

The meaning of “serious harm”: the Supreme Court in *Lachaux v Independent Print*

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The increasing accessibility of digital media has enabled businesses to become not only readers, but also publishers of their own information and opinions. This in turn requires due consideration of the limits of what can, and cannot, be lawfully published.

The Supreme Court has handed down judgment in *Lachaux v Independent Print Ltd and Evening Standard Ltd* [2019] UKSC 27, a case regarding the interpretation of section 1 of the Defamation Act 2013 (the “Act”). This is the first time that the Supreme Court has considered the meaning of section 1.

The Supreme Court unanimously dismissed the appeal, departing from the Court of Appeal decision and upholding Mr Justice Warby’s interpretation in the High Court. As a result, Claimants will now have to prove serious harm to their reputation **as a matter of fact** in order to bring a successful cause of action for libel under the Act.

Background

The Defamation Act 2013 was introduced to reform aspects of the law of defamation, which were largely developed by common law, with periodic statutory supplements. Not only was the law of defamation outdated for new forms of digital media, common law rules were seen to favour the protection of reputation over freedom of expression (leading to the consequent reputation of the English Courts as a destination for so-called “libel tourism”).

Of interest in this case was section 1(1) of the Act, concerning the new statutory requirement that a defamatory statement must cause “serious harm” to a claimant’s reputation:

“A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.”

Under common law, the position on libel was that it was **presumed** that harm had been caused to a claimant’s reputation if a defamatory statement was made. The requirement that the damage to reputation must pass a seriousness threshold was subsequently developed by case law¹.

¹ See, in particular, *Jameel (Yousef) v Dow Jones* [2005] EWCA Civ 75, which introduced a “procedural threshold” of seriousness to be applied to the claimant’s reputation before defamation could be found to have taken place. The appropriate action was to strike out the case for abuse of process given that whilst there was an actionable claim, the seriousness of damage to the claimant’s reputation had been so minimal that it did not justify the action. *Jameel* was upheld in *Thornton v Telegraph Media Group Ltd* [2011] EWHC 1414 (QB), where the Court added that a claimant should surmount a threshold of seriousness before a statement could be regarded as defamatory (paragraph 90).

The explanatory notes to the Defamation Act 2013 confirm that section 1 builds on these existing authorities to raise the bar for bringing a claim so that only cases where statements causing **serious harm** to the claimant's reputation will be successful.

Facts of *Lachaux v Independent Print*

This case concerned reporting of a high profile divorce of a French claimant residing in the United Arab Emirates, Mr Lachaux and his British wife. In February 2014, a number of British newspapers had published allegations against Mr Lachaux for, among other things, abusive behaviour towards his wife, confiscation of his son's passport and attempts to use the UAE courts to his advantage in the proceedings. This Supreme Court appeal arose from two actions of libel that were pursued by Mr Lachaux against the defendant newspaper companies, the Independent Print and the Evening Standard.

High Court and Court of Appeal

At first instance, Mr Justice Warby held that section 1 of the Act required the claimant to prove, on the balance of probabilities, that a statement **has or will cause serious harm** to his reputation. In addition to the publication of inherently injurious words, a claimant must show that the words produced **serious harm in fact**. The Court upheld the defendant's argument that unless it was "self-evident" that the inherently injurious words would cause serious harm to the claimant's reputation, then this would have to be proved by extraneous evidence. Warby J recognised that his construction of section 1 departed from the common law presumption of defamation and subsequently, that libel would no longer be actionable without proof of serious harm or the likelihood of such harm. Nevertheless, in applying his dicta to the facts of the case, he found that the newspapers had in fact caused serious harm to Mr Lachaux.

Reversing that decision, the Court of Appeal favoured the argument put forward by Mr Lachaux that section 1 **does not** affect the common law presumption of general damage and the associated rule that the cause of action is established if the statement complained of is inherently injurious (in other words, that they will cause not just **some damage** to reputation but **serious harm** to it). Again, however, upon the application of their reasoning, the Court of Appeal upheld Warby J's finding that the published articles had seriously harmed the reputation of Mr Lachaux.

The newspapers appealed this interpretation of section 1 to the Supreme Court.

The Supreme Court

With unanimous agreement, the Court dismissed the appeal.

In addition to the common law presumption of damage to reputation, the Supreme Court ruled that section 1 imposed a new threshold that the harm caused had to be serious. This higher threshold of serious harm was a clear departure from the common law position.

Furthermore, it was held that the application of the new threshold of serious harm to reputation must be determined by reference to the **actual facts** about its impact, and not just the meaning of the words. Establishing whether there is a cause of action depends on an assessment of the actual consequences resulting from the publication of the defamatory statement, which may include the size, and characteristics of the relevant audience, the quality of the publication and whether the claimant had any reputation to begin with.

The Court ruled that serious harm to reputation cannot be established solely by reference to the inherent tendency of words to cause harm to reputation. As a consequence, Claimants are now required to show through a combination of the inherent tendency of the words and their **actual impact** that serious harm has or is likely to be caused to the claimant's reputation.

"Section 1 necessarily means that a statement which would previously have been regarded as defamatory, because of its inherent tendency to cause some harm to reputation, is not to be so regarded unless it "has caused or is likely to cause" harm which is "serious"."

The Court also clarified section 1(2)² of the Act, providing that harm to the reputation of a body that trades for profit is not serious harm unless a claimant can prove that injury to reputation has actually caused or is likely to cause serious financial loss.

Upon application of its reasoning to the facts of the case, the Supreme Court found that the damage to Mr Lachaux's reputation did cause serious harm. Accordingly, they dismissed the appeal.

Impact

In addition to considering the inherently injurious character of an allegedly defamatory statement, it will now be necessary for claimants to consider to whom the statement was actually communicated, and the impact of that communication, in order to assess if serious harm to reputation was caused in fact. Without such an assessment, and extraneous evidence supporting a claim, defamation claims which may have relied simply on the character of the words are now more likely to fail.

This decision provides all publishers, whether businesses, journalists or social media users with clarification on how the court will interpret this section and how they can exercise their freedom of speech, within the limits of the law.

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² *"For the purposes of this section, harm to the reputation of a body that trades for profit is not 'serious harm' unless it has caused or is likely to cause the body serious financial loss."*