

## 2. **Tony (T) v. Bullfeather's Gazette (BG)**

T may assert causes of action based on defamation and invasion of privacy against BG for publishing the article.

### **DEFAMATION**

At common law, to prove defamation a plaintiff must establish that there was a publication of a defamatory statement of and concerning the plaintiff that resulted in [legally cognizable] damages to him/her. In addition, when the plaintiff is a public [official]/figure or the statement is a matter of public concern, the First Amendment requires that the plaintiff must additionally prove ... fault on the part of the defendant and the falsity of the statement made. The common law elements will be discussed first, then any constitutional issues, and finally BG's potential defenses.

#### **[Defamatory Statement**

##### *Statements]*

Here, there were a number of statements made in the article which are potentially defamatory: (1) Tony has violent tendencies, (2) T shot his mother's eye out, (3) T used a knife to injure one of his classmates, (4) T was "expelled," (5) T was on a virtual crime wave, and (6) T turned out to be just like another Charles Manson.

#### *Defamatory Meaning*

A statement has a defamatory meaning if it subjects to the plaintiff to humiliation, distrust, ridicule, or otherwise tarnishes his reputation in the community. A statement [need] not be defamatory on its face, however. When it is not defamatory on its face, the plaintiff must plead additional facts (innuendo) to show the defamatory implications of the statement (innuendo.)

Most of the statements [at issue] are defamatory on their face, such as saying he had violent tendencies, that he used a knife to injure another classmate, and that he was on a virtual crime wave. Others, such as him being another Charles Manson, require him to plead additional facts (innuendo) describing the innuendo from that statement, [i.e., that T is a serial killer because Charles Mason was a serial killer.] T should be able to

clearly establish that these statements would tarnish his reputation and lead to scorn, distrust, and ridicule among members of the community. ...

### **“Of and concerning”**

T must show that the [defamatory] statements made could be understood to refer to him. Here, the statements in the BG article referred to “Tony” [and did] not refer to his last name at all. This may not be enough to establish the “of and concerning.” However, the facts in the article show more about Tony and this may be sufficient to [establish that the article was] of and concerning him. [It may be reasonably concluded that the colloquium, or the “of and concerning” element is established on these facts.] ...

### **Publication**

A publication occurs if the statement is heard and understood by at least one party other than the plaintiff and the defendant. (Economopoulos). [The publication must be intentional or, at least negligent.] Here, the article by T. Ablord (“A”) was [intentionally] published by BG. If the publication is not presumed, T [will] need only establish that someone other than himself read [and understood] it to show publication. It seems like this element would be easily satisfied here.

### **Damages**

A defamatory statement may be either written, libel, or spoken, slander. At common law, what damages need to be proved depends on whether the defamatory statement is libel or slander. Slander, statements made orally or by transitory gestures, require proof of special damages (proof of pecuniary harm) unless slander per se (see, below.) In general, in cases of libel, general damages, such as injury to one's reputation, mental suffering and emotional distress, are presumed.

Here, BG's statements were published in an article in the local newspaper. Therefore, ... the statement[s] made ... would be deemed libel. It appears that [general damages] would be [presumed] in this case, as it is libel and perhaps even libel per se.

[Libel per se means that the defamatory meaning is shown by reference to the statements themselves, without extrinsic facts.] Most of these statements are defamatory on their face, such as saying he had violent tendencies, that he used a knife to injure

another classmate, and that he was on a crime wave. Others, such as him being another Charles Manson require him to plead additional facts describing the inducement or innuendo from that statement, [e.g.,] that [Manson was] a serial killer.

[In some jurisdictions, if the defamatory meaning of the statements is not clear without proof of extrinsic facts, then the libel is called “libel per quod,” and special damages must be proved. Even in these jurisdictions, however, if the defamatory meaning, proved by reference to extrinsic facts,] fit[s] into one of four slander per se categories (imputation of serious crime, serious sexual misconduct, imputation of wrongful conduct in your business trade, profession, or office, or imputation of a loathsome disease) [then general] damages [will likewise be] presumed. [Here, the article stated that T used a knife to injure a classmate, a serious crime if not excused or privileged, suggested that T intentionally shot his mother, and basically stated that T is a violent criminal. Accordingly, at common law, causation of general damages likely would be presumed on these facts.]

### **Constitutional Issues**

In common law defamation, the [falsity of a defamatory statement] is presumed and the burden is on the defendant to show that the statement was truthful. As noted earlier, [general damages are sometimes presumed, and would be presumed in this case.]

In 1964, the US Supreme Court began limiting defamation to protect public debate and prevent a chilling effect on speech protected by the First Amendment [to the U.S. Constitution. These limitations generally place additional burdens on the defamation plaintiff with regard to proving falsity, fault and damages.] To determine if [these limitations on common law defamation apply], we first ask whether the person [allegedly] defamed is a public official or public figure.

*[Was T a public official?]*

When a person is a public official ..., the plaintiff must prove that the defendant acted with actual malice. To show actual malice, [the plaintiff will be required to] prove [by clear and convincing evidence] that [the defendant] published the statements] knowing they were false or [with reckless disregard for the truth, which means] having [a

high degree of awareness that the statements were probably false] or serious doubts as to their truth. (NYT) [In addition, a public official will be required to show the defamatory statement provably false.] Hepps; [Milkovich]).

A public official is one who has ... responsibility over public affairs. Here, [T was not a public official.]

*[Was T a public figure?]*

[The Supreme Court has held that the rules stated above, that apply to public officials in defamation cases, also apply to public figures in defamation cases. Therefore, we must determine whether T is a public figure.]

A public figure can be someone whose [fame and notoriety] is so pervasive that [he or she] become[s] a public figure for all purposes, such as Madonna or Oprah. Public figures for all purposes are so well known to the public that they are considered as such. [Here,] T would definitely not be considered a ... public figure for all ... purposes. [The article refers to T as an “unknown.”] He [is a] 21 year old kid that does not appear to be known based on the facts.

If T is to be a public figure, it would certainly be a ... [limited] public figure. [A person may] become a central figure in a public controversy, and so [become] a limited public figure for that controversy only (voluntary or involuntary). A [voluntary] public figure for a limited purpose [is] one who has thrust himself/herself into the middle of some public controversy [with an intent to affect the outcome.]

[A voluntary limited public figure must voluntarily thrust or inject himself or herself into an existing public controversy.] Here, [characterizing T as a voluntary] public figure ... would be a stretch. [T did not intend to affect the outcome of any public controversy by shooting his mom in the face.] He has done nothing other than fire the shot that hurt his mother. His mother has taken all the affirmative steps to become a public figure, but not him.

There is also such a thing as an involuntary [limited] public figure, or one who unwittingly by his/her acts is [“drawn into” a public controversy and becomes central figure in the public eye with respect to it.] A person is an involuntary [limited] public

figure when through a course of conduct, it is reasonably foreseeable, at the time of the conduct, that the public interest would arise. Also, the public figure must be[come] a central part of the debate. [The Supreme Court has indicated that cases of involuntary limited public figures should be exceedingly rare.]

[It] could be [argued that it could have been] foreseen that when [T] fired the gun and his mom lost her vision that he would go down the road to becoming a public figure. [However, the only real public controversy I can see arising out of these facts would be the debate about crime and punishment, the safety of paintball guns, and perhaps, frivolous product liability suits. It would be difficult to conclude that T could reasonably have foreseen that he would become, or even that he has in fact become a central figure in any of those public controversies.] I would say T is not a[n] [involuntary limited] public figure [else, any accused criminal would become a limited public figure.]

In the unlikely event that T is found to be an involuntary public figure because of the fact that he shot his mother's eye out, T will have to show that the BG published the statements about him [with “actual malice” and will also need to show that the statements were provably false.]

[To show actual malice], T would argue that after interviewing his former classmates, A [not] only knew that the paper airplane incident was substantially true, [but, for that reason actually knew] the other statements [were false.] Here, [however] T is suing BG, [not] A who actually wrote the article [and therefore a threshold issue with respect to the attribution of fault must be addressed.]

[BG should be found to have published with actual malice.] A was given the assignment because A is a friend of the CEO of XYZ and he is one of the BG's most aggressive reporters. Furthermore, White [the editor of the BG] told A to write the story from the point of view that D was attempting to exploit D's injury for financial gain. In so doing, it was likely that A would stretch the truth. [Although motive and the interest in personal profit are not determinative of actual malice, these facts are relevant. (St. Amant, Harte-Hanks)] Moreover, T will [also] argue that [to the extent that A] had knowledge of falsity as to the statements and wrote them anyway, [BG should be held vicariously liable as A's employer for publication with actual malice. (Cantrell)]

[If T is characterized as a limited public figure,] under Milkovich and Hepps, T [will also be required to] show that [the defamatory statements were] provably false. Because T in fact never injured anyone with a knife, T would likely be able to prove the [knowing] falsity [of that statement.] As to the [statements] other [than using a knife to injure a classmate T] may have a problem of proving falsity [by reference to verifiable facts. Several of the other statements – that T has “violent tendencies,” that T is a “crime wave,” that T is “like Charles Manson” — might be hard to “prove” false.]

However, given the other statements regarding Tony's violence, knife wielding and criminal intentions, comparing T to a known murderer might be found [provably false.] .... BG would argue that calling T a “virtual crime wave,” and another Charlie Manson, [and labeling T with “violent tendencies] are no [more] provably false [than saying that a Mayor has ignorant political beliefs.]

*[If T is a private figure, was this a matter of public concern?]*

[It is likely that T will not be held to be a public figure of any type.] When the plaintiff is [not a] public official or figure, [and] is a private plaintiff [then we must ask whether the subject matter] is a matter of public concern. [If so, and even though T may be a private figure], in addition to proving the common law elements of defamation, T must show some fault (at least negligence), that the statements were provably false, and T will be required to prove actual injury (explained below), unless the NYT malice standard is met. (Gertz; Hepps; Milkovich).

To determine whether a statement is a matter of public concern, the Court will consider the form, content, and context and whether the matter is an issue of public debate, how many persons are interested in the matter, how widespread the dissemination was. (Dun & Bradstreet). So many things have been deemed a matter of public concern that is often difficult to describe when something is not a matter of public concern.

Here, the matter could be described as the fact that T is potentially violent, that he used a knife to injure his classmate, [and] that he shot him mom in the eye. These all could be considered matters of public concern [as the public is generally interested in crime and punishment.] [Moreover], the statements [would be of interest to] paintball gun owners, [persons concerned about] frivolous lawsuits and [the] protection of community

businesses. These issues are probably important to the local community and thus a matter of public concern.

If so, T would have to prove that BG at the least had “some fault” with respect to the falsity of the article, again that the statements were false, and actual [injury], unless he [is able to] meet the actual malice standard. [Actual injury means that T’s damages will need to be proved by evidence, and must not be merely presumed; such damages may, however, include general damages (damage to reputation, humiliation and shame) in addition to special damages (pecuniary harm).]

If required to do so, T will likely be able to prove some fault based on [what I believe can be established to be the] industry standard for investigation and reporting. Here, the only confirmed information the reporter had was about the shooting in the eye and the paper airplane incident. Whether a reasonable newspaper would report the other unconfirmed information is relevant here, and it is unlikely. [The requirement that T prove that the defamatory statements are provably false is addressed above.] Therefore, if T can prove actual injury, T likely could meet these enhanced constitutional requirements if [deemed] a private figure defamed with respect to a matter of public concern.

*[If T is a private figure, was this a matter of private concern?]*

[In the unlikely event that] T is found to be a private person with respect to a matter of private concern, the elements of a cause of action for defamation at common law may be all that is required. (Dun & Bradstreet) [It is noted] though [that] except as to the recovery of presumed and punitive damages, this conclusion is not clearly established by Supreme Court precedent.]

### **BG's Defenses**

Under the common law, BG could raise (1) truth as a defense and (2) various qualified privileges, including fair comment and fair reporting.

As to truth, BG will have a defense if BG can prove the statements are substantially true. It may be precisely true from the facts [that T shot D] (though it is unclear that T intentionally shot Dana in the face). It seems unlikely that the other statements can be proved true, given that Tony was not expelled and has no criminal

record. [Statements about T having “violent tendencies” and being a “virtual crime wave” and “another Charles Mason” may viewed as rhetorical hyperbole, and [thus may be constitutionally protected in any event (see below), even if not proved “true.”]

BG may also argue the privileges of fair reporting and fair comment. The [privilege of fair reporting is] most often related to objective news reporting about public [official] events and [does not] seems particularly applicable here.

[At common law, although even an opinion could be the basis of an action for defamation, the privilege of fair comment made a statement generally privileged when it concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm. The privilege of fair comment applied only to an expression of opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion.]

Here, the statements that T used a knife to injure one of his classmates would clearly be outside the scope of the privilege of fair comment. Other of A’s evaluative statements, however, may present a closer question: e.g., that T is a “virtual crime wave,” that T has “violent tendencies,” and that “T is like another Charles Manson.” These may be opinions based on true facts (T shot his mom, he hit a classmate with a paper airplane) honestly held by A. One might question whether these were A’s actual opinions, however, and one might further question whether publication of these statements was for the ulterior motive of protecting the interest of XYZ in a potential product liability action.

[Finally, the U.S. Supreme Court has held that in order to provide “breathing space” for speech protected by the First Amendment, a state may not permit the imposition of damages, pursuant to a defamation theory, for the publication of “rhetorical hyperbole” and “ridicule.” These statements, in context, may be so characterized.]

## **INVASION OF PRIVACY**

Invasion of privacy is a complex of four related torts: (1) intentional intrusion upon the seclusion of another; (2) publicity that places another in a false light; (3) public disclosure of embarrassing private facts about another; and (4) appropriation of [another's name or likeness.] The primary invasion of privacy tort that T would most likely be successful on here is placing T in a false light. ...

### **Invasion of Privacy: False Light**

To prove invasion of privacy by placing the plaintiff in a false light, the plaintiff must show that the defendant (1) publicized, (2) false facts or facts that placed the plaintiff in a false light, (3) in a manner that was highly offensive to a person of ordinary sensibilities. [If the plaintiff is a public official or a public figure, or if the matter is of public concern, then the plaintiff must also establish "actual malice." (Though the applicability of the "actual malice" standard to the case of a private figure remains in some doubt; the same rules applicable to defamation may apply here as well.)]

Publicizing a statement is not the same as a publication under defamation law. Instead it is much broader, and [usually] requires that the information be widely dispersed among the community. Here, T would argue that this requirement is met by the fact that the facts were published in the newspaper.

The statements did put T in a false light. The article misportrayed the facts concerning his incident in fifth grade. The article misportrayed him as a violent person when there was no evidence of this except for an incident at least 10 years before with a paper airplane. Also, even though the article did truthfully state that he shot his mother with the gun, it did so under false circumstances. It said that T quickly put out his mother's eye by firing at her face, which implies that T had the intent to harm his mother. Instead of portraying it as an accident, the article suggested that T was a violent person who did it intentionally.

The facts that are publicized must be either false or place the P's opinion, belief, or character in a false light. Here, T would argue that the facts about him being violent, especially about him injuring another student with a knife are false. In addition, he would

argue that being described as just like Charles Manson, having violent tendencies, and being on a virtual crime wave, based on one true incident involving him shooting his mother with the paintball gun, places him in a false light.

Would this be offensive to a person of ordinary sensibilities? Would a reasonable person object? Here, the conduct imputed to T suggests that he was a very bad person with a violent personality. The article suggests that he was Charlie Manson, a notorious serial killer. T would argue that exaggerating his nature in such a way would be highly offensive to a person of ordinary sensibilities. Calling him the next Charles Manson would likely be considered to be highly offensive. A reasonable person object to this “false light.”

[If T is found to be a public figure, or a private figure placed in a false light with regard to a matter of public concern,] T will have to prove that the statements were made with the requisite degree of fault to recover (either the NYT or Gertz standards apply.) [Here, A misrepresented the fifth grade incident. And,] while factually true, the statement that T “put his mother’s eye out” is intended to create a different impression from what A knew to be the case. Because any requisite degree of fault likely can be shown, T [may be able to] recover on a “false light” theory on these facts.

### **Intrusion Upon Seclusion**

The intentional intrusion into the seclusion or "zone of privacy" of an individual or his concerns, in a manner offensive to a reasonable person, is a tort. No publication is necessary for this cause of action.

Here, Dana asked to be and was interviewed by BG [about the shooting] and so it is unlikely that that intrusion would warrant recovery. The interview with Tony's classmates is arguably such intrusion: a small group of former associates with whom Tony would have some [legitimate] expectation of [limited] privacy [as to his conduct in a nonpublic place were approached by A in an effort to discover nonpublic information.] It seems likely however that the schoolroom atmosphere is too public to expect such privacy, especially given that it happened years ago and people can be expected to talk. [Further, the press probably has a privilege to seek out information — even confidential information — if merely asks questions of persons expected to have that information.]

### **Invasion of Privacy: Public Disclosure of Private Facts**

T may claim to have an action for this tort, which requires publicity of private facts, which are offensive and [the absence of any] legitimate public interest.

As we have seen, there has been publicity. Were the facts private? The [facts about T's conduct in the fifth grade] were from a long time ago and there has been no similar behavior since. T was a minor at the time and probably just wants to move on with his life. Yet, these are probably not private facts. [There have been cases involving the theory that one should be entitled to make a "fresh start" but the issue must really turn on whether the facts were sufficiently private and of public interest.]

As stated above, [none of these "facts" were likely sufficiently "private" to warrant protection,] this is a matter of public concern, and thus this cause of action will fail. Also, this cause of action is not recognized everywhere.

### **Appropriation of Name or Likeness**

Finally, T may try to state a claim for appropriation [of his name.] He must prove: use of name by BG for benefit of BG, commercial or otherwise. Here, T would argue that BG used his name and a story about him to help the CEO of XYZ and also to sell newspapers. [And, this contention may have some merit.]

However, BG would raise a newsworthiness privilege: that [these circumstances were a] matter of public concern. [This defense will be absolute, even if the BG had a "mixed" purpose in publishing the article, so long as the "newsworthiness" of the story was its predominate purpose.] So, T may not be successful even if he could state a prima facie cause of action for appropriation of his name and identity by the BG for its own benefit.