IN THE COURT OF APPEAL (CIVIL DIVISION) Appeal Court Ref: 2017/0897
ON APPEAL FROM
THE HIGH COURT OF JUSTICE Claim No. HQ15D05286
QUEEN'S BENCH DIVISION
B E T W E E N:

JACK MONROE

Claimant/Respondent

-and-

KATIE HOPKINS

Defendant/Appellant

APPELLANT'S SKELETON ARGUMENT
FOR PERMISSION TO APPEAL

Overview

1. The proposed appeal raises important issues of principle in relation section 1 of the Defamation Act 2013[1]:

   1.1. Whether the court can draw the inference of serious harm to reputation from the publication of words that have a "defamatory tendency" (and no more) in the absence of any evidence of harm to reputation. The Defendant/Appellant ("D") submits that to do so would be contrary to the ordinary meaning of "serious" and would, in practice, render s.1 nugatory.

   1.2. Alternatively, if such an inference is permissible, whether the seriousness must relate to the effect of the publication on the estimation of third parties, and not to the effect on the claimant consequent on it. D submits that the ordinary meaning of "reputation" requires the evaluation to be directed to the effect of the publication on third parties.

[1] 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.

2. In his ruling on D's application for permission to appeal[2] the Judge observed: "This was not a case which raised any great issues of legal principle. It turned essentially on its own facts. The points of law that are raised are in my view untenable. The Court of Appeal will not lightly interfere with findings of fact".

3. As the Judge accepts the proposed appeal raises points of law. They have a real prospect of success for the reasons set out below. Even in the absence of an error of law or principle, the Court of Appeal has the power to review findings of fact. Its willingness to do so depends on the nature of the fact and any advantages of the trial judge in relation to it. At one end of a "wide spectrum" is "a straight conflict of primary fact between witnesses" and at the other is "an inference from undisputed primary facts".[3]

4. In the present case the fact in issue is whether the Claimant/Respondent ("C") has satisfied a new statutory provision requiring proof of serious harm to reputation. There are inevitable consequences that flow from the words chosen by Parliament. They necessarily impact on the approach of the tribunal of fact where a claimant does not rely on any tangible adverse consequences arising from the publication complained of, but solely on an inferential case based on the "tendency" of the words comprising the publication and the size of its circulation.

5. The appeal court can also review the approach of the judge to any facts relied upon by the party rebutting an inferential case where it appears that he has failed to take into account or underestimated relevant factors that negative the inference.[4] D's primary submission is that C's inferential case does not get off the ground, in which case it is not necessary to consider the Judge's approach to D's rebuttal evidence. However, for the reasons set out in Ground 4 and developed in

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[2] At [17]. The Judge found that he had no jurisdiction to grant permission as the application to him was made too late, but nevertheless, gave his summary view of the merits.

[3] See, for example, the classic statement of Lord Bridge of Harwich in *Whitehouse v Jordan* [1981] 1 WLR 246, 269-270: "[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision."

[4] See, for example, the speech of Lord Mance in *Datec Electronic Holdings Ltd & Anor v United Parcels Service & Anor* [2007] 1 WLR 1325 at [42] - [49]

paragraphs [26] to [38] below, the Judge's approach to the rebuttal facts relied on by D involved faulty reasoning and errors of principle.

6. The relevant primary facts are straightforward and not in issue. The Court of Appeal is in as good a position as the Judge to evaluate them. The only credibility contest at trial was the extent of the injury to C's feelings. This is irrelevant to any of the issues raised by the proposed appeal and D does not seek to challenge the Judge's findings in this regard.

7. Finally, there is a discrete challenge to the finding that the two tweets had a defamatory tendency. It is set out in sufficient detail in Ground 1. It is also worth noting the decision of Tugendhat J in *Mughal v Telegraph Media Group Ltd* [2014] EWHC 1371 (QB) that an imputation that a person's views have "dangerous consequences", is not defamatory because it is a criticism "as to the effect of his views…. not of his character".[5] This was relied on by D but not referred to in the judgment.

8. The determination of meaning and the related issue of whether the meaning has a defamatory tendency is categorised as a matter of fact. But it is a purely evaluative exercise, based solely on the content of the publication complained of (and any permissible context) and can have a significant impact on the outcome of a defamation claim. For these reasons, the Court of Appeal has shown a greater willingness to review a judge's decision on defamatory meaning.[6] This has arisen more frequently in recent years with the move away from jury trials. Divining the attitude of "right-thinking members of society generally" involves a value judgment about contemporary standards which has often attracted appellate attention, even on a capability ruling.[7] If D succeeds on this issue, Cs claim fails before consideration of s.1.

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[5] At [29].
[6] See, for example, the approach in *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 (in particular, Diplock LJ at 171D to 177F and Salmon LJ at 186F to 187E) which has been relied on in a number of subsequent cases, including *British Chiropractic Association v Singh* [2011] 1 WLR 133 at [13] to [15].
[7] See, for example, the recent decision in *Elliott v Rufus* [2015] EWCA Civ 121.

9. In the event of D failing on this issue, the points raised remain relevant to s.1. The less serious the meaning – even if it crosses the common law threshold – the less scope for inferring serious harm from its publication.

Section 1 – inferring serious harm – application to the present case

10. The stated purpose of Parliament in the 2013 Act was to rebalance defamation law in favour of freedom of expression. It recognised that there had been some rebalancing as a result of *Thornton*[8] and *Jameel*[9], but concluded that it had not gone far enough.[10]

11. Section 1 plays an important part in this process and has been described as a "key aspect of the Bill".[11] The imposition of a serious harm hurdle in relation to all claims irrespective of the parties and the merits creates an environment where freedom of expression can better thrive. To use an expression favoured by the US Supreme Court, it provides "breathing space".[12] The inevitable corollary is that there will be claimants who are subject to false allegations that have for centuries been regarded as defamatory at common law and the law will no longer provide a financial remedy. In *Jameel & Ors v. Wall Street Journal Europe Sprl* [2007] 1 AC 359 at [152] Baroness Hale referred to the absence of a requirement to prove harm, among other matters, observing that "all this is so well established that we have ceased to think of it as odd (if we ever did) and it would certainly take the intervention of Parliament to change it". Parliament has now intervened, culled the sacred jurisprudential cow and required the harm to be serious.

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[8] *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985, which incorporated a threshold of "substantiality" into the definition of defamatory, but was focused solely on the words comprising the publication complained of.

[9] *Jameel v Dow Jones & Co. Inc*. [2005] QB 946 which enabled a court to strike out a claim which did not disclose a "real and substantial" tort. This enabled the court to all factors reputational harm, not just the words used, but was said to be a draconian remedy only to be applied in extreme cases.

[10] See for example, the Ministerial Foreword to the draft Bill and the Explanatory Notes to s.1.

[11] See, for example, The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill, February 2012.

[12] "That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive.."" *New York Times Co. v. Sullivan* 376 U.S. 254 per Brennan J at 272.

12. The approach of the common law is to presume some harm to reputation if the words complained of, viewed in isolation and subjected to established principles of construction, are found to have a meaning that has a "tendency" to cause harm. As Diplock LJ famously observed in *Slim v Daily Telegraph Ltd* [1968] 2 Q.B. 157 at 171F, the common law's approach to determining defamatory meaning is "artificial and archaic". It does not correlate with the reality of reputational harm. This renders it an unreliable basis for inferring that serious harm has been caused, where none is apparent. Of particular relevance to the present case:

    12.1. The interpretation is based on the imputed intention of the publisher in the mind of the hypothetical reasonable reader. The fact that actual readers question the veracity of the imputed meaning or know it to be false is irrelevant.

    12.2. The hypothetical reasonable reader reads the publication complained of once, generally in an informal setting. The last word of the publication is the end of the exercise. The meaning derived from it is set in stone.

    12.3. The reality is that a reader who has no interest in or knowledge of the claimant will forget whatever he derived from the publication shortly after reading it.[13] This would account for the overwhelming majority of readers of one of a large number tweets.

    12.4. In contrast, a reader who has any interest in the claimant or subject matter and/or would be minded to act in an adverse way to the claimant is likely to go beyond the last word of the publication and to obtain such further information as is available. This is particularly so where, as in the present case, the wording of the publication is obscure and further information is easily available.

13. The word "serious" imports a high level of adverse consequence.[14] The original draft bill referred to "substantial" but this was replaced with "serious" to enable the

[13] See, for example, Diplock LJ in *Slim v Daily Telegraph Ltd* [1968] 2 Q.B. 157 at 171D.
[14] See, for example, s.224 and 225 of the Criminal Justice Act 2003 and Articles 2(e) and 15 of the EC Council Directive 2004/83/EC of 29 April 2004 in relation to Refugees.

bar to be raised.[15] If serious harm to reputation has been caused, it is reasonable to expect that there would be some evidence of it i.e. some tangible adverse consequence. If the claimant does not rely on any evidence of harm having been caused in the substantial period between publication and a s.1 determination, what is the principled basis for drawing an inference of serious harm? It is important to keep in mind that there is a dual inferential burden on a claimant in such a case: first, that harm has been caused and second, that it can be characterised as serious.

14. There have been a number of first instance judgments in relation to s.1. The first was that of Bean J (as he then was) in *Cooke & Anor v MGN Ltd & Anor* [2015] WLR 895. It is the only decision in which a claimant has failed on s.1, without the Court also finding that the claim was a *Jameel* abuse of process.

15. D submits Bean J adopted the correct approach to the interpretation of s.1. In particular, at [43] he appeared to adopt an "obviousness test" in relation to the circumstances in which serious harm should be inferred in the absence of reliance on any evidence of harm. He gave the example of unwithdrawn allegations of terrorism or paedophilia in a national newspaper. In such cases, evidence of harm would be available, but would be unnecessary (in the unlikely event that the defendant in such a case was to put s.1 in issue).

16. *Cooke* involved a mistake, in common with the present case, albeit it was a prominent newspaper article in *The Sunday Mirror* and the mistake was less obvious and the rebuttal less demonstrable or speedy.

17. In the subsequent decision of *Lachaux v Independent Print Ltd* [2016] QB 402 at [57] Warby J noted that *Cooke* recognised that "the serious harm requirement is capable of being satisfied by an inferential case, based on the gravity of the imputation and the extent and nature of its readership or audience". He then gave the example of a "well-known public figure [who] complains of national media publication of a grave imputation, such as conspiracy to murder or serious sexual crime". At [58] he added: "I cannot see why the position as regards those rules of the common law should be any different in less obvious cases, where it may be

[15] *Cooke* at [37]

necessary for a claimant to prove some facts beyond the words themselves and the fact and extent of their publication".

18. *Lachaux* involved three substantial media publishers reporting claims by a former wife of domestic violence and abuse by the claimant, who was not named and was a French national resident in Dubai. The defendants accepted that the wife's allegations amounted to seriously wrongful conduct. No evidence of harm was relied on by the claimant, but the Judge inferred serious harm from the seriousness of the alleged conduct and the fact that it was published in the mass media. He did not apply an obviousness test.

19. The present claim involves a significant lowering of the s.1 bar from *Lachaux*:

    19.1. In common with *Lachaux,* C relied solely on the nature of the imputation and the extent of publication to satisfy the s.1 hurdle.[16] In contrast to *Lachaux*, the imputation was not serious and not found to be so by the Judge. The meaning attributed to the First Tweet in POC[4] was that C had "had vandalised a war memorial and had thereby desecrated the memory of those who fought for her freedom and had committed a criminal act". This was rejected by the Judge who found that the meaning was metaphorical; that C had "condoned or approved" such conduct.

    19.2. At [70] the Judge found that the section 1 hurdle was surmounted on the basis that the tweets had a "tendency to cause harm to this claimant's reputation in the eyes of third parties, of a kind that would be serious for her"**.** Even assuming it is permissible to infer serious harm to reputation merely from a tendency in the words, the tendency must be to cause serious harm to the claimant's reputation. The meaning of reputation is "the beliefs or opinions that are generally held about someone or something". It only exists "in the eyes of third parties". It is implicit in the word "reputation". Parliament did not use the words: "serious harm to the claimant".

    19.3. This is consistent with the revised common law definition of defamatory of Tugendhat J in *Thornton*[17]: "the publication of which he complains may be

[16] See POC at [9]
[17] At [96]

defamatory of him because it [*substantially*] affects in an adverse manner the attitude of other people towards him*, or has a tendency so to do*". [italics in the original]

19.4. The Judge was therefore plainly wrong to transfer the element of seriousness from the effect on reputation to the effect on the Claimant.

19.5. In addition, there was no basis for it in C's pleaded case. The sentence is in the abstract: "tendency to cause harm to this claimant's reputation in the eyes of third parties, of a kind that would be serious for her". As previously stated, C's case on serious harm did not rely on any actual or theoretical adverse consequence to her arising from the publication. POC[9.1] referred to the "inherent seriousness of the allegations made against her" and [9.2] made a bare reference to the number of D's "followers".

19.6. A consequence of taking into account the effect on a claimant is to incorporate injury to feelings into the serious harm evaluation. It is established and consistent with the meaning of reputation cited above that injury to feelings are irrelevant to s.1.[18] Despite this, a substantial section of the judgment under the heading "Serious harm" relates to injury to feelings. The Judge noted at [67] that "unless serious harm to reputation can be established an injury to feelings alone, however grave, will not be sufficient". That does not state in terms that injury to feelings are irrelevant. It is difficult to see from the judgment what "serious for her" in [70] can mean if it does not relate to the upset that, in the preceding paragraphs, he found was caused to C by the tweets.

19.7. *Lachaux* was a media publication by reputable publishers of allegations that were not withdrawn or otherwise demonstrated to be false. The present case involves a couple of tweets arising from an obvious mix-up that would be apparent to any interested reader. This is addressed further at [23] to [32] below.

[18] Almost all the decisions on s.1 refer to this. See, for example, *Cooke* at 30]. Further, at [28] of the Joint Committee report on the draft Bill (19 October 2011) it is made clear that injury to feelings could only be relevant to damages,

20. For all the above reasons, it was not open to the Judge to find that the content of either tweet or the extent of their publication gave rise to the inference that serious harm had been caused to C's reputation.

The appeal in Lachaux

21. The Court of Appeal gave permission to appeal in *Lachaux*, following the refusal of Warby J. The appeal was heard in November and judgment is awaited. A central issue is the circumstances in which the court should infer serious harm where the claimant relies solely on the words complained of and the extent of their publication. The *Independent* and *Evening Standard* submit that an "obviousness" test should be applied, which can only be satisfied in relation to an allegation of sufficient seriousness.

22. If the appeal in *Lachaux* succeeds, the proposed appeal must equally be likely to succeed (or at least have a real prospect of success). If the appeal fails, the proposed appeal would still have a real prospect of success for three principal reasons:

    22.1. For the reasons stated in [19] above, the present case is distinguishable from *Lachaux*.

    22.2. There is a real prospect that the Supreme Court would allow an appeal from the Court of Appeal in *Lachaux* or in the present case. Where there is binding Court of Appeal authority that renders hopeless an appeal to the Court of Appeal, but there is a real prospect that a further appeal to the Supreme Court may succeed, the correct approach is to grant permission but dismiss the appeal immediately.[19] Given the novelty and importance of s.1, it is likely that the Supreme Court would entertain an appeal in *Lachaux* and/or the present case and the possibility of either succeeding cannot be described as fanciful.

[19] See the White Book commentary at 52.6.2 (2017 edition) and the reference to Beedell v West Ferry Printers Ltd [2001] EWCA Civ 400

22.3. As set out in [7] and [8] above, there is a discrete issue as to whether the tweets are defamatory at common law, which, of itself, justifies the grant of permission.

The tweets and their aftermath – D's rebuttal of the inferential case

23. The tweets complained of are set out below. The first comprises 3 questions directed at C. The second comprises one which is directed to the world at large (or is rhetorical):

"@MsJackMonroe scrawled on any memorials recently? Vandalised the memory of those who fought for your freedom. Grandma got any more medals?" 7.20pm

"Can someone explain to me - in 10 words or less - the difference between irritant @PennyRed and social anthrax @Jack Monroe." 9.47pm

24. The Judge correctly rejected what he described as the literal meaning of the first tweet: "Ms Monroe had herself scrawled on and vandalised a memorial".[20] In fact, this is an inferential meaning, on the basis that the first question implied that C had previously done so. Accepting that the questions involve metaphor and at best amount to an inferential imputation of condoning or approval of the graffiti, the tweet provides no information about what C actually said on the subject. An non-interested Twitter user who comes across it will not even register it, let alone remember it. The lingering in the consciousness is even less than the notional newspaper reader identified by Diplock LJ in *Slim.* Any interested reader will want to find out more and, in contrast to the newspaper reader in *Slim,* will be in an online environment which readily enables him or her to do so.

25. There are two further relevant features of the First Tweet:

25.1. Clicking the handle @MsJackMonroe gives instant access to C's profile page (containing all her tweets), which would be the obvious starting point in finding out what she had said on the subject.

25.2. The third question makes a reference to "Grandma" which the Judge observed would not be understood.[21] That is correct in relation to the limited

[20] At [43]
[21] At [43]

facts imputed to the hypothetical ordinary reader. What is not apparent from the judgment, however, is that Ms Penny's justification of her position in the preceding media publications referred to in [15] and [16] and on Twitter included that her grandmother had received a war medal which, of itself, generated further debate.

26. Anyone who had any interest in the First Tweet would either have known already that D was in a widely publicised Twitter row with Ms Penny over the graffiti or would quickly have found out. They would not find any involvement of C.

27. Further, at 7.33pm, 13 minutes after the First Tweet, C tweeted: "I have NEVER 'scrawled on a memorial'. Brother in the RAF. Dad was a Para in the Falklands. You're a piece of shit" (with a screenshot to the First Tweet), followed by further tweets at 7.36pm: "I'm asking you nicely to please delete this lie Katie, and if I have to ask again it will be through my lawyer" (with a link to the First Tweet) and at 8.14pm: "Dear @KTHopkins, public apology +£5k to migrant rescue & I won't sue. It'll be cheaper for you and v. satisfying for me".

28. At [71(9)] the Judge observed that "denials are not at all the same thing as corrections, retractions or apologies". That depends on the circumstances. A denial to a contested allegation based on conflicting witness evidence is plainly not as effective. But where it is obvious that a mistake has been made, a denial is equally effective in undoing any harm to reputation, if not injury to feelings. No reader of the First tweet and the denials would have been left with any reasonable belief that C had either scrawled on a memorial or condoned such conduct. The Judge failed to address the specific denials in the context of the specific facts of the present case.

29. The Judge also found that a "more significant point" was that C had no access to D's followers. This fails to take into account the points made at [12] and [24] above about the reality of reader reaction in an online environment.

30. Similar observations can be made in relation to the Judge's approach (at [71(10)]) to the extensive online media coverage of the tweets, which commenced shortly after. The Judge found that it "did not amount to an authoritative or comprehensive refutation of the original allegation". It is difficult to

see how any reader of any of that coverage could not be aware that D had confused C with Ms Penny or could otherwise believe that C had scrawled on the memorial or condoned it. Further, the Judge's assumptions about readers of left and right wing titles may have some relevance in relation to a print newspaper, but fail to take into account the reality of online publications, which is that there is much more easy cross-over[22]. The reader looking for information on a subject will take it from where it is available or presented to them in a variety of ways, including online searches.

31. At some point between C's tweet of 8.14pm and 9.47pm, D deleted the First Tweet. At 9.47 she posted the Second: "Can someone explain to me - in 10 words or less - the difference between irritant @PennyRed and social anthrax @Jack Monroe". The Judge's finding as to the meaning of this tweet - a repetition of the condoned/approved imputation - is flawed for the reasons set out in GOA1.4 (see footnote).[23]

32. But even if that were a permissible finding on the basis of the specific innuendo facts relied on by C in support of such a meaning, it is unrealistic to assume that any reader who was sufficiently interested to be aware of the extraneous facts selected by C, would not be or become immediately aware of others (at least equally accessible) which demonstrated the spat between D and Ms Penny and C's hostility to any suggestion that she had scrawled on the memorial, and made it inconceivable that she would have shared Ms Penny's views on the subject. For example, C's denial tweets were accessible simply by clicking on the handle @MsJackMonroe which was included in the Second Tweet, as was the handle @PennyRed.

Additional rebuttal facts

[22] And in any event one online publication which carried the story was The Metro, which is certainly not on the left politically.

[23] 1.4. Further, in relation to the Second Tweet, the Judge correctly concluded that readers with the relevant knowledge would have understood the Defendant to be acknowledging that when she sent the First Tweet she had "mixed up" Ms Monroe and Ms Penny, but that it made no difference. The obvious reason why it made no difference was because their political views were generally similar and obnoxious to the Defendant. If they had held or expressed shared views on the specific issue of the graffiti, there would have been no purpose to the Second Tweet because the First Tweet would have applied equally to both and there would have been no "mix up".

33. *Transience [71(2)]* The Judge was wrong to compare publication on Twitter with publication in a national newspaper or television broadcast and so dismiss D's argument as to transience. The Judge was correct to point out that what matters is impact, but in failing to distinguish between tweets on the one hand, and statements made in newspapers or television broadcasts on the other, he failed to appreciate why the alleged reputational impact of a particular tweet must be treated carefully. Whilst tweets exist in permanent form, they are to some extent ephemeral. They contribute to a story but do not stand alone. They must be viewed in the context of the news event of which they are a part. Readers of tweets are users of online media. The arc of an online media story extends across many platforms and media, and included in this case the huge online media coverage of the fallout from D's erroneous tweet.

34. *Absence of evidence of belief / positive evidence that it was disbelieved [71(4) and (5)]*: The Judge accepted correctly that there was a "dearth" of evidence that the allegation was believed, but stated that this was commonplace in defamation and that the absence of such evidence was not evidence of a lack of harm. A similar observation was made by the Judge at [138] in *Lachaux*. It is based on the premise that people who think the worse of a claimant as a result of a publication usually keep their opinions to themselves. These assumptions about human behaviour and the related issue of availability of evidence of harm are open to challenge generally and in their application to the present case. The Courts have not previously been called upon to subject this issue to any scrutiny; damage was presumed and substantial damages were routinely awarded without the need to obtain any evidence of harm.

35. There are a number of ways in which harm to reputation can be evidenced which do not involve overt shunning or criticism.[24] It is not helpful to compare how frequently evidence of harm has been adduced or perceived to be available prior to the Act. Claimants did not require it and it may be that many cases were pursued where no serious harm was caused. Experience suggests that claimants have a

[24] For example, people enquiring about the allegations with the claimant directly or with a third party, a failure to respond to communications from the claimant without any apparent reason, the cancellation of a social or business event for no apparent reason, a general reduction in such activity. Any adverse change in the claimant's social, commercial or professional life following publication which does not have an overt cause could be evidence of harm.

heightened sense of concern as to the consequences of a publication and the cure is often worse than the disease. The lurking libel in the hidden spring emerging to bite a claimant at a later date is much referred to in theory, but there are no practical examples. In the modern era the springs are no longer hidden. It is telling that there were numerous tweets and other publications by people who had read the tweets complained of and immediately knew and said publicly that D had confused C with Ms Penny. The contrast between the scale of these publications and the absence of any material evidencing any belief in the truth of the imputations complained of should not have been dismissed by the Judge

36. *"Some abuse" resulting from the tweets complained of reflecting harm to reputation [71(6)]*. As previously stated, C did not rely on anything other than nature of allegation and extent of publication in support of her case on serious harm. However, the issue of "abuse" arose in the context of D's rebuttal. As the Judge recognised at [8], C is an "outspoken political activist", "highly critical of the Conservative Party and its policies" who is "often forthright in the way she expresses herself, and has quite often used profanities and other strong language, on Twitter". Most notably, she accused David Cameron of milking the death of his son for political purposes. As is inevitably the case on Twitter, her outspoken views have attracted much abuse from people with strongly contrary views to hers. The Judge briefly referred to this topic at [71(6)] and returned to it in a little more detail at [72] and [73]. He accepted: "Generally, causation is problematic". Although not apparent from the judgment, this was because the majority of the abusive tweets C produced had nothing to do with the tweets complained of but were prompted by tweets posted by C herself. In relation to the Second Tweet there was some abusive reaction, but this was plainly a response to the question about "social anthrax", as opposed to any innuendo meaning relating to the graffiti. As the Judge accepted in [71(4)], there was no evidence that any imputation in relation to the graffiti was believed. All this was analysed in detail in a witness statement from C's solicitor, which was not the subject of cross-examination.

37. The only finding left open to the Judge was that C believed that some abuse was consequential on the tweets complained of and that this had an impact on her

which was “substantial”.[25] For the reasons stated above, this can only be relevant to injury to feelings, not reputational harm.

38. *C’s existing standing and reputation [71(7) and (8)]:* The Judge was wrong to treat this as analogous to “evidence of bad reputation” through the “back door”. The longstanding restrictions on adducing evidence of bad reputation have arisen in the context of mitigation of damage in a legal environment where a claimant does not adduce of injury to reputation to be awarded damages. S.1 imposes a further requirement on a claimant – to prove serious harm to reputation. Any material that is logically relevant as to whether harm has been caused by the allegation complained of must be admissible. C’s existing reputation as summarised in [36] above is plainly logically relevant to the issue of whether it has been seriously harmed by an allegation that she has condoned scrawling “Fuck Tory Scum” on a war memorial. If she is already reviled by her political opponents for her “outspoken political activism", it would require the attribution to her of an opinion far more drastic in order to have any material impact on her reputation, let alone a serious impact.

Overall conclusion

39. If it was open to the Judge to find the s.1 hurdle satisfied on the facts of the present case, it is difficult to conceive of a case in which s.1 could make any practical difference. This is consistent with the Judge’s approval at [69] of the observation of HHJ Moloney QC in *Theedom v Nourish Training Ltd* [2016] EMLR 10 at [15](h):

    "it is important to bear in mind that s 1 is essentially a threshold requirement, intended by Parliament to weed out those undeserving libel claims otherwise technically viable, but which do not involve actual serious harm to reputation or likely serious harm to reputation in the future."

40. This is an unhelpful gloss on section 1 which, in practice, renders it nugatory. The consequence of the wording chosen by Parliament is that claims should not proceed even if they involve false and malicious publications which have caused substantial, but not serious, harm to reputation accompanied by injury to feelings.

[25] At [73]

Such claims may not be described as “undeserving” or merely “technical”. A threshold test which merely excludes undeserving technical claims is no different from the pre-existing *Jameel* jurisdiction, also referred to in [69].

41. It may be tempting to give a remedy to a claimant that is perceived to be deserving against a defendant who is perceived to be undeserving. S.1 is morally neutral and was plainly intended by Parliament to fulfil a wider public policy purpose.

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31 March 2017