1) **DEFAMATION**

a) **Policy** – Honor (Social status), Dignity (Human worth), Property (Goodwill/reputation)

b) **Elements** – Published, defamatory, statement of or about Π, resulting in damages

c) **Publication**
   i) RST § 577
      (1) Intentional/negligent communication to another
      (2) Intentional/unreasonable failure to remove matter under Δ’s control
   ii) **Qualified Immunity** – Intra-corporate communication within the scope of duty and without common law malice is immune (Doe)
   iii) **Compelled Self-Publication** – Π had no reasonable means to avoid self-publication
      (1) Lewis – Compelled to disclose reason for discharge from prior employment
   iv) **Single Publication Rule** – RST § 577A – Publication in a single issue/broadcast even if it consists of thousands of copies (Firth – Website hits/additions not republication)
   v) **Publisher/Distributor** – Requires knowledge and discretion to withhold publication (Library immunity)

d) **Communications Decency Act (CDA § 230(c)(1))**
   i) No provider/user of interactive computer service is a publisher/speaker of information provided by another information content provider
   ii) Zeran – No liability even if Δ is put on notice of content and fails to remove
   iii) Drudge – No liability though K contemplated ability to edit and promoted Drudge
   iv) **Fair Housing** – No CDA when form required response and populated list of responses

e) **Defamatory**
   i) RST 559 – Communication that lowers another’s estimation in the community or deters 3rd parties from associating with him (cmt e – substantial/respectable minority)
   ii) Of or About Π – Reasonable person would understand it is about Π (Muzikowski)
   iii) **Doctrine of Innocent Construction** – If ambiguous → non-defamatory (Lott)
   iv) **Opinion** – Pure opinion, incapable of being proven false, is not actionable
      (1) Wilkow – Opinion about using “new value” rule in bankruptcy

f) **Libel**
   i) Generally – Written words
   ii) RST § 568A – Broadcast by radio/TV is libel (Matherson)
      (a) Factors: Area of dissemination, deliberate, persistence of defamation
   iii) **Varian** – Internet bulletin board posts are libel
   iv) Libel per se is plainly libel, per quod requires explanation

vi) **Slander**
   i) Generally – Spoken words
   ii) Slander per se – Slander that doesn’t require showing special damages
      (a) Criminal offense, venereal disease, inability or lack of integrity in public office, fornication/adultery, prejudice party in trade, profession or business
      (b) Yonaty – Suggesting someone is gay is not defamation per se
f) **Damages**
   i) Libel and slander *per se* do not require proof of special damages
   ii) **Special Damages** – Loss of marriage/gratuitous entertainment, preventing servant from getting a place, loss of customers, prevent Π from receiving something
      (1) *Terwillinger* – No damages for depression after false rape charge
      (2) *Zeran* – No damages for *emotional distress* after radio encouraged harassing calls
      (3) *Eilsworth* – False lawyer rating doesn’t require witness that refused to do business
   iii) **General Damages** – Reputation, loss of business, hurt feelings, bodily suffering from hurt feelings → don’t correlate well with $$
      (1) *Faulk* – Proving general damages by reference to other performers’ salaries

iv) **Injunction** – Not granted (considered prior restraint)
v) **Retraction** – Mitigates damages, can block punitive, some states require demand/refusal before allowing Π to pursue defamation
vi) **Reply Statute** – Requires Π first be given opportunity/forum to reply

g) **Defenses – Common Law**
   i) **Truth** – Requires substantial truth – minor inaccuracy is not always falsity (*Masson*)
      (1) *Masson* – Must be material changes to invoke liability (quotations based on notes)
      (2) Accurate quotations taken out of context = false (*Price*)
      (3) *Dworkin* – “Statements of fact” in parody were obviously opinion
   ii) **Qualified Privilege**
      (1) Public/private duty to communicate
      (2) Communication warranted by exigency/occasion
      (3) Privilege Lost if exceeding privilege by going beyond duty, or done with malice (ill-will) (*Watt* – Statements btwn employees ok, btwn employee & wife not ok)
   iii) **Public Sphere Privilege**
      (1) **Litigation Privilege** – Absolute priv. for legal proceedings/reports (RST § 586)
         (a) *Kennedy* – Doesn’t cover statements to newspaper about proceedings
         (b) *Craig* – Quasi-judicial complaint procedure is privileged
      (2) **Record Libel** – Fair/accurate report of public proceeding (RST § 611) (absolute)
         (a) *Medico* – FBI documentation of investigation covered
         (b) *Brown&Williamson* – No Priv. for broadcast that mischaracterized FTC report
      (3) **Fair Comment** – “Fair comment” on issues of public concern (*e.g.* critics)
         (a) Statements of fact are qualified immunity, opinion is absolute

h) **Constitutional Privilege**
   i) **Public Officials** can’t recover without showing *actual malice* (knowing/reckless as to truth/falsity of the statement by C&C, can use circumstantial) (*Sullivan*)
   ii) **Public Figures** also can’t recover without showing *actual malice* (*Butts*)
      (1) *Involuntary* – PF through no action of their own (central figure b4 defamation)
      (2) *All-Purpose* – PF for all issues/contexts
      (3) *Limited Purpose* – Π injects themselves into public controversy on single issue
         (a) *Liddy* – Must be voluntary, & remain PF b4 defamation
   iii) **Private Persons** – In *matters of public concern* requires showing *negligence* (*Gertz*) and Π must show the statements are false (*Hepps*) (typically media-Δ)
      (1) For general damages, must show actual malice (*Gertz*)
      (2) *Dun & Bradstreet* – Private-II, not of public concern, allowed general damages
      (3) Note – *Res ipsa loquitur* can approximate strict liability

---

Note: This is by C&C, only fraud is also C&C, everything else is preponderance in the course
i) **Modern Defamation**
   i) *Obsidian* – Holding that blogger is treated like institutional press under *Gertz*
   ii) **Libel in Fiction**
       (1) Disclaimer not dispositive, description sufficient for someone that knows Π to make the connection (*Carter-Clark*)
           (a) Consider: Name, appearance, etc. (*Geisler, Batra*)
       (2) **Parody** – (1) Whether charged portions are reasonably understood as assertions of fact rather than satire/parody, (2) author *knows* it is false, so malice shown by publisher know/suspects the article is misleading/presents false impression
           (a) *New Times v. Isaacks*
2. **PRIVACY**

   a) **Generally (Prosser)**
      i) **Four COA** – Intrusion on seclusion, Public disclosure of private facts, False light, Appropriation of name/likeness
      ii) **Limitations** – No oral communications, defamation privileges count, “matters of public interest” privilege, truth is not a defense, malice/ill-will not required, forfeit right on voluntary publication

   b) **Intrusion Upon Seclusion**
      i) **RST § 652B** – Intentional intrusion into the private place or affairs of another that is highly offensive to a reasonable person
      ii) **Remedy**
         (1) Injunction must be commiserate with the scope of offense (*Galella v. Onassis*)
      iii) **Trespassers**
         (1) *Dresnick* – “Testers” at Π’s eye center not invasion of privacy (implied consent)
         (2) *Dietemann* – Invasion of privacy when journalist entered Π’s home purporting to be a customer to report on snake oil sales (arguably inconsistent with *Dresnick*)
         (3) *Food Lion* – No invasion when journalists fraudulently got jobs, but trespass and violation of duty of loyalty
         (4) *Turner* – No invasion of privacy for GPS in rental car – no expectation on public roads, but unfair trade practices ($6k damages)
         (5) *Boring* – No invasion of privacy for Google maps on private driveway

   c) **Disclosure of Private Facts**
      i) **RST § 652A** – Publicity to matter concerning private life of Π that is highly offensive to a reasonably person and not of legitimate public concern
         (1) Cmt. a – Publicity is to the public at large (broader than defamation)
         (2) Cmt. b – No liability if already published
      ii) *Sidis* – Child prodigy story is matter of public interest though he faded to obscurity
      iii) *Haynes* – Story of Π’s drunk/womanizing days part of larger historical story, not intimate details of private life
      iv) *Cox Broadcasting* – No liability for publishing rape victim’s name from public record
      v) *Florida Star* – No liability for publishing Π’s name from police report she made

   d) **False Light**
      i) **RST § 652A** – Publicity to matter placing another in false light if highly offensive to a reasonable person and knowledge/reckless as to falsity
      ii) Argument that this overlaps entirely with defamation

Note: NY has only acknowledged the right of publicity privacy claim

BE SURE TO INDICATE THAT JURISDICTION MATTERS!
e) **Right of Publicity**  
   i) **RST § 652C** – Appropriate name/likeness of another for Δ’s use/benefit  
      (1) Cmt. b – Not limited to commercial appropriation  
   ii) **NY Civil Rights Law §§ 50-51**  
      (1) § 50 – Appropriation of name, portrait, or picture of living person for purpose of advertising, or trade  
      (2) § 51 – Injunction/exemplary damages for knowing conduct  
   iii) **Public Events**  
      (1) *Zacchini* – Liability for video of human cannon ball – usurp whole value  
   iv) **Public Interest**  
      (1) *Finger* – Photo of Π and their 6 kids in fertility article – no liability – matter of public interest, photo relevant for fertility, not insinuating kids are from IVF  
   v) **Commercial vs. Expressive Use (1st Am.)**  
      (1) *Twist* – Commercial character (selling pucks, etc.) = liability for *Spawn* comic  
      (2) *Comedy III* – Liability for direct reproduction of 3-stooges picture on t-shirt  
      (3) *Carson* – Liability for “Here’s Johnny” toilets  
   vi) **Inheritability/Transferability**  
      (1) NY not inheritable, CA it is inheritable/transferrable (life + 70y)
3) **PRODUCT LIABILITY**

a) **Privity**
   i) *Winterbottom* - Privity required to maintain suit for negligent stagecoach maintenance
   ii) *Huset* – Exceptions to privity requirement
      (1) Negligence imminently dangerous to life/health; owner negligence injuring invitee; sell article known to be imminently dangerous to life/health w/out notice
   iii) **Advantage of Tort** – Punitive, K may be bad, SOL different

b) **Strict Liability**
   i) *Macpherson* – 3rd party Δ liable when defective wheel crumbled
      (1) Wheel inherently dangerous, Π expected to use without inspection
   ii) *Escola* (Traynor Concurring) – Exploding coke bottle
      (1) Analogy to contaminated food, mass manufacturing prevents inspection
   iii) **Policy** – Deterrence/safety, cheapest cost avoider, loss spreading

c) **RST § 402A**
   i) (1) Sell defective product unreasonably dangerous to user → strict liability if
      (1) (a) Δ is in the business of selling the product and
      (2) (b) it is expected to reach the user without substantial changes
   ii) (2) Applies without negligence or privity

d) **RTT § 2** – Product is defective at time of sale if it contains a manufacturing, design or warning defect
   i) (a) **Manufacturing Defect** – Product departs from intended design
   ii) (b) **Design Defect** – Foreseeable risks could have been avoided through reasonable alternative design where product is not reasonably safe with the alternative
   iii) (c) **Warning Defect** – Foreseeable risks could have been avoided by reasonable warning and omission renders the product not reasonably safe

e) **Economic Loss Rule (ELR)**
   i) **Policy** – No end-run around K, K is voluntary assignment of risk, concern about liability disproportionate to fault (floodgates)
      (1) Consider: PL ELR, Privity ELR, 3rd parties, strangers
      (2) Exceptions – Professional services, fraudulent inducement
   ii) *Seely* – ELR bars PL when truck overturns only damaging the truck/lost profits, remedy in warranty because of express warranty (free from defects under normal use)
   iii) *Casa Clara* (FL) – ELR bars claim for defective concrete causing wall cracks
      (1) Considers the whole apartment the “product” though concrete purchased separate
   iv) *Tiara Condo* (FL) – Π gets insurance relying on representations by Δ, sues when insurance is inadequate after Π pays $ to fix property and isn’t covered
      (1) Held: ELR is only PL, Δ’s negligence was independent of the K
4) **ECONOMIC HARMS**

a) **Fraud**
   i) **Elements** – False statement, made knowingly/recklessly, intended to induce reliance (material), Π relies, causation/damages
      (1) *Pasley* – Δ liable for knowing misstatement to Δ about T’s financial situation
         (a) Rule – Motive for fraud is *irrelevant*, Δ does not need to gain from the fraud
   ii) **Puffing** – Statements easily discovered through reasonable investigation equally available to both parties; statements Π wouldn’t be prudent in relying on
      (1) *Vilcan* – Representations about quality of Δ’s vacuums were puffing, representations about never having sold them before were fraud ⟹ burden on Δ to show Π saw/understood statements in K that said they had been sold
   iii) **Non-Disclosure** – RST § 551 – No duty to disclose except facts basic to transaction
      (1) Partial disclosure invokes duty to disclose fully, duty to update once disclosure is made, duty to disclose if Δ knows Π’s mistake and there is special relationship
      (2) *Swinton* – No duty to disclose termites when Π bought house from Δ
      (3) *Laidlaw* – No duty to disclose war ending which raised price of tobacco after deal
      (4) *Kronman* – No duty to disclose when knowledge is product of costly search
   iv) **Causation**
      (1) Materiality – Reasonable man attaches importance to the fact or Δ knows/should know the fact is important in Π’s decision
         (a) *TSC Indus.* – Material if reasonable shareholder would find it important
         (b) *Basic* – Holding *TSC* applies to Rule 10b-5 actions
      (2) Loss Causation – *Basic* – “Fraud on the market” – misleading statements defraud purchasers even without direct reliance because price is manipulated
         (a) *Edington* – Liability when Δ represented Π’s $-investment would be used to invest back into company when it was used to settle company debts
         (b) *Laborers Local* – Healthcare fund for union members sues for increased costs due to smoking (not *for* members) – no liability (directness/foreseeability)

b) **RTT – Unintentional Infliction of Economic Loss**
   i) § 1 – Generally – No general duty to avoid *unintentional* (negligent) ELs
      (1) When underlying policies (deference to K, floodgates) are not present, no ELR
   ii) § 3 – Preclusion of Tort Arising from K (ELR) – No ELs when in privity
      (1) Even if K, tort can be outside scope of K (fraud; neg. misrep., e.g., neg. misrep. of time to exercise stock options to employee resulting in loss of options)
      (2) Tort can arise between 3rd parties indirectly linked by K, but not if Ks contemplate 3rd parties
   iii) § 4 – Professional Negligence – Professionals are liable for negligent ELs
      (1) Requires formal training/licensing, internal code of conduct, complex discretionary judgment – Policy is unequal bargaining positions
   iv) § 5 – Negligent Misrepresentation – During business or interested transaction, supply false info due to lack of reasonable care, liable for EL
      (1) Suffered by Π that Δ *intends to supply info* to and Π *relies* on the info in a transaction Δ *intends to influence*
      (2) Δ under *public duty to supply info* and Π is in the class contemplated by the duty
      (3) Subject to comparative responsibility, no NM in K negotiation/performance
   v) § 6 – Negligent Performance of Service – Exactly like § 5, just for services
c) **Analysis – ELR**
   i) Consider position of parties: K? 3rd party? Stranger?
   ii) Consider policy rationales: Deference to K? Floodgates? Cheapest cost avoider?
   iii) Professionals exception?
   iv) Limitations – Negligent misrepresentation and negligent services (think auditors)
      (1) Statement/service results in ELs, Π is the *specific* person Δ told/serviced, Δ *intended* Π to rely on Δ to influence a transaction

d) **Professional Negligence**
   i) *Ultramares* – Accountant not liable to Π when Δ provided negligent audit reports to company which company provided to Π to induce investment (Δ’s conduct not intended for Π, not intended to influence Π, not directed to a specific transaction)
   ii) *Glanzer* – Δ liable for negligently weighing beans when Δ provided the report to Π
   iii) *Rosenblum* (minority) – Δ-auditor liable when reliance on report is reasonably foreseeable by Δ

e) **Tortious Interference with K**
   i) **Elements** – Intentional/improper interference with performance of K
      (1) Knowledge of K + intentional (not negligent) conduct
   ii) **Policy** – Intentional interference is tort independent of K
   iii) *Lumley* – Tortious interference when Δ induced singer to break exclusive K with Π

f) **Tortious Interference with Prospective Advantage**
   i) **Policy** – Note that this is before K (or no K), and Π’s loss is specifically foreseeable
   ii) *Tarleton* – Liability for shooting/killing locals to prevent doing business w/ Π
   iii) *People Express* – Liability for negligent chemical spill resulting in closure of Π’s business/lost profits – Reasoning that Π’s loss was particularly foreseeable
      (1) *Compare 532 Madison*

h) **Public Nuisance**
   i) *Anonymous* – No COA for general nuisance, must have special injury above others
   ii) *532 Madison* – Partial building collapse closes businesses when concrete rains on sidewalk – No liability to Π for public nuisance because Π didn’t show special injury
      (1) Π did show they were closed longer than others, *compare People Express*
   iii) *Camden* – No public nuisance claim against gun manufacturer for gun crimes → causal chain is attenuated
   iv) “Fishermen Exception” – Claims by Π when there is common natural resource, and there is direct harm to Π’s proprietary interest

i) **RTT – Unintentional Infliction of Economic Loss**
   i) § 7 – **EL from Injury to Person/Property not Belonging to Π**
      (1) No liability for EL caused by *unintentional* injury to person/property that Π has no proprietary interest in
      (2) Fishermen – EL when Δ damages ship and Π shares in profits, or Δ contaminates water killing fish cause Π’s loss is special
   ii) § 8 – **Public Nuisance** – Δ subject to EL of Π for harm to public resource if Π’s losses are distinct from the community
   i) **Policy** – Sharkey argues separate tort with K only for fiduciary/professional relationship or special relationship stemming from public interest (substantial risk of harm to person or property) (consider: endangered consumer vs. disappointed consumer)
j) **Unfair Competition**

i) **Factors** – Nature of Δ’s conduct, Δ’s motive, nature of intervention, relationship between Π/Δ

ii) *Mogul Steamship* – No liability for shipping cartel to block Π from trading with Chinese tea ports – individual acts not illegal \( \rightarrow \) aggregate isn’t illegal
   
   (1) Dissent – Δ’s rates were unsustainably low

iii) *INS* – Liability when Δ is paraphrasing/scooping Π’s war stories by sending Π’s stories by telegraph to west coast for publication

   (1) Δ is “reaping where Δ has not sown” – misappropriating Π’s cost of getting data
   
   (2) Dissent – News is public domain, IP law is a creature of statute

iv) *NBA* – No liability for Δ’s real-time transmission of game scores/info to pagers

   (1) *INS Factors* – Π gathers time-sensitive data at a cost, Δ’s use is freeriding, Π/Δ directly compete, and Δ’s conduct would kill Π’s incentive to produce at all

v) *Barclays* – No liability for Δ’s reporting of Π’s B/H/S stock report before trading begins because Δ’s reports collected facts and properly attributed to Π

vi) *Ely-Norris* – Holding Δ’s safes designed to appear that they have explosion chamber covered by Π’s patent was unfair business practice – 1-1 customer loss due to patent

   (1) *Reversed* by SCUSA reasoning that there were other explosion chambers on the market so damages were speculative

vii) § 43(a) *Lanham Act* – COA to anyone who’s conduct results in damages resulting from false designation of origin, or false representation connected with trademark
5) **PREEMPTION**

a) **Analysis**

i) **Express** – Positive preemption provision in statute
   - (1) *Riegel* – Holding state tort claims for medical device defects are preempted by MD amendments to FDCA express preemption prohibiting different standards

ii) **Implied**
   - (1) **Field** – Legal regulation occupies the field leaving no space for state law
     - (a) Consider – Does this claim actually fall within the occupied field?
     - (b) Consider – Special need for uniformity? Comprehensive regulatory scheme?
     - (c) *Cipollone* – Holding cigarette warning PL claims preempted by fed. reqs.
   - (2) **Impossibility** – Direct conflict between state/federal law
     - (a) *Wyeth* – Rejecting impossibility argument because FDA/CBE allows manufacturer to add to warning label unilaterally and get approval later – Δ “bears responsibility for warning content at all times”
     - (b) *PLIVA* – Failure to warn for *generic* manufacturer is preempted because CBE does not apply to generics – rejecting FDA adverse event reporting rationale
     - (c) *Bartlett* – Generic design defect claim is preempted because generic cannot change drug composition – rejecting the “stop selling” argument

(3) **Obstacle** – State law undermines federal scheme’s purpose
   - (a) *Geier* – PL tort action that would require air bags in all cars preempted by Fed. Motor Safety Act rules designed to encourage variety of passive safety devices to determine best approach
   - (b) *Williamson* – PL tort action that would require interior seats to have shoulder belts was *not* preempted by FMSA when rules allowing lap-only belts were a cost-consideration, made contemplating cost would eventually drop
   - (c) *Wyeth* – FDA claims of preemption rejected because notice/comment never addressed preemption issue because FDA claimed no preemption during N&C, then unilaterally changed to preemption without comment

b) **Cases – Discussion**

i) *Zoegenix* – state AG mandate to drop sale of time-release opiate drug without anti-abuse mechanisms – FDA advisory panel had recommended against it (but considered) – preempted by DC citing *Geier* (undermine availability of new drug for specific reason)

ii) *Stengel* – CL negligence not preempted for failure to notify FDA of adverse events from use of medical device that were required by statute

iii) *Fulgenzi* – Failure to update claim not preempted when generic drug label was not changed in response to FDA approved label change on branded

iv) *Buckman* – Preempting “fraud on the FDA” claim when regulatory consultant made false statements to FDA to get approval of bone screws – purview of the FDA

v) *Ogden* – CA food misbranding law incorporating federal law by reference (identical) not preempted, relying on FDA warning letters to demonstrate COA does not pose obstacle to FDA policy/enforcement