

MONTEREY COLLEGE OF LAW

TORTS

FINAL EXAMINATION

SPRING 2017

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Instructions:

There are three (3) questions in this examination.

You will be given three (3) hours to complete the examination.

Question 1

In compliance with her divorce agreement, Pam was required to send her two daughters, Nina, age nine, and Sara, age seven, to visit their father in another state every summer. Pam paid the airline an “unaccompanied minors” fee which guaranteed the girls would be escorted on and off the plane and supervised during the flight. When Pam checked the girls in at the Delta Airline desk, she was introduced to Darla, a flight attendant, who was assigned to supervise the girls during the flight. Darla did not inspect the girls’ bags, but greeted them warmly. Pam told Darla that Nina was working on a school project and Darla should make sure she did not spill glue or paint on her clothes. Pam tried to keep tears from flowing down her cheeks as she waved goodbye and prayed that the two would have a safe flight.

As the plane took off, the girls took out some things they had brought with them to do during the flight. Nina began gluing small plastic dinosaurs inside a box for her diorama. Darla, rushing by to deliver drinks to other passengers, commented on what a neat job Nina was doing. However, the glue that Nina was using was so toxic that it released a toxic cloud to the upper portion of the plane cabin, causing a passenger who had been standing to sort through the overhead bin, and both Darla and the only other flight attendant on the plane, who were standing up while serving drinks, to lose consciousness. The passenger incurred a serious gash on his head when he fell after losing consciousness. (None of the seated passengers, including Nina and Sara were affected by the glue’s toxicity.)

When the pilot learned of the situation, he began planning an emergency landing. It was at this time that Sara, the seven year old, realized that she simply had to use the bathroom, so the two girls packed up their backpacks and went to the restroom. Nina waited outside while Sara used the toilet. Sara was unable to open the door when she was ready to exit the restroom, and called to Nina for help. Nina was unable to open the door either, so she sat on the ground next to the locked door, and began singing to Sara to calm her down. While sitting on floor of the plane outside the restroom, Nina noticed some refreshments on a counter, and helped herself to some pretzels, peanuts, and several small bottles of what looked like tea. She managed to finish four small bottles of whiskey as she ate pretzels and peanuts as she sang to her sister.

Now intoxicated, Nina decided to ask the pilots for help with the door. The co-pilot jumped up when Nina entered the cockpit and reached out to block her path, causing Nina to recoil in fear. The co-pilot took Nina by the shoulders, turned her around, and nudged her out of the cockpit. As the pilot passed the bathroom door where Sara sat trapped, he opened the door easily, releasing Sara, and helped the two girls get safely buckled into their seats.

By the time the two girls made it safely to their father, Nina had to be admitted overnight to the hospital to recover from her consumption of so much alcohol, and both girls were weepy, withdrawn and fearful during their entire visit with their father. Sara developed a fear of small places that remained throughout her lifetime.

Please identify and discuss any tort claims that Nina and Sara and the injured passenger could make against Delta Airlines including all applicable defenses.

Question 2

"Smokeitup" is a pressure cooker manufactured by Holy Smokes Manufacturing, which designed, assembled and marketed the cooker to operate within a range of 12 to 14 pounds of pressure per square inch (PSI). Holy Smokes hired Leakalot to design and manufacture a safety valve for the cooker in order to release pressure if it rose above 14 PSI. Holy Smokes placed a warning label on the lids of its cookers stating that the valves and other pressure related components should be kept clean for optimal operation of the cooker and overall safety.

Paula worked as a short-order cook at Damn Best Barbeque. Damn Best took on occasional catering jobs, and decided to lease a cooker from Decrepit Restaurant Supply as needed for catering jobs, because Smokeitup is an expensive piece of equipment that Damn Best only uses occasionally.

Decrepit did not clean the pressure cooker after each use, believing it to be Damn Best's obligation. When the pressure cooker became dirty, its lid had an annoying tendency to stick, which would cause the pressure to rise.

While using the pressure cooker at a large catering event, Paula, as she often did, loosened the pressure cooker lid by tapping it with a meat tenderizer hammer. Unfortunately, when she tapped the lid on this occasion, the cooker exploded. Paula suffered burns and lacerations to her face and upper body as well as a concussion.

Afterward the following facts were established: 1) the Smokeitup was at 20 PSI at the time of the explosion; 2) the safety valve was inoperable because it was clogged and blocked by debris; 3) Leakalot knew that consumers tended to be lax in the maintenance of the safety valve and told Holy Smokes that the safety valve needed cleaning and regular maintenance for safety reasons; and, 4) to alert users, Holy Smokes placed the warning label (described above) on the lids.

Paula has retained you to sue on her behalf. What legal theories could reasonably be used to establish liability on the part of Holy Smokes and what defenses might reasonably be raised? With respect to Leakalot and Decrepit, identify any theories of liability or defenses, if any, that would likely arise from their status in the chain of distribution. Discuss.

Question 3

Luke, a real estate developer and avid pilot, had just moved to the small town of Garland. He quickly became frustrated with the condition of local airstrip, in particular the area for parking planes. He decided that “hangar homes” were the solution. These homes, with an attached hangar, would be joined to the airstrip by an access road. The planes would land on the airstrip as usual, then the pilot would use the access road to taxi the plane home and park in his or her own hangar.

In addition to his own benefit, Luke believed the homes would revitalize the local economy by creating new jobs, raising tax revenue, and increasing patronage of the local businesses. He bought up all the land adjoining the airstrip and applied to the town council for permits to build five hangar homes.

The plan was vehemently opposed by the town mayor, Meg, and the local hikers, who felt hangar homes would destroy the hiking trails near the airstrip. The hikers filed a lawsuit against Luke and the town council, seeking to stop the plan. Meg was actively and publicly urging the town council to settle the lawsuit and deny Luke the permits.

A town hall style meeting was held to air the different views. Galen, the editor of the local online newsletter, the Gazette, attended the event. Despite the festive air created by the food stands, beer tent, and live music, the meeting turned ugly. Meg accused Luke of bribing the town council to get the permits. In fact, he had answered questions from a council member who asked about the cost of a hangar home. “Just wait,” she told the crowd, “he’ll rape us and our environment just like he’s done before.” When it was Luke’s turn to speak, he said, “Meg doesn’t give a hoot about the hiking trails. I’ll bet she wants the town to settle just so she can ask for a raise.”

After the event, Luke went up in his airplane and dropped leaflets into the crowd, promoting the hangar homes. Galen took a video of Luke in his airplane.

The next day, the Gazette accurately reported Meg’s accusations against Luke. The story was accompanied by a photo of Luke in his plane, flying over the village green, but the photo was altered to show the pilot wearing a ski mask over his face and dropping dollar bills, not leaflets. A hyperlink at the end of the article took readers to story in a national news magazine, discussing Luke’s work and life. The article revealed he had been charged with sexual assault in college, but the case was dismissed. Luke was quoted in the article as saying, “It was a case of mistaken identification.”

In Galen's weekly column in the newsletter, "Galen Gabs," she accurately reported Luke's comments. She then argued in favor the hangar homes and urged the hikers to drop the lawsuit. The last sentence of the column read, "And then, Meg can start shaking down the town council for that raise!"

Discuss Luke's possible claims against (1) Meg and (2) Galen and the Gazette, and Meg's possible claims against Galen and the Gazette. Discuss any defenses or privileges that might apply and the likely outcome of each claim.

Torts Final Exam Spring 2017 Answer Outline Q1 L. Walther

Sara and Nina:

Negligence.

Breach of duty, Failure to check bags, or type of glue.

Foreseeable that unattended child would get booze?

Vicarious liability.

Duty- common carrier

Duty based on special relationship because paid to care for children

Damages- fear of flying, physical injuries

Nina

Negligence for allowing unsupervised access to alcohol?

Assault

Battery

Bystander liability? Negligent Infliction of Emotional Distress for Sara's entrapment?

Sara:

False Imprisonment

Passengers v. Delta

Delta became vicariously liable for the conduct of the minors when they accepted compensation to watch over the girls as "unaccompanied minors" while on the plane, hence liable to those passengers who lost consciousness from the toxic glue.

Duty - common carrier- highest duty under the law.

Defenses – could Delta argue that children assume risk, comparative fault? Children are same as adults in this situation? (I don't know why not but am I missing something?) Pam was at fault for not checking bag or glue bottle?

Draft Answer Outline Q2-Torts- Spr17

I. Paula v. Holy Smokes

a. Strict Products Liability

50 Points

b. Proper Plaintiff

i. Paula is a proper plaintiff because she was injured by an allegedly defective product.

c. Proper Defendant

i. A person who manufactures and/or assembles component parts is strictly liable for defects in the components used. Brief discussion of rationale.

ii. Holy Smokes, as the component assembler, is a proper defendant.

d. Proper Context

i. The dominant nature of the enterprise is manufacturing and distribution of a product, which easily satisfies this requirement.

e. Theories of Products Liability

i. Manufacturer's defect: Define and discuss. This theory does not apply because there is no evidence that the product was in a form other than intended.

ii. Design Defect: Would a reasonably foreseeable plaintiff expect the Smokeitup to be safer than it actually was? Discuss consumer expectation test and other tests. Liability on this basis is unclear in that no facts are provided to perform the balancing needed.

iii. Failure to warn or inadequate warning - Key basis for strict products liability

1. Was the general maintenance warning adequate here? Probably not. Holy Smokes was specifically told by Leakalot that consumers tended to be lax in maintaining the safety valve and that it was important for safety reasons to clean the valve. The consumer should have received a clear warning about the danger of explosion if the valve was not properly maintained.

2. Should there have been a warning not to tap the lid? Maybe or maybe not. A product liability defendant need not warn against obvious misuse issues, but perhaps the danger of dislodging a pressurized lid should have been emphasized.

f. Defense of misuse

i. Affirmative defense, burden of proof on defendant

ii. Probably not successful because product was being used for its intended purpose

- iii. *However, comparative fault comes into play with respect to damages. The failure to maintain and clean the valve and Paula's tapping the lid could likely be used to reduce the damages awarded*

g. Negligence **10 Points**

- i. *Duty*
- ii. *Breach*
- iii. *Causation*
- iv. *Harm*

Students should note that strict products liability was adopted to relieve plaintiffs of the often insurmountable burden of having to prove that a particular entity in the design, manufacturing or distribution of the product was negligent, i.e., that the conduct fell below the standard of care. For example, it would be difficult if not impossible to show that Holy Smokes or Leakalot did something that fell below a standard of care and caused harm to plaintiff. Shifting the burden in strict products liability makes good policy sense.

II. Paula v. Leakalot **10 Points**

- a. *Proper defendant: As above. Important to note that manufacturer of a component part is also strictly liable for Paula's injuries if the component is defective.*

III. Paula v. Decrepit Supply **10 Points**

- a. *Proper defendant: The issue to identify is whether Decrepit, which leases the Smokeitup, is also strictly liable for Paula's injuries because it is in the chain of distribution. This is closely related to proper context.*
- b. *Proper context: The issue to identify is whether Decrepit's main business is to supply a product rather than to provide a service. While the facts are sparse, it would appear from the name of the company, i.e., "restaurant supply," that the product was not incidental to a service so probable liability exists on strict theory.*

c. Negligence **10 Points**

- i. *As above. However, based upon the facts, there are two specific grounds upon which liability against Decrepit might reasonably be established*
- 1. *The failure to maintain and clean the valve. As a lessor of restaurant equipment, it is reasonable to impose a duty of cleaning the parts before they go into service. It is unreasonable to pass that duty on to the user.*

2. *The failure to maintain and clean the pressure cooker in general. The facts state that the dirty condition of the cooker caused the lid to stick, which caused the pressure to rise in the first instance. Shouldn't Decrepit be held accountable for leasing dirty equipment?*

IV. Overall Form and Content

10 Points

1)

Nina (N) v. Delta Airlines (DA)

Wow - great job!

Respondeat Superior ✓

Employers are liable for the tortious conduct of their employees while in the course and scope of their work. Thus, Delta Airlines will be vicariously liable for the tortious conduct of Darla, co-pilot, and pilot. Exceptions exist for employees that engage in intentional torts, major frolics from the general course and scope of job duties, and for independent contractors.

Negligence

A defendant is negligent if they owe a duty of care to the plaintiff and their actions fall below the applicable standard of care causing harm to the plaintiff.

Duty

As stated in the Palsgraf opinion by Justice Cardozo a duty of care is owed to all foreseeable plaintiffs. Nina, as a passenger on the plane and customer of DA is a foreseeable plaintiff.

Standard of Care

great!

The general Common Law standard of care is that of a reasonably, prudent person. However, common carriers owe their passengers the highest standard of care. An airline company is a common carrier and thus, DA owes Nina a very high standard of care.

Breach

Pam paid an extra unaccompanied minors fee in order for DA to supervise her daughters during the flight. DA guaranteed this supervision and assigned Darla the task. DA breached

their duty when Darla failed to supervise the girls. She spent the first portion of the flight rushing by to deliver drinks to other passengers.

DA also breached their duty when Darla failed to inspect the girls' bags. Darla knew that N would be working on a school project which could entail the use of scissors or other tools not normally allowed on an airplane. It is common practice for airlines to inspect all passengers' bag. A failure to inspect is likely against company policy and also a breach of the duty owed to Nina and other airline passengers.

DA also breached their duty when bottles of alcohol were left in a place accessible to Nina, a nine year old girl.

Causation

DA's breach must be the actual and proximate cause of N's harm in order to be liable for negligence.

Actual cause is satisfied by the But For test, Substantial Factor test, or alternative liability theory. But for, Darla's failure to inspect the bags and supervise the girls, Nina would not have had the opportunity to drink the whiskey bottles. Thus, DA is the actual cause of N's harm.

Proximate cause is a liability limiting device. It holds DA accountable for the natural and probable results of their actions. Here, it is foreseeable that an unaccompanied nine year old girl will drink from a miniature bottle that is the color of tea. The reason that minors need to be accompanied on flights is because they are prone to get in trouble due to their lack of experience.

DA will argue that both flight attendants losing consciousness and the emergency landing are independent superseding events that should cut off their liability for N's intoxication. Generally, acts of God like freak storms are considered intervening factors that cut off liability.

DA may also argue that the act of drinking four bottles of whiskey by a nine year old is unforeseeable. It is likely that after one sniff or taste, a child is going to hate the taste and not continue to drink.

If the courts decided that these events are so unforeseeable, then DA may not be liable for negligence.

Harm

Here, N was intoxicated and had to be admitted overnight to the hospital to recover from her consumption. This injury will be sufficient to collect damages from DA should they be found liable for negligence.

Defenses to Negligence

Comparative Negligence

If a plaintiff was also negligent her damages will be reduced by her allocation of fault.

Here, DA may argue that it was negligent for N to drink four bottles of whiskey. N will be held to the standard of a reasonably, prudent nine year old girl in the same situation. DA might also argue that was negligent for N to get up out of her chair after the pilots had announced an emergency landing.

Respondeat Superior (RS) and Intentional Torts

Typically, the doctrine of RS does not hold employees liable for the intentional torts of its employees except when the intentional torts are authorized by the company or in furtherance of the company's interests. Here, the co-pilot was protecting the cabin of a plane. It is likely company policy that no passengers are allowed in this space and employees of the airline are likely trained and given approval to do whatever it takes to keep the rest of the passengers safe by keeping people out of the cockpit. If the courts find the co-pilot was acting within the scope of his employment then DA will also be liable for the intentional torts of the co-pilot.

Assault

An intentional act that causes reasonable apprehension or fear in the mind of the victim on a imminent harmful or offensive contact.

Here, the co-pilot jumped up when Nina entered the cockpit and reached out to block her path. This was a volitional movement from the pilot and thus, intentional. A sudden movement from a grown man is likely to cause N to believe a harmful or offensive contact is imminent. The actions by the co-pilot caused Nina to recoil in fear which is evidence of apprehension or fear.

Battery

An intentional act causing harmful or offensive contact to the person of another or something closely connected thereto.

Here, the co-pilot took Nina by the shoulders, turned her around, and nudged her out of the cockpit. The act of touching Nina's shoulders was offensive contact because the co-pilot did not have consent to touch Nina. Furthermore, the nudge he gave N to get her out of the cockpit may have been harmful.

Sarah (S) v. Delta Airlines (DA)

Respondeat Superior

See above

Negligence

A defendant is negligent if they owe a duty of care to the plaintiff and their actions fall below the applicable standard of care causing harm to the plaintiff.

Duty

As stated in the Palsgraf opinion by Justice Cardozo a duty of care is owed to all foreseeable plaintiffs. S as a passenger on the plane and customer of DA is a foreseeable plaintiff.

Standard of Care

The general Common Law standard of care is that of a reasonably, prudent person. However, common carriers owe their passengers the highest standard of care. An airline company is a common carrier and thus, DA owes S a very high standard of care.

Breach

Pam paid an extra unaccompanied minors fee in order for DA to supervise her daughters during the flight. DA guaranteed this supervision and assigned Darla the task. DA breached their duty when Darla failed to supervise the girls. She spent the first portion of the flight rushing by to deliver drinks to other passengers.

Causation

See rule above.

But for Darla's failure to supervise S, S would not have been locked in the bathroom. The pilot was able to open the bathroom door easily so it is likely that Darla, another adult would have been able to open the door immediately had she been supervising.

It is foreseeable that a nine year old girl and a seven year old girl do not have the strength to open an airline bathroom door. They are usually designed to shut easily and stay closed during a flight for the safety and enjoyment of the passengers. Thus, DA will be found to be the proximate cause of S's harm.

Harm

S was weepy, withdrawn, and fearful during her entire vacation. S also developed a fear of small places that remained throughout her lifetime. Thus, S was sufficiently harmed for DA to be liable for negligence.

Defenses to Negligence

Comparative Negligence

If a plaintiff was also negligence her damages will be reduced by her allocation of fault.

Here, DA may argue that it was negligent for S to get up out of her chair after the pilots had announced an emergency landing. S will be held to the standard of a reasonably, prudent seven year old girl in the same situation.

Respondeat Superior (RS) and Intentional Torts

See above

False Imprisonment

An intentional act restricting a plaintiff to a bounded area without consent or privilege. The plaintiff must be aware of the confinement or injured thereby.

Here, S was locked in an airline bathroom. She was restricted to a bounded area. S was aware of the confinement because she called to Nina for help. However, DA did not engage in an intentional act that resulted in S locked in the bathroom so it is unlikely DA will be liable for this tort.

Injured Passenger (IP) v Delta Airlines (DA)

Res Ipsa Loquitur (RIP)

The doctrine of RIP creates a rebuttable inference of negligence if the plaintiff can prove that the event that occurred does not normally occur without negligence, the instrumentality was with the defendant's exclusive control, and that plaintiff did not cause the harm.

Here, the IP suddenly lost consciousness while standing up sorting through his overhead bin. IP will argue passengers do not normally lost consciousness on an airplane. DA will argue that passengers may lose consciousness for a variety of medical reasons unrelated to DA's actions. The airplane and its passengers are under DA's exclusive control and the IP did nothing to cause the harm.

Negligence

See above

Duty

See above

Standard of Care

See above

Breach

IP will argue DA breached their duty of care when they failed to inspect the girls' bags or for maintaining a less than adequate ventilation system.

Causation

But for the failure to find the glue or properly ventilate the plane the IP would not have fallen and suffered a serious gash on his head.

It is foreseeable that IP will lost consciousness if the plane is not well ventilated.

Harm

IP suffered a serious gash on his head which is sufficient to try and recover damages from DA

Defenses

Comparative Negligence

If a plaintiff was also negligence her damages will be reduced by her allocation of fault.

Here, DA may argue that it was negligent for IP to get up out of his chair after the plane had taken off.

END OF EXAM

*Excellent job -
you just ran fine
out of veg and!*

2)

Paula (P) v. Holy Smokes Manufacturing (HS)

✓ Products liability can be established through the theories of strict liability, negligence, warranties and misrepresentations.

✓ Strict Products Liability (SPL)

A commercial seller who put dangerous or defective products into the stream of commerce may be strictly liable (SL) for any injuries that result from dangerous product.

✓ Proper Defendant

Any company in the distribution chain may be held SL for the injuries that result from a defective product. HS manufactured, designed, assembled and marketed the pressure cooker. Thus, HS is a proper D.

✓ Proper P

Any foreseeable user or consumer of the product has standing to bring a claim of action for SPL. P is a short order cook and was using the pressure cooker at the time it exploded. Thus, P is a proper plaintiff and has standing to bring a claim of action for SPL.

✓ Product Defect

A product can be defective because of a manufacturing defect, design defect or a failure to warn.

A manufacturing defect occurs when a product is manufactured in a form other than what was intended by the manufacture. Here, there are no facts that support a manufacturing defect.

A design defect occurs when the product is manufactured just as the manufacturer intended but still presents an unreasonable risk of danger. A design defect is proven with the consumer expectation test or the danger-utility test.

Consumer Expectation Test

A product will be considered defective if a reasonable consumer would not expect the product to be as dangerous as it turned out to be. Here, a reasonable consumer would not expect a

pressure cooker to explode. Even though a consumer might expect a pressure cooker to be dangerous because of the high heat it utilizes while cooking, the seriousness of P's injuries are beyond what a reasonable consumer would expect.

Danger-Utility Test

A product will be considered defective if the danger presented outweighs its social utility. Another way to look at it is if the utility of the design is outweighed by the risk of danger. Here, a pressure cooker is not a unique kitchen tool. There are many on the market and different cooking techniques can be used. Thus, the social utility is rather low and is outweighed by the danger it presents.

Failure to Warn

A product will be considered defective if the warnings provided do not adequately describe the dangers, do not warn of all dangers or if the instructions for use are inadequate. Here, the pressure cooker had a warning label stating that the valves and other pressure related components should be kept clean for optimal operation of the cooker and overall safety. HS placed the label on the lid because it knew consumers tended to be lax in the maintenance of the safety valve. The warning HS used does not adequately describe the danger that may result from failure to abide by the warning. A warning regarding optimal operation and overall safety are vague, uninformative and do not adequately describe the magnitude of the risk if consumers fail to follow the instructions.

This is a high burden for P to prove because she will have to prove that an adequate warning would have been sufficient to avoid the injury.

The "Smokeitup" pressure cooker is likely defective because of a design defect or a failure to warn.

Causation

To succeed in a SPL claim P must prove that the defect existed when it left the manufacturer's control (actual cause) and the type of injuries suffered were a foreseeable result of the defect (proximate cause).

Here, the defect from the inadequate warning or the design of the product was present when the product left HS control. There are no facts to support that the product was modified after it

left the HS' control. HS knew that customers were lax in the cleaning of its products. It is foreseeable that the lid will stick when the product is dirty. It is foreseeable that a user of the product will use tools to unstick the lid of the pressure cooker.

Harm

P suffered burns and lacerations on her face and upper body as well as a concussion. This is sufficient for P to bring a SPL claim of action against HS.

Negligent Product Liability

→ but will it be able to prove that HS conduct fell below std of care?

✓ Duty

HS manufactured, designed, assembled and marketed the Smokeitup pressure cooker. They have a duty to manufacture, assemble and market their products as a reasonably prudent company. HS also has a duty to test and inspect its products.

✓ Breach

HS designed, assembled and marketed a pressure cooker to operate within a range of 12 to 14 PSI. Furthermore, HS hired Leakalot (L) to design and manufacture a safety valve for the cooker in order to release pressure if it rose above 14 PSI. The cooker P was using was at 20 PSI at the time of the explosion. HS breached their duty when a product they manufactured did not operate correctly. HS is responsible for the component parts it chooses to put into its products.

✓ HS also breached their duty when they failed to adequately warn of the dangers associated with failing to clean and maintain the safety valve. HS knew that the safety valve needed cleaning and regular cleaning and that consumers tend to be lax about it. An adequate warning would have specifically described the risk involved in failing to clean and maintain the product.

✓ HS may have also breached their duty if they did not perform adequate testing on the product. HS should have performed tests on dirty pressure cookers because HS knew that the safety valve needed cleaning and regular cleaning and that consumers tend to be lax about it.

Causation

But for HS negligence, P would not have been harmed by the exploding pressure cooker.

Harm

P suffered burns and lacerations on her face and upper body as well as a concussion. This is sufficient for P to bring a NPL claim of action against HS.

Defenses

Misuse

good

Comparative fault?

HS will argue that P misused the product by tapping it with a meat tenderizer hammer. This is likely not misuse as P, an experienced restaurant employee, has engaged in this behavior often without any incident. It is unlikely that P's "tapping" on the lid was such a misuse as to relieve HS of liability.

HS will also argue that Decrepit's (D) negligence in failing to clean the pressure cookers it leases a supervening act that limits their liability. It is foreseeable that D would fail to clean the pressure cooker because it is common. Leakalot told HS that consumers tend to be lax. This negligence will not relieve HS of its liability.

Express Warranty/Misrepresentation

Product liability arises from a misrepresentation when a product is other than how it is represented. Here, HS marketed a cooker to operate within a range of 12-14 PSI and included a safety valve to release pressure if it rose above 14 PSI. Here, the pressure cooker rose to 20 PSI and thus, was other than how HS represented their product.

If P can show that Damn Best BBQ leased the Smokeitup Pressure Cooker because of its representation then she may be able to recover on a theory of misrepresentation.

Paula (P) v. Leakalot (L)

As a components manufacturer, L may also be held strictly liable or found negligent for a defective or dangerous product.

Paula (P) v. Decrepit (D)

As a commercial lessor, D may also be found to be negligent for a defective or dangerous product.

D does not have a duty to inspect a product unless D has actual knowledge of defect or should have known about the defect.

END OF EXAM

3)

Luke (L) v. Meg (M)

Defamation

A defamatory statement, of and concerning the plaintiff, published to a third party, causing damages. A defamatory message is slander if spoken or libel if written. It is labeled libel/slander per se if the statement is defamatory on its face or libel/slander per quod if extrinsic facts are needed to explain the defamatory nature. Slander is considered per se if the message is about a plaintiff's business reputation, loathsome disease, crime of moral turpitude or unchastity.

Defamatory Statement

A defamatory statement is one that harms the reputation of the P and lowers P's esteem in the eyes of his community. Here, M accused L of bribing the town council to get the permits in front of the attendees of the meeting. This statement was spoken at the meeting so it is considered slander. The message is slander per se because the statement was about L's business relations.

M also told the crowd "he'll rape ^①us and ^②our environment just like he's done before." This is also slander per se because it gives the message that L is a rapist which is a crime of moral turpitude.
or, in context, hyperbole?

These quotes were also republished in an online newsletter. This is a more permanent representation to the eye and will be considered libel.

Of and concerning the P

Even if M didn't use L's name in her statement, Garland is a small town and M was actively and publicly asking the town council to deny L the permits. It is likely that everyone in attendance knew L was behind the plan and the person attempting to obtain permits.

Published to a Third Party

M's statements were made in front of a town hall meeting. As long as more than one person was in attendance (someone other than L), her defamatory statement will have been published to a third party.

Causing Damages

L's damages are assumed if M is found liable for slander per se. L can also bring in evidence of other losses and receive special damages.

Defenses

Truth is an absolute defense. M may argue that because L was charged with sexual assault it is true and accurate to label him as a rapist. M will not be able to use this defense because L's case was dismissed and L was mistakenly identified so it is untrue.

m
- 1st Am
/

The defense of consent is also not applicable here.

Absolute Privilege is an absolute defense for defamatory statements made during judicial or legislative proceedings. M may argue that a town hall meeting attended by the mayor is a legislative proceeding but this argument will not be successful.

A qualified privilege exists as a defense where the speaker and audience have a common interest. M may argue that citizens in attendance had a right to know everything about the project since it would have such a large impact on the small town. While this may be true, a qualified privilege may be lost if M acted with malice. In this context malice is knowledge of

falsity or a reckless disregard for the truth or falsity of a message. Here, M accused L of taking a bribe when in reality he had just been answering a question. M did not know her statement was false but she acted with a reckless disregard when she did nothing to determine if it was true or false. Thus, even if M did have a qualified privilege she cannot use this defense if the courts find she acted with malice.

Constitutional Protections

Constitutional protections are available to M if the message is one of public concern and if L is a public official or public figure.

Public Concern

If the courts determine that M's statement is of public concern then L will have to prove falsity and fault as part of his prima facie case. Here, L is a real estate developer in a small town. He is proposing to make some major changes to the town. Furthermore, this project is opposed by the mayor and lawsuits have been filed against it. It is likely the courts would believe news about L's character, business, and project is of the town's concern. Thus, if the statement is one of public concern L will have to prove falsity and fault.

M was wrong about his bribing charges because L was just answering questions from a council member about the cost of a hangar home. The level of fault L will be required to show is dependent on the court's characterization of him as a public official, public figure or private figure. ✓

L is not a public official because he does not hold an official office.

An all-purpose public figure is someone who has voluntarily thrust themselves into the limelight. A limited public figure is someone who has gained notoriety in a particular area. Here, it is likely that L will be considered a limited public figure. L has gained a lot of ✓

attention from his proposed project. The mayor has actively and publicly urged the town to deny the permits, the hikers have filed a lawsuit against him, and L seems to be actively and forcefully thrusting himself into the limelight when he drops leaflets in the crowd from the sky while he's flying in his airplane.

If the courts determine L is a limited public figure then L will have to prove that M acted with malice (discussed above). If the courts determine L is a private figure then L will have to prove that M acted with negligence. If the courts don't believe M acted with malice when she failed to determine if L had bribed people then she was negligent in doing so. Either way, L has met the elements of his prima facie case and will likely succeed in a defamation case against M. ✓

Portrayal in a False Light

A defendant unreasonably portraying plaintiff in a way other than he is to a substantial number of people. It must be highly offensive to a reasonable person. Here, M accused L of bribing a public official and of being a rapist. Both of these things portray L in a way other than he really is. These portrayals were made in front of anyone in attendance at the town hall meeting. A reasonable person would be offended if they were accused of bribing officials and being a rapist. Thus, M may be liable to L for the privacy tort of portrayal in a false light.

Luke (L) v Galen/Gazette (G)

Respondeat Superior

Employers are liable for the tortious conduct of their employees while in the course and scope of their work. Thus, Gazette will be vicariously liable for the tortious conduct of Galen. Exceptions exist for employees that engage in intentional torts, major frolics from the general course and scope of job duties, and for independent contractors. ✓

Defamation

G can also be liable to L for the tort of defamation as a republisher. G does not need to have the intent to defame because L only needs to show the intent to publish. Here, G accurately reported M's accusations against L so they are liable for defamation as a republisher. ✓

hyperlink?

Defenses

G will be able to assert the same defenses as M (listed above).

L will have to prove that G acted with malice, a knowledge of falsity or a conscious disregard for the truth. Here, G published the article that insinuates L was a rapist but included a hyperlink to an article proving that is false. If G read the article and was accurately reporting they should have added something to the article rather than simply posting a hyperlink that people may or may not follow.

If L can prove that G acted maliciously

Portrayal in False Light

A defendant unreasonably portraying plaintiff in a way other than he is to a substantial number of people. It must be highly offensive to a reasonable person. Here, G published an altered picture of L wearing a ski mask and dropping dollar bills. This picture inaccurately portrays L as a criminal trying to bribe people. It was published to anyone who reads the local paper which will be substantial enough for G to be liable to L for this privacy tort. A businessman being portrayed as a criminal who bribes people would be highly offensive to a reasonable person.

Meg (M) v Galen/Gazette (G)

Respondeat Superior

See Above

Defamation

See above

Defamatory Statement

Here, G published a column that read "M can start shaking down the town council for that raise!" The title of the column is Galen's Gabs. This infers a level of informality and a place where G provides her opinions. In the beginning of the column she accurately reports L's comments and then argued in favor of the hangar homes and urged hikers to drop the lawsuit. It seems like the tone of her column was opinionated and thus, if the courts determine G's comment to be an opinion then she won't be liable for defamation.

END OF EXAM

Question 3

Issue outline.

Luke v. Meg for (1) defamation/slander and (2) false light privacy invasion.

Bribing. Per se, no damages required. Published, identifies Luke. Fact not opinion. Can be proved true or false, not figurative. Lower Luke's esteem in community? Arguable.

Luke a limited purpose public figure, put himself into controversy, and the issue is a matter of (local) public concern so Luke must prove Meg acted with malice.

Malice. Arguable whether Meg thought she was telling truth. She heard statement first hand, presumably, as she is part of town council. Err on side of 1st Am. ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.")

Defenses: Public official in the course of her duties, Interested persons, Fair comment

Rape us and environment. Would reasonable person understand that "rape" in this context and under these circumstances means sexual assault against people? Opinion, or capable of being proved true or false? 1st Am. Protects "loose, figurative, or hyperbolic language" and cannot reasonably be interpreted as stating actual, provable facts about an individual. (*Gertz*)

Or slander per quod, because need more info to consider Luke a rapist. (bonus points)

Malice required. Same as above. Meg probably not acting with malice as to this statement. Meg doesn't appear to have knowledge of extrinsic facts that make the statement defamatory.

Defenses: Same as above, plus possibly judicial proceeding or litigation privilege. Not parties to litigation and not in furtherance, so no. Statements said during or preparing for settlement talks would be privileged.

False light: highly offensive to a reasonable person, did Meg act with reckless disregard re: truth or falsity of the publicized matter

Luke v. Galen & Gazette for defamation/libel, false light, maybe public disclosure, private facts

Article. Gazette liable for Galen (respondeat superior) but even if comments defamatory (discussed above) the article was accurate, didn't add content, privileged under neutral reporter's privilege/fair and accurate report, matter of public interest. No different treatment because online and not in paper form.

Altered photo of airplane/ski mask/\$\$. Parody? Fact/opinion. How likely to be understood? Malice? False light?

Hyperlink on prior rape charge: Published? Republished? Reference to a hyperlink is not likely to constitute "publication" or republication. But updates or modifications that affect the substance of the allegedly defamatory material constituted "republication" of the defamatory statements.

Concerning another? Yes, linked article identifies Luke. Defamatory? Likely to lower esteem, hurt business? Youthful indiscretion, probably not. Context, article not just about assault charge.

Defenses: Truth, Neutral reportage privilege, Fair report of official proceeding (assault charge), Consent. Luke gave a quote for article.

False light? Public disclosure of private facts?

Meg v. Galen and Gazette

Accurate report of Luke's comments. Article accurately reporting Luke's comments about Meg. Fair and accurate report, neutral reporter's privilege, official proceedings privilege (town hall debate or meeting?)

"Shake down for raise" Defamatory? Yes, published, yes, identifies Meg. Crime? Understood as accusing Meg of improper conduct? Can be proved true or false? Consider context, tone.

Mayor's salary a matter of public concern, Meg is a public official, Meg must prove G acted with malice.
(If intended as joke and understood as joke, then probably no malice.)

Defenses: Fair comment, fair report, Neutral reportage privilege? Added to the original publication.
But joke. Even if Meg offended, defamation laws don't protect against hurt feelings.

False light? Probably not.