

IN THE ENGLISH MODERN AGE: EXAMPLES OF DAMAGE TO REPUTATION ON THE INTERNET UNDER THE TORTS OF DEFAMATION AND MISUSE OF PRIVATE INFORMATION

İngiliz Modern Çağda: Haksız Fiiller Hakaret ve Özel Bilgilerin Kötüye Kullanılması Kapsamında İnternet Ortamında Gerçekleşen İtibarı Zedeleme Örnekleri

Dr. Ayten Ordu*

ABSTRACT

The internet is a modern means of communication, alongside “traditional” mass media such as newspapers, radio and television. Especially with the outbreak of the COVID-19 pandemic, the increase in the number of internet users brings with it the violations of personal rights to reputation that take place online. According to a study conducted in April 2020, 4.57 billion people across the world were

* Assist. Prof. Dr. Faculty of Law, Near East University, Nicosia (Turkish Republic of Northern Cyprus). ORCID ID: 0000-0003-0085-8042, Email: ayten.ordu@neu.edu.tr

Makale Geliş Tarihi: 25.03.2022

Makale Kabul Tarihi: 24.02.2023

⇒ Atıf Şekli: Ayten Ordu, “In The English Modern Age: Examples of Damage to Reputation on The Internet Under The Torts of Defamation and Misuse of Private Information”, Erciyes Üniversitesi Hukuk Fakültesi Dergisi, 18/1 (2023): 113-137.

⇒ Bu eser Creative Commons Atıf-GayriTicari 4.0 Uluslararası Lisansı ile lisanslanmıştır.



using the internet, which amounts to a 7% increase since April 2019.¹ As to social media users, the figure is 3.81 billion, which again presents an increase of more than 8% since April 2019.² The increase in the number of internet users can lead to a rise in the attacks that take place online, particularly those that damage a person's reputation.

This paper aims to consider the importance of personal rights and the violation of such rights through the internet, giving case examples to illustrate how sometimes these rights can be protected, yet at other times they cannot. This paper consists of two parts; in the first part of our study, personal rights and the role of the internet in damaging a person's reputation under the tort of defamation will be examined. Thereafter; part two will take into account the role of the internet in damaging reputation under the tort of misuse of private information, thus giving case examples to illustrate how a person's reputation cannot always be protected online.

Keywords: Personal Rights, Reputation, Violation, Internet, Defamation, Information Technology, Misuse of Private Information.

ÖZET

İnternet; gazete, radyo ve televizyon gibi "geleneksel" kitle iletişim araçlarının yanı sıra, modern bir iletişim aracıdır. Özellikle CO-VİD-19 pandemisi ile birlikte, internet kullanıcı sayılarındaki artış, çevrimiçi olarak gerçekleştirilen kişilik hakkı ihlallerini de beraberinde getiriyor. Nisan 2020'de yapılan bir araştırmaya göre, dünya çapında 4.57 milyar kişi, interneti kullanıyor ve bu rakam, Nisan 2019'dan bu yana %7'lik bir artış anlamına geliyor. Sosyal medya kullanıcı sayılarına gelince, rakamımız 3.81 milyar olmakla birlikte, Nisan 2019'dan Nisan 2020 tarihine kadar %8'den fazla bir artış su-

¹ Simon Kemp, 'Special Reports- Digital Around the World in April 2020' (*We Are Social*, 23 April 2020) <https://wearesocial.com/us/blog/2020/04/digital-around-the-world-in-april-2020/> (Date of Access: 15 March 2022).

² ibid

nuyor. İnternet ve sosyal media kullanıcı sayılarındaki artış, özellikle bir kişinin itibarına zarar veren çevrimiçi saldırıların artmasına da neden olabilir.

Çalışmamız, kişilik hakların önemini ve bu hakların internet üzerinden ihlal edilebileceğini göz önünde bulundurarak, söz konusu hakların internet ortamında bazı hallerde korunup, bazı hallerde ise korunamayacağını inceleyecektir. Çalışmamız, iki bölümden oluşmaktadır. İlk bölümde; kişilik hakları ve haksız fiiller kapsamında itibarın zedelenmesi hususunda internetin oynadığı rol dikkate alınacaktır. Çalışmamızın ikinci bölümü ise; özel bilgilerin kötüye kullanılması haksız fiiline ilişkin olarak, internetin kişinin itibarının zarar görmesindeki rolünü dikkate alacak ve kişinin itibarının her zaman çevrimiçi olarak korunamayacağını gösteren örnek davalara yer verecektir.

Anahtar Kelimeler: Kişilik Hakları, İtibar, İhlal, İnternet, Hakeret, Bilişim Teknolojisi, Özel Bilgilerin Kötüye Kullanılması.

INTRODUCTION

Across all legal systems, a “person” can be divided into two groups, the “*legal person*” and the “*real person*”. For the purposes of this paper, the “*real person*” has been taken into account, with the aim of giving case examples as to how their reputation can be damaged on the internet, thus allowing them to make a claim under the tort of defamation and the tort of misuse of private information.

Firstly, defamation can be defined as the “publication of an untrue statement which reflects on a person’s reputation and tends to lower him in the estimation of right-thinking members of society or tends to make them shun or avoid him.”³ As a result, a defamation claim has three elements; 1) a defamatory statement which lowers a person’s reputation in the eyes of right-thinking members of society;

³ W V H Rogers, *Winfield and Jolowicz on Tort* (16th Edition, Sweet & Maxwell 2002) 405.

2) the statement must refer to the claimant; and 3) the defamatory statement must be published.

Secondly; with regards to making a claim under the tort of misuse of private information; 1) the claimant must have a “*reasonable expectation of privacy*” in the information or images in question; and 2) the court must strike a balance between *keeping the information private, against the interest in revealing the information.*⁴

The internet is a modern means of communication that fits with the society in which we live in today. To give an example as to how a person’s right to reputation can be damaged on the internet; the online publishing of other people’s private photographs which have the negative effect of “*lowering*” them in the eyes of “*right thinking members of society*” can facilitate the violation of an individual’s right to reputation and raises the possibility of a defamation claim. For example, the publication of a professor’s photograph wearing a swimsuit on Facebook, or the distribution of such a photograph in WhatsApp groups, may have the effect of “*lowering*” the individual in the eyes of society, thus having the possible effect of damaging their reputation as a professor. Another example which can be given; is the making of defamatory remarks about other individuals on social media platforms. The making of defamatory remarks and the publication of private photographs on social media platforms not only appeal to wider audiences (particularly through the process of “*tagging*” other social media users), but they also place individuals at a greater risk of having their reputation damaged online, as opposed to defamatory remarks that are made “*face to face*”. For example, in the event that parts of an individual’s diary are published online (without obtaining the diary owner’s prior permission), it will have a greater effect of damaging the diary owner’s reputation, than it would if only one other person read the diary and confronted the diary owner about so-

⁴ Frances Quinn, *Tort Law*, (Pearson 2012) 452; Catherine Elliott and Frances Quinn, *Tort Law*, (10th edition, Pearson 2015) 268; Ayten Ordu, *Kuzey Kıbrıs Türk Cumhuriyeti’nde İnternette Kişilik Hakkının Hakaret ve Sövme (Zem ve Kadih) Yoluyla İhlaline Karşı Korunması*” (Onikilevha, December 2020) 64 (*Kişilik Hakkı*).

something that is written in the diary. Such an act will therefore give rise to a claim under the tort of misuse of private information. Under this tort, the court has a duty to respect the rights of both the claimant and defendant, by ensuring that there is a *balance* between the claimant's expectation of privacy under Article 8 of the ECHR on the one hand, and the defendant's freedom of expression under Article 10 of the ECHR on the other hand.

The aim of this paper is to discuss how an individual's right to reputation can be damaged on the internet, thus enabling such individuals to bring a claim under the torts of defamation and misuse of private information. Throughout the paper, examples have been given from real life cases, in order to help identify how sometimes an individual's right to reputation can be protected, yet at other times, they cannot.

1.1 PERSONAL RIGHTS AND THE ROLE OF THE INTERNET IN DAMAGING REPUTATION UNDER THE TORT OF DEFAMATION

1.1.1 The Person and their Rights

Across all legal systems, a person can be divided into two groups, namely the "legal person" and the "real person". According to Sir William Blackstone, "*Persons are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.*"⁵ For the purpose of this paper, only the real person will be taken into account.

⁵ William Blackstone, *Commentaries on the Laws of England in Four Books*, (Philadelphia: J.B. Lippincott Co., 1893). Vol. 1 – Book I: The Rights of Persons, Chapter 1: Of The Absolute Rights of Individuals 123. Available to view online, at: <https://ebooks.adelaide.edu.au/b/blackstone/william/comment/complete.html#book1.1> and <https://oll.libertyfund.org/pages/blackstone-on-the-absolute-rights-of-individuals-1753> (Date of Access: 28 December 2021). See also: Ordu, *Kişilik Hakkı* (n4) 4.

In English law, personal rights begin upon birth. In the case of Paton v British Pregnancy Advisory Service,⁶ it was stated that “*the foetus cannot, in English law, in my view, have any right of its own at least until it is born and has a separate existence from the mother... the child must be subsequently born alive*”.⁷ Similarly, in the case of Vo v. France,⁸ it was decided that “*the unborn child is not regarded as a “person” directly protected by Article 2 of the Convention*”.⁹ As a result, it is arguable that rights, such as the right to life as set out under Article 2 of the European Convention on Human Rights (ECHR) will begin upon birth, when the child is born alive and has a separate existence from the mother.¹⁰

Alongside a person’s right to life, other substantive personal values can be described as the right to health and bodily integrity.¹¹ In England, the importance given to the health and wellbeing of persons is fairly high. England’s National Health Service (the NHS), dates back

⁶ *Paton v British Pregnancy Advisory Service* [1979] QB 276, [1978] 2 All ER 987, [1978] 3 WLR 687, 142 JP 497. See also: Ordu, *Kişilik Hakkı* (n4) 6-7.

⁷ *Paton v British Pregnancy Advisory Service* [1979] QB 276, [1978] 2 All ER 987, [1978] 3 WLR 687, 142 JP 497. See also: *Elliot v Joicey* [1935] SC (HL) 57, [1935] UKHL 3, [1935] AC 209; *Re F (In Utero)* [1988] (Fam) 122 (4 February 1988) and Ordu, *Kişilik Hakkı* (n4) 6-7.

⁸ *Vo v. France (Application no. 53924/00)* 17 BHRC 1, (2004) 79 BMLR 71, (2005) 40 EHRR 12, [2005] Inquest LR 129, 79 BMLR 71, [2004] ECHR 326, [2004] 2 FCR 577; Ordu, *Kişilik Hakkı* (n4) 7.

⁹ *ibid*

¹⁰ European Convention on Human Rights (ECHR) https://www.echr.coe.int/Documents/Convention_ENG.pdf (Date of Access: 25 March 2022).

¹¹ Abraham Francis, Paula La Rosa, Lakshmi Sankaran and S.P Rajeev, *Social Work Practice in Mental Health, Cross Cultural Perspectives* (Volume 1 of 1st Edition, Allied Publishers 2014) 7; Matthias Baier, *Social and Legal Norms: Towards a Socio-legal Understanding of Normativity* (Routledge 2016) 5. For a detailed discussion on the nature and significance of the right to bodily integrity, refer to: Jonathan Herring and Jesse Wall, ‘The Nature and Significance of the Right to Bodily Integrity’ (2017) 76(3) *The Cambridge Law Journal* 566, <https://www.cambridge.org/core/journals/cambridge-law-journal/article/nature-and-significance-of-the-right-to-bodily-integrity/79703F3BE9C5C21BB76338C050E951BC/core-reader> (Date of Access: 23 January 2022).

to 1948¹² and has been constantly evolving to protect patients as well as ensuring they maintain a healthy lifestyle.¹³ As a result of the NHS; hospitals, doctors, nurses, pharmacists, opticians, dentists, nurses and health visitors provide free services to people, with their health and wellbeing being at the forefront.¹⁴ Especially after the outbreak of COVID-19, the NHS are constantly working towards protecting the community from the virus not only with the services that they provide, but also through issuing clinical guidance to both the community and clinicians, as well as to NHS managers.¹⁵ For the purposes of this paper, the role of the internet in damaging a person's right to life and other substantive personal values such as their health and bodily integrity will be discussed under the next heading.

With regards to the issue of a person's right to reputation, all individuals have the right to reputation and the right to not to be interfered with. This right is reinforced by the law relating to defamation. Defamation can be defined as the "*publication of an untrue statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society or tends to make them shun or avoid him.*"¹⁶ As a result, we can say that a defamation claim has three elements, namely; 1) a defamatory statement which lowers a person's reputation in the eyes of right-thinking members of society; 2) the statement must refer to the claimant; and 3) the defama-

¹² John Black and Tony White, *The Doctor's Handbook: Part.2. Understanding the NHS*, (4th Edition, Radcliffe Publishing 2010) 75. See also: '70 Years of the NHS: The Story of Our Lives' (*NHS at 70*) <https://www.nhs70.org.uk/story/70-years-nhs-story-our-lives> (Date of Access: 05 September 2021).

¹³ Ayten Ordu, *The General Principles of Negligence in the Context of Doctor's Medical Practice* (Yakın Doğu Yayınları 2016) 89-98 (*Negligence*).

¹⁴ Black and White (n12) 41. See also: '70 Years of the NHS: The Story of Our Lives' (*NHS at 70*) <https://www.nhs70.org.uk/story/70-years-nhs-story-our-lives> (Date of Access: 5 September 2021).

¹⁵ NHS England and NHS Improvement Coronavirus Specialty Guides <https://www.england.nhs.uk/coronavirus/secondary-care/other-resources/specialty-guides/#coronavirus-treatment> (Date of Access: 22 September 2021). See also: 'Coronavirus Guidance for Clinicians and NHS Managers' (*NHS England*, 12 January 2021) <https://www.england.nhs.uk/coronavirus/> (Date of Access: 22 September 2021).

¹⁶ W V H Rogers (n3) 405.

tory statement must be published. To give an example of how a person's right to reputation can be damaged through the internet, the publishing of other people's private photographs which have the negative effect of "lowering" them in the eyes of "right thinking members of society" can facilitate the violation of an individual's right to reputation and raises the possibility of a defamation claim. For example; the publishing of a professor's photograph wearing a swimsuit on social media platforms such as Facebook, or the distribution of such a photograph in WhatsApp groups, may have the negative effect of "lowering" the professor's status and reputation in the eyes of society. The professor may therefore bring a claim under defamation, not only to prevent the further publication of such material, but he or she may also request to have the defamatory material removed from the internet. The rapid development and usage of internet technology can create the danger of being exploited at any time, thus individuals need to be protected by the law at all times.

1.1.2 The Role of the Internet in Damaging A Person's Reputation Under the Tort of Defamation

The internet emerged as a new means of communication in the 1990s.¹⁷ The concept of "internet", which consists of the words "international network", can also be defined as the "network of networks".¹⁸ It is a modern means of communication, alongside newspapers, radio and television, traditionally referred to as "mass media". Today, the rapid development of the internet and social media allows people to easily put forward their ideas and thoughts, and it is as easy as "one

¹⁷ Robert Kahn and Michael Aaron Dennis, 'Internet: Computer Network' *Encyclopedia Britannica* (2020) <https://www.britannica.com/technology/Internet> (Date of Access: 22 January 2022). See also: Barış Günaydın, *İnternet Yayıncılığı ve İfade Özgürlüğü*, (Adalet Yayınevi 2010) 23; Metin Baykan, *Basın Özgürlüğü*, (Adalet Yayınevi 2011) 18-19; Mine Kaya, *Elektronik Ortamda (Elektronik Haberleşme-İnternet- Sosyal Medya) Kişilik Hakkının Korunması*, (Seçkin 2015) 63; Ordu, *Kişilik Hakkı* (n4) 26.

¹⁸ Kahn and Dennis (n18), Barış Günaydın, (n17) 24, Mine Kaya (n17) 62, Fehmi Şener Gülseren, 'İnternet Ortamında İşlenen Hakaret Suçları' (2013) 4(1) *EUL Journal of Social Sciences/ Lefke Avrupa Üniversitesi Sosyal Bilimler Dergisi*, 15, 16, Ordu, *Kişilik Hakkı* (n4) 26.

click” to publish across the world. Online defamatory remarks not only appeal to wider audiences (particularly through the process of “tagging” other users on social media platforms), but they also place people at a greater risk of having their reputation damaged as opposed to defamatory remarks that are made “face to face”. Especially with the worldwide publication of online news, personal views, opinions and stories, such postings can damage the honour and dignity of people (their reputation), their image or name. Making defamatory remarks on various social media platforms, tagging other users in postings, uploading videos that belong to others or videos of other people, using other people’s photographs, explicit names and making defamatory remarks on other postings can amount to an attack on the right to reputation of the relevant people involved.

Considering whether values such as health, life and bodily integrity can be damaged online, it can be asserted that online newspaper reports or postings cannot *directly* harm a person's health, life or bodily integrity. These values can be affected in an indirect way, for example; if a person reads an online story written about themselves which is false and is so shocking that it leads to a heart attack, we can say that the online false publication led to damaging this person’s health and wellbeing. To give an example of how the internet can play a role in damaging a person’s right to life and bodily integrity, it is arguable that online suicidal games, such as the “Blue Whale Challenge”, “Mariam” and “Momo” have a great impact. All three games are played online and they are composed of assigning a number of tasks to players, including self-harm, ultimately having the effect of leaving vulnerable children at risk of committing suicide. As a result, it is arguable that such games not only have the effect of interfering with the right to bodily integrity (by encouraging self-harm), but they also challenge the individual’s right to life.¹⁹

¹⁹ Justin Patchin, ‘Blue Whale Challenge’, (Cyberbullying Research Center, 16 May 2017) <https://cyberbullying.org/blue-whale-challenge> (Date of Access: 23 June 2021); Ant Adeane, ‘Blue Whale- What is the truth behind an online ‘suicide challenge?’ (BBC News, 13 January 2019) <https://www.bbc.com/news/blogs->

A person's right to reputation, dignity and integrity is most probably the one that is often breached online. To give an example, according to a news release that was published in 2018, a boarding gate employee of Southwest Airlines in America first laughed at a child's name, which was "Abcde", then took a photo of the child's boarding pass and posted it on Facebook, thus amounting to the online violation of the child's integrity.²⁰ In this example, the damage to one's integrity was made with the explicit mention of their name. However, sometimes with such online attacks, the name of the person need not always be mentioned.

Considering the first and second elements of a defamation claim, namely the requirement that there must be a "defamatory statement" which "refers to the claimant," we can say that the claimant does not always have to be specifically named in the defamatory statement. Despite the person's name is not being specified, the use of words or signs that play part in allowing the person to be recognized by third parties can also amount to damaging the person's reputation. For example, in the case of *Morgan v Odhams Press*,²¹ Lord Morris stated "The question for the Judge at the end of the plaintiff's case was whether there was evidence upon which the jury could (not would) decide in favour of the plaintiff. That in turn raised the question whether the jury could decide that some readers (having knowledge of certain circumstances) would reasonably understand the words as referring to the plaintiff. If no reasonable reader could have understood the words as refer-

[trending-46505722](#) (Date of Access: 23 June 2021), Derya Kantar Özkes, Büşra Kantar, Fırat Koç and Vahdet Özkoçak, 'The Effects of Crime-Encouraging Digital Games on Children and Prevention of These Effects' (2019) 7(4) Social Science Studies 215, 226, Birgül Alıcı, 'Movie Watching Culture Changing By The New Media And Children' (2019) 5(47) International Social Sciences Studies Journal 5945, 5959.

²⁰ Rob Crilly, 'Airline apologises for Staff who mocked five-year old Abcde's name' (The Telegraph, 30 November 2018) <https://www.telegraph.co.uk/news/2018/11/30/airline-apologises-staff-mocked-five-year-old-abcde-name/> (Date of Access: 23 December 2021), Ordu, *Kişilik Hakkı*, (n4) 50.

²¹ *Morgan v Odhams Press* [1971] 1 WLR 1239, [1971] 2 All ER 1156, Ordu, *Kişilik Hakkı*, (n4) 51.

ring to the plaintiff, then there would be nothing to be left to the jury”.²² This statement suggests that in any claim for defamation, it is not necessary to mention the person's name explicitly. If there is sufficient information in the defamatory statement which enables the person to be recognised, this will be sufficient for a claim in defamation. Similarly, in the case of Tilbrook v Parr,²³ it was stated “...words cannot be defamatory of a claimant unless they are capable of being understood by a reasonable reader as referring to the claimant”.²⁴

On this note; it is vital to consider that in relation to the second element of a defamation claim, a claimant may still have an action for defamation if the statement does not specifically refer to him or her, but there are sufficient grounds for others to think that the statement referred to the claimant. For instance, in the case of Newstead v London Express Newspaper,²⁵ the defendant newspaper published a story on bigamy and referred to the person convicted as being “*Harold Newstead, thirty-year-old Camberwell man.*” Although this was true, the statement was not true and was thus defamatory for the claimant who had the same name, who was of the same age and who lived in the same area as the person convicted. The court held that a reasonable person would think that the statement had made reference to the claimant and it was irrelevant that the publisher intended to refer to someone other than the claimant, so the statement was regarded to be defamatory.

The third element for a defamation claim is the requirement for the defamatory statement to be “*published*”. The “publication” requirement of a defamation claim has been defined as “*communication of the material to someone other than the person allegedly defamed.*”²⁶ Bearing in mind the ultimate aim for a defamation claim, which is to

²² *ibid*

²³ *Tilbrook v Parr* [2012] EWHC 1946 (QB), Ordu, *Kişilik Hakkı*, (n4) 51.

²⁴ *ibid*

²⁵ *Newstead v London Express Newspaper* [1940] 1 KB 377 (Court of Appeal), Ordu, *Kişilik Hakkı*, (n4) 83.

²⁶ Chris Turner, *Unlocking Torts* (4th Edition, Routledge 2014) 354.

protect the reputation of individuals *in the eyes of society*, this element of a defamation claim reinforces the purpose of the law relating to defamation. It is common to think that the third element of defamation requires mass publication, however, it has long been accepted that if one other person reads or hears the defamatory statement (and understands it), this will fulfil the “publication” requirement of a claim under defamation.²⁷ For example, a person who is unable to hear and lipread cannot bring a claim for defamatory words spoken out loud. Similarly, a person who is unable to understand English cannot rely on the law of defamation for an English article that has been written about them.²⁸

Considering the “publication” requirement of a defamatory claim, Article 10 of the European Convention on Human Rights (ECHR) sets out the right to freedom of expression.²⁹ All individuals, as well as the press have a freedom of expression under this article, but such freedom is not absolute, and can be restricted in order to protect the reputation of others.³⁰ An example of damage to a person’s reputation via publication on the internet can be the making of online defama-

²⁷ Turner, (n26) 354. See also: LexisNexis Defamation Practice Note (produced in partnership with 5RB) <https://www.lexisnexis.co.uk/legal/guidance/defamation> (Date of Access: 02 February 2022) and LexisNexis Defamation and Social Media Practice Note (produced in partnership with 5RB) <https://www.lexisnexis.co.uk/legal/guidance/defamation-and-social-media> (Date of Access: 02 February 2022).

²⁸ Turner, (n26) 354.

²⁹ ‘Freedom of Expression, Media Law and Defamation’ (*International Press Institute and Media Legal Defence Initiative*, February 2015) <https://www.mediadefence.org/sites/default/files/resources/files/MLDI.IPI%20Defamation%20manual.English.pdf> (Date of Access: 23 June 2021) and <https://ipi.media/freedom-of-expression-media-law-and-defamation/> (Date of Access: 23 June 2021). See also: ‘Press Freedom: Why is it Important?’ (News Media Association) <http://www.newsmediauk.org/Current-Topics/Press-Freedom> (Date of Access: 23 June 2021) and Ordu, *Kişilik Hakkı* (n4) 54.

³⁰ ‘Freedom of Expression, Media Law and Defamation’ (*International Press Institute and Media Legal Defence Initiative*, February 2015) <https://www.mediadefence.org/sites/default/files/resources/files/MLDI.IPI%20Defamation%20manual.English.pdf> (Date of Access: 23 June 2021) and <https://ipi.media/freedom-of-expression-media-law-and-defamation/> (Date of Access: 23 June 2021) 13, Ordu, *Kişilik Hakkı* (n4) 54.

tory remarks about them. In the unreported case of Bryce v Barber,³¹ a University law student Raymond Bryce succeeded in a defamation claim based on the posting of indecent images of children on his Facebook page by the defendant Jeremiah Barber, who was a former friend. The Facebook post included a comment which said “Ray, you like kids and you are gay, so I bet you love this picture. Ha ha.” Tugendhat J agreed that the post would be seen not only by the claimant’s 800 Facebook friends, but also by the Facebook friends of the 11 other people who were tagged in the post, thus fulfilling the “publication” requirement of a defamation claim. As a result, despite the offensive image being taken down within 24 hours, the claimant was awarded £10,000 in damages for the stress and anxiety which the post caused him to suffer. Tugendhat J also noted that the Facebook post was “not only defamatory, but a defamation which goes to a central aspect of Mr Bryce’s private life as well as his public reputation.”³²

The internet can play a role in damaging the individual’s reputation, however, in some instances, the online publication of an individual’s private story, their photograph or parts of their diary without obtaining their permission can also breach that person’s right to privacy. The individual’s right to privacy will be considered under the tort of misuse of private information heading; however; on this note, it is vital to point out that the case of Hellewell v Chief Constable of Derbyshire.³³ In this case, it was held that there is a “public interest” defence in distributing photographs of thieves by the police for the prevention, detection or investigation alleged offences. As to the facts

³¹ *Bryce v Barber* (unreported case), 26 July 2010 (HC).

³² For further information about the case, please refer to Laura Scaife, *Handbook of Social Media and the Law*, (Informa Law from Routledge 2014) 73, Gary K.Y Chan, ‘Reputation and Defamatory Meaning on the Internet’ (2015) 27 Singapore Academy of Law Journal, 694, 710, ‘Law Student Wins £10,000 after being branded a paedophile on Facebook’ (*The Telegraph*, 28 July 2010) <https://www.telegraph.co.uk/technology/facebook/7912731/Law-student-wins-10000-after-being-branded-a-paedophile-on-Facebook.html> (Date of Access: 25 June 2021).

³³ *Hellewell v Chief Constable of Derbyshire* [1995] 1WLR 804, [1995] 4 All ER 473 (Date of Access: 24 June 2020), Ordu, *Kişilik Hakkı* (n4) 58.

of the case, shop owners who were concerned about theft had contacted the police and as a result, the police provided them with photographs of thieves. One of the photographs was that of the claimant taken in custody. It was decided that in disclosing the photographs, the police had entirely acted in good faith, the aim was to prevent or detect crime and they had distributed the photographs only to those who had a reasonable need to prevent such offences from taking place. As a result, it can be stated that sharing or publishing photographs of people without permission would normally constitute a breach of the individual's right to privacy, yet this would be eliminated based on defensive reasons such as the public interest defence to prevent, detect or investigate crime.

With regards to the publication of material on matters of public interest, it is important to note that section 4(3) of the Defamation Act 2013 is based on the common law "*doctrine of reportage*."³⁴ This doctrine provides protection for neutral reporting or republication of defamatory material that has been alleged by others, thus providing a defence for those who publish reports that give a "balanced picture."³⁵ As a result, despite the publication of defamatory material, provided such publication is a "neutral reportage" on matters that are of public interest, this can ultimately constitute a defence, thus avoiding liability for defamation.

³⁴ Explanatory Notes to the Defamation Act 2013, s.4(3), para 32. The relevant section of the Act is available at: <http://www.legislation.gov.uk/ukpga/2013/26/section/4/enacted?view=interweave#section-4-3> (Date of Access: 25 June 2021). See also: Jason John Bosland, 'Republication of Defamation under the Doctrine of Reportage - The Evolution of Common Law Qualified Privilege in England and Wales' (2011) 31(1) Oxford Journal of Legal Studies, 89, 110 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619735#:~:text=The%20doctrine%20of%20reportage%20provides,or%20controversy%20of%20public%20interest. (Date of Access: 25 March 2022) and Scaife (n32) 90.

³⁵ *ibid*. See also, the case of *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634 (5 November 2001) on how the doctrine of reportage was developed.

1.2 THE ROLE OF THE INTERNET IN DAMAGING A PERSON'S REPUTATION UNDER THE TORT OF MISUSE OF PRIVATE INFORMATION

1.2.1 Misuse of Private Information

Before moving on to give examples of how the tort of misuse of private information can take place on the internet (thus damaging a person's reputation), it is essential to first consider the elements required in order to bring a claim under this tort.

In order for a claim under the tort of misuse of private information, 1) the claimant must have a "*reasonable expectation of privacy*" in the information or images in question; and 2) the court must strike a balance between *keeping the information private, against the interest in revealing the information*.³⁶ This suggests that the court has a duty to respect the rights of both the claimant and defendant, by ensuring there is a balance between the claimant's expectation of privacy (Article 8, ECHR) on the one hand, and the defendant's freedom of expression (Article 10, ECHR) on the other hand.

To give an example of a misuse of private information claim; it is arguable that the online publication of parts of an individual's diary without obtaining the diary owner's prior permission can amount to such a tort. It has previously been put forward that the internet has a great role to play in damaging an individual's reputation than remarks that are made "*face to face*". In our diary example, it is arguable that the online publication of such material will damage the diary owner's reputation to a greater extent, than if one other person reads the diary and confronts the diary owner about something that it written inside. In a misuse of private information claim, the court has the authority to decide whether the private information or images in question should be *prohibited* from being published (via an injunction)- this is where the claimant's right to privacy outweighs the defendant's right to freedom of expression, or whether the information

³⁶ Quinn (n4) 452; Elliott and Quinn (n4) 268; Ordu, *Kişilik Hakkı* (n4) 64.

or images in question *should be published*, based on the defendant's freedom of expression outweighing the claimant's right to privacy. If the information or images in question have already been published, yet they breach the claimant's right to privacy, the court can order the defendant to pay damages and an injunction may be obtained to prevent further publication.³⁷

1.2.2 Examples of Misuse of Private Information on the Internet

A key case to illustrate how the tort of misuse of private information can take place online, is the case of PJS v News Group Newspapers Ltd.³⁸ In this particular case; it was stated that *"...the appellant's solicitors have been assiduous in monitoring the internet and taking steps, wherever possible, to secure removal of offending information from URLs and web pages, but concluded that this was a hopeless task: the same information continued to reappear in new places, and tweets and other forms of social networking also ensured its free circulation."* The court as a result put forward its willingness to protect privacy in the digital age, placing great emphasis on the intrusive impact of the information about the claimant's sexual encounters being published, ruling that despite the private information had been published elsewhere in the world and on the social media, it is appropriate to prevent such information from being further published in the UK. The most important of the reasons behind this ruling was that PJS had children under the age of 16, and the publication of such material would be an intrusion into the private lives of PJS and his family. As a result, it was decided that the claimant's right to privacy outweighed the defendant's right to freedom of expression.

³⁷ Quinn (n4) 462-467; Elliott and Quinn (n4) 277-278; Ordu, *Kişilik Hakkı* (n4) 64-65.

³⁸ *PJS v News Group Newspapers Ltd* [2016] UKSC 26 (19 May 2016), Ordu, *Kişilik Hakkı* (n4) 66-67.

The case of The Author of A Blog v Times Newspapers Ltd³⁹ is an example to show that the revelation of a person's identity could be the subject of a claim under the tort of misuse of private information. The claimant in this case, was not only a police officer, but also an internet blogger, who used the name "*Night Jack*," and sought a restraining order to prevent his identity from being disclosed by the defendant. The elements to be considered under a claim for misuse of private information are firstly whether the claimant has a reasonable expectation of privacy, and secondly, whether there is a balance of interests between the claimant's right to privacy and the defendant's freedom to disclose the claimant's identity. Taking into account the activity of the claimant, the court concluded that the claimant did not have a reasonable expectation of privacy, because the activity of "*blogging*" is public, so it does not require special protection. As for the second element of the tort, it was decided that the disclosure of the claimant's identity by the defendant outweighed the claimant's right to privacy, because the primary purpose of the claim was not to protect the claimant's private information from being revealed, but rather it was aimed at preventing a police disciplinary action against the claimant, as the claimant had often blogged about his police work, and gave his opinions on a number of social and political issues relating to both the police and the administration of justice. As a result, we can see that the tort of misuse of private information does not always play a role in protecting a person's reputation online. Provided there are sufficient grounds for the information in question to be published (like in this case), then the tort will no longer play a role in protecting the misuse of such private information.

Another case where the tort of misuse of private information was relied upon is the case of OPO v MLA.⁴⁰ This case did not involve an online publication; however, it is another key case to illustrate how

³⁹ *The Author of A Blog v Times Newspapers Ltd* [2009] EWHC 1358 (QB) (16 June 2009) Ordu, *Kişilik Hakkı* (n4) 84-85.

⁴⁰ *OPO v MLA & Anor* [2014] EWHC 2468 (QB) (18 July 2014), Ordu, *Kişilik Hakkı* (n4) 85-86.

sometimes a person's reputation cannot be protected by the tort of misuse of private information, particularly if the other party's freedom of expression outweighs the claimant's right to privacy. In this case, a mother brought the claim on behalf of her child, against her ex-husband who was a performing artist. The mother was seeking an injunction to prevent her ex-husband from publishing his life story as a book. The contents of the book did not include the real names of the mother and their son, nor did it contain any specific information about their relationship. The mother's claim was that the information about her ex-husband's childhood sexual abuse, his physical and mental suffering and the incidents of self-harm that was contained in the book would cause serious psychological harm to their 11-year-old son. As a result, the mother wanted to prevent the book from being published, as access to the book or information about the book could easily be made available on the internet, which their son could access. The Court of Appeal ruled that in this particular case, the tort of misuse of private information could not directly be relied upon, because although the book features the child, it does not threaten to "misuse" any of the child's private information. The court found that the information which the book contained was likely to cause harm to the child, but such information was solely related to the father. Despite this finding, an injunction to restrain the publication of the book was granted, based on the tort of *Wilkinson v Downton*.⁴¹ Under this tort, if a defendant "wilfully does an act calculated to cause psychiatric harm" then they are likely to be found liable.⁴² The Court of Appeal found that the defendant father recognised the vulnerability of his son and the risk of harm that can be caused by his learning of matters concerning his father's past, so based on this fact, decided to grant the injunction. Nevertheless, it must be noted that a year later, the Supreme Court discharged the injunction and reversed the decision of the Court of Appeal. The Supreme Court placed great emphasis on the Appellant's freedom of expression under Article 10 of the ECHR and de-

⁴¹ *Wilkinson v Downton* [1897] EWHC 1 (QB) (08 May 1897).

⁴² Quinn (n4) 324-326; Elliott and Quinn (n4) 344.

cided that “*freedom to report the truth is a basic right to which the law gives a very high level of protection.*”⁴³ The Supreme Court went on to argue that “*...the contents of the book are not untrue, threatening or insulting, they are not gratuitous or unjustified, let alone outrageous, they are not directed at the claimant, and they are not intended to distress the claimant.*”⁴⁴ As a result, the Appellant’s freedom of expression was taken as a priority. The facts of this case did not involve an online publication, yet this is another key case to illustrate that a person’s reputation cannot always be protected by the law. In some instances, the court will allow publication of material that may damage a person’s reputation, primarily on the basis of the other party’s right to freedom of expression.

Conclusively, for a successful tort of misuse of private information claim, the claimant must first establish that they have a reasonable expectation of privacy in the information or images in question, and the court has the ultimate role of balancing the interests of the two parties involved- namely the claimant’s interest in keeping the information private, and the defendant’s freedom of expression by allowing the information to be revealed. It is ultimately up to the court to decide whether or not the information in question should be published, however, we can argue that should the court decide that the defendant has a freedom of expression, the claimant’s right to reputation will not be protected.

CONCLUSION

The internet emerged in the 1990s as a modern means of communication and it continues to develop, with the number of users increasing on a daily basis. Particularly with the outbreak of the COVID-19 pandemic, there has been a rise in the number of internet

⁴³ *James Rhodes (Appellant) v OPO (by his litigation friend BHM) and another (Respondents)* Easter Term [2015] UKSC 3 [77] (Lady Hale and Lord Toulson). On appeal from: [2014] EWCA Civ 1277.

⁴⁴ *ibid*, [122] (Lord Neuberger).

users and this brings problems. Internet and social media users can make online remarks and it is as easy as “one click” to not only damage a person’s reputation and defame them, but also to breach a person’s right to privacy, thus leading to a misuse of private information claim.

The aim of this paper was to firstly discuss the importance of personal rights. The rights that were discussed are the right to life, health and bodily integrity, as well as the primary focus of this paper, which is a person’s right to reputation. For the purposes of this paper, key cases to illustrate how a person’s reputation can be damaged online were discussed, taking into account both the tort of defamation and the tort of misuse of private information. It was found that the law does not always play a role in protecting an individual’s reputation online. This can be seen from the cases where the court decided that there were substantive grounds for deciding that the private information of individuals should be revealed, primarily based on the defendant’s right to freedom of expression.

| YAZAR BEYANI | |
|---|--|
| Mali Destek/Teşekkür Beyanı: | Bulunmamaktadır. |
| Yazarların Katkıları | Eserin tamamı yazar tarafından kaleme alınmıştır. |
| Çıkar Çatışması/Ortak Çıkar Beyanı | Yazar tarafından herhangi bir çıkar çatışması veya ortak çıkar beyan edilmemiştir. |
| Etik Kurul Onayı: | Gerekmemektedir. |

BIBLIOGRAPHY

- Adeane A, 'Blue Whale- What is the truth behind an online 'suicide challenge?' (BBC News, 13 January 2019) <https://www.bbc.com/news/blogs-trending-46505722> (Date of Access: 23 June 2021).
- Alici B, 'Movie Watching Culture Changing By The New Media And Children' (2019) 5(47) *International Social Sciences Studies Journal* 5945-5959.
- Baier M, *Social and Legal Norms: Towards a Socio-legal Understanding of Normativity*, (Routledge 2016).
- Baykan M, *Basın Özgürlüğü* (Adalet Yayınevi 2011).
- Black J and White T, *The Doctor's Handbook: Part.2. Understanding the NHS*, (4th Edition, Radcliffe Publishing 2010).
- Blackstone W, *Commentaries on the Laws of England in Four Books*, (Philadelphia: J.B. Lippincott Co., 1893). Vol. 1 – Book I: The Rights of Persons, Chapter 1: Of The Absolute Rights of Individuals, 123. Available to view online, at: <https://ebooks.adelaide.edu.au/b/blackstone/william/comment/complete.html#book1.1> and <https://oll.libertyfund.org/pages/blackstone-on-the-absolute-rights-of-individuals-1753> (Date of Access 28 December 2021).
- Bosland JJ, 'Republication of Defamation under the Doctrine of Reportage - The Evolution of Common Law Qualified Privilege in England and Wales' (2011) 31(1) *Oxford Journal of Legal Studies*, 89-110
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619735#:~:text=The%20doctrine%20of%20reportage%20provides,%20controversy%20of%20public%20interest. (Date of Access: 25 March 2022).
- Chan G.K.Y, 'Reputation and Defamatory Meaning on the Internet' (2015) 27 *Singapore Academy of Law Journal*, 694-730.

'Coronavirus Guidance for Clinicians and NHS Managers' (*NHS England*, 12 January 2021) <https://www.england.nhs.uk/coronavirus/> (Date of Access: 22 September 2021).

Crilly R, 'Airline apologises for Staff who mocked five-year old Abcde's name' (*The Telegraph*, 30 November 2018) <https://www.telegraph.co.uk/news/2018/11/30/airline-apologises-staff-mocked-five-year-old-abcdes-name/> (Date of Access: 23 December 2021).

Elliott C and Quinn F, *Tort Law* (10th edition, Pearson 2015).

European Convention on Human Rights (ECHR) https://www.echr.coe.int/Documents/Convention_ENG.pdf (Date of Access: 25 March 2022).

Abraham F, Paula LR, Lakshmi S and Rajeev S.P, *Social Work Practice in Mental Health, Cross Cultural Perspectives* (Volume 1 of 1st Edition, Allied Publishers 2014).

'Freedom of Expression, Media Law and Defamation' (*International Press Institute and Media Legal Defence Initiative*, February 2015) <https://www.mediadefence.org/sites/default/files/resources/files/MLDI.IPI%20defamation%20manual.English.pdf> (Date of Access: 23 June 2021) and <https://ipi.media/freedom-of-expression-media-law-and-defamation/> (Date of Access: 23 June 2021).

Gülseren FŞ, 'İnternet Ortamında İşlenen Hakaret Suçları' (2013) 4(1) *EUL Journal of Social Sciences/ Lefke Avrupa Üniversitesi Sosyal Bilimler Dergisi*, 15-33.

Günaydın B, *İnternet Yayıncılığı ve İfade Özgürlüğü*, (Adalet Yayınevi 2010).

Herring J and Wall J, 'The Nature and Significance of the Right to Bodily Integrity' (2017) 76(3) *The Cambridge Law Journal*, 566-588, <https://www.cambridge.org/core/journals/cambridge-law-journal/article/nature-and-significance-of-the-right-to-bodily->

[integrity/79703F3BE9C5C21BB76338C050E951BC/core-reader](https://www.britannica.com/technology/Internet)
(Date of Access: 23 January 2022).

Kahn R and Dennis MA, 'Internet: Computer Network' *Encyclopaedia Britannica* (2020)
<https://www.britannica.com/technology/Internet> (Date of Access: 22 January 2022).

Kantar Özkes D, Kantar B, Koç F and Özkoçak V, 'The Effects of Crime-Encouraging Digital Games on Children and Prevention of These Effects' (2019) 7(4) *Social Science Studies* 215-226.

Kaya M, *Elektronik Ortamda (Elektronik Haberleşme- İnternet- Sosyal Medya) Kişilik Hakkının Korunması* (Seçkin 2015).

Kemp S, 'Special Reports- Digital Around the World in April 2020' (*We Are Social*, 23 April 2020)
<https://wearesocial.com/us/blog/2020/04/digital-around-the-world-in-april-2020/> (Date of Access: 15 March 2022).

'Law Student Wins £10,000 after being branded a paedophile on Facebook' (*The Telegraph*, 28 July 2010)
<https://www.telegraph.co.uk/technology/facebook/7912731/Law-student-wins-10000-after-being-branded-a-paedophile-on-Facebook.html> (Date of Access: 25 June 2021).

LexisNexis Defamation Practice Note (produced in partnership with 5RB) <https://www.lexisnexis.co.uk/legal/guidance/defamation>
(Date of Access: 02 February 2022)

LexisNexis Defamation and Social Media Practice Note (produced in partnership with 5RB)
<https://www.lexisnexis.co.uk/legal/guidance/defamation-and-social-media> (Date of Access: 02 February 2022).

NHS England and NHS Improvement Coronavirus Specialty Guides
<https://www.england.nhs.uk/coronavirus/secondary-care/other-resources/specialty-guides/#coronavirus-treatment>
(Date of Access: 22 September 2021).

Ordu A, *Kuzey Kıbrıs Türk Cumhuriyeti'nde İnternette Kişilik Hakkının Hakaret ve Sövme (Zem ve Kadih) Yoluyla İhlaline Karşı Korunması*" (Onikilevha 2020) (*Kişilik Hakkı*).

Ordu A, *The General Principles of Negligence in the Context of Doctor's Medical Practice* (Yakın Doğu Yayınları, 2016) (*Negligence*).

Patchin J, 'Blue Whale Challenge' (Cyberbullying Research Center, 16 May 2017) <https://cyberbullying.org/blue-whale-challenge> (Date of Access: 23 June 2021).

'Press Freedom: Why is it Important?' (News Media Association) <http://www.newsmediauk.org/Current-Topics/Press-Freedom> (Date of Access: 23 June 2021).

Quinn F, *Tort Law* (Pearson 2012).

Scaife L, *Handbook of Social Media and the Law* (Informa Law from Routledge 2014).

Turner C, *Unlocking Torts* (4th Edition, Routledge 2014).

Rogers, W V H, *Winfield and Jolowicz on Tort* (16th Edition, Sweet & Maxwell 2002)

'70 Years of the NHS: The Story of Our Lives' (*NHS at 70*) <https://www.nhs70.org.uk/story/70-years-nhs-story-our-lives> (Date of Access: 05 September 2021).

CASELAW:

Al-Fagih v HH Saudi Research & Marketing (UK) Ltd [2001] EWCA Civ 1634 (5 November 2001)

Bryce v Barber (unreported case), 26 July 2010, (HC)

Elliot v Joicey [1935] SC (HL) 57, [1935] UKHL 3, [1935] AC 209

Hellewell v Chief Constable of Derbyshire [1995] 1WLR 804, [1995] 4 All ER 473

James Rhodes (Appellant) v OPO (by his litigation friend BHM) and another (Respondents) Easter Term [2015] UKSC 3 (On appeal from: [2014] EWCA Civ 1277)

*In The English Modern Age: Examples Of Damage To Reputation On The Internet Under
The Torts Of Defamation And Misuse Of Private Information*

- Morgan v Odhams Press* [1971] 1 WLR 1239, [1971] 2 All ER 1156
- Newstead v London Express Newspaper* [1940] 1 KB 377 (Court of Appeal)
- OPO v MLA & Anor* [2014] EWHC 2468 (QB) (18 July 2014)
- Paton v British Pregnancy Advisory Service* [1979] QB 276, [1978] 2 All ER 987, [1978] 3 WLR 687, 142 JP 497
- PJS v News Group Newspapers Ltd* [2016] UKSC 26 (19 May 2016)
- Re F (In Utero)* [1988] (Fam) 122 (4 February 1988)
- The Author of A Blog v Times Newspapers Ltd* [2009] EWHC 1358 (QB) (16 June 2009)
- Tilbrook v Parr* [2012] EWHC 1946 (QB)
- Vo v. France (Application no. 53924/00)* 17 BHRC 1, (2004) 79 BMLR 71, (2005) 40 EHRR 12, [2005] Inquest LR 129, 79 BMLR 71, [2004] ECHR 326, [2004] 2 FCR 577,
- Wilkinson v Downton* [1897] EWHC 1 (QB) (08 May 1897)