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Defamation: meaning of serious harm

Summary

The High Court has considered the serious harm requirement in section 1 of the Defamation Act 2013 (2013 Act) (section 1).

Background

The 2013 Act, which applies to all publications made from 1 January 2014, made significant changes to the law. In particular, a statement is no longer defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant (*section 1(1), 2013 Act*) (section 1(1)).

In *Cooke v MGM*, the High Court appeared to suggest that it would be difficult to prove serious harm by inference except in relation to the most serious allegations *([2014] EWHC 2831 (QB))*.

Where many have published words to the same or similar effect, a defendant cannot seek to reduce damages by inferring that those other publications have injured the claimant's reputation (*Associated Newspapers v Dingle [1964] AC 371*).

Facts

L, a French national who lived in the United Arab Emirates (UAE), brought libel claims in relation to five newspaper and online articles published in Dubai and the UK. The articles described UAE court proceedings against L's former wife, a British national, for kidnapping the couple's son, and included allegations against L of domestic abuse.

The question of whether the publication of the articles satisfied the serious harm requirement arose as a preliminary issue.

Decision

The court held that under section 1(1) L had to prove, on the balance of probabilities, that serious reputational harm had been caused by, or was likely to result from, the publication complained of, not just that the words had a defamatory tendency.

The natural consequence of this construction of section 1(1) was that libel was no longer actionable without proof of damage and that the legal presumption of damage would cease to play any significant role. When deciding whether actual or likely serious harm has been caused, the court was not confined to considering only the defamatory meaning and its harmful tendency, but could draw inferences having regard to all of the relevant circumstances, including evidence of what actually happened after publication.

Here, it was reasonable to infer that L had a substantial reputation in the UAE, as he had lived and worked there for nearly ten years by the time of publication. L worked in an international industry and he travelled a considerable amount. He also had personal and professional contacts in the UK. On the balance of probabilities, it was possible that tens of people and possibly even 100 who knew of L had read one or more

of the articles and identified him, and thought worse of him as a result. A person might also be seriously defamed in the eyes of those who did not already know him. On the facts, four of the articles had caused serious harm to L's reputation, having regard to: the seriousness of the topic and the defamatory meanings; the reputable nature of the publishers; the substantial circulation of the newspapers; and the inherent likelihood that the publications had reached a significant number of people who knew L or knew of him.

Where a defendant maintains that the actual or likely harm to reputation is too slight to justify a claim, the starting point procedurally should be consideration of section 1. This should usually be tried as a preliminary issue, not by way of a striking out or summary judgment application. It was not necessary here to decide the point of time at which the court should judge whether a statement is likely to cause serious harm but the court preferred the time when the matter is determined, rather than when the claim form is issued.

Following *Dingle*, in deciding whether a publication has caused or is likely to cause serious harm, the court should take account of other publications having the same or similar effect. *Dingle* remains good law following the 2013 Act, so other publications cannot be admitted into evidence for the purposes of reducing or limiting damages with reference to the seriousness of injury to reputation.

Where meaning and the question of serious harm are tried as preliminary issues, they should be tried together. If a defendant raises a threshold question such as serious harm, generally it should not be required to plead a defence before determination of that issue, owing to the risk of costs.

Comment

The most interesting aspect of this decision is the analysis of "serious harm". The decision departs to some extent from *Cooke v MGM*. The analysis of the facts here suggests that the section 1 threshold may not be very hard to achieve in cases involving articles with any significant circulation, simply by relying on an inference of serious harm; for example, without needing to call evidence of a direct impact on reputation, which is often hard to obtain.

This decision also confirms that the common law rule that the cause of action for libel and defamation arises on publication of the defamatory matter is no longer good law. The decision notes that a consequence of section 1 is that the status of a publication may change: from non-defamatory to defamatory, for example, where a cause of action lies dormant until serious harm is caused or is likely; or from defamatory to non-defamatory, for example because of a retraction and apology.

Case: Lachaux v Independent Print Ltd [2015] EWHC 2242 (QB).

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