doughty street chambers

Lachaux in the Supreme Court: what are the issues and ramifications – legal and practical – of the decision?

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Lachaux – the Supreme Court speaks

- What did the Supreme Court decide?
- How does a claimant cross the s1(1) threshold (p8)?
- Where does *Lachaux* leave limitation (p10)?
  (and a note on principles left untouched)
- Which way does the wind blow now (p12)?
  (practical tips from example cases)
- What about s1(2) (p18)?
  (serious financial loss vs special damage)
- What is required under the Protocol and CPR 53 (p22)?

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.

The Supreme Court

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

[2019] UKSC 27

[2019] 3 WLR 18

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]

what was the old law?

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.

the threshold before the 2013 Act (1) - *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.

the threshold before the 2013 Act (2) - *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 remind me: 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: (1-2)…

(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)…

s1(1) has to be read with s1(2).

- 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."*

….(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.

- If a grave allegation is 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”* – those matters are now *“part of the test of the defamatory character of the statement”* [16].

so what does all that mean?

- *"..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.

I've said it before and I'll say it again

Section 1 *"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]

vindication for Warby J

- The Supreme Court found the CA was **wrong**.
- By contrast, Warby J's analysis of the law was "*coherent and correct, for substantially the reasons which he gave*" [20].
- And there was no basis for interfering with Warby J's 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 about J's findings on the facts (upheld by Sup Ct): [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.
- He took into account the scale of publication; the fact that they 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 (see below), Sup Ct would not interfere.

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:** 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 were the meanings in *Lachaux*?

The Independent article, headed "*British mother faces jail in Dubai after husband claims she kidnapped their son*" (25.1.14) meant C:

(i) became violent towards his ex-wife Afsana soon after the birth of their son, which caused her, fearing for her safety, to escape and go on the run with the child;
(ii) having tracked Afsana down, callously and without justification snatched their son back from his mother's arms (and has never returned him);
(iii) falsely accused Afsana of kidnapping their son, a false charge which if upheld could result in her, quite unfairly and wrongly, spending several years in a Dubai jail;
(iv) was content to use Emirati law and its law enforcement system, which discriminate against women, in order to deprive Afsana of custody of and access to their son Louis;..

…meanings of the article in *Lachaux* (continued)

(v) hid the child's French passport and refused to allow him to be registered as a British citizen, as Afsana wished;
(vi) was violent, abusive and controlling and caused Afsana to fear for her own safety;
(vii) caused her passport to be confiscated thus for her to be trapped in the UAE;
(viii) obtained custody on a false basis and also initiated a prosecution of Afsana in the UAE, which was founded upon a false allegation of abduction, and which gave rise to the risk of a lengthy prison sentence there.

Meanings, as found by Sir David Eady: *Lachaux v IPL* [2015] EWHC 620 (QB) (May 2015) (similar meanings found for the *Evening Standard*); and see Sup Ct at [3].

an aside - what the facts were (as found in Fam Div)

Lachaux v Lachaux [2019] EWCA Civ 738, [2019] 4 WLR 86.

- [113] J had made a "*series of factual findings*" which *"largely preferred the father's account of events to the mother's*". J had rejected "*the majority*" of her case. J did not accept that Afsana was the victim of abuse, threats and violence (though the relationship was "*stormy*"). She had gone into hiding to prevent C from seeing their son - and because she feared she would lose the case in Dubai.
- [115] J also found she had notice of the Dubai proceedings and an opportunity to participate in them. See also [160-161].
- Afsana's appeal against J's findings dismissed.

limitation after *Lachaux*

When does the cause of action accrue (or when does the limitation period starts to run) – on **publication** or when **damage occurs**? [18]

Depends on whether or not publication is actionable *per se* – that is, without need to prove special damage.

- C does not need to prove special damage in (a) claims for libel or (b) some slander claims (where the words impute a criminal offence punishable by imprisonment or they tend to injure C in their office, calling, trade or profession: s2 of the Defamation Act 1952). In those cases, the interest protected by the law is C's reputation.
- C does need to prove special damage in all other slander claims.

- Note s14 of the Defamation Act 2013: special damage now required for slander claim based in imputation of contagious/infectious disease or imputation to a woman of unchastity.

limitation (1) - most cases (all libels / some slanders)

Where publication is actionable without proof of special damage [18]:

- *"The impact of the publication on [C's] reputation will in practice occur at [the moment of publication] in almost all cases, and the cause of action is then complete. If for some reason it does not occur at that moment, the subsequent events will be evidence of the likelihood of its occurring."*

- *"In either case, subsequent events may serve to demonstrate the seriousness of the statement's impact including, in the case of a body trading for profit, its financial implications. It does not follow that those events must have occurred before [C's] cause of action can be said to have accrued. Their relevance is purely evidential."*

limitation (2) - where proof of special damage required

- The position is different where publication of a statement is not actionable *per se.*

- In those cases, the interest protected by the law is "*purely pecuniary*". So, before there is a cause of action, the *"pecuniary loss must therefore have occurred"* [18].

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

The Sup Ct rejected 3 arguments that 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]. A loose end to fight another day? *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].

section 1(1): which way does the wind blow now?

Al Sadik v Sadik [2019] EWHC 2717 (Knowles J) (16.10.19).

- Claim for libel based on three WhatsApp messages, sent to 34 people (all members of C's wider family).
- J refused D's application to strike out the claim / for summary judgment.
- C, a businessman and philanthropist, lived in Dubai and spent 30-35 days a year in London.
- On ground (1): J found it arguable that D was domiciled in London at date of publication (see s9 of the 2013 Act).

Sadik on section 1(1)

On ground (2), J considered s1(1) and *Lachaux* [81-91] (summary at [91]).
D had not shown that C had no realistic prospect of success. Why? Factors listed at [100]:

(a) Very serious nature of the allegations. The messages alleged that C had arranged to rob his brother's house; had lied (even after swearing to tell the truth on the Quran); and had committed perjury [6], [20], [93].

(b) The *"religious component"* - C and all publishees being Muslim - exacerbated the harm.

(c) C's standing and reputation in the Middle East and elsewhere *"including London".*

Sadik on s1(1) continued

(d) The identity of the person who sent the messages – C's *"wife's sister"* - could cause some to think the allegations had substance.

(e) The "*targeted nature*" of the persons (wider family) to whom messages were sent (*"intentionally to hurt [C] as much as possible")* [96-98].

(f) The scale of publication – directly to the WhatsApp group and *"by further dissemination to those who do not know [C]".*

- The number of WhatsApp publishees (34) was *"comparatively small",* but *"not trivial*". Besides, it's not a *"numbers game"* [95].
- There was also the ***"grapevine effect"*** – further publication of the allegations, outside that group [99].

Sadik: "serious harm" arguable – [108]

- J had not overlooked the fact that there was *"no direct evidence of adverse impact"* – or the fact that there was positive evidence of the opposite (two recipients had defended C).
- J cited *Lachaux* at [21] as showing that *"absence of evidence of harm does not of itself mean a claim should fail"*.
- There was evidence of publication beyond the WhatsApp group; and it was an *"arguable inference"* that there would be *"some among that population, who do not know [C], and in whose eyes he has suffered serious reputational harm*". The *"inherent probabilities"* were that some people would have concluded that D would not have made widespread serious allegations against C, unless there was some substance to them.

Sadik – not a *Jameel* abuse [103-109]

On ground (3) (*Jameel* abuse) J referred to *Alsaifi v Trinity Mirror Plc* [2019] EMLR 1 for recent summary of the relevant principles [103].

- This was not a proper case to strike out – *"exceptionally"* – under the *Jameel* jurisdiction. J' conclusion on this *"largely follows"* from his conclusions on s1(1) [104].
- There was (arguably) a real and substantial tort in this jurisdiction; the budgeted costs were far in excess of the likely damages, but the court had *"power to control"* costs budgets.
- Damages aside, C would receive vindication by a public judgment in his favour.

heard on the grapevine…

- In considering whether D had shown that the claim was a *Jameel* abuse, J referred again to C's case on *"grapevine publication";* also, to the propensity for defamatory statements to *"percolate"* and re-emerge.
- C *"may encounter a defamatory allegation being raised with him/her by someone many years after the libel action against the original publisher was concluded. Where libel proceedings have been pursued, such a person is equipped, either by means of an apology or retraction from the original publisher or a judgment in his or her favour, to refute the defamatory statement whenever and wherever it resurfaces in the future."*
- These proceedings could benefit C in that way.

other post-*Lachaux* examples

- *Al-Ko Kober Limited & Jones v Sambhi*
  [2019] EWHC 2409 (Steyn J) (13 September 2019)

- *Caine v Advertiser and Times Ltd and others*
  [2019] EWHC 2278 (QB) (Richard Spearman QC as Dep J QBD) (23 August 2019).

- *Fentiman v Marsh*
  [2019] EWHC 2099 (Richard Spearman QC, sitting as Dep J QBD) (July 2019)

- *ZC v Royal Free London NHS Foundation Trust*
  [2019] EWHC 2040 (QB) (Knowles J) (12 July 2019)

- *Yuvaz v Tesco Stores Ltd*
  [2019] EWHC 1971 (QB) (Richard Spearman QC, sitting as Dep J QBD) (22 July 2019).

(1) Al-Ko Kober Limited & Jones v Sambhi

Summary judgment granted to Cs on their defamation claim. C1, a company (**AKKL**) manufactured and sold stabiliser couplings (used to link a caravan to a car, minimising sway); C2 was its marketing manager. D had posted videos on YouTube.

- J found that there had been no substantial argument to the effect that the requirements in s1 were not met.
- "*The statements made in the four videos were **extreme**: that by using the AKS Stabiliser drivers were risking their lives; running the risk of being involved in road accidents; that AKKL was involved in a scam on its customers; and that [C2] was himself involved in lying to customers and perpetrating a fraud on them. [Cs] do not advance evidence of any specific financial loss to date. However, the likely effect of [D's] statements on AKKL and [C2], respectively, in this regard is **obvious**.*"

(2) Caine v Advertiser and Times Ltd and others

J granted D's applications, including to strike out a defamation claim. Against a complex factual background, J granted an Extended Civil Restraint Order against C.

- J noted that the "*extent to which and the circumstances in which online content is accessed*" were "*central to whether [C] can satisfy the threshold requirement of serious harm*" in s1(1): [76]
- C's claim contained "*no allegations of fact which are sufficient to amount to an arguable case that this requirement is met (whether directly or by way of inference)".* This was especially material because the claim was based on hyperlinks, posted in May 2015, and the claim could extend back only to publications in the 12 months before 3 April 2019. "*Whether and to what extent anyone was referring to those 2015 hyperlinks in those 12 months, let alone in a way that caused them to view impugned content that appears to have been posted on [the relevant FaceBook page] in 2016, represent factual hurdles for [C]. He has pleaded nothing which even begins to surmount them"* [77].

(3) Fentiman v Marsh

Trial of libel claim based on blog postings. J summarised principles after *Lachaux* [45-54] and found the serious harm requirement was satisfied [55-56]:

(1) Meaning: allegations that C was an *"illegal cyber-attacker and hacker"*, with the last escalating to claim that C's illegal activities "*had become the subject of prosecution for criminal offences*".

(2) There had been substantial publication between 100 and 230 people for each posting.

(3) Evidence showed substantial further "*grapevine*" dissemination (including re-tweets). The hacking allegations spread throughout the PBCC community *[Plymouth Brethren Christian Church]*, as well as the community of the SHS's customers *[C was the CEO of SHS]*. **But note**: J would have been prepared to infer substantial grapevine dissemination, even without that evidence: *"Such percolation typically results from allegations like these on social media."*

(4) Evidence showed "*far from people not believing the allegations, they were so pernicious that even those close to [C] who trusted and admired him were deeply troubled by them, and seriously concerned that they might be true*". (Partly as C had a motive for wanting to shut down platforms *"damning him and his business*"; but D had no case that C was guilty of any material wrongdoing).

(4) ZC v Royal Free London NHS Foundation Trust

Trial of a claim for libel and misuse of private information.

- *Lachaux* summarised at [99-111].
- J found that the email on which the claim was based had not caused and was not likely to cause serious harm to C [112-133]
- Summary at [131]: very limited number of publishees (four); no *"grapevine percolation"*; two of the publishees knew about the contents of the email before publication (see also [118]); there was no evidence that the other two had any connection with C, had read the email, or formed any view about is contents; and there was no evidence that anyone thought the less of C by reason of its publication.
- Besides: it was true that C was dishonest and fraudulent [136-151].

(5) Yavuz v Tesco Stores Limited, Tesco Plc

Slander claim failed at trial, because C failed to show that the words had been spoken. But, had they been, C would have failed to show serious harm [59-60]:

- The claim was an alleged slander (that C was a thief), spoken by a customer assistant at a Tesco store in Lewisham. Although this was a "*grave*" allegation, with *"an inherent tendency to cause serious harm"*, only a handful of customers had been likely to have been close enough to hear what was said (near the tills); and even those who had been close, were unlikely to have heard everything. From the evidence, J thought that at least some people overhearing the conversation would have had difficulty in hearing and understanding what the assistant had said.
- C had not suggested that she knew anyone in the store that day (or that they knew her):
- *"The present case is therefore closely comparable to Nicklin J's example of being slandered in front of an unknown passer-by (and indeed the allegation in this case is in effect the same as his example of "you stole that item from the shop") and "the harm caused to [her] reputation will be limited because of the anonymity".*
- C was unable to establish a likely grapevine effect – the publishees could not pass on the information in a way that had any damaging effect on her. *"Nor did [C] adduce any evidence that any damaging imputation against her had in fact been passed on"*.
- Although the imputation was grave, on the facts there was no basis for drawing an inference of serious harm.

turning to s1(2)

Lachaux was not concerned (directly) with s1(2). But see the 3rd (of 4) points (above) from *Lachaux* [15]:

- s1(1) has to be read with s1(2).
- 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

need to take care with pre-Supreme Court cases

- ***Brett Wilson*** *LLP v Person(s) Unknown (responsible for www.solicitorsfromhelluk.com*
  [2015] EWHC 2628 (QB), [2016] 4 WLR 69 (Warby J) (16.9.15)

- ***Pirtek*** *(UK) Ltd v Jackson*
  [2017] EWHC 2834 (QB) (Warby J) (9.11.17) [45-53]

- ***Euroeco*** *Fuels (Poland) Ltd v Szczecin & Swinoujscie Seaports Authority SA*
  [2018] EWHC 1081 (QB), [2018] 4 WLR 133, [2018] EMLR 21 (Nicol J) (9.5.18) [16-17] & [69-71].
  [Note: appeal (not related to s1(2)) allowed [2019] EWCA Civ 1932. On s1(2), see [12-14] and [63] (doubtful).]

- ***Burki*** *v Seventy Thirty Limited*
  [2018] EWHC 2151 (QB) (HHJ Parkes) (15.8.18) [201-220], [245-250], [251].

- ***Gubarev*** *& others v Orbis Business Intelligence Ltd*
  [2019] EWHC 162 (QB) (Senior Master Fontaine) at [33-35]

what is “serious”?

- In the context of s1(2), as in s1(2), "*serious*" is an ordinary English word, to be given its ordinary meaning; it means something more weighty than "*substantial*": *Brett Wilson* [30], *Pirtek* [50], *Burki* [204-205], *Gubarev* [34(i)].

- Whether loss is "serious" must depend on the context: *Brett Wilson* [30], *Pirtek* [50], *Burki* [204-205].
- *Brett Wilson*: loss of a single client to a small solicitors firm could be serious.
- *Burki:* loss of a single client (and fees) for a dating agency the size of 70/30 also serious [210], [216-217].

"Serious financial loss" does not mean special damage

- *Lachaux* at [15] (above).
- *Eureco* (Nicol J) at [71] *"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*": cited in *Burki* at [207]; *Gubarev* at [34(iii)-(iv)].

special damage: harder to prove

- *Gubarev* (above) illustrates complexity of seeking to prove and quantify special damage (including need for expensive expert reports) and the difference between special damage and financial loss in s1(2). Of the corporate claimants: one withdrew its claim; one claimed financial loss; another claimed general damages (but wanted to include alleged downturn in revenue). J refused to order split trials.

Claims may cross the "*serious harm*" threshold, but fail to show special damage. See, eg, *Burki* (above) and:

- *Charakida v Jackson* [2019] EWHC 858 (QB), [2019] 4 WLR 66 (Warby J) (4.4.19)

- Paper determination of application for default judgment. Allegations published on a blog entitled "*worst liposuction ever*" - C was a consultant dermatologist - D her former patient.
- Court found serious harm - [24] - gravity and context in which published, together with the responses of 3-4 patients referred to – evidence showed at least three people read it and formed seriously adverse view of C (cancelling procedures).
- But rejected special damages claim: too vague and not enough evidence [34].

the publication must cause the harm/loss

- *Economou v de Freitas* [2018] EWCA Civ 2591
- CA upheld J's findings, based on careful analysis of the evidence, that s1(1) threshold not met. J had to be satisfied that the particular publication caused C serious harm: not shown on the complex facts before J [41].

- *Sube v News Group Newspapers*
- [2018] EWHC 1961 (QB) [2018] 1 WLR 5767 (Warby J).
- You cannot aggregate publications [22] – or allegations [34] – consider each separately.

- *Monir v Wood*
- [2018] EWHC 3525 (QB) (Nicklin J).
- J considered serious harm at [195-199], [205-214].
- The fact that other publications have caused harm to C's reputation (even on a larger scale) is no answer to the harm caused by D's publication. (Back to *Dingle* again). Though, depending on the circumstances, there might be a basis on which C could argue that the pursuit of the claim would be an abuse.

when can serious harm be decided as a preliminary issue?

- Meaning regularly determined as a preliminary issue, but not serious harm – only in (very) clear case.

- *Economou* (CA) 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*".

- *Saïd v Group L'Express* [2018] EWHC 3593, [2019] EMLR 9 (21 Dec 2018)
- Unsuccessful challenge by D on jurisdiction and *Jameel* abuse. C did not have to identify anyone who thought less of him as a result of the publication or show special damage [52].
- Query what, if any, scope there is for *"independent application"* of the *Jameel* test if *"serious harm"* has been found: although not *"subsumed"* into one, as J had found that C had a good arguable case that he could satisfy the serious harm test, for the same reasons, C had also shown a good arguable case of a serious tort committed against him *and* the game was worth the candle.

how (not) to do it

Alexander-Theodotou (and others) v Kounis
[2019] EWHC 956 (QB) - Warby J

- Noted that while meaning rulings are now commonplace (where natural and ordinary meaning: no issues requiring evidence, for reference or innuendo), that was not the case for *"serious harm"* [35].
- Cited the CA in *Lachaux* at [82(3)-(5)]: court should be slow to direct a preliminary issue involving substantial evidence (CPR 24 – or *Jameel* – managed proportionately).
- J considered serious harm from [55]. Illustrates how *not* to set out a case for a C.
- C had failed to show *"serious harm"* [66-71] – including (for C2) under s1(2). The J noted what was said in *Brett Wilson* (loss of one client can be a serious matter for a small or boutique firm), but there was no basis for such a finding in this case [70].
- C2 faced a difficult issue on reference: the people who could identify C2 (an LLP) were part of a small group, the members of which had already (prior to publication) taken an adverse view of Cs' professional conduct [66(5)].

what a claimant has to set out – from 1 October 2019

- Under the Pre-Action Protocol for Media and Communications Claims at [3.2], C should include "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], the statement of case 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]).

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].

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.

Questions?

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