

Spring 2014
Catherine Sharkey – Torts 2 – Attack Outline

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
 - v) **Libel**
 - (1) Generally – Written words
 - (2) RST § 568A – Broadcast by radio/TV is libel (*Matherson*)
 - (a) Factors: Area of dissemination, deliberate, persistence of defamation
 - (3) *Varian* – Internet bulletin board posts are libel
 - (4) Libel *per se* is plainly libel, *per quod* requires explanation
 - vi) **Slander**
 - (1) Generally – Spoken words
 - (2) 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) *Ellsworth* – 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-Π, not of public concern, allowed general damages
 - (3) Note – *Res ipsa loquitur* can approximate strict liability

Be really careful with private figures. Unclear whether matter of public concern is a requirement.

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 reasonable 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 \rightarrow 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/served, 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*
- g) **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
- h) **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 → 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