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Other Torts

1. Will the governor prevail?

The governor asserted a defamation claim against the television station. Assume that the jury finds that although the signs caused the public to hold the governor in lower esteem, the only reasonable interpretation of the signs was that the term "murderer" was intended as a characterization of anyone who would sign a death warrant. The governor of a state signed a death warrant for a convicted murderer. Two protesters are active opponents of the death penalty. At a demonstration protesting the execution of the murderer, the protesters carried large signs that state, "The governor - Murderer." A television station broadcast news coverage of the demonstration, including pictures of the signs carried by the protesters.

- Yes, because the signs would cause persons to hold the governor in lower esteem
- Yes, because the governor can prove that the television station showed the signs with knowledge of falsity or reckless disregard of the truth that the governor had not committed homicide
- No, because the governor cannot prove he suffered pecuniary loss resulting from harm to his reputation proximately caused by the defendants' signs
- **No, because the only reasonable interpretation of the signs was that the term "murderer" was intended as a characterization of one who would sign a death warrant**

Note:

To establish a prima facie case for defamation, the following elements must be proved: (i) defamatory language on the part of the defendant; (ii) that the defamatory language was of or concerning the plaintiff; (iii) publication of the defamatory language by the defendant to a third person; and (iv) damage to the reputation of the plaintiff. Where defamation refers to a public figure or involves a matter of public concern, the plaintiff also needs to prove (v) falsity and (vi) fault by the defendant.

As held by the United States Supreme Court in New York Times v. Sullivan, to prevail against a defendant on defamation of a public figure, the plaintiff must establish actual malice by the defendant by demonstrating that the defendant (i) knew the statement was false; or (ii) had a reckless disregard as to its truth or falsity.

Further, where defamation is spoken (slander), the plaintiff must prove special (i.e., pecuniary) damages, unless the verbal defamation falls within one of four exceptions, which are considered slander per se: (i) criminal activity; (ii) occupational misconduct; (iii) sexual misconduct; or (iv) loathsome disease.

D is correct. As a public figure, the governor would need to show that the television station acted with knowing falsity or with a reckless disregard for the truth or falsity of the statement to ultimately succeed. However, under the facts as presented, his claim would fail before there was any need for him to prove this standard. Here, one finding by the jury, was that although the signs caused the public to hold the governor in lower esteem, the only reasonable interpretation of the signs was that the term "murderer" was intended as a characterization of anyone who would sign a death warrant. To this end, while the signs were clearly "defamatory," they were only statements of negative opinion. Consequently, because there were no false statements of fact at issue, the governor's defamation claim would fail at the outset.

A is incorrect. Although the news coverage of the signs caused the public to view the governor with lowered esteem, the governor's defamation claim would still fail. While damage to reputation is an element of defamation, it is only one element. For a statement to be defamatory, it must be a provably false statement of fact. Here, a jury found that the negative statements about the governor on the protest signs were clearly broad statements of opinion regarding anyone who would approve an execution, rather than false statements of fact about the governor specifically. Consequently, despite the damage to the governor's reputation, he would not have a cognizable claim for defamation.

B is incorrect. Even if the governor could prove that the television station acted with knowledge of falsity or reckless disregard for truth or falsity, he would not prevail on a defamation claim against the station. For a statement to be defamatory it must be a provably false statement of fact. Here, a jury found that the protest signs covered by the television station were clearly statements of opinion, not statements of fact. Consequently, regardless of the station's motives for publishing the signs, they were not legally defamation and therefore the governor would not prevail.

C is incorrect. Although the governor would not prevail, because the protest signs were statements of opinion and not fact, his defamation claim would not fail on the basis that he could only establish reputational damage, and could not prove special (i.e., pecuniary) damages. In general, courts treat television broadcasts like written defamation/libel. Under a libel claim, a plaintiff is not required to prove special damages. Further, even if the television broadcast here was treated as verbal defamation/slander, the governor would nonetheless not have to prove special damages to prevail. Although slander claims generally require proof of special damages, there are four categories of exceptions which are considered slander per se and therefore do not require proof of special damages: (i) criminal activity; (ii) occupational misconduct; (iii) sexual misconduct; or (iv) loathsome disease. The accusation of being a "murderer" would qualify as an accusation of criminal activity, and consequently would be slander per se and thus not require a showing of pecuniary loss.

2. If the man asserts a claim against the woman based on defamation, will the man prevail?

The exchange was overheard by another person who attended the dinner. The man suffered emotional distress but no pecuniary loss. A woman and a man, who were professional rivals, were attending a computer industry dinner where each was to receive an award for achievement in the field of data processing. The man engaged the woman in conversation away from the rest of the party and expressed the opinion that if they joined forces, they could do even better. The woman replied that she would not consider the man as a business partner and when the man demanded to know why, she told him that he was incompetent.

- No, because the man suffered no pecuniary loss
- No, because the woman's statement was made to the man and not to the person who overheard the statement
- **No, because the woman did not foresee that her statement would be overheard by another person**
- No, because the woman did not intend to cause the man emotional distress

Note:

To establish a prima facie case for defamation, the following elements must be proved: (i) defamatory language on the part of the defendant; (ii) that the defamatory language was of or concerning the plaintiff; (iii) publication of the defamatory language by the defendant to a third person; and (iv) damage to the reputation of the plaintiff. Where defamation refers to a public figure or involves a matter of public concern, the plaintiff also needs to prove (v) falsity and (vi) fault by the defendant.

Further, where defamation is spoken (slander), the plaintiff must prove special (i.e., pecuniary) damages, unless the verbal defamation falls within one of four exceptions, which are considered slander per se: (i) criminal activity; (ii) occupational misconduct; (iii) sexual misconduct; or (iv) loathsome disease.

In this case, a woman and man who were professional rivals both attended an awards dinner. At the dinner, while in conversation away from the rest of the party, the man suggested a business partnership. The woman rejected this offer and explained that she considered the man incompetent. Another attendee heard the exchange and the man suffered emotional distress but not a pecuniary loss.

C is correct. A threshold requirement of a claim for defamation is that the statement is published to a third party. Publication may occur both intentionally or through negligence. Here, although another attendee heard the exchange between the man and the woman, she did not foresee being overheard. Under the facts as presented, the two spoke away from the rest of the party. To this end, not only did the woman not intentionally publish her defamation, but she was also unlikely to have negligently published her statement. She had no reason to think she would be heard by anyone except for the man himself. Consequently, if the woman did not intend to publish defamation and was also not negligent, the man will not recover.

A is incorrect. Although the man will likely not prevail, because the woman's publication of defamation was neither intentional or negligent, he would not be barred from recovery based on the absence of pecuniary loss. To prevail on a claim for verbal defamation (slander), a plaintiff must prove a pecuniary loss, also known as special damages. Where the defamatory statement at issue is slander per se, it is considered so offensive that damage to reputation is presumed, and no proof of special damages is required. Here, the woman called the man incompetent, which would qualify as an accusation of professional misconduct, and therefore slander per se. Consequently, because the defamation at issue was slander per se, the man would not need to prove special damages/pecuniary loss to prevail.

B is incorrect. Although the man would likely not recover on his claim against the woman, his claim would not fail simply because the woman spoke to him and not the third party that overheard. The man's claim will likely fail, because not only was the woman's publication of the defamation unintentional, but it was also not negligent. The woman had no reason to expect that anyone besides the man would hear her. To this end, the woman would not avoid liability merely because she only intended to speak to the man. Instead, she would avoid liability, because she did not intend her communication to be published to a third party.

D is incorrect. Although the man would not recover damages, his claim would not fail based on the woman's lack of intent to cause emotional distress. As an aspersion on the man's occupational competence, the woman's defamatory statement was slander per se. Consequently, it would be assumed that the statement caused damage to the man's reputation. Therefore, the man would not need to prove that he suffered emotional distress, nor that the woman intended to cause him emotional distress.

3. In the plaintiffs' nuisance action for damages against the defendants, the plaintiffs should

The plaintiffs, a retired couple, had lived in their home in a residential neighborhood for 20 years when the defendants, a family of six, moved into the house next door and built a swimming pool in the back yard. The family's four young children frequently played in the pool after school. They often were joined by other neighborhood children. The plaintiffs were in the habit of reading and listening to classical music in the afternoons. Sometimes they took naps. The boisterous sounds of the children playing in the pool disturbed the plaintiffs' customary enjoyment of quiet afternoons.

- Prevail, because the children's noise constituted a substantial interference with the plaintiffs' use and enjoyment of their home
- Prevail, because the plaintiffs' interest in the quiet enjoyment of their home takes precedence in time over the defendants' interests
- **Not prevail, because the noise did not constitute a substantial and unreasonable disturbance to persons of normal sensibilities**
- Not prevail, because the children's interest in healthy play has priority over the plaintiffs' interest in peace and quiet

Note:

A nuisance is a tortious harm that interferes with either private property rights or public rights. A private nuisance is a substantial, unreasonable interference with another private individual's use or enjoyment of property that is offensive, inconvenient, or annoying to an average person in the community. To prevail on a private nuisance claim, a plaintiff must demonstrate that the nuisance is an unreasonable interference by showing that the injury outweighs the utility of the defendant's conduct.

C is correct. The couple should not prevail, because the noise did not constitute a substantial and unreasonable disturbance to persons of normal sensibilities. Although the children clearly interfered with the couple's use and enjoyment of their property, based on the facts as presented, the interference does not appear to have been one which would be considered substantial or unreasonable to the average person. Consequently, were a court to balance the interests of the parties, it's unlikely it would consider the severity of the injury to the couple to outweigh the utility of the young family's own right to enjoy their property.

A is incorrect. The couple will not prevail on the basis that the children's noise constituted a substantial interference with the use and enjoyment of their home. To prevail on a private nuisance claim, a plaintiff must show an interference which would be considered unreasonable and substantial by a reasonable person. Here, even if the couple considered the children's noise to be a substantial interference, it was not an objectively substantial or unreasonable interference. Thus, the couple should not prevail.

B is incorrect. The couple would not prevail on the basis that their interest in quiet enjoyment took precedence over the interests of the young family and their children. As a general rule, no party's interests are assumed to automatically trump those of another. Instead, courts balance the relative interests of the parties. Further, based on the facts as presented, the children's interference on the couple's use and enjoyment does not appear to be either objectively substantial or unreasonable. To this end, the balancing test would likely weigh in favor of the children.

D is incorrect. Although the couple likely will not prevail, the basis for their lack of recovery will not be because the children's interest in healthy play has priority over the couple's interest in peace and quiet. As a general rule, no party's interests are assumed to automatically trump those of another. Instead, courts balance the relative interests of the parties. To this end, although a court would likely conclude that the children's interest in healthy play outweighed the couple's interest in peace and quiet, given that the children's interference was not objectively substantial or unreasonable. A court will not find that the children's interest inherently had greater priority than those of the couple.

4. In the neighbor's action against the company to recover damages for the economic loss caused to him by the electrical interference, will the neighbor prevail?

A company operates a factory that requires the use of very high voltage electricity. A neighbor owns property adjacent to the factory where he has attempted to carry on a business that requires the use of sensitive electronic equipment. Occasionally, the effectiveness of the neighbor's electronic equipment is slightly impaired by electrical interference arising from the high voltage currents used in the company's factory. The neighbor has complained to the company several times, with no result. There is no way that the company, by taking reasonable precautions, can avoid the interference with the neighbor's operation that arises from the high voltage currents necessary to the company's operation.

- Yes, because the company's activity is abnormally dangerous
- Yes, for loss suffered by the neighbor after the company was made aware of the harm its activity was causing to the neighbor
- **No, because the company did not cause a substantial and unreasonable interference with the neighbor's business**
- No, because the neighbor's harm was purely economic and did not arise from physical harm to his person or property

Note:

A nuisance is a tortious harm which interferes with either private property rights or public rights. A private nuisance is a substantial, unreasonable interference with another private individual's use or enjoyment of property that is offensive, inconvenient, or annoying to an average person in the community. To prevail on a private nuisance claim, a plaintiff must demonstrate that the nuisance is an unreasonable interference, by showing that the injury outweighs the utility of the defendant's conduct.

C is correct. The neighbor will not prevail because the company did not cause a substantial or unreasonable interference with his business. Although the company clearly interfered with the neighbor's business operations, and therefore the use and enjoyment of his property, the interference was not unreasonable or substantial such that a court's balancing of interests would weigh in favor of the neighbor. According to the facts, the high voltage current was not a severe or pervasive interference, and instead occasionally interfered with the neighbor's equipment. Further, the facts indicate that it would not be feasible for the company to eliminate the interference while still continuing its own operations. Consequently, because the nuisance posed by the company to the neighbor was not objectively substantial or unreasonable, the neighbor would not recover damages for economic loss under a private nuisance claim against the company.

A is incorrect. Not only will the neighbor not recover because the company's interference was not sufficiently substantial or unreasonable, but the neighbor will also not recover on the basis that the company's high voltage electricity was abnormally dangerous. To qualify as abnormally dangerous, an activity cannot be performed without risk of serious harm to persons or property no matter how much care is exercised. Here, however, although high voltage electricity could obviously be dangerous, there is no evidence under the facts as presented that the company's operations were impossible without a risk of serious harm. In particular, although the company could not run its operations without causing a harm to the neighbor, that harm was a slight interference and not physical harm or property damage.

B is incorrect. The neighbor will not recover on the basis that the loss suffered occurred after the company was made aware that its activities were causing harm. Although nuisances generally must be intentional interferences, this interference was not sufficiently substantial or unreasonable to be actionable and allow the neighbor to recover damages.

D is incorrect. Although the neighbor will not prevail, he would not be barred from recovering damages on the basis that the harm experienced was purely economic and did not entail physical harm to person or property. A plaintiff bringing a nuisance claim can recover based on solely economic damages, and under the facts here, the neighbor could hypothetically show that the electrical current caused physical harm to his equipment, thereby unreasonably damaging his business property. Absence of physical harm to person or property is evidence that the company's operations were not abnormally dangerous, but not an inherent bar to a nuisance claim.

5. The defendant's motion for a directed verdict in its favor, made at the close of the evidence, should be granted if the

The case went to trial before a jury. The plaintiff, who is Kitchen's general manager, brought a libel action against the newspaper based on the publication of this article. The parties stipulated that the plaintiff never embezzled any funds from Kitchen. They also stipulated that the plaintiff is well known among many people in the community because of his job with Kitchen. "Kitchen, the popular restaurant on the town square, has closed its doors. Kitchen employees have told [the newspaper] that the closing resulted from the owner's belief that Kitchen's general manager has embezzled thousands of dollars from the restaurant over the last several years. A decision on reopening the restaurant will be made after the completion of an audit of Kitchen's books." A newspaper, printed an article that stated:

- Record contains no evidence that the plaintiff suffered special harm as a result of the publication
- **Record contains no evidence that the defendant was negligent as to the truth or falsity of the charge of embezzlement**
- Evidence is not clear and convincing that the defendant published the article with "actual malice."
- Record contains uncontradicted evidence that the article accurately reported what the employees told the newspaper

Note:

To establish a prima facie case for defamation, the following elements must be proved: (i) defamatory language on the part of the defendant; (ii) that the defamatory language was of or concerning the plaintiff; (iii) publication of the defamatory language by the defendant to a third person; and (iv) damage to the reputation of the plaintiff. Where defamation refers to a public figure or involves a matter of public concern, the plaintiff also needs to prove (v) falsity; and (vi) fault by the defendant.

As held by the United States Supreme Court in New York Times v. Sullivan, to prevail against a defendant on defamation of a public figure, the plaintiff must establish actual malice by the defendant by demonstrating that the defendant (i) knew the statement was false; or (ii) had a reckless disregard as to its truth or falsity.

As held by the United States Supreme Court in Gertz v. Robert Welch, to prevail against a defendant on defamation of a private person involving a matter of public concern, the plaintiff must demonstrate that (i) the defamation was false; (ii) the defendant was negligent; and (iii) the defendant's negligence caused actual harm to the plaintiff.

B is correct. Although the general manager was a private individual and not a public official or public figure, the general manager was involved in a matter of public concern, as the restaurant was a popular local eatery, and the general manager was well known to the community for his role in its operations. The libel claim would be subject to the Gertz standard. In order to prevail, the general manager would need to show that the newspaper had negligently published the defamatory story. Consequently, if there were no evidence that the newspaper was negligent as to the truth or falsity of the charge of embezzlement, this would be a strong basis for granting a directed verdict for the newspaper.

A is incorrect. Arguing that the record contained no evidence that the general manager suffered special harm would not be a proper basis for the newspaper to seek a directed verdict. A plaintiff only needs to prove special damages, or pecuniary damages, when the defamation claim involves slander. Here, the general manager brought a defamation claim based on libel, or written defamation. Therefore, he would not be required to prove special damages to prevail.

Further, defamatory statements that implicate (i) criminal activity; (ii) professional misconduct; (iii) sexual misconduct; or (iv) loathsome disease are considered defamation per se. These statements inherently cause damage to reputation such that no proof of special damages is required. The accusation of embezzlement involves both criminal and professional misconduct, and therefore, would require no showing of special damages.

C is incorrect. When a public official or figure makes a claim of defamation, besides making a prima facie case, he is required to demonstrate that the defendant acted with actual malice. Actual malice requires either knowingly publishing a falsehood or publishing a falsehood with a reckless disregard for its truth or falsity. Here, however, the general manager was not a public official or public figure, but instead, a private individual involved in a matter of public concern. Consequently, the general manager would only need to prove negligence by the newspaper, not actual malice. Therefore, the newspaper would not be granted a directed verdict based on the absence of evidence of actual malice.

D is incorrect. Because the general manager was a private individual involved in a matter of public concern, the newspaper would be liable for defamation if the general manager showed that the newspaper had acted negligently. Consequently, evidence that the newspaper merely reported employee statements would not in and of itself cut short its liability. The newspaper also had an obligation to investigate the veracity of the statements. If the newspaper did not investigate the veracity or did so inadequately, it would be negligent and could be liable for defamation.

6. In a suit for slander by the employee against the owner, the employee will

When the employee reported to the owner's office for the test, it was not administered. Instead, without hearing the employee's story, the owner shouted at him, "You're a thief!" and fired him. At the time the owner accused the employee of stealing, the owner believed the charge to be true. The owner's shout was overheard by several other employees who were in another office that was separated from the owner's office by a thin partition. The next day, the employee accepted another job at a higher salary. Several weeks later, upon discovering that the money had not been stolen, the owner offered to rehire the employee. The owner of a truck leasing company asked one of his employees to deliver \$1,000 to the dealership's main office. The following week, as a result of a dispute over whether the money had been delivered, the owner instructed the employee to come to the office to submit to a lie detector test.

- Prevail, because the employee was fraudulently induced to go to the office for a lie detector test, which was not, in fact, given
- **Prevail, because the owner should have foreseen that the statement would be overheard by other employees**
- Not prevail, because the owner made the charge in good faith, believing it to be true
- Not prevail, because the statement was made to the employee alone and intended for his ears only

Note:

To establish a prima facie case for defamation, the following elements must be proved: (i) defamatory language on the part of the defendant; (ii) that the defamatory language was of or concerning the plaintiff; (iii) publication of the defamatory language by the defendant to a third person; and (iv) damage to the reputation of the plaintiff. Where defamation refers to a public figure or involves a matter of public concern, the plaintiff also needs to prove (v) falsity and (vi) fault by the defendant.

Further, where defamation is spoken (slander), the plaintiff must prove special (i.e., pecuniary) damages, unless the verbal defamation falls within one of four exceptions, which are considered slander per se: (i) criminal activity; (ii) occupational misconduct; (iii) sexual misconduct; or (iv) loathsome disease.

B is correct. The owner slandered the employee by falsely accusing him of theft and published the accusation to third parties by shouting it in the presence of several other employees. The employee was a private individual, and the accusation was not a matter of public concern, so the employee would not need to prove ill intent by the owner. As an accusation of both criminal activity and employment misconduct, the owner's defamatory statement was slander per se, eliminating the requirement that the employee prove special damages. Thus, because the owner slandered the employee and published this slander to third parties, the employee would prevail against the owner on a defamation claim.

A is incorrect. Although the employee will prevail against the owner on a defamation claim, the owner's inducement to the employee to come into the office would largely be irrelevant. The employee's presence in the office is relevant because other employees were also present, enabling the owner's accusation to be heard by the third parties. The employer's "fraudulent inducement" to engineer the employee's presence is completely irrelevant to a slander claim.

C is incorrect. The owner's good faith belief in his accusation would not be a bar to the employee's recovery. Traditionally, because the employee was a private individual and the facts did not involve a matter of public concern, falsity would be presumed and the employee would not need to prove ill intent by the owner. Note, however, that a growing number of states now require proof of negligence as a matter of state law even for defamation on matters of private concern. The owner's good faith belief in the truth of his statement would not be a complete defense. Thus, the owner would still be liable, despite honestly believing that his accusations were true.

D is incorrect. The owner cannot avoid liability based on intending for his statement to be heard solely by the employee. In order to be actionable, slander must be published to a third party. Publication may occur both intentionally or negligently. In this case, although the owner did not intentionally publish the slander, he did so negligently by shouting out the accusation when multiple other employees were present. Therefore, the owner's intent for his statement to only be heard only by the employee would not cut short his liability.

7. If the widow asserts a claim based on misrepresentation against the developer, will she prevail?

The widow then consulted her nephew, a law student, who researched the question and advised her that the developer had no power of condemnation under state law. The widow had been badly frightened by the developer's threat, and was outraged when she learned that the developer had lied to her. A real estate developer was trying to purchase land on which he intended to build a large commercial development. An elderly widow had rejected all of the developer's offers to buy her ancestral home, where she had lived all her life and which was located in the middle of the developer's planned development. Finally, the developer offered her \$250,000, which was the fair market value of the property. He also knowingly lied to the widow and told her that if she rejected it, state law authorized him to have her property condemned.

- Yes, because the developer knew he had no legal power of condemnation
- Yes, because the developer tried to take unfair advantage of a gross indifference between himself and the widow in commercial knowledge and experience
- No, because the developer's offer of \$250,000 equaled the market value of the widow's property
- **No, because the widow suffered no pecuniary loss**

Note:

Misrepresentation is a type of tort claim which requires a plaintiff to show that the defendant made a misrepresentation of material fact for the purpose of inducing the plaintiff to rely on the misrepresentation to his detriment. To prevail on a claim for misrepresentation, a plaintiff must have actually relied on the defendant's misrepresentation.

D is correct. In this case, a developer attempted to induce the widow to sell her home by misrepresenting his legal power to have the property condemned. Although the developer clearly made a misrepresentation of material fact in order to induce the widow to sell, she would not prevail on a misrepresentation claim. She did not ultimately rely on the misrepresentation to her detriment. Instead, the widow consulted with her nephew, learned the truth, and acted accordingly. Thus, since the widow did not rely on the misrepresentation, and thereby avoided harm, she will not prevail on a misrepresentation claim.

A is incorrect. Although the developer knew he had no legal power of condemnation, he would not be liable for misrepresentation. Liability attaches for misrepresentation when a defendant makes a misrepresentation of material fact to induce behavior by the plaintiff, and the plaintiff relies on the misrepresentation to his detriment. Here, although the developer misrepresented his power of condemnation to induce the widow to sell her home, she did not rely on this misrepresentation to her detriment. Instead of accepting his claims at face value, she consulted with her nephew. Thus, because the widow was not ultimately harmed, she will not recover damages.

B is incorrect. Although the developer did try to take advantage of the widow by inducing her to sell through misrepresentation, she would not prevail, because she did not actually rely on the misrepresentation to her detriment. Further, unfair advantage due to differentials in knowledge is an element of a claim for misrepresentation of law, not misrepresentation of fact. To prevail on a claim for misrepresentation of law, the defendant must be in a fiduciary-like, special relationship with the plaintiff. Under the facts here, there was no such relationship between the developer and the widow.

C is incorrect. Although the widow will not prevail, because she did not ultimately rely on the developer's misrepresentations, the developer would not avoid liability on the basis that he had offered fair market value for the widow's home. Notwithstanding his willingness to pay fair market value, the developer sought to induce the widow to sell by falsely representing that he had the power to condemn the property and could have claimed her land without her consent. Had the widow not sought a second opinion and instead sold her property based on the developer's misrepresentation, she would have prevailed on her claim.

8. If the law review editor asserts a claim against the other student based on defamation, she will

Two law school classmates had competed for the position of editor of the law review. One of the students had a higher grade point average, but the other student was elected editor, largely in recognition of a long and important note that had appeared in the review over her name. During the following placement interview season, the student with the higher GPA was interviewed by a representative of a nationally prominent law firm. In response to the interviewer's request for information about the authorship of the law review note, the student said that he had heard that the note attributed to the law review editor was largely the work of another student. However, the student knew that the law review editor had written the note on her own. The firm told the law review editor that it would not interview her because of doubts about the authorship of the note. This greatly distressed her. In fact the note had been prepared by the law review editor without assistance from anyone else.

- Recover, because the other student's statement was false
- **Recover, because the other student exceeded the scope of any qualified privilege**
- Not recover, because the law review editor did not prove pecuniary loss
- Not recover, because the statement was made by the other student only after the interviewer inquired about the authorship of the note

Note:

To establish a prima facie case for defamation, the following elements must be proved: (i) defamatory language on the part of the defendant; (ii) that the defamatory language was of or concerning the plaintiff; (iii) publication of the defamatory language by the defendant to a third person; and (iv) damage to the reputation of the plaintiff. Where defamation refers to a public figure or involves a matter of public concern, the plaintiff also needs to prove (v) falsity and (vi) fault by the defendant.

Certain privileges qualify as defenses to defamation. A qualified privilege allows a speaker to say something defamatory without liability. A defendant may have a qualified privilege if the recipient has an interest in the information, for example, when making statements to a prospective employer. However, the qualified privilege ONLY exists when exercised in a reasonable manner and for a proper purpose, i.e., the speaker-defendant is not privileged based on his conduct. The defendant loses a qualified privilege when it is shown that the speaker acted with "actual malice," which requires a showing of: (i) knowledge that the statement was false; or (ii) a reckless disregard as to its truth or falsity.

B is correct. The law review editor would prevail because the other student exceeded the scope of his qualified privilege. Because the law student spoke to the firm about the law review editor in the context of an employer inquiring about a potential employee, he enjoyed a qualified privilege against liability for defamation. Under the privilege, the law student was empowered to speak about the law review editor, including potentially making false statements, so long as the student's feedback was not knowingly false or made with a reckless disregard for truth or falsity. Under the facts at issue, the law student told the law firm that it was his understanding that the law review editor was not responsible for work bearing her name. At the time when the student made this statement, he knew that it was not true. Consequently, the law student would no longer be protected by the qualified privilege and would be liable to the law review editor for defamation.

A is incorrect. Although the law review editor would recover against the law student on a defamation claim, the fact that the information the law student shared with the firm was false would not in itself make the law student liable for defamation. In the context of communications with an employer (the law firm) about prospective employees, participants enjoy a qualified privilege which limits liability for defamation, provided their statements about the applicant are not knowingly false or made with a reckless disregard for truth or falsity. Consequently, a participant who shared false information about an applicant would not be liable, if they reasonably believed that information to be true. Here, however, the law student knew the information he shared was false. Therefore, the law student would be liable for defamation, not because the information he shared was false, but rather because he knowingly shared false information.

C is incorrect. The law review editor would recover against the law student because the law student's statements to the firm were knowingly false and therefore the law student would no longer be protected by the qualified privilege to communicate with an employer about a potential employee. Further, although spoken defamation, also known as slander, generally requires proof of pecuniary loss/special damages, the law review editor would not need to prove a financial loss in order to prevail on her defamation claim. Proof of pecuniary loss is not required for a slander/spoken defamation claims which involve statements considered defamation per se- so inherently offensive that damage to the target's reputation is assumed. Statements considered defamation per se involve accusations of (i) criminal activity; (ii) professional misconduct; (iii) sexual misconduct; or (iv) loathsome disease.

Here, the law student's accusation that the law review editor had taken credit for another's work would be considered an allegation of professional misconduct. Therefore, it would not be necessary for the law review editor to prove pecuniary loss.

D is incorrect. The law review editor would recover against the law student because the law student's statements to the firm were knowingly false and therefore the law student would no longer be protected by the qualified privilege to communicate with an employer about a potential employee. Further, the law student would not be shielded from liability because the law firm had asked him about the law student and he did not speak about her unprompted. The law firm's inquiry triggered the qualified privilege for the law student to speak about the law review editor, including potentially sharing information which was false but which the law student reasonably believed to be true. However, the law student ended that privilege when he made a knowingly false statement.

9. In a suit by the vacationer against the neighbor, will the vacationer prevail?

The neighbor built a dam on her property that has completely stopped the flow of the stream to the vacationer's property. The dam unreasonably interferes with the use and enjoyment of the vacationer's property but was built in conformity with all applicable laws. For 10 years, a vacationer and a neighbor have owned summer vacation homes on adjoining lots. A stream flows through both lots. As a result of a childhood swimming accident, the vacationer is afraid of water and has never gone close to the stream.

- **Yes, because the damming unreasonably interferes with the use and enjoyment of the vacationer's property**
- Yes, because the neighbor intended to affect the vacationer's property
- No, because the vacationer made no use of the stream
- No, because the dam was built in conformity with all applicable laws

Note:

A is correct. While the call of the question does not provide a specific claim, the choices are aspects of nuisance. A landowner who causes a substantial, unreasonable interference with a neighbor's use or enjoyment of his property without a valid defense is liable for private nuisance. This rule also applies to flowing water, so an upstream owner may not stop the flow of water to a downstream property if it would substantially interfere with the use and enjoyment of the downstream property.

B is incorrect. Nuisance does not require proof of intent.

C is incorrect. Private nuisance covers both use and enjoyment. For example, interference with the vacationer's enjoyment from viewing of the stream would be sufficient to sustain a private nuisance action.

D is incorrect. Conformity with all applicable laws does not foreclose a nuisance action. Because there is unreasonable interference with the vacationer's use and enjoyment of his property, the vacationer will prevail.

10. In a privacy action brought by the child's legal representative against the newspaper, the plaintiff will

When two parents were told that their child should repeat second grade, they sought to have him evaluated by a psychologist. The psychologist, who charged \$300, determined that their child had a learning disability. Based upon the report, the school board placed the child in special classes. At an open meeting of the school board, the parents asked that the \$300 they had paid to the psychologist be reimbursed by the school district. A reporter attending the meeting wrote a newspaper article about this request, mentioning the child by name. The parents were aware that the reporter was at the meeting.

- Recover, because the story is not newsworthy
- Recover, because the child is under the age of consent
- **Not recover, because the story is a fair and accurate report of what transpired at the meeting**
- Not recover, because the parents knew that the reporter was present

Note:

To establish a prima facie case for defamation, the following elements must be proved: (i) defamatory language on the part of the defendant; (ii) that the defamatory language was of or concerning the plaintiff; (iii) publication of the defamatory language by the defendant to a third person; and (iv) damage to the reputation of the plaintiff. Where defamation refers to a public figure or involves a matter of public concern, the plaintiff also needs to prove (v) falsity; and (vi) fault by the defendant.

As held by the United States Supreme Court in New York Times v. Sullivan, to prevail against a defendant on defamation of a public figure, the plaintiff must establish actual malice by the defendant by demonstrating that the defendant (i) knew the statement was false, or (ii) had a reckless disregard as to its truth or falsity.

As held by the United States Supreme Court in Gertz v. Robert Welch, to prevail against a defendant on defamation of a private person involving a matter of public concern, the plaintiff must demonstrate that (i) the defamation was false; (ii) the defendant was negligent; and that (ii) the defendant's negligence caused actual harm to the plaintiff.

Under a tort for invasion of privacy, a plaintiff can recover for four types of wrongs: (i) appropriation by the defendant of the plaintiff's picture or name for commercial advantage; (ii) intrusion by the defendant upon the plaintiff's affairs or seclusion; (iii) publication by the defendant of facts placing the plaintiff in a false light; and (iv) public disclosure by the defendant of private facts about the plaintiff.

To make a prima facie case for public disclosure of private facts, a plaintiff must show (i) publication or public disclosure by the defendant of private information about the plaintiff; and (ii) the matter made public is such that its disclosure would be highly offensive to a reasonable person. For liability to attach, the disclosure must be a public disclosure, and the facts disclosed must be private.

C is correct. The newspaper would not be liable for defamation, because the information it reported was true. However, the newspaper could still be liable for invading the parents' and child's privacy for publically disclosing private information. The disclosure was public because it was documented in a newspaper story, and the information included the name and diagnosis of a minor. Nevertheless, the parents would not recover against the newspaper. The facts about the child were disclosed at a public meeting, making them no longer private. Any fact disclosed at such a meeting is considered inherently newsworthy. Lastly, the information reported was not offensive such that it would violate ordinary decency standards.

A is incorrect. All facts disclosed at public meetings are considered inherently newsworthy, and the parents would be barred from recovery precisely because the information at issue was disclosed at a public meeting since this factor rendered it public and not private information.

B is incorrect. Although the child was under the age of consent and therefore his identity would normally be private, the parents will still be unable to recover. A newspaper cannot be held liable for disclosing the name of a minor that is a matter of public record. Under the facts as presented, the parents referred to their son at an open meeting. Therefore, the child's name was a matter of public record, and the newspaper would not be liable for publishing it.

D is incorrect. Although the parents would not recover against the newspaper, the recovery would not be barred based on their knowledge that a reporter was present at the school board meeting. Instead, the parents would not recover because the meeting itself was open to the public. All information disclosed was public, and the meeting itself newsworthy. If the information had not been disclosed at a public meeting, and the reporter reported on it, then the newspaper could have been liable for invasion of privacy. The reporter's presence and the parents' knowledge is relevant only because the underlying circumstances cut short the newspaper's liability.