

# **Table of Contents**

## **CHAPTER 1. THE PRIMA FACIE CASE**

### **I. WHO MAY SUE**

#### **A. THE PERSONAL NATURE OF THE ACTION IN DEFAMATION**

- § 1:1 Libel of the dead
- § 1:2 The non-relational nature of a defamation action
- § 1:3 Survival of defamation actions

#### **B. CORPORATIONS**

- § 1:4 Profit-making corporations
- § 1:5 Non-profit corporations

#### **C. DEFAMATION OF A PARTNERSHIP OR UNINCORPORATED ASSOCIATION**

- § 1:6 Generally

### **II. WHAT IS DEFAMATORY—AN OVERVIEW**

- § 1:7 Defamation: General considerations
- § 1:8 Libel v Slander: Criteria underlying the dichotomy
- § 1:9 Defamation: An intentional tort?

### **III. LIBEL**

- § 1:10 Libelous imputations of criminality
- § 1:11 Libelous imputations affecting business, trade, office or profession
- § 1:12 Other libelous imputations of untruthfulness or dishonesty or lack of integrity
- § 1:13 Libelous imputation of immorality
- § 1:14 The broad residual coverage of the libel action

### **IV. SLANDER**

- § 1:15 Slandorous imputations as to business, trade, office or profession

- § 1:16 Slanderous imputation of crime
- § 1:17 Slanderous charges of sexual misconduct
- § 1:18 Slanderous imputations of loathsome disease

## **V. NAME-CALLING**

- § 1:19 Generally

## **VI. PUBLICATION**

- § 1:20 In general
- § 1:21 Intracorporate and comparable publications
- § 1:22 Publication to a stenographer/secretary/typist
- § 1:23 Publication to plaintiff's agent
- § 1:24 Publication by failure to remove defamatory matter
- § 1:25 Compelled self-publication
- § 1:26 Liability of a republisher
- § 1:27 Liability of original publisher for subsequent republications
- § 1:28 Internet service providers as publishers
- § 1:28.1 Suits against anonymous internet posters or bloggers and other anonymous defamers
- § 1:29 Retraction by internet libelers

## **VII. "OF AND CONCERNING"—REFERENCE TO THE PLAINTIFF**

### **A. THE "OF AND CONCERNING"-COLLOQUIUM REQUIREMENT**

- § 1:30 In general

### **B. GROUP DEFAMATION**

- § 1:31 Defamation of a large group
- § 1:32 Defamation of a small group
- § 1:33 Disparagement of less than all of a small group
- § 1:34 New York Times and the issue of group defamation
- § 1:35 Libels of government and governmental entities
- § 1:36 "Of and concerning" and works of fiction

## **CHAPTER 2. COMMON LAW PRIVILEGES AND DEFENSES**

### **I. INTRODUCTION**

- § 2:1 Generally

## TABLE OF CONTENTS

### II. ABSOLUTE

- § 2:2 Consent
- § 2:3 The affirmative defense of truth—Truth and the First Amendment
  - § 2:4 —Truth and the common law
- § 2:5 Judicial proceedings—In general
  - § 2:6 —Judges
  - § 2:7 —Jurors
  - § 2:8 —Witnesses
  - § 2:9 —Parties
- § 2:10 —Charges of criminality made to prosecutors and police
  - § 2:11 —Attorneys
- § 2:12 —Communications unprivileged under the absolute judicial proceedings immunity
- § 2:13 State and federal officials—Absolute or qualified immunity?—Immunity of federal executive officials—*The Barr v. Matteo Doctrine*
  - § 2:14 —The states and executive official immunity
  - § 2:15 —The “Nexus” Requirement
- § 2:16 Legislative immunity—Legislators
  - § 2:17 —Witness or testimonial privilege
- § 2:18 Communications required by law
- § 2:19 United States sovereign immunity as to libel and slander
- § 2:20 Interspousal privilege
- § 2:21 Insanity
- § 2:22 Survival statutes

### III. QUALIFIED PRIVILEGES

- § 2:23 Protection of publisher’s interest
- § 2:24 Common interest
- § 2:25 Protection of interest of recipient or a third person
- § 2:26 Communications to a person who may act in the public interest
- § 2:27 Family relationships
- § 2:28 Inferior state and federal officials (not covered by *Barr v. Matteo*)
- § 2:29 The special privilege applicable to defendants providing the means of publication
- § 2:30 Publication of defamatory rumor
- § 2:31 Abuse of qualified privilege—In general

- § 2:32 —Publications for an improper motive or purpose
- § 2:33 —Knowledge of falsity or reckless disregard of Truth v. the Absence of reasonable grounds for belief in truth
- § 2:34 —Excessive publication
- § 2:35 —Matter unnecessary to implement the privilege

### **CHAPTER 3. FAIR REPORT AND NEUTRAL REPORTAGE**

- § 3:1 Introduction to fair report
- § 3:2 Source reliance
- § 3:3 Source attribution
- § 3:4 The panoply of fair report coverage—judicial proceedings
  - § 3:5 —Federal, state, and local legislative proceedings
  - § 3:6 —Official proceedings, reports and acts of executive and administrative agencies and officers and municipal corporations
  - § 3:7 —Informal official reports, press conferences and statements of important executive officers
  - § 3:8 —Arrests
  - § 3:9 —Informal official authorized police records and reports
  - § 3:10 —Informal police and criminal investigations
  - § 3:11 —Reports of public and non-public meetings of non-official bodies
  - § 3:12 —Non-public proceedings, actions and reports
  - § 3:13 —Non-local and foreign legal proceedings and official reports—Foreign governmental reports and proceedings
  - § 3:14 — —Non-local governmental reports and proceedings
  - § 3:15 —Party defendants privileged to claim fair report status
- § 3:16 Fair report and the constitution—Fair report and truth
  - § 3:17 —Fair report—A qualified or absolute privilege?
  - § 3:18 —Nonverbatim reports—General standards
  - § 3:19 —Constitutional fault and inaccurate reportage
  - § 3:20 —Reliance on official sources and documents
  - § 3:21 Non-privileged reports—Misidentification
  - § 3:22 —Slanted and distorted reports
  - § 3:23 —Fragmentary reports
  - § 3:23.1 Expungement Statutes, “Truth” v. “Accuracy” Semantic Confusion, and the Duty to Record Subsequent

## TABLE OF CONTENTS

	Determinations in Criminal Proceedings: A Modest Set of Proposals
§ 3:24	Non-privileged reports—The substantial inaccuracy requirement
§ 3:25	—Unfair accounts implying guilt or culpability
§ 3:26	—Defamatory embellishments
§ 3:27	The doctrine of neutral reportage: a highly dubious, absolutist extension of <i>New York Times</i> and <i>St. Amant</i> —An overview
§ 3:28	—The parameters of neutral reportage—Requirements—The responsible source requirement
§ 3:29	— —The “public person” requirement
§ 3:30	— —“Source attribution” and “identification”
§ 3:31	— —The “raging controversy” condition
§ 3:32	The doctrine of neutral reportage: a highly dubious, absolutist extension of <i>New York Times</i> and <i>St. Amant</i> —The parameters of neutral reportage—The neutrality requirement
§ 3:33	—Neutral reportage—an unjustified and illegitimate extension of the <i>New York Times</i> - <i>St. Amant</i> standards

## CHAPTER 4. CONSTITUTIONAL LIMITS—IN GENERAL

§ 4:1	The Supreme Court’s jurisprudence, special procedural protections, and independent appellate review of “constitutional facts”
§ 4:2	Burden of proving status; Court and jury functions
§ 4:3	Burden of proof of fault and falsity—Public persons and the burden of proving fault and falsity
§ 4:4	—Private individuals and the burden of proving fault and falsity
§ 4:5	Criminal libel
§ 4:6	Libel and the petition clause
§ 4:7	Defamation and church disciplinary proceedings and personnel terminations
§ 4:8	Libel and labor disputes—A brief introduction to federal preemption

## CHAPTER 5. PUBLIC STATUS

§ 5:1	The public official status—Definitional criteria
§ 5:2	The “Official Conduct”—“Fitness for Office” Requirement

- § 5:3 Candidates for public office
- § 5:4 Public official and candidate for public office statuses  
and the passage of time
- § 5:5 Non-identification of plaintiff's public position
- § 5:6 All purpose or general public figure status
- § 5:7 The Supreme Court and vortex or limited purpose  
public figuredom
- § 5:8 Involuntary public figuredom
- § 5:9 Vortex or limited purpose public figure—A detailed  
analysis—The preexistence requirement and rejection  
of media “bootstrapping”
- § 5:10 —Access to the means of rebuttal or response
- § 5:11 —The “Public Controversy” Requirement
- § 5:12 —The *Waldbaum* “central figure” and *Rosanova*  
“course of conduct” criteria—A critical analysis
- § 5:13 —The requirement of a reasonable nexus or  
“germaneness” to the “public controversy”
- § 5:14 Public figures and the passage of time
- § 5:15 Categories of public figures—Participants in legal  
proceedings or investigations
- § 5:16 —Professionals
- § 5:17 —Media entities, journalists and authors
- § 5:18 —Corporations
- § 5:19 —Businesspersons
- § 5:20 —Sports figures and other entertainers—Sports figures
- § 5:21 —Entertainers
- § 5:22 —Contractors and recipients of governmental moneys  
or grants
- § 5:23 Officers or candidates for labor union office, company credit  
unions or corporate boards
- § 5:24 Categories of public figures—Public employees and  
appointees
- § 5:25 —Non-candidate participants in the public political  
process and political arena
- § 5:26 —Foreign political figures and officials
- § 5:27 —Churches, church employees and religious figures

## **CHAPTER 6. FAULT STANDARDS APPLICABLE TO PRIVATE PERSONS**

- § 6:1 Private persons, *Gertz v. Robert Welch, Inc.* and a  
repudiation of *Rosenbloom v. Metromedia, Inc.*
- § 6:2 Response of the states to *Gertz* and adoption of its  
minimal constitutional requirements

## TABLE OF CONTENTS

- § 6:3 Private individuals and the non-media-media dichotomy
- § 6:4 Application of the negligence standard—In general
- § 6:5 The “journalistic malpractice” minority view
- § 6:6 Negligence regarding the defamatory character of the actionable matter
- § 6:7 The quantum of evidence required in negligence cases
- § 6:8 “Wire service defense”
- § 6:9 The minority view—Adoption of the *Rosenbloom v. Metromedia, Inc.* standard in private person cases
- § 6:10 The New York “gross irresponsibility” standard—An introduction
- § 6:11 Private figure plaintiffs and matters of purely private concern

## CHAPTER 7. CONSTITUTIONAL ACTUAL MALICE

- § 7:1 Constitutional actual malice—Introduction
- § 7:2 A subjective standard
- § 7:3 Common law malice and constitutional “actual malice”
- § 7:4 Applicability of the New York Times standard in public person-non-media defendant cases
- § 7:5 The requirement of “clear and convincing” evidence
- § 7:6 Constitutional actual malice and summary judgment/ Extension to declaratory judgment actions
- § 7:7 Constitutional actual malice—The temporal requirement
- § 7:8 —Constitutional malice and the common law foreseeable republication rule
- § 7:9 Vicarious liability and constitutional actual malice
- § 7:10 Duties of a syndicator regarding columns of a syndicated columnist
- § 7:11 Liability of book publishers
- § 7:12 Publication in the face of known contradictory information
- § 7:13 Distorted accounts—In general
- § 7:14 —Fabricated quotations and *Masson v New Yorker Magazine*
- § 7:15 Distorted headlines as evidence of “actual malice”
- § 7:16 Denials by the source(s) relied on
- § 7:17 Publications after plaintiff’s denial or denial by plaintiff’s superior
- § 7:18 Failure to contact plaintiff, allow review by plaintiff, or

- pose questions to plaintiff as the “most obvious source”
- § 7:19 Provision of or failure to provide a retraction or correction
- § 7:20 Constitutional actual malice and the failure to have a delayed broadcast apparatus
- § 7:21 The “wire service defense”
- § 7:22 The “Rational Interpretation” Rule of *Time, Inc. v Pape*
- § 7:23 Constitutional actual malice and “neutral reportage”
- § 7:24 The nature of the defamatory matter itself as evidence of constitutional actual malice
- § 7:25 Constitutional actual malice in cases involving libel by implication, ambiguous terminology, satire, humor or fiction, or ambiguous words capable of construction as fact or opinion

## CHAPTER 8. FACT VERSUS OPINION

- § 8:1 Introduction
- § 8:2 “Pure” v “Mixed” Opinion
- § 8:3 *Ollman v. Evans*: Development and expansion—Judge Starr’s Opinion
- § 8:4 *Ollman v Evans*: Development and expansion—Judge Bork’s Opinion
- § 8:5 —Judge Mackinnon’s Opinion
- § 8:6 —Chief Judge Robinson’s Opinion
- § 8:7 —Judge Wald’s Opinion
- § 8:8 —Judge Edwards’s Opinion
- § 8:9 —Judge Scalia’s Opinion
- § 8:10 —Dissents from denial of certiorari
- § 8:11 Pre-Milkovich Supreme Court precedent
- § 8:12 *Milkovich v. Lorain Journal Co.*—The Ohio Supreme Court Decisions
- § 8:13 —The Supreme Court Decision
- § 8:14 —Analysis of *Milkovich*—A prefatory comment
- § 8:15 — —Responses to and interpretations of *Milkovich*
- § 8:16 — —Actionable factual implications under *Milkovich*
- § 8:17 — —Suggested implications for existing law—Court and jury functions
- § 8:18 — — —The “Political Arena” Doctrine
- § 8:19 — — —Criterion for provability-as-factually-false
- § 8:20 — — —Imputations of criminality
- § 8:21 — — —Imputations of incompetence
- § 8:22 — — —Aspersions on motivation, honesty, or integrity



## TABLE OF CONTENTS

- § 8:23 —Analysis of Milkovich—Suggested implications for existing law—Milkovich and state constitutions
- § 8:24 Republication and the “Opinion” Rule
- § 8:25 Opinion v. Fact and the “purely private” arena
- § 8:26 Opinion-fact: Illustrative categories—The public and political arena
- § 8:27 —Imputations of criminality
- § 8:28 —Statements impugning motivation and imputing prevarication, psychiatric disturbance or insanity, and discriminatory animus—Impugning motivation
- § 8:29 — —Imputing prevarication
- § 8:30 — —Imputations of psychiatric disturbance or insanity
- § 8:31 — —Imputations of discriminatory animus
- § 8:32 —Imputations of unprofessionalism, unethical behavior, and incompetence—Introduction
- § 8:33 — —Attorneys
- § 8:34 — —Physicians and other medical service personnel
- § 8:35 — —Educators and educational institutions
- § 8:36 — —Businesspersons and businesses
- § 8:37 — —Sports figures
- § 8:38 — —Other employee cases
- § 8:39 — —Parents and those acting *in loco parentis*:
- § 8:40 —Aesthetic and other criticism of publishers, producers, journalists, authors, inventors and developers and landowners
- § 8:41 —Satire, humor, irony, parody, fantasy, and ridicule
- § 8:42 —Restaurant reviews
- § 8:43 —Labor controversies
- § 8:44 —Evaluative comments concerning pending or completed legal proceedings
- § 8:45 —Cartoons
- § 8:46 —Religions, religious figures, and religious controversies
- § 8:47 —Verbal abuse
- § 8:48 —Entertainers

## CHAPTER 9. REMEDIES

- § 9:1 Damages—Nominal damages
- § 9:2 —General damages
- § 9:3 —Special damages
- § 9:4 —Presumed damages and the First Amendment
- § 9:5 —Punitive damages—The First Amendment
- § 9:6 — —The states and punitive damages

- § 9:7 — —Other constitutional limitations on punitive damages
- § 9:8 Libel Proof Plaintiff Doctrine
- § 9:9 Injunctive relief
- § 9:10 Mandatory right of reply and retraction