

PART I
ESSAY #1
(Suggested time: One hour)

Junction City holds several annual parades, festivals and fairs to encourage community participation and patriotism. The most anticipated and largest civic gathering is on the Fourth of July (the “Junction City Salutes America’s Birthday Festival”). On July 4 the City Fair Grounds on the banks of Patriot Lake are jammed with people lined up for arcade booths and thrilling amusement rides. The afternoon brings the judging of the local 4-H Club livestock and crop competitions. In the evening, the Junction City Symphony Orchestra offers a free concert (consisting, naturally, of American music). Finally, after twilight turns to darkness, Junction City presents the state’s largest and consistently most imaginative fireworks display.

The fireworks show always attracts attention from the national press. Each year the flashing exhibit contains complex explosions that depict cherished patriotic icons such as the American Flag or the profiles of the four Presidents at Mt. Rushmore.

Two years ago Mayor Penny Pringle again hired Darryl Dynamo to direct the fireworks display for 2008. Dynamo is one of the leading pyrotechnicians in the nation. (People who plan and manage fireworks exhibits are called pyrotechnicians or “pyros.”)

Pyros are heavily regulated by state law. They must be licensed by the state. The pyro must pass a written examination and submit evidence of qualification and experience. After a criminal background investigation by the Director of Fire Protection, if the license is granted it still must be renewed every year. Dynamo has been successfully renewing his license for more than 20 years. Before any fireworks display, the pyro must guarantee an adequate security force for crowd control and to make sure spectators are kept away from the staging area. Finally, the pyro must obtain a surety bond or a certificate of insurance for each event in the amount of \$1 million coverage for each occurrence of bodily injury or property damage.

Dynamo maintains a full-time security force on his payroll. He had no problem obtaining the required insurance certificate since his safety record was spotless.

Dynamo carefully planned an elaborate fireworks display of color, patriotism and dazzle. One of his “surprise displays” was to spell out the name of the Mayor and her family in red, white and blue lights. Dynamo had been researching old issues of the Junction City Bugle and the birth records registry. He planned to “write out” the names of Mayor Pringle, her husband Paul and children Pamela and Peter. Because his research was so thorough, Dynamo thus became one of the few people in town to know that Pamela had been born out of wedlock 30 years ago and Mayor Pringle had relinquished the infant child for adoption.

Dynamo and his crew began setting up the fireworks. He carefully numbered each fireworks shell and stuffed them into well-placed mortar tubes that had been buried into the ground to anchor them. Almost a thousand fireworks shells were set to be used during the display.

July 4 arrived. As usual, Dynamo was at the fireworks staging area where he explained the display to members of the media to provide background for extensive coverage. At the end of the briefing, as the group was leaving the fireworks staging area, Randy Reporter suddenly dropped his notebook. When he bent over to pick it up, he lost his balance and fell against Mortar Tube #976. No one had noticed, but the force of his fall knocked the tube slightly askew so that instead of facing north (out to Patriot Lake where it would explode in a cascade of color), it instead faced east pointing towards the official reviewing stand where the Mayor and other dignitaries would be sitting. Randy picked himself up and ran after the rest of the reporters.

Later that day, the concert by the Junction City Symphony Orchestra was enjoyed by the hundreds of thousands of spectators. The fireworks exhibition began 4 minutes later, at about 9 pm. The crowd applauded and yelled with delight and awe as the colorful spectacle exploded into the night. Approximately eighty percent through the show, Mortar Tube #949 started the "Tribute to the Mayor" sequence. The crowds screamed as multi-colored explosions spelled out "Penny Pringle. Paul." The crowds continued to applaud but Mayor Pringle and her family at the reviewing stand were stone-faced with shock when the name "Pamela" then appeared, followed by "Peter." The Police Chief leaned over to the Mayor and said "I didn't know you had a daughter named Pamela." The Mayor was unable to answer as the fireworks show continued.

A few seconds later, Rocket #974 created a cascade of green and yellow lights. Rocket #975 followed that with a series of blue waterfalls. The automated program continued. Within a few seconds the shell inside #976 detonated and the rocket was launched to the east instead of out over the lake to the north. The rocket exploded on the ground in front of the reviewing stand, injuring the Mayor and several other people.

Mayor Penny Pringle (as a private person, obviously) has sued Dynamo for strict liability for her personal injuries because of the explosion, and for invasion of privacy for revealing that she had a daughter named Pamela. All of the foregoing facts have been entered into evidence by the parties. At the conclusion of the evidence, Penny Pringle has moved the court for a directed verdict on the issue of strict liability. At the same time, Dynamo has moved for a directed verdict on the claim for invasion of privacy. Please discuss how the court should rule on these two motions.

END OF ESSAY #1

PART I
ESSAY #2
(Suggested time: One hour)

The cause of action for malicious prosecution began as a remedy for unjustifiable criminal proceedings. The current plaintiff is complaining because the defendant unjustifiably instigated an earlier criminal prosecution against the plaintiff, causing the plaintiff expense and perhaps loss of reputation due to being investigated, and possibly arrested and tried by the appropriate criminal justice authorities. The injustice felt by one who has been wrongly prosecuted is clear enough.

The chief policy against redress for such a victim is that prosecutions of the arguably guilty should not be discouraged by the threat that the complaining witness will be held liable in civil damages. However, keep in mind that in such instances the plaintiff is generally barred from suing the police or district attorney for false arrest due to sovereign immunity. The multiple required elements of a suit for such malicious criminal prosecution tend to erect roadblocks to the plaintiff; those who can overcome such roadblocks then deserve the right to seek redress.

Expanding such a tort to “malicious civil prosecution,” however, does not have the same justifications. The plaintiff has not been exposed to prosecution by the plaintiff’s own government, but rather a leveled playing field of prosecution by another citizen. Because that other citizen is also a party in front of the civil court (unlike a complaining witness in a criminal matter), the civil court is able to deal with any “malicious” conduct through its inherent powers to sanction a party (everything from a fine to dismissal of the lawsuit). Moreover, if a second court could impose liability for what was done in the first, then a third court could question the second, and a fourth could question the third. Much more substantially, the first court’s resolution of the issues represents the appropriate solution to the dispute.

Commentators refer to malicious civil prosecution as a “disfavored action.” But should it even be a cause of action in the first place? Consider the following observations from various legal scholars concerning a current malicious prosecution action based on an underlying civil action:

#1 – J. Harper Lee:

Although the bar imposes professional restraints on how lawyers may handle the defense of a civil action, tort law does not impose civil liability on defendants or their lawyers for the malicious assertion of false and baseless defenses. This one-sided development of the law is anomalous. Defendants frequently find that it serves their financial advantage or collateral personal motives to deny claims they know are valid and justified. In effect the law, while condemning malicious conduct by plaintiffs, tolerates defendant misconduct.

In the absence of an effective remedy to compensate plaintiffs for injuries resulting from defendants’ bad faith defensive tactics, a defendant can deny a valid claim

from the pleading stage through the appeal with no fear of repercussions in the form of a subsequent civil suit. Presently, the worst consequence imposed on such a defendant is to require him to pay the amount owed in the first place. In the interim, the defendant has use of the disputed funds. A bad faith defense, however, may subject the defendant to liability for sanctions, including attorney's fees, by the court even when no statute so provides and this accomplishes most of the purposes of a malicious prosecution action. That same remedy by the court against an overzealous and malicious plaintiff should also supplant a separate civil action.

#2 – Judge David B. Sweet:

It is in the interests of the proper administration of justice that counsel should be courageous and fearless in the discharge of their duties; and, in fact, fearlessness and courage are among the principal elements that lead to professional success. As we cannot have a strong court without courageous and fearless judges, so it is impossible to have a strong bar without courageous and fearless attorneys. Both operate together in a common cause, as parts and parcels of the judicial system, to bring about the best results. We must proceed with caution lest we deprive the zealous advocate of his independence in fearlessly presenting a debatable legal cause. Loyalty and devotion to a client should be treated as a badge of merit and not serve as evidence of malice or culpable conduct.

#3 – Suzanne B. Goldberg:

The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is compelled to defend against a fabricated claim, which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also to the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings. In recognition of the wrong done the victim of such a tort, settled law permits him to recover the cost of defending the prior action including reasonable attorney's fees, compensation for injury to his reputation or impairment of his social and business standing in the community, and for mental or emotional distress.

Use the foregoing dialogue and your understanding of the purposes of tort law as a starting point. Based on the above, and using examples as necessary, please analyze and discuss whether malicious civil prosecution should remain a tort and, if so, with what elements and under what conditions or limitations.

END OF ESSAY #2

END OF PART I