

DEFAMATION

Defamation

Common Law defamation requires a showing of: (1) a defamatory statement; (2) of or concerning plaintiff; (3) publication; (4) damages.

Defamatory Statement

A defamatory statement is one that injures a plaintiff's reputation and tends to subject plaintiff to hatred, contempt and ridicule or financial injury.

Insert facts here ¹

Of or Concerning Plaintiff

The plaintiff must establish that a reasonable recipient of the information would understand that the statement referred to plaintiff.

Insert facts here ²

Publication

Publication requires that the statement be communicated to a third party who understands the defamatory meaning and its application to plaintiff.

Insert facts here

Damages

The type of damages the plaintiff must prove depends on the type of defamation.³

1 SHOW how the statement is defamatory (when discussing the effect on one's reputation, discuss employment, church, friends, school, family, etc.). Also, remember that statements of *opinion* are not defamatory. Only statements phrased as *fact* constitute actionable defamation.

2 Don't spend too much time on this element if the plaintiff is directly named. If the plaintiff's name is unclear, however, or if the plaintiff is only ambiguously referenced but not directly named (i.e. "the female professor who teaches Torts at Boston College") consider discussing the issue of COLLOQUIUM (but only write about it if it applies).

3 Now go directly to writing about the one that applies - libel or slander.

Libel

Libel is defamation that is written. When libel occurs, general damages are presumed. However, the plaintiff may offer actual evidence of damages to increase his or her award.

Insert facts here⁴

Libel Per Se and Libel Per Quod

In a minority of jurisdictions, courts distinguish between libel per se (libel that is defamatory on its face) and libel per quod (libel that is not defamatory on its face).

Insert facts here⁵

Slander

Slander is defamation that is spoken. In cases of slander, plaintiff must prove damages unless the defamation is slander per se.

Slander Per Se⁶

Slander per se exists when the defamatory statement: (1) adversely reflects one's conduct in a business or profession; (2) accuses one of having a loathsome disease; (3) accuses one of a guilt involving a crime of moral turpitude; or (4) suggests a woman is unchaste.

Insert facts here⁷

4 Is the defamation written or printed? Get out of this fast.

5 Don't spend a lot of time unless the statement is *libel per quod* – not obviously defamatory. A lot of people are confused by libel per quod. A statement that is libel per quod (not obviously defamatory) is one for which extrinsic evidence is required to prove its injurious nature. For example, the written statement "Patty was distributing 'Angelides for Governor!' bumper stickers outside of the Capitol Building last Wednesday" is not defamatory on its face, unless extrinsic evidence is offered to prove that Patty is a paid employee on the Schwarzenegger Re-Election Campaign. In that case, the statement about Patty could cause her reputational harm and financial injury, and therefore is libel per quod.

6 Do NOT write about slander per se unless one of the types applies. You will not have time.

7 Write about only those that apply. Usually one of these applies if the defamation is spoken. The bar examiners love the crimes of moral turpitude and the statements about one's business or profession.

Constitutional Defamation

When the defamation involves a matter of public concern, the plaintiff must prove two additional elements: (1) falsity; and (2) fault.

Matter of Public Concern

Insert facts here⁸

Falsity

Insert facts here

Fault

The type of fault plaintiff must prove depends on whether the plaintiff is a public or private figure.⁹ If the plaintiff is a private figure, negligence must be shown. If plaintiff is a public figure, malice must be shown.¹⁰

Malice

Malice is defined as knowledge that the defamatory statement was false or reckless disregard as to the statement's truth.

Insert facts here¹¹

8 Is this a matter of public concern? This is usually debatable (President sleeping with an intern, etc.). Use all of the facts. Also, always bring up constitutional defamation even if you ultimately conclude that it isn't a matter of public concern. Just don't analyze falsity and fault.

Also, one *major* mistake people make here is jumping to whether the PERSON is public or private before discussing whether the ISSUE is one of public concern. Those are two very distinct steps that occur at different times. Remember to start with WHAT the issue is first (is it one of public concern?) and then go to WHO the issue concerns (a public or private person?). WHAT then WHO. Those go in alphabetical order so they are easy to remember.

9 There are RULE statements for whether a plaintiff is a public or private figure but they are mostly common sense so don't stress about memorizing them – it mostly depends on whether the person voluntarily put himself/herself in the public eye – actors, politicians, etc. A good bar essay would be about someone in the middle like Monica Lewinsky or the Runaway Bride from Georgia.

10 Include only the heading that applies (malice v. negligence).

11 Only if the plaintiff is a public figure.

Negligence

Insert facts here¹²

Defenses to Defamation¹³

Truth

Insert facts here¹⁴

Consent

Insert facts here

Absolute Privilege

Defendant may assert an absolute privilege for remarks made: (1) during judicial proceedings; (2) by legislators in debate; (3) by federal executive officials; (4) in compelled broadcasts; and (5) in between spouses.

Insert facts here

Qualified Privilege

Defendant may assert a qualified privilege for: (1) reports of official proceedings; (2) statements in the interest of publisher; (3) statements in the interest of the recipient; and (4) statements in the common interest of the publisher and recipient.¹⁵

Insert facts here

12 Don't get trapped into writing a full torts negligence analysis here (with duty, breach, causation and damages). All that is required is a brief discussion of reasonableness or carelessness on the part of the defendant with respect to the truth of the statement. Also, remember that this element only applies when the plaintiff is a private figure.

13 Write about only those defenses that apply. Do not even write the definitions of the defenses that do not apply; you will not have time.

14 This defense doesn't apply if you already wrote about constitutional defamation because under that theory the plaintiff had the burden of proving falsity.

15 This is tricky. The qualified privilege may be lost if the statement goes outside the scope of the privilege, which means that the defendant either made the statement to *more parties* than just the interested recipient, gave the recipient details *outside the scope* of the defined interest (for example, a former employer telling a potential future employer details about job applicant's sexual history when the phone call was just for a job reference), or the defendant acted with malice when the statement was made. It is worth noting that in some states, the plaintiff need not show malice but only a lack of good faith on the part of the defendant in making the statement.

TORTS QUESTION
Defamation/Privacy Torts

Paula is the president and Stan is the secretary of a labor union that was involved in a bitter and highly publicized labor dispute with City and Mayor. An unknown person surreptitiously recorded a conversation between Paula and Stan, which took place in the corner booth of a coffee shop during a break in the contract negotiations with City. During the conversation, Paula whispered to Stan, “Mayor is a crook who voted against allowing us to build our new union headquarters because we wouldn’t pay him off.”

The unknown person anonymously sent the recorded conversation to KXYZ radio station in City. Knowing that the conversation had been surreptitiously recorded, KXYZ broadcast the conversation immediately after it received the tape.

After the broadcast, Paula sued KXYZ for invasion of privacy in publishing her conversation with Stan. Mayor sued Paula and KXYZ for defamation.

1. Is Paula likely to succeed in her suit against KXYZ? Discuss.
2. Is Mayor likely to succeed in his suit against Paula and KXYZ? Discuss.

TORTS SAMPLE ANSWER

Defamation/Privacy Torts

Paula v. KXYZ

Invasion of Privacy

There are four different torts that comprise the tort of invasion of privacy. To sue successfully for invasion of privacy, the plaintiff only has to prove one of the four torts. They are: (1) intrusion upon seclusion or private affairs; (2) publication of private facts; (3) false light; and (4) misappropriation. The tort of misappropriation does not apply here.

Intrusion Upon Seclusion or Private Affairs

A plaintiff has a claim for intrusion upon seclusion or private affairs when a defendant intrudes physically or otherwise upon the solitude or seclusion of another OR his private affairs in a way that is objectionable to a reasonable person. Affairs and areas are private when a plaintiff has a reasonable expectation of privacy in them.

Intrusion

Here, there was no physical intrusion when Paula was recorded; however courts have held that intrusion by way of sensory perception is enough to constitute an intrusion. Since Paula's privacy was intruded upon by the anonymous recorder who was eavesdropping using senses (and later ratified by KXYZ when they played the tape) an intrusion occurred.

Seclusion

The question is whether the coffee booth in which Paula was sitting was an area of seclusion – namely whether Paula had a reasonable expectation of privacy in it. Although she was in a public place where servers and other staff could easily intrude upon her area for the purpose of doing their jobs, it is likely that she chose the corner booth and was whispering because she intended to keep her conversation private. That expectation was probably reasonable given that many people conduct business in coffee shops (in fact, many people use them as mini-offices) and don't expect their transactions to be recorded, even if they are overheard.

Private Affairs

Here, although the facts disclosed concerned a public issue (namely the conduct of an elected official with respect to a labor dispute) the discussion included Paula's opinion on that matter, something she may have wanted to keep private given the sensitive nature of the negotiation and her role in it. Although many people publicly voice their opinions

over political matters, the intrusion into Paula's personal feelings by KXYZ would likely be more offensive to a reasonable person because its dissemination could have compromised her position in the negotiations.

Publication of Private Facts

This tort is committed when a defendant publicly discloses private information about plaintiff that is highly offensive to a reasonable person and not of legitimate concern to the public.

Private Facts

Here, for the same reason as noted above, although Paula and Stan were discussing a public issue and a public dispute, Paula's personal feelings about the mayor's conduct may be considered private enough for KXYZ to be liable under this tort.

Legitimate Concern to the Public (Free Speech Concerns)

When the publication involves a matter of public concern, the speaker's constitutional rights to free speech are implicated and otherwise tortious publication of private facts becomes legitimate.

Here, it is evident that the public would be concerned about improper conduct by an elected official of their city. Indeed, if the mayor had been taking bribes, this would impact the way he governs the city and would adversely impact the general public vs. the special interest groups. Moreover, the City labor unions likely represent a large number of working people in City, and how they are treated is undoubtedly a matter of public concern. However, it is less clear that Paula's opinion of the mayor (however legitimate it may be) is one of public concern since it's not clear that the public would believe her anyway.

False Light

False light occurs where a defendant gives publicity to plaintiff concerning views he does not hold or actions he did not take. The false light must be highly offensive to a reasonable person and the information must be made public.

Here, Paula's views about the mayor were truthful (at least as to her) and therefore, she was not placed in a false light.

Mayor v. KXYZ and Paula

Defamation

The common law elements of defamation are: (1) a defamatory statement; (2) of or concerning plaintiff; (3) publication; (4) damages. Plaintiff must establish these elements for a prima facie case.

Defamatory Statement

A statement is defamatory if it adversely affects a plaintiff's reputation and subjects him to hatred, contempt, or ridicule.

Here, Mayor will argue that the statement about him being a crook adversely affects his reputation as an honorable public servant. The statement subjects him to hatred by members of his administration, contempt by voters who elected him into office and ridicule by the media. Being called a crook will cause him to lose the respect of his voters and might cost him reelection.

On the other hand, if Paula's statement was merely an opinion that Mayor's actions were the result of not receiving bribes, that may not be sufficient to be defamatory as only factual representations (not opinions) are defamatory.

Of or Concerning the Plaintiff

Plaintiff must show that a reasonable listener would understand that the statement referred to the plaintiff.

Here, the listeners of the radio station are City residents and since there is only one mayor of City, the reference to him (although his name wasn't directly used) was easily understood by listeners.

Publication

Publication means communicated to a third party. Here, the statement was published when communicated by Paula to Stan and then by KXYZ to the public over the airwaves.

Damages

The type of damages a plaintiff must prove depend on the type of defamation.

Libel – KXYZ

Libel is defamation that is written. When libel occurs, general damages are presumed. However, courts have held that statements broadcast over the radio constitute libel for

purposes of defamation even though they are not written. Therefore the statements broadcast by KXYZ would constitute libel and damages to Mayor's reputation are presumed.

Slander/Slander Per Se - Paula

Slander is defamation that is spoken. In cases of slander, plaintiff must prove damages unless the defamation is slander per se. Slander per se includes any defamatory statement that, among other things, adversely reflects on one's conduct in a business or profession, or involves a crime of moral turpitude.

Here, the accusation that Mayor has taken bribes is definitely a crime of moral turpitude as it suggests he is corrupt and dishonest to his constituents. Moreover, the fact that he did it in the course of his job as Mayor reflects on his conduct in his profession. Therefore, the statement by Paula is likely slander per se.

Constitutional Defamation

When the defamation involves a matter of public concern, the plaintiff must prove two additional elements: (1) falsity; and (2) fault.

Matter of Public Concern

As noted above, the issue of whether Mayor was in the practice of taking bribes is one that would undoubtedly concern his public as it would affect his honesty as Mayor and ability to perform his job as an elected official. Moreover, even though the statement was Paula's personal opinion of his actions, given her close working relations with Mayor, it is likely that she may have some insight into how he negotiates with interest groups and the public may be interested in knowing that.

Falsity

If Mayor has another legitimate reason for voting against the building of the union headquarters, he may be able to demonstrate that Paula's statement is false.

Fault

The type of fault plaintiff must prove depends on whether the plaintiff is a public or private figure. If the plaintiff is a private figure, negligence must be shown. If plaintiff is a public figure, malice must be shown. Since Mayor is a public figure, he must demonstrate that Paula and KXYZ acted with malice.

Malice – Paula

If Paula acted with reckless disregard for the truth, she will be deemed to have

acted with malice. However, since Paula didn't know her statement was being recorded, she probably was just blowing off steam to a colleague and likely did not act with the requisite disregard for the truth of the statement she made. Since Stan knew the details of the situation, she could trust that he might not take her statements at face value anyway.

Malice – KXYZ

KXYZ may have been acting with reckless disregard for the truth because they quickly aired the tape without questioning its legitimacy or investigating the truth of the statement or its source.

Defenses

Qualified Privilege

The defense of qualified privilege exists for: (1) reports of official proceedings; (2) statements in the interest of the publisher; (3) statements in the interest of the recipient; and (4) statements in the common interest of the publisher and recipient.

As noted above, KXYZ may argue that it was in the public's best interest to know whether or not their elected official was corrupt, and the public was the "interested recipient" of the statement. However, given that the allegation was phrased in the form of an opinion, it cannot be said that it is in the public's interest to know the biased opinion of someone in an adversarial relationship with Mayor. Moreover, it's likely that KXYZ's audience extends beyond the boundaries of City - Mayor's territory - and therefore, it's likely that people who were not actually his constituents (and therefore not actually interested in or impacted by the statement) heard the accusation. This means that the scope of the privilege may be lost.

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APPENDIX

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MURDER

Criminal Homicide

At common law, the term homicide was used to describe three different types of unlawful killings: murder, voluntary manslaughter and involuntary manslaughter.¹

Murder

Murder is the unlawful killing of another person with malice aforethought. Malice aforethought exists when there is either: (1) intent to kill; (2) intent to inflict great bodily injury; (3) reckless indifference to an unjustifiably high risk to human life; (4) intent to commit a felony that results in a killing (felony murder).²

Insert facts here³

Felony Murder

Any death caused during the commission of, or in the attempt to commit, a felony is murder. Malice aforethought is implied by the defendant's intent to commit a felony. Today, statutory law distinguishes between first-degree felony murder and all other felony murders.

1 Remember that murder is just ONE way in which a homicide can occur, so don't forget to take a step back and introduce homicide first if the question is about homicide. However, most bar exam questions ask directly about murder or the statutory degrees of murder. When that is the case, just jump over homicide and right into the type of murder that directly answers the question. This cheat sheet is VERY flexible and can be rearranged quite easily.

Also, capital murder (murder that merits the sentence of death or "capital" punishment) is not discussed in this cheat sheet. Make sure you review it though. When it's tested, you will know because the question will directly ask about it and there will likely be a capital punishment statute involved in the question.

2 The biggest mistake people make on murder questions is putting "felony murder" in the wrong place. Most people just jump right into discussing it without introducing it as a TYPE of malice aforethought. Organization is important and the readers will be looking to see that you know where felony murder fits in the grand scheme of things.

3 Discuss only the element that applies here and give it its own heading. Was there intent to kill? Was there intent to commit serious bodily injury? How do you know? SHOW the reader what words or actions of the defendant illustrate his or her intent! Don't just make a conclusion that intent was present. If the killing is clearly only a felony murder, make a quick statement about how, based on the facts, intent to kill was likely NOT present (because there was only intent to commit the felony) and move on to felony murder.

First-Degree Felony Murder⁴

First-degree felony murder occurs when a killing occurs during the course of an enumerated felony that is inherently dangerous. In most jurisdictions, the enumerated felonies are arson, robbery, burglary, rape, mayhem and kidnapping.

Insert facts here ⁵

Elements of Felony Murder

In order to convict a defendant of felony murder: (1) the defendant must be guilty of the underlying felony; (2) the felony must be distinct from the killing itself; (3) death must have been the foreseeable result of the felony; and (4) the death must have occurred during the commission of the felony and not after it was terminated.

Guilty of Underlying Felony

Insert facts here ⁶

4 Only discuss first-degree felony murder if it applies; in other words only discuss it if one of the enumerated felonies was perpetrated. Also, if the question asks about straight first degree murder, you should discuss first-degree *felony murder* if it applies because it is ONE of the ways in which a defendant can be charged with straight first-degree murder. However, you should be careful to keep the difference between the two in mind (straight first-degree murder v. first-degree felony murder); although the charge is the same, the sentence might be different for the purpose of Criminal Procedure (a common crossover with Criminal Law). For example, when the government seeks to impose the death penalty on someone convicted of felony murder, the Eighth Amendment imposes additional limitations on the state's power to do so. The death penalty may not be imposed if the defendant is merely a minor participant and did not actually kill or intend to kill. However, the death penalty may be imposed if the defendant is a major participant in the underlying felony and exhibits extreme indifference to human life. Confusing, isn't it?!!

5 Did the killing occur during the course of an enumerated felony? Is this felony inherently dangerous? Don't write more than a sentence on the "inherently dangerous" part; it's pretty obvious for the enumerated felonies. The only situation in which it may NOT be obvious would be something like drug trafficking (not enumerated, but clearly an inherently dangerous felony because so many go wrong, the stakes are high and drug dealers often carry weapons and kill each other). If that's the case, spend more time on this element.

6 This is where most points are lost on murder questions. People simply forget to analyze the underlying felony or think they don't need to! Believe it or not, since guilt of the underlying felony is an element of felony murder, you MUST analyze the felony and apply EACH element to the defendant's actions. So if a burglary was committed, you cannot merely say that the defendant is guilty of burglary; you MUST give the rule statement for burglary (breaking and entering of a dwelling house at night with intent to commit a felony therein) and analyze EACH element as though it were a straight burglary question.

Distinct from Killing

Insert facts here ⁷

Foreseeability

Insert facts here ⁸

During the Commission of the Felony

Insert facts here ⁹

Statutory Degrees of Murder

In some jurisdictions, common law murder has been re-classified into two different categories: first-degree murder and second-degree murder.

First-Degree Murder

First-degree murder occurs when the defendant perpetrates a killing that was premeditated and deliberate.

Premeditated and Deliberate

A premeditated and deliberate killing occurs when the defendant takes time to reflect on the idea of killing and makes the decision to kill while in a dispassionate state. Premeditation can occur in mere seconds.

Insert facts here ¹⁰

⁷ This section is very short. It basically means the felony can't be the killing itself. It has to be something else, like a robbery or a burglary.

⁸ Foreseeability is also where the money is!!! Don't mess it up! Don't just STATE that the death was foreseeable; explain *why* it was foreseeable at the time the crime was planned. One easy way to do that is to state that violent crimes are likely to cause panic in victims who may, in turn, use drastic measures such as killing to defend themselves. Another explanation is that adrenalin is running while defendants are committing felonies; therefore they are likely to react without thinking first and in a drastic way – possibly resulting in a killing. Another explanation is that violent felonies carry long sentences so if the defendant is afraid of getting caught, he may spontaneously decide to “kill” the victim to prevent the victim from talking or in order to escape. See how much analysis this is??? Graders LOVE this stuff. USE your common sense to get points!!

⁹ Murders that take place after the felony is over (and the defendants “reach a place of safety”) do not count. However, those that occur while the defendant is fleeing the scene or running from the cops DO count.

¹⁰ Was the killing premeditated and deliberate?

Second-Degree Murder

Second-degree murder is all other killings that do not qualify as first-degree murder.¹¹

Voluntary Manslaughter¹²

Voluntary manslaughter is a killing that occurs with adequate provocation (also known as during the “heat of passion”).

Provocation

Provocation occurs when the defendant experiences a sudden and intense passion that causes him or her to lose control, and that passion causes the killing (i.e. the defendant was actually provoked). There must not be sufficient time between the provocation and killing for the passion of a reasonable person to subside (cooling off period).

Insert facts here ¹³

Involuntary Manslaughter¹⁴

An involuntary manslaughter occurs when the defendant commits a killing with criminal negligence or during the commission of an unlawful act.

Insert facts here ¹⁵

11 You can usually write “see above” here if you have already done a common law murder analysis because common law murder was codified into second-degree murder. Note that second-degree murder now includes not only common law murder but all other murders as well.

12 Don’t write about this if it doesn’t apply. But if you think you can make SOME argument that there was provocation (even if it’s weak), then write about it.

13 Discuss how the circumstances surrounding the killing would have caused a reasonable person to fly off the handle.

14 Don’t write about involuntary manslaughter unless it applies. A recent case on this issue comes from the 2003 Rhode Island incident in which the owners of a nightclub were charged with involuntary manslaughter (with criminal negligence) when their club caught on fire after a pyrotechnics display inside ignited some flammable soundproofing foam they installed and engulfed the entire building, thereby killing 100 people. Prosecutors alleged that the owners showed a pattern of poor management and dangerous decisions, including installing the highly flammable polyurethane foam in violation of the state fire code, allowing bands to use pyrotechnics as part of their acts, and doing several things that made it harder for concertgoers to evacuate the club. The fire was the fourth deadliest in U.S. history. In 2006, the owners pled no contest to 100 counts of involuntary manslaughter and received very minimal sentences.

15 Was the killing an accident? If so, was the defendant grossly reckless or negligent (like in the example above)? Or was it committed during a misdemeanor or non-enumerated felony?

Causation

In order to qualify as homicide, the defendant's acts must have been both the actual cause and proximate cause of the victim's death.¹⁶

Insert facts here

Defenses and Justifications

Insert defense here (with heading)¹⁷

¹⁶ Don't write about this unless it is debatable that the defendant caused the death. Look for intervening acts.

¹⁷ You can write about the defenses here OR at the end of each crime, which is preferable. Consider insanity, mistake, self-defense, defense of others, defense of dwelling, crime prevention, and intoxication (voluntary and involuntary). Only discuss those that apply.