

**FIRST AMENDMENT APPLICABILITY:**

Is the plaintiff a public official or public figure, or does the statement involve a matter of public concern?

**NO** → the First Amendment does not come into play, just analyze under the common law



GO ON TO  
COMMON LAW  
ANALYSIS

**YES** → the First Amendment does come into play



Is the plaintiff a **public official or public figure**, or is the plaintiff a **private person**?

**PUBLIC OFFICIAL OR PUBLIC FIGURE** → the plaintiff must prove, as part of the prima facie case, that the statement is **false**, that is, that the statement is purported fact (as opposed to opinion) and is not true, **AND** the plaintiff must prove the defendant's **actual malice**, that is, that the defendant acted with knowledge that the statement was false or with reckless disregard as to the truth or falsity of the statement

**PRIVATE PERSON RE MATTER OF PUBLIC CONCERN** → the plaintiff must prove, as part of the prima facie case, that the statement is **false**, that is, that the statement is purported fact (as opposed to opinion) and is not true, **AND** the plaintiff must, either:

prove the defendant's **actual malice**, that is, that the defendant acted with knowledge that the statement was false or with reckless disregard as to the truth or falsity of the statement

OR

prove **negligence** (not taking the care the reasonable person would in concerning the truth or falsity of the statement) plus **actual injury**, such as lost wages or sales



GO ON TO  
COMMON LAW  
ANALYSIS  
  
(modifying elements and  
defenses as advised)



**PRIMA FACIE ELEMENTS:**

- ① Is there a **defamatory** statement?  
(this means tending to injure reputation, i.e., deter others from dealing with the person, from viewpoint of any substantial and morally respectable group; per se categorization is sufficient, but not necessary)
- ② Is the statement **regarding a matter of fact**?  
(statements of opinion don't qualify)
- ③ Is the statement **of and concerning the plaintiff**?  
(identification of person can be implicit; can be by group identification if group is small)
- ④ Was the statement **published** by the defendant?  
(published means intentionally or negligently actually communicated to at least one third person)
- ⑤ Is there an **"extra condition"**?  
(statement is libel per se, libel per quod, slander per se, or special damages are proven)

**No liability**

Is it **libel** or **slander**?

**SLANDER PER SE / LIBEL PER QUOD ANALYSIS**

Does the statement's defamatory information come from ... ?

- adverse to one's profession or business
- loathsome disease
- guilt of crime involving moral turpitude
- lack of chastity

If **YES** → then no special damages need be proven.

If **NO** → then **special damages** must be proven.

NOT PROVED      PROVEN SPECIAL DAMAGES

If **slander** ...  
use slander per se analysis.

If **libel** ...  
Is it **libel per se**?  
(no external information is needed to understand defamatory import)  
If so, go to defenses.

... or is it **libel per quod**?  
(innuendo, etc.; some external information is needed for defamatory import)  
If so, use libel per quod analysis.

**DEFENSES:**

- ① Is the statement **substantially true**?  
(the statement is true, or at least it's close enough to the truth that the false part doesn't matter)
- ② Is the statement protected by **absolute privilege**?  
(court proceedings, legislative proceedings, high-level government executive communications, spouse-to-spouse)
- ③ Is the defendant immune via the **§230 safe harbor**?  
(internet republication under 47 U.S.C. §230)
- ④ Is the statement protected by **qualified privilege**?  
(fair and accurate reporting, neutral reportage, employment reference, other)

**LIABILITY**

Is the **qualified privilege** exceeded?

(lack of subjective belief in truth, lack of objectively reasonable belief in truth, excessive publication)