COURT OF APPEAL

KAYE v ROBERTSON & ANOTHER [1991] FSR 62

Full text

GLIDEWELL LJ:

The plaintiff, Mr Gorden Kaye, is a well-known actor, the star of a popular television comedy series. This formed the basis of a stage show in which the plaintiff was appearing in January 1990 … On 25 January 1990 Mr Kaye was driving his car on a road in London during a gale, when a piece of wood became detached from an advertisement hoarding, smashed through the windscreen of the plaintiff's car and struck him on the head. The plaintiff suffered severe injuries to his head and brain. He was taken to Charing Cross Hospital where he was on a life support machine for three days. He was then in intensive care, until on 2 February he was moved into a private room, forming part of Ward G at the hospital.

It was apparent that there was intense interest amongst Mr Kaye's fans and consequently in many newspapers and in television, in Mr Kaye's progress and condition. For fear that his recovery might be hindered if he had too many visitors, and to lessen the risk of infection, the hospital authorities placed notices at the entrance to the ward asking visitors to see a member of the staff before visiting. Mr Froggatt agreed with the hospital authorities a list of people who might be permitted to visit Mr Kaye, and this was pinned up outside his room. A similar notice to that outside the ward was pinned on the door of the room itself.

The first defendant is the editor, and the second defendant company is the publisher, of Sunday Sport, a weekly publication which Potter J, from whose decision this is an appeal, described as having 'a lurid and sensational style.' A copy of a recent edition of Sunday Sport which was put in evidence before us shows that many of the advertisements contained in it are for various forms of pornographic material. This indicates the readership it seeks to attract.

Until 13 February 1990 Mr Kaye had not been interviewed since his accident by any representative of a newspaper or television programme. On that day, acting on Mr Robertson's instructions, a journalist and a photographer from Sunday Sport went to Charing Cross Hospital and gained access to the corridor outside Ward G. They were neither seen nor intercepted by any of the hospital staff. Ignoring the notices on the door to the ward and on the plaintiff's door, they entered the plaintiff's room. Mr Kaye apparently agreed to talk to them and, according to a transcript that we have heard of a taped record they made of what transpired, did not object to their photographing various cards and flowers in his room. In fact a number of photographs, both in colour and monochrome were

taken of the plaintiff himself showing the substantial scars to his head amongst other matters. The taking of the photographs involved the use of a flashlight.

After some time members of the nursing staff of the hospital learned what was happening. They attempted to persuade the journalist and the photographer to leave, but without success. Security staff were called, and the representatives of Sunday Sport were ejected.

Medical evidence … [states] that Mr Kaye was in no fit condition to be interviewed or to give any informed consent to be interviewed. The accuracy of this opinion is confirmed by the fact that approximately a quarter of an hour after the representatives of Sunday Sport had left his room, Mr Kaye had no recollection of the incident.

According to Mr Robertson's affidavit, he regards what he and his staff had achieved as 'a great old-fashioned scoop.' He makes it clear in his affidavit that he realised that a number of newspapers were interested in interviewing and taking photographs of Mr Kaye, and that some of them would 'pay large sums of money for the privilege.' He says, disingenuously, 'I do not think it unreasonable to attempt a direct approach in order to get a free interview. The plaintiff only had to refuse.'

The defendants made it clear that they intended to publish an article in Sunday Sport about the interview with the plaintiff, using one or more of the photographs that had been taken. A draft of the article as originally prepared is exhibited to Mr Robertson's affidavit. It was intended to be in two parts, a front page lead with a banner headline and a full story inside the newspaper. The wording of both parts of the article made it clear that the defendants were saying that Mr Kaye had agreed to be interviewed and to be photographed and described the interview and pictures as exclusive to Sunday Sport.

…

Potter J … granted an injunction against the defendants in the following terms:

'1. The Defendants and each of them whether by themselves, their servants or agents or otherwise be restrained from publishing, distributing, or causing to be published or distributed by any means howsoever or by otherwise exploiting:

(a) any photographs or part of any photographs taken of the Plaintiff at the Charing Cross Hospital on 13th February 1990:

(b) any statement made by the Plaintiff in the presence of any servant or agent of the Second Defendants at Charing Cross Hospital on 13th February 1990 or any summary or record thereof until trial or further order;

2. The Defendants and each of them be restrained whether by themselves, their servants or agents or otherwise from passing off any photograph or part of a photograph taken of the Plaintiff at Charing Cross Hospital on 13th February 1990 as a photograph consented to by the Plaintiff and from passing off any statement made by the Plaintiff in the presence of any servant or agent of the Second Defendants in Charing Cross Hospital on 13th February 1990 as a statement voluntarily given by the Plaintiff to The Sunday Sport until trial or further order;

3. The Defendants and each of them be restrained whether by themselves, their servants or agents or otherwise from publishing or causing to be published any statement to the effect that the Plaintiff had posed for a photograph for publication in The Sunday Sport and/or had given an interview to The Sunday Sport while in Charing Cross Hospital for treatment until trial or further order;'

The judge also ordered the defendants to deliver up 'any tape-recording, notes of interview or photographs obtained or taken by any servant or agent of the Second Defendants in Charing Cross Hospital on 13th February 1990 and any copies of negatives thereof.'

The defendants appealed against the judge's order … At the conclusion of the hearing we announced our decision which was to the effect that the appeal was allowed to the extent that we discharged the order made under heads 1 and 2 set out above, and that we substituted for the order under head 3 an order in the following terms:

'The Defendants and each of them be restrained until trial or further order whether by themselves their servants or agents from publishing causing to be published or permitting to be published anything which could be reasonably understood or convey to any person reading or looking at the Defendants' Sunday Sport newspaper that the Plaintiff had voluntarily permitted any photographs to be taken for publication in that newspaper or had voluntarily permitted representatives of the Defendants to interview him while a patient in the Charing Cross hospital undergoing treatment.'

In place of the order for delivery up, we accepted an undertaking from the defendants' solicitors: 'that the material referred to in paragraph 4 of the aforesaid order will be kept in safe custody by the Defendants' Solicitors with the proviso that they shall be entitled to release it to the 1st Defendant to be used in any way which complies with the terms of the injunction aforestated.'

I now give my reasons for arriving at this decision.

It is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals.

In the absence of such a right, the plaintiff's advisers have sought to base their claim to injunctions upon other well-established rights of action. These are:

1. Libel

2. Malicious falsehood

3. Trespass to the person

4. Passing off.

The appeal canvassed all four rights of action, and it is necessary to deal with each in turn.

1. Libel

The basis of the plaintiff's case under this head is that the article as originally written clearly implied that Mr Kaye consented to give the first 'exclusive' interview to Sunday Sport, and to be photographed by their photographer. This was untrue: Mr Kaye was in no fit condition to give any informed consent, and such consent as he may appear to have given was, and should have been known by Sunday Sport's representative to be, of no effect. The implication in the article would have the effect of lowering Mr Kaye in the esteem of right-thinking people, and was thus defamatory.

The plaintiff's case is based on the well-known decision in Tolley v JS Fry & Sons Ltd [1931] AC 333. Mr Tolley was a well-known amateur golfer. Without his consent, Fry published an advertisement which consisted of a caricature of the plaintiff with a caddie, each with a packet of Fry's chocolate protruding from his pocket. The caricature was accompanied by doggerel verse which used Mr Tolley's name and extolled the virtues of the chocolate. The plaintiff alleged that the advertisement implied that he had received payment for the advertisement, which would damage his reputation as an amateur player. The judge at the trial ruled that the advertisement was capable of being defamatory, and on appeal the House of Lords upheld this ruling.

It seems that an analogy with Tolley v Fry was the main plank of Potter J's decision to grant injunctions in this case.

… In William Coulson & Sons v James Coulson & Co [1887] 3 TLR 46, this court held that, though the High Court has jurisdiction to grant an interim injunction before the trial of a libel action, it is a jurisdiction to be exercised only sparingly. In his judgment the Master of the Rolls said: 'Therefore to justify the court granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous and where if the jury did not so find the court would set aside the verdict as unreasonable.'

This is still the rule in actions for defamation, despite the decision of the House of Lords in American Cyanamid Co v Ethicon Ltd [1975] AC 396 in relation to interim injunctions generally. This court so decided in Herbage v Times Newspapers Limited and Others, unreported but decided on 30 April 1981.

…

It is in my view certainly arguable that the intended article would be libellous, on the authority of Tolley v Fry. I think that a jury would probably find that Mr Kaye had been libelled, but I cannot say that such a conclusion is inevitable. It follows that I … disagree with the learned judge; I therefore would not base an injunction on a right of action for libel.

2. Malicious Falsehood

The essentials of this tort are that the defendant has published about the plaintiff words which are false, that they were published maliciously, and that special damage has followed as the direct and natural result of their publication. As to special damage, the effect of section 3(1) of the Defamation Act 1952 is that it is sufficient if the words published in writing are calculated to cause pecuniary damage to the plaintiff. Malice will be inferred if it be proved that the words were calculated to produce damage and that the defendant knew when he published the words that they were false or was reckless as to whether they were false or not.

The test in Coulson v Coulson (supra) applies to interlocutory injunctions in actions for malicious falsehood as it does in actions for defamation. However, in relation to this action, the test applies only to the requirement that the plaintiff must show that the words were false. In the present case I have no doubt that any jury which did not find that the clear implication from the words contained in the defendants' draft article were false would be making a totally unreasonable finding. Thus the test is satisfied in relation to this cause of action.

As to malice I equally have no doubt from the evidence, including the transcript of the tape-recording of the 'interview' with Mr Kaye in his hospital room which we have read, that it was quite apparent to the reporter and photographer from Sunday Sport that Mr Kaye was in no condition to give any informed consent to their interviewing or photographing him. Moreover, even if the journalists had been in any doubt about Mr Kaye's fitness to give his consent, Mr Robertson could not have entertained any such doubt after he read the affidavit sworn on behalf of Mr Kaye in these proceedings. Any subsequent publication of the falsehood would therefore inevitably be malicious.

As to damage, I have already recorded that Mr Robertson appreciated that Mr Kaye's story was one for which other newspapers would be willing to pay 'large sums of money.' It needs little imagination to appreciate that whichever journal secured the first interview with Mr Kaye would be willing to pay the most. Mr Kaye thus has a potentially valuable right to sell the story of his accident and his recovery when he is fit enough to tell it. If the defendants are able to publish the article they proposed, or one anything like it, the value of this right would in my view be seriously lessened, and Mr Kaye's story thereafter be worth much less to him.

I have considered whether damages would be an adequate remedy in these circumstances. They would inevitably be difficult to calculate, would also follow some time after the event, and in my view would in no way be adequate. It thus follows that in my opinion all the preconditions to the grant of an interlocutory injunction in respect of this cause of action are made out. I will return later to what I consider to be the appropriate form of injunction.

3. Trespass to the person

It is strictly unnecessary to consider this cause of action in the light of the view I have expressed about malicious falsehood. However, I will set out my view shortly. The plaintiff's case in relation to this cause of action is that the taking of the flashlight photographs may well have caused distress to Mr Kaye and set back his recovery, and thus caused him injury. In this sense it can be said to be a battery.

Mr Caldecott, for Mr Kaye, could not refer us to any authority in which the taking of a photograph or indeed the flashing of a light had been held to be a battery. Nevertheless I am prepared to accept that it may well be the case that if a bright light is deliberately shone into another person's eyes and injures his sight, or damages him in some other way, this may be in law a battery. But in my view the necessary effects are not established by the evidence in this case. Though there must have been an obvious risk that any disturbance to Mr Kaye would set back his recovery, there is no evidence that the taking of the photographs did in fact cause him any damage.

Moreover, the injunction sought in relation to this head of action would not be intended to prevent another anticipated battery, since none was anticipated. The intention here is to prevent the defendants from profiting from the taking of the photographs, i.e. from their own trespass. Attractive though this argument may appear to be, I cannot find as a matter of law that an injunction should be granted in these circumstances. Accordingly I would not base an injunction on this cause of action.

4. Passing off

Mr Caldecott submits (though in this case not with any great vigour) that the essentials of the tort of passing off, as laid down by the speeches in the House of Lords in E Warnink BV v J Townend & Sons (Hull) Ltd [1979] AC 731, are satisfied here. I only need say shortly that in my view they are not. I think that the plaintiff is not in the position of a trader in relation to his interest in his story about his accident and his recovery, and thus fails from the start to have a right of action under this head.

Form of injunction

Before I turn to consider the form of an interim injunction which should be granted … In relation to the injunctions granted by Potter J, the wording of the first injunction was in my view wider than was necessary to prevent the defendants from doing that which was objectionable, i.e. publishing material from which the objectionable implication could be drawn.

The second injunction granted by Potter J was based upon the tort of passing off. I have already said that in my view the evidence does not prove the commission of this tort. It was for these reasons that, in common with my bretheren, I took the view that the first and second injunctions should be discharged. We considered that the third injunction was in general satisfactory but needed some amendment, and basing ourselves on the plaintiff's right of action in malicious falsehood, we granted the injunction in the terms set out above.

I therefore concluded that, to the extent I have indicated, the defendants' appeal should be allowed, but that they should be subject to an injunction in the terms which we have already announced.

BINGHAM LJ:

… Any reasonable and fair-minded person hearing the facts which Glidewell LJ has recited would in my judgment conclude that these defendants had wronged the plaintiff. I am therefore pleased to be persuaded that the plaintiff is able to establish, with sufficient strength to justify an interlocutory order, a cause of action against the defendants in malicious falsehood. Had he failed to establish any cause of action, we should of course have been powerless to act, however great our sympathy for the plaintiff and however strong our distaste for the defendants' conduct.

This case nonetheless highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens …

The defendants' conduct towards the plaintiff here was 'a monstrous invasion of his privacy' (to adopt the language of Griffiths J in Bernstein v Skyviews Ltd [1978] QB 479 at 489G). If ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties. It is this invasion of his privacy which underlies the plaintiff's complaint. Yet it alone, however gross, does not entitle him to relief in English law.

… Fortunately, a cause of action in malicious falsehood exists, but even that obliges us to limit the relief we can grant in a way which would not bind us if the plaintiff's cause of action arose from the invasion of privacy of which, fundamentally, he complains …

Full text

GLIDEWELL LJ:

The plaintiff, Mr. Gorden Kaye, is a well-known actor, the star of a popular television comedy series. This formed the basis of a stage show in which the plaintiff was appearing in January 1990. The show finished its run in London on 27 January 1990. Thereafter it was due to appear in Australia with the plaintiff in the lead. Mr. Peter Froggatt is a theatrical agent and a personal friend of Mr. Kaye. Since Mr. Kaye is at present incapable of managing his own affairs, in this action Mr. Froggatt is his next friend.

On 25 January 1990 Mr. Kaye was driving his car on a road in London during a gale, when a piece of wood became detached from an advertisement hoarding, smashed through the windscreen of the plaintiff's car and struck him on the head. The plaintiff suffered severe injuries to his head and brain. He was taken to Charing Cross Hospital where he was on a life support machine for three days. He was then in intensive care, until on 2 February he was moved into a private room, forming part of Ward G at the hospital.

It was apparent that there was intense interest amongst Mr. Kaye's fans, and consequently in many newspapers and in television, in Mr. Kaye's progress and condition. For fear that his recovery might be hindered if he had too many visitors, and to lessen the risk of infection, the hospital authorities placed notices at the entrance to the ward asking visitors to see a member of the staff before

visiting. Mr. Froggatt agreed with the hospital authorities a list of people who might be permitted to visit Mr. Kaye, and this was pinned up outside his room. A similar notice to that outside the ward was pinned on the door of the room itself.

The first defendant is the editor, and the second defendant company is the publisher, of Sunday Sport, a weekly publication which Potter J., from whose decision this is an appeal, described as having 'a lurid and sensational style.' A copy of a recent edition of Sunday Sport which was put in evidence before us shows that many of the advertisements contained in it are for various forms of pornographic material. This indicates the readership it seeks to attract.

Until 13 February 1990 Mr. Kaye had not been interviewed since his accident by any representative of a newspaper or television programme. On that day acting on Mr. Robertson's instructions, a journalist and a photographer from Sunday Sport went to Charing Cross Hospital and gained access to the corridor outside Ward G. They were neither seen nor intercepted by any of the hospital staff. Ignoring the notices on the door to the ward and on the plaintiff's door, they entered the plaintiff's room. Mr. Kaye apparently agreed to talk to them and, according to a transcript that we have heard of a taped record they made of what transpired, did not object to their photographing various cards and flowers in his room. In fact a number of photographs, both in colour and monochrome, were taken of the plaintiff himself showing the substantial scars to his head amongst other matters. The taking of the photographs involved the use of a flashlight.

After some time members of the nursing staff of the hospital learned what was happening. They attempted to persuade the journalist and the photographer to leave, but without success. Security staff were called, and the representatives of Sunday Sport were ejected.

Medical evidence exhibited by Mr. Frogatt to his affidavit in this action says that Mr. Kaye was in no fit condition to be interviewed or to give any informed consent to be interviewed. The accuracy of this opinion is confirmed by the fact that approximately a quarter of an hour after the representatives of Sunday Sport had left his room, Mr. Kaye had no recollection of the incident.

According to Mr. Robertson's affidavit, he regards what he and his staff had achieved as 'a great old-fashioned scoop.' He makes it clear in his affidavit that he realised that a number of newspapers were interested in interviewing and taking photographs of Mr. Kaye, and that some of them would 'pay large sums of money for the privilege.' He says, disingenuously, 'I do not think it unreasonable to attempt a direct approach in order to get a free interview. The plaintiff only had to refuse.'

The defendants made it clear that they intended to publish an article in Sunday Sport about the interview with the plaintiff, using one or more of the photographs that had been taken. A draft of the article as originally prepared is exhibited to Mr. Robertson's affidavit. It was intended to be in two parts, a front page lead with a banner headline and a full story inside the newspaper. The wording of both parts of the article made it clear that the defendants were saying that Mr. Kaye had agreed to be interviewed and to be photographed and described the interview and pictures as exclusive to Sunday Sport.

On Friday, 16 February 1990, upon Mr. Froggatt's undertaking by counsel to issue by noon on Monday, 19 February 1990 and serve on the defendants the writ in this action together with an

undertaking in the usual form as to damages, Potter J. on an application made on behalf of the plaintiff by Mr. Froggatt granted an injunction against the defendants in the following terms:

'1. The Defendants and each of them whether by themselves, their servants or agents or otherwise be restrained from publishing, distributing, or causing to be published or distributed by any means howsoever or by otherwise exploiting:

(a) any photographs or part of any photographs taken of the Plaintiff at the Charing Cross Hospital on 13th February 1990:

(b) any statement made by the Plaintiff in the presence of any servant or agent of the Second Defendants at Charing Cross Hospital on 13th February 1990 or any summary or record there of until trial or further order;

2. The Defendants and each of them be restrained whether by themselves, their servants or agents or otherwise from passing off any photograph or part of a photograph taken of the Plaintiff at Charing Cross Hospital on 13th February 1990 as a photograph consented to by the Plaintiff and from passing off any statement made by the Plaintiff in the presence of any servant or agent of the Second Defendants in Charing Cross Hospital on 13th February 1990 as a statement voluntarily given by the Plaintiff to The Sunday Sport until trial or further order;

3. The Defendants and each of them be restrained whether by themselves, their servants or agents or otherwise from publishing or causing to be published any statement to the effect that the Plaintiff had posed for a photograph for publication in The Sunday Sport and/or had given an interview to The Sunday Sport while in Charing Cross Hospital for treatment until trial or further order;'

The judge also ordered the defendants to deliver up 'any tape-recording, notes of interview or photographs obtained or taken by any servant or agent of the Second Defendants in Charing Cross Hospital on 13th February 1990 and any copies of negatives thereof.'

The defendants appealed against the judge's order. We heard the appeal on 23 February 1990. At the conclusion of the hearing we announced our decision which was to the effect that the appeal was allowed to the extent that we discharged the order made under heads 1 and 2 set out above, and that we substituted for the order under head 3 an order in the following terms:

'The Defendants and each of them be restrained until trial or further order whether by themselves their servants or agents from publishing causing to be published or permitting to be published anything which could be reasonably understood or convey to any person reading or looking at the Defendants' Sunday Sport newspaper that the Plaintiff had voluntarily permitted any photographs to be taken for publication in that newspaper or had voluntarily permitted representatives of the Defendants to interview him while a patient in the Charing Cross hospital undergoing treatment.'

In place of the order for delivery up, we accepted an undertaking from the defendants' solicitors: 'that the material referred to in paragraph 4 of the aforesaid order will be kept in safe custody by the

Defendants' Solicitors with the proviso that they shall be entitled to release it to the 1st Defendant to be used in any way which complies with the terms of the injunction aforestated.'

I now give my reasons for arriving at this decision.

It is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals.

In the absence of such a right, the plaintiff's advisers have sought to base their claim to injunctions upon other well-established rights of action.

These are:

1. Libel

2. Malicious falsehood

3. Trespass to the person

4. Passing off.

The appeal canvassed all four rights of action, and it is necessary to deal with each in turn.

1. Libel

The basis of the plaintiff's case under this head is that the article as originally written clearly implied that Mr. Kaye consented to give the first 'exclusive' interview to Sunday Sport, and to be photographed by their photographer. This was untrue: Mr. Kaye was in no fit condition to give any informed consent, and such consent as he may appear to have given was, and should have been known by Sunday Sport's representative to be. of no effect. The implication in the article would have the effect of lowering Mr. Kaye in the esteem of right-thinking people, and was thus defamatory.

The plaintiff's case is based on the well-known decision in Tolley v. J.S. Fry & Sons Ltd. [1931] A.C. 333. Mr. Tolley was a well-known amateur golfer. Without his consent, Fry published an advertisement which consisted of a caricature of the plaintiff with a caddie, each with a packet of Fry's chocolate protruding from his pocket. The caricature was accompanied by doggerel verse which used Mr. Tolley's name and extolled the virtues of the chocolate. The plaintiff alleged that the advertisement implied that he had received payment for the advertisement, which would damage his reputation as an amateur player. The judge at the trial ruled that the advertisement was capable of

being defamatory, and on appeal the House of Lords upheld this ruling.

It seems that an analogy with Tolley v. Fry was the main plank of Potter J.'s decision to grant injunctions in this case.

Mr. Milmo for the defendants submits that, assuming that the article was capable of having the meaning alleged, this would not be a sufficient basis for interlocutory relief. In William Coulson & Sons v. James Coulson & Co. [1887] 3 T.L.R. 46, this court held that, though the High Court has jurisdiction to grant an interim injunction before the trial of a libel action, it is a jurisdiction to be exercised only sparingly. In his judgment the Master of the Rolls said:

'Therefore to justify the court granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous and where if the jury did not so find the court would set aside the verdict as unreasonable.'

This is still the rule in actions for defamation, despite the decision of the House of Lords in American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396 in relation to interim injunctions generally. This court so decided in Herbage v. Times Newspapers Limited and Others, unreported but decided on 30 April 1981.

Mr. Milmo submits that on the evidence we cannot be confident that any jury would inevitably decide that the implication that Mr. Kaye had consented to give his first interview to Sunday Sport was libellous. Accordingly, we ought not to grant interlocutory relief on this ground.

It is in my view certainly arguable that the intended article would be libellous, on the authority of Tolley v. Fry. I think that a jury would probably find that Mr. Kaye had been libelled, but I cannot say that such a conclusion is inevitable. It follows that I agree with Mr. Milmo's submission and in this respect I disagree with the learned judge; I therefore would not base an injunction on a right of action for libel.

2. Malicious Falsehood

The essentials of this tort are that the defendant has published about the plaintiff words which are false, that they were published maliciously, and that special damage has followed as the direct and natural result of their publication. As to special damage, the effect of section 3(1) of the Defamation Act 1952 is that it is sufficient if the words published in writing are calculated to cause pecuniary damage to the plaintiff. Malice will be inferred if it be proved that the words were calculated to produce damage and that the defendant knew when he published the words that they were false or was reckless as to whether they were false or not.

The test in Coulson v. Coulson (supra) applies to interlocutory injunctions in actions for malicious falsehood as it does in actions for defamation. However, in relation to this action, the test applies

only to the requirement that the plaintiff must show that the words were false. In the present case I have no doubt that any jury which did not find that the clear implication from the words contained in the defendants' draft article were false would be making a totally unreasonable finding. Thus the test is satisfied in relation to this cause of action.

As to malice I equally have no doubt from the evidence, including the transcript of the tape-recording of the 'interview' with Mr. Kaye in his hospital room which we have read, that it was quite apparent to the reporter and photographer from Sunday Sport that Mr. Kaye was in no condition to give any informed consent to their interviewing or photographing him. Moreover, even if the journalists had been in any doubt about Mr. Kaye's fitness to give his consent, Mr. Robertson could not have entertained any such doubt after he read the affidavit sworn on behalf of Mr. Kaye in these proceedings. Any subsequent publication of the falsehood would therefore inevitably be malicious.

As to damage, I have already recorded that Mr. Robertson appreciated that Mr. Kaye's story was one for which other newspapers would be willing to pay 'large sums of money.' It needs little imagination to appreciate that whichever journal secured the first interview with Mr. Kaye would be willing to pay the most. Mr. Kaye thus has a potentially valuable right to sell the story of his accident and his recovery when he is fit enough to tell it. If the defendants are able to publish the article they proposed, or one anything like it, the value of this right would in my view be seriously lessened, and Mr. Kaye's story thereafter be worth much less to him.

I have considered whether damages would be an adequate remedy in these circumstances. They would inevitably be difficult to calculate, would also follow some time after the event, and in my view would in no way be adequate. It thus follows that in my opinion all the preconditions to the grant of an interlocutory injunction in respect of this cause of action are made out. I will return later to what I consider to be the appropriate form of injunction.

3. Trespass to the person

It is strictly unnecessary to consider this cause of action in the light of the view I have expressed about malicious falsehood. However, I will set out my view shortly. The plaintiff's case in relation to this cause of action is that the taking of the flashlight photographs may well have caused distress to Mr. Kaye and set back his recovery, and thus caused him injury. In this sense it can be said to be a battery. Mr. Caldecott, for Mr. Kaye, could not refer us to any authority in which the taking of a photograph or indeed the flashing of a light had been held to be a battery. Nevertheless I am prepared to accept that it may well be the case that if a bright light is deliberately shone into another person's eyes and injures his sight, or damages him in some other way, this may be in law a battery. But in my view the necessary effects are not established by the evidence in this case. Though there must have been an obvious risk that any disturbance to Mr. Kaye would set back his recovery, there is no evidence that the taking of the photographs did in fact cause him any damage.

Moreover, the injunction sought in relation to this head of action would not be intended to prevent another anticipated battery, since none was anticipated. The intention here is to prevent the defendants from profiting from the taking of the photographs, i.e. from their own trespass. Attractive though this argument may appear to be, I cannot find as a matter of law that an injunction should be granted in these circumstances. Accordingly I would not base an injunction on this cause

of action.

4. Passing off

Mr. Caldecott submits (though in this case not with any great vigour) that the essentials of the tort of passing off, as laid down by the speeches in the House of Lords in E. Warnink B.V. v. J. Townend & Sons (Hull) Ltd. [1979] A.C. 731, are satisfied here. I only need say shortly that in my view they are not. I think that the plaintiff is not in the position of a trader in relation to his interest in his story about his accident and his recovery, and thus fails from the start to have a right of action under this head.

Form of injunction

Before I turn to consider the form of an interim injunction which should be granted, I must comment that apart from the initial draft of the article intended to be printed in Sunday Sport which was before the judge, two other versions have subsequently appeared. A second was put before Potter J., and a third before us. Both the second and third versions use words which do not imply so clearly as did the original version of the article that the plaintiff consented to be interviewed and photographed by Sunday Sport. Nevertheless in my view the later articles are irrelevant for present purposes. The fact that at one time the defendants envisaged printing the original article is sufficient to entitle the plaintiff to an injunction which prohibits the defendants from publishing an article which contains the implication which was to be read into that original article.

In relation to the injunctions granted by Potter J., the wording of the first injunction was in my view wider than was necessary to prevent the defendants from doing that which was objectionable, i.e. publishing material from which the objectionable implication could be drawn.

The second injunction granted by Potter J. was based upon the tort of passing off. I have already said that in my view the evidence does not prove the commission of this tort. It was for these reasons that, in common with my brethen, I took the view that the first and second injunctions should be discharged. We considered that the third injunction was in general satisfactory but needed some amendment, and basing ourselves on the plaintiff's right of action in malicious falsehood, we granted the injunction in the terms set out above.

I therefore concluded that, to the extent I have indicated, the defendants' appeal should be allowed, but that they should be subject to an injunction in the terms which we have already announced.

Bingham LJ:

I have had the benefit of reading in draft the judgment prepared by Glidewell L.J. I agree with it, and with the order made.

Any reasonable and fair-minded person hearing the facts which Glidewell L.J. has recited would in my judgment conclude that these defendants had wronged the plaintiff. I am therefore pleased to be

persuaded that the plaintiff is able to establish, with sufficient strength to justify an interlocutory order, a cause of action against the defendants in malicious falsehood. Had he failed to establish any cause of action, we should of course have been powerless to act, however great our sympathy for the plaintiff and however strong our distaste for the defendants' conduct.

This case nonetheless highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens. This has been the subject of much comment over the years, perhaps most recently by Professor Markesinis (The German Law of Torts, 2nd edn., 1990,page 316) where he writes:

'English law, on the whole, compares unfavourably with German law. True, many aspects of the human personality and privacy are protected by a multitude of existing torts but this means fitting the facts of each case in the pigeon-hole of an existing tort and this process may not only involve strained constructions; often it may also leave a deserving plaintiff without a remedy.'

The defendants' conduct towards the plaintiff here was 'a monstrous invasion of his privacy' (to adopt the language of Griffiths J. in Bernstein v. Skyviews Ltd. [1978] Q.B. 479 at 489G). If ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties. It is this invasion of his privacy which underlies the plaintiff's complaint. Yet it alone, however gross, does not entitle him to relief in English law.

The plaintiff's suggested cause of action in libel is in my view arguable, for reasons which Glidewell L.J. has given. We could not give interlocutory relief on that ground. Battery and assault are causes of action never developed to cover acts such as these: they could apply only if the law were substantially extended and the available facts strained to unacceptable lengths. A claim in passing off is hopeless. Fortunately, a cause of action in malicious falsehood exists, but even that obliges us to limit the relief we can grant in a way which would not bind us if the plaintiff's cause of action arose from the invasion of privacy of which, fundamentally, he complains. We cannot give the plaintiff the breadth of protection which I would, for my part, wish. The problems of defining and limiting a tort of privacy are formidable, but the present case strengthens my hope that the review now in progress may prove fruitful.

Leggatt LJ:

I agree with both judgments that have been delivered. In view of the importance of the topic I add a note about the way in which the common law has developed in the United States to meet the need which in the present case we are unable to fulfil satisfactorily.

The recognition of a right to privacy seemed to be in prospect when Lord Byron obtained an injunction to restrain the false attribution to him of a bad poem: Byron v. Johnson (1816) 2 Mer. 29. But it was not until 1890 that in their article 'The Right to Privacy,' 4 Harv. L. Rev. 193, Warren and Brandeis reviewed a number of English cases on defamation and breaches of rights of property, confidence and contract, and concluded that all were based on a broader common principle. They argued that recognition of the principle would enable the courts to protect the individual against the infliction by the press of mental pain and distress through invasion of his privacy. Since then the

right to privacy, or ‘the right to be let alone,’ has gained acceptance in most jurisdictions in the United States.

It is manifested in several forms: see Dean Prosser, Torts, 4th edn., 1971. One example is such intrusion upon physical solitude as would be objectionable to a reasonable man. So when in Barber v. Time Inc. (1942) 159 S.W. 2 d 291 the plaintiff was confined to a hospital bed, the publication of her photograph taken without consent was held to be an invasion of a private right of which she was entitled to complain. Similarly, a so-called ‘right of publicity’ has developed to protect the commercial interest of celebrities in their identities.

‘The theory of the right is that a celebrity’s identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorised commercial exploitation of that identity. ‘The famous have an exclusive legal right during life to control and profit from the commercial use of their name and personality’: Carson v. Here’s Johnny Portable Toilets Inc. (1983) 698 F. 2 d 831 at page 835.

We do not need a First Amendment to preserve the freedom of the press, but the abuse of that freedom can be ensured only by the enforcement of a right to privacy. This right has so long been disregarded here that it can be recognised now only by the legislature. Especially since there is available in the United States a wealth of experience of the enforcement of this right both at common law and also under statute, it is to be hoped that the making good of this signal shortcoming in our law will not be long delayed.