

ECONOMIC TORTS AND INJURED FEELINGS

*George v Cannell* [2024 UKSC 19, [2024] 3 W.L.R. 153 is the first time in over a century that the UK’s highest court has substantively considered the economic tort of malicious falsehood. Sometimes known as injurious falsehood or slander of title, at common law this tort requires a falsehood, published maliciously which is calculated to produce, and does produce, “special damage” – namely, pecuniary loss.

The facts of *George* were relatively straightforward; the legal issues less so (resulting in an eventual 3:2 split and 238-paragraph decision in the Supreme Court). Fiona George (the claimant) was employed by a recruitment agency LCA Jobs Ltd. (the second defendant) which was operated by Linda Cannell (the first defendant). After resigning and starting work at a new agency, George started targeting LCA clients. Cannell emailed George threatening to take legal action for breaching her post-employment obligations not to solicit LCA clients. Cannell also made similar statements to one of the clients George had approached and George’s new boss. In fact, as Cannell well knew when making these statements, George was under no such contractual restrictions.

At first blush, it might be thought that the false statements made by Cannell to third parties would clearly attract liability in malicious falsehood or the related tort of defamation (which protects reputational rather than economic interests). Both actions were pleaded by George at first instance. The difficulty for George was that the trial judge found she had suffered no financial loss nor serious reputational harm as a result of Cannell’s actions (*George v Cannell* [2021] EWHC 2988 (QB), [2021] 4 W.L.R. 145, at [132]–[138], [180]–[182]). For example, in relation to the client that Cannell approached, the statement had no impact because the client had already decided not to deal with George for unrelated reasons.

As serious reputational harm is a pre-requisite for defamation under section 1 of the Defamation Act 2013, Saini J. rejected the defamation claim and there was no appeal from this decision. The position in relation to malicious falsehood was more complex. While at common law malicious falsehood would have failed for want of special damage, section 3 of the Defamation Act 1952 has modified the tort. It provides that “it shall not be necessary to allege or prove special damage” if the defendant’s words are: (1) “calculated to cause pecuniary damage” to the claimant and are “published in writing”; or (2) “calculated to cause pecuniary damage” to the claimant in respect of any “office, profession, calling, trade or business”. Interpreting this section, Saini J. took what was characterised on appeal as a “historical” approach. On this approach, whether words are “calculated to cause pecuniary damage” was to be decided by reference to all evidence *before, at and after* publication. In

this case, no pecuniary damage was actually caused to the claimant, so section 3 did not apply and the malicious falsehood claim was dismissed.

Both the Court of Appeal and Supreme Court took a different view to *Saini J.* Drawing on interpretative aids to which the trial judge had not been referred (including the 1948 Porter Committee Report) the appellate courts adopted a “forward-looking” approach. To put the point in terms unanimously endorsed by the Supreme Court (at [82], [199]), the test of whether words complained of are “calculated to cause pecuniary damage” under section 3 is to ask whether on the facts the defendant knew or ought reasonably to have known *at the time of* publication, it was objectively likely the words would cause financial loss. In *George*, this test was met because Cannell knew, or ought to have known, when making her false statements that George was likely to suffer financial loss (even though she did not go on to do so).

While the Court of Appeal and Supreme Court’s interpretation of section 3 is undoubtedly correct as a matter of statutory construction, a legitimate question to ask at this point is whether the debate between “historical” and “forward-looking” approaches is “much ado about nothing” (at [89]). On the historical approach, *George*’s malicious falsehood claim would be dismissed, while on the forward-looking approach her claim would succeed but sound only in nominal damages as she suffered no pecuniary loss. *George*, however, did not argue that she had suffered *only* pecuniary loss in this case. She claimed that she was also entitled to damages for her injury to feelings or distress. This set up a difficult remedies question which had real practical consequences once the forward-looking approach had been adopted: can a claimant recover for their injury to feelings in a malicious falsehood claim in the absence of pecuniary damage?

The Supreme Court was divided 3:2 on this point, with the majority holding that distress damages were not recoverable where, as here, no financial loss was suffered. The central thrust of the majority’s reasoning was that malicious falsehood is an economic tort, and its character is not altered by section 3 (at [102]–[106]). Lord Leggatt (Lord Hodge and Lord Richards agreeing) emphasised that the entire basis of the action is protecting financial interests. Compensation for distress can be awarded in malicious falsehood claims, but only if the injury to feelings is consequent upon substantial financial loss. It would be illogical if minimal or no interference with the interest protected by a tort “opens the door” to compensation for a different type of injury (at [110]).

Lord Hamblen and Lord Burrows, dissenting, said by contrast that it would be “artificial and arbitrary” if the availability of distress damages turned on whether, for example, the claimant can establish they have suffered a small pecuniary loss (at [234](vi)). Such a position would also be inconsistent with section 3, given that the purpose of this provision is

to turn malicious falsehood into a tort actionable without pecuniary loss where it applies. In their view, a claimant should generally be entitled to compensation for *all* pecuniary and non-pecuniary losses caused by the wrong, subject to normal rules on remoteness and mitigation (at [234], [235]).

Reflecting on these positions, this difference in opinion exposes a deep division in the court's approach to remedies. The majority's approach, which we can label "interest-sensitive", sees the core interest protected by a tort (here financial) as dictating the recoverability of damages. On this view, remedies are closely interwoven with the function served by a particular tort. To award damages for injury to feelings on a standalone basis in malicious falsehood would undermine its fundamental character as an economic tort as well as the law's general position that injury to feelings is not, by itself, sufficient to ground a claim for any other tort. By contrast, the minority's "interest-agnostic" approach focuses not on the interests protected by torts but rather the actual consequences suffered by the claimant. On this logic, if distress is what flows from the defendant's wrongdoing, it should be compensable regardless of whether any economic harm is done.

It is not hard to imagine a similar tension arising in other contexts, particularly in relation to torts actionable *per se*. Adopting an "interest-agnostic" approach to damages would permit substantive awards for injury to feelings following, for example, a battery, false imprisonment or trespass to land, even if the claimant suffers no other loss as a result of the defendant's conduct. The advantage of this approach, one might argue, is its consistency with the basic principle that tort damages aim to put the claimant in the position that they would have been had the wrong not occurred.

Appealing as it is, the difficulty the "interest-agnostic" approach ultimately faces is that it undermines the careful and limited way the law has chosen to protect different interests in tort. As Lord Leggatt explained, with the possible exception of the tort in *Wilkinson v Downton* [1897] 2 Q.B. 57 (which applies in highly specific circumstances), the interests protect by English tort law do not include freedom from distress (at [99]). To award distress damages for malicious falsehood absent any other loss would run roughshod over this position.

Interestingly, we can observe an "interest-sensitive" approach creep into the minority's judgment itself when referring in obiter dicta to the availability of "reputational harm" damages. Lord Hamblen and Lord Burrows acknowledged that such damages should not be available for malicious falsehood as otherwise the law of defamation would be undermined (at [234](x)), presumably because it would circumvent the limited way the law has chosen to protect reputational interests through that action. While the minority say that reputational harm damages are

the one exception to the position that all losses are in principle recoverable in malicious falsehood, the very existence of this restriction demonstrates the issues which can arise when damages are awarded on an “interest-agnostic” basis. As it happens, the question of whether reputational harm damages should be available for torts other than defamation has been left open by the Supreme Court in *ZXC v Bloomberg LP* [2022] UKSC 5, [2022] A.C. 1158 (at [79]) (which involved misuse of private information). So the battle between “interest-sensitive” and “interest-agnostic” approaches is likely to rear its head again soon.

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