Defamation 7: Defenses

Torts
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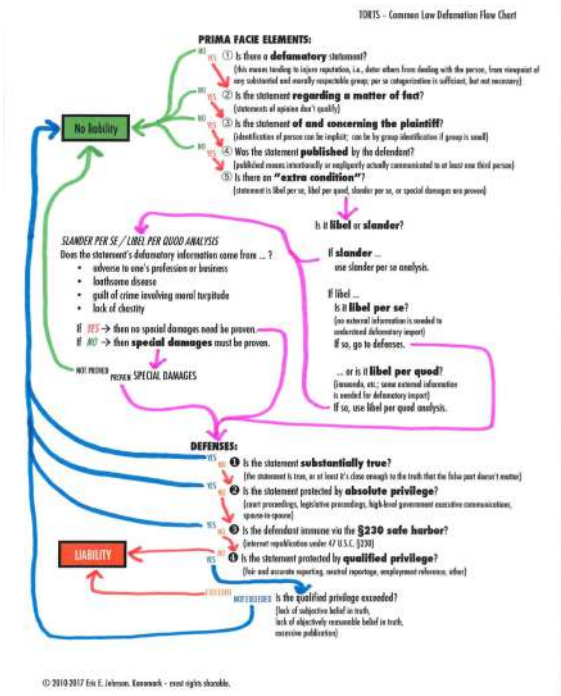
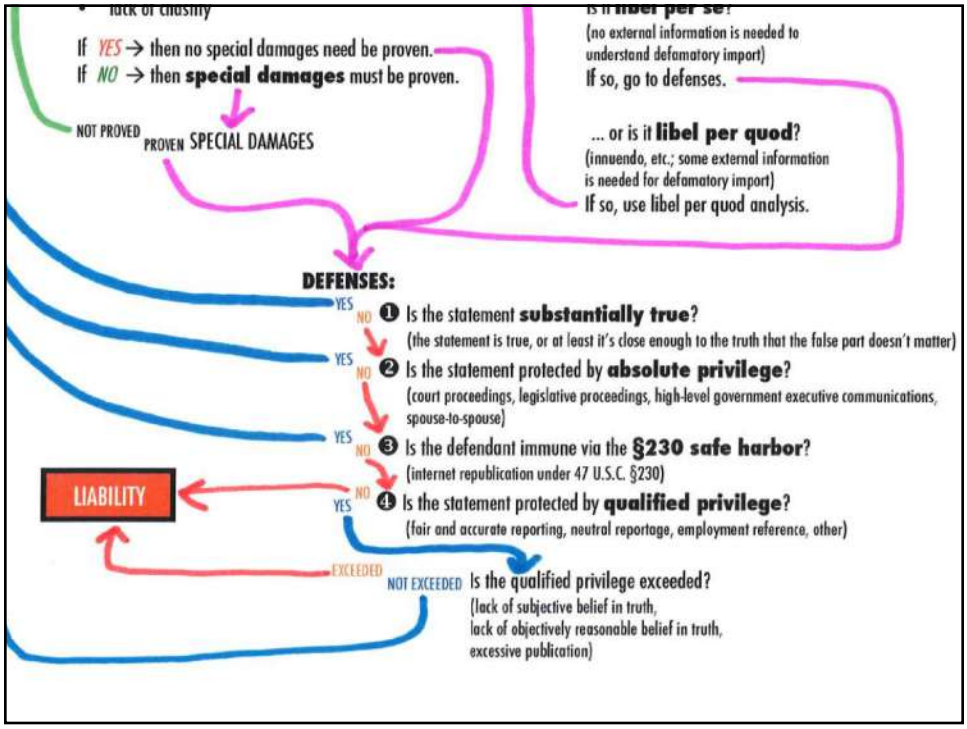




Defamation: Privileges

Republication

- Repeating a defamatory communication ("republication") ordinarily constitutes publication for defamation purposes.
- But, the fair reporting privilege and the neutral reportage privilege are defenses for republishers.

Fair reporting privilege

- Common-law based.
- The media is privileged to provide a fair and accurate report of defamatory statements made in the course of legislative, judicial, administrative and other official proceedings/records, if:
  - The proceedings or records are open to the public, and
  - Relate to a matter of public concern

Limitations on the fair reporting privilege

- Common-law malice may defeat the privilege
- Must be "fair," i.e., not distort the facts or omit important relevant facts that would change the reader/viewer's perception
  - Media report should not carry a "greater sting" than the government-generated content.

Fair reporting privilege: Examples

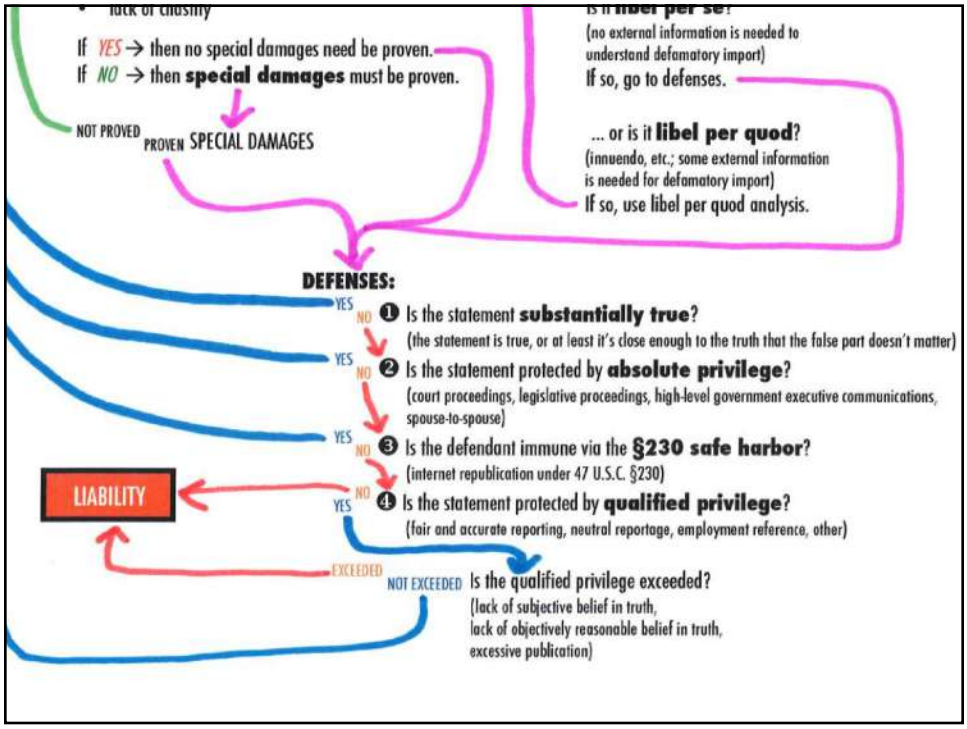
- A report based on FBI documents not generally available to the public
  - Found to be privileged
- A newspaper reporter's accurate account of police statements to the press expressing doubt about the plaintiff's rape allegations
  - Found to be privileged

Privilege of neutral reportage

- First Amendment based.
- Privilege to fairly and accurately report newsworthy charges made by one public figure against another.
- Does not apply if reporter espouses the charge or distorts the statements in order to make a personal attack.
- Generally moot where reporter lacks malice (since regular First Amendment doctrine requires malice).

§ 230

NOTE: This is not in the casebook, but it's very important.



§ 230 Safe Harbor

Applicable to Defamation, Outrage, and Privacy Torts

47 U.S.C. § 230

(c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.—

(1) TREATMENT OF PUBLISHER OR SPEAKER. — No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) CIVIL LIABILITY. — No provider or user of an interactive computer service shall be held liable on account of —

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

§ 230 safe harbor provides broad immunity against torts against site owners:

- Includes:
  - Defamation
  - Privacy torts
  - Outrage (IIED)
  - Nuisance
  - and more …
- Even works with e-mail and other contexts outside the web.
- Does not include:
  - Intellectual property infringement
- Does not apply to the original poster!

Broad applicablility

- "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.
- Not limited to special kinds of websites. Includes blogs, Twitter, consumer review sites, etc.

Site operators shouldn't lose immunity by:

- Exercising traditional editorial functions, such as pre-screening, selectively deleting.
- Encouraging or paying third-parties for contributions.
- Editing material (unless the editing materially alter the meaning of the content).

§ 230 is controversial and is subject to attempts at reform

From Sept. 23, 2020 DOJ press release:

"For too long Section 230 has provided a shield for online platforms to operate with impunity," said Attorney General William P. Barr. "Ensuring that the internet is a safe, but also vibrant, open and competitive environment is vitally important to America. We therefore urge Congress to make these necessary reforms to Section 230 and begin to hold online platforms accountable both when they unlawfully censor speech and when they knowingly facilitate criminal activity online."

§ 230 is controversial and is subject to attempts at reform

From Derek Bambauer Oct. 8, 2020 post on Brookings Institution blog:

President Donald Trump and former Vice President Biden differ on most issues, but a new proposal from Trump's Department of Justice reveals one point of agreement: Section 230 of the Communications Decency Act needs to go. Biden has openly called for its repeal. While the proposal purports to remedy flaws in the statute, its text shows that Trump has come to bury Section 230, not reform it. And though his Justice Department is advocating what it describes as reform, Trump made his personal opinion clear in a tweet on Tuesday: "REPEAL SECTION 230!!!"

§ 230 is controversial and is subject to attempts at reform

Headline from Nov. 17, 2020 piece on Wired.com:

The Senate's Section 230 Discourse Somehow Keeps Getting Dumber

§ 230 is controversial and is subject to attempts at reform

From Oct. 27, 2020 The Hill story:

Facebook CEO Mark Zuckerberg will express support for reforming Section 230 of the Communications Decency Act during a Senate hearing on the online liability law, according to prepared testimony reviewed by The Hill.

"Section 203 made it possible for every major internet service to be built and ensured important values like free expression and openness were part of how platforms operate," he is set to say.

"However, I believe Congress should update the law to make sure it's working as intended. We support the ideas around transparency and industry collaboration that are being discussed in some of the current bipartisan proposals, and I look forward to a meaningful dialogue about how we might update the law to deal with the problems we face today."