

Extended material

Chapter 21: The claimant and what must be proved

**The 'serious harm' test**

**Case study:** Controversial online columnist Katie Hopkins faced a six-figure bill after losing a libel action brought against her over two tweets she posted about food writer and activist Jack Monroe.

Mr Justice Warby ordered Hopkins, a former Apprentice star, to pay £24,000 in damages as well as more than £100,000 on account of costs.

Food blogger Ms Monroe, 28, of Leigh-on-Sea, Essex, had complained that two tweets Hopkins posted in May 2015 accused her of "vandalising a war memorial and desecrating the memory of those who fought for her freedom, or of approving or condoning such behaviour".

Hopkins had argued that her tweets did not bear the meanings complained of, were not defamatory and that it had not been shown that they caused serious harm to Ms Monroe's reputation.

The case arose after a memorial to the women of the Second World War in Whitehall was daubed with the words "F\*\*\* Tory scum" during an anti-austerity demonstration.

Hopkins wrote in a posting on Twitter in May 2015: "@MSJackMonroe scrawled on any memorials recently? Vandalised the memory of those who fought for your freedom. Grandma got any more medals?"

The judge held that the tweet "meant that Ms Monroe condoned and approved of scrawling on war memorials, vandalising monuments commemorating those who fought for her freedom".

He found that a second tweet "meant that Ms Monroe condoned and approved of the fact that in the course of an anti-government protest there had been vandalism by obscene graffiti of the women's war memorial in Whitehall, a monument to those who fought for her freedom".

The judge added: "These are meanings with a defamatory tendency, which were published to thousands."

During the trial, at the end of February at beginning of March 2017, Ms Hopkins' counsel, Jonathan Price, told the judge her case was "this relatively trivial dispute arose and was resolved on Twitter in a period of several hours".

He argued "no lasting harm, and certainly no serious harm" to Monroe's reputation resulted from it. Hopkins had "mistakenly" used Ms Monroe's Twitter handle instead of that of another columnist who had tweeted about the war memorial incident.

But the judge ruled that the publications complained of had "not only caused Ms Monroe real and substantial distress, but also harm to her reputation which was serious".

Ms Monroe's lawyer, Mark Lewis, a partner at Seddons solicitors, said she had "finally been vindicated in full from the libellous and wholly false accusation by Katie Hopkins that she had supported the vandalism of a war memorial".

He added: "Jack Monroe never did, and coming from a proud military family, never would."

Mr Lewis said: "The price of not saying sorry has been very high. Hopkins has had to pay out of her own pocket a six-figure sum in damages and costs for a tweet that should have been deleted within minutes as soon as she was told it was wrong."

Emma Woollcott, a lawyer at law firm Mishcon de Reya who specialises in reputation protection, said: "This sensible decision demonstrates how serious harm and distress can be caused by defamatory tweets, and how significant costs might have been avoided by Hopkins - when she realised her apparent mistake - by proper contrition and a prompt apology."

### **How the Duke of Brunswick did it**

As a general rule English and Welsh law regards each publication of a written work as a new publication. This is known as 'the repetition rule', which means you can be sued more than once over the content, if it is re-published.

The 'single publication rule' in the Defamation Act 2013, explained in *McNae's*, 21.2.3.3 and 21.2.3.4, erodes the effect of 'the repetition rule' substantially, but it still exists.

The 'repetition rule', also referred to as the multiple publication rule, results from an 1848 decision by the Court of Queen's Bench in a case brought by the exiled German ruler Karl II, Duke of Brunswick and Luneberg, who had heard that he had been maligned in an 1830 edition of the London newspaper the *Weekly Dispatch*.

He wanted to sue - but as the story involved had been published 17 years previously, could not do so as he was clearly outside the limitation period, which at that time was six years.

The Duke sent a servant in search of a copy of the paper. The man returned after having found a copy of the relevant edition of the paper at the British Museum, and having purchased a copy of the very same edition (as what we would now call 'a back issue') from Harmer, the *Dispatch's* publisher.

The Duke - known for eccentricities such as wearing diamond-encrusted underwear, and who once reputedly boasted that but for his wealth he would be in an asylum for the insane - then sued Harmer for libel, on the grounds that Harmer had published the defamatory material to his manservant in the copy he obtained from Harmer.

The Court of Queen's Bench awarded the Duke damages of £500 - about £44,600 at current values - ruling that the limitation period did not apply as Harmer's provision of the single copy to the Duke's servant constituted a separate, fresh act of publication.

The statutory limitation period commenced from the date of sale in 1847 of that individual copy rather than from the date in 1830 on which that edition of the *Dispatch* was first printed and distributed, the court said.

This was because the act of defaming someone was completed by the delivery of the copy, and its legal character was not altered 'either by the plaintiff's procurement or by the subsequent handing over of the writing to him'.

In 2005 the Court of Appeal made clear its disapproval of the decision during the case of *Dow Jones and Co Inc v Yousef Abdul Latif Jameel*, saying that the Duke of Brunswick's case would now be struck out as an abuse of process.

The then Master of the Rolls, Lord Phillips of Worth Matravers, said: 'An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing-field and to referee whatever game the parties choose to play upon it.'

'The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice...

'There have been two recent developments which have rendered the court more ready to entertain a submission that pursuit of a libel action is an abuse of process.

'The first is the introduction of the new Civil Procedure Rules. Pursuit of the overriding objective requires an approach by the court to litigation that is both more flexible and more pro-active.

'The second is the coming into effect of the Human Rights Act. Section 6 requires the court, as a public authority, to administer the law in a manner which is compatible with Convention rights, insofar as it is possible to do so.

'Keeping a proper balance between the Article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged.

'We do not believe that *Brunswick v Harmer* could today have survived an application to strike out for abuse of process.

'The Duke himself procured the re-publication to his agent of an article published many years before for the sole purpose of bringing legal proceedings that would not be met by a plea of limitation.

'If his agent read the article he is unlikely to have thought the Duke much, if any, the worse for it and, to the extent that he did, the Duke brought this on his own head. He acquired a technical cause of action but we would today condemn the entire exercise as an abuse of process.'

In December 2002 the Law Commission called - in its Scoping Study on defamation and the Internet - for newspapers and other organisations which run online archives to be given greater protection against the risk of a libel action.

It said that while the one-year limitation period for defamation cases could cause hardship to would-be claimants, as it gave them little time in which to prepare a case, it was also potentially unfair to allow claimants to bring actions over an article being published online, possibly decades after its original publication, because it could be extremely difficult for the online publisher to mount an effective defence. The point being made by the Commission was that evidence for the defence - for example, a defence that the article's content was true - may not be available so long after the original publication of the article. Witnesses may have died or their memories may have faded, or documents been thrown away.

'We agree with the Court of Appeal that online archives have a social utility, and it would not be desirable to hinder their development,' the Law Commission said.

In summer 2010 the United Nations Human Rights Committee warned that Britain's libel law was too restrictive, particularly in relation to the Internet.

It said the advent of the Internet and the international distribution of foreign media created the danger that the UK's 'unduly restrictive libel laws will affect freedom of expression worldwide on matters of valid public interest'.

This is the context which led to the 'single publication rule' being created in the Defamation Act 2013.