



Tort Law: Text, Cases, and Materials (5th edn)

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p. 783 14. Defamation

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Abstract

All books in this flagship series contain carefully selected substantial extracts from key cases, legislation, and academic debate, providing able students with a stand-alone resource. This chapter deals with the actions in defamation that protect reputation, paying particular attention to the relationship between the protected interest in reputation and the competing interest in freedom of expression. It first considers relevant provisions in the Defamation Act 2013, including the ‘serious harm’ criterion, before turning to the terms of Article 10 of the European Convention on Human Rights with regard to freedom of expression, with emphasis on the so-called chilling effect. It also discusses libel and slander as well as malicious falsehood, elements of a claim in defamation, defences available to the accused, and the jurisdiction of the courts of England and Wales to hear defamation claims. The chapter concludes by looking at parties who cannot sue in defamation.

Keywords: defamation, reputation, freedom of expression, Defamation Act 2013, serious harm, European Convention on Human Rights, chilling effect, libel, slander, malicious falsehood

Central Issues

- i) Common law has provided powerful protection to reputation through the torts of libel and slander. **Slanders** are generally transitory in form while **libels**, broadly, are more permanent in form. Both of these torts protect a claimant’s interest in reputation against defamatory ‘statements’ (which need not take the form of words). Neither tort requires any particular state of mind on the part of the defendant, except in special circumstances (for example, where the

statement is one of opinion, not of fact, in which case lack of honest belief must generally be shown). Libel and slander are therefore torts of strict liability which in special circumstances become dependent on 'malice'.

- ii) It has long been recognized that the protection thus afforded to reputation can conflict with freedom of expression. This has been the chief reason for gradual modification in the law of defamation. In the courts, the relationship between the protected interest in **reputation** and the competing interest in **freedom of expression** had begun to change before the most recent legislative intervention in the Defamation Act 2013. Freedom of expression had begun to be understood in terms of the public interest in receiving and imparting information in the context of a democratic society. This approach was clearly influenced by the European Convention on Human Rights. After the Human Rights Act, freedom of expression could no longer be regarded as a residual personal right (if it ever was), but was interpreted as a positive right reinforced by the public interest.
- iii) Statutory intervention through the Defamation Act 2013 attempted to achieve a new balance between reputation, and freedom of expression, while also simplifying applicable legal principles. In key areas, the position reached by the common law has been abolished and replaced by simpler provisions which strengthen protection for freedom of expression. The statutory approach is motivated by concern with the adverse consequences of defamation law to date, and not directly with the need to address Convention rights, though these rights have underpinned the changes in domestic law which inform it. In virtually all respects, the new legislation shifts the balance in favour of protecting speech; yet at the same time, it has been recognized at least in theory that reputation too is within the protection of Article 8 of the Convention. Equally significant are statutory attempts to constrain potential misuses of the law of defamation, for example, by stifling 'libel tourism', by restricting the role of juries, and by clarifying the responsibilities of those operating websites. A particularly important question concerning the new requirement of 'serious harm' under section 1 of the Defamation Act 2013 has been settled by the Supreme Court, emphasising that the section effected a significant change in the law of defamation, but arguing that this change did not amount to a 'revolution'.

p. 784

1 Common Law and 2013 Reforms

The Defamation Act 2013 (the 2013 Act) was by no means the first statutory intervention into the law of defamation, but it is the most far-reaching. Lobbying groups have been notably successful in bringing about their desired changes, and the Act has been described as 'the culmination of a phenomenally successful political campaign'.¹ Many of its provisions replace elements of common law as well as certain provisions of earlier statutes. However, the 2013 Act still does not attempt to sweep away all aspects of common law and start afresh. Rather, it builds on the work of the courts in recent years, albeit with some notable additions.

There are three distinct reasons why common law remains important in the law as it currently stands. First, the 2013 Act came into force on 1 January 2014, and by section 16 of the Act, most of its provisions are expressed to be inapplicable to actions which accrued—or in some instances statements which were made—before that date. For these cases, the pre-Act law continues to apply. Second, by no means all elements of the law are altered by the statute. Even where the statute does apply, there are areas where the common law continues to be definitive or partially definitive. Examples are the distinction between ‘fact’ and ‘opinion’ used in section 3 of the 2013 Act, which is not defined in the statute, so that courts will need to apply earlier decisions on this point; and the meaning of a ‘defamatory statement’, to which section 1 of the Act makes important additions without altering the basic definition. In these areas, the applicable principles are derived from a combination of statute and common law. Third, even where common law has been replaced, the new provisions generally state a revised version of the position arrived at by the courts. At times, the statute deliberately reflects prior decisions of the courts, and the Explanatory Notes published with the statute at many points make this apparent, although the Supreme Court’s interpretation of section 1(1) was justified partly through an argument that change in the common law position was plainly intended (see Section 4.2, which raises some questions about the reasoning on this point). In general, Parliament seems to have been content to work in partnership with the courts, adopting judicial innovations and leaving considerable discretion on some key points—such as the ‘public interest’ defence—to the courts. In an area of law so dominated by ideas of ‘balance’, it is also highly likely that some decisions concerning the common law were themselves influenced by the developing reform agenda. Apart from these points, when it comes to *understanding* the law, the position reached prior to the Act is of course often essential background, and will be referred to where it is both helpful, and feasible to do so.

p. 785 ↩ The statutory provisions are extracted and discussed throughout this chapter, rather than in a separate section. This reflects the fact that the present law is derived from an amalgamation of common law and statutory principles. Nevertheless, even those approaching the area for the first time may find useful a brief overview of the major changes wrought by the 2013 Act.

1.1 Defamation Act 2013: Key Provisions

In outline, notable contributions made by Defamation Act 2013 are as follows.

1. Introduction of a ‘serious harm’ criterion, aimed at preventing trivial claims (section 1).
2. A new requirement in the case of bodies trading for profit that a statement is not actionable unless it is likely to cause ‘serious financial loss’ (section 1(2), affecting the definition of ‘serious harm’ for such bodies).
3. Replacement of the common law defence of ‘justification’ with a slightly simpler, but otherwise similar defence which is now named ‘truth’ (section 2).
4. Replacement of the common law defence of ‘fair comment’ with a simplified defence named ‘honest opinion’, in which the problematic concept of ‘malice’ plays no part (section 3).
5. Replacement of the ground-breaking defence of ‘*Reynolds* privilege’ with a new defence of ‘publication on a matter of public interest’, which helps to realize the radical nature of the ‘privilege’ (section 4).

6. Clarification of the potential liabilities of website operators for defamatory statements posted on their websites by others (section 5).
7. Creation of a new category of privileged statements in scientific and academic journals (section 6).
8. Reform of the 'single publication rule' to protect further publications of the same statement, for example, through internet archives (section 8).
9. Restriction on actions against persons not domiciled in the UK or an EU member state: this is an attempt to tackle 'libel tourism' (the bringing of actions in UK courts in order to benefit from the claimant-friendly law that has existed in this jurisdiction) (section 9).
10. Additional protection to 'secondary' publishers (those who do not originate a statement) (section 10).
11. Curtailment of jury trials in defamation actions: trial is now to be without a jury unless the court orders otherwise (section 11).
12. The availability of new powers for courts deciding defamation actions: to order a summary of its judgment to be printed (section 12); or a statement to be removed; or distribution to cease (section 13).

In this chapter, we set out to explore the law as it stands, incorporating the statutory provisions and common law where it is still relevant, or essential to grasping the present law. The 2013 Act aims to 'rebalance' the law of defamation.² In the Section 2, before addressing the details of the law, we begin by considering what exactly is being 'balanced'?

p. 786 2 The Competing Interests: Expression and Reputation

Libel and slander have a long history—far longer, for example, than negligence. Protection of reputation through civil law was well established by the start of the sixteenth century,³ and significantly predates the recognition of 'human rights' in any form. Even so, in modern times the law of defamation has openly reflected the tension between freedom of expression, and protection of reputation. This tension has affected the manner in which the torts are defined; the defences and remedies available; and the funding of litigation. After the Human Rights Act 1998 (HRA), reputation and freedom of expression have competed in a new context. The most recent statutory reforms swing the balance further towards freedom of expression, and are particularly aimed at avoiding a 'chilling effect' on speech. Although the influence of Convention rights on the legislation is implicit and indirect, consideration of these rights has helped to shape the judge-made developments which are in many respects continued by the legislation. We begin by examining the rival interests in expression and reputation and the changing nature of their recognition in law. Freedom of expression is much more easily mapped onto the European Convention on Human Rights (ECHR) than reputation; but recent developments have found a place for reputation also within the range of protected Convention rights.

2.1 Freedom of Expression

Why Protect Expression?

There is more than one possible reason for protecting freedom of expression. As we will see, the choice of rationale has a practical impact on the law of defamation, and the evolution of its principles.

David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, Oxford: Oxford University

Press, 2002), 762–6; by permission of Oxford University Press

The Importance of Freedom of Expression

The liberty to express one's self freely is important for a number of reasons, which help to shape the development and application of the law on freedom of expression. First, self-expression is a significant instrument of freedom of conscience, personal identity, and self-fulfilment. From the point of view of civil liberties, this is probably the most important of the justifications which can be offered for free speech.

...

The freedom to choose between values, to have fun through communication, to identify and be identified with particular values or ideas, and to live one's life according to one's choice, is the essence of liberty. Freedom of expression has an important role to play here. ...

p. 787

← The second justification concerns the contribution of communication to the growth of knowledge and understanding. Freedom of expression enables people to contribute to debates about social and moral values. It is arguable that the best way to find the best or truest theory or model of anything is to permit the widest possible range of ideas to circulate. The interplay of these ideas, challenging each other and allowing the strengths and weaknesses of each to be exposed, is more likely than any alternative strategy to lead to the best possible conclusion. This treats freedom of expression as an instrumental value, advancing other goods (the development of true or good ideas) with a consequential benefit for the individual and society.

This is the basis on which freedom of expression appealed to John Milton, in *Areopagitica*, and to the utilitarian mind of John Stuart Mill, who gave the most famous, and most convincing, justification for freedom of speech in *On Liberty*. Mill argued on utilitarian grounds that there was a distinction in principle between facts and opinion. When dealing with opinions, all should be freely expressed, subject to any restrictions necessary to protect against identifiable harm. ... Assertions of fact, on the other hand, could by definition be either true or false. There would be good reason to allow free expression of the truth, as this would lead to advances in knowledge and material improvements in society, but this does not justify permitting free expression of falsehoods. However, it is not always possible to say whether an assertion is true or false, and many benefits may flow from allowing statements of fact to be asserted so that they may be tested. ... on a rule-utilitarian analysis the benefits of a general principle permitting freedom of expression are held to outweigh the disbenefits resulting from particular aspects of the rule. It is therefore preferable to permit freedom to express opinions and facts, even if untrue, rather than to adopt a general rule which permits censorship and coercion in relation to expression. ...

A third justification for free expression is that it allows the political discourse which is necessary in any country which aspires to democracy. ... A democratic rationale for freedom of expression makes perfect sense if applied to a society in which the operative model of democracy is one in which the people have the right to participate directly in day-to-day governmental decision making, or to have their views considered in the choice of policies by government. It works less well if the prevailing

model is one in which the people merely choose a government, which is then free to get on with the job of governing. ... The representative system, such as we have in the UK, would offer less support to free-expression rights than a participatory system.

In this extract, David Feldman outlines three justifications for freedom of expression.⁴ He suggests that from a 'civil liberties' point of view—which in this context is concerned chiefly with personal freedom and autonomy—the first justification is the most important. Recent judgments in defamation cases consider freedom of expression in much more 'instrumental' terms than this, appealing more to the *public* interest in freedom of expression and to the goals that it serves. That reading of freedom of expression is consistent with the concerns which have led to the Defamation Act 2013. The second and third justifications outlined by Feldman, both of which are concerned with the public interest, are of growing influence. Here is a judicial example:

p. 788 **Lord Nicholls, *Reynolds v Times Newspapers***
[2001] 2 AC 127, at 200

The high importance of freedom to impart and receive information and ideas has been stated so often and so eloquently that this point calls for no elaboration in this case. At a pragmatic level, freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy cherished in this country. This freedom enables those who elect representatives to Parliament to make an informed choice, regarding individuals as well as policies, and those elected to make informed decisions.

Lord Nicholls appears to embrace the argument from democracy, while Feldman (at the end of the extract above) was rather sceptical of its value in a representative democracy such as that of Britain. For Lord Nicholls, political representatives will be inclined to act more appropriately if the public is better informed, and they may even be influenced by public debate. The judgments in *Reynolds* were clearly influenced by Article 10 of the ECHR, and by the HRA which was then on the verge of commencement. Although the decision in *Reynolds* has been superseded by section 4 of the Defamation Act 2013, that provision effectively continues the work begun by the courts, though with greater clarity as to the working concepts, and without the awkward categorization as a 'privilege'.⁵ Though the legislation is not motivated by a wish to reflect the requirements of the Convention, the influence of Convention rights in the law on which the statute builds is clear. The legislation sets out to strike a fresh balance; but the tools used to achieve that are largely modelled on the concepts developed by the courts under the influence of Convention jurisprudence.

Freedom of Expression: The Legal Provisions

European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 ('the

Convention')**Article 10 Freedom of Expression**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

p. 789 ← This provision is one of the 'Convention rights' annexed to the HRA. We have analysed the way in which the 'Convention rights' are treated in the HRA in Chapters 1 and (in relation to nuisance) 11. The potential for reform is discussed in Chapter 1.4.

Section 6 of the HRA, extracted in Chapter 1, has been of particular importance for the law of defamation. This section states that it is unlawful for a public authority (which is defined to include a court) to act in a way that is incompatible with a Convention right. As a consequence of section 6, any court must ensure that its decisions are compatible with the relevant Convention rights, including those in Article 10. In Chapter 1 we considered whether this introduces 'horizontal effect' into the HRA, affecting the rights and obligations between citizens, rather than just the rights of citizens against the state. Judicial development in defamation law since enactment suggests an element of 'indirect' horizontal effect. 'Indirect' horizontal effect influences the interpretation of existing causes of action, rather than the creation of new actions.

The right to freedom of expression protected by the HRA is specifically the 'Convention right' expressed in Article 10. Therefore, we must examine the terms of Article 10 itself.

Article 10: Essential Features

Certain important features of this Article should be highlighted. First, the right is very broadly expressed and includes expression of information, opinions, and ideas. Second, the Article is concerned not only with *imparting* information, opinions, and ideas, which is probably the most natural meaning of the term 'expression', but also with *receiving* them. Third, states may legitimately restrict the right defined in Article 10(1), as described in Article 10(2). Among the legitimate restrictions are penalties designed to protect *reputation*. However, it is equally important that any such restrictions must be '*prescribed by law*', and that they should be '*necessary in a democratic society*'. The European Court of Human Rights has on more than one occasion found that English defamation law violated Article 10 because it failed to comply with these qualifications to Article 10(2) (*Tolstoy Miloslavsky v UK* (1995) 20 EHRR 442; *Steel and Morris v UK* (2005) 41 EHRR 403).

The 'Chilling Effect'

The prospect of an action in defamation may have unhealthy deterrent effects, inhibiting publication not only of falsehoods but also of some worthwhile and important material. This prospect is captured in the idea of a 'chilling effect'. The expression originated in the United States and was imported into English law in *Derbyshire v Times Newspapers* [1993] AC 534, through reference to the Supreme Court's decision in *New York Times v Sullivan* 376 US 254 (1964).⁶ It is another way of referring to a 'deterrent'.

Reference to the chilling effect has become an established aspect of judicial and political discussion of defamation. The risk of 'chilling' has been exacerbated by certain features of the law.⁷ By definition, the chilling effect is important chiefly from the point of view of 'functional' justifications for freedom of expression: the danger is that the public will remain uninformed of potentially important issues, and the quality of debate will be adversely affected.⁸

p. 790 2.2 Reputation

As we noted above, defamation actions protect reputation. Historically, defamation has been almost unique in protecting personal reputation,⁹ but developments in the tort of malicious falsehood have created greater potential overlap.

There is no Convention *right* which is expressly dedicated to protecting reputation. However, we have seen that protection of reputation is stated to be a legitimate reason to restrict freedom of expression, so long as the restrictions are necessary and prescribed by law (Article 10(2)). On its own, this would appear to reverse the traditional common law hierarchy of interests:

Peter Cane, *The Anatomy of Tort Law* (Oxford: Hart Publishing, 1997), 134

... in traditional English tort law, reputation is more highly prized than (the countervailing interest in) freedom of speech and information, and such protections for the latter as are recognised are embodied in defences to a claim for defamation rather than in the definition of the wrong of defamation.

It is now clear, however, that 'reputation' is also within the protection set out by Article 8 ECHR.¹⁰ The implication is that at least some defamation actions should raise very similar issues to the privacy actions discussed in Chapter 15, and in particular a balance between rights needs to be struck in both areas. In the courts, this became more securely recognized in the years leading up to enactment of the Defamation Act 2013.

Lord Phillips, *Flood v Times Newspapers*

[2012] 2 AC 273

The balancing act and human rights

44 ... The decisions to which I have referred contain frequent emphasis on the importance of freedom of speech and, in particular, the freedom of the press. That importance has been repeatedly emphasised by the European Court of Human Rights when considering article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. There is, however, a conflict between article 10 and article 8, and the Strasbourg court has recently recognised that reputation falls within the ambit of the protection afforded by article 8: see *Cumpăna and Maza-re v Romania* (2004) 41 EHRR 200 (GC), para 91 and *Pfeifer v Austria* (2007) 48 EHRR 175, paras 33, 35. In *Reynolds* Lord Nicholls, at p 205, described adjudicating on a claim to *Reynolds* privilege as 'a balancing operation'. It is indeed. The importance of the public interest in receiving the relevant information has to be weighed against the public interest in preventing the dissemination of defamatory allegations, with the injury that this causes to the reputation of the person defamed.

45 There is a danger in making an exact comparison between this balancing exercise and other situations where article 8 rights have to be balanced against article 10 rights. Before the development of *Reynolds* privilege, the law of defamation, as developed by Parliament and the courts, already sought to strike a balance between freedom of expression and the protection of reputation. Thus a fair and accurate report of court proceedings is absolutely privileged. Publication is permitted even though this may involve publishing allegations that are clearly defamatory. The balance in respect of the reporting of such proceedings is heavily weighted in favour of freedom of speech. The public interest in favour of publication is firmly established. The judge has, however, jurisdiction to make an anonymity order, thereby tilting the balance back. Decisions in relation to the exercise of this power cannot be automatically applied to a situation where the publication of defamatory allegations has no statutory protection. In the former case one starts with a presumption in favour of protected publication; in the latter one starts with a presumption against it.

A key point made by Lord Phillips in this extract is that there are different ways to strike a 'balance'. In privacy actions, the question of balance is often directly before the courts as they determine whether or not to issue an injunction. In defamation, the 'balance' sought by the law may be achieved by a pattern of legal principles which strike the overall balance between reputation and freedom of expression. Even so, it remains a challenge to explain why the structure and principles of the two areas of law remain so different, outside certain areas. In particular, injunctions to restrain publication are a key remedy in privacy actions, but are rarely used until after a full trial in defamation actions. Equally, the defamation reform debate has been almost entirely dominated by freedom of expression rather than reputation: how can it be clearly decided whether the correct balance has been struck, if only one side of the balance is being considered?

Two distinct ways of addressing this issue are possible. One is to suggest that at the level of individual interests, the significance of reputation is not to be underestimated: it is an essential aspect of human well-being.¹¹ Another is to suggest that whatever the public and social reasons for protecting freedom of expression, similar arguments can also be made for protection of reputation. Both of these are captured by Mullis and Scott,¹² who suggest that:

The task of designing any libel regime must involve reaching an appropriate accommodation between individual rights and social interests in both freedom of expression and reputation.

This means accepting that there is a social or 'public' value to reputation, just as there is to freedom of expression. Indeed, precisely this was suggested by Lord Nicholls in the path-breaking (though now superseded¹³) case of *Reynolds v Times Newspapers*:

p. 792 **Lord Nicholls, *Reynolds v Times Newspapers*, at 201**

Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognise that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others.

The crux of this appeal, therefore, lies in identifying the restrictions which are fairly and reasonably necessary for the protection of reputation.

3 Libel, Slander, and Malicious Falsehood

3.1 Libel and Slander

Libel and slander are separate torts. At common law, a libel is a defamatory statement in permanent or semi-permanent form.¹⁴ The written word may be a libel, while the spoken word is, at common law, capable of amounting to a slander. The practical difference between the two is that libel is actionable per se or without proof of damage.¹⁵ Slander, at common law, is actionable only if 'special damage' is shown.

A number of exceptions apply. Some of these specify that certain statements, not easily defined as permanent in form, may amount to libels. Others remove the special damage requirement from certain forms of slander.

Statements that are Potential ‘Libels’ by Statute

By section 4(1) of the Theatres Act 1968, the publication of defamatory words in the course of a theatrical performance amounts to a libel.

By section 166 of the Broadcasting Act 1990, publication of defamatory words, pictures, gestures, and other ‘statements’ broadcast on *radio or television* amounts to a libel.

p. 793 Slanders that are Actionable without Proof of Damage

There are two surviving exceptions to the general rule that slander is actionable only on proof of special damage. Two other exceptions, one statutory and one arising at common law, were abolished by **section 14 of the Defamation Act 2013**.¹⁶ The two surviving exceptions are:

1. Imputation of a criminal offence punishable with imprisonment. This exception is recognized at common law.
2. By section 2 of the Defamation Act 1952:

In an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.

3.2 Malicious Falsehood

We touched on the tort of malicious falsehood in Chapter 2. It is very different from defamation in that it requires the claimant to show a **false statement; made with malice**; and (unless section 2 of the Defamation Act 1952 applies) **special damage**. This may make the action considerably less attractive to claimants than the actions in defamation, which universally presume falsehood and require no malice (unless to displace certain defences). But it remains significant that defamation is not the only route to protection of reputation—and, most particularly, of *trading* reputation.

4 Elements of a Claim in Defamation

Unless the action is one in which special damage must be shown, at common law the claimant in a defamation action has needed to prove only the following:

The defendant has published a statement; with defamatory meaning; referring to the claimant.

This states only three requirements. However, **section 1 of the Defamation Act 2013** (extracted at Section 4.2) makes two very significant additions, one general, the other specific to corporations trading for profit. This is one of the most important provisions of the Act: it sets the tone for other provisions, by establishing that a defamatory statement is actionable only if it is likely to cause **serious harm** to reputation. Second, in the case of a body trading for profit, this must cause or be likely to cause **serious financial loss**.

p. 794 ↩ In this Section, we consider these four elements: defamatory meaning; ‘serious harm’ (in general, and in relation to bodies that trade for profit); publication; and reference to the claimant. Even if the claimant can show all of these elements, the defendant may nevertheless be able to establish one of the defences described in the following section. If the action is for a slander which is not actionable per se, then the claimant will also need to show that special damage was caused by the statement.

4.1 Defamatory Meaning

A Basic ‘Definition’

The basic definition of a ‘defamatory’ meaning is still derived from common law. Section 1 adds that statements with such a meaning are actionable only if ‘serious harm’ is likely.

Lord Atkin, *Sim v Stretch*

[1936] 2 All ER 1237

Judges and textbook writers alike have found difficulty in defining with precision the word ‘defamatory.’ The conventional phrase exposing the plaintiff to hatred, ridicule and contempt is probably too narrow. The question is complicated by having to consider the person or class of persons whose reaction to the publication is the test of the wrongful character of the words used. ... I propose in the present case the test: *would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?* Assuming such to be the test of whether words are defamatory or not there is no dispute as to the relative functions of judge and jury, of law and fact. It is well settled that the judge must decide whether the words are capable of a defamatory meaning. That is a question of law: is there evidence of a tort? If they are capable, then the jury is to decide whether they are in fact defamatory.

[Emphasis added]

Lord Atkin’s encapsulation is still the leading statement of ‘defamatory meaning’. There is an objective element to the idea of defamatory meaning because it refers to *right-thinking members of society*. If the only people who would think ill of the claimant as a result of the statement are not ‘right-thinking’, then in principle there is no defamatory meaning, even if the opinion of such people is important to the claimant. Such a case was *Byrne v Dean* [1937] 1 KB 818. Here the claimant was a member of a golf club. Someone informed the police that there were gambling machines on club premises, and they were removed. An anonymous poem was pinned to the wall implying that the mystery informant was the claimant.

This, according to the majority of the Court of Appeal, could not be defamatory:

Slessor LJ, at 834

In no case as it seems to me can it be said that merely to say of a man that he has given information which will result in the ending of a criminal act is in itself defamatory where he is doing no more than reporting to the police that which if known by the police might well end in the discovery of an illegal act ...

p. 795 ← This 'objective' element has its limits, however. For example, in *John v MGN* [1997] QB 586 it was considered defamatory to allege that the plaintiff was suffering from an eating disorder. Logically, 'right-thinking people' might be expected to meet such information with sympathy rather than criticism. The 'right-thinking' person, we might conclude, is taken to be morally upstanding, but not necessarily entirely rational.

The Defamatory Meaning

Statements are inherently ambiguous and few, if any, succeed in conveying the same meaning to all those who read, see or hear them. Even so, defamation generally requires that ultimately, a 'single meaning' is attached to the statement.¹⁷ This is where the subtleties begin.

The claimant is required to specify a defamatory meaning which is conveyed as the 'natural and ordinary' meaning of the statement. It does not need to be shown that this is the meaning intended by the defendant. As was made clear in *Sim v Stretch* (above), provided the meaning is *capable of being conveyed by the statement*, then whether the meaning was in fact defamatory is a question of fact which has been a question for the jury. Equally, if the statement has a defamatory meaning, then a defendant who wishes to assert truth must ensure that the 'justification' offered is sufficient to deal with that defamatory meaning.¹⁸ It is not good enough to show that the words are true on the face of them, if they are held to carry a different meaning which is defamatory of the claimant.¹⁹

'True' and 'False' Innuendo

Generally, with the exception of 'true' innuendo, both parties will propose the meaning that they consider to be the 'natural and ordinary' meaning of the words used. This is a rather misleading phrase. The 'natural and ordinary meaning' can often involve an element of 'reading between the lines'. This is referred to as an 'innuendo'. There are two sorts of innuendo. The 'false' innuendo is a matter of implication from the words themselves, and is an aspect of their ordinary meaning. The 'true' innuendo is a meaning available only to those who have knowledge of certain additional facts, outside the statement itself. We will consider each in turn.

False Innuendo

As Lord Devlin explained in *Lewis v Daily Telegraph*, the difference between **literal meaning** and **false innuendo** is a matter of degree.

Lewis v Daily Telegraph

[1964] AC 234, at 278

p. 796

A derogatory implication may be so near the surface that it is hardly hidden at all or it may be more difficult to detect. If it is said of a man that he is a fornicator the statement cannot be enlarged by innuendo. If it is said of him that he was seen going into a brothel, the same meaning would probably be conveyed to nine men out of ten. But the lawyer might say that in the latter case a derogatory meaning was not a necessary one because a man might go to a brothel for an innocent purpose. An innuendo pleading that the words were understood to mean that he went there for an immoral purpose would not, therefore, be ridiculous. To be on the safe side, a pleader used an innuendo whenever the defamation was not absolutely explicit. That was very frequent, since scandalmongers are induced by the penalties for defamation to veil their meaning to some extent. Moreover, there were some pleaders who got to think that a statement of claim was somehow made more forceful by an innuendo, however plain the words. So rhetorical innuendoes were pleaded, such as to say of a man that he was a fornicator meant and was understood to mean that he was not fit to associate with his wife and family and was a man who ought to be shunned by all decent persons and so forth. Your Lordships were told, and I have no doubt it is true, that before 1949 it was very rare indeed to find a statement of claim in defamation without an innuendo paragraph.

An example of an alleged 'false innuendo' is *Sim v Stretch* (extracted earlier). The defendant Sim had sent a telegram to the plaintiff, concerning a housemaid named Edith, which was received at the village shop (and which was therefore 'published' to a third party). The telegram read:

Edith has resumed her service with us today. Please send her possessions and the money you borrowed also her wages to Old Barton.

Taking exception to this, the plaintiff argued:

By the said words the defendant meant and was understood to mean that the plaintiff was in pecuniary difficulties, that by reason thereof he had been compelled to borrow and had in fact borrowed from the said housemaid, that he had failed to pay the said housemaid her wages and that he was a person to whom no one ought to give any credit.

The House of Lords was doubtful whether the words could carry this meaning, but did not decide this point, since they concluded that even if the meaning was established, such a meaning was not capable of being defamatory. Right-thinking people would think nothing of borrowing from a servant. It was an almost daily occurrence, according to Lord Atkin. The point here is that the pleaded meaning is simply a matter of *implication from* the words used. It is a false innuendo.

If the words used are considered 'incapable' of the meaning alleged by the claimant, then the claim will fail. This was the case in *Lewis v Daily Telegraph* [1964] AC 234.

The defendant newspapers had published stories reporting (truthfully) that the City of London Fraud Squad was inquiring into the affairs of a company. Since the literal meaning of the story (existence of an investigation) was true, the plaintiff sought to argue that the articles suggested, by implication, that there was not only suspicion (this too could perhaps be justified), but also guilt.

p. 797 **Lord Devlin, *Lewis v Daily Telegraph***

[1964] AC 234, at 285–6

It is not ... correct to say as a matter of law that a statement of suspicion imputes guilt. It can be said as a matter of practice that it very often does so, because although suspicion of guilt is something different from proof of guilt, it is the broad impression conveyed by the libel that has to be considered and not the meaning of each word under analysis. A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire; but it can be done. One always gets back to the fundamental question: what is the meaning that the words convey to the ordinary man: you cannot make a rule about that. They can convey a meaning of suspicion short of guilt; but loose talk about suspicion can very easily convey the impression that it is a suspicion that is well founded.

In the libel that the House has to consider there is, however, no mention of suspicion at all. What is said is simply that the plaintiff's affairs are being inquired into. That is defamatory, as is admitted, because a man's reputation may in fact be injured by such a statement even though it is quite consistent with innocence. I dare say that it would not be injured if everybody bore in mind, as they ought to, that no man is guilty until he is proved so, but unfortunately they do not. It can be defamatory without it being necessary to suggest that the words contained a hidden allegation that there were good grounds for inquiry. A statement that a woman has been raped can affect her reputation, although logically it means that she is innocent of any impurity: *Yousoupoff v. Metro-Goldwyn-Mayer Pictures Ltd* [(1934) 50 T.L.R. 581, C.A.]. So a statement that a man has been acquitted of a crime with which in fact he was never charged might lower his reputation. Logic is not the test. But a statement that an inquiry is on foot may go further and may positively convey the impression that there are grounds for the inquiry, that is, that there is something to suspect. Just as a bare statement of suspicion may convey the impression that there are grounds for belief in guilt, so a bare statement of the fact of an inquiry may convey the impression that there are grounds for suspicion. I do not say that in this case it does; but I think that the words in their context and in the circumstances of publication are capable of conveying that impression. But can they convey an impression of guilt? Let it be supposed, first, that a statement that there is an inquiry conveys an impression of suspicion; and, secondly, that a statement of suspicion conveys an impression of guilt. It does not follow from these two suppositions that a statement that there is an inquiry conveys an impression of guilt. For that, two fences have to be taken instead of one. While, as I have said, I am prepared to accept that the jury could take the first, I do not think that in a case like the present, where there is only the bare statement that a police inquiry is being made, it could take the second in the same stride. If the ordinary sensible man was capable of thinking that where ever there was a police inquiry there was guilt, it would be almost impossible to give accurate information about anything: but in my opinion he is not. I agree with the view of the Court of Appeal.

‘True’ Innuendo

In some cases, the defamatory meaning complained of can be understood *only* if certain additional facts—not mentioned in the statement—are known. If so, this is a case of ‘true’ innuendo. In such cases, the claimant must make clear the additional facts that are relevant when pleading the defamatory meaning. An example is *Tolley v Fry* [1931] AC 333. The defendants had advertised their ‘Fry’s Chocolate Creams’ with a cartoon
 p. 798 representing the ↵ plaintiff, a well-known amateur golfer, and a verse which referred to him by name. His likeness was being exploited in order to promote the goods of another, without permission and without reward, and the case is therefore often cited as an early example of ‘appropriation of personality’. In this particular case, however, the plaintiff was able to claim successfully in libel. The necessary additional fact providing the innuendo was that earning money from golf or from associated activities or sponsorship, including advertising, was inconsistent with his status as an amateur golfer. This case contains both ‘false’ and ‘true’ innuendo.

Viscount Hailsham, at 337

He did not complain of the caricature or the words as being defamatory in themselves; but the innuendo alleged that the ‘defendants meant, and were understood to mean, that the plaintiff had agreed or permitted his portrait to be exhibited for the purpose of the advertisement of the defendants’ chocolate; that he had done so for gain and reward; that he had prostituted his reputation as an amateur golf player for advertising purposes, that he was seeking notoriety and gain by the means aforesaid; and that he had been guilty of conduct unworthy of his status as an amateur golfer.’

In *Hough v London Express* [1940] 2 KB 507, it was made clear that in the case of a true innuendo, there is no need to show that any person who knows the relevant facts actually understands the article to be defamatory, or believes the defamatory meaning to be true. However, this position must be read subject to the provisions of s.1(1) Defamation Act 2013, requiring ‘serious harm’ to reputation in any case of defamation.

4.2 Serious Harm

Defamation Act 2013

Section 1. -Serious harm

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.

Section 1 is a very important provision. During the legislative process, it seemed clear that its aim is to remove the temptation to bring ‘trivial’ claims in defamation, and that in this respect it built upon progress made by the courts themselves. As one would expect from such a core provision, it has quickly needed to be interpreted by the courts; and the question that has arisen is the extent to which the section departs from the position reached by common law immediately before enactment. The test in section 1(1) is whether there is likely to be serious harm to the *reputation* of the claimant: it is clear since the decision of the Supreme Court in *Lachaux* (extracted below) that this is different from tangible material loss, and the section therefore does not contradict the law’s position that reputation is an interest worthy of protection in its own right. It is still

p. 799 correct to say that it is actionable ‘per se’ (without proof of tangible loss). There is an equally significant additional requirement in section 1(2), which certainly adds to the requirements of the common law, namely that where a body that trades for profit is concerned, there will be ‘serious harm’ *only* if the statement is likely to cause ‘serious financial loss’. Again, the provision may be satisfied where the loss remains *likely*.

Section 1(1)

Section 1(1) appeared to continue the work of the courts in a number of its decisions concerning common law. So, for example, the ‘Explanatory Notes’ refer to the decisions in *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414, which suggested that a ‘threshold of seriousness’ must be passed before a statement can be actionable; and *Jameel v Dow Jones & Co* [2005] EWCA Civ 75, where the Court of Appeal ruled that there must be a ‘real and substantial tort’ before a claim in defamation can be brought. In the latter case, publication in the UK had been so limited that it would be an abuse of process to bring legal proceedings: the article had been published to only five people in England and Wales, and only two of these were truly independent of the claimant. After these decisions, it was said that the advantage sought by the claimant from the action must be ‘worth the candle’ (*Jameel*) or, as Tugendhat J put it in *Euromoney Institutional Investor v Aviation News* [2013] EWHC 1505 (QB), ‘worth the expenditure of costs and other resources that would be involved if the action were to proceed’ ([143]).²⁰

In the years immediately after its enactment, perhaps the most significant question about the provisions of the 2013 Act was about the nature of the change effected by section 1(1). Did it require the claimant to show on the balance of probabilities that serious harm to reputation has in fact been caused (or is likely to be caused)? Alternatively, could the subsection be satisfied by showing that the *tendency* of the words was to cause harm, in their nature? The first interpretation, requiring proof, was recognized as potentially problematic in its impact on the complexity and cost of defamation actions, particularly because it may require a preliminary trial of fact. But it was also argued that requiring proof that the statement had caused or was likely to cause substantial harm was tantamount to changing the entire basis of defamation law, so that libel was no longer actionable ‘per se’, but only on proof of material damage.

These questions were settled by the Supreme Court in the important case of *Lachaux v Independent Print Ltd* [2019] UKSC 27. In a nutshell:

1. The Supreme Court has confirmed that s.1 should be seen as intended to effect a significant change in the law, requiring evidence of serious harm, or of the likelihood of serious harm, to reputation. There is no longer a ‘presumption of damage’ attaching to words that are in their nature defamatory. However;

2. The implications of this are limited in that factual *inferences* may be drawn from the nature of the words published as to whether or not they are likely to cause serious harm. Equally;
3. The Supreme Court rejected the broader claimed implications for the law of defamation, underlining that s.1 requires serious harm *to reputation*, and does not require separate damage from this. The nature of the action is not fundamentally altered: Parliament intended a significant change, but there was nothing to suggest an intention to revolutionize the law of defamation by altering its basis.

p. 800 **Lachaux v Independent Print Ltd [2019] UKSC 27**

The claimant in this significant decision was not a celebrity or 'household name', but an aerospace engineer. British newspapers had published articles concerning his conduct during and after the breakdown of his marriage to a British woman in the United Arab Emirates. The nature of the publications is encapsulated in the judgment of the Supreme Court (delivered by Lord Sumption) in the following extract. It can be seen that the allegations are not trivial.

2. The claimant, Bruno Lachaux, is a French aerospace engineer who at the relevant time lived with his British wife Afsana in the United Arab Emirates. The marriage broke down, and in April 2011 he began divorce proceedings in the UAE courts and sought custody of their son Louis. In March 2012, Afsana went into hiding with Louis in the UAE, claiming that she would not get a fair trial in its courts. In August 2012, the UAE court awarded custody of Louis to his father. In February 2013, Mr Lachaux initiated a criminal prosecution against Afsana for abduction. In October of that year, having found out where Louis was, he took possession of him under the custody order. In January and February 2014, a number of British newspapers published articles making allegations about Mr Lachaux's conduct towards Afsana during the marriage and in the course of the divorce and custody proceedings. These appeals arise out of two libel actions begun by him in the High Court on 2 December 2014 against the publishers of the *Independent* and the *Evening Standard*, and a third begun on 23 January 2015 against the publisher of the *i*. Other libel actions were begun against the publisher of similar articles in another online newspaper, but we are not directly concerned with them on these appeals.

The interpretation of s.1 Defamation Act 2013

Lord Sumption referred to s.1, extracted above, and continued:

11. On the present appeals, the rival constructions of this provision may be summarised as follows. The case on behalf of Mr Lachaux is that the Act leaves 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 or, as Lord Phillips put it in *Jameel* [http://uk.westlaw.com/Document/ICBCA2110E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/ICBCA2110E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>) and Tugendhat J in *Thornton* [http://uk.westlaw.com/Document/I29822440799F11DFB8B6C1A07C6C490A/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I29822440799F11DFB8B6C1A07C6C490A/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>), it has a 'tendency' to injure the claimant's reputation. The effect of the provision on this view of the matter is simply that the inherent tendency of the words must be to cause not just some damage to reputation but serious harm to it. The defendant publishers dispute this. Their case is that the provision introduces an additional condition to be satisfied before the statement can be regarded as defamatory, on top of the requirement that the words must be inherently injurious. It must also be shown to produce serious harm in fact. They submit that unless it was self-evident that such a statement must produce serious harm to reputation, this would have to be established by extraneous evidence. Warby J, after a careful analysis of the Act and the antecedent common law, substantially accepted the defendant publishers' case on the law. But he found, on the facts, that the relevant newspaper articles did cause serious harm to Mr Lachaux. The Court of Appeal (McFarlane, Davis and Sharp LJ) [2018] QB 594, preferred Mr Lachaux's construction of Section 1 [http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>), but they upheld the judge's finding of serious harm.
12. Although the Act must be construed as a whole, the issue must turn primarily on the language of Section 1 [http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>). This shows, very clearly to my mind, that it not only raises the threshold of seriousness above that envisaged in *Jameel* (Yousef) [http://uk.westlaw.com/Document/ICBCA2110E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/ICBCA2110E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>) and *Thornton* [http://uk.westlaw.com/Document/I29822440799F11DFB8B6C1A07C6C490A/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I29822440799F11DFB8B6C1A07C6C490A/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>), but requires its application to be determined by reference to the actual facts about its impact and not just to the meaning of the words.

13. In the first place, the relevant background to Section

1 [<http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)) is the common law position, as I have summarised it. Parliament is taken to have known what the law was prior to the enactment. It must therefore be taken to have known about the decisions in *Jameel (Yousef)*

[<http://uk.westlaw.com/Document/ICBCA2110E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/ICBCA2110E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)) and

Thornton [<http://uk.westlaw.com/Document/I29822440799F11DFB8B6C1A07C6C490A/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I29822440799F11DFB8B6C1A07C6C490A/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink))

and the basic principles on which general damages were awarded for defamation actionable per se. There is a presumption that a statute does not alter the common law unless it so provides, either expressly or by necessary implication. But this is not an authority to give an enactment a strained interpretation. It means only that the common law should not be taken to have been altered casually, or as a side-effect of provisions directed to something else. The *Defamation Act*

2013 [<http://uk.westlaw.com/Document/I85D47C40B09F11E280A6F376A946814B/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I85D47C40B09F11E280A6F376A946814B/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink))

unquestionably does amend the common law to some degree. Its preamble proclaims the fact ('an act to amend the law of defamation'). It is not disputed that there is a common law presumption of damage to reputation, but no presumption that it is 'serious'. So the least that Section

1 [<http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)) achieved was to introduce a new threshold of serious harm which did not

previously exist. The question on these appeals is what are the legal implications of that change, and what necessarily follows from it. Even where some change to the common law was intended, it should not go any further than that. As Lord Reid observed in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC

591 [<http://uk.westlaw.com/Document/I7572B480E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I7572B480E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)), 615, Parliament 'can be presumed not to have altered the common law further

than was necessary'.

14. Secondly, Section

1 [<http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)) 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'. The reference to a situation where the statement 'has caused' serious harm is to the consequences of the publication, and not the publication itself. 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. Ms Page QC, who argued Mr Lachaux's case with conspicuous skill and learning, challenged this. She submitted that 'likely to cause' was a synonym for the inherent tendency which gives rise to the presumption of damage at common law. It meant, she said, harm which was *liable* to be caused given the tendency of the words. That argument was accepted in the Court of Appeal. She also submitted, by way of alternative, that if the phrase referred to the factual probabilities, it must have been directed to applications for pre-publication injunctions quia timet. Both of these suggestions seem to me to be rather artificial in a context which indicates that both past and future harm are being treated on the same footing, as functional equivalents. If past harm may be established as a fact, the legislator must have assumed that 'likely' harm could be also. As to pre-publication injunctions, the section is designed to import a condition to be satisfied if the statement is to be regarded as defamatory at all. It is not concerned with the remedies available for defamation, whether interlocutory or final. It is right to add that pre-publication injunctions are extremely rare, because of the well-established constraints on judicial remedies which restrict freedom of expression in advance of publication.

15. Thirdly, it is necessary to read Section 1(1)

[http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>) with Section 1(2)

[http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>). Section 1(2)

[http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>) is concerned with the way in which Section 1(1)

[http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>) is to be applied to statements said to be defamatory of a body trading for profit. It refers to the same concept of 'serious harm' as Section 1(1)

[http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>), but provides that in the case of such a body it must have caused or be likely to cause 'serious financial loss'. The financial loss envisaged here is not the same as special damage, in the sense in which that term is used in the law of defamation. Section

1 [<http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)) is concerned with harm to reputation, whereas (as I have pointed out) special damage represents pecuniary loss to interests other than reputation. What is clear, however, is that Section 1(2)

[<http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)) 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.

16. 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 main reason why harm which was less than 'serious' had given rise to liability before the Act was that damage to reputation was presumed from the words alone and might therefore be very different from any damage which could be established in fact. If, as Ms Page submits, the presumption still works in that way, then this anomaly has been carried through into the Act. Suppose that the words amount to a grave allegation against the claimant, but they are published to a small number of people, or to people none of whom believe it, or possibly to people among whom the claimant had no reputation to be harmed. The law's traditional answer is that these matters may mitigate damages but do not affect the defamatory character of the words. Yet it is plain that Section

1 [<http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)) was intended to make them part of the test of the defamatory character of the statement.

17. I agree, as the judge did, that this analysis is inconsistent with the previous common law governing statements actionable per se. But it is inconsistent with it only to this extent: that 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. To that extent Parliament intended to change the common law. But I do not accept that the result is a revolution in the law of defamation, any more than the lower thresholds of seriousness introduced by the decisions in *Jameel* [<http://uk.westlaw.com/Document/ICBCA2110E42711DA8FC2A0F0355337E9/View/FullText.html>](http://uk.westlaw.com/Document/ICBCA2110E42711DA8FC2A0F0355337E9/View/FullText.html)

originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)> and

Thornton <[http://uk.westlaw.com/Document/I29822440799F11DFB8B6C1A07C6C490A/View/FullText.html?](http://uk.westlaw.com/Document/I29822440799F11DFB8B6C1A07C6C490A/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>)

originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)> effected such a revolution. Ms Page argued that to construe Section

1 <[http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>)

originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)> in the way that I have done would transform the way in which the Limitation Act

1980 <[http://uk.westlaw.com/Document/I6034EB00E42311DAA7CF8F68F6EE57AB/View/FullText.html?](http://uk.westlaw.com/Document/I6034EB00E42311DAA7CF8F68F6EE57AB/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>)

originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)> applies to actions for defamation; and that it would effectively abolish the

distinction between defamation actionable per se and defamation actionable only on proof of special damage. In both respects, this was said to be inconsistent with other provisions of the Act, notably Sections

8 <[http://uk.westlaw.com/Document/I13AEBA7190CB4FD6878845F048D2A987/View/FullText.html?](http://uk.westlaw.com/Document/I13AEBA7190CB4FD6878845F048D2A987/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>)

originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)> and

14 <[http://uk.westlaw.com/Document/I4B389092B9994E42A84BEAB24213F0A3/View/FullText.html?](http://uk.westlaw.com/Document/I4B389092B9994E42A84BEAB24213F0A3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>)

originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>.

In the final paragraph above (para [17]), Lord Sumption explains that he interprets s.1 as effecting a change, not a revolution. We will turn to the defendant's claimed implications for s.8 and 14, and the Supreme Court's rejection of these implications, below. But we should consider some points about the above extract.

p. 803 In para [14], Lord Sumption deals with the crucial point, that both past and 'likely' harm are to be established as questions of fact, on the same footing. This is the crucial break ↩ from the prior common law position in which harm was 'presumed' from a statement with defamatory meaning. Establishing such harm will, now, be a factual matter on which evidence may be required. Nevertheless, when we address the application to the facts of the case (below), we will see that this question of fact can to some extent be resolved with reference to the gravity of the statement and the circumstances of the publication, responding to the known difficulties of proof. For this reason, the change effected by s.1 though real is nevertheless subtle.

It is also worth noting that in para [15], Lord Sumption reasons from s.1(2), to shed light on the meaning of s.1(1). But it is worth bearing in mind that s.1(2) was not drafted at the same time as s.1(1) and did not reflect the Government's ambitions for the reforms, but was added during debates in the House of Lords in the process of political 'horse-trading'. It resurrects a proposal that was made during an earlier stage in consultation over

defamation, to add distinct requirements for 'corporate' claims for defamation, but adds it to the section on defining defamation generally. If the wording of s.1(2) (which was not part of the initial Bill) has influenced interpretation of s.1(1), this does not reflect the legislative history, as explained in the following extract.

J Steele, 'Co-production': novelty and path-dependence in defamation reform, in P Vines (ed), *Statutory Interpretation and Private Law*

The Report of the Ministry of Justice's Libel Working Group in March 2010 did not select the issue of corporate libel for consideration. By contrast, Lord Lester's Bill in 2010 did include a relatively simple clause, Clause 11, which required that:

A body corporate which seeks to pursue an action for defamation must show that the publication of the words or matters complained of has caused, or is likely to cause, substantial financial loss to the body corporate.

This was included in a separate (and non-consecutive) section from the new requirement of 'substantial harm' to reputation. With the addition of a requirement that the body corporate should trade for profit, and adjusting 'substantial' loss to the more demanding 'serious' loss, this is equivalent to the provision adopted as s 1(2) *Defamation Act 2013*. In the process of legislation, however, the government did not promote the provision. There was no equivalent in the government's own 2011–12 Defamation Bill.

During the Parliamentary process, an amendment was proposed by the House of Lords which would have dealt with the issue of corporate libel in a rather different way: when dealing with actions on the part of bodies corporate or other non-natural legal persons trading for a profit, no action for defamation would lie without permission of the court. This permission would be dependent on showing that the publication had caused or was likely to cause substantial financial loss to that body. Dealing with the problem of private bodies performing public functions and not being caught by the ruling in *Derbyshire*, the amendment also excluded libel actions by bodies corporate exercising functions of a public nature. This provision was novel for English law in its substance, but also in its insistence on a particular process by which a court must be asked for permission to bring the claim. It was rejected by the House of Commons on the basis that it was unnecessary and inappropriate to deal separately with bodies corporate. Yet the Lords' subsequent amendment, taking the same form as the eventual s 1(2), was accepted by the Government and thus by the Commons. We can assume the drafting was relatively quick.

p. 804 Implications: change not revolution

In paras [18] and [19], Lord Sumption dealt with two issues which might have meant that the interpretation of s.1 explained above was indeed revolutionary in its effect. These issues relate, respectively, to limitation periods; and to the very nature of the action in libel as an action 'per se' (not requiring material damage). In each case, he explains in the following extract why he does not accept the revolutionary implications which are claimed. First, the limitation period continues to run from the date of publication, since availability of

proof of damage is not to be conflated with the damage itself.²¹ Second, the requirement for proof of damage does not alter the nature of the damage that must be established, and the interpretation of s1 does not therefore undermine the provisions of s.14, dealing with slanders actionable per se.

18. Section

8 [<http://uk.westlaw.com/Document/I50F64C61B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F64C61B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)) is concerned with limitation. Section 4A of the *Limitation Act*

1980 [<http://uk.westlaw.com/Document/IEAF17850E44911DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/IEAF17850E44911DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink))

provides for a limitation period in defamation actions of one year from the accrual of the cause of action. The cause of action is treated at common law as accruing on publication where it is actionable per se, and on the occurrence of special damage in other cases. Successive publications therefore give rise at common law to distinct causes of action. Section 8 of the *Defamation Act*

2013 [<http://uk.westlaw.com/Document/I50F64C61B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F64C61B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink))

provides that where a statement has been made to the public or a section of the public (for example, in a newspaper) and later republished in the same or substantially the same terms, 'any cause of action against the [same] person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.' The object of this provision is to deprive claimants of the right to sue on a further publication by the same person of substantially the same defamatory statement, more than a year after the first publication. They must sue on the first publication or run the risk of being time-barred. The argument is that Section

8 [<http://uk.westlaw.com/Document/I50F64C61B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F64C61B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)) assumes that the common law rule that the cause of action accrues on publication subsists, subject only to the modification that the accrual of the cause of action for a qualifying second publication is backdated to the date of the first. Therefore, it is said, Section

1 [<http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)) must be construed on the footing that the cause of action is complete on publication and not on some later date at which 'serious harm' may occur. One of the problems of legislating piecemeal for different aspects of the law of defamation, as the Act of 2013 does, is that the interrelation between different rules may be overlooked. I rather doubt whether Parliament got to grips with the implications of Section

1 [<http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)) for limitation. I would not therefore modify my construction of Section

1 [<http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)), which I regard as clear, even if I agreed with Ms Page that its effect was to postpone the accrual of the cause of action for defamation actionable per se. But I do not

agree with her about that. It is necessary to distinguish between the damage done to an interest protected by the law, and facts which are merely evidence of the extent of that damage. Where a statement is actionable per se, the interest protected by the law is the claimant's reputation. As an element in the cause of action for defamation, publication does not mean commercial publication, but communication to a reader or hearer other than the claimant. The impact of the publication on the claimant's reputation will in practice occur at that moment in almost all cases, and the cause of action is then complete. If for some reason it does not occur at that moment, the subsequent events will be evidence of the likelihood of its occurring. In either case, subsequent events may serve to demonstrate the seriousness of the statement's impact including, in the case of a body trading for profit, its financial implications. It does not follow that those events must have occurred before the claimant's cause of action can be said to have accrued. Their relevance is purely evidential. The position is different where a statement is not actionable per se, because the interest protected by the law in that case is purely pecuniary. The pecuniary loss must therefore have occurred.

19. Section

14 [<http://uk.westlaw.com/Document/I50F7D300B0A411E2B7A0E11E7EB499C3/View/FullText.html?](http://uk.westlaw.com/Document/I50F7D300B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink))

[originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F7D300B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)) is concerned only with the law of slander. It abolishes two of the four categories of slander actionable per se, by repealing the *Slander of Women Act*

1891 [<http://uk.westlaw.com/Document/I60ECC950E42311DAA7CF8F68F6EE57AB/View/FullText.html?](http://uk.westlaw.com/Document/I60ECC950E42311DAA7CF8F68F6EE57AB/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink))

[originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I60ECC950E42311DAA7CF8F68F6EE57AB/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)) which made the imputation of unchastity to a woman actionable per se, and by providing that an imputation that a person has a contagious or infectious disease is not to be actionable without proof of special damage. The argument is that since Section

14 [<http://uk.westlaw.com/Document/I50F7D300B0A411E2B7A0E11E7EB499C3/View/FullText.html?](http://uk.westlaw.com/Document/I50F7D300B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink))

[originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F7D300B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)) abolishes two of the categories of slander actionable per se, Section

1 [<http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink))

[originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)) should not be read as abolishing all of them. The fallacy of this argument is that it assumes that Section

1 [<http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink))

[originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)) does abolish all of them. I do not think that it does. To say that a slander is actionable per se simply means that it is actionable without proof of special damage. That is still the case for the two surviving special categories of slander. As I have pointed out above, special damage in this context means damage representing pecuniary loss, not including damage to reputation. Section

1 [<http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?](http://uk.westlaw.com/Document/I50F40272B0A411E2B7A0E11E7EB499C3/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink))

originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)> is not concerned with special damage in that sense but with ‘harm to the reputation of the claimant’, ie with harm of the kind represented by general damage. It simply supplements the common law by introducing a new condition that harm of that kind must be ‘serious’ and in the case of trading bodies that it must result in serious financial loss.

Resolution: how the provisions applied to the claim

The subtlety of the change effected by s.1(1) is illustrated by its application to the claim itself. The amount of evidence presented by the claimant was limited. In the following paragraph, it is concluded that the trial judge, who had interpreted s.1(1) in much the same way as the Supreme Court, was justified in using **inferences of fact** to conclude that serious harm had in fact been established. It is important to be clear that an inference of fact is different from the ‘presumption of damage’ that existed at common law. There need to be reasons to infer from the evidence—not merely from the words themselves—that harm has in fact been caused, or is in fact likely.

21. On the footing that (as I would hold) Mr Lachaux must demonstrate as a fact that the harm caused by the publications complained of was serious, Warby J held that it was. He heard evidence from Mr Lachaux himself and three other witnesses of fact, and received written evidence from his solicitor. He also received agreed figures, some of them estimates, of the print runs and estimated readership of the publications complained of and the user numbers for online publications. He based his finding of serious harm 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 United Kingdom who knew Mr Lachaux 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, according to the meaning attributed to them by Sir David Eady. Mr Lachaux would have been entitled to produce evidence from those who had read the statements about its impact on them. But I do not accept, any more than the judge did, that his case must necessarily fail for want of such evidence. The judge’s finding was based on a combination of the meaning of the words, the situation of Mr Lachaux, the circumstances of publication and the inherent probabilities. There is no reason why inferences of fact as to the seriousness of the harm done to Mr Lachaux’s reputation should not be drawn from considerations of this kind. Warby J’s task was to evaluate the material before him, and arrive at a conclusion on an issue on which precision will rarely be possible. A concurrent assessment of the facts was made by the Court of Appeal. Findings of this kind would only rarely be disturbed by this court, in the absence of some error of principle potentially critical to the outcome.

Subsequently, in *Lachaux v Independent Print Ltd* [2021] EWHC 1797 (QB), the claim proceeded to trial. Rejecting a defence under s.4 Defamation Act 2013 that publication had been in the public interest (see further Section 5.4 of this chapter), damages for the claimant were assessed at a substantial £120,000.

It is worth noting that where defamatory statements are made via social media platforms such as Twitter, it is potentially quite easy to provide evidence from which to infer serious harm, or to establish it on the balance of probabilities. An example is *Riley v Murray* [2021] EWHC 3437 (QB), where the defendant's tweet (which was held to be defamatory of the claimant) had received 94 responses, 661 retweets, and 1764 likes within three hours. These figures allowed an inference of substantial harm. But in addition, there were actual instances of evidence of harm, through the content of responses to the tweet. As the court pointed out, this case provides one example among others of the dangers of posting 'impetuously' on a platform such as Twitter.

Section 1(2)

The provision in section 1(2) is important in its own right. As we have seen in the extracts above, the provision was not originally part of the Government's Defamation Bill, but was added to the Bill by the opposition and, eventually, accepted by the Government. The Explanatory Notes hint that the subsection merely states what would in any case be the position if applying the 'special damage' criterion to bodies trading for profit: such bodies, the Notes suggest, 'are in practice likely to have to show actual or likely financial loss' for the general test to be satisfied. However, it appears that the subsection achieves reform on an issue which has previously divided the judiciary, namely whether it is right to allow a trading corporation to bring an action in defamation for damage to reputation, in the absence of proof of any likely *financial* impact on the company itself. It is not necessarily the case that 'serious harm' would have been understood to require likely financial impact in the absence of section 1(2). This is illustrated by the discussion in *Jameel v Wall Street Journal* [2006] UKHL 44, where a majority of the House of Lords declined to follow the path preferred by Lord Hoffmann and Baroness Hale, namely to require a trading corporation to show 'special damage'. As Lord Hoffmann put it ([91]):

... a commercial company has no soul and its reputation is no more than a commercial asset, something attached to its trading name which brings in customers. I see no reason why the rule which requires proof of damage to commercial assets in other torts, such as malicious falsehood, should not also apply to defamation.

The majority in *Jameel* saw the matter differently. Lord Hope thought it unsatisfactory to single out trading companies for separate treatment compared to other bodies such as trade unions and charities. That, however, is the move now made by the legislation. Lord Hope also drew attention to the potentially

p. 807 'incalculable' damage that can be done to corporate reputation. And indeed, the statutory provision does not take the route of requiring 'special damage' to be proved. Rather, it requires only that the statements are *likely* to cause serious harm to reputation. This harm must, however, lead to 'serious' *financial* loss.

The first judicial consideration of section 1(2) came in *Brett Wilson LLP v Persons Unknown* [2015] EWHC 2628 (QB), a case which is also distinctive for an award of damages (in addition to injunctions) against unknown defendants—those responsible for running the 'solicitorsfromhelluk.com' website. Clearly, the purpose of an award that is highly unlikely ever to be satisfied is vindictory. As in *Lachaux*, Warby J held that the requirement of serious financial harm could also be satisfied by inference in a suitable case. The claimant alleged that it was inevitable that a number of prospective clients who read the website either had decided or would decide not to instruct the firm; and stated a belief that there had been a noticeable drop in conversion of

enquiries to instruction in the past six months. No figures could be provided to establish the relevant damage; but these assertions were found, in the circumstances, to suffice.²² There have been a number of other applications of s.1(2), including *Napag Trading Ltd v Gedi Gruppo Editoriale SpA* [2020] EWHC 3034 (QB), where the Court held that serious financial loss can be inferred in the same way as harm to reputation within s.1 generally. However, there needs to be a careful examination of the available evidence in order to determine whether such an inference is appropriate.

4.3 Publication

If the defamatory statement is made available to any party other than the subject of the defamation, then in principle it is ‘published’. This requirement has been judged to be met even if it is made available to only one person, such as the person at the village shop who took the telegram in *Sim v Stretch*. In *Huth v Huth* [1915] 3 KB 32, there was held to have been no publication where a butler opened a letter addressed to the subject of the alleged libel, because he was not authorized to do so. This amounts to a remoteness rule. Foreseeability has been held to be the test for ‘remoteness’ in defamation, in respect of the consequences of publication and republication: *Slipper v BBC* [1991] 1 All ER 165. However, as we have seen, the development of a ‘substantial harm’ criterion—both at common law and in section 1—means that a defamation action is now likely to be struck out if publication is very limited. There was a change of emphasis even before the 2013 Act.

Modern forms of publication have global reach and given that English libel law has had some very tempting features for those shopping around for a forum,²³ it is important to note that the courts had begun, before the 2013 Act, to require substantial publication *in this jurisdiction*. On the other hand, it should be remembered that publication to one person may in some circumstances be expected to lead to much broader circulation, especially if that person is a journalist: this was the case in *Haji-Ioannou v Dixon* [2009] EWHC 178, where the claim was not struck out. In *Al-Amoudi v Brisard* [2006] EWHC 1062 (QB), Gray J held that publication on the internet does not give rise to any presumption that publication has been made to a substantial number of people: the burden is on the claimant to show that the statement complained of has actually been accessed and read.²⁴

p. 808 Reform of the Republication Rule

Particular controversy has surrounded the **republication rule**, particularly where this applies to the inclusion of previous news stories in a newspaper’s internet archive. It is in the nature of such archives that items are transferred to them without alteration. In *Loutchansky v Times Newspapers (Nos 2–5)* [2002] QB 783, the Court of Appeal determined that there is a new publication of statements included in the archive on each occasion that the statement is accessed. This was an application of *Duke of Brunswick v Harmer* (1849) 14 QB 185, where the delivery of a copy of a newspaper 17 years after its first publication amounted to a new publication. It contrasts with the US ‘single publication’ rule, which was applied to websites in *Firth v State of New York* NY Int 88 (2002). The impact was to deprive newspapers of the intended protection of the ‘*Reynolds* defence’, though this defence has itself now been superseded by the clearer and simpler provisions in section 4 of the Defamation Act 2013. Nevertheless, because the Court of Appeal suggested that a notice could be attached to the material warning against treating it as the truth, and that this would be effective against libel actions, the

European Court of Human Rights in *Times Newspapers v UK* [2009] EMLR 14 dismissed an application by Times Newspapers alleging that its Article 10 rights had been violated by the Court of Appeal's decision in *Loutchansky*.

The republication rule has now been controlled—and its effect reversed—by section 8 of the Defamation Act 2013. Whether the Court of Appeal was correct in its supposition that the notice would afford the required protection will not be relevant in future. But at the same time, it is reasonable to ask whether it is better that an internet archive now need not warn readers that questions have been raised about the truth of statements made in the archived reports: this is the consequence of the legislation.

Defamation Act 2013

8 Single publication rule

- (1) This section applies if a person—
 - (a) publishes a statement to the public ('the first publication'), and
 - (b) subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.
- (2) In subsection (1) 'publication to the public' includes publication to a section of the public.
- (3) For the purposes of section 4A of the Limitation Act 1980 (time limit for actions for defamation etc) any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.
- (4) This section does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.
- (5) In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the matters to which the court may have regard include (amongst other matters)—
 - (a) the level of prominence that a statement is given;
 - (b) the extent of the subsequent publication.
- (6) Where this section applies—
 - (a) it does not affect the court's discretion under section 32A of the Limitation Act 1980 (discretionary exclusion of time limit for actions for defamation etc), and
 - (b) the reference in subsection (1)(a) of that section to the operation of section 4A of that Act is a reference to the operation of section 4A together with this section.

Section 4A of the Limitation Act 1980, which is referred to in the section above, sets the limitation period for actions in defamation at one year from publication, although this is subject to the court's discretion to allow a later claim under section 32A (a discretion which is rarely exercised).²⁵ The effect of section 8 therefore is to

attack the single publication rule indirectly, rather than through a conceptual change in what counts as a 'publication'. A subsequent publication will not be able to give rise to a new cause of action if it falls outside the limitation period running from the first publication, unless of course the court exercises its discretion to extend the period. Courts will doubtless have regard to the purpose of the statute in deciding whether to extend the period or not. However, there are still potential exceptions. In particular, if the *manner* of republication is different, then the limitation period may begin afresh: in effect, this will be treated as a new publication. Thus the section continues to strike a balance, and does not permit an extensive publication to masquerade as equivalent to a very limited earlier one.

Repetition

Another important feature of the English approach to publication is the **repetition rule**. Subject to comments concerning secondary parties below, any person who is involved in the dissemination of statements can be said to be 'publishing' those statements even if they do not explicitly adopt the statement as correct, and will therefore be vulnerable to an action in defamation. There is no need to show that the defendant is the *originator* of the statement, in the sense of being the first to make it. To repeat a rumour, even while disowning it, is capable of amounting to a libel or slander. The impact of this rule has now been considerably softened where allegations on a matter of **public interest** are **neutrally reported without adoption**. This was achieved initially at common law (*Al-Fagih v HH Saudi Research and Marketing (UK) Ltd* [2001] EWCA Civ 1634; *Charman v Orion* [2007] EWCA Civ 972); but has once again been more securely set out by the 2013 Act, section 4(3) (Section 5, Defences).

Protection of Secondary Parties

'Secondary' parties (printers, newsagents, and so on) were, at common law, open to defamation actions even where they had not failed to exercise due care. There was heated debate about the extent to which they were protected by a defence of 'innocent dissemination', particularly in the Court of Appeal in *Goldsmith v Sperrings* [1977] 1 WLR 478, but by section 1 of the Defamation Act 1996, a new statutory defence was introduced for those who play a secondary role in publication of defamatory material, provided they take appropriate care. Before this defence has any part to play, however, the defendant needs to be a 'publisher' of the statement in the first place, and this requires some active part to be played—as we will see. Now, by **section 10 of the Defamation Act 2013**, there is additional protection to ↵ secondary publishers, but this is a supplement to the existing statutory protection and does not replace it. These provisions are explored in relation to Defences, below.

p. 810

4.4 Reference to the Claimant

A statement need not mention the claimant by name in order to be understood as referring to him or her. Reference to the claimant can also occur by implication. This implication may, as with meaning, depend on knowledge of special facts, provided *some* people are aware of those facts. Such people may in theory make up a relatively small group; but the position in this respect will be affected by the need to show 'serious harm' in s.1. In *Hough v London Express* [1940] 2 KB 507, the plaintiff was the wife of a boxer (Frank Hough). The defendant newspaper published an article describing the words of an entirely different woman, who was

described as his wife. The defamatory meaning depended on knowledge that the plaintiff lived with Frank Hough as his wife. This additional fact *not only* supplied the defamatory meaning (that she lived as his wife, but was not), but was also needed in order to establish that the words referred, by implication, to the plaintiff.

Reference to the claimant may be entirely accidental. At common law, this was no defence. Now, sections 1 and 4 of the Defamation Act 1996 provide potential defences for some (but not all) defendants involved in a publication who had no grounds for believing that the statement was defamatory of the claimant. These provisions are further explored under Defences.

Can a statement made about a *group* of people be defamatory of any member of that group? The answer is that it can, and that there really are no special rules of thumb which apply in 'group defamation' cases. The overriding question, as in any case of defamation where a person is not explicitly named, is whether the statement 'pointed to' or would be taken to refer to the individual (*Knupffer v London Express Newspapers* [1944] 1 AC 116; *Riches v Mirror Group Newspapers* [1986] QB 256).

5 Defences

5.1 The Meaning of 'Malice'

The defence of qualified privilege is defeated on proof of 'malice'. For cases applying the law as it stood before the Defamation Act 2013, the same was true of the defence of 'fair comment'.²⁶ It is therefore useful to have in mind the leading statement of 'malice' in this context, which derives from a case on qualified privilege. There has been some debate whether malice has the same meaning in fair comment, but that question has lost its significance after the 2013 reforms.

Lord Diplock, *Horrocks v Lowe*

[1975] AC 135, at 149–50

p. 811

... in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit—the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege. So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. ‘Express malice’ is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests.

The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.

According to Lord Diplock, ‘malice’ is concerned either with knowing publication of falsehood; or (in the alternative) with desire to injure the claimant provided this is the dominant motive for the publication. Either form will do.

5.2 Truth (Previously Justification)

The actions in defamation are designed to penalize falsehood, and true accusations are treated as lowering reputation only to its rightful level. If the truth of the defamatory meaning can be established, then the motive of the defendant in publishing the statement is entirely irrelevant. This was true at common law, and continues to be the case now under the newly stated defence of ‘truth’. This principle of defamation law though long-cherished could be questioned once reputation is defined as within Article 8: why should the ‘balance’ always lie on the side of publication, in the case of trivial but damaging truths? That question dominates the law of privacy, but the structure of defamation law seems to offer no place for it.

The statutory defence of truth now *replaces* the common law defence of ‘justification’. However, the Explanatory Notes published with the statute explain (at para 16) that the section ‘is intended broadly to reflect the current law while simplifying and clarifying certain elements’. Equally, para 18 explains that ‘[i]n

cases where uncertainty arises the current case law would constitute a helpful but not binding guide to interpreting how the new statutory defence should be applied'. It is plain that the new provision is not regarded as constituting an entirely fresh start.

Defamation Act 2013

2.—Truth

- (1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.
- (2) Subsection (3) applies in an action for defamation if the statement complained of conveys two or more distinct imputations.
- (3) If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation.
- (4) The common law defence of justification is abolished and, accordingly, section 5 of the Defamation Act 1952 (justification) is repealed.

To benefit from the defence of truth, the defendant need not have known nor cared whether the allegation was true, and (with one exception) may even have acted out of spite toward the claimant. The exception arises under section 8 of the Rehabilitation of Offenders Act 1974: where a person has a 'spent' conviction for an offence, and where the alleged defamation is a statement referring to the claimant's guilt in respect of that offence, the defence of truth will be lost if 'malice' is proved.²⁷ However, malice here requires evidence of a dominant motive of injuring the claimant's reputation. In *Greenstein v Campaign Against Anti-Semitism* [2021] EWCA Civ 1006, the Court of Appeal found there was insufficient evidence of malice. Here the defendants sought to attack the defendant's character by revealing earlier convictions. It was not possible to infer an improper motive on the part of the defendant from reference to the convictions alone: it was considered fair for readers to know the character of the claimant when he was attacking the character of the defendant.

On the other hand, the very fact that truth is merely a defence, and that falsehood plays no part in the definition of a defamatory statement, complicates this simple picture. The burden of establishing truth continues to fall on the defendant rather than the claimant.

Truth and Defamatory Meaning

We have already seen that the claimant must set out the defamatory meaning of the words complained of. In doing this, the claimant is able to gain an element of control over litigation. Although the defendant is free (within limits) to choose which defamatory meaning he or she will seek to show to be true, nevertheless this must be sufficient to remove the 'sting' of the allegation. At common law, it was said that 'the justification

must be as wide as the charge'.²⁸ According to section 2(1) of the Defamation Act 2013, the *imputation conveyed* must be shown to be 'substantially true'. The test of 'substantial truth' (or previously, justification) was itself developed at common law, but is now clearly a part of the statutory definition of the defence.

p. 813 In *Riley v Murray* [2021] EWHC 3437 (QB), Nicklin J explained that application of the 'single meaning' rule is not always appropriate. Here, the defendant (Jeremy Corbyn's 'stakeholder manager') had responded to a tweet on the part of the claimant. The claimant had responded to a journalist's tweet referring to an egg being thrown at the leader of the British ↵ National Party and stated '... if you don't want eggs thrown at you, don't be a Nazi'. The claimant had retweeted this, with the message 'Good advice'. This became referred to as the 'Good Advice' tweet. The defendant took this to be a reference to an incident earlier the same day in which Jeremy Corbyn had an egg thrown at him. The defendant responded to the 'Good advice' tweet with the post complained of as defamatory: '... [the claimant] tweets that Jeremy Corbyn deserves to be violently attacked because he is a Nazi. The woman is as dangerous as she is stupid. Nobody should engage with her. Ever.'

Defences of truth, honest opinion, and public interest were all considered (the latter two are considered below). So far as truth was concerned, Nicklin J considered that this was not an appropriate case for application of the 'single meaning' rule, and that the defence of truth failed because the defendant's impetuous response presented the very worst interpretation of the claimant's tweet and gave the impression that this was the sole meaning of something which was in fact deeply ambiguous.

Nicklin J, *Riley v Murray* [2021] EWHC 3437 (QB)

75. The important point is that, in her choice of words, and particularly the decision not to include the Good Advice Tweet in the post, the Defendant's Tweet removed that important ambiguity. Instead, the Defendant pronounced what the Claimant had said in the Good Advice Tweet as a matter of fact. That decision led to the Defendant's Tweet being published (and republished) to people who were therefore unaware that what they were being told was only one interpretation of what the Claimant had said in the Good Advice Tweet. As the evidence from the responses to the Defendant's Tweet demonstrates, most if not all of the people who had read it, took it at face value; that the Claimant had said what she was described by the Defendant as having said.
76. As I have sought to demonstrate above, the authorities establish that whether the single meaning rule should be applied, very much depends on why the meaning of the words is relevant to the issue to be resolved. Here, it is not appropriate to impose an artificial single meaning on the Good Advice Tweet. To do so, would stifle the very important fact that it was ambiguous. I therefore reject Mr Bennett's submission that the single meaning rule should be applied.
77. Nevertheless, the Defendant's defence of truth fails. What the Defendant stated, as a matter of fact, in the Defendant's Tweet is not substantially true; it was at best half the story, presented to readers of the Defendant's Tweet as if it was the full story. Critically, it took away the important fact that what the Good Advice Tweet said was a matter of interpretation or opinion, upon which reasonable views could differ, and replaced it with the Defendant's unequivocal statement of what it meant as a matter of fact. In doing so, the Defendant's Tweet was a misrepresentation of what the Claimant had said in the Good Advice Tweet.
78. The position in which the Defendant finds herself could easily have been avoided. If she had said, in the Defendant's Tweet, for example, that the Claimant had posted a Tweet which was capable of suggesting, or implied, that Jeremy Corbyn deserved to be violently attacked then she may well have had a viable defence of truth (or honest opinion). But she did not do this. She took upon herself the burden of describing, as a matter of fact, what the Claimant had said and failed because she removed the element of ambiguity. Worse, she added the two elements that the Claimant had stated that Mr Corbyn 'deserved to be violently attacked'. By doing so, the Defendant put forward the very worst construction that could be put upon the Good Advice Tweet and stated, as a fact, that this was what the Claimant had said.
79. These are not trivial differences, or ones that could be excused as small errors of detail, or exaggeration, within the permitted parameters of a defence of truth. There is a significant and material difference, not least in terms of likely harm to reputation, between offering an interpretation of what someone has said, and pronouncing unequivocally the interpretation, as a review of the responses to the Defendant's Tweet more than demonstrates (see [36(iii)–(iv)] above). If anyone is guilty here of misapplying a single meaning, it is the Defendant.

80. I accept that Twitter is a fast-moving medium, and the law recognises that this must be reflected in the Court's assessment of the objective meaning of Tweets. But, beyond that, defamation law makes little accommodation for those who post on Twitter impetuously. For them, a modern reworking of a familiar maxim would be: Tweet in haste, repent at your leisure (as most defamation cases involving Twitter appear to bear out). The Defendant has failed to prove the truth of the Factual Allegation.

Further help is at hand for defendants in the form of section 2(3) of the Defamation Act 2013, which replaces section 5 of the Defamation Act 1952. The essential point of section 5, and of the new subsection, was simple:

Lord Denning, *Moore v News of the World Ltd*

[1972] 1 QB 441, at 448

... a defendant is not to fail simply because he cannot prove every single thing in the statement to be true.

Section 2(3) applies where there is more than one defamatory imputation, just as section 5 did before it. Before section 5 was applied, the court had to decide that the defamatory allegations in question were 'distinct'—which was taken to mean, that they do not have a 'common sting'. The new subsection does not use the word 'distinct'. Nevertheless, it does operate where there is more than one 'imputation'; and it seems this will be taken to have much the same meaning as the idea of distinct allegations. Indeed, the Explanatory Notes make plain that this is the intention: the new provisions 'are intended to have the same effect as those in s 5 of the 1952 Act' (para 17).

Assuming that the approach under the new provision will be the same, if the allegations *do* have a '**common sting**', the situation is both simpler, and much more beneficial to defendants: they may justify any of the allegations, using evidence drawn from any source including other parts of the same publication. These cases do not require the protection of section 2(3) and do not fall within it.

If the allegations are **distinct**, then section 2(3) comes into play. This section provides that a defendant who can justify only one of the allegations may still argue that the remaining charge is insignificant—that is to say, that it does not materially injure the claimant's reputation once the truth of the justified charge is taken into account. Alternatively, damages may be paid in respect of the remaining charge. Given that one allegation has been justified, these damages (depending of course on the nature of the two allegations) may be relatively moderate.

p. 815 **5.3 Honest Opinion (Previously Fair Comment)**

Section 3 of the Defamation Act 2013 replaces the common law defence of 'fair comment', with a defence named 'honest opinion'. Earlier, in *Joseph v Spiller* [2010] UKSC 53, the Supreme Court had suggested that the existing defence be renamed 'honest comment'. The statutory provision is a more decisive move in the same direction, and clearly settles some debated aspects of the law. It does not include the common law requirement that the opinion must relate to a matter of 'public interest', though this requirement had in any case been exceedingly readily fulfilled; nor does it depend upon 'malice'.

Defamation Act 2013

3.—Honest opinion

- (1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.
- (2) The first condition is that the statement complained of was a statement of opinion.
- (3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.
- (4) The third condition is that an honest person could have held the opinion on the basis of—
 - (a) any fact which existed at the time the statement complained of was published;
 - (b) anything asserted to be a fact in a privileged statement published before the statement complained of.
- (5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.
- (6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person ('the author'); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.

In addition, section 3(7) defines 'privileged statements' by reference to other statutory provisions; while section 3(8) abolishes the common law defence of fair comment and, accordingly, section 6 of the Defamation Act 1952.

The protection offered to opinion or comment has been an important defence at common law and many judicial (and other) statements have supported its existence in a robust and general form. In *Slim v Daily Telegraph* [1968] 2 QB 157, Lord Denning captured the protective judicial approach towards statements of opinion as follows:

... the right of fair comment is one of the essential elements which go to make up our freedom of speech. We must ever retain this right intact. It must not be whittled down by legal refinements.

It has not been possible to keep the defence entirely clear of legal refinements. Principally, this is because it is necessary to distinguish a comment or opinion from a statement of fact (a point on which common law will continue to be authoritative notwithstanding the change in terminology); and because there are some limits beyond which the defence will not operate.

p. 816

Why give Special Protection to Comment?

The particularly strong protection offered to comment, as opposed to fact, can be explained through two linked ideas.

1. Free Expression of Opinions is Essential to Debate, and Free and Lively Debate is Essential to Democracy and the Emergence of Truth

There is clearly some judicial support for this approach:

Scott LJ, *Lyon v Daily Telegraph*

[1943] KB 746, at 752

The reason why, once a plea of fair comment is established, there is no libel, is that it is in the public interest to have a free discussion of matters of public interest.

Similarly, the following statement was quoted with approval by Lord Nicholls, in *Albert Cheng v Tse Wai Chun Paul* [2000] 4 HKC 1, at 14:²⁹

J. G. Fleming, *The Law of Torts* (9th edn, NSW: Law Book Company, 1998), 648

... untrammelled discussion of public affairs and of those participating in them is a basic safeguard against irresponsible political power. The unfettered preservation of the right of fair comment is, therefore, one of the foundations supporting our standards of personal liberty.

2. Misguided Comment or Opinion is Less Dangerous than Inaccurate Statements of Fact

The theory adopted by common law appears to be that people in general will not be misled by what is evidently mere opinion. There is therefore less *need* to penalize comment than fact: it is less dangerous both to reputation, and to truth, because the reader is 'free' to assess the opinions offered (and will not be unduly influenced by them). This presumes a fairly robust and healthy level of public debate and fits well with the broadly instrumental, 'democratic' justifications for freedom of speech identified at the start of this chapter. That being so, it is no surprise to see this approach reflected in Lord Nicholls' brief remarks on the subject in *Reynolds*:

Lord Nicholls, *Reynolds v Times Newspapers Ltd*

[2001] 2 AC 127, at 201

... [r]eaders and viewers may make up their own minds on whether they agree or disagree with defamatory statements which are recognisable as comment and which, expressly or impliedly, indicate in general terms the facts on which they are based.

p. 817 ↩ Applying these two justifications for the defence, one would expect its boundaries to be set by reference to the *impact of the publication upon the reader*, rather than by judging fairness in the light of the defendant's intentions. But there has been an element of inconsistency in the case law, which the new statutory provision may help to resolve.

The Ingredients of Honest Opinion

1. No Public Interest Criterion

At common law, comment had to be on a matter of ‘public interest’. However, the classic exposition of ‘public interest’ in the particular context of ‘fair comment’, to be found in the case of *London Artists v Littler* [1969] 2 QB 375, ensured that most issues except those which can be described as genuinely ‘private’ would fall within the definition of ‘public interest’ for the fair comment defence. In *London Artists* itself, the subject of the comment was the running of a West End play. The removal of the ‘public interest’ criterion might therefore be seen as chiefly a clarification.

2. The ‘Opinion’ Must Be Genuine Opinion as Opposed to Imputation of Fact

Section 3(2) (extracted earlier) sets out the first ‘condition’ for protection, namely that the statement must be a statement of opinion. This was intended to ‘reflect the current law’.³⁰ In judging whether a statement is opinion or fact the *form* in which it is expressed is not decisive. An assertion that a work of art is ‘rubbish’ takes the form of a fact, but clearly expresses an opinion. As with defamatory meaning, the question is how the words complained of would be *understood*; and the Explanatory Notes suggest that ‘the assessment is on the basis of how the ordinary person would understand it’. In both *Corbyn v Millett* [2021] EWCA Civ 567, and *Butt v Secretary of State for the Home Department* [2019] EWCA Civ 933, the Court of Appeal has affirmed that the ultimate determinant is whether the statement would strike the ordinary reasonable reader as one of fact or opinion. In *Yeo v Times Newspapers Ltd* [2014] EWHC 2853 (QB); [2015] 1 WLR 971, applying the common law rather than the statutory test, it was emphasized that the ‘subject matter and context of the words may be an important indicator of whether they are fact or opinion’ ([88]). That remains the case; but the political context of speech has not always meant that statements are regarded as comment (as *Corbyn v Millett* underlines).

3. Indication of the Factual Basis for the Opinion

Section 3(3) provides that the comment must implicitly or explicitly indicate—whether in general or specific terms—the ‘basis’ of the opinion (which is to say, the facts upon which it is based). This reflects the common law, most particularly as it was clarified by the decision of the Supreme Court in *Joseph v Spiller* [2010] UKSC 53; [2011] 1 AC 852: courts should not seek too specific an indication of the facts which form the basis for the opinion stated.

Lord Phillips PSC, *Joseph v Spiller*

[2010] UKSC 53; [2011] 1 AC 852

p. 818

98 ... There is no case in which a defence of fair comment has failed on the ground that the comment did not identify the subject matter on which it was based with sufficient particularity to enable the reader to form his own view as to its validity. For these reasons, where adverse comment is made generally or generically on matters that are in the public domain I do not consider that it is a prerequisite of the defence of fair comment that the readers should be in a position to evaluate the comment for themselves.

...

101 There are a number of reasons why the subject matter of the comment must be identified by the comment, at least in general terms. The underlying justification for the creation of the fair comment exception was the desirability that a person should be entitled to express his view freely about a matter of public interest. That remains a justification for the defence, albeit that the concept of public interest has been greatly widened. If the subject matter of the comment is not apparent from the comment this justification for the defence will be lacking. The defamatory comment will be wholly unfocused.

102 It is a requirement of the defence that it should be based on facts that are true. This requirement is better enforced if the comment has to identify, at least in general terms, the matters on which it is based. The same is true of the requirement that the defendant's comment should be honestly founded on facts that are true.

103 More fundamentally, even if it is not practicable to require that those reading criticism should be able to evaluate the criticism, it may be thought desirable that the commentator should be required to identify at least the general nature of the facts that have led him to make the criticism. If he states that a barrister is 'a disgrace to his profession' he should make it clear whether this is because he does not deal honestly with the court, or does not read his papers thoroughly, or refuses to accept legally aided work, or is constantly late for court, or wears dirty collars and bands.

104 ... The comment must ... identify at least in general terms what it is that has led the commentator to make the comment, so that the reader can understand what the comment is about and the commentator can, if challenged, explain by giving particulars of the subject matter of his comment why he expressed the views that he did. A fair balance must be struck between allowing a critic the freedom to express himself as he will and requiring him to identify to his readers why it is that he is making the criticism.

The Supreme Court's conclusion in *Joseph v Spiller* was accepted and adopted by the legislature in framing section 3(3). It is worth noting that, long before the decision in *Joseph v Spiller*, it was clear that if the facts on which the comment is based are *generally known to the public*, then the defendant need not set them out explicitly in the publication. Rather, such facts must be sufficiently 'indicated'. The following leading case remains significant in interpreting the law.

Kemsley v Foot [1952] AC 345

The defendant had published an article attacking the conduct of a newspaper, under the title 'Lower than Kemsley'. There was no other reference in the article to Kemsley, who was proprietor of an entirely separate newspaper. Kemsley brought an action in libel on the basis that the article, through its title, attacked his reputation. The House of Lords decided that a sufficient 'substratum of fact' was present in the statement made. The *fact* referred to by implication was that Kemsley was responsible for the press of which he was proprietor. ↵ This was well known, and did not have to be spelt out explicitly. The *criticism* was that the Kemsley press was 'low'. This might be fact or comment, but in any case it was not (as the plaintiffs contended) pure comment made without reference to relevant facts. The defence could therefore go before the jury.

The next important question was whether the defendant needs to show the *truth* of all facts used as the basis of the comment. Here, the House of Lords in *Kemsley* provided defendants with significant leeway.

Lord Porter, Kemsley v Foot [1952]

AC 345, at 357–8

... As I hold, any facts sufficient to justify [the] statement would entitle the defendants to succeed in a plea of fair comment. Twenty facts might be given in the particulars and only one justified, yet if that one fact were sufficient to support the comment so as to make it fair, a failure to prove the other nineteen would not of necessity defeat the defendants' plea. The defendant only needs to prove a sufficiently solid foundation for the comment.

4. Could an Honest Person Have Held the Opinion?

Section 3(4) requires that an 'honest person' could have held the opinion *either* (a) 'on the basis of facts that existed at the time the statement complained of was published'; *or* (b) on the basis of anything asserted as a fact in a privileged statement published before the statement complained of.

It is plain that the hallmark of 'honest opinion' is not the reasonableness of the opinion, but the possibility that **an honest person might hold it**. There is a degree of objectivity therefore (the standard relates to what view an honest person could take). However, the standard will protect a wider range of statements than a 'reasonableness' criterion would achieve, since opinions which are not 'reasonable' may nevertheless be honestly held. Nevertheless, an honest person must have some basis on which to form an opinion. The statute sets out the basis on which such an honest opinion might be formed. The first limb, (a), refers to 'facts that existed' at the time of the statement; while the second applies to facts asserted in privileged statements.

It may be assumed that s.3(4)(a) will apply only to *true* facts since they could not otherwise be said to 'exist'; and that reflects the prior common law: this was also the view taken by Nicklin J in *Riley v Murray* [2021] EWHC 3437 (QB), the facts of which were set out in Section 5.2 above. Given the finding in relation to truth, the defence of honest opinion also failed.

On the other hand, it would appear that it does not now matter whether or not the maker of the statement was *aware of* the facts, since what matters is whether an honest person *could* form the opinion on the basis of those facts.

5. Did the Defendant Honestly Hold the Opinion?

Section 3(5) provides that the defence of honest opinion will be defeated if the claimant shows ‘that the defendant did not hold the opinion’. It is in this way that the statute avoids the concept of ‘malice’ altogether: publishing an opinion that is not genuinely held is the replacement idea, avoiding the need to consider the difficult question of *motive*.

p. 820 ↩ Before the 2013 Act, the notion of honesty had been distanced from the notion of fairness or reasonableness. Notable is the following statement of Lord Porter.

Lord Porter, *Turner v MGM*

[1950] 1 All ER 449

To a similar effect were the words of LORD ESHER, M.R. (20 Q.B.D. 281), in *Merivale v. Carson* which are so often quoted:

‘... would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have [written] this criticism...?’

I should adopt them except that I would substitute ‘honest’ for ‘fair’ lest some suggestion of reasonableness instead of honesty should be read in.

The intention was to enhance the protection offered by the defence. What though of those who publish the opinions of others? The 2013 Act deals with this through a separate subsection, section 3(6): if the defendant publishes a statement of opinion made by another, the test is whether the defendant ‘*knew or ought to have known*’ that the *author* did not hold the opinion. In other words, a publisher of someone else’s statements is protected unless there is reason to think the statement-maker was not honest. This is a new and simpler way of approaching an old problem. Previously, the House of Lords in *Telnikoff v Matusevitch* [1992] 2 AC 343 had dealt with the issue by applying an objective test to the published comment: could an honest person have held the views expressed? Now, a reasonableness test is applied to the defendant in relation to the publication of another’s views.

6. From ‘Malice’ to Honesty

At the start of this section on defences, we outlined the general test for ‘express malice’, derived from *Horrocks v Lowe*. *Horrocks v Lowe* itself concerned qualified privilege, but it was often assumed that the test would be the same in fair comment. In *Cheng v Tse Wai Chun* [2000] 4 HKC 1,³¹ Lord Nicholls proposed that malice may operate quite differently in the two defences. His approach in that case may be seen as the background to the new statutory approach, in which ‘malice’ does not feature at all. In particular, while intent to injure, ill will, or

spite, will certainly suffice to lose the protection of qualified privilege, Lord Nicholls doubted whether this should be the case in 'fair comment' (as it was then called). In particular, 'intent to injure' is not inconsistent with the *purpose* for which the defence of fair comment exists, since many (if not most) contributors to the debate have an ulterior motive of some kind.

p. 821 5.4 Publication on a Matter of Public Interest

Defamation Act 2013

4. Publication on matter of public interest

- (1) It is a defence to an action for defamation for the defendant to show that—
 - (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
 - (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.
- (2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
- (3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.
- (4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgment as it considers appropriate.
- (5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.
- (6) The common law defence known as the Reynolds defence is abolished.

Section 4 states a new defence of publication on a matter of public interest. The defence will succeed provided the subject matter of the publication is a public interest matter, and the publisher 'reasonably believed' that publication was in the public interest whether the allegation was true or false. The defence has its origins in common law and particularly in the innovative decision of the House of Lords in *Reynolds v Times Newspapers* [2001] 2 AC 127. Some consideration of its history is essential to understanding the provision itself, not least because the courts are required to 'make such allowance for editorial discretion' as they think appropriate. As the Supreme Court has put it:

Serafin v Malkiewicz [2020] UKSC 23 ; [2020] 1 WLR 2455

53. The origin of the defence lies in the common law. Any study of how in the common law one principle emerges, stage by stage, from another until it achieves independence of it, like a butterfly shedding a chrysalis and taking wing, would do well to address first the decision in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 <[http://uk.westlaw.com/Document/I85F5BC70E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I85F5BC70E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>)>, then the decision in *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2007] 1 AC 359 <[http://uk.westlaw.com/Document/IDBF971D059A711DB8451933D3B7EAAAC0/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/IDBF971D059A711DB8451933D3B7EAAAC0/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>)>, and finally the decision in *Flood v Times Newspapers Ltd* [2012] 2 AC 273 <[http://uk.westlaw.com/Document/I93B5901073B511E1ACFDB9FF7D2377D5/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=\(sc.DocLink\)>](http://uk.westlaw.com/Document/I93B5901073B511E1ACFDB9FF7D2377D5/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>)>.

p. 822 ↩ There are important differences between the common law defence created by the courts, and the statutory replacement which has ‘taken independence’ of it. The House of Lords described the defence it had created in *Reynolds* as a form of ‘privilege’; and attempted to define it in line with existing common law privileges requiring a ‘duty’ to convey information, and a corresponding ‘interest’ in receiving that information.³² It was pointed out by critics that the resemblance was weak, and that it was a poor form of privilege which offered protection only once all the circumstances had been weighed: traditionally, a ‘privilege’ provides the maker of a statement with certainty that it is safe to do so, on a particular occasion. The legislation improves on the common law position by reclassifying the defence as, simply, protecting publication that is in the public interest, thus removing the difficult connection to privilege. The components of the defence are also somewhat simplified and clarified. The *Reynolds* defence has, therefore, broken free from the sources from which it developed. The exercise in judicial development of the law has at the same time been vindicated: plainly here judicial activism has been accepted by the legislature, which has stepped in to complete its achievements. Legislation has been needed to achieve a degree of simplification where the courts had not, at least so far, been able to reach agreement on the radical nature of the decision.³³

In order to understand the legislative provision (section 4), we should consider its precursor in *Reynolds*. In practice, courts continue to refer to the factors set out in *Reynolds* in considering whether the requirements of s.4 are satisfied, although as we will see this must be done with caution.

Reynolds v Times Newspapers Ltd [2001] 2 AC 127

Lord Nicholls identified the subject matter of the claim at 191:

Mr Reynolds pleaded that the sting of the article was that he had deliberately and dishonestly misled the Dáil on Tuesday, 15 November 1994 by suppressing vital information. Further, that he had deliberately and dishonestly misled his coalition cabinet colleagues, especially Mr Spring, the Tanaiste (deputy prime minister) and minister for foreign affairs, by withholding this information and had lied to them about when the information had come into his possession.

The material differences between English and Irish editions of the newspaper and the version of the story carried by each played a part in the newspaper's failure to persuade the House of Lords that it should benefit from a qualified privilege in this case.

The Context of *Reynolds*: Political Speech

The newspaper advanced a case that English law should *recognize and protect a general category of 'political speech'*, subject to proof of malice. This suggestion was explicitly related to the historic decision of the US Supreme Court in *Sullivan v New York Times* 376 US 254 (1964). *Sullivan*, and its invocation of the 'chilling effect', had been relied on some years earlier by the House of Lords when it determined, in *Derbyshire v Times* p. 823 *Newspapers* [1993] ↵ AC 534, that an elected entity such as a local authority would be unable to sue for defamation. With the HRA on the verge of commencement, the defendants sought to extend this invocation of *Sullivan* to achieve more general protection for political speech. As we have seen, the statutory language now adopted is more general, referring to 'public interest'; and the position in this jurisdiction is very different from that adopted in the US.

In *Sullivan*, the US Supreme Court recognized that 'political speech' must be protected against the threat of defamation actions. The case was brought by an elected official who argued that he was accused in an advertisement (by implication, since he was not named in the publication) of violent intimidation of civil rights protesters. The Supreme Court held that in the absence of a relevant state of mind on the part of the defendants, this publication could not be the subject of libel proceedings.

The relevant state of mind which would take the publication outside the protection of the *Sullivan* defence was similar to 'malice' as that expression is used in *Horrocks v Lowe*. It would not be essential (although it would be sufficient) to show actual spite or ill will. Rather, intentional deceit (knowing publication of lies), or reckless disregard for truth, would suffice. Unusually, this state of mind would have to be shown with 'convincing clarity', and not simply on the balance of probabilities.³⁴ In effect, this amounted to a 'qualified privilege' for political speech, and this is what was contended for by the newspaper's lawyers in *Reynolds*.

Rejecting the newspaper's argument, the House of Lords pointed out that the idea of 'political speech' was inherently difficult to define and that it could lead to overly narrow protection.³⁵ The privilege that was recognized in *Reynolds* was in one sense broader, in that it could arise in respect of any matter of *public interest*. However, in other respects it was much narrower and more uncertain than the rule argued for by the defendants. The House of Lords did not offer unqualified protection to all public interest publications, subject to malice. Instead, a more modest but still controversial adaptation of the common law was undertaken, developing the duty-interest version of the qualified privilege defence so that it would cover certain publications made to the world at large. A new and very different sort of 'duty-interest' privilege was

recognized, in which the relevant interest is explicitly the *public* interest in receiving information irrespective of its truth or falsity. Now, through legislation, the link with privilege has been broken: it can be seen as merely a stage in the development of the public interest defence.

The *Reynolds* privilege left many important decisions over proper journalistic conduct to the courts and, unlike *Sullivan*, it (effectively) focused on the *conduct* of the defendant. This was a relatively novel departure for defamation law, which was not typically concerned with negligence-type standards.

Lord Nicholls, *Reynolds v Times Newspapers*

[2001] 2 AC 127

... At 204–5**Conclusion**

p. 824

My conclusion is that the established common law approach to misstatements of fact remains essentially sound. The common law should not develop ‘political information’ as a new ‘subject matter’ category of qualified privilege, whereby the publication of all such information would attract qualified privilege, whatever the circumstances. That would not provide adequate protection for reputation. Moreover, it would be unsound in principle to distinguish political discussion from discussion of other matters of serious public concern. The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give appropriate weight, in today’s conditions, to the importance of freedom of expression by the media on all matters of public concern.

Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiff’s side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing.

This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury. Over time, a valuable corpus of case law will be built up.

Broadly, the newspaper was entitled to publish unproven allegations where there is a *duty* to do so, and a corresponding public *right to know* the information. The most significant, and most obvious criticism levelled at *Reynolds* is that this test would do little to foster an editor’s ‘confidence’ in publishing any given story. Later courts attempted to grapple with this problem; and section 4 continues their work.

***Jameel v Wall Street Journal* [2006] UKHL 44; [2007] 1 AC 359**

The message conveyed by the majority of judges in this case is that the spirit of *Reynolds* was to enhance the protection of responsible journalism. The ten factors offered by Lord Nicholls were indicative; and the relationship with common law privilege not to be taken too seriously. No list of factors appears in the statutory provision.

Lord Hoffmann, *Jameel v Wall Street Journal* [2016] UKHL 44

- p. 825
- 46 Although Lord Nicholls uses the word ‘privilege’ it is clearly not being used in the old sense. It is the material which is privileged, not the occasion on which it is being published. There is no question of the privilege being defeated by proof of malice because the propriety of the conduct of the defendant is built into the conditions under which the material is privileged. ...
- 56 In *Reynolds*, Lord Nicholls gave his well-known non-exhaustive list of ten matters which should in suitable cases be taken into account. They are not tests which the publication has to pass. In the hands of a judge hostile to the spirit of *Reynolds*, they can become ten hurdles at any of which the defence may fail. That is how Eady J treated them. The defence, he said, can be sustained only after ‘the closest and most rigorous scrutiny’ by the application of what he called ‘Lord Nicholls’ ten tests’. But that, in my opinion, is not what Lord Nicholls meant. ...

***Flood v Times Newspapers* [2012] UKSC 11**

Reversing a decision of the Court of Appeal, the Supreme Court in this case decided that a publication containing allegations of corruption on the part of C, a serving police officer, were protected by *Reynolds* privilege. The decision to print the story and to name the officer concerned were decisions that could be made by ‘responsible journalists’. Lords Mance and Dyson particularly emphasized that decision-making by editors and journalists merits respect and should be given weight.

Lord Mance, *Flood v Times Newspapers*

[2012] UKSC 11

- 137 The courts ... give weight to the judgment of journalists and editors not merely as to the nature and degree of the steps to be taken before publishing material, but also as to the content of the material to be published in the public interest. The courts must have the last word in setting the boundaries of what can properly be regarded as acceptable journalism, but within those boundaries the judgment of responsible journalists and editors merits respect. This is, in my view, of importance in the present case.

A draft Defamation Bill was before Parliament at the time of the decision in *Flood*. Illustrating the reciprocal influence of courts and legislature in reforming this area, the remarks in *Flood* are now directly reflected in section 4(4) Defamation Act. Indeed, the Bill was redrafted in order to take account of *Flood*: in other words, to keep up with the courts.

Section 4

We extracted section 4 at the start of this section. It not only simplifies and recategorizes the law, but also makes reasonable belief on the part of the publisher, that publication is in the public interest, the decisive factor. Respect for editorial judgment is expressly part of the judgment as to reasonableness. It therefore makes a clean break from any link to privilege, and from any idea that Lord Nicholls might have been setting out a ‘checklist’ of considerations to be fulfilled in every case, though the earlier cases continue to be referred to for guidance. It also makes no reference to ‘malice’, which ordinarily is decisive in depriving a defendant of a defence of qualified privilege. Now, such matters are relevant only to the extent that they affect the

p. 826 ‘reasonableness’ of the belief that publication is in the public interest. The ↩ language of ‘responsible journalism’ is avoided, and indeed the *Reynolds* defence itself did not only benefit newspapers (*Charman v Orion* [2007] EWCA Civ 972). It has been clearly stated that the s.4 defence is available to anyone publishing material of public interest in any medium: *Economou v Freitas* [2019] EMLR 7. Reasonable belief is a separate question from truth, so that it will generally not be appropriate to strike out a s.4 defence without hearing evidence on the defendant’s plea that there was a reasonable basis for their belief (*Sivier v Riley* [2021] EWCA Civ 713).

Important guidance on the application of s.4 can be gleaned from the discussion by the Supreme Court in *Serafin v Malkiewicz*, which corrected some errors which it noted, with some professed embarrassment, in the Court of Appeal’s decision below. The authority of the Supreme Court’s remarks are slightly complex since formally, they did not form part of the decision, which was a decision to remit for a full retrial. Nevertheless, the Supreme Court heard full argument on the point and their remarks are carefully considered.

First, the Court recognized that the Court of Appeal in the earlier case of *Economou v Freitas* [2018] EWCA Civ 1853 (QB) had been correct to say that the *rationale* for the new defence under s.4, and the *Reynolds* defence, were the same, and that the principles that underpin the *Reynolds* defence continue to be relevant to interpreting the public interest defence (para [68]). At the same time, the two defences are not identical. Second, when considering whether there was a ‘reasonable’ belief on the part of the defendant that publication was in the public interest (s.4(1)(b)), some of the factors which were listed in *Reynolds* may be relevant—for example, seeking comment from the person to whom the published statement refers. But it is not correct to say that the *Reynolds* factors are a ‘checklist’—even a non-exhaustive one—as the Court of Appeal appeared to say. Third, if there is a failure to seek comment from the claimant, this is always relevant to s.4(1)(b) (reasonableness of belief), but it would be incorrect to call it a ‘requirement’ to seek such comment.

Reportage

A particular line of authority developed before the 2013 Act under the auspices of the *Reynolds* privilege establishing that where the ‘public interest’ in publication derived not from the *content* of an allegation, but from the fact that it had been made, then one of Lord Nicholls’ ten factors—whether the defendant had taken steps to verify the allegation—would be inapplicable (*Roberts v Gable* [2008] QB 502). This ‘reportage’ category did not include reports which adopted the allegations as *true* (as in *Galloway v Telegraph Group* [2006] EWCA Civ 17, where the allegations were embraced ‘with relish and fervour’ and were also embellished). The approach to reportage in these cases has been adopted in section 4(3) of the Defamation Act 2013, extracted earlier in this section.

5.5 Innocent Defamation; Distributors and Intermediaries

Innocent Defamation

‘Innocence’ in respect of a defamatory statement was no defence at common law. The Defamation Act 1996 introduced two defences of use to those who are not at fault in the publication of a defamatory statement. The first, in section 1, benefits only those who are not in the position of ‘author, editor, or publisher’ of a statement, and requires reasonable care to be taken. ‘Publisher’ for these purposes is a narrower category than the class of people ‘publishing’ a statement at common law (see *Bunt v Tilley*, later in this section), and is defined in the section itself. This section is intended to assist those with a ‘secondary’ role in the publication.

Defamation Act 1996

1 Responsibility for publication

- (1) In defamation proceedings a person has a defence if he shows that—
 - (a) he was not the author, editor or publisher of the statement complained of,
 - (b) he took reasonable care in relation to its publication, and
 - (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.
- (2) For this purpose ‘author’, ‘editor’ and ‘publisher’ have the following meanings, which are further explained in subsection (3)—

‘author’ means the originator of the statement, but does not include a person who did not intend that his statement be published at all;

‘editor’ means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it; and

‘publisher’ means a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business.

- (3) A person shall not be considered the author, editor or publisher of a statement if he is only involved—
- (a) in printing, producing, distributing or selling printed material containing the statement;
 - (b) in processing, making copies of, distributing, exhibiting or selling a film or sound recording (as defined in Part I of the Copyright, Designs and Patents Act 1988) containing the statement;
 - (c) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;
 - (d) as the broadcaster of a live programme containing the statement in circumstances in which he has no effective control over the maker of the statement;
 - (e) as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.

p. 828 Section 1 only benefits those who have no reason to believe that the publication is defamatory and who take reasonable care. Once put on notice that the publication contains defamatory material, the protection of section 1 ceases to operate (section 1(1)(c)).

The Defamation Act 2013 has added further protection for ‘secondary’ publishers, as they might loosely be called. Section 10 applies to the same categories of publisher as the provision just extracted:

Defamation Act 2013

10. Action against a person who was not the author, editor etc

- (1) A court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.
- (2) In this section ‘author’, ‘editor’ and ‘publisher’ have the same meaning as in section 1 of the Defamation Act 1996.

This relatively simple provision only protects secondary publishers if it happens not to be reasonably practicable to proceed against the author, editor or (primary) publisher; this is aimed at removing the temptation to proceed against ‘soft targets’ in the distribution process and thus to contribute to the chilling effect; but its protection is naturally contingent on circumstance.

Section 5 is a more complex provision.

5. Operators of websites

- (1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.
- (2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.
- (3) The defence is defeated if the claimant shows that—
 - (a) it was not possible for the claimant to identify the person who posted the statement,
 - (b) the claimant gave the operator a notice of complaint in relation to the statement, and
 - (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.
- (4) For the purposes of subsection (3)(a), it is possible for a claimant to ‘identify’ a person only if the claimant has sufficient information to bring proceedings against the person.
- (5) Regulations may—
 - (a) make provision as to the action required to be taken by an operator of a website in response to a notice of complaint (which may in particular include action relating to the identity or contact details of the person who posted the statement and action relating to its removal);
 - (b) make provision specifying a time limit for the taking of any such action;
 - (c) make provision conferring on the court a discretion to treat action taken after the expiry of a time limit as having been taken before the expiry;
 - (d) make any other provision for the purposes of this section.
- (6) Subject to any provision made by virtue of subsection (7), a notice of complaint is a notice which—
 - (a) specifies the complainant’s name,
 - (b) sets out the statement concerned and explains why it is defamatory of the complainant,
 - (c) specifies where on the website the statement was posted, and
 - (d) contains such other information as may be specified in regulations.
- (7) Regulations may make provision about the circumstances in which a notice which is not a notice of complaint is to be treated as a notice of complaint for the purposes of this section or any provision made under it.
- (8) Regulations under this section—
 - (a) may make different provision for different circumstances;
 - (b) are to be made by statutory instrument.

...

- (10) In this section '*regulations*' means regulations made by the Secretary of State.
- (11) The defence under this section is defeated if the claimant shows that the operator of the website has acted with malice in relation to the posting of the statement concerned.
- (12) The defence under this section is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others.

Plainly, the section aims to offer appropriate protection to the operators of websites, who may well fulfil the definition of a 'publisher' at common law. That definition is not altered; instead, new provisions are introduced specifically to deal with the distinctive issues that may arise.³⁶ Regulations have been issued to clarify the process required of both complainants and website operators in relation to potentially defamatory material posted on websites;³⁷ these are accompanied by Guidance.³⁸ The pre-Act law illustrates the difficulties, and also shows how the courts had attempted to achieve appropriate solutions from case to case.

Godfrey v Demon Internet [2001] QB 201

Demon Internet was an Internet Service Provider (ISP), providing subscribers with access to (amongst other things) bulletin boards. The claimant put Demon on notice of a defamatory statement posted on the board, and requested its removal. Demon did not remove the posting. Morland J held that the ISP had 'published' the statement:

p. 830 ← ... every time one of the defendants' customers accesses [the bulletin] and sees that posting defamatory of the plaintiff there is a publication to that customer.

Having been put on notice, Demon could not benefit from the protection of section 1 of the Defamation Act 1996. An operator in the position of Demon could now benefit from the protection of section 10 or section 5 of the Defamation Act 2013, if it was practicable to bring an action against other appropriate parties (section 10) or if those parties were identifiable (section 5).

Bunt v Tilley [2006] EWHC 407

This case also concerned an ISP, but the case was crucially different from *Godfrey*. First, the defendants appear to have played a much more passive role in publication. Therefore, they did not satisfy the *threshold* test of having 'published a defamatory statement' which, quite independently of section 1 of the Defamation Act 1996, is a prerequisite of a successful action in defamation. Second, no adequate steps were taken by the claimant to put them on notice of the defamatory contents for the purposes of section 1 of the Defamation Act 1996. And third, the defendants were protected by the Electronic Commerce (EC Directive) Regulations 2002, regulation 13. As a result, there was no liability on the part of the ISPs.

For present purposes, it is particularly important to notice the first of these distinctions. There is no need to bring into play the section 1 defence if the defendant has not passed the threshold test of 'publishing' the defamatory statement as a matter of common law. 'Publication' for these purposes requires some element of

knowledge. There is of course no need to know that the statement is *defamatory* (this is the very point of section 1). But the defendant should at least intend a publication:

Eady J, *Bunt v Tilley*

[2006] EWHC 407 (QB)

22 I have little doubt ... that to impose legal responsibility upon anyone under the common law for the publication of words it is essential to demonstrate a degree of awareness or at least an assumption of general responsibility, such as has long been recognised in the context of editorial responsibility. As Lord Morris commented in *McLeod v St. Aubyn* [1899] AC 549, 562:22:

‘A printer and publisher intends to publish, and so intending cannot plead as a justification that he did not know the contents. The appellant in this case never intended to publish.’

In that case the relevant publication consisted in handing over an unread copy of a newspaper for return the following day. It was held that there was no sufficient degree of awareness or intention to impose legal responsibility for that ‘publication’.

While not concluding that there was any error of analysis in this case, the Court of Appeal in *Tamiz v Google* (below) has nevertheless set some limits to the degree to which the idea of ‘publication’ can be used to prevent liability on the part of operators of other types of website.

p. 831 ↩ In *Metropolitan International Schools Ltd v Designtecnica Corp, Google UK Ltd, Google Inc* [2009] EWHC 1765; [2009] EMLR 27, Eady J ruled that an internet search engine provider is not to be regarded as ‘publishing’ the material which is located by an internet search, including ‘snippets’ which appear in response to the search. Google, in this case, merely facilitated the discovery of potentially defamatory material by making automatic search in response to search terms entered by internet users. Even once notification of libellous material is given, the search results cannot be ‘taken down’: the search engine can only respond by blocking particular URLs or web addresses. The defendant in this instance could not be fixed with liability for the period after which it had been notified because it was, during this period, attempting to block the web addresses in question. Its position was therefore different from the position of internet service providers who fail to respond to complaints and remove defamatory material of which they have been notified (as in *Godfrey v Demon Internet*, above).

***Tamiz v Google Inc* [2013] EWCA Civ 68**

Without suggesting that these decisions were incorrect, the Court of Appeal differed from Eady J (the judge below) in relation to whether Google could be described as the ‘publisher’ of certain statements posted on its ‘Blogger’ service. While the defendant was not considered to be a publisher of those statements before the claimant’s complaint, it was arguable that it could be said to have become a secondary publisher of the material during the period (which in this instance was five weeks) between notification, and removal of the material. In this instance, the ‘Blogger’ site would be treated as akin to an ‘enormous bulletin board’ provided

by the defendant—the posts on that board were not akin to ‘graffiti’ left on the defendant’s wall. The case was not so similar to *Bunt v Tilley* as to call for similar conclusions. It was also arguable that the protection of section 1 of the Defamation Act 1996 would in any event be lost, because the defendant may have had cause to believe that defamatory allegations had been made (section 1(1)(c)).

Nevertheless, the Court of Appeal found a different route to striking out the action. Given the relatively short period of time during which the posts were available after the defendants received the complaint, there would not be held to have been a ‘real and substantial tort’. The comments would have ‘receded into history’ and any damage to the claimant’s reputation would be ‘trivial’: ‘the game would not be worth the candle’. As already explained, this test has now been subsumed for future cases into the ‘serious harm’ test in section 1(1).

Offers to Make Amends

Any defendant may respond to an action in defamation by ‘offering to make amends’. The appropriate contents of such an offer, and its implications, are explained in sections 2 to 4 of the Defamation Act 1996. As stated by Lord Judge LCJ in *KC v MGN Ltd (Costs)* [2013] EWCA Civ 3: ‘The objective, to the advantage of both sides, is vindication without litigation.’ ‘Amends’ for these purposes must include a suitable apology and correction, together with appropriate damages. Damages should be agreed. If an offer to make amends is accepted, but no agreement is reached as to damages, then damages will be assessed by a court on broadly the same basis as in defamation generally. However, the offer to make amends will be taken into account and a suitable discount applied.³⁹ The only *defence* to flow from these provisions is provided by section 4 of the Defamation Act 1996. By this section, it will be a defence to an action in defamation to show that an offer to make amends has been made, provided the defendant had no grounds for believing that the statement made was defamatory of the claimant.

p. 832

Defamation Act 1996

4 Failure to accept offer to make amends

...

- (2) The fact that the offer was made is a defence (subject to subsection (3)) to defamation proceedings in respect of the publication in question by that party against the person making the offer. ...
- (3) There is no such defence if the person by whom the offer was made knew or had reason to believe that the statement complained of—
 - (a) referred to the aggrieved party or was likely to be understood as referring to him, and
 - (b) was both false and defamatory of that party;

but it shall be presumed unless the contrary is shown that he did not know and had no reason to believe that was the case.

- (4) The person who made the offer need not rely on it by way of defence, but if he does he may not rely on any other defence.

On the face of it, section 4(3) is similar to section 1 and appears to be concerned with failure to exercise due care in publication. But in *Milne v Express Newspapers* [2005] 1 WLR 772, the Court of Appeal made clear that this is not the correct interpretation. Rather, by subsection (3) the defence is lost only if there is a state of mind akin to malice under *Horrocks v Lowe*. If the defendant makes a publication *knowing or having reason to believe* that the statement is false and defamatory, then this is equivalent to knowledge of falsity, or recklessness as to truth, as required by malice. The required state of mind for section 4 is therefore quite different from due care under section 1.

5.6 Privilege

Some statements are recognized to be so important that they ought to be made with full confidence that they are beyond the reach of an action in defamation. In other words, these statements are to be protected *regardless of truth or falsity*. Such statements are protected by privilege.

Absolute and Qualified Privilege

There are two levels of privilege in English law. Statements that attract 'absolute privilege' cannot be the subject of proceedings in defamation no matter what the motive of the speaker. Statements that attract 'qualified privilege' can only be the subject of proceedings in defamation if it can be shown that they were made with 'express malice'.

p. 833 **Absolute Privilege**

In some situations, being able to speak freely is of such public importance (or, in the case of judicial proceedings, potentially defamatory statements are so unavoidable a part of the procedure), that no action in defamation is possible, no matter what the motive of the speaker. Key examples of 'absolute privilege' are statements in Parliament; statements made in the course of judicial proceedings; and fair and accurate reports of judicial proceedings (Defamation Act 1996, section 14; amended by section 7 of the Defamation Act 2013).

Qualified Privilege

Statutory qualified privilege: section 15 of the Defamation Act 1996 specifies that the reports and other statements mentioned in Schedule 1 to the Act are protected by qualified privilege. The Schedule is lengthy and may be directly consulted by those who are curious to see these listed. Some additions are made by Defamation Act 2013, section 7. More notable, however, is the separate section 6.

Section 6 Defamation Act 2013 created an entirely new qualified privilege applying to peer-reviewed statements in scientific or academic journals, and did not mirror any judicial developments. Rather, it reflected the concerns of lobbyists, particularly 'Sense about Science', though it is not confined to scientific publications. The concerns that gave rise to the reform were affected by litigation brought by the British Chiropractic Association against a science writer, Simon Singh.⁴⁰ Though ultimately unsuccessful, the litigation underlined the vulnerability of *individual* writers on scientific matters, since the claimants had chosen not to proceed against the Guardian newspaper in which the article was published. Oddly perhaps, the new section would not have protected the writer in that case, since it applies only to peer reviewed statements in certain journals.

Qualified privilege at common law: the leading statement of qualified privilege at common law, outside the area defined by *Reynolds v Times Newspapers*, is the following:

Lord Atkinson, *Adam v Ward*

[1917] AC 309

A privileged occasion is ... an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

Leaving aside the many variations of common law privilege and concentrating on this short but widely accepted statement of principle, we can see that Lord Atkinson emphasizes *both sides* of a relationship. The *giver of the statement* must be under a duty, which may be legal, social, or moral, to make the statement to the relevant person (and not more widely). The person who receives it must have a corresponding *interest or duty* in receiving it. Lord Atkinson goes so far as to underline that *the reciprocity is essential*. With this in mind, it is clear that the form of privilege recognized in *Reynolds v Times Newspapers* is a striking departure for common law. Section 4 of the Defamation Act 2013, as we have seen, breaks ↩ the link between the defence derived from *Reynolds* (now, the public interest defence), and qualified privilege, thus clarifying the nature of *Reynolds*.

p. 834

6 Jurisdiction

Section 9 of the Defamation Act 2013 limits the jurisdiction of the courts of England and Wales to hear defamation claims. The provision is directly aimed at curtailing 'libel tourism', which is to say the bringing of actions in English courts where neither the publication, nor the defendant, is strongly linked to the jurisdiction. This phenomenon had been encouraged by the pro-claimant features of English libel law. For reasons of EU and international law, however, the impact of the section is limited by the need to exclude actions against persons domiciled in a range of jurisdictions. The restrictions apply even where the claimant is domiciled in England and Wales.

9. Action against a person not domiciled in the UK or a Member State etc

- (1) This section applies to an action for defamation against a person who is not domiciled—
 - (a) in the United Kingdom;
 - (b) in another Member State; or
 - (c) in a state which is for the time being a contracting party to the Lugano Convention.
- (2) A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.

Note that England and Wales must be clearly the most appropriate place for the action. It is apparently not enough for it to be one appropriate forum amongst others. The section was interpreted and applied by the Court of Appeal in *Wright v Ver* [2020] EWCA Civ 672, identifying multiple factors which should be considered including evidence as to all the places a statement had been published; the number of times it had been published in each jurisdiction; the amount of damage to reputation suffered in each jurisdiction; the availability of fair processes and remedies elsewhere; and any barriers to access to justice. In this instance, England Wales was not clearly the most appropriate jurisdiction, with wider publication in the United States and there was some evidence that the claimant's most important business relationships were in the United States. It was likely on the evidence that a state in the US would be the most appropriate jurisdiction.

7 Parties Who Cannot Sue in Defamation

In *Derbyshire v Times Newspapers* [1993] AC 534, the House of Lords accepted that open criticism of a directly elected body such as a local authority was so important that such a body should not be entitled to bring an action in defamation. The case incorporated a relatively ↵ early recognition of the 'chilling effect' in English courts. The prohibition in *Derbyshire* did not extend to individual politicians. Equally, the local

p. 835

authority retained the right to bring an action in malicious falsehood where, as we have seen, the rules strike a different balance between claimant and defendant, requiring falsehood, actual damage, and inappropriate motive to be established by the claimant.

Lord Keith, at 547–8

There are ... features of a local authority which may be regarded as distinguishing it from other types of corporation, whether trading or non-trading. The most important of these features is that it is a governmental body. Further, it is a democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines. It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech. ... What has been described as ‘the chilling effect’ induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public.

Lord Keith in this case (decided before the HRA was enacted) expressed the view that English law had no need for the assistance of the European Convention in protecting freedom of expression.

In *Goldsmith v Bhoyrul* [1998] QB 459, the principle against local authorities suing in defamation was extended to cover *political parties* standing for election. So far, however, this is as far as the restriction has developed. Certainly, an *individual* seeking election may sue for defamation. In *Culnane v Morris and Naidu* [2005] EWHC 2438, an election candidate for the British National Party brought an action in defamation arising from statements in an election leaflet circulated on behalf of the Liberal Democrat candidate. Eady J had to interpret section 10 of the Defamation Act 1952, which provides:

10 Limitation on privilege at elections

A defamatory statement published by or on behalf of a candidate in any election to a local government authority or to Parliament shall not be deemed to be published on a privileged occasion on the ground that it is material to a question in issue in the election ...

In *Plummer v Charman* [1962] 1 WLR 1469, the Court of Appeal had concluded from this section that the *only* defences available where statements are made in an election campaign were justification (now truth) and fair comment (now honest opinion)—in other words, and despite the title to the section, that *no* privilege could attach to them. Eady J used the authority of the HRA to depart from this interpretation and to understand the words as providing that no *special or additional* privilege attaches to election material because of its status. Therefore, the defendant could attempt an argument that the statements made were within the protection of qualified privilege.

p. 836 **8 Remedies**

Superficially at least, libel damages appear very generous, given that the injury suffered by the claimant is typically intangible and in some instances no quantified loss is established at all. Such damage is to some extent ‘presumed’ on the claimant’s behalf; although the operation of this principle is altered by section 1 of the Defamation Act 2013 and particularly by the requirement that bodies trading for profit must be likely to suffer serious financial harm, for a statement to be actionable by them.

There are significant contrasts between the calculation of defamation damages and of damages in cases of personal injury. As we saw in Chapter 9, awards in respect of non-pecuniary loss in personal injury cases are ‘conventional’, and all parties are able to ascertain in advance what a ‘typical’ award for a given injury is likely to be. Defamation awards are not (or have not been until recently) subject to convention in the same way. They are also typically ‘at large’. They were generally assessed by the jury, though juries are no longer likely to appear in many—if any—defamation actions (section 11).

In a series of cases through the 1990s, the Court of Appeal took action to restrain the level of damages awarded in defamation cases. The tactics of interpretation employed by the Court of Appeal were controversial, but in any event the consequence was that juries were given considerably more guidance than was previously the case. As with many other provisions of the 2013 Act, section 11 may be loosely seen as a continuation of the work of the judiciary.

In *John v MGN* [1997] QB 587, at the culmination of this judicial reform process, Sir Thomas Bingham MR explained that before the Court of Appeal took action, the jury had been ‘in the position of sheep loosed on an unfenced common, with no shepherd’ (at 608). They lacked guidance, and not unexpectedly had no instinctive sense of where to pitch their award. The stages in the Court of Appeal’s campaign against this state of affairs were as follows.

1. In *Sutcliffe v Pressdram* [1991] 1 QB 153, the Court of Appeal resolved that the jury had clearly not understood the value of money when it made its award of £600,000 to the wife of a convicted murderer. *Private Eye* magazine had suggested that she benefited from her husband’s crimes by selling her story to a newspaper. In future, juries should have more guidance on the real value of the sums awarded. However, the Court of Appeal had no choice but to remit the case for a new trial.
2. By the time of *Rantzen v MGN* [1994] QB 670, the Court of Appeal had acquired a new power under section 8 of the Courts and Legal Services Act 1990 to replace a jury award which was considered to be excessive. It recognized that the jury award of £250,000 might not fit the existing definition of ‘excessive’, and (referring to *Pepper v Hart*) it was clear that there was no intention to change the definition of this word on the part of the legislature. But the Court of Appeal nevertheless decided—appealing to Article 10 ECHR—that it had a *duty* to interpret section 8 as broadening its powers of intervention in the sense of lowering the threshold of intervention. This case was decided some years before the HRA and this interpretation required the Court of Appeal to misapply some observations of Lord Goff in *AG v Guardian (No 2)* [1990] 1 AC 109 where he had said that there was no difference between common law, and Article 10. What he meant by this was that there was no need for change. It

is a big step from this to hold that statutory provisions *must* be reinterpreted specifically in order to protect Article 10 rights (or, more strongly still since this is before the HRA, to protect the UK from litigation on the basis of a violation of Article 10).

p. 837 ↩ Now that there would be awards arrived at by the Court of Appeal, rather than simply by juries, juries should in future have these judicial awards referred to them for attention. However, the corpus of Court of Appeal awards built up slowly, and the Court of Appeal grew impatient.

3. In *John v MGN* [1997] QB 586, the Court of Appeal took two further decisive steps. First, reversing its own conclusion in both *Sutcliffe* and *Rantzen*, the court decided that juries should have the level of non-pecuniary awards in personal injury actions brought to their attention. Second, counsel for both parties would be invited to suggest an appropriate level of damages. This would not lead to a bidding war, because counsel would learn to be realistic:

Lord Bingham, at 616

The plaintiff will not wish the jury to think that his main object is to make money rather than clear his name. The defendant will not wish to add insult to injury by underrating the seriousness of the libel. So we think the figures suggested by responsible counsel are likely to reflect the upper and lower bounds of a realistic bracket. The jury must of course make up their own mind and must be directed to do so. They will not be bound by the submission of counsel or the indication of the judge. If the jury make an award outside the upper or lower bounds of any bracket indicated and such award is the subject of appeal, real weight must be given to the possibility that their judgment is to be preferred to that of the judge.

Some forceful doubts about the step taken in *John* were set out by Lord Hoffmann in the following appeal from the Jamaican Court of Appeal. This Privy Council decision was an appeal on Jamaican law so that it is binding only in Jamaican law, and the comments did not quite amount to formal disapproval of the approach in *John*. Equally, of course, the 2013 reforms in effect remove the jury from defamation trials. Even so, the principles set out by Lord Hoffmann are of general interest as they draw attention to the need to protect reputation in the first place—a need too readily forgotten perhaps in the journey to better protection of free speech. Lord Hoffmann's remarks place some traditional arguments about defamation awards in a modern social and legal context.

The Gleaner v Abrahams

[2004] 1 AC 628

49 Reference to awards in personal injuries cases ... was advocated as a legitimate comparison by Diplock LJ in *McCarey v Associated Newspapers Ltd (No 2)* [1965] 2 QB 86, 109–110 but rejected by Lord Hailsham of St Marylebone LC in *Broome v Cassell & Co Ltd* [1972] AC 1027, 1070–1071 and by the Court of Appeal in *Rantzen's case* [1994] QB 670, 695. In *John v MGN Ltd* [1997] QB 586, the Court of Appeal reversed itself and since then juries have regularly been told to have regard to awards of general damages (for pain, suffering and loss of amenity) in personal injury actions. These are themselves conventional figures: the current scale was fixed by the Court of Appeal in *Heil v Rankin* [2001] QB 272 and runs to a maximum of £200,000 for the most catastrophic injuries. As a result, Eady J said in *Lillie v Newcastle City Council* [2002] EWHC 1600 (QB) at [1547]–[1551] that there is now a ceiling of £200,000 for compensatory damages in libel cases.

p. 838

50 Their Lordships express no view on the current practice in England. But the matter is clearly one on which different opinions may be held. The arguments in favour of comparison tend to stress the moral unacceptability of treating damage to reputation as having a higher 'value' than catastrophic damage to the person. It is, however, arguable that the assessment of general damages in both personal injury and libel cases is far more complicated than trying to 'value' the damage: an exercise which everyone agrees to be impossible on account of the incommensurability of the subject matter. Other factors enter into the calculation. Personal injury awards are almost always made in actions based on negligence or breach of statutory duty rather than intentional wrongdoing. Furthermore, the damages are almost always paid out of public funds or by insurers under policies which are not very sensitive to the claims records of individual defendants. The cost is therefore borne by the public at large or large sections of the public such as motorists or consumers. The exemplary and deterrent elements in personal injury awards are minimal or non-existent. On the other hand, the total sums of compensation paid for personal injury are very large. They have an effect on the economy which libel damages do not. The amounts of the awards in personal injury actions therefore depend to some extent upon what society can afford to pay victims of accidents over and above compensation for the actual financial loss they have suffered. As Lord Woolf MR said of general damages in personal injury cases in *Heil v Rankin* [2001] QB 272, 297, para 36: 'Awards must be proportionate and take into account the consequences of increases in the awards of damages on defendants as a group and society as a whole.'

51 Once it is appreciated that the awards are not paid by individual defendants but by society as a whole or large sections of society, there are also considerations of equity between victims of personal injury which influence the level of general damages. Compensation, both for financial loss and general damages, goes only to those who can prove negligence and causation. Those unable to do so are left to social security: no general damages and meagre compensation for loss of earnings. The unfairness might be more readily understandable if the successful tort plaintiffs recovered their damages from the

defendants themselves but makes less sense when both social security and negligence damages come out of public funds. So any increase in general damages for personal injury awarded by the courts only widens the gap between those victims who can sue and those who cannot.

- ... 53 Few of these considerations of equity and policy apply to awards in defamation cases. On the other hand, defamation cases have important features not shared by personal injury claims. The damages often serve not only as compensation but also as an effective and necessary deterrent. The deterrent is effective because the damages are paid either by the defendant himself or under a policy of insurance which is likely to be sensitive to the incidence of such claims. Indeed, the effectiveness of the deterrent is the whole basis of Lord Lester's argument that high awards will have a 'chilling effect' on future publications. Awards in an adequate amount may also be necessary to deter the media from riding roughshod over the rights of other citizens. In *Kiam's case* Sedley LJ said, at p 304, para 75:

'in a great many cases proof of a cold-blooded cost-benefit calculation that it was worth publishing a known libel is not there, and the ineffectiveness of a moderate award in deterring future libels is painfully apparent ... Judges, juries and the public face the conundrum that compensation proportioned to personal injury damages is insufficient to deter, and that deterrent awards make a mockery of the principle of compensation.'

...

p. 839

- 55 In addition, as this case amply illustrates, there are other differences between general damages in personal injury cases and general damages in defamation actions. One is that the damages must be sufficient to demonstrate to the public that the plaintiff's reputation has been vindicated. Particularly if the defendant has not apologised and withdrawn the defamatory allegations, the award must show that they have been publicly proclaimed to have inflicted a serious injury. As Lord Hailsham of St Marylebone LC said in *Broome v Cassell & Co Ltd* [1972] AC 1027, 1071, the plaintiff 'must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge'.
- 56 A second difference is that in an action for personal injury it is usually not difficult for the plaintiff to prove that his injury caused inability to work and consequent financial loss. Loss of earnings is therefore recoverable as special damage and ordinarily, in cases of grievous injury, constitutes by far the greater part of the award. Likewise, the expenses of care, nursing and so forth are recoverable as special damage. They do not constitute a factor in the assessment of general damages. In defamation cases, on the other hand, it is usually difficult to prove a direct causal link between the libel and loss of any particular earnings or any particular expenses. Nevertheless it is clear law that the jury are entitled to take these matters into account in the award of general damages. The strict requirements of proving causation are relaxed in return for moderation in the overall figure awarded. In the present case, in which Mr Abrahams was unable to find any remunerative employment for five years, loss of earnings must have played a significant part in the jury's award.

Lord Hoffmann here underlines a traditionally recognized distinction between the functions of defamation damages, and of damages for personal injury. Personal injury damages are almost solely compensatory: they seek to make good what has been lost.⁴¹ Defamation damages on the other hand have multiple roles to play. Certainly, they may seek to **compensate** for hurt feelings and lost opportunities. But they are also aimed at **vindication** of the claimant's good reputation (in other words at repairing the damage suffered),⁴² and also at **deterrence**. Equally, they are more frequently inflated by an element of **aggravation**: the injury to the claimant is made worse by the conduct of the defendant after the complaint of defamation is made. For example, in *Sutcliffe v Pressdram*, *Private Eye* responded to the initiation of proceedings by publishing further allegations about the plaintiff. In *John v MGN*, having initially offered a limp apology, the defendants responded aggressively with further allegations. Defamation awards are capable of being increased by an award of **exemplary damages**, most particularly where the defendant *calculated* that he or she could profit from publication of a defamatory statement. This was held to be the case in *John* itself, where the defendant newspaper was treated as having decided that it could achieve higher sales figures through carrying an ill-researched and sensationalist story concerning the plaintiff's alleged eating disorder, irrespective of its truth or falsity. By section 34 of the Crime and Courts Act 2013, exemplary damages cannot be awarded against a relevant publisher found liable in a relevant claim if it was a member of an approved regulator at the time of the events giving rise to the claim, but there are exceptions concerned with the reasonableness of the

p. 840 regulator's decision whether or not to award a penalty. By section 41, 'relevant publishers' are ← those who publish news-related material written by different authors and subject to editorial control. Claims for exemplary damages against the press will, so far as approved regulators emerge, therefore be subject to the provisions of this statute.

The deterrence argument mentioned above brings us to a less traditional aspect of Lord Hoffmann's defence of defamation damages. The **economic impact** of defamation damages is, he contends, also different from the impact of personal injury damages. On the one hand, there is no real harm in having high awards, since there is little impact on the economy as a whole: defamation proceedings tend to be 'one-off' affairs between the parties and do not engage a broad sector of the economy.⁴³ Equally, the award is likely to succeed in having considerable **deterrent effect**, according to Lord Hoffmann. *Either* the defendant will not have insured against this form of liability at all, *or* any relevant insurance contract will provide for penalties in the event of a claim being made.

How does Lord Hoffmann's argument in favour of a separation between libel and personal injury damages stand up to scrutiny, particularly having regard to the new status of Article 10 in English law? It can of course be pointed out by a critic of libel awards that the UK has twice been found to have violated Article 10 on the grounds of disproportionate awards of damages. On the other hand, in neither of these cases (*Tolstoy Miloslavsky v UK*; *Steel and Morris v UK*) was there a media defendant—both awards were made against *individuals*. In the case of *Steel and Morris*, the disproportion in the award was expressly identified as flowing, at least partly, from a comparison with the *defendant's means*. Disproportion is only partly a question of relationship between award and injury suffered. Thus, an award might arguably be 'proportionate' if it is based on the amount needed to *deter* future interference with the reputation of the claimant or of others, particularly where the defendant is in no sense 'impecunious'. Indeed, high awards (particularly those which

treat persistence in a defence or course of conduct as grounds for aggravated damages) could be seen as an aspect of a broader goal, to encourage apologies and discourage extended litigation. This is underlined by sections 2–4 of the Defamation Act 1996, introducing provisions relating to offers to make amends.

Injunctions

There is a long-standing principle that courts will be very reluctant to grant injunctions to restrain publication in advance of full trial of a defamation action, which is to say on an ‘interim’ basis. At common law, interim injunctions have not been granted unless the defendant has *no realistic chance* of succeeding in a defence: *Bonnard v Perryman* [1891] 2 Ch 269. What then is the impact of section 12 of the HRA in a defamation action? This question is particularly pressing given the growing influence of the action to restrain publication of *private* information (Chapter 15). As we noted at the start of this chapter, protection of reputation is one of the reasons why freedom of expression may legitimately be restricted within the terms of Article 10 of the Convention. But equally, reputation is an aspect of privacy, which is protected by Article 8. As Ward LJ expressed the matter in *Roberts v Gable* [2007] EWCA Civ 721; [2008] QB 502, the *Reynolds* defence sought to balance these two rights: ‘responsible journalism is the point at which a fair balance can be held between freedom of expression on matters of public concern and the reputation of the individual harmed by that disclosure, the vital balance between article 10 and article 8 of the Convention’.

p. 841 ← Section 12 of the HRA is extracted in Chapter 1.

If a court is considering whether to restrain publication, section 12(3) requires that the applicant should be ‘likely’ to succeed in its application at trial, before such restraint can be granted. Even taking into account section 12(4), this would (if applied to defamation) *dilute* the protection afforded to free speech at common law, since *Bonnard v Perryman* requires that the claimant, to obtain such an injunction, needs to show that the defendant has no realistic prospect of success. Clearly, this is much more demanding than the ‘likelihood’ test.

In *Greene v Associated Newspapers* [2004] EWHC 2322, the Court of Appeal concluded that, despite its general wording, section 12(3) had no application to an action in defamation. A section concerned with protecting ‘freedom of expression’ could not have been intended to *reduce* the protection afforded to freedom of expression, and it would be absurd to replace the *Bonnard v Perryman* approach with the weaker ‘likelihood’ test. Prior to *Greene*, the role of section 12 had been considered in respect of actions for *breach of confidence* (*Cream Holdings v Banerjee* [2005] 1 AC 253). Here, section 12(3) introduces the vexed question of balance between rights under Articles 8 (privacy) and 10 (expression). In *Greene*, the Court of Appeal’s conclusion in respect of defamation was that *even if* reputation is regarded as protected within the terms of Article 8 (as it now is), defamation actions nevertheless raise distinct issues when it comes to remedies. A reputation can be repaired by an award of damages, while confidentiality is destroyed for good once the information is published. There needs to be a very strong reason for prior restraint in an action for defamation.

New Remedies and the 2013 Act

The 2013 Act introduces new remedies through sections 12 and 13. Section 12 is aimed at vindicating reputation without inflating the cost of defamation actions, and in this sense it is in the same spirit as sections 2–4 of the Defamation Act 1996 (offers to make amends). By section 12, the court may order the

defendant to publish a summary of its judgment, where it has decided in favour of the claimant. The details of the summary and its publication should be agreed by the parties but in default of that, they are to be determined by the court. Section 13 is more complex, and is necessitated partly by the protection offered to those who are not 'publishers' by section 10. The section enables the court to order those distributing a defamatory publication to stop doing so, which is a significant provision since in some instances section 10 will preclude an action against them.

13. Order to remove statement or cease distribution etc

- (1) Where a court gives judgment for the claimant in an action for defamation the court may order—
 - (a) the operator of a website on which the defamatory statement is posted to remove the statement, or
 - (b) any person who was not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting material containing the statement.
- (2) In this section 'author', 'editor' and 'publisher' have the same meaning as in section 1 of the Defamation Act 1996.
- (3) Subsection (1) does not affect the power of the court apart from that subsection.

p. 842 ← This section was applied in *Blackledge v Persons Unknown* [2021] EWHC 1994 (QB). The claimant was an academic who had been the subject of seriously defamatory allegations of sexual impropriety. The maker of the statements had hidden behind anonymity, and while there was a substantial award of damages as well as an injunction against the anonymous maker of the statements, this in itself would not be effective. The Court therefore awarded an injunction compelling Google LLC to remove the defamatory statements from its site, accepting that this was unlikely to be done in the absence of an injunction from the court.

9 Conclusions

- i. The law of defamation inevitably raises the question of how to balance freedom of expression, against protection of reputation. That question has been expressed over the years in relation to the defamation actions in a variety of different contexts. It is given a new dimension by the integration of Articles 8 and 10 ECHR into English law through the Human Rights Act 1998; but it also underlies all of the provisions of the Defamation Act 2013, most of which seek to build upon the emerging balance achieved by the courts in recent years.
- ii. It is particularly clear that the legislation builds on the work of the courts in relation to the defences of honest opinion and of public interest reporting. The latter defence is a reworking of the ground-breaking decision in *Reynolds v Times Newspapers*, which adopts the core principles of that decision but breaks the link with privilege which was the basis on which the House of Lords was able to justify that development. Thus, defamation provides a striking example both of judicial development of new

legal principles, and of cooperation between legislature and the courts in developing a new balance in a politically, as well as ethically sensitive area. However, the legislature has also been able to develop the law in directions that would not have been open to the courts alone, for example, by all but abolishing trial by jury in cases of defamation, and by the introduction of new remedies designed to reduce the 'chilling effect' of this area of law.

- iii. One pressing question concerned the interpretation of s1 of the Defamation Act 2013. Was this intended simply to define the level of seriousness required for an actionable defamation, or was it intended that defamation claimants must now prove on balance of probabilities that harm to reputation has flowed, or is likely to flow, from the defamatory statement? The Supreme Court has determined that the latter interpretation is the correct one; but at the same time, the requirement may be satisfied by a factual inference. On this question too, the interpretation is one of change, rather than revolution, in the law of defamation.

Further Reading

Balin, R., Handman, L., and Reid, E., 'Libel Tourism and the Duke's Manservant—An American Perspective' (2009) EHRLR 303–31.

Barendt, E., *Freedom of Speech* (2nd edn, Oxford: Oxford University Press, 2005), chapters 1–2 and 6.

Dunlop, R., 'Article 10, The Reynolds Test and the Rule in the Duke of Brunswick's Case—The Decision in *Times Newspapers v UK*' (2006) EHRLR 327.

p. 843 ← Groppo, M., 'Serious Harm: A Case Law Retrospective and Early Assessment' (2016) 8 Journal of Media Law 1.

Howarth, D., 'Libel: Its Purpose and Reform' (2011) 74 MLR 845.

Loveland, I., *Political Libels* (Oxford: Hart Publishing, 2000).

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Mullis, A., and Scott, A., 'Tilting at Windmills: The Defamation Act 2013' (2014) 77 MLR 87.

Sewell, C., 'More Serious Harm than Good? An Empirical Observation and Analysis of the Effects of the Serious Harm Requirement in s.1(1) of the Defamation Act 2013' (2020) 12 JML 47–77.

Steyn, Lord, '2000–2005: Laying the Foundations of Human Rights Law in the United Kingdom' (2005) 4 EHRLR 349.

Tambini, D., 'What is Journalism? The Paradox of Media Privilege' (2021) 5 EHRLR 523.

Trindade, F., 'Malice and the Defence of Fair Comment' (2001) 117 LQR 169.

Notes

¹ A. Mullis and A. Scott, 'Tilting at Windmills: the Defamation Act 2013' (2014) 77 MLR 87, 87.

² See, for example, Ministry of Justice, *Complaints about defamatory material posted on websites: Guidance on Section 5 of the Defamation Act 2013 and Regulations* (January 2014), para 1: 'The purpose of the Defamation Act 2013 is to rebalance the law on defamation and to provide more effective protection for freedom of speech while at the same time ensuring that people who have been defamed are also entitled to protect their reputation.'

³ The first known action in slander is said by Warren and Brandeis to have been recorded in 1356: 'The Right to Privacy' (1890) 4 *Harvard Law Review*, at 198.

⁴ He continues by identifying two further, less influential justifications: forcing the development of a capacity for tolerance, and fostering artistic and scholarly endeavour.

⁵ See Section 5, 'Defences'.

⁶ See also Section 5.4 of this chapter.

⁷ Examples we will see in this chapter are the burden of proving truth; the scale of possible damages; the absence of financial support for defendants; and the general costs of litigation including especially the risk of disproportionate costs where the claimant enters into a conditional fee agreement.

⁸ For confirmation of the chilling effect in the media, see E. Barendt, L. Lustgarten, K. Norrie, and H. Stephenson, *Libel and the Media: The Chilling Effect* (Oxford: Clarendon Press, 1997).

⁹ Corporations have been able to sue in defamation in the same way as individuals, but this is qualified by s 1(2) Defamation Act 2013, requiring the likelihood of 'serious financial harm' for actions by bodies trading for profit. Another tort which protects personal reputation is malicious prosecution (Chapter 2).

¹⁰ Apart from the case next extracted and Strasbourg authorities referred to there, see also *Clift v Slough BC* [2010] EWCA Civ 1171.

¹¹ W. Howarth, 'Libel: Its Purpose and Reform' (2011) 74 MLR 845.

¹² A. Mullis and A. Scott, 'The Swing of the Pendulum: Reputation, Expression and the Re-centring of English Libel Law', in D. Capper (ed.), *Modern Defamation Law: Balancing Reputation and Free Expression* (QUB, 2012).

¹³ Parliament built upon the solution provided by the House of Lord in *Reynolds*, removing some of its complexity but retaining its core objectives, in enacting a new 'public interest' defence in s.4 Defamation Act 2013 (Section 5.4).

¹⁴ In *Monson v Tussauds* [1894] 1 QB 671, a defamatory waxwork image of the plaintiff (placed close to the famous 'Chamber of Horrors') was treated as a potential libel.

¹⁵ This continues to be the case notwithstanding the enactment of s.1 Defamation Act 2013, requiring that a statement cause (or be likely to cause) 'serious harm'. Serious harm to reputation is not the same idea as 'special damage' for the purposes of an action in slander, as the Supreme Court has recognized: see the extracts in Section 4.2 of this Chapter.

¹⁶ These were imputations of unchastity of a woman or girl under Slander of Women Act 1891; and imputation of certain (generally contagious) diseases, at common law.

¹⁷ The impact of this is modified in some respects by s 5(2) Defamation Act 2013 (and its predecessor): not every possible imputation need be true, providing additional (unproved) imputations do not seriously harm the claimant's reputation.

¹⁸ *Substantial* justification will generally be sufficient, as we will see.

¹⁹ Subject to s 5(3) Defamation Act 2013.

²⁰ In *Euromoney*, the question was whether to allow amendment of the claim.

²¹ There is room to doubt whether Parliament would really have failed to get to grips with the implications for limitation periods as Lord Sumption suggests, as this is a regular issue in reform of any area of tort. However, he also rejects the notion that there is a conflict with the limitation position.

²² See further H. Tomlinson QC, 'Brett Wilson LLP v Persons Unknown, corporate damages and injunction against unknown operators of website' (2016) Ent L Rev 22.

²³ The defendant has the burden of showing truth and the level of available damages is high. The republication rule described below, but now controlled by s 8 Defamation Act 2013, has also had an impact.

²⁴ A defence based on lack of substantial publication was therefore not struck out: the defendants argued that the statement complained of, published on the internet, had only been downloaded in the UK by lawyers and associates of the claimant.

²⁵ For limitation periods in general, see Chapter 7.

²⁶ Under the 2013 Act, the relevant defence is 'honest opinion', and malice plays no part: the key question is whether the opinion is honestly held (see Section 5.3).

²⁷ Subsections 16(1)–(3).

²⁸ Since the Court of Appeal's decision in *Lucas-Box v News Group Newspapers Ltd* [1986] 1 WLR 147, defendants have been required to set out precisely what meaning they intend to justify: just as the meaning contended for by the claimant must be *capable of being conveyed* by the statement, so also must the meaning argued (and justified) by the defendant pass the same test.

²⁹ Lord Nicholls was sitting in this case as a member of the Hong Kong Court of Final Appeal.

³⁰ Explanatory Notes, para 21.

³¹ This decision is binding in Hong Kong law, but not in English law. An extract is set out here because Lord Nicholls' assessment of the case law is drawn from the English authorities; because Lord Nicholls was the chief architect of the *Reynolds* privilege which also sidestepped issues of malice; and because it has been referred to in numerous subsequent decisions in England, as well as in the Explanatory Notes to the 2013 Act.

³² *Adam v Ward* [1917] AC 309.

³³ In *Jameel v Wall Street Journal* (below), Lord Hoffmann and Baroness Hale suggested that the *Reynolds* defence be simply recognized as a public interest defence; but the courts as a whole had not been ready for this move.

³⁴ Loveland points out that the majority of the Supreme Court will not have trusted the Alabama courts with the 'balance of probabilities' test in such cases: I. Loveland, *Political Libels* (Hart Publishing, 2000).

³⁵ In the United States, the boundaries of the *Sullivan* privilege have been elastic and it has been interpreted as including actions brought by 'public', not just 'political' figures.

³⁶ For an enquiry into the issues, see S. Hedley, 'The Internet: Making a Difference?', in D. Capper, *Modern Defamation Law: Balancing Reputation and Free Expression* (QUB, 2012).

³⁷ The Defamation (Operators of Websites) Regulations 2013 (SI 2013 No 3028).

³⁸ MoJ, *Complaints about defamatory material posted on websites: Guidance on Section 5 of the Defamation Act 2013 and Regulations* (January 2014).

³⁹ *Nail v News Group Newspapers* [2005] 1 All ER 1040.

⁴⁰ *Singh v British Chiropractic Association* [2010] EWCA Civ 350.

⁴¹ For refinements and qualifications to this statement see Chapter 8.

⁴² Note, on this point, the award of damages against ‘persons unknown’ in *Brett Wilson LLP v Persons Unknown* [2015] EWHC 2628 (QB). Given that the damages were unlikely ever to be paid, the purpose is clearly vindictory.

⁴³ This omits the non-economic social harm of the chilling effect; but Lord Hoffmann seems to have considered the ‘chilling’ of bad journalism to be quite beneficial.

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