

This piece updates section 21-2-1 on pages 283-4 of the 24th Edition.

Serious harm in defamation claims is a matter of fact to be established. The "serious harm" requirement set out in section 1 of the Defamation Act 2013 is a factual matter which must be established by reference to the impact the statement about which a claimant complains has or will have on his or her reputation, the Supreme Court has held.

The decision overturns an earlier Court of Appeal judgment in which it was held that the 2013 Act had not replaced the old common law presumption that a defamatory statement had damaged a claimant's reputation.

The Supreme Court judgment by Lord Sumption - with whom Lord Kerr, Lord Wilson, Lord Hodge and Lord Briggs agreed – came in the case of French-born aerospace engineer Bruno Lachaux, who had sued the Independent, Evening Standard and i over stories published in 2014 which reported claims his former wife, Afsana, had made about his conduct towards her and in relation to their son.

Mr Justice Warby held at first instance that Mr Lachaux had met the requirement in section 1 of the Defamation Act 2013 by demonstrating that the published statements over which he was suing had seriously harmed his reputation.

But in the Court of Appeal, Lord Justice Davis, sitting with Lord Justice McFarlane and Lady Justice Sharp, held that the "serious harm" requirement in section 1(1) had not displaced the legal presumption of damage in defamation cases, and that serious harm to a would-be claimant's reputation could be shown by inference from the seriousness of the defamatory meaning.

The Supreme Court rejected that interpretation - but upheld Mr Justice Warby's original finding in favour of Mr Lachaux on the facts of the case.

Media law specialist Caroline Kean, a partner at law firm Wiggin, welcomed the judgment as "a very real victory for the media".

She said: "Although the publishers lost their appeal on the particular facts of the case, the Supreme Court case made it plain that section 1 of the 2013 Act has raised the bar and going forward if someone wants to claim they have been defamed, they will have the burden of showing, as a fact, that publication has caused them harm in the past or is, as a fact, likely to cause harm in the future.

"The Supreme Court has confirmed that the 2013 Defamation Act was intended to stop claimants bringing fatuous claims.

"Historically, a defamatory statement was 'deemed' to cause damage and even trivial claims could proceed to trial. Although prior to the Act the courts had found on a couple of occasions that claims should not be allowed to proceed because they did not pass a minimum threshold of seriousness, most cases proceeded unchallenged." Lord Sumption said in the Supreme Court judgment that the Court of Appeal's approach gave little or no effect to the language of section 1 of the Act and was also "internally contradictory".

The wording of section 1 clearly showed that it not only raised the threshold of seriousness required for a defamation claim to go ahead, but also required that its application should be determined by reference to the actual facts about the impact of the publication in question and not just the meaning of the words, he said.

The Defamation Act 2013 unquestionably amended the common law.

"The least section 1 achieved was to introduce a new threshold of serious harm which did not previously exist," Lord Sumption said.

Section 1 necessarily meant that a statement which would previously have been regarded as defamatory, because of its inherent tendency to cause some harm to reputation, was not to be regarded as such unless it had caused or was likely to cause harm which was serious.

"The reference 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. "It points to some historic harm, which is shown to have actually occurred. This is a proposition of fact which can be established only by reference to the impact which the statement is shown actually to have had. It depends on a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated.

"The same must be true of the reference to harm which is 'likely' to be caused. In this context, the phrase naturally refers to probable future harm."

Section 1(1) also had to be read with section 1(2), which concerned the way in which section 1(1) was to be applied to statements said to be defamatory of bodies trading for profit.

Section 1(2) referred to the same concept of "serious harm" as section 1(1), but provided that in the case of a company a publication must have caused or been likely to cause "serious financial loss".

Lord Sumption went on: "What is clear, however, is 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 threshold of seriousness.

"As applied to harm which the defamatory statement 'has caused', this necessarily calls for an investigation of the actual impact of the statement.

"A given statement said to be defamatory may cause greater or lesser financial loss to the claimant, depending on his or her particular circumstances and the reaction of those to whom it is published.

"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. The draftsman must have intended that the question what harm it was 'likely to cause' should be decided on the same basis."

Lord Sumption added: "Finally, if serious harm can be demonstrated only by reference to the inherent tendency of the words, it is difficult to see that any substantial change to the law of defamation has been achieved by what was evidently intended as a significant amendment."

The Act now meant that the defamatory character of the statement no longer depended only on the meaning of the words and their inherent tendency to damage a claimant's reputation.

Lord Sumption added: "The common law rule was that damage to reputation was presumed, not proved, and that the presumption was irrebuttable.

"If the common law rule survives, then there is no scope for evidence of the actual impact of the publication. That is the main reason why in my opinion it cannot survive."

But on the facts of this case, Mr Lachaux had demonstrated as a fact that the harm caused by the publications complained of was serious, as Mr Justice Warby had held and the Court of Appeal had accepted.

Lachaux v Independent Print Ltd and Another

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*Supreme Court: Lord Kerr, Lord Wilson, Lord Sumption, Lord Hodge and Lord
Briggs*

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