. Incidental publication to such people is OK, if the total circumstances make the method of communication reasonable, considering the importance of the interest to be protected, the likelihood and scope of harm that might result without the communication, and the difficulty of finding an alternative means of communication. Or fourth, communication of the defamatory aspects of the statement is not reasonably believed to be necessary to accomplish the purpose of the privilege.

b. Special Rules

Now for the special rules governing whether the privilege to report accurately about a public proceeding is abused. If this particular privilege is invoked, abuse occurs not necessarily under any of the circumstances identified above, but rather if the report an unfair or inaccurate report of the proceeding. Such a situation might arise, for example, if the reporter reports the proceeding in a selective and misleading manner, to give the reader an inaccurate picture of what happened, or if the reporter edits comments made at the proceeding to give them a defamatory character they would not otherwise have had. If multiple assertions are contained in a given statement, a person must analyze each assertion separately to determine whether it is defamatory, and whether a privilege might apply.

B. Absolute Privileges

The second kind of privilege is an absolute privilege. Absolute privileges immunize a defendant from liability for defamation, even if they are abused.

1. Consent

One absolute privilege is a plaintiff’s consent to the publication of the defamatory statement.

2. Statements Made in the Course of Judicial Proceedings

Another absolute privilege protects statements made by judges, attorneys, jurors, witnesses, and similar officers in the course of the judicial proceedings, if the statement has some relationship or connection to the matter before the court and to the person's particular role in the proceeding, even if the statement is not strictly relevant to the proceedings. These include not only statements made in open court, but also statements in pleadings, motion papers, etc., as well as statements in conferences and discussions that take place before a judicial proceeding is even commenced, if a judicial proceeding is seriously being contemplated at the time the statement is made. Matters which are completely extraneous to the proceedings, though, are not covered.

3. Statements Made by Legislators Performing Legislative Functions

Statements made by a member of Congress, or of any state or local legislative body, are privileged if the statement is made as a direct part of the legislative process. Courts are split over whether the privilege applies to members of a legislative body that is not the highest legislative body in a particular state—for example, local bodies like city councils or county boards.

4. Executive Privilege

Executive officials enjoy an absolute privilege to defame, if the defamatory statement is made in the performance of their duties—for example, statements made in the course of communications that they are required or permitted to make in performance of their duties. The rule extends to all federal executive officers, and all of the governors and cabinet-level officers of the states. Some states extend the rule to lower state executive officers.   
  
5. Statements between Spouses  
  
Any defamatory statement communicated between husband and wife is absolutely privileged.

6. Required Publication of a Defamatory Statement

A person who is required under the law to communicate or facilitate the communication of defamatory material cannot be held liable for so doing. The chief application of this rule appeared during a time when radio stations and other media outlets were required to give political candidates an equal chance to speak and could exercise no control or censorship over what was said. That is generally no longer the rule today.