

MONTEREY COLLEGE OF LAW
HYBRID TORTS SEC. 2
FINAL EXAMINATION
SPRING 2023
PROF. L. HOLDER

General Instructions:

Answer Three (3) Essay Questions

Total Time Allotted: Three (3) Hours

QUESTION 1

FAYETTEVILLE TN [March 9, 2023] – The ethanol-fueled fungus known as whiskey fungus has thrived for centuries around distilleries. It’s been a source of complaints from residents who live near Kentucky bourbon distilleries, Canadian whiskey makers, and Caribbean rum manufacturers.

Since 2017, Jack Daniel’s has spent \$30 million building six warehouses (at about \$5 million each), known as barrelhouses, to age its iconic whiskey in rural Lincoln County, Tennessee. JD plans to build eight more, for a total of 14.

Starting a few months after the first two barrelhouses were put into operation in 2017, residents have complained that a sooty, dark crust has blanketed homes, cars, road signs, bird feeders, patio furniture, and trees as the fungus has spread uncontrollably, fed by alcohol vapors wafting from charred oak barrels of aging Jack Daniel’s whiskey.

JD could install air filters in the barrelhouses. But air filters could hurt the flavor that the whiskey acquires during the aging process. Distillers refer poetically to the liquor that evaporates during that process (which is what fuels the fungus) as “the angel’s share.”

Melvin Keebler, general manager of the Jack Daniel Distillery, told Lincoln County officials that 14 barrelhouses would generate \$1 million in annual property tax revenue for the county by 2023, which had about \$15 million in general fund spending for the 2022 fiscal year. Keebler also said that JD “complies with all local, state, and federal regulations regarding the design, construction, and permitting of our barrelhouses. We are committed to protecting the environment and the safety and health of our employees and neighbors.” Studies have shown that the fungus is not hazardous to human health.

In 2018, Christi Long bought a 4,000-square-foot mansion, known as the Manor at ShaeJo, built in 1900, which she operates as a wedding and event venue. The Manor is about half a mile from the property with the six original barrelhouses. When Long bought the Manor, she knew two Jack Daniel's barrelhouses were nearby and she had heard about the black fungus. "I knew there was some level of it," Long told a reporter. "But it wasn't to this point We were told it gets on the roof, maybe on the side of the house and you cleaned it off. We had no idea that it actually kills vegetation and trees and it pretty much sticks to everything."

Her net profits from operations in 2019 were \$170,000.00. In 2020 and 2021 her profits were half that (due in part to Covid, but also to increasing fungus). In 2022, Long could have booked events that would have generated the same net profits as in 2019; but potential clients "literally ran away" from bookings after visiting the Manor. With all six barrelhouses operating, whiskey fungus had inundated the property, darkening the copper roof and exterior walls, creeping over the rock garden and metal gate and encrusting the branches of the magnificent magnolia trees. Long pressure-washes the property every three months with bleach and water, but the fungus always returns, and appears to be gaining strength. Each wash costs Ms. Long \$2,500.00. In 2022, her business lost \$30,000.00.

Ms. Long filed a lawsuit against JD in January, contending that JD's barrelhouses are a private nuisance. Analyze Ms. Long's rights and potential remedies, and JD's defenses.



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QUESTION 2

NEW DELHI [March 24, 2023] — Key Indian opposition leader Rahul Gandhi could lose his parliamentary seat if a court finds him guilty of defamation over his remarks about Prime Minister Narendra Modi's surname.

Gandhi represents a constituency in southern Kerala state as a member of the Congress party. Indian parliamentary rules say that a member loses his or her seat if convicted of a crime and sentenced to two or more years in prison.

The case against Gandhi dates back to an election rally in 2019 when Gandhi said: "Why do all thieves have Modi as their surname?" In the speech, he went on to name fugitive Indian diamond tycoon Nirav Modi, banned Indian Premier League boss Lalit Modi, and Narendra Modi. P.M. Narendra Modi is not related to either of the other two.

The defamation case was filed in western Gujarat state. The plaintiff, Purnesh Modi, said Gandhi's comments had "defamed the entire Modi community." Modi is a common last name in western Gujarat state, occurring there with 1:960 frequency, and more than 62,000 times. Purnesh Modi is not a public official or public figure.

Gandhi is one of India's main opposition leaders and he will most likely go up against Modi when the prime minister seeks a third term in 2024.

Analyze Purnesh Modi's claim against Gandhi to defend the Modi surname, and Gandhi's defenses. Presume Indian defamation law is exactly the same as majority-view U.S. defamation law.

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QUESTION 3

Paul played golf but wanted to improve his skills. Knowing this, Paul's friend, Ace, purchased by mail order directly from House of Zog a "Golfing Gizmo" training device designed for all skill levels to practice, and Ace gave the Gizmo to Paul for his birthday. The Gizmo used two pegs that stuck into the ground, attached at the top by an elastic cord. From the elastic cord, a golf ball hung on a cotton cord that was attached to the bottom of the pegs. The Gizmo box and instruction manual said the gadget was "completely safe" and that the "ball will not hit player." The instructions also stated that if hit correctly, the ball would return to the initial point of contact, but if hooked or sliced, the ball would return off-center.

Paul set up the Golfing Gizmo per the instructions. Paul took a swing, was hit on the head with the ball, and was injured. Paul testified at trial to having read the instructions (attached below and incorporated by reference) before using the product. Paul also presented expert testimony at trial that Paul hit the ball from underneath and caught the cord with the shaft of the club, causing the ball to ricochet back at Paul's head.

Paul sued House of Zog for strict liability based on express warranty and misrepresentation theories. Will Paul prevail in his claim? Discuss.



IMPROVE YOUR GOLF AT HOME

- HIT A REAL GOLF BALL
- ONLY 40 FT. OF SPACE NEEDED
- COMPLETELY SAFE BALL WILL NOT HIT THE PLAYER
- INDICATES HOOK OR SLICE

HOUSE OF ZOG
803 N. ALFRED ST.
Los Angeles 90069, Calif.

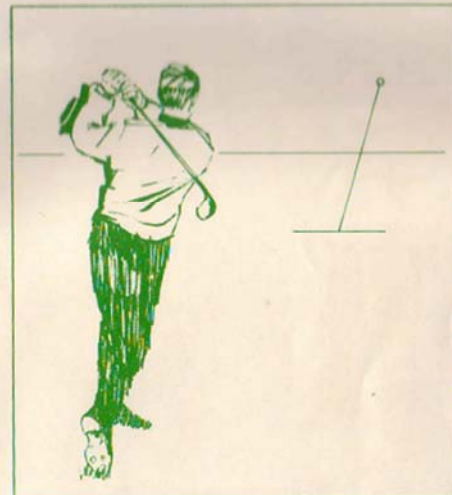


The "Golfing Gizmo"

The "Golfing Gizmo" enables you to improve your golf at home, without the costly expense of a driving range, or the waste of time chasing practice shots at your golf club. Many golfers prefer to practice their shots without any onlookers, the "Golfing Gizmo" lets you practice your shots in the privacy of your own home, at your own convenience.



1. Use your yard, parkway, or any area that allows 40 feet of space. Insert stakes each end of elastic, stretch 25 inches. Place in turf flush with ground. Place ball at right angles to elastic, full length of cord. Tee the golf ball in your usual manner.



2. Drive golf ball with full power, with iron or wood clubs. You are hitting a real golf ball, not a toy or plaything. Concentrate on your own improvement in coordination, rhythm, and power. "Golfing Gizmo" gives you more practice, in less time, at less cost.

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Question 1 Answer Outline

PRIVATE NUISANCE

Private nuisance is a **substantial, unreasonable interference** with another private individual's **use or enjoyment** of property she actually possesses or to which she has a right of immediate possession.

1. Substantial Interference

The interference with plaintiff's right in his land must be substantial. This means that it must be **offensive, inconvenient, or annoying to an average person in the community**. It will not be characterized as substantial if it is merely the result of plaintiff's hypersensitivity or specialized use of his own property. [Is a century-old mansion used as a wedding venue a specialized use?]

2. Unreasonable Interference

For a nuisance based on intent or negligence, the interference with plaintiff's use of his land must be unreasonable. To be characterized as unreasonable, the severity of the inflicted **injury must outweigh the utility** of defendant's conduct. In balancing these respective interests, courts take into account that every person is entitled to use his own land in a reasonable way, considering the neighborhood, land values, and existence of any alternative courses of conduct open to defendant.

REMEDIES

1. Damages

For a private nuisance, or for a public nuisance where plaintiff has suffered some unique damage, the usual remedy is damages.

2. Injunctive Relief

Where the **legal remedy** of damages is **unavailable or inadequate**, injunctive relief may be granted. The legal remedy may be inadequate for a variety of reasons, e.g., the nuisance is a continuing wrong, the nuisance is of the kind that will cause irreparable injury, etc. In deciding whether an injunction should issue, the courts take into consideration the relative hardships that will result to the parties from the grant or denial of the injunction. Hardships will not be balanced, however, where defendant's conduct was willful.

3. Permanent damages (Boomer V. Atlantic Cement Co.)

To grant the injunction unless defendant pays plaintiffs such permanent damages as may be fixed by the court seems to do justice between the contending parties.

DEFENSES

1. Legislative Authority

Conduct consistent with what a zoning ordinance or other legislative license permits is relevant but not conclusive evidence that the use is not a nuisance.

2. "Coming to the Nuisance"

The problem: Has plaintiff assumed the risk, thereby being barred from recovery by the fact that she has "come to the nuisance," by purchasing land and moving in next to the nuisance after it is already in existence or operation? The prevailing rule is that, in the absence of a prescriptive right, the defendant may not condemn surrounding premises to endure the nuisance; i.e., the purchaser is entitled to reasonable use or enjoyment of her land to the same extent as any other owner as long as She buys in good faith and not for the sole purpose of a harassing lawsuit.

Question 2 Answer Outline

DEFAMATION

1. Prima Facie Case

To establish a prima facie case for defamation, the following elements must be proved: (i) *Defamatory language* on the part of the defendant; (ii) The defamatory language must be “*of or concerning*” the *plaintiff*—i.e., it must identify the plaintiff to a reasonable reader, listener, or viewer; (iii) *Publication* of the defamatory language by the defendant to a third person; and (iv) *Damage to the reputation* of the plaintiff. Where the defamation refers to a public figure or involves a matter of public concern, two additional elements must be proved as part of the prima facie case: (v) *Falsity* of the defamatory language; and (vi) *Fault* on defendant’s part. **2.**

a. Defamatory Language / b. Inducement and Innuendo

Defamatory language is language that tends to adversely affect one’s reputation. This may result from impeaching the individual’s honesty, integrity, virtue, sanity, or the like.

If the statement standing alone is defamatory, it is defamatory “on its face.” “Why do all thieves have Modi as their surname?” is defamatory on its face if Plaintiff can prove Gandhi was referring to him.

*3. “Of or Concerning” the Plaintiff

The plaintiff must establish that a *reasonable* reader, listener, or viewer would understand that the defamatory statement referred to the plaintiff.*

*a. Colloquium

A statement may be actionable even though no clear reference to the plaintiff is contained on the face of the statement. In such a case, however, the plaintiff is required to introduce additional extrinsic facts that would lead a reasonable reader, listener, or viewer to perceive the defamatory statement as referring to the plaintiff. Pleading and proving such extrinsic facts to show that the plaintiff was, in fact, intended is called “colloquium.”*

*b. Group Defamation

A significant issue is presented with respect to this prima facie case element when the defamatory language refers to a group without identifying any particular individual within that group. In such cases, the following rules operate:

1) All Members of Small Group

Where the defamatory language refers to all members of a small group, each member may establish that the defamatory statement was made of and concerning him by alleging that he is a member of the group.

2) All Members of Large Group

If, however, the defamatory statement refers to all members of a large group, no member of that group may establish this element of the cause of action.

3) Some Members of Small Group

Where the defamatory language refers to some members of a small group, plaintiff can recover if a reasonable person would view the statement as referring to the plaintiff.*

4. Publication

A statement is not actionable until there has been a “publication.” The publication requirement is satisfied when there is a *communication to a third person who understood it*.

5. Damage to Plaintiff’s Reputation

In ascertaining whether this element of the plaintiff’s prima facie case has been satisfied, it may be necessary to distinguish between libel and slander. As will be seen below, the burden

of proof as to damages (to plaintiff's reputation) may depend on this distinction.

c. Slander: Slander is *spoken defamation*. It is to be distinguished from libel in that the defamation is in less permanent and less physical form.

2) Damages Rules for Slander

a) Special Damages Usually Required

In slander, injury to reputation is *not presumed*. Thus, ordinary slander is not actionable in the absence of pleading and proof of special damages.

b) Slander Per Se—Injury Presumed

If, however, the spoken defamation falls within one of four categories, characterized as slander per se, an injury to reputation is presumed without proof of special damages. These four categories are:

(1) Business or Profession / (2) Loathsome Disease / (4) Unchastity of a Woman

(3) Crime Involving Moral Turpitude

A defamatory statement that the plaintiff is or was guilty of a crime involving moral turpitude is actionable without pleading or proof of special damages. Because common law crimes generally are deemed to involve moral turpitude (e.g., assault, **larceny**, perjury), this category of slander per se incorporates a large number of statements.

The Restatement extends this category to all crimes punishable by imprisonment.*

d. Private Persons Need Not Prove Actual Malice

Defamation actions brought by private individuals are subject to constitutional limitations only when the defamatory statement involves a matter of "public concern." And even in those cases, the limitations are not as great as those established for public officials and public figures. [*Gertz v. Robert Welch, Inc.*]

1) Matters of Public Concern—At Least Negligence Required

When the defamatory statement involves a matter of public concern, *Gertz* imposes two restrictions on private plaintiffs: (i) it prohibits liability without fault, and (ii) it restricts the recovery of presumed or punitive damages.

DEFENSES

a. Consent: As with all torts, consent is a complete defense to a defamation action.

b. Truth: In cases of purely private concern where plaintiff is not required to prove falsity defendant may establish the truth of the statement as a complete defense.

d. Qualified Privilege: In certain situations, a speaker may say something defamatory without being liable because of the existence of a qualified privilege.

Question 3 Answer Outline

PRODUCTS LIABILITY: “Products liability” is the generic phrase used to describe the liability of a supplier of a product to one injured by the product.

Existence of a Defect

To find liability under any products liability theory, plaintiff must show that the product was “defective” when the product left defendant’s control.

Design Defects

When all the products of a line are made identically according to manufacturing specifications, but have dangerous propensities because of their mechanical features or packaging, the entire line may be found to be defective because of poor design.

a) Inadequate Warnings

Inadequate warnings can be analyzed as a type of design defect. A product must have clear and complete warnings of any dangers that may not be apparent to users.

D. LIABILITY BASED ON STRICT TORT LIABILITY

1. Prima Facie Case

To establish a prima facie case in products liability based on strict liability in tort, the following elements must be proved:

- a. The defendant is a *commercial supplier*;
- b. The defendant produced or sold a *defective product*;
- c. The defective product was the *actual* and *proximate cause* of the plaintiff’s injury; and
- d. The plaintiff suffered *damages* to person or property.

Product Not Substantially Altered

To hold the commercial supplier strictly liable for a product defect, the product must be expected to, and must in fact, reach the user or consumer without substantial change in the condition in which it is supplied.

F. REPRESENTATION THEORIES (EXPRESS WARRANTY AND MISREPRESENTATION OF FACT)

1. Express Warranty

An express warranty arises where a seller or supplier makes any affirmation of fact or promise to the buyer relating to the goods that becomes part of the “basis of the bargain.” [UCC §2-313]

c. “Basis of the Bargain”

If the buyer is suing, the warranty must have been “part of the basis of the bargain.” This is probably less difficult to show than a buyer’s subjective “reliance” on the representation.

d. Basis of Liability—Breach of Warranty

As with implied warranties, the plaintiff need *not* show that the breach occurred through the fault of the defendant, but only that a breach of the warranty did in fact occur.

2. Misrepresentation of Fact

Liability for misrepresentation may arise when a representation by the seller about a product induces reliance by the buyer. In products cases, liability for misrepresentation is usually

based on strict liability, but may also arise for intentional and negligent misrepresentations.

a. Defendant's State of Mind

1) Strict Liability

As long as the defendant is a seller engaged in the business of selling such products, there is no need to show fault on the defendant's part. The plaintiff need only show that the representation proved false, without regard to the defendant's state of mind.

2) Intentional Misrepresentation

For intentional misrepresentations, the plaintiff must show that the misrepresentation was made *knowingly* or with *reckless* disregard for the facts.

3) Negligent Misrepresentation

For negligence liability, knowledge of the misrepresentation on the part of the defendant need not be proved. The plaintiff need only show that a reasonable person should have known such representations to be false when making them.

b. Material Fact Required

The misrepresentation must be of a material fact, i.e., a fact concerning the quality, nature, or appropriate use of the product on which a normal buyer may be expected to rely. "Puffing" and statements of opinion are not sufficient.

c. Intent to Induce Reliance of Particular Buyer

The defendant must have intended to induce the reliance of the buyer, or a class of persons to which the buyer belongs, in a particular transaction. Evidence of a representation made to the public by label, advertisement, or otherwise is sufficient to show an intent to induce reliance by anyone into whose hands the product may come.

d. Justifiable Reliance

There is no liability if the misrepresentation is not known or does not influence the transaction. Reliance may be found if the representation was a *substantial factor* in inducing the purchase, even though not the sole inducement.

e. Actual Cause

Reliance by the purchaser serves to show actual cause.

f. Proximate Cause and Damages

Both elements are analyzed in the same manner as for products liability cases based on negligence or strict liability, *supra*. If the plaintiff can show that the misrepresentation was intentional, some courts will allow punitive damages to be claimed.

g. Defenses

1) Assumption of Risk

If the plaintiff is entitled to rely on the representation, a defense of assumption of risk does not apply.

2) Contributory Negligence (Fault)

Whether contributory negligence is a defense depends on the type of misrepresentation.

For negligent misrepresentations, contributory negligence is a valid defense.

In strict liability actions, the plaintiff's unreasonable behavior is analyzed as in other strict liability actions for defective products, *supra*. If the plaintiff can show that the defendant's misrepresentation was intentional, contributory negligence would be no defense.

1)

Long v. JD

Private Nuisance

A private nuisance is a ^{substantially} substantial non-trespassory invasion that interferes with the enjoyment and use of the property of another that is either intentional and unreasonable or unintentional and otherwise actionable under the law of torts.

Non-Trespassory Invasion

Here, we have fungus, a particulate matter, unlikely to level to an actual trespass that is leaving the property of the JD Barrelhouse and spreading to The Manor. There is a non-trespassory invasion.

Enjoyment and Use

The non-trespassory invasion must interfere with the enjoyment and/or use of the property of another. Here, the Manor ^{bought by Long in 2018} has been used by Long as an event and wedding venue. We can see clearly that her rights to use and enjoyment of her property have been interfered with, not only because of the intrusive nature of the fungus, but because her potential clients are "literally running away" upon seeing the venue. This has caused to her lose business, which is one of the enjoyments/uses she gets from the property.

Substantial

The interference is substantial if the average person in the community would consider the invasion either annoying, inconvenient, or offensive. This standard does not adjust to the overly sensitive or to those persons who have learned to live with and tolerate a nuisance.

Use actual factual details instead of generalizations. Neighbors complained starting 2 mos after 1st barrelhouse.

Here, not only does the unsightly fungus invade the outer structure of the home, but it kills vegetation, and trees, and pretty much anything that it sticks to. If the fungus was only a small cosmetic blemish, it could be argued that the average person in the community might not consider it offensive, annoying, or inconvenient (although they probably would). However, the fact that the fungus kills vegetations and plants surrounding the property will almost certainly make this invasion substantial.

JD may argue that The Manor is more sensitive than an average person in the community since the sole purpose of the residence is as an event and wedding venue. This would likely fail as anyone who has fungus growing and spreading over their property that kills vegetation would be judged by the average person to be offensive, annoying, or inconvenient. Any home being used for a residential purpose would not want a fungus encroaching on their home and killing their vegetation.

Intentional

stick closely to facts.

Here, we can infer that the nuisance is intentional by JD's conduct. JD could install air filters in the barrelhouses, but this would hurt the flavor of the whiskey, and damage the product coming from this barrelhouse. It could also potentially harm their reputation as a whiskey maker due to poor quality coming from these particular barrelhouses.

Additionally, the residents have complained of the fungus. Regardless, JD continues the practice and doesn't install the fans, making this an intentional act.

Unreasonable: utility vs harm test

An invasion is unreasonable if the damage caused by the conduct outweighs the benefit that it produces. This appears to be the most substantive portion of the discussion. Here, you have a large corporation that contributes greatly to the community, bringing in \$1 million in annual property tax, or 1/15th of the general spending. JD has also spent \$30

Not yet: only it 14 barrelhouses are built/running.
(6 now & planned)

million on the existing warehouses, and plans to spend an additional \$40 million for another eight barrelhouses, for an all in investment of \$70 million.

In contract, across the street, Ms. Long has invested in a 4,000 square-foot mansion and was bringing a net profit of \$170,000 in 2019. It is difficult to calculate her more recent profits as they were damaged by Covid and the fungus.

Looking at the economic impact of each, it would appear that JD brings a great deal of benefit to the community.

Next, its important to take into consideration the actions that each party can take to mitigate the nuisance. As discussed supra, JD chooses not to install air filters in the barrelhouses as that would impact the flavor, taste, and quality of the whiskey. By installing air filters, JD would be eliminating the fungus and prevent the nuisance. However, as mentioned, this could impact the product that comes from these facilities, developing a less than desirable reputation, and potentially cause the barrelhouses with air filters to shut down. If people avoid whiskey made in barrelhouses with air filters, it could cause irreparable damage to the sites and to JD's investment and reduce their economic benefit of the community.

As the facts suggest, Ms. Long has taken extensive measures to control the fungus and is simply unable to. If the fungus only required cleaning, that would be one matter, but the fact that it kills vegetation surrounding the venue makes the venue unsightly. With the uncontrolled nuisance, Ms. Long's only other avenue are to cut and run from the Manor, possibly sustaining further economic damages, or turn the venue into a haunted house. Neither of which are probably appealing.

Although the Barrelhouse brings a great amount of economic benefit, the court will likely finds its invasion to be intentional and unreasonable, and Ms. Long will have established her prima facie case for private nuisance.

Injunctive Relief

Generally, injunctive relief, which would be an estoppel of the activity causing the nuisance, is only awarded by the courts when other legal remedies won't suffice. These instances include when the nuisance is continuing or when there has been irreparable harm done by it.

Here, the nuisance is continuing, as suggested by Ms. Long's continued efforts to wash her property every 3 months with bleach and water, with the fungus always returning. If JD does not install the air filters, containing the fungus and preventing its further spread, the fungus will continue to spread onto the Manor and is therefore a continuing nuisance.

Additionally, irreparable harm has been done to the Manor. The structure of the house itself is covered with the fungus, and the vegetation surrounding the property has come to dwindle and die off. Cleaning a house with bleach only costs \$2,500, but killing vegetation that has taken time grow would, including magnolia trees, would be irreparable damage.

However, some courts have refrained from offering injunctive relief even when these elements are met. Instead that have relied on "permanent damages" which seek to compensate the injured party for their total loss in value of the property or its use or enjoyment. In these cases, the party causing the nuisance has brought an immense economic value into the community. Given the disparity in the benefit brought by JD, and the losses sustained by Ms. Long, a court may prefer to offer special damages to Ms. Long as opposed to enjoining JD from continuing its operations.

General Damages

General damages are non-economic damages and typically deal with pain and suffering, and other harms to the persons psyche or emotional well being. The facts do not suggest that Ms. Long has suffered any such damage.

Special Damages

Special damages are awarded for any economic losses including loss of past or future income, lost opportunities, medical bills and expenses, ect.

Ms. Long will likely be awarded special damages for the loss in her investment, the incidental cost to attempt to clean her house, and for her lost profits of \$30,000.

JD's Defenses

Coming to the Harm

Although not an absolute defense to a claim of nuisance, courts do take into consideration whether the plaintiff came to the nuisance, or whether the nuisance came to them. Here, in 2018, after the plant had begun operating, she purchased the Manor. This would be considered coming to the nuisance and it is something that courts will take into consideration.

She may attempt to argue that she was unaware of the nuisance, but this would likely fail as this is common knowledge for residents living near Kentucky bourbon distilleries, Canadian whiskey makers, and Caribbean rum manufacturers. Additionally, from the picture attached, it appears that the JD Barrelhouse would be hard to miss from the Manor.

Jurisdictional Compliance

As with Coming to the Harm, courts do not treat jurisdictional compliance as an absolute defense, but it is something they will consider when weighing their harm v. benefit analysis.

Conclusion

JD's conduct constitutes a private nuisance because they have intentionally allowed the fungus to spread to Ms. Long, thereby interfering with her enjoyment and use of her property. Because of the economic impact that JD's barrelhouses have on the community, the court may prefer to award damages to Ms. Long as opposed to estopping JD from continuing its nuisance under an injunction.

Torts Hybrid Section 2 – Spring 2023

QUESTION 1 – Issue: Private Nuisance	Weight
ID _____	
Private Nuisance – complete and accurate rule statement Private nuisance is a <i>substantial, unreasonable interference</i> with another private individual's <i>use or enjoyment</i> of property she <i>possesses or to which she has a right of immediate possession</i> .	8/10
Private Nuisance – complete and accurate element definitions 1. Substantial Interference 2. Unreasonable Interference 3. Actual or right of immediate possession	14/15
Private Nuisance – Analysis: facts support each element; particular attention to the “injury must outweigh the utility” test of unreasonable interference.	27/30
Defenses Legislative authority – discussion re law compliance Coming to the nuisance – discussion re purchase knowing of problem	6/10
Remedies- Damages: calculation of monetary damages using facts Injunctive Relief: why and why not an appropriate remedy Permanent damages: why and why not an appropriate remedy	13/15
Overall organization	19/20
	87/100%

2)

Example

Defamation:

(1) Defamatory language by the defendant

(2) Of or Concerning the plaintiff

(3) Publication

(4) Damage

Matter of Public Concern: falsity
fault

Defamatory language by the defendant:

Defamatory language is language that harms the reputation of a person as to lower their estimation in the community or deter people from associating or dealing with them.

Gandhi made the statement of "Why do all thieves have Modi as their surname." This language is defamatory as it is stating that if your last name is Modi, you are a thief.

related to or are

Calling someone a criminal is defamatory language as being a thief frowned upon by reasonable viewers, listeners, or readers.

Of or Concerning the plaintiff:

When the plaintiff is identifiable by a reasonable viewer, listener or reader. If the identity is not clear, there must be colloquium, meaning there must be extrinsic facts used to prove that the plaintiff was being referred to and that a reasonable reader, viewer, or listener would reasonably know that the plaintiff was being referenced. Here, Gandhi did not specifically mention Purnesh Modi's name, so there must be a colloquium to prove that Purnesh was being referred to in his speech. Modi specifically mentioned three names, Nirav Modi, Latit modi and Narendra Modi. There are 62,000 other people with the last name Modi. Purnesh is not a public figure and therefore it is likely not common knowledge to the reasonable person that he plans on running against Modi. Because a

GOOD

reasonable person would likely not have this information, it is unlikely that they would perceive the language to be referring to Purnesh.

Publication:

Intentionally or negligently spreading defamatory statements to a third party. Here, Gandhi intentionally announced in a speech at an election rally the defamatory language. Because Gandhi told viewers in the audience, there is publication to a third party.

Public Figure/Matter of Public Concern:

While ^{P.M.} Modi is not a public figure or public official, ^{P.M.} Modi is likely to run against Gandhi for prime minister. The public would likely be interested to know that a potential government candidate is a thief. Because this is a matter of public concern, there must be actual malice, where under the NY Times test, the statement was made with (1) knowledge that the statement is false and (2) reckless regard for the truth. Based on the fact pattern it is unknown as to whether these elements were satisfied, however the standard of reckless disregard is lower than the standard of negligence and reckless disregard is usually hard to prove.

In conclusion, because Purnesh cannot prove through colloquium that the statements are of and concerning him, it is likely he does not have a case for defamation.

Slander vs. Libel

Slander is defamatory language that is spoken. Libel is defamatory language that is written. Because Gandhi said his defamatory statements in a speech, this is slander. General damages for slander are only assumed if one can prove the slander is defamation per se.

Defamation Per Se:

Slander is defamatory per se if it is referring to one of the four categories.

Malice only if public figure; public concern test is negligence.

- (1) commission of a criminal offense
- (2) fornication or adultery
- (3) infection of venereal disease
- (4) Prejudice against plaintiff in his profession.

Commission of a criminal offense:

Here, there is slander per se in the form of commission of a criminal offense. If someone is a thief that makes them a criminal committing the criminal offense of theft. Because this element is satisfied, if there is colloquium to prove the statements are about Purnesh Modi, the defamation is defamation per se and general damages are assumed.

Defamation Per Quod:

When statements are made that require extrinsic facts to show defamatory language. Here, calling anyone a thief is defamatory, as theft is a crime and the average person would agree that being a criminal is frowned upon in a community and may defer people from associating or dealing with you. Because the defamatory language is clear, defamation per quod does not exist.

Group Defamation:

6000
When the defamatory language is so broad as to include a large group of people, it is unlikely that one will recover damages for defamation unless it can be proven that the plaintiff was specifically named. Gandhi referred to people who have Modi as a surname. Modi is a common last name and is used more than 62,000 times. Modi also said that his comments "defamed the entire Modi community." Defamation to 62,000 people is too broad and therefore, damages cannot be awarded.

Defenses:

Defenses for defamation include qualified privilege, absolute privilege, consent and truth.

Qualified privilege:

An actor has qualified privilege when the statements being made are (1) Reports of Judicial proceedings, (2) Interest of the publisher (3) Interest to the recipient (4) Common interest of the publisher and the recipient (5) Public Interest. These statements are qualified unless the scope of the language is outside of the privilege or they are made with actual malice.

Public Interest:

As stated above, because Modi plans to run as prime minister in 2024, Gandhi will use the defense of public interest to defend his defamatory statements. The scope of the language was made at an election rally and if it was referring to ^{P.M.} Purnesh, a potential opponent, the language is within the scope of his privilege. As stated above, there is likely no malice.

Absolute Privilege:

An actor has absolute privilege and immunity from defamation when the statements are made in legislative, judicial or executive proceedings, are compelled news broadcasts or publications, or communication between spouses. Here, none of these defenses apply.

Truth:

If a defendant can prove that the statement he made is true, the truth is a complete defense to defamation. If Gandhi has proof that Modi is a thief, he will not be liable for damages for defamation.

Consent:

If the plaintiff gives the defendant permission to make the statements, there can be no claim for damages for defamation. Here there is no proof of consent and this is not applicable.

Damages:

Under defamation per se, general damages are assumed, special damages must be proven, and punitive damages will be awarded only if the statement is made with malice. General damages are emotional damages such as pain and suffering and loss of enjoyment to life. Specific damages are economic damages such as loss of future and past wages and cost of future and past medical bills. Punitive damages are damages meant to punish the defendant to deter him from committing the act again. If the element of "of or concerning the plaintiff" in defamation was met, the elements of defamation per se also would be met, and therefore Purnesh would automatically be awarded general damages, would have to prove specific damages, and would only be awarded punitive damages if he could prove that the statements Gandhi made were made with the knowledge they were false and the reckless regard to the truth. *Unless Matter of Public Concern**

In conclusion, because the colloquium would not satisfy the element of defamatory language being "of or concerning" the plaintiff, there is no defamation and therefore Gandhi is not liable to Modi for damages of defamation.

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QUESTION 2 – Issue: Defamation	Weight
<p>Defamation – complete and accurate rule statement</p> <p>1. Prima Facie Case To establish a prima facie case for defamation, the following elements must be proved: (i) Defamatory language on the part of the defendant; (ii) The defamatory language must be “of or concerning” the plaintiff—i.e., it must identify the plaintiff to a reasonable reader, listener, or viewer; (iii) Publication of the defamatory language by the defendant to a third person; and (iv) Damage to the reputation of the plaintiff.</p> <p>2. Where the defamation involves a matter of public concern, two additional elements must be proved as part of the prima facie case: (v) Falsity of the defamatory language; and (vi) Fault on defendant’s part.</p>	8/10
<p>Defamation – complete and accurate element definitions</p>	14/15
<p>Defamation – Analysis: facts support each element; particular attention to *colloquium and group defamation—these are essential discussions*. Discusses <i>Gertz v. Robert Welch, Inc.</i>, Matters of Public Concern Private figures suing on a matter of public concern must show (i) at least negligence as to truth or falsity, and (ii) actual injury (no presumed damages)</p>	27/30
<p>Defenses – no good defenses here</p> <p>a. Consent</p> <p>b. Truth: In cases of purely private concern where plaintiff is not required to prove falsity defendant may prove truth as a complete defense.</p> <p>d. Qualified Privilege – none is good defense, but Fair Comment and Criticism might be the best.</p>	5/5
<p>Remedies-</p> <p>Damages for Slander: a) Special Damages Usually Required In slander, injury to reputation is not presumed. UNLESS -</p> <p>b) Slander Per Se—Injury Presumed if within four categories, without proof of special damages: (1) Business or Profession / (2) Loathsome Disease / (4) Unchastity of a Woman *(3) Crime Involving Moral Turpitude* "Why do all thieves have Modi as their surname?"</p> <p>Restatement: all crimes punishable by imprisonment – bonus! BUT under GERTZ, actual injury is required when matter of public concern.</p>	18/20
<p>Overall organization</p>	19/20
	91/100%

3)

well done!

Example

Paul v. House of Zog

Products liability

✓ Products liability is a generic phrase that describes the liability of the seller of a product that injures a person due to its defect

There are 5 theories under products liability

1) Intent

2) Negligence

3) Strict liability

4) warranties

a. merchantability

b. fitness for a particular purpose

5) representations

a. express

b. Misrepresentation with scienter

Here, we have a strict liability case based on express warranty and misrepresentation.

Strict liability theory

For strict liability we need:

1. A defective product that was defective when it left the commercial sellers hand.

A commercial seller is one whose business is to sell the particular product, it can be anyone in the commerce stream such as the manufacture or retailer. Here, Zog is least the retailer. This product has a design defect and a warning defect that I will discuss below.

2. Zog was the legal cause of the injury

Legal cause is the but for cause and proximate cause. But for the defective product from Zog there would be no injury to Paul. Proximate cause is the foreseeability that the gizmo would cause the injury to Paul and there were no supervening-intervening causes. Here, Paul is a foreseeable plaintiff as he has horizontal privity to the gizmo, he also set it up per the instructions and thus no supervening-intervening causes are here. Thus, Zogs gizmo is the legal cause of the injury.

Privity

Vertical privity is no longer required, however, horizontal privity is as follows:

- 1) liable to any family member or guest who was reasonable to use it (majority of states follow this)
- 2) liable to any natural person who was reasonable to use it
- 3) liable to any person who was reasonable to use it

Paul was given this gizmo as a gift and is the property owner of the gizmo. He falls under the 1st category and thus, Zog is liable to Paul.

3. Damage

Paul has sustained a head injury from the gizmo and thus has damage.

Express warranty theory

An express warranty is one in which a seller makes an oral statement, written statement, shows a model, or gives a sample in which creates the warranty. Here, the instruction booklet states that "a completely safe ball will not hit the player." This express written warranty has been breached since the ball did indeed hit the player. The instructions do not mention what makes a ball safe so a reasonable person would think that was type of golf ball used in the general use of playing golf.

Misrepresentation with scienter

1. The seller made an assertion of fact that was false

Zog is making the assertion that the gizmo will not hit a player and due to the design defect, that was a false assertion.

2. the assertion was made with knowledge the assertion was false, did not have the confidence in his assertion, or had no basis in his assertion.

Here, Zog would not have any basis in their assertion that the golf ball will not hit a player. If they had done exhaustive, if any, field testing they would have found that assertion to be untrue. Thus, they had no basis in the assertion that the ball would not hit a player.

3. The seller intended the buyer to rely on the assertion

In order for a company to sell a golf gizmo such as this, they will make the product sound much more appealing to use than having to get the golf equipment together, drive out to the range, pay the fee, and then drive back home. The assertion that a completely safe ball will not hit the player" while using the product in the backyard of your home is one of the selling points of the product. Thus, there was an intent to have a buyer rely on it.

4. The buyer justifiably relied on the buyers assertion

Paul will have justifiably relied on it if a reasonable person would have thought relied on the assertion that "is completely safe ball will not hit the player" while using the product in the backyard of your home. Here, while reading the booklet, it seems easy enough to work on your golf game without any danger and thus, it is justifiable to rely on that information as it is not an outrageous statement.

5. there was breach of the representation that caused damage

The breach of the representation must material. Here, the statement the "a completely safe ball will not hit the player" while using the product in the backyard of your home is material to the convenience of working on your golf game from home with no danger of getting hit in the head. Thus, the material breach of representation was the cause of the damage.

Once we have established the theory of liability we then look to the defect type, there are 3:

1) Design defect

A defect in design is from the blue print stage of the product and defect is inherent in the product. The risk utility test is used for comparison to competition when there is a safer design available or the availability to an alternative design that is not unreasonably detrimental to the cost or the usage of the product. Here may find that both of these opportunities exist with the gizmo.

2) manufacture defect

The product was not manufactured to the design and thus was so unreasonably defective to a reasonable person that it became unreasonably dangerous. Here, the gizmo is made

Good. Also use
consumer expectation test.

per the simple design of a ball on the end of a stretchy string. Thus, it is not a manufacturing defect.

3) warning defect

There is a warning defect when the warnings are missing, lacking in foreseeable misuse, or inconspicuous.

Here, there are no warnings whatsoever. Thus, we have a warning defect.

Defenses

1) Did not heed the warning

Here, there are no warnings whatsoever to heed. Thus, Zog will have no defense here.

2) Unforeseeable misuse

Here, Paul did not misuse the gizmo. He set it up per the instructions of the booklet and hit the ball as any golfer would. Zog will have no defense here.

3) Unreasonable alteration

Here, Paul did not alter the product in anyway. He set it up per the instructions of the booklet and hit the ball as any golfer would. Zog will have no defense here.

DAMAGES

General Damages -

These damages not monetarily calculable such as pain and suffering. Trier of fact will decide on the cost.

General damages under Strict liability

Paul has a head injury from the golf ball hitting him in the head and thus, will have a personal injury claim against Zog.

General Damages under breach of Warranties

The golf ball did in fact hit Paul in the head as expressly stated in the instruction booklet and thus, will have a breach of warranty claim against Zog.

General Damages under breach of Misrepresentation

- personal injury, damage to property, and mere economic loss

Conclusion

Paul will be successful in his suit of strict products liability under the theories of express warranty and misrepresentation.

END OF EXAM

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<p>QUESTION 3 – Issues: Products Liability strict liability / express warranty / misrepresentation (<i>intentional and negligent</i>)</p> <p>*THE CALL OF THIS QUESTION IS IMPERFECT – FOR THAT REASON, THERE IS MORE FLEXIBILITY IN GRADING THIS EXAM. THE TWO BEST CLAIMS ARE PRODUCTS LIABILITY (1) STRICT LIABILITY FOR DESIGN DEFECT AND/OR FAILURE TO WARN, AND (2) BREACH OF EXPRESS WARRANTY. THE MISREPRESENTATION THEORIES ARE NOT GOOD THEORIES, BUT THEY ARE WITHIN THE CALL OF THE QUESTION, SO ARE INCLUDED HERE. **STUDENTS WHO WRITE ONLY PRODUCTS LIABILITY (STRICT LIABILITY FOR DESIGN DEFECT AND FAILURE TO WARN) AND (EXPRESS WARRANTY THEORY) SHOULD HAVE ALL POINTS ALLOCATED AGAINST JUST THE TWO THEORIES.</p>	<p>Weight</p>
<p>Issue 1: Strict Liability – complete and accurate rule statement Existence of a Defect: Design Defects / Inadequate Warnings a. The defendant is a commercial supplier, b. The defendant produced or sold a defective product, c. Product was the actual and proximate cause of the plaintiff's injury; and d. The plaintiff suffered damages to person or property. Design Defects: consumer expectation test / danger-utility test Inadequate warning</p>	<p>9/10</p>
<p>Strict Liability – Complete and accurate element definitions</p>	<p>10/10</p>
<p>Strict Liability– Analysis: facts support each element</p>	<p>19/20</p>
<p>Defenses— Contributory / Comparative Negligence Misuse / Alteration</p>	<p>6/6</p>
<p>Remedies- Damages for personal injury (economic and noneconomic damages), property damages, purely economic losses are NOT recoverable</p>	<p>3/4</p>
<p>Issue 2: Express Warranty Theory An express warranty arises where a seller or supplier makes any affirmation of fact or promise to the buyer relating to the goods that becomes part of the “basis of the bargain.” Privity not required Causation and damages (supra)</p>	<p>9/10</p>
<p>Express Warranty – Complete and accurate element definitions</p>	<p>9/10</p>
<p>Express Warranty – Analysis: facts support each element</p>	<p>19/20</p>
<p>Express Warranty Defenses— Contributory / Comparative Negligence / Assumption of Risk</p>	<p>5/6</p>
<p>Remedies- personal injury and property damages, purely economic losses ARE recoverable.</p>	<p>3/4</p>

<p>Issue 3: Intentional Misrepresentation theory: An intentional misrepresentation by a defendant, made with scienter, which is material and justifiably relied upon by a plaintiff and which causes damages to the plaintiff, is actionable.</p> <p>Intentional misrepresentations:</p> <ul style="list-style-type: none"> Material Fact Scienter (made knowingly or with reckless disregard for the facts) Intent to Induce reliance. Justifiable reliance Actual and proximate cause Damages 	
<p>Intentional Misrepresentation – Complete and accurate element definitions</p>	
<p>Intentional Misrepresentation – Analysis: facts support each element</p>	
<p>Defenses</p> <p>1) Assumption of Risk: If the plaintiff is entitled to rely on the representation, a defense of assumption of risk does not apply.</p>	
<p>Remedies- A plaintiff may recover compensatory damages for the value of what he would have received if not for the misrepresentation.</p>	
<p>Issue 4: Negligent Misrepresentation theory</p> <ol style="list-style-type: none"> 1. Material Fact 2. Scienter (reasonable person should have known such representations to be false when making them) 3. Intent to Induce Reliance of Particular Buyer (The defendant must have intended to induce the reliance of the buyer, or a class of persons to which the buyer belongs, in a particular transaction. Evidence of a representation made to the public by label, advertisement, or otherwise is sufficient to show an intent to induce reliance by anyone into whose hands the product may come.) 4. Justifiable reliance (privity is irrelevant for misrepresentation and the required reliance may be shown to be that of a prior purchaser who passed the product on to the victim.) 5. Actual and proximate cause 6. Damages <p>A defendant is liable for a negligent misrepresentation only to:</p> <ol style="list-style-type: none"> (a) the person to whom the misrepresentation was made; and (b) to any other specific persons or identifiable group of persons 	
<p>Negligent Misrepresentation – Complete and accurate element definitions</p>	
<p>Negligent Misrepresentation –</p>	

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Analysis: facts support each element	
Negligent Misrepresentation — Defenses Assumption of Risk - If the plaintiff is entitled to rely on the representation, a defense of assumption of risk does not apply. Contributory / Comparative Negligence	
Remedies- A plaintiff may recover compensatory damages for the value of what he would have received if not for the misrepresentation.	
Overall organization	Included
	92/100%