

A man lived in a lakefront home. The man suspected that his neighbor was emptying her septic tank into the lake. Although he did not have any tangible proof, the man had seen the neighbor putting a large hose that led from an area in the neighbor's backyard where the septic tank was located into the lake late at night. Based upon this observation, the man identified the neighbor by name and made the following statement to a local reporter: "She is polluting the lake and ruining its ecosystem by dumping the contents of her septic tank into it every night!"

The reporter published the statement in the newspaper. Upon reading it, the neighbor was horrified because in actuality she had simply been pumping water from the lake into her backyard.

If the neighbor brings a defamation action against the man, will the neighbor be likely to prevail?

- A. No, because pollution of the lake is a matter of public concern.
- B. No, because the man did not act with actual malice.
- C. Yes, because the man acted negligently when he spoke to the reporter about the neighbor.
- D. Yes, because the reporter published the man's defamatory statement about the neighbor.

### **Explanation:**

At common law, **defamation** liability could be strict. This means that the plaintiff was not required to prove that the defendant was at fault (eg, knew that the defamatory statement was false). However, a number of Supreme Court decisions based on the **First Amendment** have since imposed the following **fault requirements**:

If the plaintiff is a **public official** or figure, the plaintiff must prove that the defendant acted with **actual malice**—ie, knowledge that the defamatory statement was false or reckless disregard for its falsity.

If the plaintiff is a **private person** and the defamatory statement involves a **matter of public concern**, the plaintiff must prove that the defendant was **at least negligent** as to the falsity of the statement.\*

Here, the man falsely told the reporter that the neighbor was dumping the contents of her septic tank into the lake. The neighbor is a private person and the man's statement involves a matter of public concern—the potential pollution and destruction of the lake's ecosystem. This means that the neighbor is constitutionally required to prove that the man was negligent. The neighbor can likely do so since the man made the statement to the reporter despite having no tangible proof that it was true. Therefore, the neighbor is likely to prevail (**Choices A & B**).

\*If the plaintiff is a private person and the defamatory statement involves a matter of private concern, then the constitutional requirements do not apply. However, most states today require at least negligence by the defendant for all defamation actions.

**(Choice D)** Defamation requires proof that the defendant published the defamatory statement by intentionally or negligently communicating it to a third party. And here, publication occurred when the man spoke to the reporter. However, the reporter may also be subject to defamation liability for republishing the man's statement.

### **Educational objective:**

A defamation plaintiff is constitutionally required to prove that the defendant acted with fault if the plaintiff is a public official or figure (actual malice required) OR a matter of public concern is involved (at least negligence required).

### **References**

New York Times v. Sullivan, 376 U.S. 254, 283–84 (1964) (holding that the First Amendment affects the plaintiff's right to recover under the common law tort of defamation).

Restatement (Second) of Torts §§ 580A, 580B (Am. Law Inst. 1981) (fault requirement for defamation of public or private person).

