

Torts II

Final Examination

Spring 2024

Prof. T. Brill

General Instructions:

Answer Three (3) Essay Questions.

Total Time Allotted: Three (3) Hours

Recommended Allocation of Time: Equal Time per Question

Question 1

Mark is a well-known poker player, Las Vegas dealer and hand model. His hands have appeared in numerous magazine advertisements, modeling rings and bracelets. He is known for his stealthy card play and as a dealer, has been awarded “Best Dealer” awards several years in a row at his casino. He also plays music with a casino band, and makes \$1,000 per gig for live shows. He is a bit of a celebrity for his fiery lead guitar playing.

Home Haven designs a line of high-end home décor items. The company makes all kinds of house furnishings, from kitchen gadgets to furniture to lighting fixtures. Low and Strong advertises and sells merchandise to lower middle-class clientele. Therefore, several years ago Low and Strong asked Home Haven, whose initial products appealed to upscale customers who shop at Williams & Sonoma and Ethan Allen, to produce the *Everyday* living line for its customers.

Mark lives in a rented apartment with an outdoor deck. Six months ago he stopped at Low and Strong to buy a new lounge chair for the deck because his old chair was falling apart. For \$75, he bought a bright orange Home Haven *Everyday* lounge chair with four steel tubular legs held onto the chair by one bolt on each of the front two legs, and one bolt on each of the back two legs. Before Mark bought the chair, Low and Strong had had two customer complaints that the single-bolt construction of the legs made the chairs feel wobbly, and the customers returned the chairs, but fortunately no one was injured in either of the other two incidents.

Mark took the chair home and set it out on his deck. Mark decided to move the chair so he could catch more sun when he sat on the deck. As he was dragging the lounge chair across the deck, he was holding the chair by the front legs. One of the front tubular legs collapsed and crushed his right index finger between the chair leg and a tubular bar on the base of the chair. As it collapsed, the chair sliced Mark’s crushed fingertip from his index finger, and the fingertip fell between the cracks and under the deck. A relative found the fingertip a few hours later, and took Mark to the hospital. A surgeon was able to reconnect the fingertip, but because of the long delay, it lost all feeling. The surgery cost \$100,000, \$80,000 of which was covered by Mark’s insurance.

After the accident, Mark missed two weeks of work at the casino before he headed back to work. Besides his finger going numb, Mark has decreased hand function because he cannot move his other fingers as easily as before the accident. Mark’s doctors tell him the scars from the surgery will fade over time, but the index finger will always look like it was crushed.

Last week Low and Strong started selling a model of the chair that has two bolts on the front legs, and two bolts on the back legs, instead of one.

Identify and analyze all the products liability claims (including negligence if applicable) that Mark will bring against the appropriate defendants. Will he win or lose his claims? Why or why not?

Question 2

After marijuana was legalized by the voters in an initiative, the anti-drug state legislature passed a new state law that required state highway patrol officers to randomly stop motorists and check for marijuana, and arrest anyone found to be in possession, and to take them into custody immediately.

In High Town, a city within the state, massive protests occurred against the state's harsh stance on marijuana, and the local city police was criticized for aggressively managing these protests. Numerous injuries had occurred from the use of tear gas, tasers, and rubber bullets.

The local newspaper, the *City Times*, published an article on the front page that described the police department's conduct as a "reign of terror" against the residents of the city. The article, entitled "*Shame on You, Police Department*" listed the name of the police chief and his job title, Chief of the Police.

The article included a quote from a local flower shop owner, Carl Ames, who had been passing a protest on his way back to his store, which he had owned and operated for twenty years. The article mistakenly attributed to Mr. Ames a statement that he supported the police's efforts. After the publication of the article, Mr. Ames was upset with the mischaracterization of his comments in the article, and demanded that the newspaper publish a retraction. He claimed his business had suffered because no one wanted to buy flowers from him because people thought he supported the harsh conduct of the local police. Three days later, the Times published a retraction on page six of the sports section of the paper.

The Times is published in print and on line daily. Issues remain archived for two years.

Please discuss any defamation claims that the Chief of Police (*Chief v. Times*) and Carl Ames may have against The Times (*Smith v. Times*) and any possible defenses The Times may raise.

Question 3

David, a former investment banker with Goldfinger and Parks, recently opened his own financial planning firm. He was initially licensed to sell securities, but his license expired because he failed to pay the renewal fee. State law requires all persons who sell publicly traded securities to be licensed.

David lived near his parents and often had dinner with them at their country club. He was always on the look out to meet new clients at these dinners. One night, his parents introduced David to their dear friend Penny, a wealthy widow. During dinner, Penny complained she needed to earn more interest on her investments and asked David for suggestions.

David had just made a deal with Cheatham Fund to receive a 20% sales commission, which was much higher than the 5% offered by other funds. David told Penny, "I have a number of clients, even my parents, who have invested in Cheatham Fund and are very happy with their consistently high returns. You may want to look into this to get high interest on your money." David's parents said nothing.

In fact, David's parents had never invested in Cheatham Fund. David would not let them, since after researching the fund, he himself was worried the reported results were not possible and may even be inaccurate.

Over the next week Penny asked other friends about Cheatham Fund, and all confirmed they were happy with the reported high returns. She asked her longtime CPA, who warned her in a general way about the risks of private funds. But Penny was desperate to earn more interest, so she called David to say she would invest in Cheatham Fund.

David asked Penny to complete a financial statement to be sure she qualified for the private fund. She completed the application showing a net worth of \$1.5 million, and she gave David a check payable to Cheatham Fund for \$1 million. David did not question her about her other sources of income or investment experience.

Sadly, only a week after Penny's check for \$1 million cleared, Cheatham Fund declared bankruptcy. The fund showed high returns for the past 5 years, but only because it was a fraudulent Ponzi scheme. Penny lost her entire investment.

Discuss Penny's misrepresentation causes of action against David and his parents, and any defenses they may raise.

Product liability Assessment Rubric		Points
Issue (9 points max)	Design defect (3pts)	
	Warranty (merchantability) (3pts)	
	Negligence (3pts)	
Rules (38 points max)		
A) Design defect	(1) commercial supplier (2 points)	
	(2) defective when it left manufacturer's control (2 points)	
	2 (b) two methods of proof:	
	(b1) risk benefit test (8 factors—(i) Usefulness and desirability of the product; (ii) Availability of safer alternative products; (iii) The dangers of the product that have been identified by the time of trial; (iv) Likelihood and probable seriousness of injury; (v) Obviousness of the danger; (vi) Normal public expectation of danger (especially for established products); (vii) Avoidability of injury by care in use of product (including role of instructions and warnings); and (viii) Feasibility of eliminating the danger without seriously impairing the product's function or making it unduly expensive. (2 points)	
	(b2) Consumer expectation test (2 points)	
	(3) privity (2 points)	
	(4) causation (2 points)	
	(5) damages—non economic, different issues re loss of use of hand (2 points)	
	(6) defenses of contributory negligence (2 points)	
	(7) discuss misuse (2 points)	

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	(6) defenses of contributory negligence (2 points)	
	(7) discuss misuse (2 points)	

B. Negligence	(1) duty—owed by all product suppliers (2 points)	
	(2) breach—below standard of care (2 points)	
	Causation (3a) actual (2 points)	
	Causation (3b) proximate (2 points)	
	(4) damages (2 points)	
C. Merchantability	(1) fault not an issue (2 points)	
	(2) generally acceptable among those who deal in similar goods and fit for the ordinary purpose for which they will be used (2 points)	
	(3) privity (2 points)	
	(4) causation (2 points)	
	(5) damages (2 points)	
	(6) comparative negligence (2 points)	
Analysis (38 points)		
Conclusion (10 points)		
Organization, clarity and writing (5 points)		
TOTAL		
Comments:		

B. Negligence	(1) duty—owed by all product suppliers (2 points)	
	(2) breach—below standard of care (2 points)	
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	(5) damages (2 points)	
	(6) comparative negligence (2 points)	
Analysis (38 points)		
Conclusion (10 points)		
Organization, clarity and writing (5 points)		
TOTAL		
Comments:		

Defamation Assessment Rubric		Points
Issue (9 points total)	a. Libel by Chief against newspaper (3 points)	
	b. Libel by Ames against newspaper (3 points)	
	c. Retraction (3 points)	
Rules (35 points max)		
a. Libel by chief	i. Defamatory language (5 points)	
	ii. Of and concerning plaintiff (5 points)	
	iii. Publication (5 points)	
	iv. Damage to reputation (5 points)	
	v. Falsity (5 points)	
	vi. Fault (5 points)	
b. Libel by Ames	i. Truth as a defense? (5 points)	
c. Analysis (41 points)		
a. Chief (20 points)	i. (1) Damage to reputation 1 st amendment requires proof of actual damage (different from special damages can include actual damage to reputation) (4 points)	
	ii. (2) Falsity—burden of proof—truth as defense (4 points)	

Defamation Assessment Rubric		
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	b. Libel by Ames against newspaper (3 points)	
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Rules (35 points max)		
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	v. Falsity (5 points)	
	vi. Fault (5 points)	
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c. Analysis (41 points)		
a. Chief (20 points)	i. (1) Damage to reputation 1 st amendment requires proof of actual damage (different from special damages can include actual damage to reputation) (4 points)	
	ii. (2) Falsity—burden of proof—truth as defense (4 points)	

	iii. (3) Fault—public official actual malice (knowledge or reckless disregard) and clear and convincing evidence (4 points)	
	(4)	
a. Ames (21 points)		
	i. Defamatory inducement and innuendo, opinion (4 points)	
	(5)	
	ii. Damage to reputation may require proof of actual damages (4 points)	
	iii. Falsity—burden of proof—truth as defense (4 points)	
	iv. Fault—matter of public concern, private person negligence? (5 points)	
	v. Retraction effectiveness and timing (4 points)	
Conclusion (10 points)		
Writing style, organization, clarity (5 points)		
Total		
Comments:		

	iii. (3) Fault—public official actual malice (knowledge or reckless disregard) and clear and convincing evidence (4 points)	
	(4)	
a. Ames (21 points)	i. Defamatory inducement and innuendo, opinion (4 points)	
	ii. Damage to reputation may require proof of actual damages (4 points)	
	iii. Falsity—burden of proof—truth as defense (4 points)	
	iv. Fault—matter of public concern, private person negligence? (5 points)	
	v. Retraction effectiveness and timing (4 points)	
	Conclusion (10 points)	
Writing style, organization, clarity (5 points)		
Total		
Comments:		

Misrepresentation Assessment Rubric			Points
Issue (9 points max)	a. Broker fraud (3 points)		
	b. Broker negligent misrepresentation (3 points)		
	c. Parents fraud (3 points)		
Rules (38 points max)			
a. Broker--fraud	i. Misrepresentation (3 points)		
	ii. Scienter knowledge or reckless disregard (3 points)		
	iii. Intent to induce reliance (3 points)		
	iv. Causation—actual reliance (3 points)		
	v. Justifiable reliance (3 points)		
	vi. Damages (3 points)		
B. Broker Negligent misrepresentation	i. Misrepresentation in a business capacity (3 points)		
	ii. Breach of duty (3 points)		
	iii. Causation (3 points)		
	iv. Justifiable reliance (3 points)		
	v. Damages (3 points)		
C. Parents	i. Misrepresentation (3 points)		
	ii. Scienter knowledge or reckless disregard (3 points)		

Misrepresentation Assessment Rubric		Points
Issue (9 points max)	a. Broker fraud (3 points)	
	b. Broker negligent misrepresentation (3 points)	
	c. Parents fraud (3 points)	
Rules (38 points max)		
a. Broker—fraud	i. Misrepresentation (3 points)	
	ii. Scienter knowledge or reckless disregard (3 points)	
	iii. Intent to induce reliance (3 points)	
	iv. Causation—actual reliance (3 points)	
	v. Justifiable reliance (3 points)	
	vi. Damages (3 points)	
B. Broker Negligent misrepresentation	i. Misrepresentation in a business capacity (3 points)	
	ii. Breach of duty (3 points)	
	iii. Causation (3 points)	
	iv. Justifiable reliance (3 points)	
	v. Damages (3 points)	
C. Parents	i. Misrepresentation (3 points)	
	ii. Scienter knowledge or reckless disregard (3 points)	

	iii.	Intent to induce reliance (3 points)	
	iv.	Causation—actual reliance (3 points)	
	v.	Justifiable reliance (3 points)	
	vi.	Damages (3 points)	
	Analysis (43 points)		
A. Broker—fraud (15 points)	i.	Opinions?	
	ii.	Statement of future facts	
	iii.	Superior knowledge (justifiable reliance)	
	i.	Professional capacity	
B. Broker Negligent misrepresentation (15 points)	ii.	Duty owed only to person to whom the representation is made	
C. Parents	i.	Duty to speak up	
	Conclusion (10 points)		
Writing style, organization, clarity (5 points)			
Total			

	iii.	Intent to induce reliance (3 points)	
	iv.	Causation—actual reliance (3 points)	
	v.	Justifiable reliance (3 points)	
	vi.	Damages (3 points)	
	Analysis (43 points)		
A. Broker—fraud (15 points)	i.	Opinions?	
	ii.	Statement of future facts	
	iii.	Superior knowledge (justifiable reliance)	
	i.	Professional capacity	
B. Broker Negligent misrepresentation (15 points)	ii.	Duty owed only to person to whom the representation is made	
	i.	Duty to speak up	
C. Parents			
Conclusion (10 points)			
Writing style, organization, clarity (5 points)			
Total			

KCL

Torts

Spring 2024

Prof. Brill

NO ANSWER OUTLINE

1)

I. Product Liability Under Negligence - Against Home Haven and Low and Strong

To prove a product liability negligence claim, the Plaintiff must prove the Defendant: 1. Owed a Duty of Care to the Defendant; 2. Breached that Duty of Care; 3. Was the Actual and Proximate Cause of the Defendant's Injury; and 4. Damages.

A. Duty of Care: Under a negligence claim, the Defendant owes a duty of care to both the Buyer and to the general public. In Products Liability, the negligent party is the one whose negligent design or actions towards the product caused the actual defect. In most negligence claims, only the manufacturer is liable unless there is supervening cause that cuts off the liability of the manufacturer.

In this case, there are two potentially liable parties: Home Haven (the manufacturer) and Low and Strong (the retailer). The retailer only has a duty of care to do a cursory inspection of the product under a negligence claim. Low and Strong would only have a duty to Mark if they knew about the dangers of the product and sold it anyway.

By all indications, this injury was caused by a design defect on the part of Home Haven. Low and Strong was aware there was a defect with the design, as they had two prior customers complain that the single bolt chair construction made the chairs feel wobbly and these customers returned the chairs. Low and Strong continued to sell the chairs.

Since Low and Strong had a strong indication that the chairs were dangerous and sold them anyway, they would have a duty of care. Low and Strong's negligence is a supervening cause against Home Havens potential design defect. Thus, under a liability cause of action, only Low and Strong are potentially liable for negligence.

B. Breach of Duty:

In assessing whether there was a breach of duty, we first look to whether there was a manufacturing defect, information defect, or design defect.

A manufacturing defect occurs when a single product is unreasonably dangerous by normal consumer expectations due to a deviation from the standard product design. All the single bolt

Can't they both be negligent? If there were previous injuries known to L&S, that conclusion would be more likely true, but here they just know about two wobbly chairs - either so was on the way on the but I think it's likely HH could also still be on the hook - unless L&S were intentional or reckless

chairs sold by Low and Strong appeared to be designed the same, thus it would not be a manufacturing defect.

An information defect occurs when there is insufficient warnings or instructions about the use of the product. There is no indication that the wobbly chairs and Mark's injury occurred due to incorrect use or insufficient warnings. There was not an information defect.

A design defect occurs when a the design of a line of products is unreasonably dangerous per consumer expectations. To determine whether the product is too dangerous or risky by societal standards, the courts employ a risk - benefit analysis. The risk benefit elements and analysis of the single bolt chairs are below:

1. Is the Product **Useful and Desirable**? Yes, an attractive lounge chair for a deck has utility and value to consumers.
2. What is the **Availability of Safer Alternative Products**? We can assume safer alternative products are readily available, as Low and Strong recently began carrying a model of the same chair with two bolts in the front legs and two bolts on the back lets, instead of the single bolt design that caused Mark's injuries. This was less than six months after Mark's injury.
3. Were the **Dangers of the Product Identified by the Time of Trial**? Yes, prior to Mark's injury two other single bolt model owners had complained about the chair being wobbly. The danger of injury was apparent from Mark's injuries.
4. What was the **Likelihood and Probability of Serious Injury**? The likelihood of injury seems high based on this fact pattern. It was foreseeable that a chair poorly constructed in this manner might collapse and with fingers nearby the sharp edges, the injuries seem likely. The Defendant may argue that the way Mark was carrying the chair increased the dangers of injury. Mark could argue the chairs were inherently unsafe and one could injure themselves in a variety of ways, including the chairs collapsing while someone was sitting on them. **More than likely, the court would find the likelihood of injury to be high.**
5. **Obviousness of Danger**: The danger was not terribly obvious to Mark, but should have been obvious to the Defendant. They had two other customers return this same model for being wobbly and unsafe.
6. **Natural Public Expectation of Danger** for this Specific Product: The public would expect a lounge chair to be safe with a low expectation of danger or injury.
7. **Avoidability of Injury from Care or Warnings and Instructions**: There is no indication the chair was improperly used, so it is unlikely injury would have been avoided from a different way of caring from it or from additional warnings / instructions.

8. **Feasibility of a Safer Design without changing the Nature of the Product or Incurring Significant Additional Costs:** Adding a second bolt to the chair design would neither significantly change the utility or attractiveness of the product. It is doubtful that there would be a significant additional cost to add four more bolts to the chair. Perhaps most significantly, Low and Strong started selling a two bolt model of the chair last week, meaning they must feel the cost and utility of a safer design are both affordable and can be done without changing the nature of the chair.

Based on the design defect risk analysis, the one bolt line of chairs was too dangerous and could be made safer with relative ease. The single bolt chairs would be considered overly dangerous and defectively designed.

C. Actual Causation: The defectively designed chair was the actual cause of Mark's injuries; there were no other potential factors that could have caused his injuries.

Proximate Cause: The court will ask if the use of the chair was a "foreseeable use" contemplated by the manufacturer and a normal use by an average consumer. The chair was used for sitting on his deck and moved with his hands as any person would. **The use of the chair was foreseeable, thus the poor design of the chair was the actual and proximate cause for Mark's injury.**

D. Damages: Under a negligence product liability claim, a Plaintiff can receive both general and special damages. Mark could request the following:

- \$20,000.00 for the remaining cost of his surgery not covered by insurance
- Pay for the two week of work at the casino Mark missed.
- Mark will likely no longer be able to play lead guitar with the finger injuries, so he could request lost income at the amount of \$1,000.00 per gig for loss of present and future income.
- Mark most likely can no longer work as a hand model, so he can request anticipated lost future and present income
- Mark's hands are a huge part of his identity and how he has made his living in the world for years. He would likely suffer great emotional pain and suffering from the injuries to his hands, and Mark is entitled to request these damages under negligence as well.

Likely Result for Negligence Claim: Mark will likely succeed in his negligence claim against Low and Strong, as it was their negligent decision to continue selling defective products that led to his injury. Mark's negligence claim against Home Haven will fail, as Low and Strong's supervening negligence would "cut off" liability on a negligence claim against Home Haven.

II. Product Liability Under Strict Liability: Against Home Haven and Against Low and Strong

The requirements for a strict liability product liability claim are: 1. The Defendant must be a commercial supplier; 2. The Product must have been defective when it left the Defendant's Control; 3. The Product defect must be the actual and proximate cause of the Plaintiff's injuries; 4. Plaintiff must have suffered damages.

A. Commercial Supplier: Both Home Haven and Low and Strong are commercial suppliers, and thus a strict liability claim can be brought against both companies. Under strict liability, all companies in the chain (from manufacturing to shipping to resale, etc.) are potentially liable if the product was defective when it left their control. Even if the company is not considered to be negligent or at fault, **all companies in the chain are potentially liable if the strict liability claim is successful.**

B. Product Defective when it Left Defendant's Control: The chair was most certainly defective when it was purchased by Mark from Low and Strong. Most likely, it was also defective at the time it left the control of Home Haven. As established in the risk benefit analysis in the negligence section above, the product was **defectively designed. The court will likely find the product was defective when it left both Home Haven and Low and Strong's control, and thus both companies are potentially liable under a strict liability analysis.**

C. Actual Causation: The defectively designed chair was the actual cause of Mark's injuries; there were no other potential factors that could have caused his injuries.

Proximate Cause: The court will ask if the use of the chair was a "foreseeable use" contemplated by the manufacturer and a normal use by an average consumer. The chair was used for sitting on his deck and moved with his hands as any person would. **The use of the chair was foreseeable, thus the poor design of the chair was the actual and proximate cause for Mark's injury.**

Damages: Under a strict liability analysis, the Plaintiff can sue for general damages but not special damages. Thus, Mark can sue for:

- Mark will likely no longer be able to play lead guitar with the finger injuries, so he could request lost income at the amount of \$1,000.00 per gig for loss of present and future income.
- Mark most likely can no longer work as a hand model, so he can request anticipated lost future and present income
- Mark's hands are a huge part of his identity and how he has made his living in the world for years. He would likely suffer great emotional pain and suffering from the injuries to his hands, and Mark is entitled to request these damages under negligence as well.

Product Liability Under Implied Warranty of Merchantability: Against Low and Strong

extra points for
identifying even
if you didn't
have time to discuss -
good strategy -
in the future if you can
also at least state the
rule that applies, even
more extra points.

2)

Chief v. Times (Public Figure/ Public Concern)

Defamation

To establish a case of defamation, there must be: (1) a defamatory statement that is likely to affect one's reputation, (2) the statement is of or concerning the plaintiff that a reasonable listener, view, or reader would know to be of the plaintiff, (3) publication to a third party either intentionally or negligently, (4) the statement must be false, (5) the fault on part of the defendant, (6) the defamatory statement harmed the plaintiff's reputation

Defamatory Statement

The defamatory statement in question is the City Times publication in the Newspaper calling the police department conduct as a "reign of terror" and the heading "Shame on You, Police Department. " a heading like this is likely to affect someone's reputation especially the residents of the town will have a negative outlook on police.

Of and Concerning the Plaintiff

The plaintiff must prove the defamatory statement was pertaining to him. If a plaintiff is not directly name in the defamatory statement, the plaintiff must use colloquium to bring in extrinsic evidence such as innuendo or inducement that the statements were pertaining to him.

Here, the article published in the City Times directly named the plaintiff along with his job title as chief of police. Since the newspaper is a local one and the article is covering local protests, those is that right the article will know that the statement is pertaining to the local police chief.

Publication to a Third Party

Publication to as third party must be made to an outside party not just between the plaintiff and the defendant, where a reasonable person would understand who the publication is pertaining to. The publication can either be made intentionally or negligently.

Here, the City Times published this newspaper to its local residents and to its website. The publication was intentional because it was covering the city wide protests of the anti drug legislation which included coverage of the police department's/ Police Chief's conduct during the protests.

Falsity of the Statement

Under common law, the Defendant had the burden of proof to prove that the defamatory statement was true to avoid liability. Under the modern trend, the burden of proof falls onto the plaintiff to prove that the state was false.

Here, the Police Chief would have to prove that the defamatory statement was false. The statement call the police department's conduct a "reign of terror" can be viewed as an opinion which the Police Chief would have to find clear and convincing evidence to prove that thew statement is false. However, this would be difficult because the fact suggest the police have been aggressive in managing the protests including numerous injuries that have occurred from the use of tear gas, tasers, and rubber bullets. The statement "Shame on You, Police Department" would also be difficult to prove if the newspaper just reported on the facts of the situation that was occurring. Here, the Police Chief would have a difficult to near impossible time proving the statement was false.

Fault on the Defendant's Part

Under a defamation claim, if the plaintiff is a public figure, the statement is concerning a public matter and the defendant is a news outlet, then the plaintiff must show that the defendant published the statement with actual malice. Actual malice is proven when then plaintiff can show the defendant knew the statement to be false or had a reckless disregard for the truth and published the statement anyway and the plaintiff must have clear and convincing proof of this.

Here, the Police Chief would have to prove City Time knew these statements about him and the department to be false and published it anyways. City Times has the best argument that newspapers do not have a duty to fact check there articles unless they know that statement may be false. Here, City Times reported on accurate information that was of public concern since the protests were happening on a massive scale. Here, no actual malice would be found against City Times.

Damages

The damages a plaintiff can receive depend on how the statement was published. Here, the publication concerning the police chief was found in the local newspaper and on its website. This would make the defamatory statement libelous. Libelous is a written form of defamation. Libel Per se occurs when the defamatory statement is libelous on its face meaning you do not have to use extrinsic evidence to prove who the defamatory statement was about or who it is pertaining to. Plaintiff will recover presumed damages. Under Libel per quod, the defamatory statement requires

extrinsic evidence to prove who the statement is about or why the statement is defamatory, then you must prove special damages (money).

Here, the defamatory statement would be libelous on its face because it names the Police Chief directly and the defamatory statement is affecting his reputation within the city. However, the Police Chief could not prove that the newspaper published (1) a false statement, (2) that they published the article with actual malice. The newspaper will not be liable for defamation.

Smith v. Times (Private Person, Public Concern, Media)

Defamation

To establish a case of defamation, there must be: (1) a defamatory statement that is likely to affect one's reputation, (2) the statement is of or concerning the plaintiff that a reasonable listener, view, or reader would know to be of the plaintiff, (3) publication to a third party either intentionally or negligently, (4) the statement must be false, (5) the fault on part of the defendant, (6) the defamatory statement harmed the plaintiff's reputation

Defamatory Statement

A defamatory statement must be likely to adversely affect one's reputation.

Here, the statement in question is City Times publication of a quote in their newspaper that wrongfully attributes to Mr. Ames a statement that he supported the police's effort. In a city that has massive protests against police efforts this could wrongly affect his reputation along with his flower shop. However, the statement is not defamatory on its face because the plaintiff would have to use extrinsic evidence to show why the statement he supports police efforts is defamatory.

Of and Concerning the Plaintiff

The plaintiff must prove the defamatory statement was pertaining to him. If a plaintiff is not directly name in the defamatory statement, the plaintiff must use colloquium to bring in extrinsic evidence such as innuendo or inducement that the statements were pertaining to him.

Here, Mr. Ames is directly named in the newspaper article

Publication to a Third Party

Publication to a third party must be made to an outside party not just between the plaintiff and the defendant, where a reasonable person would understand who the publication is pertaining to. The publication can either be made intentionally or negligently.

Here, the City Times published this newspaper to its local residents and to its website. The publication was intentional because it was covering the city wide protests of the anti drug legislation and interviewing local residents about their opinion of police conduct. The City Times published Mr. Ames' quote onto their newspapers and website.

Falsity of the Statement

Under common law, the Defendant had the burden of proof to prove that the defamatory statement was true to avoid liability. Under the modern trend, the burden of proof falls onto the plaintiff to prove that the statement was false.

Here, Mr. Ames can prove the statement attributed to him was false, if he can go back and show that the newspaper mixed up his name and statement with someone's else who was being interviewed that day.

Fault on the Defendant's Part

Under a defamation claim, if the plaintiff is a private figure, the statement is concerning a public matter and the defendant is a news outlet, then the plaintiff must show that the defendant published the statement with actual malice. Actual malice is proven when the plaintiff can show the defendant knew the statement to be false or had a reckless disregard for the truth and published the statement anyway and the plaintiff must have clear and convincing proof of this.

*Private individual
negligence only
required
(Gertz)*

Here, Mr. Ames can prove that the newspaper acted with actual malice when it recklessly disregarded the truth when it did not pay attention to whose statement during the interview belonged to which person and published the statements anyways. Since Mr. Ames can prove the statement was false, with actual malice, and with clear and convincing evidence, City Times will be liable for defamation.

Damages

The damages a plaintiff can receive depend on how the statement was published. Here, the publication concerning Mr. Ames was found in the local newspaper and on its website. This would make the defamatory statement libelous. Libelous is a written form of defamation. Libel Per se

occurs when the defamatory statement is libelous on its face meaning you do not have to use extrinsic evidence to prove who the defamatory statement was about or who it is pertaining to. Plaintiff will recover presumed damages. Under Libel per quod, the defamatory statement requires extrinsic evidence to prove who the statement is about or why the statement is defamatory, then you must prove special damages (money).

Here, since the statement pertaining to Mr. Ames was Libel per quod, he must prove special damages in order to recover. Here, Mr. Ames can prove economic loss by showing his business has suffered because no one wants to buy flowers from him because people think he supports the harsh conduct of local police. Newspaper is liable for Defamation

Defense

The newspaper can try to mitigate its damages because it retracted their error of Mr. Ames statement, but it might not work since the retraction was published on page 6 on the newspaper and the issues remain archived for two years.

extra issue: False Light

3)

Penny v. David & his parents

Misrepresentation

A defendant makes a misrepresentation based on past or present material fact that, they knew this fact to be untrue, they intended to induce the plaintiff to rely on their misrepresentation, the plaintiff did actually and justifiably rely, and that caused them damages.

Past or present material fact

The past or present fact must be about what is currently at stake it cannot be speculative as to the future or a mere opinion. Mere puffery will not suffice.

Here David stated he "has a number of clients that have invested in the Cheatham Fund, they were very happy with the results, and his parents were his clients."

His parents were not his clients at the time he made his statements and the facts do not indicate that the Cheatham Fund was happy with their results. Penny was looking to make more money on investments.

Thus, the high returns would be considered a material fact for penny.

Knew to be false

the defendant must have known the statement they made to the plaintiff to be false at the time they made the statement.

David knew that the Cheatham Fund was a fraudulent Ponzi Scheme. He also had his ~~worries~~ ^{not exactly - he didn't trust results} that the results were not possible and may even be inaccurate at the time he made the statements.

Thus, the statement was ^{known to be} false.

Inducement

Inducement will be satisfied if the defendant intentionally tried to get the plaintiff to rely on them because they knew that the plaintiff would rely on the defendant's fiduciary duty to them.

David was a former investment banker but had not renewed his license to practice. This was required by law. David could claim because he wasn't licensed he had no fiduciary duty to Penny.

However, David was always on the lookout for new clients. He knew Penny was a wealthy widow and took advantage of the opportunity that Penny asked for his advice and made a very convincing statement to her. David's parents were dear friends of Penny's and that could mean that she had known about his work and trusted his opinion. David knew his statements were false and made that statement that his parents and others were in on the investment to try and gain her trust.

Thus, there was inducement.

Actually Relied

Plaintiff must have actually relied. Subjective standard.

Penny gave David \$1 million dollars. The plaintiff could argue that the amount of money she gave to who she believed to be an investment banker was actual reliance because she trusted him with the large amount of money.

Penny actually relied

Justifiably relied

This is based on an objective standard that it would be understandable that the plaintiff would rely.

David had Penny complete a financial statement to see if she could qualify for the loan. Anyone who completes a qualifying application and gets approved by said statement would believe that they are entrusting their money to a professional who knows what they're doing. It's also arguable that because Penny was a dear friend of David's parents that she would

trust David even more with her money. The parents were also silent when David made his assertions. So, one can conclude she took their silence as an affirmation of his statements.

There was justifiable reliance.

Damages

Any monetary loss or deprived benefit of the bargain.

Here, Penny lost her \$1 million dollars because the Cheatham Fund declared bankruptcy.

She could sue for the amount of money she lost because of their misrepresentation.

Conclusion

David could be liable for fraudulent misrepresentation.

What about parents?

Penny v. David and David's Parents

Negligent Misrepresentation

A misrepresentation made recklessly or carelessly. The defendant made a negligent misrepresentation in a business or professionally setting, the defendant breached their duty because the plaintiff relied on them, there was actual and justifiable reliance, that caused damages.

Material fact

The material fact must have been made in a business or professional setting.

David and his parents will argue that they were at the dinner table and not in an office. It was simple dinner conversation

However Penny will argue that because the conversation was specifically about business, and David's business to be exact, that there was a misrepresentation made in a professional setting.

There was a misrepresentation made in a business setting.

Breach

The breach comes from the defendant knowing that the plaintiff would rely on the defendant's statements.

Here, Penny was dear friends with David's parents and she must have known about the business he's in. It's reasonable to think that because Penny knew David was friendly with the parents and his work that she would trust David's opinion.

Thus, there was a breach.

Actual reliance

Defined and analyzed the same as above.

Justifiable Reliance

Defined and analyzed the same as above.

Damages

Defined the same as above.

Conclusion

David and his parents will be liable for negligent misrepresentation.

should discuss that parents are not brokers, but could be liable because they arranged the meeting and are therefore acting on behalf of a broker is "agents"

Defenses

Contributory Negligence - Good!

A plaintiff may be able to recover if there was a negligent misrepresentation but not an intentional one.

Here, the defendants will argue that when Penny asked all her friends about the Cheatham Fund and they confirmed that they were pleased with the high returns she did her research and because she did her research her failing to see through the defendant's misstatements absolves them from having to pay her anything.

However, Penny will argue that because it was a Ponzi scheme her friends were being paid out with other peoples money fraudulently and because they money was coming to them illegally their confirmations should not be used against her.

Conclusion

✓ Penny will not be found contributorily negligent.

END OF EXAM