**Hanna and Dodd: McNae's Essential Law for Journalists 25th edition**

**Additional material for chapter 21: The claimant and what must be proved**

*Section numbers from the book are used where relevant. The book should be read. It has more content and context.*

**21.2.1 – Defamation and ‘serious harm’**

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 ruled.

The decision overturns an earlier decision in which the Court of Appeal judgment ruled 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, Lord Sumption said.

*Lachaux v Independent Print Ltd and Another*. Neutral citation: [2019] UKSC 27

David Price QC and Jonathan Price, instructed by David Price, Solicitor Advocate, for the appellants, Independent Print Ltd and Evening Standard Ltd; Adrienne Page QC and Godwin Busuttil, instructed by Taylor Hampton, for the respondent; Guy Vassall-Adams QC, Romana Canneti and Edward Craven for the Intervener, the Media Lawyers' Association, by written submissions only*.*

**21.2.1.2 Serious harm**

**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 Ms Hopkins, a former Apprentice star, to pay £24,000 to Ms Monroe as damages as well as more than £100,000 on account of Ms Monroe’s legal costs. Losing the case meant that Ms Hopkins also had the bill for her own costs. Ms Monroe, 28, of Leigh-on-Sea, Essex, had complained that two tweets Ms 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 behavior’. Ms 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 in Whitehall to the women of the Second World War was daubed with the words ‘F\*\*\* Tory scum’ during an anti-austerity demonstration. Ms Hopkins wrote in a posting on Twitter: ‘@MsJackMonroe scrawled on any memorials recently? Vandalised the memory of those who fought for your freedom. Grandma got any more medals?’ Mr Justice Warby ruled that the tweet bore the meaning ‘that Ms Monroe condoned and approved of scrawling on war memorials, vandalising monuments commemorating those who fought for her freedom’. He ruled that a second tweet by Ms Hopkins bore the meaning ‘that Ms Monroe condoned and approved of the fact that in the course of an anti-government protest there had been vandalisation 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 defamation trial Ms Hopkins' counsel, Jonathan Price, told the judge the dispute was ‘relatively trivial’ and had been ‘resolved on Twitter in a period of several hours’. He argued that ‘no lasting harm, and certainly no serious harm’ to Ms Monroe's reputation resulted from it. Ms 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 Ms Hopkins’ two tweets had ‘not only caused Ms Monroe real and substantial distress, but also harm to her reputation which was serious’ (*Monroe v Hopkins* [2017] EWHC 433 (QB)).

Ms Monroe’s lawyer Mark Lewis, a partner at Seddons solicitors, said of the judgment that his client had ‘finally been vindicated in full from the libellous and wholly false accusation by Katie Hopkins that she had supported the vandalisation of a war memorial’, adding: ‘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 of the judgment: ‘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.’

**21.2.3.4 Repeating by republishing**

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 21.2.3.3 and 21.2.3.4 in *McNae’s*)*,* erodes the effect of ‘the repetition rule’ substantially – but the rule still exists.

The 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 (what we would now call a back issue) from Harmer, the *Dispatch's* publisher.

The Duke, who was known for eccentricities such as wearing diamond-encrusted underwear, and reputedly once 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 had bought from Harmer.

The Court of Queen's Bench awarded the Duke damages of £500 - about £45,000 at current values - ruling that the original 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.

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

It ruled that the act of defaming someone was completed by the delivery of the defamatory copy.

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.

‘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 defamation 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 - might not be available so long after the original publication of the article, as witnesses might have died, their memories could have faded, or documents could have 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 defamation law was too restrictive, particularly in relation to the Internet.

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’, it warned.

This is the context which led to the introduction of the ‘single publication rule’ in the Defamation Act 2013.