an easement, in which case major ongoing management obligations were required for its exercise, in all likelihood taxing the capacity of the dominant owners. Faced with these alternatives, the majority of the Supreme Court favoured the latter, with significant factors being the intended use and changing social attitudes towards recreation. But, for the future, at least in such circumstances, some comfort may be drawn from the preference of conveyancers for a leasehold, as opposed to a freehold, structure.

MICHAEL CARDWELL

Address for Correspondence: School of Law, University of Leeds, Leeds, LS2 9JT, UK.
Email: m.n.cardwell@leeds.ac.uk

## SERIOUS HARM TO REPUTATION RIGHTS? DEFAMATION IN THE SUPREME COURT

*LACHAUX* provided the first opportunity for the Supreme Court to examine the Defamation Act 2013 and, in particular, its new prohibition in section 1 (1) on action absent a demonstration that publication "has caused or is likely to cause serious harm to the reputation of the claimant". The court held that this threshold requires proof that the impact or likely impact of a statement's publication in fact has or will seriously affect the claimant's reputation. This interpretation is consistent with statutory wording and also with legislative intent. However, it could trigger expensive and lengthy interlocutory proceedings. As a result, there may well be a shift away from defamation to more claimant-friendly actions under data protection.

Mr. Lachaux is a French aerospace engineer who in 2010 married Afsana, a British citizen of Bangladeshi origin, in London and moved with her to the United Arab Emirates (UAE) where she gave birth to their son. Since April of that year and for many years subsequently, Lachaux and Afsana were involved in an extremely bitter divorce and custody battle. In January and February 2014 articles appeared in various British media outlets – the *Huffington Post*, *Independent*, *i* and *Evening Standard* – that bore the meaning that Lachaux was "a wife-beater; that when Afsana escaped, taking their son with her, he falsely accused her of kidnap, causing her to face the risk of being jailed on such a charge; and that he unjustifiably snatched their son back from her" (*Lachaux v Independent Print and Another* [2015] EWHC 2242 (QB)). Lachaux launched defamation proceedings in August and September 2014 and in May 2015 he mounted a further claim against an additional article that had appeared in the *Huffington Post.* In July 2015, the High Court held that all bar the last article were actionable. Appeals by the defendants were subsequently rejected both in the Court of Appeal in September 2017 ([2017] EWCA Civ 1334) and then by the Supreme Court ([2019] UKSC 27). However, as explored below, this commonality hides a critical

dispute as to the meaning of the serious harm threshold set out in section 1 (1) of the Defamation Act 2013.

The starting point here is the historic common law rule that defamation in the "permanent" form of a libel (although, as discussed further below, not most forms of slander) is actionable per se. Like so many other recent liberalisations of defamation's strictures, this rule first came under (albeit limited) challenge through judicial innovation. First, the Court of Appeal in *Jameel v Dow Jones* [2005] EWCA Civ 75 held that where a person's reputation in this jurisdiction had "suffered no or minimal actual damage" (at [40]) a defamation claim could be struck out under the Civil Procedure Rules (read alongside the Human Rights Act 1998) for failing to disclose "a real and substantial tort" (at [70]). Second, Tugendhat J. in *Thornton v Telegraph Media Group* [2010] EWHC 1414 (QB) held that the concept of defamation itself required "a tendency or likelihood" (at [93]) for a statement not just to negatively affect reputation but to "substantially" do so (at [96]). Throughout the *Lachaux* litigation, it was agreed that section 1(1) of the Defamation Act 2013 had built on both of these developments and, in particular, had raised the threshold for action here from that of mere substantiality to the more weighty one of seriousness. What was in principal dispute was whether this threshold only required a claimant to demonstrate that the meaning of a statement had an *propensity* to produce such a result or that they would need to show that as a result of publication such a serious effect had *in fact* eventuated or, at least, was likely to actually eventuate in the future. Importantly, the two judicial developments above diverged on this crucial point, with *Jameel* clearly focusing on a publication's outcome in fact and *Thornton* only on a tendency inherent in the meaning of the statement itself.

At first instance, Warby J. unequivocally held that section 1(1) required that that a serious impact on reputation had to be shown to be likely in fact and, furthermore, that the claimant would have to prove this on the "balance of probabilities" (at [45]). Davis L.J. in the Court of Appeal held to the contrary that section 1(1) only required a demonstration that the statement objected to had a "tendency" to cause serious reputational harm (at [50]). His use of this term suggested that a consideration of the inherent meaning of a statement should remain paramount. Thus, if this meaning had a propensity to be seriously damaging to reputation – for example, an allegation that a named politician accepted bribes – then the threshold would *ipso facto* be met. However, he muddied the waters by holding that such a tendency could be rebutted by the defendant producing, for example, "irrefutable evidence that the number of publishees was very limited, that there had been no grapevine percolation and there is firm evidence that no-one thought any the less of the claimant by reason of the publication" (at [79]). In a short and unanimous Supreme Court judgment of just 26 paragraphs, Lord Sumption gave his backing to Warby J.'s initial construction.

However, as regards potential future harm and in contrast to Warby J., he stopped short of explicitly addressing what degree of likelihood of actual harm eventuating would be sufficient.

The primary argument Lord Sumption advanced in support of his interpretation rested on the literal meaning of "publication has caused or is likely to cause harm" as set out in section 1(1) itself. The two limbs of this phrase were understood to be "functional equivalents" (at [15]) and, since the first limb clearly focused on the actual harm produced by a publication, it was held to follow that the second limb also did so by means of a test of factual likelihood. Closely related to this, section 1(1) also needed to be read coherently with section 1(2) which provided that, as regards bodies trading for profit, satisfaction of the serious harm test would require at least a likelihood of "serious financial loss". This latter outcome was indisputably concretely factual in nature. Lord Sumption's other major argument was purposive. In sum, if a mere tendency would continue to suffice then the "anomaly" identified in the law would continue and it would be "difficult to see that any substantial change to the law of defamation [had] been achieved by what was evidently intended as a significant amendment" (at [16]) (although finding use of this unnecessary, Warby J.'s judgment had provided clear legislative evidence that such a significant change was indeed intended). Finally, Lord Sumption addressed two counter-considerations. First, he rejected the suggestion that his interpretation had implicitly, and against the clear wording of another part of the act, collapsed the test for action in libel (and extraordinary forms of slander) into that applicable to slander generally, namely, proof of "special damage". These concepts remained distinct since, whereas damage assessed under section 1 could continue to arise directly from harm to reputation, "special damage" was confined to "damage representing pecuniary loss, not including damage to reputation" (at [19]). Second, he noted that a *via media* construction as suggested by the Court of Appeal would be "internally contradictory" since if satisfaction of the test in section 1(1) really did continue to depend on the "inherent tendency of the words" (at [20]) then there could be no room for this to be rebutted by factual evidence of the lack of a likelihood of harm.

The Supreme Court's interpretation of the meaning of the section 1(1) threshold is legally convincing. Nevertheless, it undoubtedly produces a serious risk that defamation actions will become stuck in lengthy and expensive interlocutory proceedings. That is unlikely to be conductive to the efficient functioning of the judicial system. Worse yet, it may inhibit *bona fide* claimants from commencing or continuing with a case. In that context, it is important to return to a number of mitigating commonalities in the judgments. First, as previously stated, all three courts agreed that Lauchaux had suffered the requisite serious harm, a (hopefully) unsurprising holding given that widespread publication of extreme claims had

eventuated. Second, all the judgments upheld the rule established in *Dingle*, namely, that damages cannot be mitigated on the basis of that similar statements had been published about the same claimant by other persons. It was also found that defamation's "repetition rule", a construction which treats a statement that somebody else made an allegation as equivalent to making that allegation oneself, had also remained unaffected. Finally, all agreed that the serious harm test could be proved not only by direct evidence but also by inference. Especially the last of these should go a considerable way to allaying the genuine concerns of claimants. Nevertheless, it remains the case that untrue and unfair attacks on reputation are increasing (principally online) and defamation law may often not provide an effective avenue for vindicating the rights that are thereby impaired. At least in relation to natural as opposed to legal persons, many of these rights are recognised at a fundamental level not only within the concept of private life (as enunciated in the European Convention and EU Charter) but also in the protection of personal data (as expounded only in the later). Moreover, statutory data protection contains explicit safeguards against inaccurate and unfair processing of information relating to natural persons, this law has already been recognised by the courts as relevant in reputation cases (see e.g. *Moulay v Elaph Publishing* [2017] EWCA Civ 29) and new General Data Protection Regulation 2016/679 significantly strengthens these safeguards including in order to protect individuals from damage to "reputation" (recital 75). With defamation actions becoming more difficult, individuals wishing to vindicate their reputation may increasingly look to these alternative remedies. Even should Brexit eventuate, we may therefore still find European legal imports playing a greater role in shaping reputation rights in this jurisdiction.

DAVID ERDOS

Address for Correspondence: Trinity Hall, Cambridge, CB2 1TJ, UK. Email: doe20@cam.ac.uk

## LIABILITY IN NEGLIGENCE IN PROVIDING A PUBLIC GOOD: REALLY NOT SO DIFFERENT?

IN *Poole Borough Council v GN* [2019] UKSC 25, the Supreme Court ruled that a local authority did not owe a duty of care to children whose family it had placed in public housing near another family it knew to have a reputation for anti-social behaviour, and who went on to subject the claimants and their mother to extreme forms of harassment, resulting in harms which included both physical and psychological injury. The Supreme Court upheld the ruling of the Court of Appeal in the same case ([2017] EWCA Civ 2185) but on different grounds. The Court of Appeal in *GN* had considered that its own earlier decision in *D v East*

https://doi.org/10.1017/S0008197319000862 Published online by Cambridge University Press