



- Lee Burgess: Welcome back to the Law School Toolbox podcast. Today, we are doing another in our “Listen and Learn” series – today we’re talking about defamation. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the law school and early legal career experience, so you’ll be the best law student and lawyer you can be. We’re the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl’s Guide to Law School](#). If you enjoy the show, please leave a review or rating on your favorite listening app. And if you have any questions, don’t hesitate to reach out to us. You can reach us via the [contact form](#) on LawSchoolToolBox.com, and we’d love to hear from you. And with that, let’s get started.
- Alison Monahan: Hello, and welcome back to the “Listen and Learn” series. Today, we’re talking about defamation, which is one of the intentional torts. You might see this tested on a Torts essay along with other intentional torts, and defamation is also sometimes tested on the MBE. Now, although defamation is not the most frequently tested issue on Torts essays, it does show up from time to time, so you need to be able to spot this along with some of the other intentional torts that are commonly triggered in a defamation fact pattern.
- Alison Monahan: In addition to the general rule for defamation, there are some special rules and defenses that you should know. Today, we’ll talk about the elements of defamation, when a special pleading standard might apply, and some common defenses. With that, let’s get started!
- Alison Monahan: First, let’s cover the basics. Defamation is a legal claim involving injury to someone’s reputation on the basis of a false statement. The defamatory statement might be written – which is called “libel”, or spoken – which is called “slander”. So, you should consider defamation as a potential claim anytime you come across someone speaking or writing about someone else negatively.
- Alison Monahan: Now, let’s go over the elements of defamation. The elements of a defamation claim are, one – a false statement of fact; two – that is about the plaintiff; three – publication or communication of the statement to a third party; four – fault amounting to at least negligence; and five – damages.
- Alison Monahan: So, let’s walk through each of these elements one-by-one. The first element – a false statement of fact – is the most important. Falsity is at the crux of a defamation claim. Truth is a complete defense to defamation, which means there is no liability under defamation for someone who tells the truth. An example of a false statement of fact is, for example, “Paula is a thief who stole Bob’s car.” Now, if Paula didn’t steal Bob’s car, that statement is a false statement of fact and it would meet the first element.



Alison Monahan: A quick note on the “fact” piece of this element: What happens when a statement is framed as an opinion? Well, here there’s a special rule that applies. If someone makes a statement of opinion that gives a listener or a reader a reasonable impression that there is a factual basis for that opinion, that statement is actionable and may be defamatory. However, a statement of pure opinion is not actionable.

Alison Monahan: So, let’s look at some examples that might be helpful here. Let’s compare two statements. The first statement is: “I think Bob has a drinking problem.” The second statement is: “I think Bob has a drinking problem because I have seen him sitting on his front porch drinking beer before noon every day this week.” Do you see the difference between these? The first statement is pure opinion, which is not actionable. It’s not a statement of fact, it’s just my opinion. I think Bob has a drinking problem. In the second statement, the speaker gives a factual basis for this opinion. In this case, the statement will be treated like a false statement of fact, and there may be liability for defamation if the other elements are met.

Alison Monahan: Now, that was a lot to take in, so let’s take a moment to recap. The first element of defamation is a “false statement of fact”. The next element is that the statement must be “of and concerning” the plaintiff, which is a fancy way of saying this statement must be about the person bringing the defamation claim. For example, a statement that, “I think personal injury lawyers are unethical” is not “of and concerning” any particular plaintiff. But stating, “I think Bob Smith, the personal injury lawyer, is unethical” – that is about Bob Smith, and Bob Smith would have a claim for defamation if the other elements of defamation are met.

Alison Monahan: Now, the next element of defamation is communication or publication of the statement to a third party. So, at least one other person must hear or read the statement about the plaintiff in order for it to be actionable. Now, you don’t need a large audience. The fact that at least one person other than the speaker or the plaintiff has heard or read the statement is enough to satisfy the “publication” element. Because it’s such a low bar, publication typically isn’t a major issue in defamation fact patterns. Nevertheless, you’ll need to analyze this element using its own mini-IRAC.

Alison Monahan: Now, the next element of defamation is fault. As with other intentional torts, there must be fault on the part of the defendant. With defamation, the level of fault required depends on whether the plaintiff is a private figure or a public figure. Let’s take a closer look at these definitions and see how they work.

Alison Monahan: A “private figure” is just a regular person who is not famous in any way. When a private figure sues for defamation, he or she must show that the speaker acted negligently in making the defamatory statement. This means that the private



figure plaintiff must establish the speaker did not make reasonable efforts to determine whether the statement at issue was true or false prior to communicating or publishing that statement to a third party.

Alison Monahan: A higher standard for fault applies in defamation claims brought by “public figures”, who are individuals that have achieved widespread notoriety or fame. Examples of public figures include elected officials and celebrities like famous actors, musicians, and athletes. When a public figure sues for defamation, he or she must establish that the speaker acted with “actual malice”. Actual malice is knowledge that the statement is false, or reckless disregard for the truth or falsity of the statement.

Alison Monahan: Once you determine what level of fault applies, you can turn to the last element, which is damages. The plaintiff must have suffered some type of legally recognized harm, such as emotional distress or the loss of a job. And there’s another special rule for this element. In cases involving slander (or spoken defamation), there is a special rule for damages known as “slander per se”. Where a statement involves any one of the following categories, damages are presumed: one – a criminal offense; two – a loathsome disease; three – inappropriate conduct related to the plaintiff’s business, trade, profession, or public office; or four – serious sexual misconduct. In slander involving any of these types of statements, injury to the plaintiff’s reputation is presumed and the “damages” element will be satisfied.

Alison Monahan: So, let’s recap the five elements before we turn to a few fact patterns. The elements of defamation are, one – a false statement of fact; two – that is about the plaintiff; three – publication or communication of the statement to a third party; four – fault amounting to at least negligence; and five – damages. And don’t forget the special sub-rules we discussed. The first is that a statement of opinion can be actionable where it’s reasonable to believe the speaker had a factual basis for the opinion. The second special rule is the fault standard for private figures vs. public figures. And the third special rule is the “slander per se” rule for damages.

Alison Monahan: Alright, now let’s get into some hypos to make sure you’ve got it. Here’s the first one, which is loosely based on the [February 2009 Torts essay from the California bar exam](#):

Alison Monahan: “VeryBestLawyers.com, a popular lawyer review website, posts contact information for local attorneys, along with comments about their services. Paul was listed on the website as a personal injury lawyer who handles car accident cases. In the comments, one of Paul’s former clients stated that, ‘I think Paul is unethical because Paul missed a filing deadline in my personal injury case and I lost.’ In fact, Paul met all of the filing deadlines in the case and the client lost because he was found to be at fault for the car accident. After reading the



review, a potential client with whom Paul had conducted an initial consultation decides to hire a different lawyer. Will Paul succeed in his claim for defamation against the former client?"

Alison Monahan: Let's walk through each of the elements of defamation here. The first issue is whether there is a false statement of fact. Here, we have a statement of opinion, so this triggers the special rule we talked about before. Remember, statements of opinion may be actionable where a reader would reasonably believe there is a factual basis for that opinion. Here, the statement "I think Paul is unethical" is followed by "because Paul missed a filing deadline in my personal injury case and I lost." This statement really makes it seem like the speaker has a reasonable basis for calling Paul "unethical". But the truth is that Paul didn't miss any filing deadlines, and the client lost the case because he was at fault in the accident. This statement would be treated as a false statement of fact and is actionable if all the other elements are met.

Alison Monahan: Now, moving on to the next element. The statement is clearly about Paul because it's a comment about his services, along with his contact information. There's no question this is about him. As mentioned, this element is usually easy to satisfy.

Alison Monahan: The next element is publication. The comment about Paul was posted to a popular ratings website, so the publication element is clearly satisfied. Any third party with access to the website could read the statement, and the facts mention that a potential client did actually read the review.

Alison Monahan: The next element is fault. Remember, the level of fault required depends on whether Paul is a private figure or a public figure. You could really argue either way on this point, since a lawyer holds a position of public importance and is regulated by the state. If Paul is a private figure, he would need to show negligence – and that's probably met here, since the client didn't make a reasonable effort to verify the statement before posting the review. If Paul is a public figure, he needs to establish actual malice – that is, knowledge of falsity, or reckless disregard for truth or falsity. Most likely the fault element is satisfied either way here, since the client presumably knows why Paul actually lost the case.

Alison Monahan: The last element is damages. Here, the facts state that Paul lost a potential client after he read the negative review. So, damages are clearly satisfied. In conclusion, all of the elements of defamation are met, and Paul has a viable claim for defamation against the former client on the basis of this review.

Alison Monahan: Let's look at another example. This one is loosely based on the [February 2020 Torts essay from the bar exam in California](#):



Alison Monahan: “Paul is a law student. Dan, Paul’s Evidence professor, mistakenly believed that Paul plagiarized his midterm paper. In fact, Dan got confused while grading after drinking too many glasses of wine and mistook his own answer key for Paul’s paper. Dan told Paul’s entire Evidence class ‘not to plagiarize on your final paper like that no-good cheater Paul did on his midterm.’ After Dan’s statement to the class, Paul suffered severe emotional distress and had to seek psychiatric treatment for anxiety. Can Paul prevail in a defamation claim against Dan?”

Alison Monahan: Well, what do you think? Let’s go through it. First, we have a statement that suggests Paul is a cheater who plagiarized his midterm paper. This is a false statement of fact. We know from the facts that Dan was mistaken about the plagiarism. Next, we know the statement is about Paul because Dan named Paul and called him a “no-good cheater”. There’s no question who Dan was referring to. We also have publication, since Dan told Paul’s entire Evidence class not to cheat on their final paper.

Alison Monahan: The next element is fault. Paul is probably a private figure since there’s nothing to suggest he’s achieved any particular fame or notoriety. He’s just a law student, so he only needs to establish Dan was negligent in making the statement. Negligence is satisfied here, since the facts state that Dan drank too much wine while grading and mistook his own grading key for Paul’s essay. Dan didn’t make an effort to check his facts before calling Paul a “no-good cheater”.

Alison Monahan: The final element is damages. Here’s where the special rule about slander per se comes in. Where a spoken statement (slander) concerns inappropriate conduct related to the plaintiff’s business, trade, profession, or public office, damages are presumed. You’d need to argue that the statement involves Paul’s profession as a lawyer, because he submitted this paper in a law school class, and because plagiarism is unethical. I think here you’d also want to say, “Even if this is not slander per se, damages are still satisfied, because Paul suffered anxiety and had to seek psychiatric treatment.” So, this is another example of a viable defamation claim. All of the elements are clearly satisfied here.

Alison Monahan: Let’s do one more quick example before we wrap up:

Alison Monahan: “Patty was charged with shoplifting from a high-end shopping mall and was convicted after a three-day trial. Doug, a local reporter, attended Patty’s trial and took careful notes during the trial. Doug wrote an article about the trial and Patty’s conviction that was published in a local newspaper. All of the details in Doug’s story are true. Patty sues him for defamation. Will she prevail?”

Alison Monahan: Well, what do you think about this one? Here, we don’t have a false statement of fact. As we said before, truth is the ultimate defense to defamation. The newspaper published Doug’s accurate report about Patty’s trial, and everything



he said in the article is true. Even though Patty might be embarrassed, she doesn't have a viable claim for defamation.

Alison Monahan: Now that we've gone over a few hypos, I wanted to mention a few other considerations. First, there are defenses to defamation other than truth. The most important one is called "privilege". There are two types of privilege: absolute privilege, and qualified privilege. We don't have time to get into these defenses today, but I do want to flag this so you review privilege and know when it applies.

Alison Monahan: Also, there are a few torts that are often tested in a cluster along with defamation. The examiners like to test defamation along with other intentional torts, such as intentional infliction of emotional distress and false light, which is one of the four privacy torts. You might also see a colorable claim for negligence along with a defamation claim, like in the example with the professor who called the student a "no-good cheater" after a drunken grading mishap. You should include these other torts in your intentional torts attack plan, and be sure to consider these when you're working through a defamation fact pattern.

Lee Burgess: And with that, we're out of time. If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@lawschooltoolbox.com or alison@lawschooltoolbox.com. Or you can always contact us via our website [contact form](#) at LawSchoolToolBox.com. Thanks for listening, and we'll talk soon!

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[California Bar Examination – Essay Questions and Selected Answers, February 2009](#)

[California Bar Examination – Essay Questions and Selected Answers, February 2020](#)

[Podcast Episode 288: Listen and Learn – Assault and Battery \(Torts\)](#)

[First-Hand Guide to 1L Courses – Torts](#)