Supreme Court considers need to prove serious harm in defamation claims

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Good news for publishers/defendants and their insurers following judgment in Lachaux v Independent Print Ltd

The Supreme Court handed down Judgment in *Lachaux v Independent Print Ltd and Another* [2019] UKSC 27 on 12 June 2019. The case addresses the issue of whether the Defamation Act 2013 (DA 2013) has raised the threshold that must be passed before a defamation claim can be pursued and is therefore of great significance.

In concluding that the DA 2013 introduced an enhanced threshold of serious harm from that established by the previous case law and by requiring it to be determined by reference to the actual facts as to its impact, not merely as to the meaning of the words, the Supreme Court has, through this judgment, strengthened the hand of those that seek to resist defamation claims.

The facts

Mr Lachaux was an aerospace engineer who lived with his wife in the United Arab Emirates. The marriage broke down and there was a dispute over custody of their son. Mrs Lachaux had gone into hiding with her son claiming that she would not get a fair trial. The UAE courts awarded custody of the child to Mr Lachaux who went on to bring a criminal prosecution against his former wife. The Independent and Evening Standard, amongst others, covered the story.

Mr Lachaux brought a defamation claim against the publishers in the UK. The court determined that the articles concerned meant that Mr Lachaux had been violent and abusive towards his wife during their marriage; had hidden their child's passport to stop her removing him from the UAE; had made use of UAE law and the UAE courts to deprive her of custody of (and contact with) their son; had callously and without justification taken the child out of her possession and had then falsely accused her of abducting him.

Whilst the Supreme Court was primarily considering the effect of the DA 2013, it looked at the history of the common law. This was important because the law had distinguished between defamation actionable per se and defamation that was actionable only on proof of special damage. The former was by far the largest category and included all libel claims (in essence, where publication is in permanent form) and certain categories of slander.

As to the latter this relates to the remaining categories of slander. In practical terms those claims for slander which required harm to be suffered were effectively treated as torts where the harm done was not injury to reputation but was wrongfully inflicted financial loss caused by a statement.

Historically, a working definition of what made a statement defamatory was that "*the words tend to lower the plaintiff in the estimation of right-thinking members of society generally*" (Lord Atkin in *Sim v Stretch* [1936]). The meaning of the statement was derived from an objective assessment of what a notional ordinary reasonable person would attach to it. Where the claim related to an action for defamation that was actionable per se, damage was presumed and did not need to be proved. The claim simply rested on the inherently injurious character (or tendency) of a statement bearing that meaning. The presumption concerned was one of law and was irrebuttable.

Case law pre Defamation Act

Before the DA Act 2013 came into force, two cases added a requirement that the damage to reputation in a case actionable per se must pass a minimum threshold of seriousness.

The first, *Jameel (Yousef) v Dow Jones & Co* [2005], found that the presumption of harm could not be applied where the damage concerned was shown to be so trivial that the need to protect the

claimant's reputation could not be justified given the interference with freedom of expression. Where so little was at stake, the court said it would be an abuse of process for an action to proceed. This decision introduced a procedural threshold of seriousness to be applied to the damage to the claimant's reputation. However, it was clear that (i) the damage had only to be more than minimal and that was all (ii) the operation of the threshold might depend on the evidence of actual damage and not just on the nature of the statement.

The second case was *Thornton v Telegraph Media Group* [2011] in which the court said that in addition to the procedural threshold recognised in *Jameel (Yousef)*, there was a substantive threshold of seriousness before a statement could be regarded as meeting the definition of "defamatory". This threshold was that in order to be defamatory, a statement had to "substantially" affect in an adverse manner the attitude of other people towards the claimant or have "a tendency to do so".

Moving forward section 1 of the DA 2013 states:

"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 the body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss".

High Court decision in *Lachaux*

Mr Lachaux's case was that the DA 2013 did not affect the common law presumption of general damage. He argued that its effect was simply that the inherent tendency of the statement must simply be to cause not just some damage to reputation but serious harm to it. The defendants argued that the DA 2013 introduced an additional condition that the statement must be shown to produce serious harm as a matter of fact.

In the High Court, the judge found in favour of the defendants' argument but concluded that, on the facts, the articles did cause serious harm to the claimant's reputation within the meaning of section 1(1). The Court of Appeal disagreed and found in favour of the claimant's argument on the construction of the DA 2013 (whilst upholding the overall decision in favour of the claimant). The defendants appealed to the Supreme Court against the finding of serious harm.

Supreme Court reinforces earlier decision

The Supreme Court concluded that the High Court Judge was right. Lord Sumption said *"… the issue must turn primarily on the language of section 1. This shows, very clearly to my mind, that it not only raises the threshold of serious and above that envisaged in Jameel (Yousef)… and Thornton, 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."*

The Supreme Court said that the DA 2013 *"…unquestionably does amend the common law to some degree"*. It said that the *"…least that section 1 achieved was to introduce a new threshold of serious harm which did not previously exist."* The question was what the legal implications of that change were and what followed from it.

The court indicated that the effect of section 1 was that a statement which would previously have been regarded as defamatory because of its inherent tendency to cause some harm to reputation was no longer to be regarded as defamatory unless it *"has caused or is likely to cause*" harm which is *"serious"*.

The court said that the reference to a situation where a statement has caused serious harm was to the consequences of the publication (and not the publication itself). This was a reference to some historic harm which could be shown to have actually occurred. This was a proposition of fact - it could only be established by reference to the impact which the statement was shown to have actually had. It depended on a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated. The same was true of the reference to harm which was "likely" to be caused - this naturally referred to probable future harm.

The court considered that both past harm and likely future harm were matters which the legislator must have assumed could be established as a fact.

The court said that it was also necessary to read section 1(1) with section 1(2) - section 1(2) was concerned with the way in which section 1(1) was to be applied to statements said to be defamatory of a body trading for profit. The court said:

"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 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) 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."

The Supreme Court felt that the claimant's argument would mean that no substantive change to the law had taken place. The court gave the example of a statement which amounted to a grave allegation against the claimant but which was published to a small number of people, or people who did not believe it or among whom the claimant had no reputation to be harmed. The traditional way of approaching such a publication might be to say that these matters all went to reduce damages but did not affect the defamatory character of the statement. However, the Supreme Court said that it was plain that section 1 was intended to make this part of the test of the defamatory character of the statement. The impact of the publication on the claimant's reputation would, in practice, occur at the moment of publication in almost all cases and the cause of action was then complete. If, for some reason, it did not occur in that moment, the subsequent events would be evidence of the likelihood of its occurring. As the court commented - *"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 court emphasised that "*…special damage in this context means damage representing pecuniary loss, not including damage to reputation. Section 1 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."*

Having analysed the law, the court considered the question of whether the claimant had established that serious harm had been caused. The High Court judge had concluded that it had, on the basis of (i) the scale of the publications (ii) the fact that the statements complained of had come to the attention of at least one identifiable person in the UK who knew the claimant (iii) that they were likely to have come to the attention of others who either knew the claimant or would come to know him in

future and (iv) the seriousness of the statements themselves. The Court said that it was not prepared to overturn the judge's findings in this respect.

The future: the raising of the threshold

The Court of Appeal's decision in *Lachaux* significantly diluted the impact of section 1 of the DA 2013 which had been understood to have significantly raised the bar for claimants. So on the face of it, the Supreme Court judgment was a very positive development for defendants. The requirement for claimants to prove serious harm and/or serious financial loss constituted a raising of the bar which would mean that a number of claims which would previously have been successful would no longer be, on the basis that they did not meet this threshold. It is extremely welcome that the Supreme Court has now reiterated that the DA 2013 has indeed raised the bar as had been anticipated. This will enable more claims to be successfully defended on the basis that they do not meet the threshold of seriousness required.

It remains to be seen how claimants will react to the raising of the threshold. On the face of it they will need to either rely on the fact that the allegations concerned are exceptionally serious (for example of serious criminal activity) or will need to provide evidence of actual harm to their reputations (which may be difficult). Defendants will also be alert to the possibility that the fact that claimants face an increased threshold and an increased burden of proof may lead claimants who have substantive claims to incur significant costs in establishing that serious harm has been caused or is likely to be caused to their reputations. In practical terms it may be appropriate to concede this in appropriate cases in order to avoid those costs being incurred.

The court also provided some extremely helpful guidance in relation to claims made by companies. On the face of it, the court has made it clear that the serious financial loss referred to in section 1 is not special damage, but is reflected in damage to the company's reputation. It will be interesting to see how this is applied in practice. One way to examine the issue is to look at a company's goodwill. This is because a company's reputation (and its value) often forms part of the valuation of its goodwill. It may be necessary for a company to show that the value of its goodwill has been reduced by the publication complained of and that this reduction in value is serious before it can pursue a claim for defamation. This will, in all likelihood, involve expert accountancy evidence which may be extremely hard to obtain and/or establish as there can be a host of reasons why a company's goodwill changes in value.

Valuing goodwill is, in itself, not a science in any event and can be extremely complex. Given the number of potential contributing factors to a goodwill valuation, it may be extremely difficult for a specific company to show that a specific publication caused a specific reduction in the value of its goodwill, as opposed to any other factor. In this respect, the Supreme Court decision reinforces the High Court decision of Mr Justice Warby in *Undre v London Borough of Harrow*. In *Undre* (where BLM successfully defended a claim by a company against a local authority) he found that the claimant company had not established (for example, by evidence from its auditors or through expert accountancy evidence or other material) that it had suffered a specific loss as a result of the publication complained of. For further detail on the judgments in *Undre* please see here for the BLM article – *Defamation: Serious financial loss and offers of amends examined*. Mr Justice Warby is of course the High Court Judge whose decision the Supreme Court agreed with in *Lachaux*.

Whilst the courts have indicated that they are concerned about the costs associated with establishing that a statement meets the section 1 test (and the front-loading of those costs) and of interlocutory hearings to deal with these issues, this may well be unavoidable given the Supreme Court's judgment. Parties may well want to see the impact of the judgment tested. It may also be welcome if it leads to proceedings being resolved at an earlier stage than would otherwise be the case. We will be closely monitoring developments in the light of *Lachaux* including whether the courts will go on to provide

further clarification as to the evidence that individuals and companies will need to produce in order to meet the *serious harm* test.