



Neutral Citation Number: [2015] EWHC 2242 (QB)

Case Nos: HQ14D05024  
HQ14D05025  
HQ15D00253  
HQ15D00344  
HQ15D00553

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 30/07/2015

Before:

**MR JUSTICE WARBY**

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Between :

**Bruno Lachaux** **Claimant**  
**- and -**  
**Independent Print Limited** **Defendant**

**Bruno Lachaux** **Claimant**  
**-and-**  
**Evening Standard Limited** **Defendant**

**Bruno Lachaux** **Claimant**  
**-and-**  
**AOL (UK) Limited** **Defendant**

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**Adrienne Page QC and Godwin Busuttil** (instructed by **Taylor Hampton Solicitors Ltd**) for  
the **Claimant**

**David Price QC** (of **David Price Solicitors & Advocates**) for **Independent Print Ltd. &**  
**Evening Standard Ltd.**

**Manuel Barca QC and Hannah Ready** (instructed by **Lewis Silkin**) for **AOL**  
Hearing dates: 20-21 July 2015

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE WARBY

**Mr Justice Warby :**

**A. INTRODUCTION**

1. This is the trial of preliminary issues in these libel claims, pursuant to orders made by Nicola Davies J on 1 April 2015 and Nicol J on 29 June 2015.
2. The claimant is an aerospace engineer, a French national who currently teaches at a military college in Abu Dhabi, in the United Arab Emirates ('UAE'), which is where he lives. He brings these claims against three different news publishers in respect of five articles first published between 20 January and 10 February 2014.
3. Two of the five articles were published online in the *HuffingtonPost* by AOL (UK) Ltd ('AOL'), represented by Mr Barca QC and Ms Ready. Two were published by Independent Print Ltd ('IPL') in hard copy, in *The Independent* newspaper and its sister paper, 'i'. The *Independent* article was also published online by IPL at [www.independent.co.uk](http://www.independent.co.uk). The fifth article was published by Evening Standard Ltd ('ESL') in the *Evening Standard* newspaper and online at [www.eveningstandard.co.uk](http://www.eveningstandard.co.uk). ESL is a sister company of IPL, and the two are jointly represented by Mr Price QC.
4. Each of the articles complained of contained an account of events in the UAE, including proceedings against the claimant's ex-wife, Afsana Lachaux ('Afsana'), for 'kidnapping' the couple's son. The articles reported allegations against the claimant said to have been made by Afsana, who was described in the first *Huffington Post* article as a 'British victim of domestic abuse'. Each article bears similar defamatory meanings about him. I shall come to the specific meanings of which he complains. For introductory purposes, it is fair to summarise the meanings as being that the claimant is 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.
5. The claims relate to publication in this jurisdiction and, in the case of the *HuffingtonPost* ('the Post'), *Independent*, and *Evening Standard*, online in Dubai. The agreed readership figures for the twoPost articles together are some 4,800. For the IPL articles the agreed readership figures for the print copies are 154,370 - 231,555 (the *Independent*) and 523,518 - 785,277 (the 'i'). The *Independent* article had 5,655 unique visitors online. The *Evening Standard* readership figures are 1.67 - 2.5 million for the print edition and 1,955 unique visitors online.
6. The main issue for my decision is, in relation to each article, whether the publication of such allegations about this claimant by these defendants in this jurisdiction and Dubai, to the extent just outlined, has caused or is likely to cause sufficient harm to the claimant's reputation to justify the bringing of these claims.
7. Now that jury trial is very much the exception in libel actions (see *Yeo v Times Newspapers Ltd* [2014] EWHC 2853 (QB), [2015] 1 WLR 971) orders for the trial of preliminary issues of this kind are easier to make, and more common. In this case, meaning has already been tried as a preliminary issue in two of the claims. In ordering the trial of the preliminary issues now before me Nicola Davies J and Nicol J were following a course I recommended in *Ames v The Spamhaus Project Ltd* [2015] EWHC 127 (QB), [2015] EMLR 13 [101].

**B. ISSUES**

8. The preliminary issues ordered to be tried are:

- i) Reference. In the claims against IPL and ESL there are issues as to whether, or the extent to which, the words complained of referred or were understood to refer to the claimant.
  - ii) Meaning. In three of the claims – the two against AOL and the second claim against IPL – there are some issues about the natural and ordinary meaning of the words complained of.
  - iii) Serious harm. In relation to all five claims, I have to decide whether the publication of the words complained of satisfies what I shall call ‘the serious harm requirement’ laid down by s 1(1) Defamation Act 2013 (‘the 2013 Act’): that the publication has caused or is likely to cause serious harm to the reputation of the claimant.
  - iv) Abuse of process. In the AOL claims I have to decide whether, pursuant to the principles established in *Jameel v Dow Jones* [2005] EWCA Civ 75, [2005] 1 QB 946 (‘*Jameel*’) the pursuit of the claim constitutes an abuse of the court’s process on one or more of four grounds specified in the order of Nicola Davies J.
9. The legal principles that apply to the first, second and fourth issues are well settled. Although, as will be seen, there has been some difference of approach to the reference issue, the main issues of law and fact that arise concern the serious harm requirement. I have to resolve disputes about the true construction of s 1(1) of the 2013 Act, and to apply the law as I find it to the facts I find established by the evidence.
10. Two main issues of law arise in relation to the serious harm requirement. The first is whether, on the proper construction of s 1(1), what a claimant must prove in order to satisfy the serious harm requirement is (a) as the claimant maintains, that the offending words have a tendency to cause serious harm to the claimant’s reputation; or (b) as the defendants submit, that serious harm to the claimant’s reputation has in fact been caused or is likely to be caused. The second issue in relation to the 2013 Act is whether, in reaching a conclusion on the issue of whether a given publication caused or is likely to cause serious harm, the court can and should take any and if so what account of other publications to the same or similar effect as the material complained of.
11. It is perhaps as well to make clear at the outset what this trial is not about.
- i) This is not a dispute about jurisdiction. As their corporate names suggest, each of the defendants is a company registered in England and Wales. There is no dispute that this court has, and is bound to exercise, jurisdiction over these claims against these defendants, if the claims cross the threshold of seriousness set by English law.
  - ii) I am not deciding any issue about the truth or falsity of what was stated in the articles complained of. This is an important feature of a preliminary issue trial of this kind. In one of the claims against IPL, and in the claim against ESL, Defences have been served asserting that the articles were true. As Ms Page has been at pains to make clear, however, the claimant emphatically denies

that there was any truth in any of the articles, so far as his conduct is concerned. It is not my task to decide which side is right about this.

iii) Nor is this judgment concerned with whether the defence of public interest, on which IPL and ESL also rely, may be available to them, or to AOL. Nor do I have to decide the merits of any other affirmative defence.

12. The fact that it is not necessary or indeed relevant to plead let alone investigate the merits of defences in order to determine whether a publication is harmful enough to justify the pursuit of a libel claim is one of the main justifications for trying issues of meaning and harm as preliminary issues. The potential savings in costs and time for the parties and the court are enormous. I return to this point later.

### **C. RELEVANT LEGAL PRINCIPLES**

13. The determination of whether a published statement is defamatory of an individual claimant is now a three-stage process. It must be decided whether, to the extent this is disputed, the statement (1) refers to the claimant; (2) bears a meaning that is defamatory of the claimant; and (3) has caused or is likely to cause serious harm to the reputation of the claimant.

14. Stages (1) and (2) reflect the requirements of the common law. Stage (2) can and sometimes must be sub-divided into two separate elements: (a) the identification of the meaning of the words, and (b) the determination of whether that meaning is defamatory. Stage (3) reflects the serious harm requirement enacted by Parliament in s 1(1) of the 2013 Act. It will be necessary to consider the impact of that amendment in the context of the common law and the *Jameel* abuse of process doctrine, developed under the influence of the Human Rights Act 1998.

#### *(i) The common law*

15. The common law principles applicable to the process I have identified are clearly established, and not the subject of any major dispute. They can therefore be quite shortly summarised, without the need for extensive citation. The nature of the parties' arguments makes it convenient to set out some of the common law principles as to damage at the same time.

### **Reference**

(1) "It is an essential element of the cause of action for defamation that the words complained of should be published 'of the [claimant]': *Knupffer v London Express* [1944] AC 116, 120. This does not mean the claimant must be named. The question is whether reasonable people would understand the words to refer to the claimant:

"The test of whether words that do not specifically name the [claimant] refer to him or not is this: Are they such as reasonably in the circumstances would lead persons acquainted with the claimant to believe that he was the person referred to?"

*David Syme v Canavan* (1918) 25 CLR 234, 238 (Isaacs J).

- (2) This is an objective test. If the words would be so understood by such people it is not necessary for the claimant to prove that there were in fact such people, who read the offending words; so an individual defamed by name in Cornwall has a cause of action even if he was unknown in that county at the time of publication: see Gatley on Libel & Slander 12<sup>th</sup> ed para 7.3; *Multigroup Bulgaria Ltd v Oxford Analytica Ltd* [2001] EMLR 28 [22] (Eady J) cited with approval in *Jameel* at [28].

To this extent, I do not accept Mr Price's submission for IPL and ESL that it is an essential element of this claim for the claimant to prove that at least one person understood the words complained of to refer to him. That is not an essential element of the cause of action at common law. Whether such proof is necessary to satisfy the serious harm requirement, or to overcome a *Jameel* application, or both, is a separate matter.

### **Meaning**

- (3) Although in practice any newspaper article, broadcast, blog or other publication may be understood in different ways by different ordinary people, it is a rule of defamation law ('the single meaning rule') that, as in the construction of contracts or statutes, a given set of words is to be treated as having only one meaning: *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 [71-72].
- (4) The legal principles by which that single meaning is to be identified can be taken from the summary given by Sir Anthony Clarke MR in *Jeynes v News Magazine Ltd* [2008] EWCA Civ 130 [14]:

“(1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole and any ‘bane and antidote’ taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, ‘can only emerge as the product of some strained, or forced or utterly unreasonable interpretation...’ ... (8) It follows that ‘it is not enough to say that by some person or another the words might be understood in a defamatory way.’”

### **Defamatory meaning**

- (5) A meaning is defamatory of the claimant if it '[substantially] affects in an adverse manner the attitude of other people towards him, or has a tendency to do so': *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB), [2011] 1 WLR

1985, [96] (Tugendhat J). This also is an objective test. 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. The ‘people’ envisaged for the purposes of this test are ordinary reasonable readers.

- (6) On the issue of defamatory meaning it is firmly established that (leaving to one side any complications introduced by true innuendo meanings, of which there are none in the present case) no evidence is admissible other than the words or other statement complained of. See, e.g., *Slim v Daily Telegraph* [1968] 2 QB 157, 173 (Diplock LJ); *Charleston* 70 (Lord Bridge).

### **Damage**

- (7) If a statement published in writing or other permanent form is held to be defamatory by these tests the cause of action for libel is complete, and some harm to reputation is presumed. Damages for injury to reputation and feelings are recoverable. Evidence is admissible as to the extent of such damage but no such evidence is necessary.
- (8) Some spoken defamatory words are actionable without proof of actual damage (or ‘*per se*’). An example is a statement which imputes the commission of an imprisonable crime. The common law categories of slander actionable *per se* have been modified and amplified by statute: s 2, Defamation Act 1952. In cases of slander actionable *per se* the position is the same as in libel: damage is presumed and the cause of action is complete at the time of publication. In other cases of slander, it is necessary to prove special damage in the form of financial loss. If the slander is of a kind that requires proof of special damage the cause of action is not complete unless and until special damage is suffered.
- (9) In the class of case - of which the present is an example - where many have published words to the same or similar effect, it is not legitimate for a defendant to seek to reduce damages by proving the publications of the defendant or others, and inviting an inference that those other publications have injured the claimant’s reputation. This is a brief and deliberately general summary of what I shall call ‘the rule in *Dingle*’: *Associated Newspapers Ltd v Dingle* [1964] AC 371.
- (10) It is not legitimate to prove in mitigation of damages specific acts of misconduct: ‘the rule in *Scott v Sampson*’ (1882) QBD 491.

(ii) *The impact of statute: the Human Rights Act*

### **Jameel**

16. The common law principles outlined above enable a claimant who has suffered minimal actual harm to reputation to establish a cause of action. The pursuit of a claim for damages or for an injunction in such a case may however represent an interference with freedom of expression which cannot be justified as necessary for or proportionate to the pursuit of the inherently legitimate aim of protecting or vindicating reputation.

17. In *Jameel* the court recognised that s 6 of the Human Rights Act 1998 requires the court to dismiss such a case as an abuse of process. For the purposes of identifying cases which should be dismissed on this ground the Court adopted the criterion that applies where the court's permission is required to serve proceedings in tort on a defendant outside the jurisdiction: whether the claim involves a 'real and substantial tort' in this jurisdiction.
18. It is unnecessary to review in detail at this point in this judgment the *Jameel* abuse doctrine as stated in *Jameel* itself and subsequent authorities. The principles may be found rehearsed in some detail in *Ames* at [27]-[33] and elsewhere. The bases on which AOL contend that the present claims should be dismissed pursuant to the *Jameel* jurisdiction are conveniently reflected in the issues for preliminary trial set out in the Order of Nicola Davies J. These are whether, pursuant to the principles established in *Jameel*, the pursuit of the claim constitutes an abuse of the court's process on the basis that:-

“a. The Claimant does not have a sufficient connection to or reputation in this jurisdiction to be able to establish a real and substantial tort here;

b. The words complained of were not published to a sufficient number of persons in this jurisdiction who understood them to refer to the Claimant for him to be able to establish a real and substantial tort here;

c. The claim cannot serve the legitimate [purpose] of protecting or vindicating the Claimant's reputation in this jurisdiction; and/or

d. There is no realistic prospect of a final trial yielding any tangible or legitimate advantage such as to outweigh the disadvantages for the parties in terms of expense and the wider public in terms of court resources.”

### **Delay**

19. It is a feature of this case, not uncommon in libel actions, that the claimant has been criticised for delay. In his Skeleton Arguments before Nicol J and for this trial Mr Barca placed reliance on delay by the claimant in pursuing his complaints about the AOL articles in a manner which led Mr Busuttil at the previous hearing and Ms Page at this one to object that he was straying well outside the boundaries of the *Jameel* issues as defined by Nicola Davies J, above.
20. Before Nicol J, Mr Barca pointed out that an action 'may ... be considered an abuse if the court's processes are being abused for improper collateral purposes, such as to harass a defendant (or perhaps someone perceived to be in league with the defendant): see ... especially, *Grovit v Doctor* [1977] 1 WLR 640 (HL).' Reference was made to the way that the claimant handled another libel complaint, against his ex-wife's son from a previous marriage, Rabbhi Yahiya. This was said to be 'Of a piece with C's conduct in this regard, and further feeding the impression of a collateral tactical agenda.' As has been pointed out on the claimant's behalf, collateral purpose abuse

is something quite separate and distinct from *Jameel* abuse. It requires proof of a dominant improper purpose.

21. Mr Busuttil, having raised this point before Nicol J, had understood that collateral purpose abuse was not in the event to be pursued. The passages quoted above did not feature in Mr Barca's Skeleton Argument for this trial, and *Grovit v Doctor* was not among the authorities relied on. However, there was a section of the Skeleton Argument headed 'Delay' that repeated much of the corresponding section of the previous document, including this passage: 'Whatever the motive for such extraordinary conduct (be it to vex or harass his ex-wife or for some other unfathomable reason), it is quite plain that C did not use the court's process through any genuine concern to seek redress for the 'serious harm' caused to his reputation on account of anything published by Mr Yahiya in 2014.'
22. It was this that evidently set the antennae of the claimant's team tingling, sensitised as these were to the risk of an attempt to expand the boundaries of the argument. In the event, Mr Barca did not put to the claimant in cross-examination any case that he had a dominant or collateral improper motive or purpose for bringing these proceedings. In closing submissions Mr Barca made clear that he was not inviting any such finding, but relying exclusively on *Jameel* principles. I approach AOL's application on that basis.
23. It is necessary even so to give a little more consideration to this aspect of Mr Barca's case. Both his written and oral argument relied in support of his *Jameel*; application on passages in the judgments of Hale LJ in *Steedman v BBC* [2001] EWCA Civ 1534, [2002] EMLR 17 and Sharp LJ in *Bewry v Reed Elsevier UK Ltd* [2014] EWCA Civ 1411, [2015] 1 WLR 2565.
  - i) In *Steedman* Hale LJ observed at [34] that the claimants had not put in evidence or offered explanations for their delay in complaining about the broadcasts which they said were libellous, saying that "This makes it difficult to conclude that vindication was uppermost in their minds at any time." Mr Barca invites me to conclude in this case that vindication was not "uppermost" in the mind of the claimant.
  - ii) Mr Barca relies on Sharp LJ's conclusion in *Bewry* at [41] that the claimant's claim "falls squarely within the *Jameel* jurisdiction", in part because "it cannot be said that the claim is brought to vindicate his reputation". He links this last passage to observations earlier in Sharp LJ's judgment at [25-26], [31] and [36], in which she upheld "the defendant's principal contention on this appeal ... that there was serious and unexplained delay on the part of the claimant..."
24. Ms Page is right, in my judgment, to argue that these submissions of Mr Barca conflate two distinct issues. In *Steedman* and *Bewry* the claimants had issued proceedings after the expiry of the limitation period. The only issue in *Steedman*, and the main issue in *Bewry* was whether the claims should be struck out or, alternatively, the claimants should benefit from a discretionary disapplication of the limitation period pursuant to s 32A of the Limitation Act 1980. The onus is on a claimant to persuade the court to exercise this discretion. By s 32A(2) the court is required to have regard to all the circumstances, but mandated to have regard in particular to certain specified factors. The first of these is 'the length of, and the reasons for, the delay on the part of the [claimant]': s 32A(2)(a). Paragraph [34] of *Steedman* and



paragraphs [25-26], [31] and [36] of *Bewry* are all concerned with the discretion under s 32A.

25. A *Jameel* application raises issues distinct from those that arise on an application by a claimant under s 32A. Dismissal for *Jameel* abuse is not a discretionary matter. Where the case is shown to involve a disproportionate interference with freedom of expression it is the court's duty to dismiss it. The onus is on the defendant to persuade the court that this is the case. Abuse of process arguments did not feature at all in *Steedman*, which preceded *Jameel* by several years. *Jameel* abuse did feature in *Bewry*, but only in relation to a small number of claims which had been brought within the limitation period. Those claims related to the communication of the offending words to just three people. It is those residual claims that Sharp LJ held to fall 'squarely within *Jameel*'. The other words relied on by Mr Barca appeared in the following context: 'There are a miniscule number of publications, it cannot be said that the claim is brought to vindicate his reputation in respect of those publications, or that any vindication would inure if he did so. Damages would be minimal.'
  26. This part of *Bewry* is not concerned with delay. It is a clear and straightforward application of *Jameel* principles to a case of minimal publication and minimal damage. Indeed, the position on *Jameel* abuse was so clear that Sharp LJ concluded paragraph [41] in this way: 'Mr White [Counsel for the claimant] was right in my judgment not to argue that we should allow the claim to continue if the [defendant's] appeal on the limitation issue was allowed.'
  27. Delay may be indicative of a purpose or motivation other than vindication, but those are not relied on here. I do not say that purpose can never be relevant to *Jameel* abuse but it is necessary to focus on an objective evaluation of the weight of the competing rights. In my judgment delay will usually be relevant in the assessment of whether a defamation claim represents *Jameel* abuse only if and to the extent that the delay supports an inference that objectively any harm caused, need for vindication, or need for restraint on future publication is negligible.
- (iii) *The impact of statute: the serious harm requirement*
28. Section 1(1) of the 2013 Act is headed "Requirement of serious harm" and provides:

"1.— **Serious harm** (1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant."
  29. A requirement that 'serious' harm to reputation has been or is likely to be caused is clearly more demanding than the common law test identified in *Thornton*: a tendency 'substantially' to affect in an adverse way people's attitudes to the claimant. Parliament has left it to the judges to apply the serious harm requirement, 'serious' being an ordinary word in common usage.
  30. These points have been made by Bean J in *Cooke v MGN Ltd* [2014] EWHC 2831 (QB), [2015] 1 WLR 895 [37], [39] and by me in *Ames* at [49] and [52] and are not in dispute in the present case. The main issue between the parties is the extent to which s 1(1) has altered the approach the court must take to the determination of whether a statement is defamatory. In *Cooke* Bean J accepted that evidence is admissible and

may be necessary on the issue of whether serious harm to reputation has been or is likely to be caused. My approach in *Ames* was to the same effect, though it is fair to say that the issue was not debated or part of the ratio. The claimant's case is that in order to determine whether the serious harm requirement is satisfied one should look only at the offending words.

### **What is required to prove serious harm?**

31. The main burden of the argument for the defendants on the s 1(1) issues has been carried by Mr Price. His principal submission is that *Cooke* was rightly decided; that is, that Bean J was correct to conclude that 'has caused' requires a claimant to establish as a fact on the balance of probabilities that serious harm has been caused to his reputation, and 'is likely to' requires proof that serious harm probably will be caused in the future: see *Cooke* [30-31].
32. To this, Mr Price adds that in principle the party who has the burden of proving a disputed fact may do so by evidence directly going to prove that fact, or by inference from other facts. Although he accepts that inference may sometimes be enough, it cannot always be so. On the contrary, serious harm to reputation will in most cases result in tangible adverse consequences, he submits. If no evidence of such consequences is adduced, the court should not draw an inference of serious harm.
33. Mr Price focuses his argument on construction upon the words of the subsection itself. He draws attention to the fact that 'has caused' and 'is likely to cause' are presented as alternatives. That of itself means that Parliament has departed from the common law approach of determining only whether words have a defamatory tendency. Further, as Bean J accepted in *Cooke*, the words 'has caused' direct attention to what has happened in the past, and the words 'is likely to cause' refer to what may happen in future.
34. Mr Price points out that the words 'is likely to' or similar phrases are often used in statutes to refer to a future event or consequence: see for example s 12(3) HRA, and the examples given in *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2005] 1 AC 253 [21]. In *Cream* the House of Lords held that the word 'likely' in s 12(3) HRA should be read as ordinarily denoting more probable than not. Mr Price argues that it should be given a like meaning in the present context, as was common ground in *Cooke*, and as I was inclined to accept in *Ames* at [54].
35. Different language would have been used, submits Mr Price, if Parliament's intention had been to allow claims to proceed provided only that the allegation had a tendency, or was inherently likely, to cause serious harm. Parliament could easily have replicated the definition in *Thornton* [96], using the word 'tendency' but substituting 'seriously' for 'substantially'. Alternatively, Parliament could have adopted the term 'calculated to' which is used in ss 2 and 3 of the Defamation Act 1952, and is recognised as setting a standard of likelihood lower than the balance of probabilities: see *Andre v Price* [2010] EWHC 2572 (QB).
36. It follows from Parliament's choice of language, in Mr Price's submission, that in order to succeed in a defamation claim today the claimant must prove as a fact that the publication complained of has caused or is likely to cause serious harm to the claimant's reputation. Such an issue will fall to be decided in the same way as similar

issues would be decided in any other context: on the basis of evidence. He accepts that there may be cases where the court can infer from the nature and extent of the publication complained of that serious harm to reputation has been or is likely to be caused. But it will not by any means always be enough for a claimant to point to what has been published and rely on its tendency to cause serious reputational damage.

37. Mr Price bolsters his submissions by reference to the legislative history of s 1(1), relying on the Ministerial Foreword to the draft Defamation Bill which preceded the Bill and the Act, a passage in the Report of the Joint Committee on the draft Bill, and the Explanatory Notes to the Act itself, to which I shall return. Mr Price argues that the interpretation for which he contends is clearly the one which will give effect to Parliament's intention, which was to rebalance defamation law in favour of freedom of expression.
38. The submissions for the claimant can also be concisely summarised. It is submitted that s 1(1) is solely directed to the quality of the meaning conveyed by the words. The subsection does no more than 'put into place an adjusted definition of the term "defamatory"', thereby raising the threshold of seriousness identified in *Thornton*. The overall structure of defamation law is left unaffected. Three key propositions are set out in paragraph 34 of the claimant's Skeleton:
  - i) 'The purpose of s 1(1) was to harden up existing law' relating to the exclusion of trivial defamation claims through a 'threshold of seriousness';
  - ii) this purpose was achieved by putting into statute 'an adjusted definition of the term "defamatory", the purpose and effect of which was to upgrade the harmful effect required to surmount the threshold of seriousness from 'substantial' ... to "serious"';
  - iii) the existing law was to be and was otherwise undisturbed. Thus, for instance it is argued, the law as to what evidence is admissible for the purposes of deciding whether a statement is defamatory remains as it was: only the statement complained of is admissible.
39. It is pointed out that I am not bound by *Cooke* or *Ames* and it is submitted that the approach taken in those cases was, to the extent it is inconsistent with the claimant's present arguments, mistaken.
40. In support of these submissions Ms Page has developed three principal strands of argument. One is concerned with the language of s 1(1) itself. It is submitted that the words 'is likely to' reflect the common law requirement of a tendency, and common law authorities using these terms interchangeably. The words 'has caused' are said to be a reflection of the first element of the common law definition as expressed in *Thornton*. That in turn is said to reflect the fact that the tort is complete on publication. Thus, it is argued, the only material alteration to the law is the introduction of the word 'serious' in place of 'substantial'.
41. Secondly, Ms Page argues that if the defendants' arguments are correct Parliament will have wrought radical changes in the structure of defamation law. It will have abolished the objective test of meaning; the single meaning rule; the 'tendency' test of what is defamatory; the rule that libel is actionable per se, and the presumption of

harm. It will also have impliedly repealed s 2 of the 1952 Act. Parliament should not be taken to have intended such a revolution, in the absence of clear words indicating as much.

42. The third strand of Ms Page's argument relies on the legislative history and the purposes for which the 2013 Act was passed. She submits that the Parliamentary materials assembled by Mr Price on behalf of IPL and ESL show that the mischief at which s 1(1) was aimed was to get rid of all non-serious claims at an early stage, because of the high costs of defamation litigation and the adverse impact on freedom of expression of bullying by the rich. She submits that the materials contain nothing, other than the Explanatory Notes, to suggest that it was intended that evidence would be submitted on the issue of serious harm, or that there would be any conflation of *Jameel* and *Thornton*, which are two distinct lines of authority.
43. As to the Explanatory Notes, these are not to be treated as reflecting the will of Parliament, submits Ms Page, relying for this submission on Lord Steyn's words in *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 1 WLR 2956 [5] – [6]. She adds that the length and expense of the present trial illustrate the mischief that would result if the defendants' submissions were accepted. Costly trials such as this are the opposite of what Parliament intended, she submits.
44. I have approached this issue with an open mind, putting to one side for the moment the conclusions arrived at in *Cooke* and *Ames*. My starting point is, as ever, consideration of the language used by Parliament, in the context in which that language was used. An important part of that context is the existing common law. Parliament is presumed to know the common law, and to legislate by reference to it. Thus, Parliament is presumed to have been aware of the *Thornton* definition of what is defamatory, the rules as to how a defamatory meaning may be proved, the presumption of damage, and the other common law rules outlined above. The *Jameel* jurisdiction, being a creature of judicial decision-making, albeit pursuant to statute, is to be treated for this purpose as a common law rule. Parliament also legislates, of course, in the presumed knowledge of existing statute law, and the meaning that has been ascribed to it by the courts.
45. In my judgment this approach leads to the clear conclusion that in enacting s 1(1) Parliament intended to do more than just raise the threshold for defamation from a tendency to cause 'substantial' to 'serious' reputational harm. The intention was that claimants should have to go beyond showing a tendency to harm reputation. It is now necessary to prove as a fact on the balance of probabilities that serious reputational harm has been caused by, or is likely to result in future from, the publication complained of.
46. It is important, first of all, to note that the claimant's Counsel are clearly wrong to describe s 1(1) as a 'definition of the term "defamatory"'. It is a principle of statutory construction that Parliament is assumed not to intend the repeal of a common law rule other than by express words or necessary implication: see *Bennion on Statutory Interpretation* (6<sup>th</sup> ed 2013), p 280; *R (Morgan Grenfell Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, 607 [8], [41], [44]. In any event, the formula adopted in this subsection, that a publication 'is not defamatory unless ...', is

simply not apt to create a new definition. It is clear, in my judgment, that the subsection serves to add to the common law, not to substitute a different provision.

47. Secondly, taken by themselves, the terms ‘has caused’ and ‘is likely to cause’ would naturally suggest to most lawyers or laymen two different and alternative ways of meeting the serious harm requirement: either by proving as a fact either that serious reputational harm has already been suffered or, alternatively, that it probably will be suffered in future. It would not occur to the ordinary reader that these requirements were to be taken as a single and indivisible requirement, satisfied or not, by reference only to the words complained of.
48. If one then adds an appreciation of the particular common law context, these conclusions are not undermined, but reinforced. The existing law of defamation provided some ready-made, carefully crafted and well-understood terminology, in the form of the *Thornton* ‘tendency’ definition and the term ‘calculated to’ in the 1952 Act. Either would have been suitable for the purpose which Ms Page attributes to Parliament. Parliament chose instead to adopt quite different language, which is not to be found in the common law of defamation or previous statutes on the subject.
49. Sometimes this happens when the law is modernised. Maybe, if the term stood alone in the subsection, ‘likely to’ could be interpreted as modern language synonymous with ‘tend to’ or ‘have a tendency to’. I do not think so, because there is nothing particularly archaic about ‘tend to’. Moreover, as Mr Price points out, wording such as ‘likely to’ is typically used in statute to refer to the prospect of a future event, not a tendency. Parliament must have known how the House of Lords had construed the word ‘likely’ in *Cream*. In any event, given that in s 1(1) the term ‘likely to’ does not appear alone but in conjunction with the words ‘has caused’, I do not think it could be right to treat the former as intended to replicate the common law tendency test. The words ‘have caused’ must be given some effect. Ms Page’s submission does not satisfactorily account for their presence in the section. It treats them in substance as surplusage - at best an inaccurate Parliamentary rendition of the redundant and confusing first part of the common law definition.
50. In my opinion, the fact that s 1(1) was enacted in a legal context that included the *Jameel* jurisdiction lends further weight to these conclusions. By the time the section was passed the common law had developed a twin-track approach to the elimination of trivial defamation claims: they might fail to meet the threshold of seriousness identified in *Thornton*, and be struck out on the grounds that the statement complained of was not defamatory; or they might be struck out as an abuse of process pursuant to *Jameel*. Inherent in the *Jameel* requirement of a real and substantial tort, but absent from the *Thornton* test, is an assessment of all the circumstances including, and in particular, the gravity *in fact* of the reputational harm that a publication has caused or is likely to cause. This twin-track approach creates what is clearly a somewhat unsatisfactory legal scenario. The use in s 1(1) of the new language, ‘has caused or is likely to cause’ is consistent with an intention to simplify the law by drawing together the strands, and subsuming all or most of the *Jameel* jurisdiction into a new and stiffer statutory test requiring consideration of actual harm.
51. There can be no question but that Parliament knew about the role of the *Jameel* jurisdiction. Indeed, I doubt there would have been a need in this case for the presumption that Parliament knows the common law, and the statutory context in

which it legislates. The passage of the 2013 Act was preceded and accompanied by extensive and intensive description, discussion, and criticism of the common law. It is hard to envisage any remotely interested Parliamentarian who was unaware of the essential common law rules to which I have referred above. The materials available to demonstrate this are voluminous. It is unnecessary to list them. I shall however refer to two. Legislative history is always relevant as an aid to construction, provided it is used to show the context and background in which Parliament used the words it chose. In my view the legislative history lends support to the conclusions at which I have arrived independently of them.

52. The draft Defamation Bill which was the origin of the Act was the subject of a report by a joint Committee of the House of Lords and House of Commons. That report (Draft Defamation Bill, HL Paper 203, HC 930-1 of 19 October 2011) noted at paragraph 27 that ‘under the existing common law, the courts have power to throw out any claim that fails to meet a “threshold of seriousness”, including where no “real and substantial” wrongdoing can be demonstrated ...’. The Joint Committee referred to the government’s then proposal to impose a requirement of ‘substantial harm’ and called for a test of ‘serious and substantial’ harm instead. The relevant considerations identified by the Committee were, on the one hand, the importance of ensuring ‘that wealthy individuals and organisations cannot stifle comment and debate that has no significant impact on their reputation’ and, on the other, ‘the risk of increasing costs at the start of the claim’. The Report emphasised at paragraph 30 what the Committee saw as the importance of considering ‘the context in which a statement is made’, which it took to include Post-publication events such as ‘a rapid apology and correction’, or a notice attached to internet material that has been challenged as libellous. None of this is relevant under the common law approach.
53. The Explanatory Notes to the Act were relied on by Bean J in *Cooke* at [37] and by me in *Ames* at [49]. As Lord Steyn observed in the *National Asylum Support Service* case at [5]: “In so far as ... Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are ... always admissible aids to construction.” The following passage makes clear that Parliament was well aware of the twin-track approach of the common law to trivial claims:-
- “11. The section builds on the consideration given by the courts in a series of cases to the question of what is sufficient to establish that a statement is defamatory. A recent example is *Thornton v Telegraph Media Group Ltd* in which a decision of the House of Lords in *Sim v Stretch* was identified as authority for the existence of a “threshold of seriousness” in what is defamatory. There is also currently potential for trivial cases to be struck out on the basis that they are an abuse of process because so little is at stake. In *Jameel v Dow Jones & Co* it was established that there needs to be a real and substantial tort. The section raises the bar for bringing a claim so that only cases involving serious harm to the claimant's reputation can be brought”.
54. Paragraph 10 of the Explanatory Notes shows that Parliament had in mind that there might be cases where a publication has taken place but has not yet caused serious harm: “The provision extends to situations where publication is likely to cause serious

harm in order to cover situations where the harm has not yet occurred at the time the action for defamation is commenced.’ This identifies a mischief which s 1(1) sought to address: a statement which has been published and is likely to cause serious harm to reputation, but has yet to do so. Ms Page’s construction does not acknowledge the possibility of such a scenario.

55. Some Hansard extracts are among the materials put before the court by Mr Price. He has not based his arguments on those extracts, however. For my part I do not regard s 1(1) as ambiguous, and hence I do not consider the case satisfies the requirements for the application of the doctrine in *Pepper v Hart* [1993] AC 593. I am comforted however by the thought that, if I am wrong about that, my approach to the construction of s 1(1) receives support from the statements made by Mr Djanogly, the Parliamentary Under-Secretary for Justice, promoting the Bill in the Commons: see HC debates of 12 June 2012 vol 546 col 259; Public Bill Committee 19 June 2012 col 17 (referring to a question at col 12).
56. In arriving at my conclusions I have given careful thought to Ms Page’s submissions that they involve imputing to Parliament – contrary to principle – an intention to revolutionise defamation law by implication, and to do so in a way that in practice risks defeating Parliament’s intention by making litigation in this area more not less expensive and complex. I regard both submissions as alarmist and ill-founded. I acknowledge the presumption against implied repeal of the common law. But I do not accept that my construction of s 1(1) is as radical as is suggested, or that it involves the dramatic consequences attributed to it by the claimant’s Counsel. To the extent that my construction does involve the implied repeal or amendment of common law principles, an intention to achieve that is, in my judgment, necessarily implicit in Parliament’s choice of language.
57. Much that is said on the claimant’s behalf on this aspect of the matter seems to me to be based on a false premise, namely that on this approach it will in all cases be necessary for a claimant to adduce evidence to prove that the publication complained of is defamatory of him or her. As recognised in *Cooke and Ames*, however, the serious harm requirement is capable of being satisfied by an inferential case, based on the gravity of the imputation and the extent and nature of its readership or audience. Suppose a well-known public figure complains of national media publication of a grave imputation, such as conspiracy to murder or serious sexual crime. They could hardly be required to call witnesses who read the words to say they thought the worse of the claimant in order to establish a claim. In such a case the common law rules for the objective assessment of the meaning and defamatory tendency of words are plainly unaffected, as is the single meaning rule.
58. I cannot see why the position as regards those rules of the common law should be any different in less obvious cases, where it may be necessary for a claimant to prove some facts beyond the words themselves and the fact and extent of their publication. The court can still undertake an objective determination of the single meaning of the words, and whether it satisfies the *Thornton* test, before considering whether it has been proved that serious harm has been or is likely to be caused by the publication.
59. One main difference in practice may well be that a claim will no longer succeed where the meaning is a serious one but the claimant’s reputation in the eyes of those who read the words complained of is not in fact harmed seriously, if at all. This can

occur, as illustrated by the facts of *Riches v News Group Newspapers Ltd* [1986] QB 256 and *Oriental Daily Publisher Ltd v Ming Pao Newspapers Ltd* [2012] HKCFA 59, [2013] EMLR 7. In each of those cases the defendants reported allegations which were grave, but made by sources who lacked credibility. None of the claims was considered deserving of large sums in compensatory damages, but proof that readers did not believe the serious defamatory allegation made could not at common law defeat a claim altogether. It could be relied on only to mitigate compensatory damages. In this jurisdiction a *Jameel* application would be available as an alternative, were it not for s 1. But either approach has drawbacks for a defendant.

60. I accept that my construction of s 1(1) means that libel is no longer actionable without proof of damage, and that the legal presumption of damage will cease to play any significant role. These, however, are necessary consequences of what I regard as the natural and ordinary, indeed the obvious meaning of s 1(1). They are, moreover, consequences which had in practice already been brought about by previous developments. The HRA and the emergence of the *Jameel* jurisdiction which substantially eroded if they did not wholly undermine these common law rules. Since *Jameel* it has no longer been accurate other than technically to describe libel as actionable without proof of any damage. I cannot see this as a substantial argument against my construction of the statute.
61. The claimant's argument that this construction involves the implied repeal of s 2 of the Defamation Act 1952 is ingenious, but in my judgment ultimately misconceived. At common law spoken words were actionable as slander without proof of special damage if they defamed the claimant 'in the way of' – meaning, roughly, in connection with - any profession, calling, trade, business or office. Section 2 of the 1952 Act replaces the common law rule with the following: '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 damages, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling trade or business.' As noted above, the term 'calculated to' was held in *Andre v Price* to connote a test of likelihood, lower than 'more likely than not'. 'Disparagement' was interpreted as requiring 'a certain threshold'.
62. The claimant's argument is that s 2 permits a slander action to be maintained in relation to defamatory speech which disparages a person in their trade etc. without proof of special damage; if s 1(1) of the 2013 Act requires proof of actual serious harm it has brought about a fundamental change to s 2. The fallacy will be obvious from what I have already said. The general common law rule is that a slander action requires proof of special damage. Section 2 alleviates that burden, where its requirements are satisfied. All that s 1(1) has done is to add a requirement that a claimant prove actual or likely serious harm to reputation. This is not in conflict with the existing law, still less does it involve an implied repeal.
63. In invoking the spectre of s 1 disputes leading to spiralling costs at an early stage, it seems to me that Ms Page falls into the trap of generalising on the basis of the particular circumstances of this case, which are quite particular. She also, to an extent, finds herself describing the kettle from the perspective of the pot. For one thing, this trial has involved very substantial argument on the true interpretation of s 1(1). It is not only the defendants who have devoted time and resources to this. The 73-page



Skeleton Argument submitted by Ms Page and Mr Busuttil runs to just short of 26,000 words, a large part of it devoted to the issues of law that arise from the s 1 disputes. That will not be the case every time an issue of serious harm is tried.

64. Secondly, as noted later in this judgment, the claimant's written evidence for this trial went in my opinion a long way beyond what was necessary and proportionate. I eliminated a great deal of it from consideration as irrelevant. Thirdly, a large part of the hearing was absorbed by cross-examination of the claimant which, in my judgment, also went beyond what was really needed. Lessons are there to be learned. Even then, this hearing has taken only two days, and the evidence examined has not been very extensive. I am confident that in future, with appropriate case management after the applicable principles have been settled, issues such as this can be tried in a more economical and proportionate way.
65. In summary, my conclusion is that by s 1(1) Parliament intended to and did provide that a statement is not defamatory of a person unless it has caused or will probably cause serious harm to that person's reputation, these being matters that must be proved by the claimant on the balance of probabilities. The court is not confined, when deciding this question, to considering only the defamatory meaning of the words and the harmful tendency of that meaning. It may have regard to all the relevant circumstances, including evidence of what has actually happened after publication. Serious harm may be proved by inference, but the evidence may or may not justify such an inference.
66. I remain of the views expressed in *Ames* at [50] and [101]. In particular, where a defendant maintains that the actual or likely harm to reputation is too slight to justify a claim, the starting point should be consideration of s 1; and *if* that issue is raised it will *usually* be preferable for it to be tried as a preliminary issue, rather than by way of a striking out or summary judgment application, which may fail on the grounds that the conclusion is not obvious and the prospect of success not fanciful. I emphasise 'if' and 'usually' because it is not every case in which serious harm will be a real issue; and where it is, a preliminary trial will not invariably be appropriate.
67. It is not necessary in this case to determine the subsidiary question of the point in time from which the court is to judge whether a statement 'is likely to' cause serious harm. Nor was it in *Cooke* or *Ames*. The contenders are the time when the claim form is issued, or the time at which the issue is determined. The wording of the section does not assist. Bean J preferred the former: *Cooke* [32]. I am inclined to prefer the latter, on the grounds advanced by Mr Price. If the former approach is adopted a claim would fail if actual damage had been caused at the time of the determination, but was not likely at the time of publication; and a claim would succeed if damage was likely at the time of publication even if it turned out that none was caused.
68. On either approach it must be accepted that a consequence of s 1 is that the status of a publication may change from non-defamatory to defamatory. A cause of action may lie inchoate until serious harm is caused or its future occurrence becomes probable. I see no difficulty with that. A similar position prevails at common law in respect of slanders which are not actionable without proof of special damage. Another consequence is that a publication may in principle change from being defamatory to being not defamatory (and hence not actionable), for instance by reason of a prompt and full retraction and apology. That is a novelty in the substantive law of defamation,

but does not represent any great change of substance. It is well-established that one effect of *Jameel* is that the pursuit of an action, legitimate when it began, may cease to be so when circumstances change: see, e.g., *Hays plc v Hartley* [2010] EWHC 1068 (QB), *Cammish v Hughes* [2012] EWCA Civ 1655, [2013] EMLR 13. Fairness can usually be achieved via costs orders.

### **Other publications and the rule in *Dingle***

69. As part of their case that serious harm to reputation has neither been nor is likely to be caused by the publications complained of, all the defendants seek to rely on other publications to the same or similar effect. In their Defences IPL and ESL each put their case in the following way, which AOL adopts in support of its case on serious harm and *Jameel* abuse:

(1) ‘The relevant allegations have been made in many media and other publications, a number of which have a greater print and/or online readership and/or prominence than the Independent and/or named the Claimant and/or were published prior to the Article.’

(2) ‘Afsana’s allegations will remain accessible on the internet irrespective of the continued publication of the Article’.

(3) ‘Any consideration of such coverage will disclose the fact that in 2002 the Phoenix Municipal Court in the State of Arizona granted an injunction against the Claimant prohibiting him from stalking or otherwise harassing a woman who had been in a relationship with him and an associate of hers (“the Harassment Injunction”).’

70. In support of points (1) and (2) the defendants have adduced evidence of a range of other publications, together with circulation and readership statistics. Mr Price has prepared a chronology, demonstrating which publications first appeared on which dates. This material shows that some of the other publications took place earlier than those complained of, and that some had a very substantial readership. Particular reliance is placed on articles published in the *Daily Mail*, in which allegations made by Afsana were given extensive publicity, and about which the claimant, on his own account, wanted to complain. He did not, as he was advised the articles were protected by the privilege for fair and accurate reporting of court proceedings. As a matter of chronology, the articles complained of against IPL and ESL came after a publication on the website of the Emirates Centre for Human Rights, the first AOL article, articles in the *Daily Telegraph* and *Daily Mail*, and in the *Gulf News* and the *National*.

71. The objection which has inevitably been raised on behalf of the claimant is that reliance on this material violates the rule in *Dingle*. In *Dingle*, on 17 May 1958 the *Daily Mail* and other papers reported the contents of a Parliamentary Select Committee report which defamed the claimant. The report was fair and accurate and therefore immune from suit in libel. On 16 June the *Mail* published a further, unprivileged report to similar effect. On 26 June it published a further article stating that all interested parties had been cleared of any deliberate intent to defraud. The

claim was tried by judge alone. The judge reduced damages on account of the earlier publications. The House of Lords held that this was not legitimate. The earlier publication was inadmissible on the question of what general damages were appropriate to compensate the claimant for the article complained of, which was neither privileged nor shown to be true, nor should damages be reduced on the ground that the Select Committee report had tarnished the claimant's reputation.

72. Ms Page submits that *Dingle* is authority for a rule that at common law other publications to the same effect as the words complained of, or relating to the same incident as is referred to in the words, are inadmissible in relation to the assessment of general damages for injury to reputation, whether the other articles are published by the defendant or others, and whether or not they are the subject of complaint by the claimant. This rule is qualified only by s 12 of the 1952 Act, by which a defendant may prove in mitigation of damages that the claimant has recovered or claimed damages for libel or slander, or agreed to accept compensation, 'in respect of the publication of words to the same effect as the words on which the action is founded.'
73. Again, it is Mr Price who leads the argument for the defendants on these issues. He seeks to meet Ms Page's objections in three ways. First, and least radically, it is submitted that the true ratio of *Dingle* is narrower than the claimant suggests. Mr Price submits that the decision simply relates to what material is admissible in mitigation of damages, and is not authoritative in the new legal environment in which a claimant must establish serious harm to reputation. Alternatively, it is submitted that certain propositions must follow from the nature of injury to reputation, the wording of s 1, and established principles of causation in tort. One such proposition is said to be that where newspaper A reports an allegation and newspaper B subsequently reports the same allegation, the claimant can recover against B in respect of damage to reputation caused by publication to those readers of B who were not previously aware of the allegation, and only in respect of that damage. Thirdly, it is submitted that the authorities on *Jameel* abuse support the view that the existence of other past and likely future publications to similar effect is relevant and admissible in determining whether a publication constitutes a real and substantial tort.
74. The decision in *Dingle* has not commanded universal agreement. To some it seems no more than common sense that previous publications to the same or similar effect are relevant when assessing what damage to reputation has been caused by a given publication. The ratio of the decision is, however, not that it is irrelevant to consider the state of a person's reputation at the time the words complained of are published. The common law has always recognised that a person should only be compensated for injury to the reputation they actually possess. A defendant may prove in mitigation that a person has a bad reputation in the relevant sector of his life. The common law has however developed rules as to the *means* by which such a matter may be proved or, put another way, the evidence which is admissible to establish it. Previous publications to the same effect are inadmissible. The court will admit evidence from individuals who can speak of how a person is or is not esteemed, in the relevant sector of his reputation, or evidence of a conviction or possibly some other single notorious event. *Dingle* is in my judgment properly understood as a reaffirmation of those long-established rules of common law, and the policy considerations that underlie them.

75. The speech of Lord Denning perhaps reflects this most clearly. Giving his reasons for concluding that Pearson J had erred he identified the issue in this way, [1964] QC 371, 410:

“5. Now comes the difficult point which I may state in this way. The "Daily Mail" are only responsible for the damage done to the plaintiff's reputation by the circulation of the libel in their own newspaper. They are not responsible for the damage done to the plaintiff's reputation by the report of the select committee or by the publication of extracts from it in other newspapers. If the judge *isolated* the damage for which the "Daily Mail" were responsible from the damage for which they were not responsible, he would have been quite right, see *Harrison v. Pearce*. But it is said that he did not *isolate* the damage. He reduced the damages because the plaintiff's reputation had already been *tarnished* by reason of the publication of the report of the select committee and of the privileged extracts from it in the "Daily Mail" and other newspapers. I think he did do this and I think he was wrong in so doing.”

76. At p410-411 Lord Denning gave these reasons for that conclusion:

“At one time in our law it was permissible for a defendant to prove, in mitigation of damages, that, previously to his publication, there were reports and rumours in circulation to the same effect as the libel. That has long since ceased to be allowed, and for a good reason. ... It does a newspaper no good to say that other newspapers did the same. They must answer for the effect of their own circulation without reference to the damage done by others. They may not even refer to other newspapers in mitigation of damages. Such has been the law ever since 1829 (*Saunders v. Mills*), and it cannot be called in question now. It is but a particular instance of the general rule which excludes rumours or reports to the same effect as the libel, see *Scott v. Sampson*; *Speidel v Plato Films Ltd.*: and it has been implicitly recognised by the legislature in the statutes of 1888 and 1952 which have created some limited exceptions to it, not in question here. ”

77. At 412 Lord Denning addressed the contention that the claimant's reputation had been 'tarnished' by other publications. In the process he identified the kinds of evidence that the common law accepts as admissible on the issue of bad reputation:

“In order to get round this law about reports and rumours, Mr. Faulks said that they had got to the stage here where Mr. Dingle's current reputation was *tarnished*: and that evidence of tarnished reputation was admissible in evidence. But how are you to distinguish between reports and rumours which are inadmissible and tarnished reputation which is admitted? only in this way: In order to show that a man has a bad reputation,

you should call *those who know him* and have had dealings with him. They are in a position to judge his worth. If they consider he has a bad reputation, they are very likely right, and he has nothing much to lose. If it is a settled reputation which has been accumulated over a period by a sequence of misdeeds, they will know of it. If it is a reputation which has been destroyed at one blow by a single conviction, they will know of it too. Either way, if you call those who know him well, you are likely to get at the truth. ... “

78. The other principal speech on this issue was that of Lord Radcliffe, with whom Lords Morton and Cohen agreed. He said this at 396:

“Whatever may be the qualifications or requirements as to evidence led on the issue of reputation by way of mitigation of damages for libel, I do not believe that it has ever yet been regarded as permissible to base such evidence on statements made by other persons about the same incident or subject as is embraced by the libel itself. In my opinion it would be directly contrary to principle to allow such an introduction.”

79. Lord Radcliffe identified the principles:

“A libel action is fundamentally an action to vindicate a man's reputation on some point as to which he has been falsely defamed, and the damages awarded have to be regarded as the demonstrative mark of that vindication. If they could be whittled away by a defendant calling attention to the fact that other people had already been saying the same thing as he had said, and pleading that for this reason alone the plaintiff had the less reputation to lose, the libelled man would never get his full vindication.”

80. Dealing with the ‘tarnished reputation’ point, Lord Radcliffe said this:

“It is, I think, a well understood rule of law that a defendant who has not justified his defamatory statements cannot mitigate the damages for which he is liable by producing evidence of other publications to the same effect as his; and it seems to me that it would involve an impossible conflict between this rule and the suggested proof of tarnished reputation to admit into consideration other contemporary publications about the same incident. A defamed man would only qualify for his full damages if he managed to sue the first defamer who set the ball rolling: and that, I think, is not and ought not to be the law.

I believe that in saying this I am doing no more than recognising the rule derived from *Saunders v. Mills*.<sup>8</sup> This case was decided in 1829 and it has enjoyed a long and respected reign in the textbooks on libel.”

81. Lord Radcliffe left open the possibility of proving bad reputation by means other than what he called ‘the reception of such hazy generalities as a “well-known pickpocket” or ‘a notorious prostitute’’. He was not persuaded that the House’s recent decision in *Speidel v Plato Films Ltd* resolved the issue. But he said at 399:

“I do not think it necessary to say anything on that point because, whatever this recent decision must be taken as laying down, I am confident that none of the members of the House contemplated that the evidence of reputation that they were speaking of could possibly embrace evidence of the use of repetition of the same defamatory words by other persons dealing contemporaneously with the same incident or subject. When one speaks of a plaintiff's "actual" reputation or "current" reputation (to quote my own adjective) one means his reputation as accumulated from one source or another over the period of time that precedes the occasion of the libel that is in suit.”

82. The rule in *Dingle* was considered in *Rath v Guardian Newspapers Ltd* [2008] EWHC 398 (QB), where the defendant pleaded reliance on a failure by the claimant to complain about similar allegations in previous articles published in the same newspaper, and argued that in the light of modern developments in the law relating to what is admissible in mitigation of damages (in particular *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579) it was at least arguable that this was a legitimate procedure. Tugendhat J rejected the argument and struck out the relevant pleading. No variant of the argument advanced to Tugendhat J has been advanced to me.
83. The ratio of *Dingle* is binding on me, and it was not suggested otherwise. I have identified its ratio above. It would in my view be quite wrong for me to distinguish the decision by taking the narrow view of its ratio that Mr Price suggests. There is no principled distinction to be drawn between the admission of other articles in mitigation of damages, as was attempted unsuccessfully in *Dingle* in a legal environment where damage was presumed, and the attempt to introduce such articles to reduce or limit damages in the present case, in the changed environment following the 2013 Act.
84. I would add that I am far from persuaded that there is anything fundamentally wrong with the rule in *Dingle*. The reasoning of Lords Radcliffe and Denning is persuasive, not only at the level of authority but also in terms of both principle and pragmatism. The argument at this trial has underlined some of the practical problems which would be liable to flow from the approach that is urged on me by the defendants. Somewhat perversely, publishers, ordinarily straining to scoop one another with a news story, would have the opposite incentive when it came to responsibility for damage to reputation. There would be a contest not to be found to be first. And it is of course not just a question of timing. One would have to consider the extent of any overlap between readerships. Mr Price’s core submission would require some assessment of the overlap between the readership of A and B. There is no evidence on that issue in this case, and I see no reason to assume that there is any substantial overlap between the readership of the various publications at issue.

85. It seems to me that the principled justifications for adhering to the rule in *Dingle* are at least as strong as they were at the time it was decided. I have cited the principles identified by the House of Lords. Another, pointed out by Diplock LJ in the Court of Appeal (p189-190), is that the rule corresponds with basic principles of causation:

“If a man reads four newspapers at breakfast and reads substantially the same libel in each, liability does not depend on which paper he opens first. Perhaps one newspaper influences him more than another, but unless he can say he disregarded one altogether, then each is a substantial cause of the damage done to the plaintiff in his eyes.”

86. Secondly, at common law, a publication which bears a meaning defamatory of the claimant is irrebuttably presumed to have caused the claimant damage, if the claimant chooses to sue upon it. It could be argued that the same approach should in logic and fairness be adopted by the common law when considering the impact, if any, of other published statements to the same or similar effect: the court should presume or at least infer that a statement having a defamatory tendency has in fact caused the harm which it is inherently liable to cause. Otherwise, the scales are set unevenly as between the parties. If I am right in my construction of s 1(1) of the 2013 Act, there is now no irrebuttable presumption of serious harm to reputation; it must be proved. Although it may sometimes be proved by inference, evidence of actual harm in the form of adverse social media responses, name-calling, or similar events is admissible, and may be necessary. In this new legal context, adherence to the limits set by *Dingle* on evidence of collateral harm to reputation may be more likely to hold the scales evenly between the parties than it did in the past. There is less room for complaint by defendants. There would be some room for complaint by claimants if defendants were now permitted to put in evidence other defamatory publications and, without more, invite an inference that these had caused serious harm to reputation. The position of a defendant would approximate to that of a claimant under the previous law.
87. I note that the impact of *Dingle* is modified by s 12 of the 1952 Act in a case where a previous publication has resulted in a claim for damages, whether or not that claim has succeeded. This may not be entirely logical, but it has two effects relevant to the present case. Co-defendants can in principle rely on each other’s publications in mitigation. And a defendant such as AOL sued for two publications to the same effect can rely on the first in mitigation of damages in respect of the second.

#### **D. REFERENCE AND DEFAMATORY MEANING**

88. The publications complained of and their dates of first publication are as follows:-

20 January 2014	<i>HuffingtonPost</i>	‘British victim of domestic abuse faces prison in UAE’.
24 January 2014	<i>Independent</i> (online)	‘British mother Afsana Lachaux faces jail in Dubai after husband claims she kidnapped their son’

- 25 January 2014 *Independent* (print) ‘British mother faces jail in Dubai after husband claims she kidnapped their son’
- ‘i’ (print only) “Kidnap” mother abandoned by UK, family say’
- 6 February 2014 *HuffingtonPost* ‘Distracted by a Big, Shiny Arms Deal - David Cameron Has Abandoned a British Citizen, Please Help’
- 10 February 2014 *Evening Standard* “Dubai's a small place - he took Louis in an instant”  
(print and online)

(i) *The first Post Article*

89. It is not necessary to set out in full the words complained of given the narrow scope of the dispute. It is useful to set out some key passages however. The first article contained the following words (The numbering is mine).

“[1] When Afsana Lachaux left her job as a senior civil servant four years ago in London it was as a newly wed to start afresh in Dubai, but she could never have imagined how that dream would swiftly turn into a nightmare. A victim of domestic abuse, Afsana took her baby and bravely left her partner three years ago, but has been trapped in Dubai ever since as her ex-husband has exacted a prolonged campaign of intimidation and harassment against her.

[2] Now, on 21 January, she will appear in court accused of kidnapping her own child, as she suffers the consequences of the Emirati legal system that affords little protection for victims of domestic violence.

[3] Afsana Lachaux, a 46-year-old British citizen of Bangladeshi origin, had her passport taken from her in June 2011 after her abusive ex-husband used his influence with Emirati authorities to obtain an indefinite travel ban on her and her three-year-old son. Since then she has been forced to live in abject poverty, reliant on support from her two adult sons working in London, and seen her health deteriorate swiftly.

[4] The ex-husband, a wealthy foreign exchange dealer, told her that he would ‘destroy her’ at a divorce hearing and has successfully used the Emirati legal system to do just that. At a



trial held in her absence, he was granted sole custody of their child after a judge ruled she was an unfit mother due to neglect on the basis that her child has eczema. In October 2013, after more than a year of living in hiding, Afsana's ex-husband snatched their child after finding out where they were living."

90. It is not disputed by AOL that, applying the objective test to which I have referred, this article referred to the claimant. For the purposes of the serious harm test, however, it is pointed out that the reference to Afsana's husband as a 'wealthy foreign exchange dealer' was inaccurate – as the claimant agrees.
91. The meanings complained of in respect of the first *Post* article are that:
- i) while he was still married to and living with his ex-wife Afsana, the Claimant subjected her to physical abuse which she bravely left him to escape, taking their baby son with her;
  - ii) the Claimant falsely accused Afsana of kidnapping their son, a false charge which had unjustly left her facing jail in the UAE, when the truth was (as he knew) that she had justifiably taken him away with her to escape his abuse;
  - iii) the Claimant improperly threatened Afsana at a divorce hearing, telling her that he would 'destroy' her; and
  - iv) having tracked down Afsana after more than a year of living in hiding, the Claimant snatched their son back from her without justification and with callous disregard for his welfare.
92. The dispute relates only to the words that I have underlined. There are two elements to those words. In my judgment the first – the sting that the claimant snatched his son back 'without justification' - is plainly present. The entire tenor of the article is to suggest that the mother was justified in taking her child away from a violent father, and that he consequently was unjustified in taking the child back. The word 'snatching' itself conveys a wrongful act. I am not persuaded however that the additional imputation of callous disregard for the boy's welfare is present.
- (ii) The Independent article*
93. There is no material difference between the print and online versions of this article. Its meaning was determined by Sir David Eady, sitting as a Judge of the High Court, on 11 March 2015 when he ruled, [2015] EWHC 620 (QB), [40] that it meant that the claimant
- i) became violent towards his ex-wife Afsana soon after the birth of their son, which caused her, fearing for her safety, to escape and go on the run with the child;
  - ii) having tracked Afsana down, callously and without justification snatched their son back from his mother's arms (and has never returned him);

- iii) falsely accused Afsana of kidnapping their son, a false charge which if upheld could result in her, quite unfairly and wrongly, spending several years in a Dubai jail;
  - iv) was content to use Emirati law and its law enforcement system, which discriminate against women, in order to deprive Afsana of custody of and access to their son Louis;
  - v) hid the child's French passport and refused to allow him to be registered as a British citizen, as Afsana wished;
  - vi) was violent, abusive and controlling and caused Afsana to fear for her own safety;
  - vii) caused her passport to be confiscated thus for her to be trapped in the UAE;
  - viii) obtained custody on a false basis and also initiated a prosecution of Afsana in the UAE, which was founded upon a false allegation of abduction, and which gave rise to the risk of a lengthy prison sentence there.
94. At this trial IPL has disputed reference to the claimant. Mr Price advances a submission that notwithstanding these conclusions of Sir David Eady it is still necessary as a matter of law for the claimant to prove that he was referred to, and to do so by adducing evidence from readers of the publication complained of who understood it to refer to him. The claimant's Counsel initially responded that this argument was not open to IPL in the light of Sir David's findings. They then drew back from reliance on any estoppel and argued simply that the submission was wrong. I agree.
95. Mr Price's submission is that in principle, where a claimant is not named, and reference is put in issue by the defendant, the claim will normally fail in the absence of such evidence. It is only permissible to rely on an inference that there were such readers if it is obvious, and this is 'the only reasonable inference', he argues; and only rarely will the court grant a claimant the 'indulgence' of permitting reliance on inference. Mr Price has not persuaded me that there is any reason of principle why in this context an inference should be permitted only if there is no other reasonable inference, as opposed to being the one that is more likely than any other to be true. These submissions are in my judgment wrong in law and unsupported by the passages cited (*Grappelli v Derek Block Holdings* [1981] 1 WLR 822, 830; *Fullam v Newcastle Chronicle and Journal Ltd* [1977] 1 WLR 651, 6659B, *Dwek v Macmillan Publisher Ltd* [2000] EMLR 284 and *Baturina v Times Newspapers Ltd* [2011] 1 WLR 1526 [44]-[50]). These passages in my judgment represented no more than applications of established principle to particular facts. The true position is as I have stated above: the test is an objective one.
- (iii) *The i article*
96. This is merely an abbreviated version of what appeared in the *Independent*, under the same by-line. It is not disputed that it bears the same defamatory meanings. Reference is established for the reasons given above.

(iv) *The second Post Article*

97. The article is long, but the words complained of are short. The article goes into detail about the ‘botched arms deal’ referred to in the headline. The words complained appear at the end of the article (again, the numbering is mine):

...While this botched deal was playing out, a British citizen named Afsana Lachaux was in serious trouble. She still is.

Afsana is a Bangladeshi-born, British-raised woman – a lifelong civil servant (both local and national level), a mother to two graduate sons, who are now working in London. She had left for Dubai to start a new life with her French husband in 2010.

Sadly, shortly after arriving there, her spouse became violent and abusive. Terrified for her own life, she fled their Dubai apartment with their new baby son, Louis, just a few months old...”.

98. It is not disputed by AOL that this second article referred to the claimant. The defamatory meaning attributed to these words by the claimant is that ‘shortly after he arrived with Afsana in Dubai, the Claimant became violent and abusive towards her, causing her, terrified, to flee for her life.’ The dispute concerns syntax only. I find that this article does bear the defamatory meaning complained of.

(v) *The Evening Standard article*

99. The defamatory meanings of this article were determined by Sir David Eady at the same time as he ruled on the meaning of the *Independent* article. He held that the *Evening Standard* article meant that the claimant:

- i) became violent and abusive towards his ex-wife Afsana within months of marrying her, beating her and leaving her with bruises on at least one occasion;
- ii) assaulted Afsana in public on custody visits relating to their young son;
- iii) attempted to snatch their son on one custody visit, leaving him with a badly bruised head;
- iv) callously and without justification snatched their son from out of his pushchair in the street (and has never returned him);
- v) subjected Afsana to the injustice of facing jail in Dubai for “abducting” her own child, when in truth she had only fled with him to escape the Claimant's violent abuse;
- vi) having chosen to obtain a divorce in a Sharia court, also used Emirati law and its law enforcement system, which discriminate against women, in order to deprive Afsana of custody of and access to their son Louis;

- vii) hid the child's French passport and refused to allow him to be registered as a British citizen, as Afsana wished;
  - viii) was violent, abusive and controlling and caused Afsana to fear for her own safety;
  - ix) caused her passport to be confiscated thus for her to be trapped in the UAE;
  - x) threatened to report Rabbhi and Shabbir Yahiya to the police for aiding a kidnap if they came to Dubai;
  - xi) caused Afsana to go on the run with Louis;
  - xii) obtained custody on a false basis and also initiated a prosecution of Afsana in the UAE, which was founded upon a false allegation of abduction, and which gave rise to the risk of a lengthy prison sentence there.
100. As in the case of the IPL article, Mr Price argues that reference still needs to be established. That in my judgment is wrong for the reasons already given. The question of how many people in fact understood the words complained of to refer to the claimant is a question of fact to be determined by evidence or inference when considering harm.

## **E. THE SERIOUS HARM ISSUE**

### *(i) The facts*

101. The figures for circulation and readership, unique views and page impressions which I have given in paragraph [5] above are agreed. There is some disagreement about the extent to which those figures provide the full picture, which I will have to address. First, I must address the evidence of the witnesses.
102. The evidence for the claimant on the issue of serious harm is contained in two statements of the claimant, his evidence under cross-examination and in re-examination, and supporting witness statements of his solicitor Daniel Taylor, and three others. At the outset of the hearing I ruled substantial parts of these statements, other than Mr Taylor's, to be irrelevant and inadmissible at this trial. I deal with this in section G below. The defendant's evidence was given by AOL via witness statements of Mr Coad, its solicitor, Mr Riley AOL's Commercial and Audience Development Director, and Afsana.
103. I shall outline the undisputed facts, identify the areas of dispute, and then state and explain my findings of fact on those matters of significance which are disputed.

### **Undisputed matters**

104. The claimant was born in 1974 in Muret, France and went to Lycee in Toulouse. In 1996 he graduated in Aerospace Mechanical Systems Design from the University Paul Sabatier in Toulouse. In 1998 he obtained a Master of Sciences degree in Aerospace Testing in France. In February 1998 the claimant undertook an internship with Honeywell International Inc, in Arizona, initially. Over the next five years,

whilst working with Honeywell, he obtained an MBA degree from a graduate school in Arizona.

105. In September 2003 he left Honeywell and in October of that year he moved to Switzerland, where he spent a year working for Pilatus Aircraft Ltd. His employment was terminated by Pilatus in August 2004. Towards the end of that year he began work for Panasonic Avionics Corporation, based in Dubai. He has lived in the UAE ever since. He held a senior management position with Panasonic until mid-2011.
106. The claimant met Afsana in February 2008 in New Delhi, where he was then working. She is a British citizen of Bangladeshi origin who was then married to her second husband. She was unemployed at the time, but had been a senior civil servant in this country. Between December 2008 and September 2009 the two went on a series of vacations together in Paris, USA, Turkey, Qatar, Dubai, and Cuba. From about February 2009 they were in a relationship, and from about March/April 2009 discussed getting married. In September of 2009 the claimant learned that Afsana was pregnant with their son. She accepted his proposal in January 2010, and on 26 February 2010 they were married at The Old Marylebone Town Hall, London. There was a wedding lunch afterwards at a restaurant, attended by a dozen people. The couple then made their way to Dubai separately after that. Louis was born in Dubai on 4 April 2010.
107. The marriage soured soon after Louis was born, and before the wedding reception took place at the Manoir Au Quat' Saisons in Oxfordshire on 28 August 2010. The reception went ahead, however, with some 40 guests. In due course the marital relationship deteriorated to such an extent that in April 2011 the claimant petitioned for divorce in Dubai. In mid-2011 he was dismissed by Panasonic Aviation Inc, in circumstances that led to a successful employment claim by him against them. In August 2011 he tried to obtain a new position using contacts with recruitment agencies based in England, with whom he had registered in 2009. One such consultant is Keith Wills, who has made a statement in support of the claim. Mr Wills worked in Worcester for a company called Resource Group, as a specialist in recruitment for the aviation and aerospace industry.
108. Mr Wills initiated contact with the claimant in March 2009, having found his LinkedIn profile, and pitched to him a suggestion he move to a competitor of Panasonic. They had some contact over the following month or two, but the claimant stayed with Panasonic. The two were in contact again two years later after the claimant lost his job with Panasonic.
109. Mr Wills explains that the UK, and England in particular, is 'an incredibly important aviation and aerospace industry hub', with the industry employing 389,000 people directly or indirectly and having an annual turnover of £20 billion. There are therefore many aerospace recruiters in England, dealing with enquiries from the UK and abroad. Mr Wills describes the 'fluid' nature of the industry, with individuals constantly on the move; it is a 'small world.'
110. This evidence finds some support in the claimant's second witness statement, served during the hearing, which gives more detail of his attempts to find alternative work via recruiters. This shows he was contacted by a colleague of Mr Wills at Research Group in January 2010. He was in contact with Touch, recruiters based in Amesbury,

Wiltshire, in October 2008, March 2009, May 2009 (when he was in London visiting Afsana), and August 2010 (when he came to England for the wedding reception). In about August 2012 he applied to Alpha Aviation Group of Crawley for aPost as Operations Manager. In June 2013 he applied for a job as Operations Director via an English company, Zenon Aviation. In August 2013 he was contacted by Arion Recruitment of London, about a role in Germany.

111. The claimant's efforts to find employment were not successful until February 2013, when he began working in the role he now occupies, as a teacher and instructor at the Military College in Abu Dhabi.
112. In January 2014 the claimant came to know about what he describes as a 'campaign to defame me in the English press'. He attributes this 'campaign' to Afsana and her son Rabbhi Yahiya. I make no findings on these allegations. I am only concerned with what was published by these defendants, what it meant, and how harmful it was.
113. It was on 23 January 2014 that the claimant first learned of the 'campaign'. It was brought to his attention by his Scottish friend Jim Macfarlane, who was then living in Dubai. Mr Macfarlane, one of the claimant's witnesses, was a Human Resources Manager with Panasonic from 1998-2007, which is how he came to know the claimant. He and his wife used to socialise with the claimant and Afsana. The Macfarlanes have since moved back to Scotland.
114. The claimant's statement says 'I then saw several media articles relating to myself and my son...' Mr Macfarlane's statement is a little clearer on what it was that he drew to the claimant's attention. He had seen 'several articles online' which he promptly brought to the claimant's attention. He confirms that one of these was the first *Post* article, which first appeared on 19 January 2014. The other published material available to be seen online on 23 January 2014 included the Emirates Centre for Human Rights item, and the articles in the *Telegraph*, *Mail*, *Gulf News* and *National* to which I have referred.
115. Mr Macfarlane says 'every time I had gone on the internet in January 2014 ... there seemed to be another news item reporting Afsana's version of events.' Mr Macfarlane describes his own reaction to the publications he saw. He says he was surprised to see the allegations of assault made by Afsana. He says of his reaction to seeing the articles he mentions, 'Fortunately, I know Bruno well enough to know that the allegations made were false.'
116. On learning of the 'campaign' the claimant took two steps. He contacted the Dubai court, as 'some of the articles suggested that the next hearing in the criminal child abduction case ... was due to take place on 3 February 2014.' The suggestion was wrong. The claimant also made contact with his solicitors, Taylor Hampton in early February. On 3 February 2014 he sent them an email listing 'the articles that troubled me the most'. Five such articles were listed in the email, by giving links to them, in this order: (1) the *Independent* article; (2) the first *Post* article; (3) a *Daily Mail* article of 23 January 2014; (4) a *Daily Telegraph* article of the same date; and (5) a further *Daily Mail* piece.
117. Subsequently, the claimant was advised that he could not sue in respect of the *Daily Mail* articles as these were protected by reporting privilege. However, the claimant

entered into conditional fee agreements ('CFAs') with Taylor Hampton and Counsel, and obtained after-the-event ('ATE') insurance, in respect of claims against each of the present defendants. On 28 August 2014 Taylor Hampton wrote a detailed pre-action protocol letter to the Editor-in-Chief of the *Post* complaining of the first *Post* article. On 22 September 2014 they sent a detailed letter before action to the Editor of *The Independent*. On 23 September 2014 they wrote a similar letter to the Editor of the *Evening Standard*. Correspondence followed these initial letters which can fairly be described – particularly in the case of the AOL claims - as voluminous.

118. The first *Post* article was removed from its UK website on 29 September 2014. At the same time thePost published the following ('the Apology'):

“ Rori Donaghy  
Director at the Emirates Centre for Human Rights  
**British Victim on Domestic Abuse Faces Prison in the UAE**

Posted 20/01/2014 16.58 GMT. Updated 29/09/2014 16.59 BST

On 20 January this year, the HuffPost UK published a blogPost by Rori Donaghy (Director at the Emirates Centre for Human Rights) headed “British Victim of Domestic Abuse faces Prison in the UAE”. ThePost recorded the travails experienced under the Emirati legal system by Afsana Lachaux, a British citizen of Bangladeshi origin, in connection with a bitter custody battle with the ex-husband over their three year old son.

The HuffPost UK has received a complaint about thisPost from Afsana’s ex-husband, and we accept that thePost might fairly be criticised for conveying a one-sided impression of the couple’s dispute; it could have been made clearer that Afsana’s allegations of domestic abuse were denied by her ex husband.

We are happy to put that right, and apologise to him for any embarrassment caused.

Follow Rori Donaghy on Twitter:  
[www.twitter.com/roridonaghy86](http://www.twitter.com/roridonaghy86)

119. On 1 November 2014 Taylor Hampton discovered the existence of the *i* article. The claim forms in the five actions were issued as follows: 2 December 2014 (*The Independent* and *Evening Standard*), 19 January 2015 (first *Post* article), 23 January 2015 ('*i*'), and 5 February 2015 (second *Post* article). The last two of these claim forms were not immediately served, nor were any letters or notices of claim sent in respect of them at that time. However, AOL discovered that a claim form had been issued and on 17 March 2015 took down the second article.
120. On 11 May 2015 Taylor Hampton wrote letters of claim about the secondPost article, and the *i* article. Each letter stated that they had discovered the publication of the further article 'In January this year'. This prompted responses from the defendants; solicitors pointing to apparent inconsistencies between that statement and other statements by Taylor Hampton. Proceedings in respect of the secondPost article and *i*

article were served subsequently, under cover of letters confirming that the proceedings were covered by the CFA and ATE arrangements notified earlier.

### **Issues in dispute**

121. The principal matters of fact which are in dispute on the issue of serious harm are these:
- i) Whether vindication has been ‘uppermost’ in the claimant’s mind in pursuing these proceedings.
  - ii) The nature and extent of the claimant’s connections with and reputation in this jurisdiction.
  - iii) The extent to which readers of the words complained of are likely as a matter of fact, to have identified the claimant as the person referred to in the articles as Afsana’s husband.
  - iv) The extent to which the agreed figures for readership and unique users are to be treated as augmented by viral or ‘grapevine’ publication via social media and otherwise.
  - v) The impact of thePost’s cessation of publication and the Apology.
122. The first and last of these issues are raised by AOL and not by IPL or ESL. In cross-examination the claimant was challenged and questioned by Mr Barca about issues (i) to (iii). This was done primarily in reliance on the account contained in Afsana’s two witness statements, but also with reference to disclosed documents. Mr Price did not cross-examine but, as he was entitled to do, claimed on behalf of his clients the benefit of any findings made by me in favour of AOL as a result of Mr Barca’s cross-examination.

### **Discussion and findings**

123. I have no hesitation in concluding that the claimant was genuinely dismayed and upset by the publication of the first *Post* article, the *Independent* article and the *Evening Standard* article, and that he was and remains sincerely concerned at the impact of those publications on his reputation. I accept Mr Macfarlane’s evidence that he drew the first of these three articles to the claimant’s attention on 23 January 2014. I find that the probability is that he also drew the claimant’s attention to the *Independent* article, which was second in the claimant’s list of 3 February 2014. I am satisfied that the primary aim of the proceedings in respect of those two publications, and the *Evening Standard*, which was discovered later, is the legitimate aim of protecting and vindicating the claimant’s reputation.
124. I base these conclusions in part on my assessment of the claimant’s written and oral evidence, including his demeanour in the witness box. His first witness statement expressed how ‘tremendously difficult’ it is for him to know that very many people here and in Dubai will have read the articles complained of. He expresses concern for his reputation among people who know him and those who do not, including concern about the impact on his professional reputation. Those are not by any means



unfounded concerns, in my view, given the nature of the allegations and the extent of his acquaintance, which I discuss later.

125. Having heard the claimant cross-examined in some detail I am left wholly unpersuaded by Mr Barca's suggestion in closing, that I should treat the claimant's credibility as undermined by the content of his oral evidence. He gave his evidence in a dignified and correct manner, with conviction. It is true that, as I have mentioned, he gave evidence of matters additional to those detailed in his first witness statement, and gave late disclosure of documents. This should not have happened. However, I do not conclude that he had suppressed any documentation or was behaving dishonestly. I accept his explanation for the late disclosure: that he had located further documents when preparing to give evidence. Other matters of which he gave oral evidence that were not mentioned in his first witness statement emerged in the course of relevant responses to questions from Mr Barca. They emerged in a natural way, and it was not suggested that the claimant had schemed to add these matters. There was little attack on the accuracy of what he said. It was not put to him that he had invented matters. This was suggested in closing by Mr Barca. Such an accusation did not stick in my view.
126. I also base my conclusions on the following further factual matters and findings.
- i) The claimant took prompt steps to seek legal advice. I note, incidentally, the order in which he listed the five articles of most concern to him when he emailed Taylor Hampton on 3 February 2014. The *Post* and *Independent* head the list, above the first *Daily Mail* article, which was published earlier than the *Independent* article.
  - ii) The unchallenged evidence is that by 11 February 2014 the claimant had obtained Arabic translations of the *Post* and *Independent* articles, as well as the *Daily Mail* pieces, which he produced to the judge at a hearing in Dubai on 11 February 2014 in the child abduction case.
  - iii) Although the initial letters of complaint took time, they were not in my judgment delayed because the claimant was not concerned to vindicate his reputation. The principal reasons were that the claimant's lawyers needed to establish the facts, review the merits, and secure an offer of ATE cover before deciding whether to offer to enter into CFAs with him.
    - a) The suggestion advanced to Nicol J on behalf of AOL, that the claimant was seeking to use these proceedings for the collateral purpose of harassing his ex-wife, was in my judgment inherently improbable. For one thing, he could have sued her personally. I have been shown no evidence that I consider supportive of the inference that in pursuing these defendants the claimant was in reality targeting Afsana. Mr Barca's second thoughts on this were the better ones. In the absence of any identified purpose other than vindication, however his invitation to infer that this was 'not uppermost' in the claimant's mind lacks persuasive force.
    - b) There is in any event a better explanation. The claimant's first witness statement explains, and I accept, that he 'wanted to get on with my

complaints against the *Post*, *Independent* and *Evening Standard* as soon as possible, and indeed was agitated when this did not happen as quickly as I would have liked'. He could not fund the claims from his own pocket, or run them himself, and his lawyers had to get to grips with a complex history which included claims and counterclaims between him and Afsana.

- c) This is corroborated by the letters before action in respect of all three claims. These gave details of the CFAs and ATE insurance and said this: 'Finally, you ought to be aware that since Mr Lachaux first consulted us in relation to this matter earlier this year, we have spent a considerable amount of time not only putting together the funding arrangements mentioned above, but also establishing the facts, collating evidence, and ensuring that our client's case is sound.'

127. A delay of seven or eight months between publication and first complaint is long, but far from unheard of. The limitation period in defamation is uniquely short, but still allows a year. One should be wary of drawing adverse inferences against a claimant who promptly seeks legal advice and makes complaint well within the limitation period. In this case, given the explanations provided, the delay cannot justify an inference that the claimant was not primarily concerned with vindication. Those explanations may not easily justify the whole of the period of delay, given that Taylor Hampton had confirmed a willingness to act for the claimant by mid-February 2014. However, the detail of what happened between then and August was not explored. It may well be that it involved an evidential exploration and evaluation, and the advice on merits which is ordinarily required before ATE is made available. There is no basis for inferring that the unexplained delay between February and the sending of the letters before action is accounted for by a lack of enthusiasm on the claimant's part for clearing his reputation of serious charges.
128. As for the second *Post* article, the factual picture has been muddied by what I am satisfied was a misstatement in Taylor Hampton's letter of claim of 11 May 2015, and a lack of clarity in Mr Taylor's witness statements on the subject. On the basis of Mr Taylor's second statement (paragraph 7) and the claimant's oral evidence I have however reached these conclusions. The article was not discovered in January 2015 as stated in the letter of claim, but in February 2014. That happened as a result of a search made by Taylor Hampton after the firm was instructed by the claimant. The article was discussed with the claimant at that time. In mid-February 2014, the firm advised the claimant that it was willing to act for him in relation to the first *Post*, *Independent* and *Evening Standard* articles. It did not express a willingness to act in relation to the second *Post* article, but nor did it say it would not. The matter was put to one side, deliberately or otherwise, pending a later consideration of the possibility of additional claims.
129. The claimant gave evidence that there had to be consideration of whether to include a claim in respect of this article within the CFA, but of course the article is to the same broad effect as the first article. The claimant agreed, when this was put to him by Mr Barca, that he had been happy to leave it to the professional judgment of the lawyers to decide which articles to complain about. The likelihood in my judgment is that the second *Post* article was considered by all to be something of a makeweight, and was simply overlooked thereafter, until some time in about late 2014, whilst the claimant

and his legal team concentrated their efforts on the three articles about which complaint was made in August of that year. The claim was in due course brought, on the lawyers' advice. The claimant's aim in approving this was the legitimate aim of vindication, but I do not consider that he saw this claim as more than an add-on.

130. The position in relation to the *i* article has some similarities. This, being a print-only publication, in the UK only, it did not come to the claimant's attention via Mr Macfarlane or through his own research. Nor was it turned up by database and internet searches undertaken by Taylor Hampton in February 2014. Taylor Hampton's letter of 11 May 2015 mistakenly said that the article had been discovered in January 2015. In fact it was discovered in November 2014 via a LexisNexis database search. In my opinion, the likelihood is that this too was a matter on which a decision was left by the claimant to his lawyers' professional judgment. The claim was managed in the same way as the claim in respect of the second *Post* article. The claimant had no collateral motive. There is, however, one very obvious distinction between the position in relation to the second *Post* article and the article in *i*: the far greater circulation and readership of the latter.
131. Before I turn to the nature and extent of the claimant's contacts in and reputation in England and Wales I should note that the extent of his reputation in Dubai has not been explored in any detail in the evidence and submissions. However the Amended Particulars of Claim invite an inference of publication to a substantial number of friends and acquaintances there, and it is reasonable to infer that, as someone who had lived and worked in the UAE for nearly 10 years by the time these articles were first published the claimant has a substantial reputation there.
132. My findings in relation to the claimant's connections to and the extent of his reputation in England and Wales are as follows:
- i) The claimant visited England on at least the following occasions: 2005, when he attended a three day training course in London with Panasonic; May 2009, when he visited his 'significant other', Afsana, for a period of some days (email of 26 May to Phil Newton of Touch); November 2009 (he produced an old tube ticket to prove this); the end of January and February 2010 (to meet Afsana's family and for the wedding); August 2010 (for the wedding reception).
  - ii) The claimant personally knows and/or is known to the following people who are residents of England and Wales or who may have read or may read the words complained of here (and/or in some cases in Dubai):-
    - a) members of Afsana's family;
    - b) friends and acquaintances of Afsana, personal and professional; I accept the claimant's evidence that Afsana has a wide circle of friends and connections, rather than the narrow one which she maintains. He explained convincingly that the reason why the guest list for the wedding reception was quite restricted was that many people would have had to come a very long way;

- c) relatives of the claimant: he has two cousins who live here, named Eric and Remi Vaizelle; Remi has a wife and family; I accept the claimant's evidence about these relatives, which was that he knows them and spoke to Afsana of both;
- d) personal friends and acquaintances made by the claimant himself who are resident here; the claimant's statement names by way of example ten of these, besides the Macfarlanes, who live in Scotland;
- e) professional contacts in the recruitment business (I have given some of the names above);
- f) professional contacts in the aviation sector who live and work in the UK (the claimant identifies persons who work for the companies SITA, Rockwell Collins, Serco, Jet Airways and McKinsey and Co.);
- g) English colleagues with whom the claimant worked in previous jobs in the aerospace industry (the claimant names five of these, by way of example);
- h) British nationals whom the claimant has got to know working in Dubai (the claimant names eight such, one of whom is his witness Salim Kudus, now living in Australia, and refers to others who were English or lived and worked in England);
- i) individuals contacted in the course of his present work; several of the claimant's current colleagues are British, and some ordinarily resident here and working only temporarily in Abu Dhabi;
- j) pilots whom the claimant meets on trips around the world in connection with his work, including former BA and RAF pilots.

133. Mr Barca challenged the claimant's evidence on some of these matters, putting to him what Afsana says in her second witness statement. The attempt was not especially successful. For instance, among his own friends and acquaintances in this jurisdiction the claimant identified Vishal Nischshal and Bijal Batavia. It was suggested to him that they were Indian citizens living here temporarily. The claimant replied that they are now British citizens who have lived here since 2008 or 2009. Challenged over Carol Alderson, the claimant agreed she was a Dubai lawyer in the firm acting for him in the divorce, but said she had come across the articles when she was in the UK. He added that a Dubai consultant named Marie Barton had done the same. It was put to the claimant that Alistair and Caroline Peel, whom he named, had not returned to the UK since they met Afsana in Dubai. He replied that he thought they were both in the UK now, having contacted Alistair Peel for comment on what Afsana had said in her second statement.

134. This all reflects, in my judgment, two things. One is that the witness statement could and should have been fuller. The other is however that there are inherent difficulties for a claimant in the position of Mr Lachaux in being asked to list everybody he can think of whom he knows or who knows him who might have read a publication of which he complains. For a professional person in an international business nowadays,

the task is all but impossible. If the claimant is honest, and his claim is genuine, it is all but inevitable that if challenged in the way that happened here, his memory will be jogged, and some additional details or even additional individuals will be identified.

135. A court must always be cautious of lists of names or other details preceded by ‘for example’, whether such lists appear in statements of case or witness statements. Too often, this formula can falsely suggest that there are numerous other unidentified examples. In this case, however, the unforced emergence of the name and details of Marie Barton leaves me with the firm impression that the formula, as used in the claimant’s evidence, reflects the existence of some other examples that could be given. I do not find that the other examples are very numerous, but I am satisfied that the pool of those who know or know of the claimant is larger than the list of names he has provided.
136. As to actual identification by readers of the articles complained of, it seems to me that anyone in any of the categories I have listed above who read any of those articles is likely to have identified the claimant as the husband referred to. Of course, the *Independent* referred to a wealthy foreign exchange dealer, but that false detail is not likely to have misled a reader in any of the specified classes. There is much in each article that is distinctive of the claimant, and unlikely to be taken by any informed reader as indicating some other Frenchman called Lachaux living in Dubai with an ex-wife called Afsana.
137. How many of these people actually did read one or more of the articles it is impossible to determine with any kind of precision. One can say with some confidence that it is not likely that every single one of them did so. It can be said with confidence that Mr Macfarlane read the *First Post* article and the *Independent* article, and I accept that the two women identified by the claimant as having read the words complained of did read one or more of the offending articles. The true position as to the extent of publication to people who know the claimant or know of him will lie somewhere between these two extremes.
138. I do not think I would be justified in accepting the defendants’ submission that the absence of ‘tangible’ evidence of adverse responses to publication indicates that the true position lies towards the ‘Macfarlane’ end of the spectrum, or that those who did read the offending words were unaffected by it. Mr Macfarlane is evidently a good friend of the claimant, who was confident enough to trust him over the publishers on a matter of this kind. Only two other individuals have been named as having read some of the words complained of, and there is no evidence of their reaction to whatever it was they read. But it is only human nature for people with less close relationships whose opinion of a defamed individual has been affected, to shy away from raising the matter with that individual. Sometimes there is an outward display of hostility, or an overt shunning or avoidance of a person. But evidence of that kind has always been rare, for obvious reasons. The advent of social media has notoriously increased public online denunciation by strangers, but there is no evidence that it is common for friends or acquaintances to do this. My conclusion is therefore that there were, on the balance of probabilities, tens of people and possibly more than 100 who know or know of the claimant and read one or more of the articles and identified him, and who thought the worse of him as a result.

139. That is not the end of the matter, as the impact of publication is never confined to the initial readers. It will always, to some degree, include people to whom the sting is passed on via the ‘grapevine’ including, today, social media. As to that, there was some debate at the hearing as to whether the impact of such republication by electronic means had been taken into account in Mr Riley’s calculations. It seems to me that one can be confident that it had not, as there are ways in which electronic republication can occur which would not be captured by Mr Riley’s figures. I do not give great weight to this, however, as it seems that Facebook ‘likes’ and other mainstream ways of passing on information have been taken into account. I do not discount, however, repetition by email or word of mouth. I do not believe that the ‘grapevine’ is nowadays wholly visible to the onlooker, as the defendants submitted. In the end, however, these points do not, for reasons which will appear, seem to me to be of great importance in this case.
140. What I think of rather greater significance is that all this discussion tends to leave out of account, as if it was unimportant, the impact of publication on the claimant’s reputation in the eyes of people who do not already know the claimant. A person can after all be defamed, and seriously defamed, in the eyes of those who do not know him. He does not need to establish an existing reputation in order to complain, and may be entitled to substantial damages for the harm to his reputation caused by publication to people who have never heard of him. This was acknowledged in *Jameel*. The matter is discussed in *Ames* at [41]-[42].
141. Here, it cannot be and is not said that the allegations are trivial. The AOL readership was not enormous, but not minimal – at least in the case of the first article. IPL may have published directly to as many as 1 million people, and ESL to as many as 2.5 million. I take the defendants’ case to be, in summary, that insofar as such publication caused harm to the claimant’s reputation in the eyes of people whom the claimant does not know, and who do not know him, that is not serious harm. That is not an untenable argument in principle, for reasons given in *Ames* at [43], but it will be a rare case in my judgment in which such a proposition can be made good on the facts.
142. It is in this context that it was relevant for the parties to explore the prospect of Louis going to school in England, and the chances of the claimant working here, in that or any other event. I do not think that if serious harm has not yet occurred it could be said that future serious harm was probable for those reasons. What can properly be said is that present harm to reputation in the eyes of those who do not yet know a person can be serious if their opinion of him matters. That may be so if there is a real prospect that the claimant will come into contact with such people, or if he is likely to take steps to avoid such contact because of his tarnished reputation in their eyes. In the event, I think the prospect of father or son or both coming to this country is a real one, and a matter for consideration on serious harm for the reasons I have given. More significant, in my view, is the nature of the claimant’s work. He is in an industry that is by its nature international. He has remained in the Middle East for many years, but he travels a considerable amount. In his work to date he has moved jobs internationally, and shown an interest in working elsewhere. He deals with many people who are resident here. There is some truth in Mr Barca’s submission that the claimant’s present ‘centre of interests’ lies in the UAE. It does not by any means

follow that he cannot be caused harm to reputation that is serious by publication in this jurisdiction.

*(ii) Application of the law to the facts*

143. I address each article separately, in chronological order.

### **First *Post* article**

144. I find that the publication of this article has caused serious harm to the claimant's reputation. The defamatory meanings conveyed are serious. The topic is serious. The article is plainly meant to be taken seriously. The publisher is reputable. The article remained online for over 9 months. It was directly published, on the agreed figures, to 3,250 unique visitors in the UK (of which I find the vast majority will have been in this jurisdiction) and to 1,360 unique visitors in the UAE. These are figures for the website and the *Post*'s mobile apps. I accept that these figures may understate the number of visitors slightly, because visits from a single IP address are treated as unique visitors. I accept that there will inevitably have been some republication in each jurisdiction which is not captured by these agreed figures. In addition, it does appear that there were hundreds of tweets of the article. I do not, however, attribute great weight to these points.

145. The principal grounds for concluding that the publication caused serious harm are (a) that publication on the agreed scale is inherently likely to have reached a significant number of people – by which I mean at the very least a dozen - who know the claimant or know of him, whose opinion of him is likely to have been seriously affected in an adverse way; and (b) that the probability is that the claimant's reputation has been seriously harmed in the eyes of others, whose opinion of him matters. Mr Macfarlane is clearly a person whom this article did reach, who knew who it was about, but whose opinion of the claimant was not so affected. But he was a close friend. For the reasons given above I do not agree that the absence of visible or tangible evidence of adverse reactions from other identifiable publishees undermines my conclusions. As the claimant said in his oral evidence, though in different words, silence is not evidence of the absence of impact.

146. I do not consider that the Apology serves significantly to reduce the harm done by the publication. It apologised for not stating that the claimant denied Afsana's allegations. It did not retract those allegations or suggest they were false. The original headline remained, describing Afsana as a 'victim'. I am not persuaded that the Apology 'compounded' the damage as submitted by Ms Page, but it did not in my judgment undo damage caused earlier.

147. Nor, to the extent this was advanced as an argument, do I consider that the claimant can be said to be causally responsible for the harm to reputation, because he failed to make complaint until August 2014. The point was certainly made in cross-examination in relation to the second *Post* article, that AOL could not be held responsible for continuing publication when the claimant knew of the article yet failed to complain. That was in my opinion an argument without foundation in that and the present context.

### ***The Independent***

148. I find that this publication has caused serious harm to the claimant's reputation. The reasons for that conclusion resemble those I have given above in respect of the *Post*, but the arguments are the stronger in this instance. The defamatory imputations were to similar effect, in a serious article in a reputable newspaper. The scale of their publication was vastly greater. The circulation of the print copy was 77,185, in the jurisdiction. The range of estimated readership figures given at [5] above is the result of multiplying this by 2 or 3. The online publication was much more modest, but still substantial at 5,153 unique users in the UK and 401 in Dubai between first publication and 12 May 2015, and 25 and 1 after that.
149. I would not have found this last category of publication, if it had stood in isolation, to be sufficient evidence from which to infer serious harm. But that does not affect my overall conclusions. This is another publication that came to Mr Macfarlane's attention in January 2014, which supports an inference that others who knew the claimant, including in Dubai, also saw it. The fact that there is no other affirmative evidence identifying a reader of this article does not dissuade me from drawing the inference that serious harm was caused, for the reasons given above in respect of the first *Post* article. Mr Price makes the point that the defamatory meanings which Sir David Eady found this article to bear cover meanings his clients defend as true which are not complained of by the claimant. He submits that in the absence of amendment those meanings ought not to be taken into account in resolving the issue of serious harm. I have taken account of all the meanings found, as a whole, but my conclusions would have been the same had I confined myself to those specifically complained of in the Particulars of Claim.

### **The 'i'**

150. I find that this publication also has caused serious harm to the claimant's reputation. Again, the reasoning is similar to that given above, though in this instance there is no online publication and none in Dubai. However, the imputations are serious, as is the newspaper, and the circulation (261,759) and estimated readership (2 or 3 x circulation, so up to 785,277) in this jurisdiction are both very substantial. No individual is identified as having read this article, but the claimant's evidence identifies two by name who read some of the material complained of, besides Mr Macfarlane. They read it in this country. That is evidence of matters that are inherently probable. It is not possible to say which of the offending articles either woman read, but the candidates are *The Independent*, The 'i', and the *Evening Standard*. The inference of serious reputational harm is justified.

### **Second *Post* article**

151. The claimant has not persuaded me that this publication has caused serious harm to his reputation, or that it is likely to cause such harm. This was an article of 32 paragraphs, the primary focus of which was on the arms deal referred to in the headline. The words complained of appear in three of those paragraphs, towards the end. The article was published on 6 February 2014. Although it remained online for 13 months the total number of unique visitors over that period is 306. It is a natural inference, supported by the figures for the *Independent* online, that the majority of these were early in the publication period, when the piece was new. Mr Macfarlane was not one of those publishers, however, even though he had seen the earlier *Post* article and was clearly attentive to stories about the claimant at that time. Had he seen



the second article he would surely have mentioned it to the claimant, and on the evidence he plainly did not. The claimant himself did not become aware of it until it was turned up by his solicitors' search in February 2014.

152. Neither the claimant nor Taylor Hampton seem to have done anything about the matter for the best part of a year after that. He left it to them, and they took no action. He does not appear to have chased them about that. In this instance I consider it reasonable to infer from the absence of action that nobody saw a pressing need for vindication in respect of this article. I conclude that the reason was that there was already a claim on foot for vindication in respect of an article addressed to the same readership which contained the same allegations, and others more equally if not more serious. It is legitimate by virtue of s 12 of the Defamation Act 1952 to take into consideration the claim in respect of the firstPost article as a matter capable of mitigating damage. The article has now been removed. This is a claim which, looked at in isolation, fails to cross the statutory threshold. The fact that there is another valid claim against AOL on foot is not a justification for allowing this separate claim to proceed.

### ***The Evening Standard***

153. I find this publication has caused serious harm to the claimant's reputation. Like the *Independent* and *i* articles, this contained grave allegations very widely published. The *Standard* has the largest circulation of all, at 835,779. As before, the estimated readership figures at [5] above are arrived at by multiplying this by 2 or 3. The inference of serious reputational harm seems to me inescapable. The fact that the claimant is foreign and lives abroad does not mean that ESL can publish seriously defamatory allegations about him to as many as 2.5 million people in this jurisdiction with impunity. That is not, in my judgment, a consequence that Parliament intended to achieve by raising the threshold in s 1. As in the case of the *Independent*, the meanings found by Sir David Eady go beyond those complained of by the claimant, and he has not amended his claim. In reaching my conclusion on serious harm I have taken into account all the meanings found, but my conclusion would have been the same if I had confined myself to those specifically complained of.

### **'Other publications'**

154. In reaching my above conclusions on the five articles complained of I have left out of account the other publications relied on by the defendants in relation to harm. That is on the basis that Dingle means they are inadmissible on the issue of harm to reputation. By contrast, s 12 of the 1952 Act expressly allows each of the publications complained of in these actions to be taken into account in mitigation of damages in relation to any other such publication. The defendants have, perhaps understandably, refrained from running cut-throat defences on serious harm in reliance on s 12. I have nonetheless taken s 12 into account in reaching my conclusion on the secondPost article. I have considered it in respect of the other claims, but concluded that in the absence of any evidence of overlap in readership the only relevance of s 12 is to underline the point that each publication must be considered in isolation.

## **F. JAMEEL**

155. My conclusions on the preliminary issues for trial in the AOL claims (paragraph [18] above) are that:-
- i) the pursuit of the first AOL claim does not constitute an abuse of process on any of the four bases identified in the order of Nicola Davies J;
  - ii) the *Jameel* issue does not arise in relation to the second AOL claim, because in the absence of serious harm to reputation there is no cause of action; I might well have concluded in any event that it was unnecessary and disproportionate to add this claim to the claim in respect of the first article.
156. I add this in relation to my conclusion on the first claim. So far as the threshold of seriousness is concerned, that conclusion must follow inevitably from my findings on serious harm, which is a more exacting test than *Jameel*. I have however taken account of proportionality and in particular, two issues that have arisen in the course of argument.
157. The first is whether there are any alternative means by which the claimant could pursue his complaints over these publications. Mr Price, to whom I put these points although they arose in the context of *Jameel*, identified these alternatives: self-help, in the form of a response to the publishers or a self-published statement; and a regulatory complaint to the Independent Press Standards Organisation. I am not persuaded that any of these would represent a satisfactory substitute for a libel claim. AOL has done little in response to the claims. IPSO's procedures are little-tested. Its predecessor, the PCC, did not provide a satisfactory forum for the resolution of complex legal or factual disputes. A claim in data protection law for breach of the Second Principle was identified by me as a candidate, but not advanced with any enthusiasm by any party.
158. The other point to which I should refer is an argument advanced by AOL, IPL and ESL, that the impact of other publications on reputation may be relevant and admissible in the *Jameel* context, whatever the merits of the rule in *Dingle*. Mr Barca refers to observations of Eady J in *Kaschke v Osler* [2010] EWHC 1075 (QB) [20] as authority for the proposition that what matters is the 'marginal effect' of the publication complained of. Mr Price refers to *Karpov v Browder* [2013] EWHC 3071 (QB), [2014] EMLR 8 and *Subotic v Knezevic* [2013] EWHC 3011 (QB) as cases where 'the existence of numerous other publications to similar effect was relevant as to whether the publications complained of constituted a real and substantial tort', on the basis that the extent of harm caused by the latter must be judged in the context of the former.
159. I am not persuaded that either submission accurately reflects the law in this area. The publication taken into account by Eady J in *Kaschke* as relevant to the need for vindication was a posting by the claimant herself revealing, truthfully, that she had at one time been under suspicion as a terrorist: see [8]. Such a factual scenario raises different issues, as is evident from [23(i)-(iv)] of the judgment. The decision in *Subotic* was not materially founded on the harmful impact of other publications. In *Karpov* such impact does appear to have been a factor, but the key publication was a public denunciation by the US authorities, which may be within the exceptions to *Dingle*. In any event these decisions predated the entry into force of s 1(1). I find it

hard to see how the pursuit of an action in respect of a publication that has caused serious harm to reputation can be characterised as an abuse on these grounds.

## **G. PROCEDURE AND THE TRIAL PROCESS**

160. This trial has given rise to procedural points some of which are likely to have wider significance in relation to the trial of preliminary issues on serious harm and/or *Jameel* abuse. There are five points: (1) the separation of trials on meaning and serious harm; (2) the extent to which it is desirable for the parties' cases on the merits to be pleaded out in advance of a preliminary issue trial such as this; (3) the content of witness statements for the trial of such issues; (4) disclosure; and (5) cross-examination. To set these points in context I need to outline the procedural history.

### *(i) Procedural history*

161. In the first two IPL and ESL claims, the Defendants served Defences on 23 January 2015 containing defences of truth and public interest. Sir David Eady then tried the issue of meaning in each of those actions and handed down his judgment on 11 March 2015. By the time the matter came before Nicola Davies J on 18 March 2015 the statements of case had not moved on. The claimant had not served any Reply to the Defences of IPL and ESL, and no Defence had been served by AOL.
162. Nicola Davies J rejected the claimant's submission that AOL should serve a Defence before any preliminary issue trial. Instead, she ordered such a trial and extended time for service of Defences by AOL until after judgment on the preliminary issues. On 29 June 2015 Nicol J took a similar course, extending time for service of a Reply in the IPL action, and for service of Defences in the second IPL claim, again until after judgment. Nicol J consolidated the two actions against AOL, and the two against IPL and ESL.
163. The orders of Nicola Davies and Nicol JJ laid down a procedural regime to ensure the preliminary issues identified by their orders were fully prepared for this trial. Nicola Davies J directed AOL to state by letter the respects if any in which its case on serious harm differed from that pleaded by IPL and ESL. She directed the claimant to plead to that statement of case. Each order set a timetable for disclosure and inspection of documents, exchange of witness statements and supplementary witness statements, in relation to the preliminary issues. The direction as to supplementary witness statements provided a date for such statements to be served if necessary 'responding to the witness statements already served.' The date for service of such statements, as amended by the order of Nicol J, was 13 July 2015, a week before this hearing. The timetable was adhered to.
164. At the outset of the hearing Mr Barca applied for an order striking out substantial portions of the statements of the claimant, Mr Wills, Mr Macfarlane, and Mr Kudus on the grounds that they were irrelevant and, in part, unfairly prejudicial to Afsana. After hearing Ms Page in opposition to the application I upheld Mr Barca's objection and ruled that the statements of these witnesses should not be open to public inspection other than in a redacted form, omitting the objectionable material.
165. Mr Barca cross-examined the claimant for a substantial part of the first day of the trial. In the course of his answers the claimant gave evidence about matters relevant to

harm which had not been mentioned by him in his witness statement, or otherwise put in evidence. The claimant also referred to documents, copies of which he had brought with him to the witness box, which had not been disclosed by him.

166. Mr Barca understandably complained of this fresh evidence and new documentation. Overnight, the claimant made a second witness statement explaining the position and copies of these documents were produced and supplied to the defence team. Mr Barca applied to cross-examine further on these matters, but I declined to allow that in view of the pressure of time and Ms Page's express acceptance on the claimant's behalf that she would not seek, on account of a failure to cross-examine, to limit his freedom to comment on the issues raised.

(ii) *Procedural issues*

**(1) Separating meaning and harm**

167. Sir David Eady mentioned at the outset of his judgment that there had been considerable debate at the hearing about the merit of proceeding with a determination of meaning. I can understand why, with the parties present before him, he went ahead. Without at this stage attributing responsibility to either party, however, I can say that it is inherently undesirable to separate the trial of issues of meaning and serious harm. Generally, the issues should be tried together: see *Ames* [101].

**(2) Service of Defence and Reply**

168. In my judgment, Nicola Davies J and Nicol J were clearly right to extend time for service of further Defences and Replies. Without, again, attributing blame or responsibility to any party at this stage, and subject always to the circumstances of individual cases, I would say this. It will generally be not only unnecessary but also undesirable for a defendant raising a threshold issue, such as a contention that the claim against it does not meet the serious harm requirement to be required to plead a Defence before that issue is determined. The existence or otherwise of a substantive defence is immaterial for that purpose. As Mr Barca has observed, there is another point. An offer of amends under the Defamation Act 1996 can only be made before service of a Defence. This is a point of relevance not only to defendants but also to claimants, who may prefer an offer of amends to a costly contest on the merits.
169. In these circumstances it seems to me that it may be unwise for a defendant raising a threshold issue to choose to plead a Defence, if not required to do so. Defendants who choose to plead a substantive defence will do so at risk as to costs, if they later succeed on the issue of harm. Similarly, a claimant who chooses to serve a Reply when such an issue has been raised may be at risk as to the costs of doing so.

**(3) The Content of Witness Statements**

170. Two issues arise: relevance, and sufficiency. I shall deal with them in turn.
171. The claimant's first witness statement is 34 pages long, consisting of 138 paragraphs. A large proportion of this deals with matters other than harm to reputation. The statement covers a wide range of matters including things said by Afsana during the wedding lunch about the claimant's wealth, details of the breakdown of their

relationship, Afsana's conduct towards the claimant and their son, the content of correspondence between the two, Afsana's tax affairs, the divorce proceedings, a fake Facebook account, the claimant's dismissal by Panasonic Avionics in June 2011, and defamatory emails about the claimant purporting to originate from 'Tom Daly' and/or 'Hamed'. The statement sets out to deal in considerable detail with the truth or falsity of the articles complained of.

172. Mr Wills' statement also deals with allegedly pseudonymous emails about the claimant and contained his opinion about how damaging the articles complained of would be to the claimant. Mr Macfarlane's statement describes some conduct of Afsana, his own dismissal from Panasonic and the alleged reasons for it, and gives his opinion about the meaning and likely effect of the articles complained of. Mr Kudus dealt with a conversation in or around March/April 2011 between his family's nanny and Afsana, and things he was told by his wife about Afsana.
173. Mr Barca's application to strike out these parts of the claimant's witness statements as irrelevant was founded on the general power of the court under CPR 3.1(2)(m) to 'take any other step or make any other order for the purpose of managing the case and furthering the overriding objective'. In support of his application Mr Barca relied on *Sandhurst Holdings Ltd v Grosvenor Assets Ltd* (Ch D, 17 July 2001) [2001] LTL, October 25, 2001, and to *GG v YY* [2014] EWHC 1627 (QB). In *Sandhurst* it was common ground that witness statements or parts may be struck out under r 3.1(2)(m) if they are irrelevant and scandalous, and the court and opposite party ought not to be embarrassed by having to deal with them. Hart J declined to exercise the power.
174. In *GG v YY* Tugendhat J did exercise the power under CPR 3.1(2)(m) to strike out entire witness statements on the grounds that they were 'irrelevant to the matters in respect of which they are purportedly made, and so are an abuse of the court's process and likely to obstruct the just disposal of the proceedings': [2014] EWHC 1627 (QB) [51]. Reference was also made in the course of argument in *GG* to the court's powers under CPR 32.1(1) to control the evidence, and its powers under CPR 32.13(2) to direct that, by way of exception to the general rule in r 32.12(1), a witness statement which has been put in evidence at a hearing in public should not be open to inspection: see *ibid.*, [43-45].
175. Pointing out that this is the general rule, Mr Barca submitted that for that reason it was not merely a matter of my deciding in due course whether or not the material to which he objected was or was not relevant to my determination, I needed to rule whether it ought to go on the public record. As a fall-back or alternative position, he invited me to exercise my powers under CPR 32.
176. I did not understand Ms Page to suggest that the passages to which objection was taken by AOL contained any admissible evidence relevant to the issue of whether the publications had caused serious harm to *reputation*. That was clearly correct on her own approach to the serious harm requirement. It was also surely right if as I have held s 1(1) permits examination of the evidence of harm. That approach means that the actual response of individuals to the publication complained of is relevant and admissible. That may depend on what those individuals believed about the truth of the matter before they read the offending statement. That, however, does not call for a determination of what in fact was the truth of the matter. In any event, in this case, the

claimant's evidence of falsity was plainly not directed to or relevant to the issue of serious harm to reputation.

177. Ms Page advanced three main submissions.

- i) The threshold for striking out a witness statement or part of it is a high one. She relied on what Hart J said in *Sandhurst Holdings*: 'this is not a jurisdiction which should be lightly exercised'. AOL do not come close to meeting the threshold, it was submitted.
- ii) Since IPL and ESL have placed defences of truth on the record, and these are open to public inspection (CPR 5.4C), it is fair and reasonable for the claimant to respond publicly, and for the court to allow him to do that through a witness statement. He could have done so in a Reply, but that would have been a more expensive and hence disproportionate exercise. To strike out parts of the statement would be unjust as it would leave the public with an unbalanced picture, and permit the publication under the protection of reporting privilege of the allegations against him without his own refutation of those allegations.
- iii) In order to assess whether an action is a *Jameel* abuse it is relevant for the court to consider the extent to which the allegations are said to be false, and the extent to which, if the claimant succeeds, he will make clear not only that he has been grossly libelled but that the public has been seriously misled. Libel actions depend on the particular facts – and in order to understand how seriously defamatory it is, one needs to know more than just the broad lines of the story. The details of the denial are critical.

178. These submissions fail to engage with some of the grounds of objection to the passages complained of by Mr Barca. On any view, the opinions of witnesses about how damaging the articles were or would be in the eyes of others are inadmissible. Nor could these arguments possibly justify the admission of evidence about pseudonymous emails, the contents of which are not complained of against these defendants. I do not consider these arguments justify, either, the inclusion in a witness statement served for the express and limited purpose of this preliminary issue trial of detailed material going to the question of whether the publications were or were not true.

179. Ms Page's first argument as to relevance only begins to get off the ground because in this case IPL and ESL have served Defences containing detailed pleas of truth. As I have said, in general it is undesirable for Defences to be served in cases where serious harm and/or *Jameel* are raised and are suitable for preliminary trial. In the absence of a substantive defence, on the public record, this first justification for a detailed response would inevitably fail. The mere fact that, in private correspondence, a defendant had asserted the truth of a statement complained of as a libel could not possibly justify pages of detailed refutation in a witness statement prepared for a trial such as this. There could be, and indeed is, no objection to the claimant stating firmly and unequivocally that there is no truth in the allegations his ex-wife has made against him and which the defendants have reported. Going into detail is a different matter.

180. I do not regard the fact that substantive Defences are on the record in the IPL and ESL cases as coming close to being a sufficient justification for the extensive detail in the

claimant's first statement of the matters to which I have referred, or for the other passages objected to. The risk of unbalanced reporting is legally and factually slender. That is because the privilege for reports of the contents of public documents such as statements of case is subject to proof that the publication is for the public benefit: see s 15(3) of the Defamation Act 1996. As those responsible for safeguarding the legal interests of commercial publishers are well aware, this requires balanced reporting. The point was made by Tugendhat J in *Qadir v Associated Newspapers Ltd* [2012] EWHC 2606 (QB), [2013] EMLR 15 where reporting of the contents of a claim form was in issue. At [100-101] the Judge said this:

“... as a general rule (that is one to which there may be exceptions) it will not be for the public benefit to publish any defamatory allegations made in a claim form of particulars of claim available to the public from the court under CPR 5.4C without at the same time publishing the fact that the defendant has denied, or is disputing, the allegations, as the case may be. The effect of s 15(3) is to give the court trying a defamation action the power and duty to consider a balancing exercise on the particular facts of the case. In effect in that, and in the predecessor legislation, Parliament has required the court to carry out a balancing exercise similar to the one which has now become familiar under the HRA, namely art.10 and art. 8 (see *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 A.C. 593, Lord Steyn at [17].

I find it hard to envisage any circumstances in which there would be a public benefit in publishing defamatory extracts from a claim form or particulars of claim without there being included in the publication a statement that the allegations are disputed or, if it be the case, denied.”

181. The failure of the defendant in *Qadir* to report a denial and the contents of the Defence once it was aware of these defeated its reporting privilege defence. The observations of Tugendhat J must apply, with the necessary modifications, to reporting of a Defence. Experience also suggests that unbalanced reporting is factually improbable in a case such as this, where one ex-spouse is already suing three publishing companies for libel over allegations of misconduct originating with another ex-spouse.
182. I think Ms Page places too much weight on the observation of Hart J in *Sandhurst Holdings*. Of course, parties and the court should beware of devoting cost to nit-picking objections to witness statements in judge-alone hearings. It will often be disproportionate to engage in this kind of exercise. But if a serious principled objection is raised, the court should not shrink from addressing it, especially if it may have significant consequences for reporting and/or costs. In doing so, it seems to me that the appropriate test is the overriding objective. Judged by that yardstick, the passages objected to cannot be held acceptable on the first basis advanced by Ms Page.
183. As for Ms Page's second argument, relating to *Jameel*, this in my judgment was weaker than her first. I have certainly not found it necessary to reach any view at all

about the extent or merits of the dispute over truth. My view is that in defamation cases where the publication complained of has caused or is likely to cause serious harm to reputation the *Jameel* jurisdiction will generally have no role to play. Even if I was wrong about that, it seems to me that the court should be wary of engaging, in the course of a *Jameel* application, or trial, in any detailed assessment of the substantive defences which defendants advance, or say they will advance if the serious harm requirement is satisfied. It should usually be possible to assess whether the claim is serving a legitimate aim proportionate to the likely costs of resolving the dispute, without an assessment of the merits.

184. For these reasons I concluded that the material objected to was irrelevant or otherwise inadmissible and ought not to be made public at this hearing. It did not seem to me to be necessary however to go so far as to strike out the passages objected to, as they might become relevant in future and it would be wasteful to require a further statement to be made reinserting the material. A witness statement is not available to the public as of right other than at a public hearing when it is put in evidence. I therefore concluded that only edited versions of the statements should be available to the public, and my order to that effect was made under CPR 32.13(2). Such an order may be made if the court is satisfied that it is necessary in the interests of justice or in the public interest: CPR 32.13(3). I was satisfied that it was necessary for both those purposes, given the irrelevance and/or inadmissibility of the material, for present purposes. Edited versions have subsequently been supplied. These will be accessible at the hand-down hearing, if anyone wishes to inspect them.

#### **(4) Disclosure**

185. The short lesson from this case is that searches of email accounts and other electronic media should be carried out carefully. Some of the material disclosed late by the claimant clearly should have been discovered and disclosed sooner.

#### **(5) Cross-examination.**

186. In *Ames* at [101] I said:

“For the purposes of a preliminary issue trial ... There may be cross-examination. In *Cooke* there was none, and Bean J observed that it would have been inappropriate in that case: see [24]. It may not always be so, however, and this case may well be an example of one where cross-examination would be appropriate.”

187. The extent to which cross-examination is appropriate at a trial of this kind will depend on all the circumstances of the case, and in particular the nature of the issues raised. The traditional approach, of which I was reminded by Mr Barca via references to passages in paragraphs 12-10, 12-11 and 12.35 of Phipson on Evidence 18<sup>th</sup> ed, may require adaptation or modification. The general rules are of course as set out at para 12.35 of Phipson:

“As a rule a party should put to each of his opponent’s witnesses in turn so much of his own case as concerns that particular witness, or in which he had a share ... If he asks no



questions he will generally be taken to accept the witness's account and will not be permitted to attack it in his final speech..."

188. At this trial IPL and ESL have accepted that disputed propositions of fact should be assumed in the claimant's favour, save to the extent that AOL successfully challenges them ([122] above). It has of course been the claimant's case that the serious harm issue does not call for evidence. The court has power under CPR 3 and 32 to adapt its procedures. In principle the parties could have taken the view that I should be invited to resolve disputes of fact, so far as necessary, 'on the papers.' I am inclined to think that Ms Page, Mr Price and their clients made the right judgment when they chose not to exercise their right to cross-examine but rather to leave the court to resolve the serious harm issue by reference to the witness statements and other documentary evidence. This did not cause a difficulty in this case, but it may be important in future for the parties to ensure that the ground rules are made clearer before or at the directions stage rather than grapple with disputes about the right approach when the matter comes to trial.
189. AOL's attack on the claimant's case was more wide-ranging than that of IPL and ESL, and embraced *Jameel* and issues of delay. Where a party wishes to invite a conclusion that a witness had some improper motive, or to impugn their honesty or reliability as a witness, then it will ordinarily be no more than basic fairness to ensure that the case to be put to the court is first put to the witness for his or her response. Against this background it was clearly appropriate in this case for Mr Barca to cross-examine the claimant, even if not all of the contentions that he seems initially to have meant to advance were persisted in at the final submission stage. It may nonetheless be best for a time limit for cross-examination to be set at the directions stage.

## **H. THE INTERIM APPLICATIONS**

190. There are two additional applications before me: applications by the claimant
- i) for an order striking out those paragraphs of the Defences served by IPL and ESL that rely on 'other publications' as an answer to the claimant's case on serious harm. I have identified the three allegations targeted for this attack in paragraph [68] above. Having reached the conclusions I have on the applicability of *Dingle* I shall grant this application in respect of points (1) and (2). Established law, which is binding on me, means that these parts of those Defences disclose no reasonable basis for defending the claim on damage and tend to obstruct the process of doing justice. Item (3) amounts to reliance on collateral allegations of wrongdoing and is barred by the rule in *Scott v Sampson*, and should be struck out for that reason.
  - ii) for an order that AOL pay the costs of the pre-action correspondence between it and the claimant in any event, on the grounds that this was prolix, unnecessarily aggressive and argumentative, and/or disproportionate. By agreement, argument on this application has been deferred until after my judgment on the principal issues has been handed down.