Section 6

Overview

1. The grounds on which the Appellants submit that the Court of Appeal and Warby J ("the Judge") fell into error are set out in [2] to [7] below. [8] to [10] are directed to the criteria for permission to appeal to the Supreme Court. The propositions of law on which the grounds are based arise from the ordinary meaning of the words of section 1 of the Defamation Act 2013. This is addressed in [11] to [16]. The Appellants' primary submission is that it is not necessary to go beyond the words. Alternatively, the Parliamentary debate and preceding developments in the common law, addressed in [17] to [25], support the Appellants' case. The ordinary words and the legislative history are inconsistent with the approach of the Court of Appeal for the reasons set out in [26] to [35].

The Grounds of Appeal

The construction of section 1 – "has caused or is likely to cause"

2. The Court of Appeal was wrong in its construction of s.1 and the Judge and Bean J in *Cooke & Anor v MGN Ltd & Anor* [2015] WLR 895 were correct. S.1 requires a claimant to prove that the publication complained of has caused serious harm to his or her reputation as at the date of the determination or that it is more likely than not that such harm will be caused in the future. "Is likely" is not to be equated with a "tendency". Parliament was not simply giving statutory status to *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985 and raising the threshold from "substantial" to "serious".

3. Further, the Court of Appeal was wrong to reject the grounds on which the Appellants challenged the Judge's decision, as set out in [4] to [7] below.

Drawing the inference of serious harm in the absence of any evidence of harm

4. The Judge was wrong to infer that serious harm had been caused to the Respondent's reputation by each of the Appellants' articles in the absence of any evidence of harm in the period of 18 months since their publication:

    4.1. In accordance with the approach of Bean J in *Cooke* at [43], in the absence of any evidence of harm, the inference should only be drawn where the circumstances are such that the publication of the statement is "so obviously likely to cause serious harm to a person's reputation". The circumstances in which it is permissible to draw an inference depend on the nature of the fact that requires proof. If it is not obvious that serious harm will be caused to a claimant's reputation by the publication complained

of and the claimant has not adduced any evidence of harm having been caused, what is the principled basis for drawing the inference of serious harm?

4.2. It is not enough to assert that evidence of harm to reputation is difficult to obtain. At best, this could be an argument against having a requirement to prove serious harm. In any event, the assumptions made by the Judge at [138] about human behaviour and the related issue of availability of evidence of harm do not withstand proper scrutiny, particularly in the modern era. There are a number of ways in which harm to reputation can be evidenced which do not involve overt shunning.[1] It is not helpful to compare how frequently evidence of harm has been adduced or perceived to be available prior to the 2013 Act. Claimants did not require it and it may be that many cases were pursued where no serious harm was caused. 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 and nor is the "grapevine".

4.3. The Respondent did not invite a finding of "obviousness", the Judge did not make it and there would be no basis to do so in the particular circumstances of the present case. It involves an unnamed foreign claimant with limited connections to the jurisdiction in relation to allegations attributed to Afsana, his former wife, in the context of contested family proceedings, in articles directed primarily at the UAE legal system. The trial embarked on an unnecessary assessment of the precise extent of the Respondent's connections in order for the Judge to estimate how many readers would have understood the articles to refer to him. There was no direct evidence that there were any such readers. If necessary, it can be shown that the Judge's estimate was based on errors in his approach to the evidence. The more fundamental point is that the focus should be on evidence of harm, rather than numbers and the precise extent of the connections with the UK. If a claimant has a substantial reputation in the UK there is much more likely to be evidence of harm arising from a UK media article.

4.4. The inference of serious harm should not be drawn merely because the article is published by the mainstream media and an imputation can be derived from it by

[1] 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. Reactions to a media article can be evidenced by a wide range of social media.

operation of the common law principles for determining meaning that involves conduct properly to be described as seriously wrong. 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.

4.5. For example, the common law's hypothetical reasonable reader is treated as reading the article once. The final sentence is the end of the exercise. Any defamatory imputation that is derived from it is set in stone. If there are a million readers the claimant is treated as having been defamed a million times. The reality is that a reader who has no pre-existing knowledge of the claimant will generally forget whatever he derives from the article shortly after reading it.[2] Quality - the nature of the readers and their relationship to the claimant - is often more important than quantity.

Whether the common law "repetition rule" applies to a section 1 determination

5. The Judge was wrong not to take into account that the relevant allegations were attributed to Afsana and identified as contested. The common law "repetition rule" dictated that, for the purposes of determining the meaning of the articles, the allegations had to be treated as true. There is no reason to transplant this rigid and artificial rule to a s.1 determination. Readers do not generally assume that an allegation is true simply because it has been made. There are a variety of factors, such as the circumstances in which it is made and the apparent availability of independent corroboration, that impact on a reader's assessment of truth. Untested claims made in the context of an acrimonious divorce attributed to the wife or "her family" are irrelevant to the Respondent's competence in his chosen field. In a personal context, people tend to make judgments on others on the basis of what they know of them, not how they are portrayed by former spouses in a short-lived unsuitable marriage. The Judge's reference (at [138]) to "trusting him [the Respondent] over the publishers" mischaracterises the nature of the contest, which was between the Respondent and Afsana.

Whether the rule in Dingle v Associated Newspapers Ltd applies to a section 1 determination

6. The Judge was wrong to hold (at [69] – [87]) that the rule in *Dingle v Associated Newspapers Ltd* [1964] AC 371 (HL) applied to a s.1 determination:

[2] See, again, the observations of Diplock LJ in *Slim* at 171D. There are a number of other judicial statements in relation to the transience of a newspaper article.

6.1. Its ratio and the issues debated within it relate to the admissibility of material in mitigation of damages. In contrast to the position now, Mr Dingle had no obligation to establish serious harm to his reputation consequential on the article complained of in order to be in the position to obtain an award of damages.

6.2. The Judge failed to take into account that Afsana's allegations were reported in many media and other publications, a number of which have a greater print and/or online readership and/or prominence than the Appellants' newspapers and/or named the Respondent and/or were published prior to the Appellants' Articles and/or referred to an injunction granted in 2002 by the Phoenix Municipal Court prohibiting the Respondent from stalking or otherwise harassing a former partner. The Evening Standard article was published on 10 February 2014, by which time there had been widespread publication of Afsana's allegations throughout the media and any grapevine effect would have taken place. The Judge simply relied on the total number of readers of the article in isolation. If there were any who knew the Respondent, it is highly likely that they would also have been aware of Afsana's allegations by then.

Readers who get to know the claimant after the section 1 determination

7. The Judge wrongly took into account (at [140] – [142]) in determining "has caused" that there would be people who read the articles and did not know the Respondent but may get to know him at some unspecified point in the future. The Judge relied on two "extreme" examples in the cases cited by him that bear no resemblance to the present case. It would be fanciful to suggest that a person who got to know the Respondent would connect him to an article read years previously; and the Judge did not do so. Future contact of this kind could only be relevant to "is likely to cause" on the basis that at the time of becoming acquainted with the Respondent, that person would seek to find out information about him. The most common method would be an internet search. This would reveal numerous articles containing Afsana's allegations – including the Appellants' articles in an amended form – and widespread coverage of the present case.

The criteria in Practice Direction 3.3.3

8. The above grounds raise arguable points of law of general public importance. Freedom of expression is a fundamental human right. The balance to be struck between it and the protection of reputation is of general public importance. The stated purpose of Parliament in the 2013 Act was to rebalance defamation law in favour of freedom of expression in

order to reduce the number of claims and the "chilling" effect of the threat of a claim.[3] S.1 is a "key aspect" of this process.[4] It is novel; the tort of defamation was previously actionable per se. All the proposed grounds of appeal raise fundamental issues as to the nature of the s.1 requirement and how it can be satisfied. The grounds set out in [6] and [7] are more specific, but relate to circumstances that commonly arise in the coverage of news stories in the modern era. In relation to [7], the distinction between "has caused" and "is likely to cause" is important because the assessment of future harm (and any substantive defences available if it is likely to be caused) must be judged by reference to the form of the article at the time it is read. Parliament intended to reward publishers that made appropriate amendments to online material following a complaint.[5]

9. Assuming that the appeal raises arguable points of law of general public importance, it is difficult to see on what basis it could be said that they ought not to be considered now by the Supreme Court. The present case is the first appellate decision on s.1. Since *Cooke* was decided in July 2014 Bean J's interpretation of "has caused" and "is likely to cause" has been regarded as uncontroversial and followed by a number of judges without question. It is plainly desirable that any arguable points of law in relation to s.1 are resolved by the country's most senior appellate court as soon as possible.

10. The Respondent submitted to the Court of Appeal that "even if the Supreme Court were to revert to Bean and Warby JJ's construction of s.1 – which seems unlikely to say the least – there seems to be no prospect of that Court overturning Warby J's factual finding of serious harm based on that interpretation". For the reasons previously stated, the Appellants' challenges to the approach of the Judge raise issues of law of general public importance which are arguable. Success for the Appellants on one or more of these issues of law should result in a reversal of the s.1 determination.

The words of section 1

11. S.1(1) provides: "A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant".

12. S.15 provides that ""publish" and "publication", in relation to a statement, have the meaning they have for the purposes of the law of defamation generally" and ""statement" means words, pictures, visual images, gestures or any other method of signifying meaning". In a

[3] See for example, the Ministerial Foreword to the draft Bill and the Report of the Joint Committee on the Draft Defamation Bill at [18]
[4] See, for example, The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill, February 2012.
[5] See, for example, the Joint Committee report at [30].

newspaper case it must mean the publication of the specific article complained of and not the composite publication of the imputation complained of by all media outlets.

13. "Has caused" is past tense and clearly refers to something that has happened prior to the date of the determination. It is contrasted with "is likely to cause" which clearly refers to the future. The words "is likely to" or "would be likely to" are commonly used in statutes to refer to a future event or consequence.[6]

14. The ordinary meaning of reputation is "the beliefs or opinions that are generally held about someone or something". Harm to reputation must involve a lowering of opinion.

15. If a person is already aware of a reported imputation, seeing a further report in terms that are not materially different is unlikely to cause any further lowering of estimation. Nicola Davies J was therefore correct to observe at an earlier hearing that taking similar publications into account: "seems no more than common sense".[7]

16. "Serious harm" has a well-established meaning in other contexts, involving a high level of adverse consequence.[8] "Serious" is word that necessarily imports a consideration of actual or likely consequences. If any harm to reputation has not had and is not likely to have any adverse consequence, on what basis can it be characterised as serious?

The legislative history in the context of preceding developments in the common law

17. The common law adopts a two-stage approach to determining whether a statement is defamatory. Both involve considering the wording of the statement in isolation; the extent and effect of their publication is irrelevant. First, what imputations are conveyed by the statement, as determined by established principles of construction? Second, does any imputation tend to make right-thinking members of society generally think the worse of the claimant?[9] This is directed solely to its moral quality. If so, the statement is actionable as a defamation even if its publication did not cause any harm to the claimant's reputation. As was memorably stated by Goddard LJ in *Hough v London Express Newspaper Ltd* [1940] 2 KB 507 at 515:

> "If words are used which impute discreditable conduct to my friend, he has been defamed to me, although I do not believe the imputation, and may even know that it is untrue."

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[6] See for example s.12 of the Human Rights Act 1998 as interpreted by *Cream Holdings Ltd & Ors v. Banerjee & Ors* [2005] 1 AC 253 and the examples given in *Cream* at [21]

[7] The transcript of proceedings before Nicola Davies J at pp55-56. Judgment reference [2015] EWHC 915 (QB).

[8] 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.

[9] This was the formulation of Lord Atkin in *Sim v Stretch* [1936] 2 All ER 1237 at 1240, which was most commonly cited to juries.

18. The Human Rights Act 1998 incorporated Article 10 ECHR into English law. The Article 10 jurisprudence recognises that being sued for defamation (or the threat of such a claim) amounts to an "interference" with freedom of expression. The question therefore arose as to whether the limited common law requirements to establish a prima facie claim were sufficient to justify the interference involved in being sued. The availability of potentially costly substantive defences was felt to be insufficient protection. It was necessary to set a higher entry barrier at the pre-defence stage.[10] These concerns led to two material developments.

19. In 2005 the Court of Appeal established the *Jameel* jurisdiction[11] which enabled a claim to be struck out as an abuse of process where it disclosed "no real and substantial tort". The significance of this development is that it involved a consideration of all the circumstances at the date of the application in order to assess the gravity of any reputational harm that had been caused. The seriousness of the imputation was merely a factor. The imputation in *Jameel* was funding terrorism.

20. The main difficulties for a defendant were that the absence of harm did not necessarily lead to a finding of abuse and if there was any conflict of primary fact it was assumed that the claimant would succeed on it at trial.

21. In 2010 in *Thornton* Tugendhat J held that any definition of defamatory had to include a "threshold of seriousness". "Definition 9" was therefore amended to include the word "substantially" i.e. "substantially affects in an adverse manner the attitude of other people towards him, or has a tendency so to do". As the Judge noted at [15(5)]:

    "Although the word 'affects' might suggest otherwise, it is not necessary to establish that the attitude of any individual person towards the claimant has in fact been adversely affected to a substantial extent, or at all. It is only necessary to prove that the meaning conveyed by the words has a tendency to cause such a consequence".

    Other definitions such as that of Lord Atkins cited in [17] above merely refer to a tendency.

22. The limitation of the *Thornton* threshold is that it solely concerns the meaning of the words.

23. It may also be relevant to note that in *Jameel & Ors v. Wall Street Journal Europe Sprl* [2007] 1 AC 359 there was an unsuccessful attempt to require a corporate claimant to establish likely financial loss. At [152] Baroness Hale observed:

    "The tort of defamation exists to protect, not the person or the pocket, but the reputation of the person defamed. Indeed, as Tony Weir points out in *A Casebook on Tort* (10th edition, 2004, at p 519), it is so tender to a person's reputation that it allows him to claim

[10] See, for example, *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985 at [60] – [62].
[11] *Jameel v Dow Jones & Co Inc* [2005] 2 WLR 1614.

substantial damages without having to show that the statement was false, or that it did him any harm, or that the defendant was at fault in making it. In the case of an individual, all this is so well established that we have ceased to think it odd (if we ever did) and it would certainly take the intervention of Parliament to change it."

24. What appears normal to a defamation lawyer may appear odd to a layperson and vice-versa. Opinions can differ on the extent to which the law should require a defamation claimant to prove harm, if at all. Parliament carefully considered the issue and legislated in sufficiently clear terms in s.1.

The Parliamentary debate

25. As Bean J noted in *Cooke* at [34]:

"The 2013 Act was the product of extensive parliamentary scrutiny. A draft Bill was produced in March 2011 for public consultation and pre-legislative scrutiny by a Joint Committee of both Houses. The Joint Committee reported on the draft Bill on 19th October 2011. The Defamation Bill itself was then presented to the House of Commons on 20th May 2012 and after detailed consideration in both Houses received Royal Assent on 25th April 2013".

The following matters are evident from the extensive parliamentary scrutiny. They are inconsistent with the Court of Appeal's construction:-

25.1. All the circumstances prevailing at the date of the determination are relevant to the assessment of serious harm, including steps taken following publication to mitigate any harm.[12]

25.2. "Is likely to cause" is not to be equated with a "tendency" to cause.[13] The Explanatory Notes explicitly refer to "is likely to cause" in the context of future harm.[14]

25.3. Corporations must prove serious financial loss has, in fact, been caused.[15] This is relevant because if "is likely to" is equivalent to a "tendency", it must equally apply to s.1(2), in which case corporations can simply rely on the gravity of the imputation, in abstract, without having to prove any actual loss.

25.4. S.1 builds on *Thornton* and *Jameel*. This is also explicit in the Explanatory Notes.[16]

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[12] See, for example, The Minister of State in charge of the Bill, Lord McNally, Hansard, House of Lords 17 December 2012 Column GC423 and the Joint Committee report at [30].
[13] See, for example, The Parliamentary Under-Secretary of State for Justice, Jonathan Djanogly, Hansard, House of Commons, 12 June 2012, col. 259, cited by the Judge at [55].
[14] At [10] cited by the Judge at [54] and the Court of Appeal at [35].
[15] See, for example, Hansard, House of Commons, 16 April 2013, col. 267 – 283; Hansard, House of Lords, 23 April 2013, col. 1365 – 1384; Hansard, House of Commons, 24 April 2013, col. 913 – 921.
[16] At [11], cited by the Judge at [53] and the Court of Appeal at [35].

25.5. Parliament recognised that s.1 could involve a "front-loading" of cost but judged that the overall costs savings (in terms of reduced defamation litigation) would justify it.[17] This was a cost-benefit judgment that Parliament was entitled to make.

Why the approach of the Court of Appeal is inconsistent with all of the above

26. The conclusions of Davis LJ (with whom McFarlane and Sharp LJJ agreed) are set out in the sub-paragraphs of [82]. The most significant is at (1) which states that s.1(1) has simply given statutory status to *Thornton* and raised its threshold from "substantial" to "serious". If this conclusion is correct the s.1 hurdle will be satisfied solely by the seriousness of any imputation conveyed by the words by operation of the common law principles for determining meaning. The remaining conclusions in [82] consider the possibility of a "further issue" of serious harm after meaning has been determined. But if s.1 is simply an enhanced version of *Thornton* there will be no further issue for determination. Everything will turn on the seriousness of the imputations found at the meaning hearing.

27. [82(1)] is grounded on the analysis at [46] – [50] which concludes that "is likely" equates to the common law "tendency". It is said that there is little practical difference between a tendency and a likelihood. This ignores the particular context in which the tendency requirement has applied in defamation. It can be satisfied in circumstances where there is no likelihood of any harm being caused.

28. Further, the analysis fails to take into account the juxtaposition of tense in s.1 between "has caused" and "is likely to cause". These are presented as alternatives; one referring to the past, the other to the future. Contrary to [66], Bean J was correct to state that the dividing line between past and future cannot be the "moment" of publication i.e. when the presses roll or the article goes online. Even if it is assumed that harm for the purposes of serious harm is solely the act of reading, not all readers will read the article at exactly the same time and where the grapevine and other forms of republication are operative there will inevitably be some delay.

29. S.1 is clearly asking the court two questions as at the date of the determination: has serious harm to reputation been caused and, if not, is it likely to be caused in the future?

30. The Court of Appeal's construction cannot be reconciled with the juxtaposition of tense in s.1. The common law tendency is tense neutral because it views the wording of the

[17] See, for example, the Report of the Joint Committee on the Draft Defamation Bill at [29] and The Parliamentary Under-Secretary of State for Justice, Jonathan Djanogly, Hansard, House of Commons, 12 June 2012, col. 259.

statement in isolation. This is to be contrasted with s.1 which refers to "its [the statement's] publication. Further, if "has caused" is intended to refer to the "moment of publication" there is no single act of reading to which it can attach. In any event, if a tendency suffices, "has caused" becomes otiose.

31. As Davis LJ appears to accept, there can be no scope for "building" on *Jameel,* as was plainly intended by Parliament. To do so would entail a consideration of all the circumstances prevailing at the time of the determination, with the possibility of matters occurring subsequent to publication impacting on the viability of the tort. The Judge saw no difficulty in accommodating this. Davis LJ felt it would be undesirable.

32. This and the other factors on which the Court of Appeal relied to support its construction are, at best, arguments against requiring a claimant to prove that serious harm to reputation has been caused.

33. For example, the Court was concerned about the potential cost of early determinations of s.1. But as is apparent from [24.5] above, Parliament took this into account. Once the relevant legal principles are no longer in issue any s.1 disputes should be capable of swift and economic determination. It falls to the parties and, if not, the Court, to ensure that the costs are proportionate.

34. Throughout his judgment Davis LJ placed reliance on the longstanding presumption of damage to reputation, noting the finding of the Court of Appeal in *Jameel* that it was not inconsistent with Article 10 and based on "strong pragmatic reasons". Parliament took the view that the common law did not provide sufficient protection to freedom of expression and legislated in sufficiently clear terms to require proof that serious harm to reputation has been caused or is likely to be caused. This is incapable of being satisfied by any presumption of damage. It is unnecessary to consider the precise nature or current status of the presumption. Duncan & Neill opines that it is "doubtful" that it has survived[18] and the Judge at was of the view (at [60]) that it "will cease to play any significant role".

35. The points raised by Davis LJ (at [60] – [64]) in relation to limitation are more theoretical, than practical and can be addressed without injustice should they arise. Proof of serious harm to reputation is now part of the cause of action for defamation and time runs from when it has occurred. The issue would only arise where a claimant brought a claim more than 1 year after the date of first publication and contended that the harm had occurred subsequent to it. The general discretion to extend time would be available, if required.

[18] [4.06] f/n 3.