

Civil Procedure
Professor Sachs
Final Exam, Fall 2012

Please answer each of the following four questions. You're welcome to use any paper or electronic materials you have brought with you, but not the Internet.

Each question is worth a specified number of points out of 100, and is accompanied by a recommended time allocation. The recommendations build in an extra fifteen minutes at the beginning (to read through the whole thing) and five minutes at the end (for proofreading).

Make sure that you read each question carefully, and take a few minutes to outline each answer before beginning to write. If you just dive in, you'll get lost halfway through. Organize your answers clearly. Also, to facilitate grading, please answer the four questions in the separate spaces provided by the exam software. There are no page or word limits (though brevity is appreciated).

Unless you're given specific details to the contrary, you should assume that every party is properly served, every pleading is properly pleaded, that every motion or brief presents the best arguments available to the party filing it, and so on. But don't try to invent new and helpful facts not mentioned in the exam. *Not every fact you're given is relevant, and not every question or issue has a definite legal answer.* If you're uncertain, say what you think the answer probably is, and why it's not a sure thing. Also, if there are multiple considerations pertaining to a particular legal result, you should give as many as are relevant—even if just one of them might ordinarily be enough to end the case.

You don't need to follow the "IRAC" format with rigor (or any other particular memo-writing structure). But it helps to state an applicable legal standard before applying it. Citations to individual rules or statutes are helpful, though complete chapter-and-verse isn't necessary so long as you state the substance correctly. The same is true for relevant cases.

Answers will be graded on your understanding and analysis, as well as on clarity of exposition. Each individual question on the exam will be curved, to reward those who do well on hard questions, and then the exam as a whole will be curved. Final grades will be calculated in compliance with Duke's grading policies.

Good luck!

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Question I. (65 points) (≈ 2 hrs. 25 min.)

Capt. Gladys Stoutpamphlet, U.S. Navy (Ret.), is a well-known explorer of the Arctic. On a recent trip, she claimed to have located the elusive Woolly Northern Penguin on an ice floe off the coast of Nunavut, Canada. Her famous photograph of the penguin was featured on the cover of a sold-out issue of *People Magazine*.

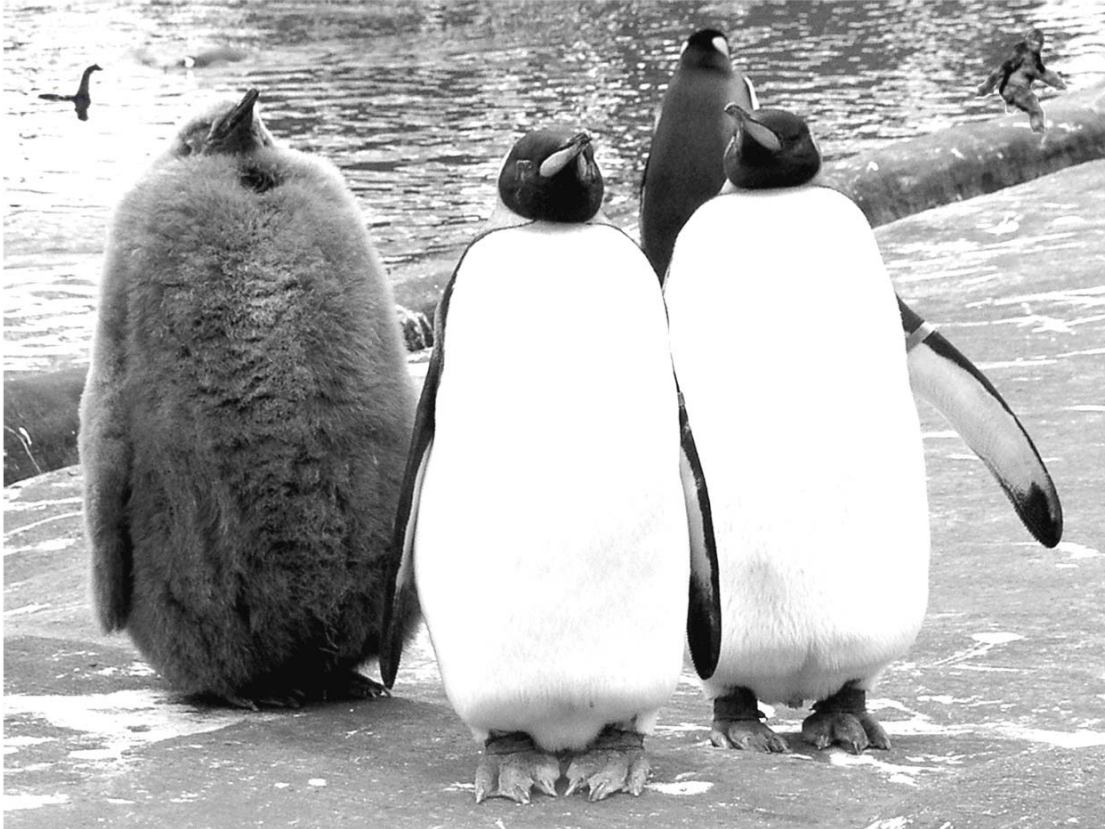


Fig. 1. The celebrated “Stoutpamphlet Photograph.” The wooly penguin is at left.
© 2012 Time Inc. Used by permission.

Stoutpamphlet became a local hero in her home state of Maine. Her hometown of Frenchboro was renamed “Stoutpamphlet, Maine,” and she soon became the face of nationwide advertisements for Maine blueberries, Maine tourism, and Maine lobster conservation initiatives.

Controversy then erupted when a rival explorer, Tom Aniseed of Missoula, Montana, publicly accused Stoutpamphlet of inventing the wooly penguin species. He suggested that she had staged the photo by capturing a regular penguin and dressing him in a brown woolen sweater. Aniseed regularly discussed the matter with his nephew, Theodore Fennel of Anaheim, California, and he urged Fennel to do something about it.

At the time, Fennel was a junior designer at Snark Tees, a California T-shirt manufacturer based in Anaheim. With his uncle's encouragement, Fennel designed a line of T-shirts critical of Stoutpamphlet. The front of the shirts featured Stoutpamphlet's photograph with the word "FAKE" superimposed. The back of the shirts bore the phrases "Team Aniseed" and "Stoutpamphlet Lied; Penguins, Hide!"

Snark manufactures T-shirts in a factory in Brazil. It sells the T-shirts directly to consumers via its website, which is hosted on servers in Virginia and can be accessed throughout the United States (and, indeed, the world). The bulk of Snark Tees' business is on the West Coast, though it does a brisk business in many regions of the country. For example, its "Got Syrup?" T-shirts celebrating the 2011 National Maple Syrup Festival found many buyers in Vermont, Maine, New Hampshire, and New York.

Twenty of Fennel's T-shirts were ordered over the website by Revolution Shirts. Revolution is organized as a New Hampshire corporation, but it has no facilities there. It only operates a single T-shirt store in Jonesport, Maine. The web order was placed from Revolution's store computer and listed the company's official post office box in New Hampshire as the billing and shipping address. Once the shirts arrived at the post office, Revolution drove them across the border and resold them to customers in Maine.

Many Maine residents felt betrayed by Stoutpamphlet's apparent deception. Protest marches occurred outside her home, but she continued to maintain her innocence.

Stoutpamphlet sued Aniseed for defamation in the U.S. District Court for the District of Montana. As required by Montana law, she argued that Aniseed's statement was false, was damaging to her reputation among Montana residents, and was made either with knowledge that it was false or in reckless disregard of the truth (that is, after the speaker recognized that the statement might well be false and decided not to investigate further). A dramatic trial followed, in which Stoutpamphlet's attorney led a family of Woolly Northern Penguins into the courtroom, sat them at the counsel's table, and entered them as Plaintiff's Exhibit B. Stunned, the jury returned a verdict in Stoutpamphlet's favor in the amount of \$80,000.

Stoutpamphlet has now brought another suit against Snark, Fennel, and Revolution in the U.S. District Court for the District of Maine. She is joined in her suit by Time Inc. (the publisher of People Magazine), to which she had sold her copyright in the photograph. Time Inc. is a Delaware corporation with its principal place of business at 1271 Avenue of the Americas, New York, NY. It is a wholly-owned subsidiary of Time Warner Inc., another Delaware corporation, which has its principal place of business at One Time Warner Center, New York, NY.

The complaint asserts two claims: a defamation claim under Maine law on behalf of Stoutpamphlet, and a copyright claim under 17 U.S.C. § 501(b) on behalf of Time. Time alleges that Revolution violated their copyright by distributing the photo on T-shirts in Maine, contrary to 17 U.S.C. § 106(3), and that Snark and Fennel bear secondary liability for enabling that violation. Time seeks statutory damages from the defendants of between \$750 and \$30,000 for each T-shirt sold.

Among other things, Stoutpamphlet alleges (i) that the statements on the T-shirts were false, (ii) that her reputation among Maine residents was damaged by the T-shirts' advertisement and sale, and (iii) that the defendants made or distributed the statements on the T-shirts in reckless disregard of the truth. Stoutpamphlet also alleges that the defamatory statements on the T-shirts fall outside the First Amendment's guarantee of free speech, and that they were so harmful to her reputation that \$2.5 million in joint and several damages would be appropriate.

The defendants have not yet answered the complaint. Instead, their lawyers recommended a scorched-earth approach of raising a wide variety of defenses by motion. They have jointly filed a motion to dismiss all claims based on subject-matter jurisdiction, personal jurisdiction, improper venue, improper joinder of Time Inc., and absence of an indispensable party (namely Aniseed).

Furthermore, the defendants have jointly filed a special motion to dismiss Stoutpamphlet's defamation claim under a Maine statute. Maine has what is known as an "anti-SLAPP" law, designed to stop "Strategic Litigation Against Public Participation (SLAPP)." The relevant portion of the law states as follows:

§ 7. Protecting Free Speech by Stopping Abusive Lawsuits.

(a) IN GENERAL.— All speakers shall have the right to exercise their freedom of speech under the Maine and U.S. Constitutions without fear of burdensome litigation or intrusive discovery practices.

(b) SPECIAL MOTION TO DISMISS.—

(1) IN GENERAL.— A defendant in any suit for libel, slander, or defamation may bring a "special motion to dismiss."

(2) LEGAL STANDARD.— The court must grant the special motion and dismiss the plaintiff's claim unless it finds, after a proper

showing by the plaintiff, that the plaintiff is likely to succeed in proving that the statements on which the suit is based—

- (A) were false;
- (B) caused injury to the plaintiff's reputation; and
- (C) were made by the defendant—
 - (I) with knowledge that they were false, or
 - (II) in reckless disregard of the truth.

(3) TIMING.— The court must hear and decide a special motion as expeditiously as possible. Upon filing of the special motion, all discovery must be stayed until the special motion is decided.

The defendants accompanied their special motion to dismiss with affidavits stating that they had investigated the matter before they distributed the shirts and that, at the time, they had wholly believed Aniseed's accusation to be true.

Stoutpamphlet has filed her own motion for partial summary judgment against each defendant, based on claim preclusion and on issue preclusion as to her allegations (i)–(iii). Attached to her motion are certified copies of the opinion and judgment in the Montana litigation. She has also moved to compel Aniseed to submit to an interview by a psychiatrist, arguing that he is a pathological liar whom the defendants should not have trusted. Finally, citing Rules 12(b), 12(d), and 56, she has filed a motion requesting that the court continue discovery and postpone its decision on the defendants' special motion to dismiss until she can depose the defendants to find out what they actually believed about Aniseed's allegations at the time.

You are clerking in the District of Maine. Your judge is now considering (1) the defendants' motion to dismiss all claims, along with (2) Stoutpamphlet's motion for partial summary judgment, (3) her motion to compel a psychiatric interview, and (4) her motion to postpone a decision on the defendants' special motion. Unless (4) is granted, the court will then go on to consider (5) the defendants' special motion to dismiss Stoutpamphlet's claim.

Your research into state law has revealed that, under the law of Maine (as well as every other relevant state), publishing or distributing someone else's statements can still qualify as defamation under certain criteria—criteria that would be satisfied by

Stoutpamphlet's allegations (i)–(iii), if true. You have also found that the Maine long-arm statute lets state courts exercise jurisdiction to the maximum extent allowed by the Due Process Clause of the Fourteenth Amendment. Finally, all relevant states use the same claim and issue preclusion rules as the federal courts, and none of them permit a contribution suit by the publisher or distributor of a defamatory statement against the original speaker.

What rulings would you recommend on these motions, and why?

Question 2. (16 points) (*≈ 35 min*)

Below are seven sets of things—pairs and triplets—that may seem similar to each other, but aren't. **For each set, *briefly* describe each thing, explain what role it plays in the law (that is, why we have it around), and show how it differs from the other thing(s) in the set.**

(A few sentences is plenty. So, if the pair were “Compulsory and permissive counterclaims,” an answer might read: “Compulsory counterclaims have to involve the same transaction or occurrence as the first claim. We make you raise them to avoid extra suits between the same parties for the same events; this way the court deals with everything relating to that transaction at once. Any other counterclaims are just permissive. We let you bring them if you want, because you’ve already been dragged into court by that person anyway, so we might as well hear your claims against them while we’re at it.”)

1. Attorney-client privilege and the work-product doctrine.
2. Declaratory relief and injunctive relief.
3. Magistrate judges and Article III judges.
4. Motions to dismiss and motions for judgment on the pleadings.
5. Impleader and interpleader.
6. Interrogatories, document production requests, and subpoenas *duces tecum*.
7. Class actions under 23(b)(1), (2), and (3).

Question 3. (*1 point*) (*≈ 0 min*)

Multiple Choice: **In general, how broad is the subject-matter jurisdiction of state courts?**

- A. broad
- B. somewhat broad
- C. very, very, very broad
- D. not that broad at all, really

Question 4. (18 points) (*≈ 40 min*)

The Rules Committee is considering an amendment to Rule 50 that would cause it to read as follows. (Deleted text is in ~~strike through~~; added text is underlined.)

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

(a) JUDGMENT AS A MATTER OF LAW.

(1) *In General.* If a party has been fully heard on an issue during a jury trial and the court finds that ~~a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue~~ a verdict for the party on that issue would be contrary to the weight of the evidence, the court may:

...

How would this amendment change the law? If it were adopted, would any other provisions in the rules or the statutes have to be changed as well? What would the practical consequences of all these changes be? Is the amendment a good idea?

(End of Exam)