

# Libel I: Bringing a Libel Suit

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1

## Introduction

- What is libel?
- Establishing libel
- Who may bring an action in libel?
- Who may be sued for libel?
- Defences to libel
- Libel remedies

2

# Introduction

- Defamation
  - Civil Law
  - No consolidation
    - Common Law
    - Defamation Act 1952
    - Defamation Act 1996
    - Defamation Act 2013

3

## What is defamation?

"He that filches from me my good name,  
robs me of that which not enriches him,  
but makes me poor indeed"

Othello, Act iii, Sc.3

- ECHR Article 10 & Reputation

4

## What is defamation?

- *Parmiter v Coupland* (1840) 6 M amp 105
  - “...calculated to injure the reputation of another...”
- *Youssouf v MGM* (1934) 50 TLR 581
- *Sim v Stretch* [1936] 2 All ER 1237
  - “...in the estimation of right-thinking members of society generally...”



5

## What is defamation?

- *Report of the Faulks Committee on Defamation*  
Cmnd 5909 (1974)
  - “...publication to a third party...likely to affect a person adversely in the estimation of reasonable people...”
- Defamation Act 2013, Section 1
  - A definition of defamation?
    - “...not defamatory unless...publication...”
- Classification: Libel v Slander?

6

## Requirements

- Defamatory Meaning...
  - Direct or innuendo
  - Likelihood of serious damage to reputation  
(See S1, Defamation Act 2013)
- Identification
- Publication

7

## Privacy v Libel

- UK: significant distinction in the past
  - *Terry (previously LNS) v Persons Unknown* [2010]  
EWHC 119
- But... distinction blurring in recent years:
  - As confirmed in - *Sicri v Associated News* [2020]  
EWHC 3541 (QBD)

8

# Legal Protections for Reputation

- Defamation
  - Primary route to protect reputation
  - Civil law tort
- Other routes to protect image / reputation?
  - Privacy
    - Where truth or some other defence available
    - Injunctions pre-publication much easier to acquire
      - E.g. the Beckhams and gagging the nanny
        - *Beckham v Gibson* QBD 29 Apr 2005
        - Subsequent libel action withdrawn prior to trial; no disclosures of settlement details (NDA?)
  - Property
    - Primarily in UK via copyright, ‘passing off’; no “image right”

9

## Defamatory Meaning

10

## Defamatory Meaning

- Natural and ordinary meaning
  - Direct or Innuendo (implied, special knowledge)
- *Sim v Stretch* [1936] 2 All ER 1237
  - “...in the estimation of right-thinking members of society generally...”
- *Byrne v Dean* [1937] 2 All ER 204
  - Who are these ‘right-thinking’ people?

11

## Defamatory Meaning

- Defamation –v- mere insult
  - *Berkoff v Burchill* [1996] 4 All ER



12

## Defamatory Meaning

- Article to be assessed as a whole
  - *Charleston v Newsgroup Newspapers* [1995] 2 All ER 313



- *Cruise v Express Newspapers* (1998) EMLR 780
- The Web and ‘whole’ articles
  - *Buddhist Society of Western Australia v Bristle* [2000] WASCA 210

13

## Defamatory Meaning

- The importance of context
  - ‘Bane and antidote’
  - *Norman v Future Publishing* [1999] EMLR 325, CA



- Meaning: traditionally from article alone:
  - *Charleston v Newsgroup Newspapers* [1995] 2 All ER 313
- BUT... Section 1, Defamation Act 2013 & ‘serious harm’
  - *Lachaux v Independent Print Limited & Anor* [2019] UKSC 27.
- Impact of Defamation Act 2013, Section 11

14

## Defamatory Meaning

- *Tolley v J S Fry & Sons Ltd* [1931] UKHL 1



- Contrast: *Irvine v Talksport* [2003] 2 All ER 881
- Note also impact Section 1 DA 2013

15

## Defamatory Meaning

- Innuendos in defamation law
  - Supporting facts & publication
  - *Cassidy v Daily Mirror* [1929] 2 KB 331
  - *McAlpine v Bercow* [2013] EWHC 1342 (QB)

16



## Distinguishing Meaning

- *Dyson v Channel 4* [2023] EWCA Civ 884
  - CA overruled Nicklin J
  - Broadcast –
    - “appalling abuse and exploitation in the factories in Malaysia where its cordless vacuums and other appliances are made”.
    - Factories run by ATA, manufactured for Dyson
    - Broadcast questioned Dyson handling of allegations  
“has this iconic British brand lost credibility?”
  - Meaning and:
    - intrinsic reference (in the report) / extrinsic reference  
(‘reference innuendo’)

17

## Distinguishing Meaning

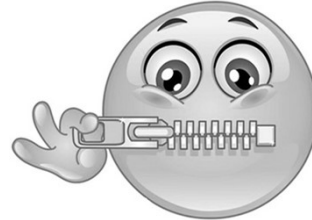
- *McAlpine v Bercow* [2013] EWHC 1342 (QB)
  - Tweet: “Why is Lord McAlpine trending?  
\*Innocent face\*”
  - Meaning of “\*Innocent face\*”
    - Tugendhat J
      - “insincere and ironical”  
“the Tweet meant...that the Claimant was a paedophile....”  
or innuendo to the same effect
      - Why does it matter if natural and ordinary or innuendo?



18

## Distinguishing Meaning

- Libel and the Media
  - Emojis can carry a defamatory meaning!
  - *Burrows v Houda* [2020] NSWDC 485 (Aus)
  - Judgment:
    - <https://www.caselaw.nsw.gov.au/decision/1742d2614c447c83bbc6d457>
  - One academic comment (others exist!):
    - [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3898572](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3898572)



19

## Distinguishing Meaning

- *Riley v Murray*
  - The Egg and the Rose: Who's a Nazi?
  - [2021] EWHC 3437 (QBD)
  - [2022] EWCA Civ 1146 (CA)
- Meaning & Defences

20

# Serious Harm

- Defamation Act 2013 Section 1
  - Requirement of serious harm
    - “publication has caused or is likely to cause serious harm to the reputation of the claimant.”
    - For commercial companies (“trade for profit”) “serious harm” = event or likelihood of “serious financial loss

21

# Serious Harm

- Leading case now Supreme Court judgment in:
  - *Lachaux v Independent Print & Evening Standard* [2019] UKSC 27
  - <https://www.supremecourt.uk/cases/uksc-2017-0175.html>
    - S1(1) DA 2013 Act interpretation
      - Cause of action arises at point of publication
      - “has caused or be likely to cause” “Serious harm”
      - “Serious harm”
        - Consequences of publication
        - Inherent tendency of words and actual impact on audience
        - *Charleston* overruled re evidence of damage
        - “Likely to” – potential future damage
        - Damage and subsequent damage: timing

22

## Defamation Act 2013

### □ Effect of Section 1

- Libel no longer actionable *per se*, unless \*serious harm\*
- What can constitute ‘serious harm’?
  - *Cooke v MGN* [2014] EWHC 2831 QB
    - Bean J, @para 43: “Some statements are so obviously likely to cause serious harm that this likelihood can be inferred. If a national newspaper...wrongly accuses someone of being a terrorist or a paedophile, then in either case...the likelihood of serious harm to reputation is plain...”
  - *Jack Monroe v Katie Hopkins* [2017] EWHC 433
    - False allegation of support for defacing a WW2 memorial
  - *Lachaux v Independent Print & Evening Standard* [2019] Allegations of domestic abuse made by ex-wife during custody case

23

## Serious Harm

### □ See also now:

- *Dyson v MGN* [2023] EWHC 3092 KB
  - Brian Reade column – “frank, fearless...(and funny).”
  - “Message to young folks today is that cheats do prosper”
  - “Then there’s Robert Halfon, chair of the Commons Education Select Committee, claiming that if schoolkids want to succeed they need to follow the example of James Dyson. That’s the vacuum cleaner tycoon who championed Vote Leave due to the economic opportunities it would bring British industry before moving his global head office to Singapore.  
In other words kids, talk the talk, then screw your country, and if anyone complains tell them to suck it up. But what must really puzzle them now is why they need to be truthful. We teach them that honesty is the best policy and cheats never prosper, yet the man elected to the top job in the country is acknowledged by even his closest colleagues to be a liar and a cheat.”
  - Nicklin J – no serious harm.

24

## B. Identification

25

## Identification

- Defamation / Libel must refer to claimant
- Intention of publisher is irrelevant
  - *Hulton v Jones* [1910] AC 20
- Identification of groups
  - *Knupffer v London Express* [1944] AC 116
- Unintentional Identification
  - *Hulton v Jones* [1910] AC 20
  - *Newstead v London Express* [1940] 1 KB 331
  - *Kerry O'Shea v MGN* May 4, 2001
- Identification by Association
  - *Cassidy v Daily Mirror* [1929] 2 KB 331

26

## C. Publication

27

### Publication is...

- Communication to a third party
  - *Pullman v W Hill & Co Ltd* [1891] 1 QB 524
- Subject has a duty to pass material to others
  - *Theaker v Richardson* [1962] 1 All ER 229
- In a form which recipient can understand
  - *Jones v Davers* (1596) Cro Eliz 496
  - *Price v Jenkings* (1601) Cro Eliz 865

28

## Online Publication

Website “hits”

- *Buddhist Society of Western Australia v Bristle* [2000] WASCA 210

Separate Publications in one website?

- *Charleston v Newsgroup Newspapers Ltd, The Times* March 31, 1995
- *Cruise v Express Newspapers* (1998) EMLR 780

29

## Intentional & Unintentional Publication

- Negligence is sufficient
  - Reasonably foreseeable in all relevant circumstances
  - Or
  - Natural and probable result of responsible party’s actions
- *Pullman v W Hill* [1891] 1 QB 524, Lord Esher
  - Theft of a letter from a locked drawer not publication
- *Slipper v BBC* [1990] All ER 165
  - BBC’s liability also covered republication in newspaper review

30

## Serious Harm & Scope of Publications

- *Amersi v Leslie* [2023] EWHC 1368 KB
  - Jigsaw effect – multiple small publications?
    - 15 memos to 6 identified and seven unidentified individuals
    - Each memo only sent to one person
    - Nicklin J – no serious harm – action struck out
- *Amersi v Leslie* [2023] EWCA Civ 1468
  - Warby LJ (Underhill LJ agreeing)
    - Section 1 & Slipper Damages
    - Appeal struck out, but note Warby’s commentary on the issues

31

## The Multiple Publication Rule

The Rule:

- *Pullman v W Hill* [1891] 1 QB 524
- *Shevill v Press Alliance SA* [1995] 2 AC 18 at p 41

Application to the internet:

- Commonality of online archives in news media
- *Loutchansky v Times* [2002] 1 All ER 652
  - The Limitation Period
  - *Duke of Brunswick v Hamer* [1849] 14 QB 185

32



## The Single Publication Rule

- Defamation Act 2013, Section 8
  - Single publication rule
    - “publishes a statement to the public (‘the first publication’) and
    - Subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same”
    - “includes publication to a section of the public”
    - Limitation period to run from “date of first publication”
    - “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”
    - Court retains discretion under Limitation Act 1980 S32A

33

## Place of Publication

- Jurisdiction
  - Brussels Regulation 2002
    - Formerly Brussels Convention 1968
    - *Shevill v Press Alliance SA* [1995] ECR 1415
    - Whither Brexit Britain? (Lugano Convention application rejected May 2021)
  - Private International Law
    - *Berezovsky v Michaels* [2000] 1 WLR 1004
    - *Harrods v Dow Jones* [2003] EWHC 1162
      - *Gutnick v Dow Jones* [2002] HCA 56 (Aus)
    - *Don King v Lennox Lewis* [2004] EWCA Civ 1329
    - *Jameel v Dow Jones* [2005] EWCA Civ 75

34

## Online Publication

- Defamation Act 2013, Section 9
  - “Action against a person not domiciled in the UK”
    - [post-Brexit edit]
  - No jurisdiction unless court satisfied:
    - Of all places of publication E&W is most appropriate place for action

35

Likely Libel Claimants?

36

## Who may sue for libel?

- Living persons
  - *Smith v Dha* [2013] EWHC 838 (QB)
- Those on the run??
  - *Polanski v Conde Nast Publications* [2005] 1 WLR 637
- Companies
  - *Lewis v Daily Telegraph* [1964] AC 234
- Government bodies and local authorities
  - *Derbyshire CC v Times Newspapers* [1993] AC 534
- Political parties
  - *Goldsmith v Bhojru* [1998] QB 459
  - (Note also impact of Deregulation Act 2015, re repeal of Section 13 Defamation Act 1996).
- Nationalised industries
  - *British Coal Corp V NUM* (1996)

37

## Concluding Remarks

38