

Chapter 10: Defamation and Privacy Extra Questions

Question 1

Critically discuss whether the tort of defamation strikes an equal balance between freedom of speech and the right to protect your reputation.

Answer guidance

To consider the two types of defamation: libel and slander – though following *Youssof v MGM Pictures Ltd* [1934] 50 TLR 581 there is some overlap. Note that mere abuse is not libel – *Byrne v Dean* [1937] 1 KB 818. Discussion of who cannot be libelled points to the limits of libel law – not local authorities or political parties. Highlight criticisms of libel law raised in *Steel and Morris v United Kingdom* [2005] 18 BHRC 545 and *BCA v Singh* [2010] EWCA Civ 350. Though the Defamation Act 2013, has codified the defences and introduced new defences in relation to the internet and libel, will have some effect. The requirement of s.1 Defamation Act 2013, that serious harm is needed, to deter using the libel laws to prevent free speech, also contains provisions to end so called libel tourism. But is still complex and costly. The Defamation Act has not really addressed issues of cost, and damages so arguably not really a full response to the criticisms of the old law.

Question 2

Dieter is a journalist for the local newspaper, The Daily Dish, where he writes about the local council. He suspects that local councillor, Jessica Lang, is misusing council funds to support her failing printing company, Words R Us, and is going to publish an article on this. Dieter did not give Jessica an opportunity to see the article before it was published even though the article contained serious allegations of financial misconduct. After writing the article he tells his wife Alina that, 'She is a liar and a thief – just like all councillors'.

Alina has written a letter to the Chief Executive of the local council, repeating the allegations made by Dieter. She leaves the letter on the kitchen table and the housekeeper Mallika reads it, even though it clearly says 'Private and Confidential'. Jessica is very angry when she sees the newspaper article in the Daily Dish. She argues that it has harmed her reputation and her business – though there is no evidence of this. She writes to the editor of the Daily Dish to remove the article from the newspaper's website, but it stays online for a week before it is removed.

Sally is an entertainment journalist on the Daily Dish, she recently saw a play which starred Jessica's sister Gert. In Sally's review of the play, she writes about Gert, 'She can't act, she can't sing, and she has a face like the behind of a bus.' Gert is upset by the review.

Discuss any possible legal action that can be taken.

Answer guidance

In each case, you will need to work out whether defamation takes place by reference to the elements in the first paragraph.

Jessica needs to show that the newspaper article was defamatory see *Sim v Stretch* [1936] 2 All ER 1237, *Berkoff v Burchill* [1996] 4 All ER 1008 and s.1 Defamation Act 2013 – where have to show that suffered serious harm. In relation to the business, would unlikely to be successful as no financial loss. Need to consider possible defences s.4 Defamation Act 2013 – Public interest defence. Similar to the *Reynolds v. Times Newspapers Ltd* [1993] 3 WLR 1010 defence in that the article was published in the public interest and in a responsible manner. So the question is by not allowing Julie to defend herself before publication whether responsible or not.

Then to consider the status of the online version – possible defence of innocent dissemination – but fact that waited a couple of days may mean less successful see *Godfrey v. Demon Internet* [1999] 4 All ER 342. S.5 of the Defamation Act 2013 would not apply as the newspaper was the operator of the website.

Remark to Alina not defamatory – groups cannot be defamed: *Knupffer v. London Express Newspapers Ltd* [1944] AC 116.

Mallika reading the letter – would not be deemed as publication per *Huth v Huth* [1915] 3 KB 32.

Gert would need to also argue per *Sim, Berkoff* etc that the article was defamatory, but following s.1 of the Defamation Act 2013, would have to show serious harm and question whether the article would satisfy this requirement.

Question 3

Jim Cruese and Katarina Lawrence are famous actors who are getting married. They have agreed an exclusive deal with Famous magazine to publish pictures of the wedding and of their honeymoon. The couple have hired an exclusive beachside hotel on a private island for the wedding. All wedding guests were made to sign an agreement forbidding them from bringing any electronic devices or revealing any pictures of the wedding. However, one of the cleaners sneaks a miniature phone in the cleaning trolley and manages to take a number of blurred pictures, which she sells to Okayish magazine.

Katarina has a drug problem and is photographed leaving an addiction clinic. This is published as a front page exclusive for the Daily Fail paper. Katarina is upset as she has managed to keep her addiction secret. She was also pictured with her daughter MoonSky.

Advise both Jim and Katarina as to any tortious remedies they may have.

Answer guidance

You need to think about the tort of breach of confidence and whether any relevant cases fit the facts.

To note that there is not a tort of privacy *Wainwright v Home Office* [2003] UKHL 53, but they can sue under the tort of breach of confidence. Regarding the wedding pictures see the case of *Douglas v Hello (No.3)* [2005] EWCA Civ 595, but following *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22 liability will only arise in relation to private and not public information, is likely to be regarded as private information also to refer to *Moseley v News Group Newspaper Ltd* [2008] EWHC 1777 (Q.B) and *Murray v Express Newspapers Plc* [2008] EWCA Civ 446.

More debateable in relation to Katarina being photographed leaving clinic, has invited the press into her home *McKennitt v Ash* [2006] EWCA Civ 1714 and the application of the second limb *Van Hannover v Germany* [2005] 40 EHRR 1, *RocknRoll v News Group Newspapers* [2013] EWHC 24 (Ch) relevant here – especially in relation to MoonSky.

Question 4

Critically discuss in what ways Tort law has attempted to protect a person's privacy.

Answer guidance

Your answer needs to address the traditional reluctance of the courts to introduce a tort of privacy (and why this was the case).

There has been some reluctance to have a tort of Privacy see *Wainwright v Home Office* [2003] UKHL 53. The courts have been prepared to extend the tort breach of confidence see the decisions in *McKennitt v Ash* [2006] EWCA Civ 1714 and *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22. Discuss when the two tests in these cases should be applied. Note that the courts are trying to strike a balance between privacy and freedom of speech. Arguably the tort of breach of confidence goes some way to protect privacy, but is not as conclusive as a specific tort of privacy might be due to the test of reasonable expectation of privacy see *McKennit, Van Hannover v Germany* [2005] 40 EHRR 1.