

“Serious financial loss” under section 1(2) Defamation Act 2013

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The Statutory Provision



Section 1 of the Defamation Act 2013

“(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”.

Purpose - “Raising the Bar”



The purpose of this provision is

- to “raise the bar for bringing a claim”
- to “build on” the common law “threshold of seriousness”
- to prevent trivial cases being brought.

Section 1: Uncontroversial points



- C must now prove that statement “has caused or is likely to cause serious harm to reputation”.
- Section 1(1) is concerned only with harm to reputation – injury to feelings cannot, of itself, found a claim.
- Higher test for a body that trades for profit “caused or is likely to be caused serious financial loss”.

Case Law on Section 1(1)



Leading case - *Lachaux v Independent Print*, [2016] QB 402, July 2015

- May be enough for C to rely on inferences of serious harm drawn from nature of allegation and extent of publication.
- D can't rely on other publications of the same libel to show lack of serious harm
- The threshold is not very high – “*tens or possibly hundreds*” of people reading words and thinking less of claimant are sufficient.

Case Law: *Lachaux* appeal



Lachaux is, this week, before Court of Appeal, hearing began Tuesday

Grounds of Appeal include:

- A media defendant should be able to rely on other publications of the same allegations.
- Level of existing UK reputation should have been assessed.
- Judge was wrong to draw inferences of serious harm.

“Bodies Trading for Profit”



What about “bodies trading for profit”?

Very limited case law so far: only cases containing any substantial discussion

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Two immediate issues:

- What is a “body trading for profit”?
- Is “seriousness” of loss a relative term?

Body trading for profit



- No statutory definition.
- Obviously covers trading companies
- Position of charities and NGOs seeking to make money unclear.
- In *Cooke v MGN* – it was conceded that Midland Heart housing association was not covered

“Seriousness” of financial loss



- Is “serious financial loss” a relative term, assessed by reference to the profits, assets or turnover of the body?
- Relative measure seems appropriate
- The problem of very large companies where even very substantial losses will not be “serious”.

Proving “Serious Financial Loss”



Four possible ways of proving serious financial loss have been suggested:

- Direct financial loss
- Reduction in balance sheet goodwill
- Wasted management time
- Money spent on mitigating the damage

Direct financial loss – the paradigm case

- C seeks to prove direct losses resulting of from the impact the libels on customers
- But must be loss of profit – reduction in turnover is not enough (*Undre v LB Harrow* [2016] EWHC 931 (QB)).
- C must also establish causation – often not straightforward, particularly if there are other damaging, non-defamatory statements

- Direct financial loss can also be inferred
- Sometimes this can be done from very slim materials (*Brett Wilson LLP v Persons Unknown* [2015] EWHC 2628 (QB))
- In that case: no pleaded figures for decline in business, one prospective client withdrew business – but inference drawn

Reduction in balance sheet goodwill

- This would reflect damage to the corporate name and brand and would be a loss suffered by the company.
- In contrast, reduction in share price is not sufficient – share price is not an aspect of goodwill or an asset of the company (*Collins Stewart v Financial Times* [2005] EMLR 5)

Wasted management time – spent dealing with the problems caused by the libels.

- Cost of time spent investigating wrong or mitigating its consequences is recoverable.
- Not necessary to show additional expenditure or loss of revenue or profit (*R+V*
Verischerung v Risk Insurance [2006] EWHC 43 (Comm)).
- Must be “directly attributable” to the libel.

Possible ways of proving loss – (4)



Expenditure incurred by C in mitigation of damage is generally recoverable:

- Employing a PR consultant (*ReachLocal v Bennett* [2015] EMLR 7)
- Costs of “counter-publicity”
- Costs of investigation identity of wrongdoers
- Costs of removing republications from the internet.

Finally: Procedural Points



- Serious harm must be specified in the Pre-Action Protocol letter and must be pleaded
- In particular special damages must be pleaded
- Whatever basis for “serious financial loss” is being relied on it must be set out clearly and with specificity in the Particulars of Claim
- “No pleaded harm case, no claim”

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