



Defamation & ‘serious harm’ post *Lachaux*

Nicholas Dobson applauds the elegance of the judgment in *Lachaux*, which gives a much clearer basis for future consideration of potentially defamatory material

IN BRIEF

► Section 1 of the Defamation Act 2013 raises the common law threshold of seriousness and requires its application to be determined by reference to actual facts and not merely to the meaning of material words.

Reputation has always been a precious commodity. Shakespeare knew this. So in *Richard II*, Mowbray, feeling ‘pierced to the soul with slander’s venomous spear’ pleaded passionately that ‘The purest treasure mortal times afford/ Is spotless reputation.’ And Cassio in *Othello* mourned to evil Iago: ‘Reputation, reputation, reputation! O, I have lost my reputation, I have lost the immortal part of myself.’

So the law long recognised the need to protect reputation from unjustified assault. As Lord Sumption indicated, opening his elegant Supreme Court judgment on 12 June 2019 in *Lachaux v Independent Print Ltd* and another [2019] UKSC 27, [2019] All ER (D) 42 (Jun): ‘The tort of defamation is an ancient construct of the common law.’ But whilst this tort has over centuries evolved several unique rules, most of these ‘originated well before freedom of expression acquired the prominent place in our jurisprudence that it enjoys today’.

From 1888 there has been a succession of statutes seeking ‘to modify existing common law rules piecemeal, without always attending to the impact of the changes on the rest of the law’. The latest is the Defamation Act 2013 (DA 2013). The *Lachaux* judgment concerns the interpretation of section 1. Entitled ‘Serious harm’, the section provides

that: ‘(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.’

Summary background

The claimant, Bruno Lachaux had lived with his British wife, Afsana, in the United Arab Emirates (UAE). The marriage broke down and the claimant in the UAE courts began divorce proceedings and sought custody of their son, Louis. The matters at issue arose following reports in various British newspapers about the claimant’s conduct during the marriage and the subsequent divorce and custody proceedings.

In a meaning hearing Eady J found various defamatory meanings in articles published by *The Independent* and *Evening Standard* newspapers. He held that the articles (among other things) meant that the claimant had been violent and abusive towards his wife during their marriage, had hidden Louis’ passport to stop her removing him from the UAE, had used UAE law and the UAE courts to deprive her of custody and contact with her son, had callously and unjustifiably taken Louis out of her possession and then falsely accused her of abducting him. The appeals arose out of two high court libel actions against the publishers of *The Independent* and *The Evening Standard*, and a third against the publisher of the *i* newspaper

In the substantive High Court hearing, Warby J rejected the newspapers’ argument that the statements were not defamatory because they did not meet the threshold of seriousness in s 1(1) of DA 2013, holding that the claimant had evidentially demonstrated ‘serious harm’. While the Court of Appeal upheld the High Court’s ‘serious harm’ finding and dismissed the newspapers’ appeal, it considered that the 2013 Act left unaffected the common law presumption of general damage and the associated rule that the cause of action is made out if the statement complained of is inherently injurious.

Supreme Court view

Lord Sumption gave a concise summary of the common law background leading to the Defamation Act 2013. He explained that the law distinguishes between defamation actionable per se (without proof of damage) and defamation actionable only on proof of special damage. Libel is always actionable per se but slander is now so in only two circumstances: words imputing criminal offences or those tending to cause injury in a person’s office, calling, trade or profession. All other slanders are actionable only on proof of special damage (ie, pecuniary loss to interests other than reputation).

Per Lord Atkin in *Sim v Stretch* [1936] 2 All ER 1237, 1240, a statement is defamatory if ‘the words tend to lower the plaintiff in the estimation of right-thinking members of society generally.’ The meaning of an alleged defamatory statement is derived from an objective assessment of the defamatory meaning that the notional ordinary reasonable reader would attach to it. At common law, where defamation is actionable per se, damage to the claimant’s reputation is presumed rather than proved. This depends on the inherently injurious character of a statement bearing that meaning. The presumption is one of law, and irrebuttable.

In the decade before the 2013 Act two important cases introduced the requirement that damage to reputation in a case actionable per se must pass a minimum threshold of seriousness (see *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946 and *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985).

In the Supreme Court’s view, the language of section 1 of DA 2013 shows very clearly that the measure not only raises the threshold of seriousness above that envisaged in the cases just mentioned, but also requires its application to be determined by reference to actual facts about its impact and not merely to the meaning of the words in question.

Lord Sumption noted that although a statute is presumed not to alter the common law unless it so provides either expressly or by necessary implication, the 2013 Act

‘unquestionably does amend the common law to some degree.’ In his view, section 1 ‘necessarily means that a statement which would previously have been regarded as defamatory, because of its inherent tendency to cause some harm to reputation, is not to be so regarded unless it “has caused or is likely to cause” harm which is “serious”’.

Moreover, the reference in section 1 to a situation where the statement *has caused* serious harm is to the consequences of the publication, and not the publication itself. Lord Sumption said that this ‘points to some historic harm, which is shown to have actually occurred’ and ‘is a proposition of fact which can be established only by reference to the impact which the statement is shown actually to have had.’ This depends not only on a combination of the inherent tendency of the words but also their actual impact on those to whom they were communicated. In the court’s view, the ‘same must be true of the reference to harm which is “likely” to be caused.’ For in this context, ‘the phrase naturally refers to probable future harm’.

As indicated, s 1(2) of DA 2013 provides that ‘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’. The court considered it clear that section 1(2) ‘must refer not to

the harm done to the claimant’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 seriousness threshold. This must necessarily call for an investigation of the actual impact of the statement. For whether ‘that financial loss has occurred and whether it is “serious” are questions which cannot be answered by reference only to the inherent tendency of the words.’

So in the Supreme Court’s view ‘the defamatory character of the statement no longer depends only on the meaning of the words and their inherent tendency to damage the claimant’s reputation.’ It is to that extent that Parliament intended to change the common law. As Lord Sumption indicated, section 1 supplements the common law by introducing a new condition that relevant harm must be ‘serious’ and in the case of trading bodies that it must result in serious financial loss. The court also did not accept that its interpretation of section 1 led to any major inconsistency with section 8 (limitation) or section 14 (slanders actionable per se).

In the circumstances, the Supreme Court substantially adopted the legal approach of Warby J at first instance. The judge had based his serious harm finding on: (i) the scale of the publications; (ii) the fact that the statements

complained of had come to the attention of at least one identifiable person in the UK who knew the claimant; and (iii) that they were likely to have come to the attention of others who either knew him or would come to know him in future; and (iv) the gravity of the statements themselves. Warby J’s finding was justifiably ‘based on a combination of the meaning of the words, the situation of Mr Lachaux, the circumstances of publication and the inherent probabilities.’

Comment

When a common law construct like defamation evolves piecemeal over many years with various statutory adjustments on the way, it can end up looking like a ramshackle ‘House that Jack built’. For wedging concepts developed in multifarious previous contexts into subsequent divergent statutory installations can end up like badly fitted central heating. Nevertheless, Lord Sumption and his Supreme Court colleagues have given a much clearer basis for future consideration of potentially defamatory material as well as providing important protection to freedom of expression for media and others.

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