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What – right now – amounts to ‘serious harm’ after the spate of recent cases, including the impact of the ‘rule in *Dingle*’?
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Defamation Act 2013, section 1

Section 1 – “Serious harm”

- (1) A statement is not defamatory unless **its publication** has caused or is likely to cause **serious harm** to the reputation of the claimant.
- (2) For the purposes of this section, harm to the reputation of a body that trades for profit is not “serious harm” unless **it** has caused or is likely to cause the body **serious financial loss**.

In force from 1 January 2014.

(1) Where are we now on serious harm?

Where the Supreme Court in Lachaux said we should be.

section 1 in the Supreme Court

Lachaux v Independent Print Limited & Evening Standard Limited (Lachaux)

[2019] UKSC 27

[2020] AC 12

12 June 2019: Lords Sumption, Kerr, Wilson, Hodge, Briggs.

what does section 1 do?

“...it not only raises the threshold of seriousness above that envisaged in Jameel and Thornton but requires its application to be determined by reference to the actual facts about its impact and not just to the meaning of the words.”

Lachaux at [12]

the old law and (common law) threshold

The Supreme Court reviewed the origins of defamation [4-5] and some of its “*more or less artificial rules*” [6], including how the single meaning of a publication is ascertained (the hypothetical ordinary reasonable reader) and the presumption of damage to C’s reputation (an “*irrebuttable*” presumption of law).

There were two “*important cases*” in the decade before the 2013 Act:

- *Jameel (Yousef) v Dow Jones* [2005] QB 946 CA (***Jameel***);
- *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985 (***Thornton***) Tugendhat J.

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Jameel

Jameel established a “*procedural threshold of seriousness*” to be applied to damage to C’s reputation [8].

- This was a “*low*” threshold – the damage had to be “*more than minimal*”.
- The operation of the threshold depended on the evidence of actual damage (not only the inherently injurious character of what had been published).
- CA held that libel’s presumption of general damage was compatible with Article 10 of the European Convention on Human Rights (ECHR).*
- In “*rare*” cases, where damage was shown to be “*trivial*”, the claim would be struck out as an abuse of process.

* See also the 3:2 decision in *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2007] 1 AC 359 HL.

*

Thornton

Thornton said there was a “*substantive threshold of seriousness*” [9].

- A statement may be defamatory of C if it substantially affects in an adverse manner the attitude of others towards C, or has a tendency to do so.
- This (raised) threshold still looked mainly at what the publication meant – the “*inherent propensity of the words to injure [C's] reputation*” - but:
 - J noted it was “*difficult to justify*” a presumption of damage if “*words can be defamatory while having no likely adverse consequence for [C]*”.
 - And, after *Jameel*, if there was “*no or minimal actual damage*”, an action for defamation could constitute an interference with Article 10 ECHR.

so – with that reminder - what does section 1 do?

“...it not only raises the threshold of seriousness above that envisaged in Jameel and Thornton but requires its application to be determined by reference to the actual facts about its impact and not just to the meaning of the words.”

Lachaux at [12]

four things about section 1 – from *Lachaux* [13-17]

- (1) The “*least*” that s1 achieved was “*to introduce a new threshold of serious harm which did not previously exist*” [13].
- (2) Whether publication of a statement “*has caused*” serious harm refers to “*the consequences of the publication, and not the publication itself*”. It is a proposition of fact.
 - “*It depends on a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated.*”
 - Ditto for whether harm is “*likely*” to be caused [14].

...four things (continued)...(3)...

(3) s1(1) has to be read with s1(2) – [15].

- The “*financial loss*” envisaged in s1(2) is “*not the same as special damage, in the sense in which that terms is used in the law of defamation*”.
- s1(2) “*must refer not to the harm done to [C’s] reputation, but to the loss which that harm has caused or is likely to cause*”. The “*financial loss*” is the “*measure of the harm*” and must “*exceed the threshold of seriousness*”.
- This calls for “*an investigation of the actual impact of the statement*”. A statement “*may cause greater or lesser financial loss to [C] depending on [their] particular circumstances and the reaction of those to whom it is published*.”
- Whether financial loss has occurred (or is likely) – and whether it is “*serious*” – “***cannot be answered by reference only to the inherent tendency of the words.***”

..four things...(4)

(4) s1 was “evidently intended as a significant amendment”.

- If “*serious harm*” could be demonstrated by reference only to the inherent tendency of the words, it was hard to see that any substantial change would have been achieved.
- “*Suppose that the words amount to a grave allegation against [C], but they are published to a small number of people, or to people none of whom believe it, or possibly to people among whom [C] had no reputation to be harmed. The law’s traditional answer is that these matters may mitigate damages but do not affect the defamatory character of the words. Yet it is plain that section 1 was intended to make them part of the test of the defamatory character of the statement*” [16].

so what difference does it make?

- “..the defamatory character of the statement **no longer depends only on the meaning of the words** and their inherent tendency to damage [C’s] reputation” [17].
- This was a change to the common law – but this was not a “revolution”, any more than the changed thresholds in *Jameel* or *Thornton* had been.

(2) what do you consider for serious harm under s1(1)?
Again, see the Supreme Court (and Warby J) in Lachaux.

was the Judge (Warby J) right to find “*serious harm*”?

- The Supreme Court found Warby J’s analysis of the law “*coherent and correct, for substantially the reasons which he gave*” [20]. And there was no basis for interfering with his decision on the facts [21].
- J had heard evidence from C, three other factual Ws and C’s solicitor. C had *not* called evidence from anyone who read the statements about the impact on them – but Sup Ct did not accept, any more than the J had, “*that [C’s] case must necessarily fail for want of such evidence*” [21].

...more on why Warby J was right [21]

- J's finding was based on a **combination** of the **meaning of the words**, the **situation of C**, the **circumstances of publication**, and the **inherent probabilities**.
- J took into account the scale of publication; the fact that the publications had come to the attention of "*at least one identifiable person*" in the UK who knew C; that they were "*likely*" to come to the attention of others who knew him; and the gravity of the statements made.
- Absent an error of principle (there was none: see below), Sup Ct would not interfere.

Lachaux: no error of principle by Warby J [22-25]

The Sup Ct rejected 3 arguments that Warby J had been wrong in principle:

- The “*repetition rule*” (which affects meaning and the availability of a defence of truth) survives the 2013 Act [23].
- The rule in *Dingle* (evidence of damage caused to C’s reputation by earlier publications treated as irrelevant) survived too. **But note:** no-one had invited the court “*to abrogate*” the *Dingle* rule [24] - *Dingle v Associated Newspapers Ltd* [1964] AC 371 HL.
- C’s reputation was harmed at publication, even if the publishee “*had never heard of [C] at the time*” (and knew only what the publication said) [25].

so what do you need to consider under s1(1)?

- **Meaning:** what meaning – or meanings – are conveyed (to the hypothetical ordinary reasonable person)?
- **Publication:** what is it – how / where / by whom was the statement published (national media / social media / mass or limited publication) - nature and context of the publication?
- **Claimant's situation:** who is C? what are C's circumstances?
- **Reaction/impact:** to whom was it published? how many people? how did they react (did they believe it or not)? what actual effect(s) did publication have on C (their reputation)? what (on the facts) were the likely effects?

(3) And what about $s_1(2)$?

See *Lachaux [15], Gubarev, Musst...*

and what about s1(2)

Lachaux was not concerned (directly) with s1(2) – but, as noted above, s1(1) has to be read with s1(2) – see [15]:

- The “**financial loss**” envisaged in s1(2) is “**not the same as special damage, in the sense in which that terms is used in the law of defamation**” [15].
- s1(2) “must refer not to the harm done to [C’s] reputation, but to the loss which that harm has caused or is likely to cause”. The “**financial loss**” is the “**measure of the harm**” and must “**exceed the threshold of seriousness**”.
- This calls for “an investigation of the actual impact of the statement”. A statement “may cause greater or lesser financial loss to [C] depending on [their] particular circumstances and the reaction of those to whom it is published.”
- Whether financial loss has occurred (or is likely) – and whether it is “serious” – “**cannot be answered by reference only to the inherent tendency of the words.**”

The CA in *Lachaux* had noted that 1(2) had been introduced into the Defamation Bill at a “very late stage” [37]. It was a Lords amendment on 23.4.13; Royal Assent was 25.4.13

s1(2) in *Gubarev v Orbis Business Intelligence* [2020] EWHC 2912 (QB)

Warby J at [41-45]. Cites *Lachaux* at [15]

- Proof of financial loss may not be the “*sole requirement*” in s1(2), but “*in principle, all cases that fall within s1(2) require proof of serious reputational harm that results from the statement complained of and financial loss that is (a) serious, and (b) consequent on the reputational harm*” [42].
- Financial loss can be inferred, but “*inference is not the same as speculation; there must be a sound evidential basis on which to infer that the publication is more likely than not to have caused serious financial loss*” [45].
- Wide publication and the seriousness of the allegation is not likely to be enough. “*More evidence, and a more detailed examination of the context, will normally be required.*” The burden is on C to establish that it is more likely than not that the loss it proves is a consequence of the publication complained of and not “*some other cause or causes*” [45].
- C had failed to show the nature and scale of the impact of publication; it was unclear whether there was any impact on its “*bottom line*” [89].

s1(2) in *Musst Holdings Ltd v Astra Asset Management UK Ltd*

[2021] EWHC 3432 (Ch) (Freedman J)

- Judgment following trial of a contract claim and defamation claim.
- J followed the approach of Warby J in *Gubarev*: see [613-621] (law) and [622-632] (on the facts).
- C had failed to show that it had suffered any loss, or that any loss was likely.
- C tried – but failed - to show that substantial redemptions were the result of the publication of the defamatory statements. On the evidence, the decision had been made based on a number of factors [626].
- J noted that if a problem might have been caused by the publication, a reasonable investor would not simply pull its money or reduce its investments “*unless satisfied it was the right thing to do*”. Here, disclosure of C’s financial position would have shown the true position to publishees. The court should consider the context in which a publication occurred and “*should not assume that a publishee would take immediate or unreasonable action*” in relation to the statement [631].

Eureco Fuels (Poland) Ltd v Szczecin & Swinoujscie Seaports Authority SA

[2018] EWHC 1081 (QB), [2018] 4 WLR 133 (Nicol J) at [71]. Pre-Lachaux decision that serious financial harm did not mean special damage.

“Absent some clearer indication of Parliament's intention, I would not limit “serious financial harm” to special damage. I also see no reason why “serious financial loss” may not, like other forms of “serious harm”, be capable of inference from the evidence. Loss to investors is not automatically to be viewed as loss to the company, but it can make borrowing more expensive and the raising of equity more difficult. Here, there is also evidence of an adverse impact on suppliers and of management time made necessary by responding to the libels”. Cs' claim was limited to republication (here) of allegations abroad and the J noted that there might be issues about what led to the consequences, but there was “sufficient evidence at this stage that the source of [Cs'] investment is mainly in the UK”. In addition, there was evidence that “UK suppliers of waste products no longer offer him such competitive rates, which is evidence of financial loss of a different kind”.

The CA decision [2019] EWCA Civ 2932, [2019] 4 WLR 156 was not concerned with s1(2).

(4) Overall – where are we on “serious harm”?

It is a serious threshold requirement that needs to be (and is) taken seriously.

the serious harm requirement in s1 has to be taken – er - seriously

- Since *Lachaux* in the Supreme Court, the courts focus on the facts – the circumstances of the publication – and the impact that publication had (or was likely to have) on C's reputation.
- The factors highlighted above (slide 18) – **meaning – publication – C's situation** – and (the actual) **reaction/impact** are relevant. That the defamatory meaning is serious is (alone) not enough. Serious harm – **caused by the publication** – is something that C has to demonstrate (on the facts).
- The decision in any particular case is rooted firmly in, and turns on, the facts. Warby LJ may well be right that, even allowing for the serious harm requirement in s1, defamation “*remains a relatively simple tort to prove*” - *Soriano v Forensic News LLC* [2021] EWCA Civ 1952, [2022] WLR (D) 9, at [15]. But **proof** – of serious harm – is required.

what a claimant has to set out (and then prove)

- Under the Pre-Action Protocol for Media and Communications Claims at [3.2], C should include in their Letter of Claim “*how or why*” C says that [the publication of] the statement complained of has caused or is likely to cause serious harm, including, where C is a body trading for profit, “*such details as are available of the nature and value of the serious financial loss*” C says has been caused or is likely by reason of the publication.
- Under CPR 53 PD 53B at [4.2(3)], the particulars of claim must set out the “*facts and matters relied upon in order to satisfy the requirement*” of s1 of the Defamation Act 2013 (serious harm / serious financial loss).
- If a special damages claim is made, note that C has to set out “*details of any particular damage*” in the letter of claim (Protocol [3.2]); and “*full details*” of facts and matters relied on in support of claim for damages in the statement of case (CPR 53 PD 53B at [4.2(5)]).

(5) When does the court determine “serious harm”?

If disputed, at trial – unless it can be disposed of summarily.

when will “serious harm” be determined by the court?

- There is a strong trend in favour of the early determination of issues relating to meaning (meaning, defamatory at common law, fact/opinion), but not serious harm. Issues relating to meaning do not (generally) require evidence – beyond the publication itself. By contrast, “*serious harm*” (where disputed) generally turns on contested facts*.
- In *Economou v de Freitas* [2018] EWCA Civ 2591, [2019] EMLR 7, the CA said at [40]: “*where the matter is contested, and cannot be dealt with summarily, the issue of serious harm is, in short, best left to trial, where it can be determined as appropriate on the evidence*”.
- Remember that in *Economou*, Warby J had found that some publications (in mass media) failed at the serious harm hurdle. The CA upheld his decision [41]: “*the fact that an inference of serious harm can be drawn in an appropriate case does not in my view preclude the sort of causation analysis undertaken by the judge, depending always on the facts. Ultimately, the judge had to be satisfied that the particular publication concerned had caused [C] serious harm; and for the reasons he gave, when considering the complex facts which were before him, he was not so satisfied here.*”

* The *Theedom* litigation showed the perils of trying “*serious harm*” early: *Theedom v Nourish Trading/Training Ltd* [2015] EWHC 1769 (QB) and [2016] EWHC 1364 (QB), [2016] EMLR 10.

recent examples of summary determination (1)

BHX v GRX [2021] EWHC 770 (QB) (Nicklin J)

- Libel claim based on a text message sent to C's father by D (C's sister).
- Principles on serious harm stated shortly at [55(9)].
- C failed to disclose a reasonable cause of action [59]. There was nothing to suggest that C's father had repeated the allegation; and the "*absence of any real reputational harm*" was demonstrated by the reply to the message sent by the father – his reply was clear and contemporaneous – the suggestion that there was any serious harm was "*fanciful and unreal*".
- Judge struck out the case; would also have granted summary judgment.

recent examples of summary determination (2)

Webb v Jones [2021] EWHC 1618 (QB) (Griffiths J)

- J dealt with serious harm at [60-73].
- Libel claim based on FaceBook posts, published within a group ("*Dodgy Horse Dealers*"), which had 16,000 members.
- J found that the claim was hopeless and should be struck out.
- [63] "*Serious harm may be inferred, but only in an appropriate case. It is not to be assumed, and it certainly cannot be assumed only because the statement is seriously defamatory on its face, even if it is. There must be facts, and the facts must be pleaded, like any fact essential to a cause of action.*"

another (not so recent) example of summary determination (3)

Theodotou v Kounis [2019] EWHC 956 (QB) (Warby J) at [68-70]

- A libel claim (on a FaceBook post) was struck out: the evidence was that the few people who would have identified Cs from the post were “*either dissatisfied ex-clients or others who will already have taken against [Cs], so that no material harm was done.*”
- Had it been necessary to deal with s1(2) – for C2 (a firm of solicitors) – the J would have found against C2 on “*serious financial loss*”. While the loss of one client could (in some circumstances) be a serious matter – eg, *Brett Wilson LLP v Persons Unknown* [2015] EWHC 2628 (QB), [2016] 4 WLR 69 at [27-30] – in this case, the evidence was that clients had left Cs “*before the offending publication*”.

(6) What do the recent cases show?

The principles are clear (Lachaux, Turley) – they are being applied, with close scrutiny of the circumstances (and evidence) in each case – the threshold is real (serious).

Unsurprisingly, the many (very many) cases show that each case turns on its facts.

recent examples – serious harm at trial (1)

Riley v Murray [2021] EWHC 3437 (QB) (Nicklin J)

- Libel claim based on a tweet – suggesting that C had said that Jeremy Corbyn had deserved to be violently attacked, and shown herself to be a dangerous and stupid person who risked inciting unlawful violence [25-26].
- For the relevant principles (after *Lachaux*), J repeated the summary he gave in *Turley v Unite the Union* [2019] EWHC 3547 (QB) at [107-109]. He included:
 - (1) the propensity of defamatory statements to “percolate” beyond their original publication (Bingham LJ in *Slipper v BBC*);
 - (2) the acknowledgment that C may struggle to produce evidence from publishees in whose eyes they were damaged (*Doyle v Smith*, *Sobrinho v Impresa*); and
 - (3) harm is not a “*numbers game*” – a well-targeted arrow may cause more damage than indiscriminate firing (*King v Grundon*, *Dhir v Sadler*, *Monir v Wood*).

Riley (continued)

- The absence of analytics data from Twitter had hampered the examination of the extent of publication of D's Tweet (and responses/replies to it) [35]. But C had produced evidence, including posts on social media, as to the response to it [36]. The position had been complicated by the fact that Owen Jones (who had 1 million followers) had tweeted, resulted in a "pile-on"; and by C having responded to D's Tweet by quote-tweeting (and denouncing) it [16], [37-38].
- C relied on the seriousness of the allegation, the extent of publication, and the actual harm shown [40]. D asserted that C could not rely on republication that followed her "quote-tweet" [41].
- J's decision on the facts is at [42-47]. J limited the evidence which he was satisfied was "directly" linked to D's Tweet [42]: *"Such is the nature of social media, that very quickly discussion can fragment, with users commenting upon the contributions of others. In part, this is simply the modern version of the well-recognised 'percolation' or 'grapevine' effect in the spread of defamatory allegations, and some of this is properly to be regarded as the harm to reputation arising from the original publication. Nevertheless, the Court must take care to ensure that the relevant harm to reputation has been caused by the publication complained of."*
- It was not necessary to resolve the argument that D was not responsible for further publication of D's Tweet caused by C having quote-Tweeted it – because serious harm to C's reputation had been caused before she sent that tweet [43]. *"As s.1 is a threshold issue, once it has been surmounted by a claimant, it is not necessary to consider by what margin. This is a matter, if it is reached, that would be relevant to damages."* [43]
- There was "*clear, contemporaneous, evidence of the impact of the defamatory sting*" of D's Tweet; it was quickly posted on FaceBook and spread; there was evidence of serious reputational harm being caused (unconnected with C's own Tweet) [45].

recent examples – serious harm at trial (2)

Three decisions of Saini J

Davies v Carter [2021] EWHC 3021 (QB) at [62-63]

- Publications were to the world and directly to C's employer; C produced evidence of how they were received and what happened. (Note: J was prepared to infer, from evidence as to harm caused by earlier – time-barred – publications, that similar harm was likely to be caused by later publications).

George v Cannell [2021] EWHC 2988 (QB)

- See [114-138], which show the need to focus on the evidence / the particular facts.

Coker v Nwakanma [2021] EWHC 1011 (QB)

- See [12], [33-34] – Saini J uses the statement of principles in *Turley*.

George (continued)

- One publication in *George v Cannell* (a slander) was to a single person, who already had a negative opinion of C; the potential percolation was too limited to constitute serious harm: [121-125], [132]. C also failed to show serious harm on an email, also sent to one person [133-135].
- Worth noting the approach in the context of malicious falsehood [200-210]: the circumstances of publication, and evidence as to the likelihood of (pecuniary) damage, were relevant. J noted that the exercise is different in cases of mass media or general publication (when evidence from / in respect of most publishees is not available) and limited publication cases (where inquiry into the circumstances of the publishees and other evidence is “*admissible and decisive*”) [206-207]. Saini J granted PTA on the interpretation of s3 of the Defamation Act 1952.

more recent examples – assessing serious harm (3)

Two Collins-Rice J decisions

Sahota v Middlesex Broadcasting Corporation Ltd [2021] EWHC 3363 (QB)

- Serious allegations published in Punjabi television programme about businessman: see [23-31]. C's evidence included witnesses who had seen the broadcast who, while they did not believe the allegations, were shocked by them and concerned about the impact they might have.

Mahmudov v Sanzberro [2021] EWHC 3433 (QB)

- Son and daughter of Eldar Mahmudov, the former head of national security in Azerbaijan, sued 6 Spanish-based defendants for libel published online.
- Judgment is on a jurisdiction challenge under CPR 11, on the fit between EU and domestic law. But J considered serious harm [41-42], [56-68].

Mahmudov (continued)

- J noted that s1 provides for a “*test of impact*”, which must be satisfied on the balance of probabilities on each defamatory statement [41].
- Serious harm has “*an important causation element*”, with a number of aspects [42]:
 - If multiple Ds publish the same libel, D is responsible “*only*” for the harm caused by its own publication in the minds of its own readership.
 - Since each publication must satisfy the test, it is not possible to aggregate or cumulate injury to reputation over a number of publications in order to pass the threshold (*Sube*).
 - BUT – if causation is established – D cannot diminish the seriousness of the harm caused by pointing to the same publication by others (or else C risks falling between various stools – see the explanation of the “*so called ‘rule in Dingle’*” in *McCormack* at 149ff).

Mahmudov (continued)

- On the facts, Cs' problem was the extent of publication (very limited in the jurisdiction) and "causation" [58].
- C's evidence did not clearly indicate any actual harm occasioned via readers in the UK, as a result of publication in the UK. There was evidence of harm – closure of a bank account, faltering of a business – but none of it was attributed to readership of any particular version of the publications complained of. Whether any such harm was caused by any libel – "*as opposed to entirely independent factors*" – was in issue. [63]
- The harm (here) "*may well*" have been the result of publication in Spain (which is the overwhelming locus of the readership). Cs had to show that the "*root, as well as the fruit*" of the grapevine was here [64].
- The articles had followed a joint investigation – by Spanish and UK titles (including *The Observer*); Cs had not sued the UK publishers, but their articles had reported on the same themes (unexplained wealth – reasons to investigate) [65.]
- J said [65]: "..if [Cs] could show harm in the UK as a result of UK readership of the Spanish articles, then [Ds] could not be heard to try to diminish their responsibility by showing that their readers had also read the story in the UK titles. But **what [Cs] cannot do is work back from evidence of harm in the UK to an assumption that it was caused by the Spanish articles rather than the English articles.** If the underground springs of [Cs'] UK reputation have been contaminated by suspicions, it does not follow that that must be attributed to the poison of the (defamatory) Spanish articles rather than the (if not defamatory, distinctly suggestive) English articles)." From "first principles", the latter were "**overwhelmingly the more likely cause** of any reputational harm in the UK not specifically attributable to other particular publications" – since they have a wider publication in the UK and are in English.

(7) What is the ‘rule in *Dingle*’?

For a quick summary, see Lachaux and Sicri (and, for more, Wright); or delve into its history to understand its context.

what is the rule in *Dingle*?

As described in *Lachaux* at [24]

- “*The effect of the Dingle rule is to treat evidence of damage to [C’s] reputation done by earlier publications of the same matter as legally irrelevant to the question what damage was done by the particular publication complained of. It has been criticised, but it is well established. It has the pragmatic advantage of making it unnecessary to determine which of multiple publications of substantially the same statement occurred first, something which in the case of a newspaper would often be impossible to ascertain and might differ from one reader to the next. The practical impact of the Dingle rule in the modern law is limited by section 12 of the Defamation Act 1952, which allows a defendant to rely in mitigation of damage on certain recoveries or prospective recoveries from other parties for words to the same effect; and by the operation of the Civil Liability (Contribution) Act 1978. Section 1 of the Act is concerned with the threshold of harm and not with the measure or mitigation of general damage. But both raise a similar question of causation. It would be irrational to apply the Dingle rule in one context but not the other, and no one is inviting us to abrogate it. The judge was therefore entitled to apply it.*”

what is the rule in *Dingle* (2)?

As described by Warby LJ in *Sicri v Associated Newspapers Ltd* [2020] EWHC 3541 (QB), [2021] 4 WLR 9 at [178(6)]:-

- “..It is a rule of evidence or case management, grounded in pragmatic considerations. Its ratio is that, whilst the defendant to a claim in defamation may prove, in mitigation, that the claimant had a pre-existing general bad reputation, this may not be done by relying on other publications to the same or similar effect: see my decision in Lachaux at first instance [2016] QB 402 [74]ff, and the passage cited above from the judgment of Lord Sumption when the case reached the Supreme Court. I note that Jay J has recently reached essentially the same conclusion in the libel case of Napag Trading Ltd v Gedi Gruppo Editoriale SpA [2020] EWHC 3034 (QB): see [51]ff esp. [55-57] and [60].”

to understand and appreciate *Dingle* – see its context

- *Scott v Sampson* (1882) VIII QBD 491
- The Porter Committee on the Law of Defamation (1948)
- Defamation Act 1952, section 12
- *Plato Films Ltd v Spiedel* [1961] AC 1090 HL (a year before *Dingle*)
- *Dingle v Associated Newspapers Ltd* [1964] AC 371 HL

Scott v Sampson (1)

- “Speaking generally the law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit; and if such false statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action. **The damage, however, which he has sustained must depend almost entirely on the estimation in which he was previously held.**”
- D could produce evidence that C had “no reputation” – “general evidence of reputation should be admitted” 503. (C, who would have notice of the case, could meet that with evidence as to their reputation).
- But evidence of “rumours or suspicions” to the same effect as the libel were not admissible 504; and nor was evidence of facts tending to show C’s disposition (in effect, that C had – but ought not to have - a good reputation) 505.

Scott v Sampson (2)

- The case was a claim for libel: that a theatre reviewer (C) had extorted £500 from an admiral by threatening to publish defamatory statements about a deceased actress.
- The court reviewed the old law (498-502) and considered what the position should be, under the new rules which required a D to plead the material facts on which they relied. The court was concerned to limit the matters raised to the relevant issue, that is: "*to what extent the reputation which [C] actually possesses has been damaged by the defamatory matter complained of*".
- The court reviewed the evidence that had been held inadmissible by the trial judge: 505-507. This included a witness who had heard the story in question before it was published by D – having "*heard it in some club*". The court asked: "*How can the gossip of some idler in a club be material to the issue in this case? How is it shown that [C's] reputation was in the slightest degree affected by such gossip? And how can [C] meet such evidence as this?*" The court's concerns included that the story told in the club might have originated with D – or to have come someone whom no-one who knew them would believe for a moment.

The Porter Committee on the Law of Defamation - 1948

- Cmnd 7536/48 – made two recommendations about mitigation of damages [142-158].
- (1) that D should be able to give evidence in mitigation of damages that C had recovered (or brought other actions for) damages for a defamatory statement to the same effect [145]. Otherwise, except in (newspaper) cases covered by s6 of the 1888 Law of Libel Amendment Act, the jury assessed damages on the basis that the libel sued on was the only defamatory statement made about C and that the damages awarded would be C's only recompense for the injury to his reputation. This became s12 of the 1952 Defamation Act.
- (2) that the rule in *Scott v Sampson* should be abolished. The reasons included the near impossibility of finding a witness who would give evidence of general bad reputation (an invidious task) and the risk that a notorious rogue could have damages assessed as if they had an unblemished reputation. The recommendation was that D (on giving notice to C) should be able to rely in mitigation of damages "*upon specific instances of misconduct on the part of [C], other than those charged in the publication complained of*" – calling evidence and cross-examining C in support of such allegations; and C, in turn, would be entitled to call evidence to contradict them [156]. This was not enacted.

Defamation Act 1952, s12

12. Evidence of other damages recovered by plaintiff.

- In any action for libel or slander the defendant may give evidence in mitigation of damages that the plaintiff has recovered damages, or has brought actions for damages, for libel or slander in respect of the publication of words to the same effect as the words on which the action is founded, or has received or agreed to receive compensation in respect of any such publication.

This extended s6 of the 1888 Act to all libel claims (not only newspaper libel). As the Porter Committee had noted at [144]: “*While libels contained in newspapers, no doubt, provide the commonest case of a number of different publications of the same libel, e.g. where the libel is contained in an agency report or syndicated feature, we see no logical reason for drawing a distinction between these and other cases.*”

Plato Films Ltd v Spiedel

- C, who had been Supreme Commander of the Allied Land Forces in Central Europe, sued for libel over a film – “*Operation Teutonic Sword*” – distributed in the UK by D. It depicted C as being party to two murders in 1934 (including of King Alexander of Yugoslavia) and as having betrayed Field Marshal Rommel to the Nazis in June, 1944.
- D pleaded that the allegations were true. D also put forward a plea in mitigation of damages, which included that C was “*widely reputed to have been and in fact was*” guilty of a series of specific acts of misconduct (set out by D). The plea – paragraph 5 – is set out at 1092-1093. It was struck out.
- The CA allowed the appeal in part, to permit D to plead that C had (before publication of the film) “*a bad reputation as a man who was a party to and/or responsible for acts which were war crimes and/or against humanity and/or atrocities*” (1123). This did not include any of the specific acts.
- D’s appeal – to restore the whole paragraph – failed.

Plato Films (2)

- There were five speeches: all endorsed *Scott v Sampson* 1124, 1128, 1137, 1146, 1148.
- **Viscount Simonds** noted that “*in practice it may be difficult to define exactly either the borderline between evidence of general bad reputation and that of specific conduct which has led to it or the area of conduct which the general bad reputation is to cover*” (1125).
- **Lord Radcliffe** (1130-1132) thought that it was impossible to treat general reputation and specific acts as entirely separate - the “*difficulty is that ‘general evidence of reputation’ does not convey an idea of any content*” (1130). He said:-
- “*..it would be wrong to hold that general evidence of reputation, which must mean reputation in that sector of [C’s] life that has relevance to the libel complained of, cannot include evidence citing particular incidents, if they are of sufficient notoriety to be likely to contribute to his current reputation. Such incidents are, after all, the basic material upon which the reputation rests, and I cannot see the advantage to anyone of excluding the better form of evidence favour of the worse*”. The issue was not whether the incidents happened – but “*whether it is common report that they did*”.
- He (alone) would have allowed D’s plea in mitigation in paragraph 5 to refer to specific incidents – but under the (edited) opening words that C “*is widely reputed to have been...*” (1132).

Plato Films (3)

- Lord Denning reviewed authorities back to the earliest writ (in 1536). He agreed with Cave J that rumours – the “*gossip of some idler in a club*” – was inadmissible. “*Rumour is a lying jade, begotten by gossip out of hearsay, and is not fit to be admitted to audience in a court of law*” (1136).
- A libel action was concerned with C’s reputation – that is, what other people think C is – not with C’s character (what C in fact is) (1138). The esteem in which C was held by others, who knew C and were in a position to judge C’s worth, spread out and became C’s reputation (1138). Evidence of C’s reputation – good or bad – should come from those who know, and have had dealings with, C (1139). He took the view that:-
 - Evidence of good character would come from a person of good standing – “*a clergyman, a schoolmaster, or an employer*” – who would have to speak generally (not relying on specific incidents). Although in cross-examination, W might be asked for the grounds of their belief.
 - So far as bad character is concerned – evidence often came from a police officer, who could say that C was a “*well-known pickpocket*” or “*common prostitute*”, speaking from their own observation or knowledge. Again, the W cannot give particular evidence – though they could be asked in cross-examination about the grounds of their belief.

Plato Films (4)

- **Lord Morris** noted (1145) that – before *Scott v Sampson* – Ds had sought to defend themselves on the basis that they “*had merely said what was currently and widely being said about [C]. ‘If so many are saying this, what injury has my mere repetition done?’; such was the form of the plea. My Lords, had such a plea found any lasting favour, the ugly voices of rumour and gossip with their furtive breathing of scandal would have gained a hearing which the law denies them*”.
- He acknowledged that the rule in *Scott* may be the subject of criticism. Not least because the line between “*general evidence of reputation*” and “*rumour*” may “*often become slender*”; cross-examination of a witness might open up the floodgates “*through which streams of details and particular facts may flow*”; and that there may be cases in which it is difficult to find a witness who can speak to C’s reputation. But these matters were for consideration by anyone who might wish by legislation to change the law (1147).
- **Lord Guest** considered that if specific incidents of misconduct were to be proved in mitigation of damages, it would open the door to “*truly collateral*” issues, which had only an “*indirect bearing*” on the main question, would prolong the trial and confuse the jury (1148).

Dingle v Associated Newspapers Ltd

- Philip Burrington Dingle (later Sir Philip) was the town clerk (for many years) of Manchester – “*one of the great industrial and commercial cities of the North of England*” (396).
- Manchester promoted a private bill, in the 1957-1958 Parliamentary session, which included a set of clauses about its acquisition of the undertaking of Ardwick Cemetery Ltd.
- A Select Committee of the HoC reported (15 March 1958) on the Bill (the **Report**). It quoted the President of the Board of Trade on the (supposed) true value of the shares. The Committee view was that Manchester had obtained the shares by “*presenting a one-sided view which failed to disclose the true position of the company on a break up*”. Dingle had been responsible for dealing with the company. The Committee expressed their “*unanimous strong disapproval*” of a letter sent by Dingle.
- The Report was presented in Parliament and reported on in newspapers, including The Mail, which published 21 articles on the subject – including an interview with the Chair of the company, who expressed his views about the sale and Dingle. The article accused Dingle of sharp or underhand conduct in relation to the sale.
- In November 1958, the President of the Board of Trade changed his view - there had been a misunderstanding and, in fact, Manchester’s offer had been a generous one.... In short, Dingle was in the clear.
- The Mail reported the new statement – but Dingle sued.
- The Judge awarded £1,100, which the CA increased to £4,000 (Dingle had not asked for jury trial).

Dingle (2)

- At trial, D had introduced a number of newspaper reports – to rebut an allegation of malice – but (expressly) on the basis that they were **not** relied on to mitigate damages (395, 410, 415).
- **Lord Radcliffe** (on damages from 394) held that the Report, and reports of it, were not admissible to show that C had a tarnished reputation (396). D could not rely on statements made by others about the same matter (the subject of the libel); otherwise, D would only recover full damages by suing the first defamer (396). There had been no witness to say C had a bad (“*tarnished*”) reputation (prior to the libel) (398). He speculated that there might be cases where evidence of some incident of notoriety would be admissible, although it may be that the law has “*confined itself*” to “*hazy generalities*” (that C was a notorious pickpocket/prostitute).
- **Lord Morton** (from 401) – nothing of note on this point.

Dingle (3)

- **Lord Cohen** (from 404) noted that it was not argued at trial that the J was entitled to mitigate damages on account of injury done to C by publication of the Report; rather, it was said the J, in assessing damages, should have regard to C's reputation as it was at the date of the libel – and, on that point, it could not but be affected by the publication of the Report. Cohen observed that it was possible that a single event (such as conviction of serious crime) might have such an effect – but, since the only admissible evidence of bad reputation had been held to be “*general evidence*”, the J was not entitled to treat C's reputation as “*tarnished*”. He quoted Holroyd-Pearce LJ from the CA decision, [1961] 2 QB 162 at 179 (not entitled to assume that C's reputation had changed within four weeks of the publication of the Report; the “public unmasking” of a villain, or a conviction in a court of law, might have more immediate effect – but C was a person of good reputation, who had *“recently had something damaging attributed to him. A man's reputation in the sense in which the word is used in civil or criminal courts does not alter daily as good or bad deeds are ascribed to him. It is the judgment of his fellows on his general life over a period.”*

Dingle (4)

- Lord Denning (from 407) gave a key speech – dealing with this point from 410.
- D was liable only for the damage caused by its publication (not the Report or other publications); if the J had isolated the damage for which D was responsible, that would have been the right approach; but J had reduced the damages because he took the view that C's reputation was tarnished by the publication of the Report (and publication of privileged extracts from it by D and others). J had been wrong to do so (410). D was not entitled to prove that there were "*reports or rumours in circulation*" to the same effect as the libel; that had *long since ceased to be allowed* – "*for good reason*". "*Newspapers in particular must not speak ill about people for the spice it gives their readers. It does a newspaper no good to say that other newspapers did the same. They must answer for the effect of their own circulation, without reference to the damage done by others..*" (s12 of the 1952 Act provided a limited exception to this).
- To prove a tarnished reputation, D would have to call witnesses, who knew C and could testify to C's reputation (unless C admitted it). Reports of a particular incident (even if notorious) were not admissible (411-412). It was wrong to reduce C's damages because of the damage "*already done by the publication of the Report*" (413).
- Lord Morris (from 413) noted that the (privileged publication of the Report, and reports of the Report) did not mean that C had a "*blemished*" reputation – D accepted that he had a good reputation before the "*cemetery business*" (418).

mitigation of damages (some changes after *Dingle*) – a note

- One established exception to the rule that only general evidence of bad reputation is admitted is that D may rely on C's criminal convictions: *Goody v Odhams Press* [1967] 1 QB 333 at 343. Judicial strictures in civil litigation may be admissible.
- D is also allowed to adduce evidence that is “*directly relevant background context*”: *Burstein v Times Newspapers Ltd* [2001] 1 WLR 529 CA; *Turner v News Group Newspapers* [2006] 1 WLR 3469 CA. The evidence must be relevant to the subject matter of the libel or the relevant sector of C's reputation so that, if not adduced, there would be a risk of damages being assessed on a false basis.
- The change in practice of the (almost) abolition of jury trial in defamation affects the practical considerations in limiting evidence. (Though note that, in criminal cases, applications to adduce evidence of “*bad character*” are commonplace).

(8) How does *Dingle* fit into the s1 world?

To answer a question with a question – and it will be one for the appellate courts: does Dingle fit into the s1 world?

so how does *Dingle* fit into the section 1 world?

- The “rule” in *Dingle* is about mitigation of damages.
- But, as *Lachaux* noted at [24] (above): “*Section 1 of the Act is concerned with the threshold of harm and not with the measure or mitigation of general damage. But both raise a similar question of causation. It would be irrational to apply the Dingle rule in one context but not the other, and no one is inviting us to abrogate it. The judge was therefore entitled to apply it.*” That looks like an invitation...
- When a C has to prove under s1(1) – as a matter of fact - that the publication they complain about has caused, or is likely to cause, serious harm to their reputation – does it make sense to insist that other reports must be left out of account? And is the position even more stark under s1(2)?
- But - so far – the “rule” in *Dingle* lives on, and rules.

a (short) suggested reading list on *Dingle*

- *Sicri v Associated Newspapers Ltd* [2020] EWHC 3541 (QB), [2021] 4 WLR 9 at [178] – for a succinct guide to what *Dingle* is, and is not, by Warby J - perhaps a heads-up for the approach on any appeal to the CA?
- *Wright v McCormack* [2021] EWHC 2671 (QB) (Julian Knowles J) at [149-168]. This is a thorough consideration of the principles - and, since there is an application for PTA (pending), this may become the leading decision. [But no: see update below]
- *Mahmudov v Sanzberro* [2021] EWHC 3433 (QB) (Collins Rice J) (see above)
- *Napag Trading Ltd v Gedi Gruppo Editoriale SpA* [2020] EWHC 3034 (QB) (Jay J) at [51-60]

...and

- *Lachaux* (of course) – decisions of the Supreme Court and of Warby J [2015] EWHC 2242 (QB), [2016] QB 402 at [69-87].
- *Monir v Wood* [2018] EWHC 3525 (QB) (Nicklin J) at [197-199]
- *Economou v de Freitas* both in the CA & Warby J [2018] EWCA Civ 2591, [2019] EMLR 7 & [2016] EWHC 1853 (QB), [2017] EMLR 4 (and see above)
- *Barron v Vines* [2016] EWHC 1226 (QB) (Warby J) at [24-25]

Wright v McCormack

- PTR in a libel claim based on 14 tweets and a YouTube video – all about cryptocurrency and blockchain.
- C complained that D accused him of having claimed, fraudulently, to be the inventor of bitcoin.
- D said that the allegation – including C's failed attempts to prove that he was the bitcoin inventor – was notorious and formed part of C's (global) reputation.
- J reviewed *Dingle*, set out the principles [150]ff and, on a close analysis of the facts (lengthy and detailed), struck out material on which D wished to rely (including many published reports). J rejected D's attempts, in various ways, to introduce the material. His reasons for rejecting D's case were largely based on *Dingle*. J included, for example, that to say that there was a “widely held view” was equivalent to saying that there was a “rumour” – such material was inadmissible.
- Note that C dropped part of his claim in aggravation of damages – which would have let in the reports as part of D's response to the claim [234], [237] (cf the admission of reports in *Dingle*).
- Note also that it appears that D had not put forward any of the material as “*Burstein* particulars” (though query whether material would have qualified) [241-243].

Update on Wright PTA (1)

On the day this talk was recorded, Warby LJ refused PTA in *Wright v McCormack* (order sealed 28.1.22). For one thing, Ds had applied out of time; but on the substance, these were case management decisions and an appeal had no real prospect of success. On rebuttal of serious harm (Ground 2) Warby LJ said:

“..The Judge’s legal analysis was comprehensive and clearly correct. He plainly recognised that Dingle does not always exclude consideration of rival causal factors; where a claimant identifies some specific item of harm as consequent on the alleged libel the defendant may in principle rely on specific alternative causes. There is no real prospect that the Court of Appeal would reverse or interfere with the Judge’s application of the law to the specifics of what was pleaded or sought to be pleaded here. The Judge’s view that the “old” pleading was in substance an attempt to use third-party publications to rebut a claim for general damage, based on an inference of harm to reputation was clearly right. He was entitled to take the view that the defendant had not sufficiently pleaded that the same material could serve as rebuttal of the claimant’s case on causation in respect of the two specific matters relied on and that this would be an artificial and fanciful suggestion.”

Update on Wright PTA (2)

On the *Dingle* point in relation to mitigation of damages (ground 3), Warby LJ said this:

“...There is no plea of Burstein mitigation. Nor is there any authority to suggest that a raft of other publications can count as “directly relevant background context” and thus be admitted as Burstein mitigation. So to hold would involve a serious incursion into the Dingle principle. The Judge was entitled to reject the novel argument that such other publications could be admitted under the principle that general bad reputation can be established by proof of a “single notorious event”. This is an exception to the general rule that only general evidence of reputation is admissible. It is a narrow one, and the cases in which it has been held available are plainly distinguishable from the matters referred to here. They consist, to date, of criminal convictions (Goody v Odhams Press [1967] 1 QB 33) and, arguably, judicial strictures in civil proceedings (Waters v Sunday Pictorial [1967] 1 WLR 967; Turner v News Group Newspapers Ltd [2006] 1 WLR 3469 [47-48]). Third party defamations of the kind relied on here are clearly not within these categories nor are they analogous.”

So far as *Dingle* is concerned, the search for the right case continues.

(9) What if there were no ‘rule in *Dingle*’?

Imagine that...

to conclude: imagine there's no *Dingle*...

Spicer v Met Police Commissioner [2021] EWHC 1099 (QB) (Julian Knowles J)

- C sued on a press release, put out after a criminal trial: C had been acquitted of causing death by dangerous driving, but convicted of careless driving; his co-accused was convicted of the more serious offence. The criminal trial had been widely reported.
- D's case included that C could not demonstrate serious harm specifically from this article – as opposed to the widespread coverage of the trial – the case was too general, vague and unparticularised [241].
- J considered serious harm at [354-378]; his summary of the *post-Lachaux* principles is at [355].

Spicer (2)

- J noted that there is a “*causation requirement*” in s1 – in some cases, it may not be difficult to prove (the only issue may be the extent of the harm); for example, a business person with an unblemished reputation being accused of dishonesty in a trade journal – if C could show serious harm, it “*probably would not be difficult*” to show that it flowed from the trade journal publication. But, in this case, C had to prove that it was the publication of this article which caused serious harm – that it “*was the causative element in the context of a case which generated a lot of media coverage*”.
- It appears that the court had before it a significant quantity of media coverage of the trial: this may have been because C tried (unsuccessfully) to prove that this coverage was derived from (and caused by) D’s article [362-369]. J did not appear to have any difficulty in dealing with this material.
- J rejected C’s case on serious harm on the facts [369-378] (it was vague and speculative [372]). Other than C’s bare assertion, there was no evidence that D’s article (not this other widespread reporting) harmed C. In addition, the person killed had been a student at the university, where the fatal collision occurred; this shocking event would have been widely discussed within the university community - and C’s involvement would have been the subject of rumour, speculation and gossip – all the more so after he was charged [371].

Spicer (3)

- The decision in *Spicer* makes sense – the J looked at the circumstances at the time of publication (including the criminal trial and reporting of it). The reference to press cuttings did not derail the trial. There was no unfairness to C (who relied on the press cuttings). There was no sense of unreality.
- Why didn't *Dingle* get in the way? It was cited – but on a different point (see [238], [324-325], [328]) - not in relation to serious harm or mitigation of damages.
- If the parties do not find a way to work with and/or around *Dingle*, then a trip to the CA – and beyond – is on the cards.

(10) some summary points to end?

For the context, see the materials above...

In short

- Serious harm is a serious threshold requirement – C has to prove that the threshold is crossed. It's a question of impact and causation – of/by the publication in question - under both s1(1) (serious harm) and s1(2) (serious financial loss).
- In many cases, the threshold will not be an issue. But, where it is disputed, it will generally be an issue for trial (social media cases require particularly careful consideration). There may be cases where a strike out/summary judgment will run (eg: small publication, no “*percolation*”, possibly where publishees have a pre-existing negative opinion of C, where no real impact).
- As for *Dingle*, it's a point crying out to be taken – in the right case – on appeal. It comes from a different age – of jury trials and different concerns about case management – when presumptions in libel were many and various. Things have changed – including trial by judge alone. Importantly, section 1 requires a focus on reality – **what (serious) harm was caused by this publication?** Sure, you need to isolate the publication and the damage it causes (or is likely to cause) – but that does not mean you should isolate from reality. Is *Dingle*'s time up? We will (soon) see.

the end

- but – to be continued....

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for reference: Explanatory Notes on section 1

- [10] Subsection (1) “extends to situations where the publication is likely to cause serious harm in order to cover situations where the harm has not yet occurred **at the time the action for defamation is commenced.** ...”
- [11] Section 1 said to build on *Thornton v Telegraph Media Group* [2011] 1 WLR 1985 (recognition of a “threshold of seriousness”) and *Jameel v Dow Jones* [2005] QB 946 CA (power to strike out trivial cases, where no “real and substantial” tort). “... The section **raises the bar** for bringing a claim so that only cases involving **serious harm** to the claimant’s reputation can be brought.”
- [12] Notes that “bodies trading for profit” are already, in practice, “likely to have to show actual or likely financial loss. The requirement that this be **serious** is consistent with the new **serious harm** test in subsection (1).”

for reference: Joint Committee on draft Defamation Bill

- “Improving protection of freedom of speech” [26-30].
- Referred to the present “surprisingly low hurdle”. The Bill “must ensure that wealthy individuals and organisations cannot stifle comment and debate that has **no significant impact** on their reputation. The public interest requires our law and its procedures to **prevent trivial claims from being started** and, where that happens, **ensure that they are stopped**” [27].
- The threshold test of seriousness would “raise the bar in a material way and give greater confidence to publishers that **statements which do not cause significant harm**, including jokes, parody and irreverent criticism, do not put them at risk of losing a libel claim....We accept that there may be a period of litigation while the courts spell out the precise meaning of “serious and substantial” as part of the threshold test but, over time this will create a better balance between free speech and reputation...” [28]
- <https://publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20302.htm>
- Session 2010-12, HL Paper 203, HC930-I (19 October 2011)

Joint Committee (2)

- A judge should decide whether the harm test is satisfied at a “very early stage in legal proceedings”. “We do not pretend that early resolution comes without the risk of increasing costs at the start of a claim, but the potential advantage of sifting out weak cases will be a major advantage to both sides:...” [29].*
- “Further, the context in which a statement is made **must** be considered carefully when deciding whether the harm test is satisfied. For instance, the sting of a defamatory allegation is likely to be lessened or removed altogether where the publisher makes a rapid correction or apology. Equally, there may be less chance of serious harm where a notice is attached to material on the internet indicating it has been challenged as libellous. The law must encourage attempts by publishers to correct false information in support of responsible free speech and the protection of reputation; this should include recognising that prompt action can undo the risk of harm. Also, ..., the court **must** additionally take into account the nature of the setting in which the statement was made as part of considering its full context...” [30].

* But see above: if disputed, determination of serious harm generally waits until trial (there are rare cases where the case is so weak that it can be struck out or summary judgment granted).

Joint Committee (3)

The Committee, acknowledging that corporations may find it difficult to prove *actual* financial loss, favoured requiring proof of a *likelihood* of such loss. This would “often be a matter of legitimate inference from the nature of the allegation **and** the extent of publication [115]. It added:-

- “The test of "substantial financial loss" should focus on whether there has been, or is likely to be, a substantial loss of custom directly caused by defamatory statements.” (Impact being most serious/hardest to mitigate where has led to material reduction in customer numbers/turnover generally)
- Neither mere injury to goodwill nor any expense incurred in mitigation of damage to reputation should enable a corporation to bring a libel claim. (Goodwill too vague a concept and any corporation could create its own mitigation costs, eg by spending money on advertising to counter the impact of a defamatory statement, thus making the test ineffectual).
- A corporation should not be entitled to rely on a fall in its share price, since such loss is suffered by shareholders, rather than the corporation itself. (This already settled law).
- If a trading corporation can prove a general downturn in business as a consequence of a libel, even if it cannot prove the loss of specific customers/contracts, that would suffice as a form of actual (albeit unquantified) loss.



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