IN THE COURT OF APPEAL (CIVIL DIVISION) Appeal Court Ref: A2/2016/1266
ON APPEAL FROM
THE HIGH COURT OF JUSTICE Claim No: HQ13D06031
QUEEN'S BENCH DIVISION
BETWEEN:

RONALD TERANCE STOCKER

Claimant/Respondent

- and-

NICOLA STOCKER

Defendant/Appellant

DEFENDANT/APPELLANT'S SKELETON ARGUMENT
FOR PERMISSION TO APPEAL

References to documents are by tab/page(s)

The claim

1. The claim relates to an exchange on Facebook between D and Deborah Bligh ("DB") on 23 December 2012 ("the Exchange")[1] and an email sent on 2 January 2013 by D to Eric Roche ("the Email").[2] The Judge stayed the claim in relation to the Email[3] under the *Jameel* jurisdiction i.e. on the basis that it did not disclose a real and substantial tort. The Judge upheld the claim in relation to the Exchange and stated that he would have awarded £5,000 in damages, had C sought an award.[4] Any magnanimity on C's part in relation to waiving damages is dwarfed by the costs consequential on a notional £5,000 award. The trial and the finding that D had libelled C were widely reported.

Overview of the proposed appeal

2. D primarily relied on 3 matters to support her justification defence. First, an occasion on 23 March 2003 when C put his hands around D's throat with such force as to leave reddening visible to police officers hours later, constrict her

[1] 9/81-84
[2] See APOC[7] at 11/88-89
[3] See the order of Mr Justice Mitting of 3 March 2016 at [2] at 5/58
[4] See the judgment at [54]-[56] at 4/55-56

breathing and put her in fear that he was trying to kill her. Second, a series of threats made by C to D in the course of the divorce proceedings. Third, the breach of a non-molestation order ("NMO") arising from C's attendance at D's stall at Tring market.[5]

3. The majority of the primary facts on which D relied were found to be true either explicitly, or, insofar as they were not directly addressed in the Judge's oral judgment, they were implicit in the explicit findings. C also made relevant admissions in the course of cross-examination.

4. These matters ought to have been sufficient to make good D's justification defence. For the reasons set out in [8] to [44] below, the Judge erred in principle in the reasoning that led him to find that they did not.

5. The Judge found that neither D nor DB gave "a moment's thought" to the fact that the Exchange was visible to the Friends.[6] For the reasons set out in [45] to [67] below, this was fatal to the claim. C did not complain of the publication to DB.

Justification

C's pleaded meanings

6. The meanings complained of were set out in Amended Particulars of Claim ("APOC")[6]:

> "6. The said words in their natural and ordinary meaning were meant and were understood to mean that the Claimant:
> (1) had tried to kill the Defendant by strangling her, for which he was arrested by police;
> (2) had also threatened the Defendant and breached a non-molestation order protecting her, for which he was also arrested;
> (3) had been arrested countless times and accordingly, it was to be inferred, was a dangerous and thoroughly disreputable man."[7]

7. The following observations can be made:-

   7.1. The threat is pleaded in the singular. The nature, context and/or level of gravity are not particularised.

[5] See the RRAD at [14.9]-[14.15] at 12/110-112
[6] See the judgment at [19] at 4/41-42
[7] 11/88

7.2. The same applies to the breach of the non-molestation order.

7.3. The inferential meanings of “dangerous” and “thoroughly disreputable” are drawn solely from the bare allegation that C has been “arrested countless times”.

7.4. The reference to “gun issues” in the Exchange is not reflected in the pleaded meanings.

8. The Judge’s rejection of the substantial truth defence appears to be based primarily on two factors.

9. The first was upholding the “tried to kill” element of [6.1] and finding that C did not intend to kill D.[8] The latter finding was strictly unnecessary as D did not allege that C had tried to kill her, although that is what she feared he was intending to do. The Judge did not analyse from a reputational perspective the impact of an unproved meaning of intent to kill in the context of a proved allegation of the act of strangulation. Inherent in the act is that it puts the victim in fear of possible killing. D submits that the Judge erred in principle in finding that the words “tried to strangle” made by a live victim necessarily imputed an intent to kill. In any event, the gravity of what was proved was such as to outweigh any unproved meaning of an intent to kill.

10. The second factor was liberating the inferential meaning of “dangerous” in [6.3] from the allegation that C had been “arrested countless times”.[9] This was impermissible. A claimant’s pleaded meanings are key to the determination and proper conduct of all aspects of defamation litigation from the first stages through to trial.[10] This is well-established and at least equally important in the modern era of litigation as it limits the factual issues for determination. The ability to select the meanings complained of is one of the advantages possessed by a claimant. Meanings are commonly narrowly drafted because it can limit the material on which a defendant can rely in support of a truth or comment defence. The downside of this is that the claimant is tied to the specificity of his pleaded

[8] See the judgment at [38]-[43] at 4/50-52
[9] See the judgment at [44]-[54] at 4/52-55
[10] See Gatley on Libel and Slander, 12th Edition, at [26.20] to [26.22]

meanings.[11] If a meaning determination takes place before trial, the claimant can amend his pleaded meanings. It is unfair to a defendant for the meanings to be widened in a judgment after a trial when he has no opportunity to adduce evidence to support an amended justification defence and/or rely on honest comment.

11. In any event, the proved and admitted facts that were properly before the court by virtue of the other meanings are sufficient to justify the adjective "dangerous". The Judge did not analyse what he understood it to mean by or why it would be unjustified to describe C as dangerous.

The strangling allegation

12. The Judge placed strong reliance on the Oxford English Dictionary ("OED") definition of strangle, which he understood was "not prohibited".[12] Disputes on meaning are commonplace and for a variety of reasons it is not the practice to refer to dictionary definitions. Meaning is a jury question. The judge is obliged to put himself in the position of the ordinary reader who will not have a dictionary to hand. In the absence of an innuendo meaning the construction will be based on the knowledge that an ordinary person can be taken to have. The meaning of words is often dependent on their context. The resorting to a dictionary definition can lead to an overly literal approach.

13. The OED definitions are: "1(a):To kill by external compression of the throat. 1(b): To constrict painfully (of the neck or throat)." It is not necessary to resort to a dictionary to be aware that strangling is a violent act that involves the painful constriction of the throat which restricts breathing. Sometimes it can lead to death. The two definitions are not inconsistent.

14. At the commencement of the trial the Judge suggested that counsel look at the OED definition and observed: "You might from that gain the primary and the secondary definition, and fit it into the context of a message which said he "tried" to do something." C's counsel replied that "resort to dictionaries was considered

[11] See, for example, footnote 85 to [26.20]
[12] See the judgment at [36] at 4/49-50

a little controversial for those who practice in this field".[13] It was apparent to D's counsel from the Judge's observation that he had formed the view that the word "tried" necessarily imputed an intent to kill in circumstances where D was alive and had red marks on her throat. This reasoning was ultimately reflected in his judgment at [36].

15. In the light of the Judge's reference to the OED, D's counsel obtained *R v Grimwood* [1962] 2QB 621, a decision on an offence under s.14(1) of the Offences against the Person Act 1861 of an "attempt to …. suffocate or strangle … with intent to murder".[14] Lord Parker CJ identified the issue on appeal as follows: "The only question that arises in this case is as regards the judge's direction on the question of intent to murder. That there was an attempt to strangle and an attempt to suffocate is quite clear and admitted..".[15]

16. The wording of the statute is contrary to the Judge's reasoning. If an attempt to strangle necessarily imputes an intent to kill, why were there two limbs to the offence? What do the words "attempt to strangle" mean in this context? The most natural meaning is, as in *Grimwood,* the act of strangulation which does not lead to death.

17. If there is to be resort to extraneous materials, a more reliable indicator of meaning than a dictionary in this context is s.14, *Grimwood* and the numerous references in family cases to "tried to strangle" in circumstances which do not obviously import an intent to kill.[16] Strangling is a well known form of domestic abuse, which in common with other forms, is based on control and dominance with the purpose of obtaining the victim's future or continued subservience. An unqualified allegation of strangling is rarely used by someone who is alive.

18. The reality, of which a jury would be aware, is that the words "he tried to strangle me" are a common way of a victim describing a violent constriction of the throat that prevented her from breathing but, self-evidently, did not result in her death. The ordinary reader will not be focussed on establishing the precise mens rea of

[13] See the transcript of day 1 of the trial at p9 at 7/62
[14] Repealed by the Criminal Law Act 1967
[15] At 626
[16] See, for example, the judgment of Dame Elizabeth Butler-Sloss, President of the Family Division in *Re L & Ors (children)* [2001] 2 WLR 339 at 351A

the aggressor. The victim may not know it. What is relevant to both is the nature of the act. The words do not impute any intention to the aggressor other than what he has, in fact, done. The additional words used by D, "he spent a night in the cells", are more consistent with an assault than an attempted murder.

19. The determination of meaning is categorised as an issue of fact. But it is purely evaluative, does not turn on any witness evidence 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 meaning.[17] This has arisen more frequently in recent years with the move away from jury trials. There are obvious cost benefits in dispensing with a jury, but the ordinary meaning of words is quintessentially a question for 12 ordinary members of the public.

20. In the present case the Judge's approach was contrary to the injunction against over-elaborate analysis, while also being too literal.[18] The words "he tried to strangle me" when spoken by a live victim with marks on her neck do not necessarily impute an intention to kill.

21. Assuming the Judge was correct to find a meaning of intent to kill, there was a further error of principle in the failure to analyse in reputational terms the gravity of what C had actually done in comparison with the gravity of the imputed meaning.

22. C claimed that he had briefly made contact with D's mouth without any pressure and that shortly after she telephoned the police she admitted that she had done a "terrible thing" by reporting him for assault. He attributed the invention to D's post-natal depression. He did not admit the existence of any red marks on her neck, notwithstanding that the police had recorded their existence in D's statement 2 hours after the incident and referred to them in C's interview. Throughout the litigation he persisted in accusing D of making the whole thing

[17] 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].
[18] See *Gillick v Brook Advisory Centres* [2001] EWCA Civ 1263, from which the passage in *Rufus v Elliott* [2015] EWCA Civ 121 cited by the Judge at [35] was derived.

up.[19] She was robustly cross-examined at length on this basis,[20] which was widely reported in the media.

23. The Judge accepted that red marks on her neck and throat were seen by the police officers. He stated his conclusion briefly at [43]: "The most likely explanation about what happened is that he did in temper attempt to silence her forcibly by placing one hand on her mouth and the other on her upper neck under her chin to hold her head still. His intention was to silence, not to kill".[21] D's evidence was that she was unable to breathe and she believed that C was intending to kill her.[22] One of the evils of strangulation is that it necessarily puts the victim in fear of possible death. It is also an inherently dangerous act. The Judge did not explicitly rule on D's evidence in this regard, but it was a corollary of the findings that he did make. If he was intending to reject the evidence it was necessary for him to do so explicitly.

24. A defamation case is not to be equated with a criminal trial. A criminal sanction may be more closely linked to the intent of the aggressor. C committed a serious act of domestic violence that was dangerous and traumatic for D. The law of defamation has not reached such a level of abstraction that the victim of such an act should be liable in damages to her aggressor if she frames her truthful description of what happened in words that inadvertently give rise to an imputation as to his state of mind that she is unable to prove.

25. The strangling allegation also necessarily impacts on the inferential "dangerous" allegation. The latter will be addressed in greater detail below. It is worth observing at this point that C accepted in cross-examination that if he had deliberately put his hand around D's neck with such force and for such time as to constrict her breathing, make her think that he was trying to kill her and cause reddening that lasted for hours afterwards it would justify describing him as dangerous.[23]

The Defence

[19] See RRAR[16.1]-[16.2] at 13/141-142
[20] See the transcript of day 2 of the trial at pp97-124 at 8/71-77
[21] 4/52
[22] See D's first ws at [4]-[5] and the transcript of day 2 of the trial at pp97-124 at 8/71-77
[23] See the transcript of day 1 of the trial at pp33-34 at 7/63

26. In the present case, the justification defence in the Re-Re-Amended Defence ("RRAD") at [14] essentially sought to mirror the meanings in APOC[6], other than the attempt to kill in relation to the strangling allegation.[24] It set out the threats made by C and one instance of C's breach of the non-molestation order. It did not seek to attribute any level of gravity to them, because C had not done so and the "dangerous" meaning in APOC[6.3] was tied to the fact of the arrests. RRAD[6.3] denied that it was reasonable to infer from the fact that a man has been arrested on more than one occasion that he was dangerous or disreputable. The Judge appears to have accepted this.[25] Further, the addition of the fact of the arrest to the strangling allegation in APOC[6.1] and the threats and breach of the non-molestation order in APOC[6.2] added nothing. The conduct imputed to C would entitle a police officer to arrest him.

27. RRAD[14.8] advanced a "dangerous" meaning based on the facts relied on in support of the other meanings.[26] But because of the limited way in which the meaning was pleaded in APOC[6.3] D did not seek to rely on the history of abuse which she alleged C had subjected her to over the course of the marriage to justify it. In the light of APOC[6.3] it may well have been impermissible for her to do. She also did not investigate the possibility of whether a freestanding "dangerous" meaning could have been defended as honest comment. There were certainly elements of the Exchange that were capable of giving rise to such a meaning that could be regarded as comment.

28. In the light of the Judge's finding on substantial truth, relying in part on the liberation of "dangerous" from the arrests, it is appropriate to consider below the nature and context of the threats and the breach of the NMO. This is without prejudice to the submission that it was sufficient on the pleaded case for D to establish the fact of a threat and a breach.

The threats

29. RRAD[10.4] alleged: "The Defendant initiated the ending of the marriage, petitioned for divorce on the basis of the Claimant's alleged unreasonable

[24] 12/110-112
[25] At [37] at 4/50
[26] 12/110

behaviour and obtained her financial entitlement....The settlement was substantially greater than the Claimant was initially willing to pay her. The Claimant still regards it to be his money and regularly describes it as such."[27] This was admitted in Re-Re-Amended Reply ("RRAR")[10.4].[28]

30. The threats were pleaded in RRAD[14.11].[29] D alleged that they were made in the period between October 2010 when D informed C that she wanted a divorce and 9 March 2011 when she obtained the NMO. At this point C was seeking to persuade D to accept a settlement which was substantially lower than her entitlement. At the time the parties were living separate lives in Chadwell Hill Farm, the matrimonial home of 11 years. A particular source of discontent for C was the possibility of D continuing to live there and a number of the pleaded threats related to this. It was bought in C's name and he regularly described it as "my home". Sole ownership was transferred to D as part of the financial settlement in June 2012.

31. The only threat addressed explicitly in the judgment (at [53]) related to "Michael Vaughan". The Judge identified the threat as "circulating texts which he had obtained in obscure circumstances".[30] In fact, C had obtained from Vaughan a series of intimate emails, photographs and texts exchanged between D and Vaughan in January 2011 (which he had included in the trial bundles) and in relation to which D had the clearest expectation of privacy. The evidence in C's witness statement[31] was that he had called Vaughan after going through D's mobile telephone records and finding calls to a number he did not recognise. C said that he had a conversation with Vaughan that resulted in him providing C with all the intimate and private material. In the course of the conversation Vaughan apparently said that he "did not want to be named in any divorce proceedings" and that "he worked for the security services". How the possibility of Vaughan being "named in any divorce proceedings" emerged in the conversation remained obscure even after C's cross-examination. C accepted

[27] 12/101
[28] 13/124
[29] 12/111
[30] 4/55
[31] At [58] at 16/183-184

that since D met Vaughan after she had commenced divorce proceedings, Vaughan could not be the cause of the breakdown of their marriage.[32]

32. C admitted in cross-examination that he had threatened D with the disclosure of the Vaughan "folder" to D's parents, the parents at J's school and even to J (when he was older "to find out what his mother was really like").[33] In RRAR[10.13] he had denied any threatened disclosure other than to D's father.[34] He received the documents from Vaughan on 27 February 2011.[35] On 1 March 2011 he signed undertakings to the court[36] in which he stated that he did not have any of D's emails, which he accepted in cross-examination was untrue,[37] and would not disclose or make any use of D's emails or other confidential documents.

33. The Judge also found that C "may well have boasted of threats, whether or not made, to others and of his capacity to obtain details of the defendant's private affairs by covert means". He was not satisfied that C made any threats of "immediate violence" against D.[38] But the threats alleged by D did not involve "immediate violence"; they were expressly or impliedly contingent on her not accepting his proposals for settlement.[39]

34. In any event, the Judge accepted that C's conduct "belittled" and "intimidated" D, "whatever his intentions to her may have been". It was inherently likely that a woman in D's position would feel belittled and intimidated by such conduct. Further, the admitted Vaughan threat was plainly unreasonable. The obvious purpose was to intimidate D into accepting substantially less than her financial entitlement.

Breach of the non-molestation order – Tring market

35. In the light of the meanings complained of by C, D selected one unchallengeable breach of the NMO for inclusion in her RRAD at [14.15]. This was C's

[32] See the transcript of day 1 of the trial at p75 at 7/64
[33] See the transcript of day 1 of the trial at pp93-94 at 7/65
[34] 13/125-126
[35] By email from Vaughan at18/223
[36] 19/224-225
[37] See the transcript of day 1 of the trial at p98 at 7/66
[38] At [53] at 4/55
[39] See RRAD[14.11] at 12/111

attendance at D's stall in Tring market following his court appearance for possession of an unlicensed gun. The Judge found that C "spoke to the defendant about matters other than J and so breached the non-molestation order".[40] The fact that he turned up there was also plainly a breach.[41] One of the main reasons for restricting mode of contact is to avoid unpleasant scenes such as that which occurred at Tring market. The Judge found that C was angry that a man ("SH") with whom D was in relationship was present at the stall. Earlier in his judgment he found that C was obsessed by D having relationships with other men.[42] This obsession ultimately led to a debarral order against him under section 91(14) of the Children Act 1989.[43] C was entitled to have SH accompany her at her place of work. C's anger at SH's presence is an aggravating rather than mitigating factor.

36. The Judge did not identify the "matters" about which C spoke. D's evidence was that C had said that "her name was now mud with the police and that she came across in a very bad light in court".[44] In cross-examination, C did not deny this.[45] D said that C refused her requests to leave and it was only when she threatened to call the police that he did so. C accepted in cross-examination that D asked her to leave twice and only on the third time of asking after D referred to the NMO did he do so.

37. The Judge characterised the breach as "comparatively trivial" in "the context of the acrimonious dealings which had occurred between the two of them since 2010".[46] The fact was that from 9 March 2011 C was subject to an order of the court which sought to prevent D from being intimidated, harassed and pestered.[47] C's attendance at Tring breached the order on three grounds: his presence at the market and what he said (contrary to paragraph (3)) which combined with his conduct was a breach of paragraph (2).

Dangerous

[40] At [51] at 4/54
[41] See RRAD[14.13] at 12/111-112
[42] At [3] at 4/34
[43] See RRAD[10.10] at 12/101-102 and the order at 21/228
[44] See D's first ws at [32] at 17/215
[45] See the transcript of day 1 of the trial at p125 at 7/67
[46] At [51] at 4/54
[47] 20/226-227

38. The Judge found at [54] that D had "not met the sting of the postings that C was a dangerous man".[48] He did not particularise what was meant by "dangerous" in this context or assess whether the proved facts were sufficient to justify it. Dangerous generally means able or likely to cause harm. It is an imprecise term that refers to an unquantifiable risk of future harm.

39. A person can be a dangerous choice of partner without having been physically violent. Even if the Judge was equating it with violence, the non-statutory definition of domestic violence and abuse adopted across the UK Government is: "Any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. The abuse can encompass, but is not limited to: psychological, physical, sexual, financial [and] emotional".

40. This was relied on in a recent meaning determination in *Lachaux v Independent Print Ltd* [2015] EWHC 620 (QB). The meanings complained of included "became violent towards his ex-wife". The meanings the defendants sought to prove true included: "was violent, abusive and controlling". The claimant unsuccessfully sought to prevent the defendants from relying on "abusive and controlling". Sir David Eady accepted that it was "probably right to view domestic abuse as a continuum – including such matters as verbal abuse, "controlling" and sometimes physical violence....It is all part of a pattern".[49]

41. In any event, C was guilty of a serious act of physical violence which, as he accepted, is sufficient of itself, to justify the description.

42. A person can be dangerous, without intending to be harmful. In fact, he can be more dangerous if he does not realise the consequence of his behaviour. The Judge found that C's threats and other conduct (as particularised in greater detail above) "belittled" and "intimidated" D. He did not rule on whether C intended to do so. The fact that this was the obvious effect of his conduct is, of itself, sufficient to justify describing him as dangerous. Most men do not lay hands on their partners' necks, grab their arms, breach non-molestation orders and/or

[48] 4/55
[49] At [17]

make threats that cause them to be “belittled” and “intimidated”. Those that do can lawfully be described as dangerous. There is a sufficient but necessarily unquantifiable risk that C would behave in a similar manner with a future partner.

43. Finally, the European Court of Human Rights would undoubtedly regard “dangerous” as a value judgment, as opposed to a statement of fact. As Lord Phillips noted in *Spiller & Anor v Joseph & Ors* [2011] AC 852 at [76], it regards a requirement to prove the truth of a value judgment to be contrary to article 10. An “interference” with the article 10 right will only be proportionate where the value judgment “has no factual basis to support it”.

Conclusion

44. On a correct application of the relevant principles, there was no inaccuracy in the words complained of. Alternatively, any inaccuracy was not such as to give rise to liability; either by virtue of s.5 of the Defamation Act 1952 or the common law principles of substantial truth & *Jameel*. In relation to the latter, there was evidence that a small number of Friends saw the Exchange. The Judge found that “Ms Bligh's family and friends cannot now believe and cannot have believed for long that the claimant was dangerous or posed a risk to her”.[50] RRAD[9.13] incorporated the facts supporting the justification defence into D’s denial of a real and substantial tort.[51] Any element of inaccuracy had no notional or practical consequence given what was proved.

Responsibility for publication

45. The Exchange took the form of a conversation between DB and D. Both claimed they did not appreciate that it was visible to the Friends,[52] which the Judge accepted.[53] C did not complain of the publication to DB. APOC[4] alleged that D “wrote and published” the extracts complained of to the Friends. It was not alleged that D was aware of this or that she ought to have been.[54] RRAD[4.8] alleged: “The Defendant did not know or intend that the Exchange would be

[50] At [55] at 4/55
[51] 12/100
[52] See DB’s first ws at [27] at 15/160-161, the transcript of day 2 of the trial at pp56-57 at 8/69-70 and 213-217 at 8/79-80 and D’s first witness statement at [40] at 17/216-217
[53] At [19] at 4/41-42
[54] 11/87-88

accessible to the Friends or anyone other than Ms Bligh. Further, the means of publication to any Friends was Ms Bligh's Facebook account. It is therefore denied that, insofar as there was any publication to the Friends, the Defendant can be liable in defamation for it."[55] In opposition, RRAR[4.5] alleged: "The Defendant, by making an accessible posting on Ms. Bligh's Facebook page, published the words to others. It is denied that the ownership of the page on which the words were published is relevant to the issue of the Defendant's liability for their publication".[56]

46. The Judge applied what he described as "settled principles of the common law of defamation". He held that, since the publication to Friends was a consequence of the mode of publication employed by D, she would be liable unless she could establish that she had taken reasonable steps to prevent it.[57] In other words, there was no obligation on C to establish knowledge or negligence on D's part. He distinguished what Laws LJ said in *Berezovsky v Terluk* [2011] EWCA Civ 1534 at [22] to [28][58] on the basis that it was limited to cases of republication.

47. There are a number of reasons why this approach is flawed:

    47.1. The common law authorities are not clear-cut. There is Court of Appeal authority in favour of a knowledge-based test and the most recent decision, in 1962, left the matter open.

    47.2. Further or alternatively, Laws LJ in *Terluk* was correct to opine that the modern law of defamation should not treat reputation as akin to a right of property and should more visibly occupy the legal territory of privacy and free

[55] 12/94
[56] 13/120
[57] See the judgment at [27]-[34] at 4/44-48
[58] "[28]:As I have indicated, the defendant is in my judgment liable on the facts for the republication (subject to any available defences) whatever the test. By giving the interview in the sure apprehension that it was to be broadcast in the United Kingdom he intended or authorised that event. If my Lord and my Lady agree with that conclusion, it becomes unnecessary to resolve the legal issue as to which test is correct. Nor do I think it appropriate to do so, since it seems to me with respect that these may be deeper waters than counsel have acknowledged. If Mr Browne is right, the tort of defamation would be located (at least in the republication case) closer to the territory of claims in negligence, where reasonable foreseeability of harm is a prime constituent of the duty of care. That might be apt for the protection of reputation seen as akin to a right of property. But I incline to think that the modern law in this area should more visibly occupy the legal territory of privacy and free expression, and the tensions between them; and to that end the tort of defamation should excoriate not carelessness, but knowing or deliberate action."

expression, and the tensions between them; and to that end the tort of defamation should excoriate not carelessness, but knowing or deliberate action.

47.3. The non-excoriation of the defendant should apply whether the publication of which he is unaware can properly be described as a direct publication or a republication by the person to whom the defendant intended to publish. There is no reason, in principle, to distinguish between the two cases.

47.4. Further or alternatively, the publication to the Friends is properly to be described as republication or if not, is analogous to it.

The pre-Human Rights Act authorities

48. Most of the cases involved a letter addressed to the plaintiff but read by another person. The issue was whether there had been any publication at all on which the plaintiff could seek a remedy. A number, such as *Pullman v Hill* [1891] 1 QB 521 cited by the Judge, suggest a test akin to negligence. It is often not apparent whether the burden is on the plaintiff to establish negligence or on the defendant to establish the absence of it.

49. However, *Sharp v Skues* (1909) 25 TLR 336 CA, is direct Court of Appeal authority for a knowledge-based test. The jury questions were: (1) Was the letter sent by the defendant likely, according to the ordinary course of business, to be opened by a partner or clerk? Answer —Yes. (2) Might it, according to the defendant's knowledge, be possible for the letter to be opened by a partner or clerk of the plaintiff? Answer —No . Phillimore J held the answer to (1) was sufficient to establish publication. The Court of Appeal disagreed. Lord Cozens-Hardy MR recited the jury's findings and stated:

> "On these findings it was impossible to hold that what was done amounted to a publication by the defendant. It would be a publication if the defendant intended the letter to be opened by a clerk or some third person not the plaintiff, or if to the defendant's knowledge it would be opened by a clerk; but the jury had negatived this in the clearest terms, and under these circumstances it was impossible to hold that some act done by a partner or a clerk of the plaintiff by his direction and for his own convenience when absent from the office could be a publication by the defendant under circumstances which the jury have found, in answer to

Question 2, the defendant knew could not possibly happen. The learned Judge in the Court below was wrong in saying that an answer in the affirmative to either the first or the second question would entitle the plaintiff to judgment."[59]

50. The most recent decision is *Theaker v Richardson* [1962] 1 WLR 151. The relevant questions were: "Question 2. Did the defendant anticipate that someone other than the plaintiff would open and read the letter? Answer: Yes. Question 3. Was it a natural and probable consequence of the defendant's writing and delivering of the letter that the plaintiff's husband would open and read the letter? Answer: Yes.".[60] On appeal the issue was whether both findings were perverse. The Court concluded by a majority that they were not. It was therefore not necessary to determine the consequence of a negative answer to 2, but not 3. At p162 Pearson LJ observed: "It may well be that if the jury's answer to question 3 can be upheld, that is sufficient to decide the appeal without considering the answer to question 2".

51. The Judge referred to Gatley [6.17] and [6.18].[61] This refers to the case law on letters and opines that "reason to know" that it may be opened by someone other than the addressee is sufficient. But the footnote refers to *Sharp* and the absence of a "mechanical rule".

The modern law of defamation

52. As Lord Nicholls of Birkenhead observed in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127: "Historically the common law has set much store by the protection of reputation".[62] Cases such as *Pullman v Hill* are good examples. In a variety of ways, the modern law of defamation has been rebalanced. The main driving force has been article 10 ECHR and the Human Rights Act 1998. The Judge opined that the present case is "not about freedom of expression".[63] However, the article 10 rights of a defendant are engaged in every defamation claim. It is well-established that the fact of being sued, let alone the potential award of damages and costs, is a "restriction" or "penalty" within the meaning of article 10(2). In defamation cases it is often substantial. Further, the principles

[59] At p337
[60] At p153
[61] At [32] at 4/47
[62] At 192F
[63] At [30] at 4/46

governing responsibility for publication are one of the ways in which a balance is struck between freedom of expression and the protection of reputation. Whether a knowledge or foreseeability test should apply impacts on freedom of expression more widely than the present case.

53. The lower the burden on a claimant to establish responsibility for publication the more people will find themselves sued for defamation or sued more widely than they anticipated. Even if they can establish a substantive defence, it is a costly and draining process. The principles for determining responsibility must be seen in the context of other elements of defamation law. If a defendant is held to be responsible for publication he faces an objective test for determining meaning (his intended meaning is irrelevant), a presumption of falsity (he must prove by admissible evidence that what he wrote was substantially true, and his belief that it was is irrelevant), and the possibility of a substantial award of damages even if the claimant has suffered no loss.

54. This is the context in which Laws LJ's observations in *Terluk* should be seen. The defendant should not be excoriated with the rigours of defending a defamation claim unless he was aware of the publication on which he is sued. Although *Terluk* was about republication, the observations are equally applicable to responsibility for publication generally.

55. From a claimant's standpoint, modern methods of publication are likely to involve more available defendants than the sender of a letter. In cases of ongoing publication, such as the internet, the claimant can inform those in control of the ongoing publication of its existence rendering them liable for its continuation on a knowledge based test, even if they were previously unaware of it.[64]

56. For all these reasons, responsibility for publication should be based on an awareness by the defendant that his act will or is likely to lead to a communication to the category of publishees on which the claim is based.

Republication

[64] See, for example, *Byrne v Deane* [1937] 1 KB 818

57. The rival tests in *Terluk* for establishing primary liability for the republication were reasonable foreseeability and intention/authorisation. The latter was preferred by Laws LJ. The case involved an interview broadcast on a Russian television channel. The defendant claimed that he was unaware that he was being filmed for broadcast. This was a lie. He was therefore liable for the broadcast whatever test was applied. *Starr v Ward* [2015] EWHC 1987 (QB) was the opposite. The defendant had been told by the BBC that the interview would not be broadcast in the form that it was. She could not therefore be liable for it on either basis. Nevertheless, Nicol J expressed his agreement with the preferred view of Laws LJ.[65] The first supplement to the 12th edition of Gatley has amended [6.52] to describe it as "the better view".

58. Most republication cases involve a defendant intending to communicate words to one publishee ("the intended publishee") and in consequence they are communicated to others without the defendant intending to so ("the unintended publishees"). The prime characteristic is the involvement of the intended publishee in the consequent publication. The intended publishee will generally control the means of publication to the unintended publishees. The claimant will generally be entitled to seek redress from the intended publishee for this publication. This is particularly relevant in internet cases where the unintended publication is ongoing and the intended publishee, not the defendant, has the power to stop it.

59. The extent of the delay between the intended and unintended publication and/or the precise means by which the latter is transmitted should not be relevant to the basis of liability. If *Terluk* had not been aware that he was being filmed for broadcast his liability for the broadcast should not depend on whether it was live.

60. Insofar as it is necessary to draw distinctions between such cases and those involving letters, they are obvious. First, the intended publishee is someone other than the claimant. This enables the claimant to sue the author on the intended publication and if he establishes liability to rely on a foreseeability test to obtain damages for the consequent publications. Second, the claimant can sue the intended publishee for the consequent publications.

[65] At [76] and [77]

The present case

61. The following facts were not in issue: The Exchange took the form of a status update by DB ostensibly directed solely to D followed by a series of comments on it by them ostensibly directed solely to each other. The accessibility of this method of communication to the Friends was dependent on DB's Facebook settings. The default setting is that such communications are visible. DB could have easily hidden or deleted the Exchange at any time, so as to make them inaccessible.[66]

62. The Judge relied on the default setting to justify the finding that D's comments were publication, not republication. He compared the position to placing a comment on an office notice board.[67] But a person who places a document on an office notice board does not require the active involvement of anyone else, knows what she is doing and if she has the power to put it up, also has the power to take it down.

63. DB's Facebook settings were within her control. The extent of publication and the identity of the publishees were contingent on her choice of Friends. The publication to them could not have taken place without her active involvement. She initiated the Exchange in the form of a status update, which as a result of her settings, meant that the comments on it were visible to her Friends.

64. In these circumstances, it is appropriate to characterise the publication to Friends as a republication by DB, or if not, there is no reason to apply a different test. The unintended publication to Friends was a consequence of the intended publication to DB. C could have sued D on the publication to DB and relied in support of his claim for damages on the consequent publication to the Friends. He would have been required to establish liability in relation to the publication to DB in circumstances where a defence of qualified privilege would appear to be available. On the Judge's findings, he would not have been able to establish an absence of honest belief on D's part to defeat the defence. Even if he had been able to do so, the burden of proof would be on him to make good his damages

[66] See RRAD[4.4] at 12/93, RRAR[4.3] at 13/120 and Response 15 of C's Part 18 Response dated 28 May 2014 at 14/154
[67] At [33] at 4/47

claim on the basis that D should reasonably have foreseen the publication to Friends consequent on the publication to DB.

65. The fact that the settings were default is not relevant to whether the publications to the Friends should be categorised as a republication or analogous. It could only be relevant to whether D knew or ought to have known that it was visible to the Friends. The Judge found that D did not know and C did not set out to establish that she ought to have known. Given that the Exchange was initiated by DB with a communication ostensibly directed solely to D, it is by no means obvious that D would be liable on a negligence test.

66. Finally, there are two topics that should be addressed. At the CMC provision was made for the possibility of expert evidence on Facebook. This was at C's request and was intended to be directed to the extent of publication. There was an issue as to whether publication could have gone beyond than the Friends. In the event, no evidence (expert or otherwise) was adduced by C to support any wider publication. It was never suggested that expert evidence was required in relation to responsibility for publication and there would have been limited material on which it could be based. D was not notified of the claim until shortly before the expiry of the limitation period when proceedings were issued. She had no access to the Exchange and was dependent on such information as was provided by C after proceedings were commenced. It was unclear what material was available to C. In the event, the parties simply relied on the admitted facts relevant to their respective submissions on the law.

67. At [34] the Judge referred to the fact that C could have spoken to DB on the telephone.[68] The availability of another form of communication cannot affect the correct legal test for the publication that did take place. It could only be relevant to its application to the facts. Since the Judge found that D was unaware that the Exchange was visible to Friends, her motive for declining to speak to DB on the telephone is irrelevant. However, in fairness to D, the Judge's finding at [12] does not reflect D's evidence.[69] She said that DB was not someone that she

[68] 4/47-48
[69] 4/36

wanted to speak to.[70] This is consistent with what she said in the Exchange. She added that she was at work, having opened her shop on the Sunday before Christmas. The Judge was candid about his lack of familiarity with social media. One of the reasons why such communications are so prevalent is that they give distance in comparison with a telephone conversation and it is possible to dip in and out of them if a distraction arises. It is not equivalent to being on the telephone for 2 hours 18 minutes.

David Price QC
For the Defendant/Appellant
22 March 2016

[70] See the transcript of day 2 of the trial at p212 at 8/78