APPEAL NO:
CLAIM NO: QB-2019-004612

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
THE HONOURABLE MR JUSTICE SAINI [2021] EWHC 2988 (QB)
BETWEEN : -

FIONA GEORGE

Appellant/Claimant

- and -

(1) LINDA CANNELL
(2) LCA JOBS LIMITED

Respondents/Defendants

RESPONDENTS' SKELETON ARGUMENT FOR APPEAL: 28 JANUARY 2022

Reading List: Judgment below, PTA form, GOA, APOC, Appellant's skeleton argument for the appeal ("ASA"), this skeleton argument and the authorities referred to within the skeleton arguments, so far as is necessary

Contents

Overview

1. It appears to be common ground that "calculated" in section 3(1) of the Defamation Act 1952 means "more likely than not" and is to be judged objectively.[1] There are

[1] ASA[2]. There is Court of Appeal authority to this effect. See, *Tesla Motors Ltd v BBC* [2013] EWCA Civ 152 at [27] and *Tinkler v Ferguson* [2021] 4 WLR 27 at [37].

three interpretations relevant to the present appeal of what s.3(1) requires a claimant to demonstrate is more likely than not:

1.1. Some financial loss has been caused by the publication of the words complained of and this determination is made by looking back from the date of the trial on the basis of any probative fact including what occurred after publication ("the historic test"). This was J's interpretation, and it is correct.

1.2. Some financial loss would be caused by the publication and this determination is made on the basis of any probative fact in existence at the date of publication ("the forward-looking from publication test"). In most cases, this will result in the same answer. It will do so in the present case for the reasons set out in the RN. It would generally only make a difference if an unlikely event occurred following publication.

1.3. The imputation conveyed by the words complained of, viewed in isolation, has a tendency to cause financial loss and the court is prohibited from considering any other probative fact in relation to likely loss, such as the number of publishees and whether the words had or were likely to have any impact on them ("the tendency test"). This is the interpretation contended for by C. It is not put in such stark terms. The case as stated in ASA[2] and GOA[2] is that "the evaluation must focus on those words". However, it appears that C is contending for an exclusionary rule equivalent to that for determining defamatory meaning at common law. If that is not C's case, it is unclear from the ASA or GOA what facts other than the words are accepted to be admissible.

2. C is driven to such an interpretation because of J's findings of fact, none of which are in issue in the appeal.[2] J rejected C's primary case that the falsehood complained of – the existence and breach of a post-employment restriction against dealing with D2's clients – had been published to all the clients, numbering around 100. The only publications found to have taken place were to two individuals (Butler and Lingenfelder) on whom the falsehood had no impact and was not likely

[2] There appears to be a desultory challenge in ASA [91] which could be answered if necessary. However, permission to appeal was granted to solely in relation to the correct interpretation of s.3(1) as is reflected in the GOA.

to have had any impact as at the date of publication. Butler had already decided not to do any business with C. Lingenfelder, C's "director", did not want her to deal with D2's clients in any event and C had the means to demonstrate to him that there was no post-employment restriction, which she did shortly after publication. Any interpretation of s.3(1) for which C contends must exclude such facts in order for her to succeed.

3. The tendency test (or any test which excludes probative facts on causation) is inconsistent with the essential reasoning of three binding Court of Appeal decisions, a number of first-instance decisions, the modern approach to freedom of expression and civil litigation which demands a meaningful harm hurdle, the accepted interpretation of s.2 and the principles of statutory interpretation. There has been no decision since the 1952 Act was passed that provides any support for the tendency test. Further, to adopt it would be obviously undesirable, as the present case illustrates.

4. Even if the tendency test was adopted and liability thereby established, J's alternative finding of nominal damages cannot be challenged or enlarged by an award for injury to feelings. Insofar as damages for injury to feelings are available in a malicious falsehood claim, it is only where loss or harm occurs and the injury to feelings is connected with it. There was no loss or harm consequent on the publications found by J and insofar as C suffered injury to feelings it was based on a misconception as to the number of publishees and/or that harm had been caused. Further, the claim is now a *Jameel* abuse of process and should not consume any further costs or court resources in the form of a retrial on damages, as contemplated by C.

Binding authorities inconsistent with the tendency test

5. The tendency test is inconsistent with the essential reasoning of three binding Court of Appeal decisions: *Sallows v Griffiths* [2001] FSR 15, *Tesla Motors Ltd v BBC* [2013] EWCA Civ 152 and *Tinkler v Ferguson* [2021] 4 WLR 27. Each establishes that s.3(1) is directed to the effect of the publication complained of. None of the exceptions in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 apply. A previous interpretation of a statutory provision is not *per incuriam* merely

because a subsequent court regards it to be incorrect, unless it was decided in ignorance of the terms of a statute or a rule having the force of a statute, neither of which apply in the present appeal.[3]

6. The Court is therefore bound to reject the tendency test (or any test which precludes reliance on facts relevant to causation of likely loss), even in the unlikely event that it considers it to be correct. The submissions in [50]-[64] below on statutory interpretation are without prejudice to this overriding submission.

Tesla Motors Ltd v BBC

7. *Tesla* is the leading modern authority on s.3(1) and was relied on in *Tinkler.* It was an application to amend the POC. Permission was refused on the ground that the case on special damage and s.3(1) did not have a real prospect of success or alternatively did not pass the *Jameel* threshold.[4]

8. The programme complained of contained a number of criticisms of the performance of an electric car that, viewed in isolation, would have put off a potential purchaser. The reason that the s.3(1) case did not have a real prospect of success was that the programme had been broadcast on numerous previous occasions (outside the limitation period) by the time of the broadcast complained of and it was likely that any loss arising from its contents would already have been caused.[5] This was a factor extraneous to the words complained of, irrelevant to a tendency test.

9. At first instance Tugendhat J had also found that in relation to each false statement complained of in the programme there was a true statement not complained of relating to the same matter which was unfavourable and that this cancelled out any likely loss from the false statements. While the Court of Appeal disagreed on the facts, it did not question that, in principle, such an argument would be available to a defendant.[6] The truth of words not complained of is a further extraneous factor. This is not simply because the words are not "the words upon which the action is

[3] Lord Greene MR in *Young* at p729.
[4] [28], [30], [46] re special damage, [47] - [50].
[5] [31], [36]-[37] & [47] - [50].
[6] [34]-[36].

founded". It is because the truth or falsity of words is distinct from any inherent tendency to cause loss.

10. Given the obvious conflict between *Tesla* and C's case, ASA [46]-[49] seek wrongly to explain the decision as merely an example of *Jameel*. They do not engage with the admissibility of the pre-existing broadcasts in the s.3(1) evaluation or the Court's general observations as to causation.

11. *Tesla* is also relevant in relation to the distinction between special damage and s.3(1). The issue is over-complicated in the ASA.

12. A claim for special damage requires the identification of the amount of the loss and particularisation of how it has been caused by the publication complained of.[7] At trial the court will determine whether the factual averments as to the amount and cause have been proved.

13. A claim under s.3(1) requires the identification of the nature of the loss and the mechanism by which it is likely to be caused by the publication complained of.[8] If the only issue was the tendency of the words, this would not be necessary. While the claimant can refer to generalities e.g. "in the ordinary course of things derogatory statements about any commercial product are likely to put off some potential customers with a consequent loss of revenue from sales", the defendant can counter them with specific facts extraneous to the words which are relevant to whether any financial loss is likely to be caused or has been caused. That is why Tesla's pleading satisfied the nature and mechanism requirements, but the case was found not to have any real prospect of success on the facts.[9]

14. There is no difference between "pecuniary damage" and "financial loss". Modern statutes, such as s.1(2) of the Defamation Act 2013, refer to "financial loss".[10]

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[7] See [37] & [46].
[8] At [37].
[9] [37] & [47]-[50].
[10] The term is not "novel" as suggested by ASA[21]; it is used in the statutes below. The only point made by Lord Sumption at [15] in *Lachaux v Independent Print Ltd* [2020] AC 612 was that the serious financial loss in s.1(2) of the 2013 Act had to be caused by serious loss to reputation, whereas special damage did not. For the use of "financial loss" see, for example, Administration of Justice Act 1982 s72; Administration of Justice Act 1985 s21; Anti-social Behaviour, Crime and Policing Act 2014 s90; Armed Forces Act 2006 s84; Building Societies Act 1986 Schedule 2 Part 1; Building Societies Act 1997 s36; Charities Act 2011 s195; Charities Act 2011 s213; Children Act 1989 s11o; Civil Jurisdiction and Judgments Act 1982 Schedule 1; Companies Act 2006 s83; Companies Act 2006 s1206; Coroners and

ASA[21] states: ""Pecuniary damage" means damage in the form of monetary or financial damage; damage that hits the claimant in his or her pocket". Insofar as this is intended to suggest something other than financial loss, it is wrong and unsupported by authority.

15. "Special damage" is often used interchangeably with "financial loss" or "pecuniary damage" in judicial statements of principle.[11] The only distinction relates to the level of particularisation required for special damage.[12] This is evidently why s.3(1) juxtaposes "special damage" with "pecuniary damage". It is not an attempt to limit the matters that may be taken into account in determining whether financial loss is likely, as suggested in ASA[21].

Tinkler v Ferguson

16. A similar approach to causation and reliance on facts extraneous to the words can be found in *Tinkler.* It was part of the Court of Appeal's essential reasoning in upholding the conclusion of Nicklin J that the s.3(1) case had no real prospect of success. This was one of the grounds on which the claim was struck out.

17. The publication complained of was an announcement to the Stock Exchange which was critical of the claimant's management. Nicklin J concluded that: "If the Announcement had been the only thing of significance publicly to affect Mr Tinkler, then an inferential case based on a drop-off of offers of directorships or investment opportunities might have had some prospect of success".[13] However, it was only an early incident in a wider battle, played out in public, with other previous and subsequent incidents much more likely to have caused pecuniary damage to him.[14]

Justice Act 2009 Schedule 7, Part 1; Courts Act 2003 s15; Criminal Justice Act 2003 s116; Data Protection Act 1998 s31; Defence Reform Act 2014 s46; Employment Act 2008 s7; Employment Rights Act 1996 s24; Employment Rights Act 1996 s163; Family Law Act 1996 Schedule 7 Part III; Farm Land and Rural Development Act 1988 s2; Financial Services and Markets Act 2000 s229; Friendly Societies Act 1992 Schedule 2; Greater London Council (General Powers) Act 1973 s23; Infrastructure Act 2015 s23; Juries Act 1974 s19; Legal Services Act 2007 s64; Local Government Act 1972 s173 & s173A; Local Government, Planning and Land Act 1980 s24; Merchant Shipping (Liner Conferences) Act 1982 The Text of the Code; Merchant Shipping Act 1995 Schedule 5A; Protection from Harassment Act 1997 s3 & s8; Railways Act 2005 Schedule 2; Reserve Forces Act 1996 s83 – 85; Sexual Offences Act 2003 s136o; Solicitors Act 1974 s87; Statutory Corporations (Financial Provisions) Act 1974.

[11] See, for example, Lord Hoffmann at [90] and Lord Hope at [97] in *Jameel.*

[12] See the references to *Tesla* above and *McGregor on Damages* 21st Ed. [51-20].

[13] [94(iii)].

[14] [94(iii)].

18. The Court of Appeal identified one of the two relevant s.3(1) questions as: "is there an arguable case that they [the losses] were caused by the publication of the RNS Announcement?".[15] It relied on pre-existing and subsequent facts in answering in the negative and concluding, essentially for the reasons given by Nicklin J, that the s.3(1) case was not viable.[16] One of the facts relied on was an earlier announcement (not complained of) the effect of which would be impossible to separate out from the announcement complained of.[17]

19. The analysis of *Tinkler* in ASA [57]-[62] suffers from a similar failure to engage with difficulties that it presents to C's case. There is criticism of the reliance on post-publication facts, but nothing is said about the reliance on pre-existing facts. As previously noted, the pre-existing facts in the present case are fatal to C's s.3(1) case.

Sallows v Griffiths

20. In *Sallows* the plaintiff and first defendant were directors of a company and the second defendant was a shareholder. The defendants sought to procure the plaintiff's removal by making trumped-up charges of dishonesty which were communicated to him at a board meeting, also attended by the company's solicitor, at which he was dismissed. The malicious falsehood claim was based on publication to the solicitor and the company at the board meeting and a further alleged publication to the personal assistant of one of the defendants. A separate claim against the company for wrongful dismissal was settled with a payment of damages. The judge awarded £5,000 damages for malicious falsehood. The defendants appealed on the basis that neither the solicitor nor the personal assistant could cause loss to the plaintiff and that there was no separate publication to the company, or if there was, any loss was indistinguishable from the loss for wrongful dismissal. The Court of Appeal accepted the defendants' submissions and allowed the appeal. Its essential reasoning is evident from the passage at [17] (highlighted by J at [205]) and reproduced in headnote (1). The s.3(1) test requires the court to consider the circumstances of publication in determining whether

[15] [76].
[16] [77]-[83].
[17] [81].

consequent financial loss is likely and if those circumstances provide no evidence of likely loss the claim will fail.

21. ASA [41]-[44] seek to explain the decision solely by reference to the "double recovery" point and assert that it is difficult to elicit any conclusions of law of general application. They fail to cite or address the clear statement of principle in [17], relied on by J: "Whilst the plaintiff did not have to show that he had sustained special damage, he did have to show that the statements in the circumstances in which they were made were calculated to cause damage to him in the way of his office, profession or business". There is no attempt to reconcile the need to consider the circumstances in which the statement was made with C's case that s.3(1) is solely concerned its content.

Other authorities inconsistent with the tendency test

IBM v Websphere Limited [2004] FSR 39

22. In *IBM* the publication was a leaflet distributed to customers of IBM which accused them of making improper threats to a smaller trade competitor. At [84] Lewison J rejected the s.3(1) case on the ground that "it does not seem to me to be likely (as opposed to possible) that any of IBM's customers were actually diverted by the leaflet". He relied on IBM's large advertising spend, the very limited distribution of the leaflet, its amateurish quality, and the absence of any complaints from any of its customers.[18] These factors were all extraneous to the content of the leaflet and the last was post-publication.

Niche Products Ltd v MacDermid Offshore Solutions LLC [2014] EMLR 9

23. In *Niche Products Ltd*, cited by J at [193], the publication included statements that were arguably likely to lead to lost sales of the claimant's product in favour of the defendant's. It also contained statements commending the defendant's product which were not complained of, but which were likely to be a significant cause in any lost sales. In reliance on *Tesla*, the defendant submitted that this was fatal to the s.3(1) case. Birss J accepted that the likely effect of the words not complained of was relevant to s.3(1) but concluded that there was a properly arguable claim

[18] The law was stated at [74].

that some real proportion of the likely lost sales were more likely than not to have been caused by the statements complained of.[19]

Peck v Williams Trade Supplies Ltd [2020] EWHC 966 (QB)

24. In *Peck*, a defamation and malicious falsehood claim, the publication was an email to a single prospective employer which alleged that the claimant was unfit for the job for a number of reasons. Nicklin J relied on *Tesla* [27] to state that ""calculated to cause pecuniary damage" requires a claimant to show that it is more likely than not that s/he has been caused pecuniary damage by publication of the falsehood" and then noted that "the issue of causation remains important, whether a claimant relies upon a plea of special damage or upon s.3 Defamation Act 1952".[20] In consequence, on a preliminary trial on meaning, it was not necessary or appropriate to make a determination for the purposes of the malicious falsehood claim because "the only relevant question [on meaning] is what meaning did the publishee understand the publication to bear and, if there is a dispute about it, whether this meaning is an available meaning for the purposes of malicious falsehood".[21]

25. Insofar as any dispute as to meaning is relevant to whether the publication is likely to cause financial loss, Nicklin J is clearly right that what matters is the actual understanding of the publishees. This is inconsistent with the tendency test and is therefore criticised in ASA [51]-[56]. C is driven to suggest that causation is only relevant where special damage is alleged. This is plainly wrong and inconsistent with *Tesla* and *Tinkler.*

26. ASA[56] also criticises the distinction drawn by Nicklin J at [16] between publication to a large, but unquantifiable, number of publishees and publication to a single person, submitting that it is incoherent and unworkable, would result in a two-tier system and undermine the one of the central objectives of s.3(1). This is said to be "to cure the mischief of cs who have been made the subject of malicious falsehoods having no remedy because in practical terms they are not in a position to call witnesses to give evidence about actual financial loss, i.e., publishees, who

[19] [50]-[54].
[20] [15].
[21] [16].

would state that they interpreted the words complained of in a way that caused them to stop doing business with the c".

27. It is accepted that the objective of s.3(1) was to provide a remedy where financial loss was likely to have occurred, but special damage could not be alleged and proved. This supports the practical distinction made by Nicklin J in relation to extent of publication. As J correctly recognised at [172], making findings as to the circumstances of publication in cases of limited publication is a different and more precise exercise than in those concerning wide publication. In the former case, the court is likely to have the opportunity of receiving evidence from or in respect of most publishees. There is therefore greater scope for proving specific financial loss if it has occurred and less or no scope for reliance on s.3(1) if it has not, depending on the extent to which the absence of causative financial loss can be definitively ascertained.

BHX v GRX [2021] EWHC 770 (QB)

28. In *BHX* the claimant and defendant were brother and sister, and the publication was a message to their father. Nicklin J reviewed the relevant legal principles at [55(10)-(12)], part of which was cited by J. He concluded that any attempt to rely on s.3(1) would fail and took into account the father's response to the message.[22]

The absence of any authority supporting the tendency test

29. ASA does not identify any authority that supports the tendency test.

Fielding v Variety Incorporated [1967] 2 QB 841 (CA)

30. There is no reference to *Fielding* on which C strongly relied before J. It does not assist C for the reasons given by J at [212], most significantly, that liability was not in issue.

Quinton v Peirce [2009] FSR 17

31. There is passing reference to *Quinton* at ASA[45] and the bald assertion that it supports C's case. The parties were district council candidates. The publication

[22] [61].

was an election leaflet which alleged that the claimant supported significant and unwanted housing development in a rural area. The claimant alleged that the leaflet had caused him to lose the election and, in consequence, the allowances to which he would have been entitled, if re-elected. This was relied on as special damage and in support of an alternative s.3(1) case.

32. The malicious falsehood claim failed on falsity and malice. As recorded in the headnote, Eady J's conclusions on special damage and s.3(1) were obiter. They were dealt with briefly. At [50] he recorded the defendant's submissions based on *IBM v Web-Sphere* [2004] FSR 39 at [74]. This included that "'calculated" to cause the Claimant pecuniary loss is a matter to be judged, not by reference to what might subsequently have happened, but rather as at the time of publication (i.e., during the period when the leaflet was being distributed prior to the election itself)". *IBM* [74] is not authority for such a proposition and it is evident from [84] that Lewison J took into account the absence of customer complaints following distribution of the leaflet.

33. At [85] and [86] Eady J concluded:

> "85. I thus reject the case based on this tort. I will consider, however, the other outstanding questions. Were the words calculated to cause Mr Quinton pecuniary loss? This is not entirely easy, but on balance I conclude that they were. It is, I recognise, highly technical. Nevertheless, I do think that (judged at the time of publication) the words published were likely to put in jeopardy his council allowances. He may well have found himself, if elected, out of pocket for the reason that his expenses outweighed the allowance, but that would be to take the analysis too far and, what is more, on a completely speculative basis.
>
> 86. When I turn to the question of actual financial loss, I conclude that Mr Quinton has not discharged the burden of proving causation. The leaflet may well have played a significant part in swinging the election Mr Peirce's way, but there were also other factors at work such as, for example, what appears to have been a high turnout of Liberal Democrat supporters in the ward. I cannot say that overall I am persuaded that it was the leaflet which caused Mr Quinton to lose his seat. Nor can I be satisfied to the required extent that he would, if elected, have been appointed a committee chairman, so as to qualify for the additional allowance. Evidence could have been introduced in support of that claim, but it was not."

34. There is an inconsistency between the two findings, which is itself inconsistent with Court of Appeal's reasoning in *Tesla* and *Tinkler*. The only route to the allowances was to win the election. In relation to the special damage claim, the Judge was unable to find that the leaflet caused the defeat. In the circumstances, this was

also fatal to s.3(1). Whether the leaflet would be likely to "put in jeopardy" the allowances, whatever that means, was insufficient to support a finding of probable loss.

35. In any event, *Quinton* is not authority for a tendency test. While Eady J was of the view that s.3(1) had to be judged as at the date of publication, there is nothing to suggest that only the tendency of the words could be taken into account.

Calvet v Tomkies [1963] 1 WLR 1397 (CA)

36. ASA [39]-[40] submit that *Calvet* "establishes, contrary to the conclusion reached in the Judgment, that in a s.3(1) case consideration of how the offending publication actually affected the pecuniary position of the c is irrelevant". This is misconceived. As is apparent from the headnote, the decision related to the defendants' unsuccessful application for discovery which went beyond the limited averment in the plaintiff's pleading in relation to s.3(1). The publication was a newspaper article which reported the plaintiff actress having said that Hollywood was "vicious, corrupt and cruel".

37. The only averment in support of s.3(1) was that publication of the statements "was and is calculated to cause pecuniary damage to the plaintiff in that they will prevent her obtaining employment as a film actress in Hollywood and elsewhere". It was common ground that this was not an allegation of special damage, merely an allegation of general damage. The defendants sought discovery of documents relating to the plaintiff's earnings in advance of a retrial. As Lord Denning MR noted: "The argument before us depends entirely on what is relevant in these pleadings".[23] In the absence of any allegation of any specific loss of earnings or general loss of business consequent on the article there was no basis for the discovery sought.

38. At the original trial the plaintiff had given evidence indicating that she had lost a lot of business by reason of the article. Lord Denning was not prepared to decide whether such evidence was admissible.[24] He did make clear that she could not

[23] At 1399.
[24] At 1400.

introduce by a side wind evidence of special damage, actual loss, or lost engagements.

39. The decision is not authority for the general proposition contended for in ASA[40]. Further, there is nothing in the judgment that purports to limit the ambit of probative evidence to be relied on by a defendant in opposition to a s.3(1) case.

Gatley on Libel and Slander 12th edition

40. For completeness, it is worth noting the statements in *Gatley* which are inconsistent with a tendency test. If the court's interpretation of s.3(1) was faulty one would have expected some recognition of this possibility in *Gatley* or some other commentary.

41. *Gatley* [21.14] states: "The claimant must plead and prove with sufficient particularity that it was more likely than not that the damage referred to in s.3(1) was caused by "the words upon which the action is founded"". This requires him to give particulars of the allegedly probable damage and the grounds relied on for saying that it is more likely than not".

42. [21.15] states: "Whether the claim is made for special damage or under s.3, the damage must be such as directly and naturally (or naturally or probably) results from the words. The defendant will not be liable where the damage is attributable not to his words but to some other unconnected fact or circumstance."[25]

The modern approach to freedom of expression and civil litigation

43. It is now well-established[26] that:

    43.1. The fact of being sued at all is a serious interference with the defendant's freedom of expression (because of the financial risks and hassle and consequent future chilling effect) which requires justification as a necessary and proportionate protection of a sufficiently substantial right of the claimant; and

[25] *Sallows v Griffiths* [2001] FSR 15 is cited in the footnotes.
[26] See for example, *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR at [60] to [63]. See, for example, *Axel Springer AG v Germany* [2012] EMLR 15 at [83] in relation to Article 8.

43.2. The court has its own interest in ensuring that its resources are not committed to a claim where little is at stake.[27]

44. These factors led to the imposition of a threshold of seriousness in the determination of defamatory meaning and ultimately the enactment of the serious harm test in s.1 of the Defamation Act 2013, which supplants the common law tendency test.

45. ASA[34]-[37] submit that the requirement to prove falsity and malice provide a sufficient Article 10 safeguard and suggest that the court should have no sympathy with a malicious defendant. There are a number of difficulties with this submission:

45.1. It is inconsistent with the established recognition in domestic and Strasbourg jurisprudence that being sued at all, is a serious infringement of the right to freedom of expression that requires justification.

45.2. A meaningful harm hurdle equally protects non-malicious defendants. It allows any potential defendant to avoid the costs and hassle of litigation, or if sued, to avoid the potentially substantial costs of rebutting a case on falsity or malice, by relying on an evident absence of loss. This remains a relevant factor in the present case. Ds have grounds to challenge J's approach to malice, which would give rise to further costs and court time in the appeal. However, it is unnecessary for them to do so because they have a sufficiently strong rebuttal of the s.3(1) appeal.

45.3. The court has its own interest in ensuring a meaningful harm hurdle. It should not waste its limited resources in policing non-defamatory falsehoods which have caused no loss, irrespective of whether they were published maliciously.

45.4. This case is a paradigm of the need for a meaningful harm hurdle. The trial occupied a week of court time, when it should have been apparent to C's legal representatives that any publications that could be proved had not caused any harm and the inferential case on wider publication was speculative. C's "die hard" approach was intimately connected with the huge costs and ATE

[27] See, for example, *Jameel (Yousef) v Dow Jones & Co. Inc.* [2005] QB 946 at [80].

liability that had been incurred under the legal representatives' CFAs. C submitted a costs budget of £529,837 excluding success fee, vat and ATE premium. This was reduced to £365,470. Ds' potential costs liability at trial remained in excess of £1m which would have ruined them. C's exorbitant costs prevented the claim from settling, as J noted in his judgment on costs. It is reasonable to infer that the dominant motive for this appeal is for the legal representatives to obtain a "win" under the CFAs and for the ATE insurer to avoid paying Ds' costs.

45.5. In *Ferguson v Associated Newspapers Ltd*, unreported 3 December 2001, Gray J relied on Article 10 to interpret "calculated" in s.3(1) as meaning "more likely than not". Gray J concluded that any wider interpretation would constitute an unnecessary restriction on freedom of expression.[28] This was relied on by Lewison J in *IBM v Websphere Limited* [2004] FSR 39 at [74] and Tugendhat J in *Cruddas v Calvert* [2013] EWHC 2298 (QB) at [192]-[195].

46. There is no necessary justification for an interpretation of s.3(1) that allows a claim to be brought absent it being more likely than not that the publication has caused some financial loss. This is not an overly onerous requirement. There is no minimum level of loss. Where there has been widespread publication to potential clients or customers of an imputation that has a tendency to put them off, absent any opposing causation factor, such as was present in *Tesla*, the court can infer that there must have been some loss of business, even if identifiable losses cannot be proved.

47. The insurmountable difficulty C faces is that her case on widespread publication failed and the only two publications that were proved were found not to have caused any loss. There is no principled basis for her submissions on s.3(1). They are simply a means to accommodate J's findings of fact.

Section 2 of the 1952 Act

48. S.2 provides:

[28] Page 15, lines 10-23.

> "In an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business."

49. In *Andre v Price* [2010] EWHC 2572 (QB), Tugendhat J held that "calculated to disparage" in s.2 "must be considered not only in the light of the words complained of themselves, but also in the context in which they are spoken" and that it was necessary "to have regard to the publishees and the circumstances of the publication".[29] To consider only the words would permit trivial claims and be inconsistent with Article 10.[30] The parties were formerly married and the publication was an allegation by the wife that the husband had had an affair with his business manager. This was made to a studio audience but not broadcast. Given the limited number of publishees and the absence of a professional context, Tugendhat J held that the s.2 case did not meet the necessary measure of seriousness for it to be put to a jury.[31]

Statutory interpretation

50. The tendency test is inconsistent with all the relevant principles of statutory interpretation. Insofar as it is necessary to look beyond the wording of s.3(1), there are a number of other principles that compel the court to reject the test.

The wording

51. C's primary submission is that because s.3(1) does not refer to "publication", it is solely concerned with the "inherent propensity or tendency" of the words to cause financial loss. The short answer to this is that the phrase "the words upon which the action is founded" naturally includes the circumstances of publication. The action is founded on the instances of publication of the words set out in the POC. Absent publication there is no action.

[29] 99 101
[30] 98
[31] 103

52. In the 70 years since the Act was passed there has never been any previous suggestion that s.3(1) is not directed to the publication of the words. If this was the natural interpretation of s.3(1), it would be a surprising omission.

53. If Parliament's intention was to exclude consideration of any factor relevant to likely financial loss other than the words, it would have used the word "tendency". The tendency test was well established in defamation by 1952. Lord Atkin's test in *Sim v Stretch* [1936] 2 All ER 1237 – would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? – was the standard jury direction. In contrast, the word "calculated" is more closely directed to a consequence, in whatever degree of likelihood it is understood.

54. To say that words have a tendency to cause financial loss is fairly meaningless. It all depends on the circumstances in which they were published. A tendency test is explicable in relation to defamation because the likely estimation of right-thinking members of society is an abstraction directly connected with the imputation conveyed by the words. Further, defamation has a single meaning rule. This does not apply in malicious falsehood, giving rise to further potential conceptual difficulties if a tendency test was adopted in relation to s.3(1).

The avoidance of "absurdity"[32]

55. Excluding the circumstances of publication leads to the absurd outcome that a publication can be demonstrated to have caused no financial loss (and that none was likely at the date of publication), yet the court is driven to conclude that such loss was more likely than not. J noted this at [209].

The mischief[33]

56. ASA[11] cites extracts from the Report of Lord Porter's committee and the Parliamentary debate. It is clear that the perceived mischief was, as stated in [51] of the Report, publications causing "very serious damage which, owing to technical rules of evidence, it is impossible to prove strictly as special damage". S.3(1) was

[32] *Bennion on Statutory Interpretation*, 7th Edition, Chapter 12.
[33] *Bennion*, Chapter 10.

simply intended to address the perceived difficulties of proof. Financial loss remains the gist of the tort, contrary to what is suggested in ASA[12].

57. The established interpretation of s.3(1) by the courts, as expressed in *Tesla, Tinkler* and *Sallows,* satisfactorily addresses the mischief.

58. There is nothing in the extraneous legislative material to suggest that Parliament intended to provide a remedy in the absence of any likelihood of financial loss.

Settled practice[34]

59. A further factor against the interpretation contended for by C is that s.3(1) has been in existence for 70 years and has been repeatedly understood by the courts to be directed to the effect of publication, taking into account all relevant circumstances. There has been no judicial or academic observation to the effect that this is contrary to the wording of s.3(1) or unjust.

60. During this period Parliament has passed two further Defamation Acts in 1996 and 2013. These would have afforded an opportunity to remedy the position if it perceived that the s.3(1) hurdle had been set too high.

61. The reliance on settled practice is stronger in relation to s.3(1) because this is not merely a case of Parliament omitting to act. Parliament chose to abandon the tendency test in the closely related tort of defamation by passing s.1 of the 2013 Act. This was a key element of Parliament's stated intention to rebalance the law in favour of freedom of expression. It was underpinned by the Article 10 jurisprudence referred to in [43] above, which demanded a meaningful harm hurdle in order to avoid trivial claims.

62. At the time the 2013 Act was passed, Parliament would have understood the accepted interpretation of s.3(1) to provide a sufficient hurdle to justify a malicious falsehood claim. It is inconceivable that it would have retained a tendency test for malicious falsehood, while abandoning it for defamation.

[34] *Bennion* [24.20] and [24.22]

S.3(1) of the Human Rights Act 1998[35]

63. This requires the court to interpret legislation, insofar as is possible, in a manner compatible with Convention rights. Article 10 is engaged in the interpretative process for reasons previously stated. Any countervailing right of a claimant is only engaged where there has been a sufficiently serious level of harm. An interpretation of s.3(1) [DA] which has the effect of rejecting claims where no loss is likely does not engage any ECHR right of the claimant. It is therefore not necessary to debate which article, if any, might be engaged in a malicious falsehood claim where loss was likely. Insofar as it is engaged, it is sufficiently protected by the historic test.

64. Article 10 has been relied on in relation to the interpretation of "likely" in s.3(1) [DA] and "calculated to disparage" in s.2 [DA], as previously noted. It could be relied on, if necessary, to support the interpretation of "the words on which the action is founded" as referring to the publication of them, in order to ensure that a claim can only succeed where it is more likely that not that the publication has caused financial loss. At its lowest, this is not an "impossible" interpretation, within the meaning established in the case law on s.3(1) [HRA].[36]

Historic or Forward-looking?

65. Proceeding on the basis that "calculated" means "more likely than not" and that the likely financial loss must be caused by the publication, there are two options in relation to the date for determination: (a) it is more likely than not that financial loss has been caused by the publication ("historic") or (b) at the date of publication it was more likely than not that financial loss would be caused by it ("forward-looking from publication").

66. The historic test is to be preferred. In a number of the cases considered above, the court has taken into account facts occurring after publication because of their obvious relevance to likely loss. *Gatley* states a historic test and contemplates

[35] *Bennion* Chapter 29.
[36] See *Bennion* chapter 29 and the cases referred to: "Section 3 has been described as "a powerful tool whose use is obligatory; it is expressed in "forthright, uncompromising language". The latitude given to the court in seeking to achieve compatibility is of an "unusual and far-reaching character" and allows the court considerable flexibility" (page 764).

causation issues arising before or after publication. The principles of statutory interpretation referred to above militate in favour of the historic test. There is no benefit to a forward-looking test.

67. In principle, the two tests will only result in a different outcome where an unlikely event occurs in the period between publication and trial which impacts on whether it is likely that financial loss has been caused. A forward-looking test will prevent this from being taken into account. The consequence is that liability could be imposed notwithstanding that it is evident by the time of trial that no loss has been caused. This would be absurd and unjustifiable in Article 10 terms, for reasons previously stated. Relatedly, a claimant would be deprived of a remedy even where it was likely that financial loss had taken place, where the relevant event probative of loss took place after publication.

68. A historic test is also more practical. It is easier to make a determination as to what is likely to have actually happened than to speculate as to what was likely to happen from the perspective of an earlier date. A forward-looking test is particularly complicated where there is more than one publication complained of or it has continued over a period of time and/or there are a number of factors relevant to likely loss, some which have taken place before the initial publication, some after and some where it may not be possible to definitively state when they occurred.

69. A historic test for s.3(1) is consistent with other harm-related determinations that commonly arise at trial, referred to below. As in the present case, it is common for defamation and malicious falsehood claims to be brought together and for the claimant to rely on special damage and s.3(1). There appears to be no dispute that the following harm-related determinations are historic: (a) serious harm to reputation under s.1(1) of the 2013 Act (b) serious financial loss under s.1(2) (c) special damage whether claimed in defamation or malicious falsehood (d) the level of general damages for defamation and malicious falsehood and (e) the application of *Jameel* to defamation and malicious falsehood. There is no good reason why a post-publication probative fact on loss should be admissible in relation to all of the above, but inadmissible in relation to s.3(1).

70. ASA[17]-[18] relies on s.3(1)(b) in opposition to a historic test. This relates to oral falsehoods and requires the pecuniary damage to be "in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication". The subsection is little used and there is no authority on it. On its face, it merely adds a further requirement that "office etc" is held at the time of publication and that the loss is in respect of it. It does not mandate that the determination of likely loss has to be made as at the date of publication.

Conclusion

71. S.3(1) requires the claimant to prove that it is more likely than not that the publication complained of has caused some financial loss. The claimant does not have to specify the amount of the loss or go beyond identifying its nature and the mechanism which has caused it to occur. There is no restriction on the admissibility of evidence as to whether loss has been caused, other than such restrictions as generally apply in civil litigation.

72. J's findings that the only two proved publications did not cause any loss are not challenged and are fatal to the malicious falsehood claim.

Respondent's Notice

73. Even if the test is forward-looking, it would make no difference to the outcome of the present case for the reasons set out in the RN. These do not require any amplification.

Outcome if C succeeds on s.3(1)

J's alternative finding of nominal damages is not capable of challenge

74. At [216] J stated that if C had succeeded on s.3(1) he would have awarded a nominal sum in general damages. This alternative finding was not the subject of permission to appeal and is incapable of challenge. Nominal damages was the

only permissible award on the basis of J's findings of fact.[37] Alternatively, it was an award that was reasonably open to J and not capable of challenge on appeal.

No award for injury to feelings permissible in the absence of any loss or harm

75. When granting permission to appeal, J stated that he would have awarded "some sum for injury to feelings where C had made an evidential case (subject to resolution of entitlement in law, which D contested)".

76. In the light of this, C seeks a retrial limited to damages. There are a number of reasons why the Court should not order a retrial and should limit the damages to a nominal sum as indicated by J.

77. Insofar as damages for injury to feelings are available in a malicious falsehood claim, it is only where loss or harm occurs and the injury to feelings is connected with it. The question of whether damages for injury to feelings is available, at all, in malicious falsehood "bristles with problems", to use the words of Sir Donald Nicholls V-C in *Joyce v Sengupta* [1993] 1 WLR 337 at 348E. The V-C and Sir Michael Kerr were of the opinion that damages should be available for injury to feelings. However, it is apparent that this was contingent on the existence of likely loss and its connection with the injury to feelings.[38]

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[37] In *Joyce v Sengupta* [1993] 1 WLR 337 Sir Donald Nicholls V-C did not accept that damages under s.3(1) would always be nominal. But that was said in the context of examples where the claimant was likely to have suffered loss, but was not in a position to allege and prove special damage. Where, in contrast, there is a finding that the publication has caused no loss there is no proper compensatory basis on which anything other than nominal damages could be awarded. In contrast to defamation, no damages can be awarded for vindication.

[38] "Thus so far as the reported decisions go, they show that an award of **"parasitic"** damages under this head has never been made for malicious falsehood." 347G [emphasis added]

"Take the example I gave earlier of a person who maliciously spreads rumours that his competitor's business has closed down. Or the rumour might be that the business is in financial difficulty and that a receiver will soon be appointed. The owner of the business **suffers severe financial loss**. Further, **because of the effect the rumours are having on his business** he is worried beyond measure about his livelihood and his family's future. He suffers acute anxiety and distress. Can it be right that the law is unable to give him any recompense for this suffering against the person whose malice caused it? Although injury to feelings alone will not found a cause of action in malicious falsehood, ought not the law to take such injury into account **when it is connected with financial damage inflicted by the falsehood**?" 347H-348B

"A close analogy is that of slander in a case where it is actionable only on proof of pecuniary damage. In Lynch v. Knight (1861) 9 H.L.C. 577, 598, Lord Wensleydale said: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though **where a material damage occurs, and is connected with it**, it is impossible a jury, in estimating it, should overlook the feelings of the party interested"". 348C

78. An award of damages for injury to feelings was upheld by the Court of Appeal in *Khodaparast v Shad* [2000] 1 WLR 618, where the defendant had circulated within the Iranian community a mock photograph which suggested that the plaintiff was a pornographic model. This had caused her to be "deprived of employment in the Iranian community or by any member of that community, and deprived of employment which she greatly enjoyed". The injury to feelings was directly connected with the losses and harm caused by the falsehood.

79. There is no principled basis for awarding damages for injury to feelings where it can be demonstrated that no loss or harm has been caused. J's finding that the two proved publications caused no loss or harm is fatal to any entitlement that might otherwise exist.

No evidential basis for an award for injury to feelings

80. Relatedly, C's evidence on injury to feelings was directed to a case on the facts which J rejected.

81. C claimed to have been angered on discovering the Butler Words.[39] This was due to her erroneous perception that it caused Butler not to do business with her. He had already decided not to have anything to do with her.

82. C claimed to have been upset by the Lingenfelder Email and felt that her reputation with Lingenfelder and his firm had been tarnished.[40] It appears to be common ground that damage relating to injury to reputation cannot be recovered in malicious falsehood. In any event, J found that there was no such harm, that Lingenfelder quickly accepted that there was no contractual restriction on C and C believed that her bosses were "100% behind her".[41] No mechanism of loss was pleaded in relation to the Lingenfelder Email. There was no evidence adduced to suggest that C was concerned that the Lingenfelder Email would cause her financial loss. Any concerns held by C is relation to loss of income arose from her

[39] See WS FG1 at [77]-[79].
[40] See WS FG1 at [91] & [96].
[41] Judgment [80], [81], [94]-[100] [134(iii)-(iv)], [135], [181] & [196].

erroneous belief that D1 had published the falsehood complained of to all of D2's clients.[42]

No retrial on Jameel grounds

83. In any event, the claim is now a *Jameel* abuse of process. Had C sought to pursue it on the basis of the facts as found by J at trial, it would have been struck out on the basis of an absence of loss and no prospect of further publication.[43] There is no sufficiently tangible benefit in a further trial for the purposes of determining whether any damages are available to C for injury to feelings and if so, how much. The costs would far outweigh the amount of any possible award. It is unclear whether C contemplates a second fact-finding exercise relating to loss and injury to feelings. This would be impermissible given the absence of challenge to J's findings on appeal and unfair. A trial limited to an assessment of damages on the basis of J's findings would still be totally disproportionate.

84. Any further debate on the recoverability of damages for injury to feelings should await a s.3(1) case where it is likely that meaningful financial loss has been caused.

85. It is reasonable to infer that the dominant motive for seeking a retrial is to put C's legal representatives and ATE insurers in a better position in relation to costs. A finding for C with nominal damages may not amount to a "win" under the CFAs and would not, in any event, amount to success under CPR 44.2(2). Improving a party's position on costs is not a factor that can justify the consumption of further costs and court resources where what is at stake, other than costs, is minimal.[44]

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For the Respondents/ Defendants
28 January 2022

[42] See Judgment at [100] & [134(v)].
[43] The standard form claim for an injunction in the POC was never pursued with any vigour, given the unlikelihood of any repetition, and was abandoned at trial (Transcript, Day 4/p89/l20-25).
[44] See, for example, *Hays Plc v Hartley* [2010] EWHC 1068 (QB)