

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 generally not defamatory. Only statements of fact that are verifiable constitute actionable defamation. Nonetheless, simply labeling speech as opinion does not insulate it from liability *if the opinion itself implies facts*. I know that's probably clear as mud, so let's look at an example:

If you run around the office telling everyone that, "in your opinion, your boss is a jerk and an alcoholic," you are teetering on the edge of possible defamation. The jerk part is clearly opinion, as it's not capable of being proven true or false. The alcoholic part is more like a fact, as you are implying some sort of factual knowledge about his/her addiction to alcohol. But there's no reason to waste time writing about the opinion/fact distinction on a bar exam essay if the statement is clearly a fact. Just move on.

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 (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

Constitutional Defamation

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

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 'Romney for President!' bumper stickers at school last Wednesday" is not defamatory on its face, unless extrinsic evidence is offered to prove that Patty is an intern for President Obama. 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.

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 here

Negligence

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 too much about it. It mostly depends on whether the plaintiff voluntarily put herself the public eye (e.g., actors, politicians, commentators, etc.), so remember to use words like "voluntary" and "intent" in your analysis.

A good bar exam essay would be someone in the middle, like infamous intern, Monica Lewinsky, the notorious sorority girl whose absurd email went viral without her consent, or family members of well-known criminal suspects, like Casey Anthony, who, through no fault of their own, end up being dragged through the court of public opinion. The bar examiners just want to see good factual analysis when the issue is in the grey area. They care less about the precise conclusion you reach.

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

11 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.

Defenses to Defamation¹²

Truth

Insert facts here¹³

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.¹⁴

Insert facts here

12 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.

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

14 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.

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 adrenaline 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 famous 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, which led to flames engulfing 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.

CRIMINAL LAW QUESTION

Murder

On August 1, 2002, Dan, Art and Bert entered Vince's Convenience Store. Dan and Art pointed guns at Vince as Bert removed \$750 from the cash register. As Dan, Art, and Bert were running toward Bert's car, Vince came out of the store with a gun, called to them to stop, and when they did not do so, fired one shot at them. The shot hit and killed Art. Dan and Bert got into Bert's car and fled.

Dan and Bert drove to Chuck's house where they decided to divide the \$750. When Chuck said he would tell the police about the robbery if they did not give him part of the money, Bert gave him \$150. Dan asked Bert for \$300 of the remaining \$600, but Bert claimed he, Bert, should get \$500 because his car had been used in the robbery. Dan became enraged and shot and killed Bert. He then decided to take all of the remaining \$600 for himself and removed the money from Bert's pocket.

On August 2, 2002, Dan was arrested, formally charged with murder and robbery, arraigned and denied bail. Subsequently, the court denied Dan's request that trial be set for October 15, 2002, and scheduled the trial to begin on January 5, 2003. On January 3, 2003, the court granted, over Dan's objection, the prosecutor's request to continue the trial to September 1, 2003, because the prosecutor had scheduled a vacation cruise, a statewide meeting of prosecuting attorneys, and several legal education courses. On September 2, 2003, Dan moved to dismiss the charges for violation of his right to a speedy trial under the United States Constitution.

1. May Dan properly be convicted of either first degree or second degree murder, and, if so, on what theory or theories, for:
 - a. The death of Art? Discuss.
 - b. The death of Bert? Discuss.
2. May Chuck properly be convicted of any crimes, and if so, what crime or crimes? Discuss.
3. How should the court rule on Dan's motion to dismiss? Discuss.

CRIMINAL LAW SAMPLE ANSWER

Murder

1. May Dan be convicted of 1st or 2nd Degree Murder of Art?

First Degree Murder

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

Premeditation 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.

Here, Dan did not perpetrate the killing of Art; Vince did. Therefore, it would have been impossible for Dan to have premeditated it.

Second Degree Murder/Common Law Murder

Second-degree murder is all other killings that do not qualify as first-degree murder. Under the common law, murder was defined as 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; or (4) intent to commit a felony that results in a killing (felony murder).

Here, since Dan did not perpetrate the killing, he could not have intended to kill, inflict great bodily injury or demonstrated an unjustifiably high risk to human life. Therefore, the only theory under which Dan can be guilty is felony murder.

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.

First-Degree Felony Murder

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.

Here, Dan committed an inherently dangerous felony – robbery. Therefore, provided all other elements of felony murder are met, Dan may be guilty of first-degree felony murder.

Elements of Felony Murder

In order to be guilty of felony murder: (1) the defendant must be guilty of the underlying felony; (2) the felony must be distinct from the killing itself; (3) the 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 - Robbery

Robbery involves the taking of personal property of another by force or threat of force with intent to permanently deprive.

Here, Dan is guilty of robbery because, along with Bert and Art, he used a gun (use of force) to take money (personal property) from Vince with intent to permanently deprive Vince of the \$750. Therefore, Dan is guilty of robbery.

Distinct from Killing

Here, the robbery is the felony committed (see above), which is distinct from the felony of murder.

Foreseeability

Here, although Dan did not intend to kill Art or even Vince, it is entirely foreseeable that a murder would result from the commission of a robbery. First, it is foreseeable that when a threat of deadly force is used in the commission of a robbery, victims will respond with deadly force in an effort to defend themselves. It is also foreseeable that a defendant will use deadly force in order to avoid being caught while fleeing a crime scene. Moreover, when tensions are high it is possible for weapons to accidentally discharge. All of these events are the foreseeable result of a robbery, and therefore death of any party involved is foreseeable.

During the Commission of the Felony

A felony is still ongoing until the defendants reach a place of safety.

Here, Art was killed as the felons were running out of Vince's convenient store. Given that Art was killed in the middle of the getaway, the felony was still ongoing when Art was killed.

Exception – Redline Rule

Although Dan appears to be guilty of felony murder based on the above analysis, there is an exception to felony murder called the Redline Rule, which provides that felons are not liable for the deaths of any co-felons that occur during the commission of the crime, so long as the death is caused by the victim or a police officer attempting to prevent escape or further criminal activity. Here, the death was caused by the victim as he was trying to prevent the escape of the

criminals. Therefore, the Redline Rule applies and Dan is not guilty of the murder of Art.

- 1a. May Dan be convicted of 1st or 2nd degree murder of Bert?

First-Degree Murder

Here, Dan killed Bert out of anger when Bert demanded more money. Since first-degree murder requires deliberation, which is reflecting on the killing in a cool, dispassionate manner, Dan likely did not deliberate before killing Bert, as he was reacting out of anger and was certainly not dispassionate when he decided to kill.

Second-Degree Murder - Felony Murder

Although it is foreseeable that a felon would kill another over a disagreement about how to perpetrate the crime, Dan can only be guilty of felony murder if the felony of robbery (of the convenience store) was still ongoing at the time Bert was murdered. Although Dan and Bert were hidden in a place where the cops couldn't see them, because Chuck demanded money to house them and threatened to expose them if they didn't comply with his demands, an argument can be made that Chuck's house was not a place of safety, and therefore the felony of robbery was still ongoing. Consequently, felony murder of Bert by Dan is a viable theory.

Second-Degree Murder - Voluntary Manslaughter

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).

Here, it is arguable that Dan was sufficiently angry when Bert demanded more money and therefore felt provoked enough to lose control. After having committed such a serious crime with serious consequences, Dan probably felt entitled to the reward money and was angered that it might be taken from him. Although reasonable people would not kill over money, in this situation (where tensions were running high and the parties likely don't have much money - hence the decision to rob a convenience store), Dan may have been adequately and reasonably provoked.

2. Chuck's Crimes

Robbery - Accessory Liability (After-the-Fact)

An accessory after-the-fact is one who has knowledge that a crime was committed and assists a felon in escaping the authorities. Although charged with "accessory liability," under the common law, the accessory was considered just as guilty as the principal and punished accordingly.

Here, Chuck may be guilty of accessory to robbery since he housed Dan and Bert from the police after the crime. The fact that he demanded part of the robbery money further demonstrates that he was willing to participate in the crime and assist Dan and Bert. Therefore, Chuck is probably guilty of accessory to robbery.

Felony Murder - Bert

For Chuck to be guilty of felony murder, he must be guilty of the underlying felony, robbery. As noted above, Chuck is likely guilty of accessory to robbery (after-the-fact), but this is not the same as robbery itself. For that reason, he likely is not guilty of felony murder.

Extortion

Extortion is obtaining property by consent but through threat of force or exposure.

Here, Chuck may be guilty of extortion since he received \$150 after he threatened to reveal Dan and Bert's crime to the police. Although they consented to the exchange, it was only under the threat of exposure and therefore Chuck is likely guilty of extortion.

3. Dan's Motion to Dismiss

6th Amendment

The 6th Amendment provides every defendant with the right to a speedy trial. To determine whether this right has been violated, courts look to: (1) the length of delay; (2) the reason for the delay; (3) whether the defendant asserted his 6th Amendment rights; (4) any prejudice to the defendant.

Here, the trial was technically scheduled for over one year after Dan was arrested, which is a significant delay, but not necessarily for a murder trial where there are many witnesses to interview, documents to prepare, etc. Moreover, Dan is not likely prejudiced by the delay since he is guilty, at a minimum, of voluntary manslaughter, which carries a sentence much longer than one year. Nonetheless, since Dan objected to the delay (it's not clear whether he actually asserted his rights), and the reasons for the delay are somewhat objectionable (a cruise and CLE courses that can be rescheduled) it is possible that Dan will prevail on his motion to dismiss.