

EC 2012 Adv Torts Britton
Highest Scoring Paper

Dear Pete and Puck,

I have reviewed the facts you supplied to my office. I have determined that the following claims could potentially be raised based on these facts.

Negligent misrepresentation

plaintiff, the investors. Defendant: TrueBlue; WindWell. The investors who invested in WindWell because of the certification of "robust" provided by TrueBlue could raise a claim of negligent misrepresentation. This claim would be against TrueBlue, but the investors could seek to hold WindWell ~~jointly and severally~~ liable for TrueBlue's actions.

Misrepresentation as a cause of action in torts not to be confused with misrepresentation as an element of other claims. Generally, misrepresentation is intentional. However, there is a cause of action for negligent misrepresentation. To be actionable, the defendant must be in the business of providing information. The defendant must make a negligent statement of material fact. The plaintiff must justifiably rely on the misrepresentation. Finally, there must be actual damages suffered. Most jurisdictions allow recovery of 'the benefit of the bargain'. For justifiable reliance, the standard is usually one of reasonableness. However, some jurisdictions allow recovery by the especially

gullible, and apply a standard of a person of the same intelligence and experience as the plaintiff.

Multiple defendants can be liable for the same cause of action when they 'act in concert' as part of a joint enterprise. See Biercyński v. Rogers. When harm is 'indivisible', there will be joint and several liability, when harm is divisible, damages can be apportioned based on the comparative negligence of each party.

Fortunately, you do not have to worry about this, the investors cannot prove you acted in concert with True Blue in negligently certifying Windwall as "robust", when that was not in fact true. But that point need not be reached, for the investors cannot prove actual damages. There is no indication the investors have suffered any harm because of True Blue's negligent misrepresentation. In fact, up until your other recent problems, the business has been a success. Thus, the investors' claim for negligent misrepresentation would fail, against both True Blue and Windwall.

Intentional Interference with an existing contract

plaintiff! ~~Weatherway~~ Windwall Defendant Weatherway

There is a possibility Windwall has a claim for intentional interference with an advantageous

relationship against WeatherAway. This is a very murky area of tort law, for several reasons. First, it punishes a party for intentionally inducing a breach of contract or otherwise interfering with an economic opportunity. Yet contracts law is not concerned with fault or motives, or attitude. Second, there is a thin line between unfair competition and fair business competition. Third, an element of the tort is "improper" interference, but this is not clearly defined.

Nonetheless, I believe you have a viable claim for this, specifically for interference with an existing contract. The general elements of intentional interference are: intentional, and improper, interference, with an existing or prospective contract or economic opportunity, causing a third party to breach its obligation to the plaintiff or otherwise interfering with the opportunity. For existing contracts, the defendant must know of the contract, or know its conduct will induce a third party to breach or otherwise make performance difficult.

Section 767 of the Second Restatement of Torts does not define "improper" but lists several factors, including: nature of the conduct, intent of the actor, proximate cause, the interest interfered with, and the interest defendant sought to protect.

Unfortunately, I do not believe Windwall can prevail on this claim. As I mentioned, there is a thin line between business competition which is fair, and that which is unfair and interference. Besides being "angry" with 3-ARM for supplying a potential competitor, there is no other evidence of intentional conduct, nor conduct that is arguably within the amorphous "improper" concept. Perhaps the argument could be made that Weatherway was such a large company, it knew Windwall could not adversely affect its interests, and that it intentionally became "angry" with 3-ARM to cause 3-ARM to breach its contract. But this is rather attenuated. Thus, this claim would likely fail. On the bright side, Windwall could pursue a breach of contract claim against 3-ARM. But that is beyond my realm of torts practice.

Negligence (pure economic loss)

plaintiffs: Fishermen Defendants: Windwall

• The Fisherman could pursue a negligence claim against Windwall for the drop in quality of their fish because of the windmills. Windwall would likely prevail in this claim.

• For a negligence claim, a plaintiff must establish: Duty, breach, causation, and harm/damages. For causation

there must be causation-in-fact and proximate cause. Proximate cause means legal cause, and to be proximate cause, the defendants' actions must be foreseeable. Closely tied to foreseeability is the somewhat-confusing pure economic loss doctrine. When a defendant suffers solely economic harm; and such harm is not foreseeable, this doctrine precludes recovery. A maritime law case, Louisiana ex rel. Guste v. M/V Testbank, required physical harm with economic loss in order to preclude application of the doctrine and allow recovery.

The damage to the quality of the fish is solely economic loss. There is no physical harm to the fishermen. Nor was the damage foreseeable, thus, the fishermen's claims likely fail.

Interference with existing economic opportunity Plaintiff: Windwall. Defendant: SCSF

Windwall may have a potential claim against SCSF for intentional interference with an existing economic opportunity. See my above analysis regarding TrueBlue for the elements of this claim.

As I mentioned above, the interference must be both intentional and improper. Again, "improper" is a vague concept. The second Restatement's factors in section 767 include: the actor's motive, the interest sought

to be protected, social good, and the interest interfered with. In regards to social good, in the Brimelow case, the defendant intentionally interfered with a sideshow's business by attempting to help the low-paid female performers, who had to turn to prostitution (and one had to live with a dwarf of ill-repute) because of their poor wages. The court found that the defendant's actions were in the public interest, and thus excused the conduct.

SCSF would likely argue that Brimelow should apply, that their act of throwing nets over the windmills was in the interest of protecting the local marine life, the local fishermen, and the community. However, given the murkiness of their ~~soot~~ tort, that may not be successful. There was certainly intent, based on the act of throwing nets, at night while trespassing, to stop the windmills from working. This certainly interfered with windmills' ability to generate energy, and thus make money. It therefore interfered with windmills' existing economic opportunity.

Additionally, a court would likely find this improper. Windwall also benefits from the social good factor, as you set up the company to generate clean energy and serve the public good. While SCSF has a potential argument its conduct was not improper under Brimelow, this should be a viable claim,

Interference with an economic opportunity - Barney

For the same reasons stated above regarding SCSF, Windwall has a likely action for interference with an economic opportunity against Barney for SCSF's actions of throwing nets on the windmills.

Public nuisance

plaintiffs: SCSF/fishermen defendant: Windwall.

The fisherman may have a claim for public nuisance against Windwall.

Nuisance, as a tort, is "substantial interference with use and enjoyment of property". Public nuisances generally affect the health, safety, and property interests of the general public. Substantial interference means "offensive to a person of ordinary sensibilities". The attorney general normally enforces public nuisances, by seeking the remedy of abatement (fixing the nuisance). There may exist a private self-help right of abatement in the case of emergency. An individual could seek a cause of action for public nuisance by proving a harm different in kind (not just degree) from the one suffered by the general public.

While the harmful wind energy generated by Windwall indisputably harmed the fisherman's fish, it is arguable whether this is a harm suffered by the general public at all. After all, those aren't specifically

"fish", only found in rocky crags below sea level, not all local marine life. Additionally, SCFF's acts of using nets on the windmills are not permissible self-help abatement. Thus, this fails, small likelihood.

Trespass

plaintiff's windmill Defendants: SCFF, Barney

windmill has a likely action against SCFF and Barney for trespass. The defendants acted in concert to trespassing. Thus, windmill could recover against them for damages to the windmill, actual damages the business suffered while the windmills were not functioning, and any resulting lost profits,

Wrongful death

plaintiff's designated plaintiff(s) (Brady's wife, family) Defendant: Windmill - Brady's surviving family (if any) could attempt to sue windmill for wrongful death. Wrongful death is a statutory private right of action allowing recovery for death. However, without more facts and a wrongful death statute, it is unclear if it would succeed, ~~but~~

Survival-negligence

plaintiff - Brady's estate Defendant - windmill,

Another statutory cause of action is survival. It allows

a decedent's estate to pursue any cause of action. The decedent would be able to bring while alive. If there is an applicable survival statute, Brady's estate would pursue a negligence claim, likely arguing Windwall owed a duty to Brady to prevent him from falling off the cliff.

An owner of land owes a duty to trespassers only when the trespasser is actually discovered, the duty to actually discovered trespassers is a duty to warn of specific known hazards.

Brady (and SCSF) were not actually discovered trespassers. They snuck onto the property, at night, Windwall would have owed a duty if they were invitees which entails a duty to inspect and correct any dangerous conditions. But, since Brady was not actually discovered, no duty was owed. To take future precautions, Windwall may want to fence off the cliff, or post warning signs. Thus, this claim likely fails.

Defamation

P^t, ~~Windwall~~ Pete and Puck D^t, Harry and Barney Pete and Puck may have a defamation claim against Harry and Barney.

In defamation, the common law elements include; a statement, of and concerning the plaintiff, that is

materially false, and defamatory, that is published, with fault, and damages. Damages are presumed for libel per se, slander per se, and libel per quod. The flyer is written, and clearly refers to Pete and PUCK. Thus, it is libel per se.

The flyers are the statement, they are offend concerning Pete and PUCK, who are both living and ascertainable. It makes reference to what they knew and intended, which is materially false. It was published -- meaning publication in the narrow sense of being heard and understood (economopous) through the act of distribution.

However, the damage to the community is a matter of public concern. Under Gertz, when the plaintiff is a private figure in a public concern, they establish fault by negligence. But only actual damages. They must establish constitutional malice to receive punitive and presumed damages.

Finally, to be defamatory, a statement must expose the plaintiff to contempt/ridicule/hatred/distrust /obloquy, or have a tendency to instill their officership, see Bell v. Orlando Newspapers.

* The contents of the flyers fit the above definition. Because Pete and PUCK are private citizens in a public concern, they need only prove negligence, but the contents of the flyer seem to

to induce constitutional malice - meaning knowledge of falsity or reckless disregard of the falsity. The flyer was published with reckless disregard of its falsity as to Pete and Puck knowing the soundwaves' effects under Sullivan and St. Amant, thus they can establish ^{constitutional} ~~actual~~ malice and receive presumed and punitive damages, unless Barney and Harry can establish the qualified privilege of making a statement in the interests of the public. Finally, Pete and Puck may have separate causes of action against Barney and Harry. For each republication of the flyers, if foreseeable, thus, while Barney and Harry could potentially raise the privilege of statement in interest of others, Pete and Puck should pursue this claim.

Intrusion

plaintiff: Puck Defendant: Petrick

- Invasion of privacy, or right to privacy, consists of four separate torts, one, and the most common one, is intrusion.

To be actionable, the intrusion must be objectionable to the reasonably prudent person, affect an interest in which the plaintiff has a reasonable expectation of privacy, and while the intrusion does not need to be for pecuniary gain, it must be intended to harm plaintiff's interest.

surreptitiously taking photos, as Pedrick did, is actionable as intrusion, Pedrick intended to harm Puck's interests, intruded upon Puck's reasonable expectation of privacy, and such actions are objectionable to the reasonably prudent person. Note that ~~not~~ Thus, Puck can likely recover for any harm to his reputation caused by the photo (which, under intrusion, may besmell). Puck can recover for mental distress.

~~False Light~~

If Puck S; Pedrick

Puck's better option would be to pursue false light. To be actionable, the defendant

Injurious falsehood

If Pete and Puck S; Barney and Harry

- For the flyers, Pete and Puck may also have a claim of injurious falsehood against Barney and Harry.

Injurious falsehood is essentially defamation without defamatory content. But, as defamation is largely disfavored by modern courts, Pete/Puck may have a better chance of recovering under this theory.

They must be able to prove their statement, of and concerning them or their proprietary interests, that is false (which is not presumed), that is published (narrow sense), with common law malice (intent), and relied upon by third parties to

Injurious Falsehood

Tra pecuniary harm. This would likely fail, as Puck and Puck cannot prove the fibs resulted in pecuniary harm or were relied upon.

Injurious Falsehood

T^t, Puck A^s, Pedrick

- Puck may be able to pursue Injurious Falsehood against Pedrick. See above analysis for elements.
- However, Puck would be unlikely to prove actual pecuniary harm or reliance, thus, this would fail.

Defamation

T^t, Puck Swindell A^s, Pedrick

- Puck and Swindell could potentially pursue a cause of action in defamation against Pedrick for the handbill he distributed with Puck's photo. See the above analysis regarding the defamation claim against Harry and Dainey for the elements of defamation. Again, this is a matter of public concern, and the plaintiffs are public figures. The use of the photo and contents are defamatory, and Pedrick here clearly arguably meets the ^{constitutional} ~~actual~~ malice standard, even though negligence would be enough. Thus, this is likely successful, though Pedrick may attempt to use the First Amendment defense to show substantial truth as a defense.

False Light

The Timesweek v. Pedrick.

False light is an actionable privacy action when a defendant uses true information to create a false impression that is objectively false to the public. In other words, improper association.

While the "rating" was only conceivably referring to Timesweek and technically true, Timesweek was improperly associated with the false allegations in the handbook.

SL: Storage of dangerous items

The homeowners and fishermen v. Windwell.

Under Rylands v Fletcher, there may be strict liability when items not inherently dangerous escape storage and cause harm. This is a category of strict liability, also requiring causation in fact and actual harm. The non-natural structure aspect of Rylands has eroded in modern law.

What is not inherently dangerous, but when released, it can cause harm, and it did here.

To the fish and nearby structures, thus, Windwell could potentially be strictly liable for harm it's not fully caused.

SL abnormally dangerous activities

The above theory of storage of dangerous things is the most likely theory of strict liability. The fishermen and homeowners can pursue. They are not likely to satisfy the rest of the factors for abnormally dangerous activities, including appearance of location, gravity of harm, and degree of harm.

Private nuisance

If homeowners sue Windwell,

For the cracks in their homes and fences, the homeowners may be able to prove substantial interference with the rights of use and enjoyment of their property. They did not come to the nuisance, Windwell came after them. While the nuisance created, it did cause the damage. Thus, there is potential thus claim could succeed.

Private nuisance

If fishermen sue Windwell

for the same reasons stated above, The fishermen may have a potential private nuisance claim against windwell.