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What - right now - amounts to "serious harm" and "serious financial loss" for individuals and companies?

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Defamation Act 2013, section 1

Section 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.

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

In force from 1 January 2014.

Explanatory Notes on section 1

- [10] Subsection (1) “extends to situations where the 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**. ...”

- [11] Section 1 said to build on *Thornton v Telegraph Media Group* [2011] 1 WLR 1985 (recognition of a “threshold of seriousness”) and *Jameel v Dow Jones* [2005] QB 946 CA (power to strike out trivial cases, where no “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.”

- [12] Notes that “bodies trading for profit” are already, in practice, “likely to have to show actual or likely financial loss. The requirement that this be **serious** is consistent with the new **serious harm** test in subsection (1).”

Waiting for the Supreme Court - *Lachaux*

- *Lachaux (Respondent) v Independent Print Media Ltd & Evening Standard Limited (Appellants)*
  UKSC 2017 / 0175

- Heard: November 13-14, 2018

- Lord Kerr
- Lord Wilson
- Lord Sumption
- Lord Hodge
- Lord Briggs

- https://www.supremecourt.uk/cases/uksc-2017-0175.html

What was section 1 meant to do?

- To “raise the bar” for bringing a defamation claim: *Lachaux* [36] (the question arising on the appeal being “as to just how far the bar has been so raised”).
- To “weed out, by means of a threshold of seriousness, trivial claims”: *Lachaux* [43].
- The “very existence of this section should of itself operate to deter the issuing of trifling and unmeritorious claims in the first place. Even if it does not do so in any given case, then the remedy, by reference to s1(1), is still there with regard to trifling claims”: *Lachaux* [78].

Joint Committee on the Draft Defamation Bill

Session 2010-12, HL Paper 203, HC930-I (19 October 2011)

- "Improving protection of freedom of speech" [26-30].
- Referred to the present "surprisingly low hurdle". The Bill "must ensure that wealthy individuals and organisations cannot stifle comment and debate that has **no significant impact** on their reputation. The public interest requires our law and its procedures to **prevent trivial claims from being started** and, where that happens, **ensure that they are stopped**" [27].
- The threshold test of seriousness would "raise the bar in a material way and give greater confidence to publishers that **statements which do not cause significant harm**, including jokes, parody and irreverent criticism, do not put them at risk of losing a libel claim.....We accept that there may be a period of litigation while the courts spell out the precise meaning of "serious and substantial" as part of the threshold test but, over time this will create a better balance between free speech and reputation..." [28]

- https://publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20302.htm

Joint Committee (2)

- A judge should decide whether the harm test is satisfied at a "very early stage in legal proceedings". "We do not pretend that early resolution comes without the risk of increasing costs at the start of a claim, but the potential advantage of sifting out weak cases will be a major advantage to both sides:..." [29].

- "Further, the context in which a statement is made **must** be considered carefully when deciding whether the harm test is satisfied. For instance, the sting of a defamatory allegation is likely to be lessened or removed altogether where the publisher makes a rapid correction or apology. Equally, there may be less chance of serious harm where a notice is attached to material on the internet indicating it has been challenged as libellous. The law must encourage attempts by publishers to correct false information in support of responsible free speech and the protection of reputation; this should include recognising that prompt action can undo the risk of harm. Also, ..., the court **must** additionally take into account the nature of the setting in which the statement was made as part of considering its full context..." [30].

Key cases in the Court of Appeal (for now) on s1(1)

- *Lachaux* [2017] EWCA Civ 1334, [2018] QB 594

  McFarlane, Davis, Sharp LJJ (12 September 2017)

  [25-39] (background); [41-50] (meaning of s1(1)); [56-82] ("disposition" on s1(1)) – esp. [70-73], [77], [79-82].

- *Economou v De Freitas* [2018] EWCA Civ 2591

  Lewison, Ryder, Sharp LJJ (21 November 2018)

  [27-41] – esp [37-41].

Section 1(1) - what is "**serious** harm"?

- Harm*.
- That is "serious."
- "Serious" is an ordinary English word.
- The word serious "means what it says and requires no further gloss....it conveys something rather more weighty than 'substantial'": *Lachaux* [44].

- *s1(1) focuses on harm to reputation: not injury to feelings; not the *consequences* of harm to reputation; & no requirement of special damage: *Lachaux* [42].

Crossing the threshold:
showing “serious harm” caused / likely to be caused

- If the meaning conveys a “serious defamatory imputation”, then “an inference of serious reputational harm ordinarily **can and should** be drawn accordingly”: *Lachaux* [70]*; Economou* [37].

- “...serious reputational harm is capable of being proved by a process of inference **from the seriousness of the defamatory meaning**”: *Lachaux* [72]

- “Whether in any given case **the imputation is of sufficient gravity as of itself** to connote serious reputational harm (quite apart from the question of consequential or special damage) should normally be capable – where the question of serious harm is in issue and not appropriately to be left to trial – of being relatively speedily assessed at the meaning hearing....”: *Lachaux* [79].

Meaning matters most – but is that all there is?

- If issue of “serious harm” raised, and not appropriate to leave to trial, then “it may be that it conveniently can be dealt with at a meaning hearing. The seriousness of the reputational harm is then evaluated having regard to the **seriousness of the imputation conveyed by the words used**: coupled, **where necessary or appropriate**, with **the context in which the words are used** (for example, in a newspaper article or widely accessed blog)”: *Lachaux* [73].

- “The key problems for [C], as [J] identified, were reference (that is, the limited number of relevant people..who understood [the words] to refer to [C]) **and causation**. The fact that an inference of serious harm **can** be drawn in an appropriate case does not in my view preclude the sort of causation analysis undertaken by [J], depending always on the facts. Ultimately, [J] had to be satisfied that it was the particular publication concerned that had caused [C] serious harm;...” *Economou* [41].

Is this the real world? Is this just tendency?

- Before the 2013 Act, the elements of the cause of action in libel were (any **publication** to a third party) of words/images **referring** to, and **defamatory** of, C.
- Defamatory: if words/images had a **tendency** to lower C in the estimation of right-thinking members of society generally (incorporating a '"threshold of seriousness").
- Meaning – the "single meaning" - assessed by reference to the hypothetical ordinary reasonable person (irrelevant / no evidence as to how any publishee understood the words).
- Damage presumed (a presumption of law). Nothing for C to prove.

- s1(1) requires that the **publication** of the statement ("its publication") **caused** or is **likely to cause** serious harm.

- *Lachaux:*
- focuses on meaning (the imputation), *almost* (but not quite) to the exclusion of everything else. Isn't context everything? What about *publication*?
- states at [50] that "is likely to cause" in s1(1) is to be "taken as connoting a **tendency to cause**". That was based on Davis LJ's view that the words "tendency" and "likelihood" are "used in effect interchangeably" in the defamation context. But, in fact, the cases cited were about *meaning* (not publication or the effect of publication).

What does C have to show?

- "If the **imputation of the words used is serious, carrying with it the inference that serious reputational harm has been or is likely to be caused**, then it is, in my view, not right for [C] then to have to carry a further burden, at an interlocutory stage, of adducing further evidence to prove serious harm at a preliminary issue hearing. It is surely fairer, **once** such a case has been properly pleaded and **the defamatory meaning is sufficiently grave for an inference of serious harm to be drawn**, that it is then for [D] to seek to show why the claim nevertheless should not be permitted to proceed to trial: whether by making an application under CPR Pt 24 or by a *Jameel* application. Otherwise, if the facts are contentious the case should be left to go to trial in the usual way – just as in any other tort case": *Lachaux* [80].

What can D do?

- “If it is, nevertheless, desired by a defendant to put in evidence at an interlocutory stage designed to show that there is no viable claim of serious harm the summary judgment procedure under CPR Pt 24 is available if the circumstances so justify. There may, for instance, be cases where the evidence shows that **no serious reputational harm has been caused or is likely** for reasons unrelated to the meaning conveyed by the defamatory statement complained of. One example could, for instance, perhaps be where [D] considers that he has **irrefutable evidence** that the **number of publishees was very limited**, that there has been **no grapevine percolation** and that there is **firm evidence that no one thought any the less of [C]** by reason of the publication. Whether such evidence is in truth unanswerable and whether such matters are best resolved on a summary judgment application or best left to trial is then for the court to determine.”: *Lachaux* [79]

Goodbye to (many) preliminary issues on "serious harm"

- "..where [C] has advanced a sufficient case on serious reputational harm, **by reference to the seriousness of the imputation conveyed by the words used**, then ordinarily the case should be left to go to trial, where there can then be finally decided the extent to which there was serious reputational harm and, if it is so established, what the resultant damages – including also recoverable damages for consequential loss (if any) – should be": *Lachaux* [81].

- "If there is an issue as to meaning (or any related issue as to reference) that can be resolved at a meaning hearing, applying the usual objective approach in the usual way. If there is a further issue as to serious harm, then there **may** be cases where such issue **can also appropriately be dealt with at the meaning hearing**. If the meaning so assessed is evaluated as seriously defamatory it will **ordinarily** then be proper to draw an inference of serious reputational harm. Once that threshold is reached further evidence will then be likely to be more relevant to quantum and any continuing dispute should **ordinarily** be left to trial": *Lachaux* [82(3)].

Goodbye to all (or most of) that (2)

- “(4) Courts should ordinarily be slow to direct a preliminary issue, involving substantial evidence, on a dispute as to whether serious reputational harm has been caused or is likely to be caused by the published statement.
  (5) A defendant disputing the existence of serious harm may in an appropriate case, if the circumstances so warrant, issue a Part 24 summary judgment application or issue a *Jameel* application: the *Jameel* jurisdiction continuing to be available after the 2013 Act as before (albeit in reality likely only relatively rarely to be appropriately used)”: *Lachaux* [82(4)-(5)].

- “In a case where the matter is contested, and cannot be disposed of summarily, the issue of serious harm is, in short, best left to trial, where it can be determined as appropriate, on the evidence”: *Economou* [40].

Determination of meaning: all systems still ‘go’

- The court can now (no juries) determine meaning of a publication as a preliminary issue.

- “[9] ....Indeed, as the natural and ordinary meaning of a publication is a matter upon which no evidence beyond the words themselves is admissible, in most cases meaning can be determined as soon as it is clear that the issue of meaning is disputed between the parties. ..
  [10] The **benefits are obvious**. Indeed, if there is no factual dispute on the issue of publication (e.g. a dispute over the actual words published, reference or innuendo), I struggle to see circumstances in which the parties would want to proceed through the stages of defamation litigation *without* having meaning determined. Its determination can lead to the parties resolving the dispute without the need for further litigation. Even if the claim cannot be settled at that stage, there remain significant benefits for the future conduct of the case. [D] would know, for example, what would be required for any truth defence to have a real prospect of success. Equally, if meaning is determined *before* a Defence is served, it remains open to [D] to make an offer of amends under s2 Defamation Act 1996... But most importantly, it avoids the spectre of hugely wasteful litigation (perhaps requiring up to a year's preparation and several weeks of trial) of a meaning that the words are found not actually to bear”:

  Nicklin J in *Bokova v Associated Newspapers* [2018] EWHC 2032 (QB) (31 July 2018).

Meaning and harm: hand in hand

- *Morgan v Associated Newspapers* [2018] EWHC 1725 (QB), [2018] EMLR 25 (Nicklin J) - meaning found by J "sufficiently serious to give rise to the clear inference of serious reputational harm arising from its publication" [34]. (And note: publication of a defamatory statement of opinion *can* cause serious harm [18-24]; [28-31]).

- From *Lachaux,* the "publication of a seriously harmful allegation will ordinarily justify an inference that serious reputational harm was caused; that such an inference is in principle rebuttable by evidence; but that such an investigation will hardly ever be appropriate before trial, and rarely useful even then, so far as liability is concerned; evidence going beyond the words themselves, and the context and extent of publication, will be more likely to be relevant to quantum": *Doyle* (below) (Warby J) at [120].

What about *Jameel*?

- The *Jameel* procedure has "not been **wholly** subsumed into section 1 of the 2013 Act, even if there is now a potential degree of overlap": *Lachaux* [79].

- Warby J, having referred to *Jameel* as a "fallback defence", said it would be "incoherent" to permit a *Jameel* defence where the serious harm threshold had been met. "The solution would be to ensure that the serious harm threshold is set at a level which obviates any such argument. In my view, the law already does so. In short, although the *Jameel* doctrine may not have been **entirely subsumed** in the serious harm requirement, there is **no relevant difference** between them in the context of this case": *Doyle v Smith* [2018] EWHC 2935 (QB) (2 November 2018).

Jameel – useful if circumstances change
(or facts become clear)

- *Jameel* continues to be useful if circumstances change, to the extent that there is no longer any point in the proceedings, eg:
- *Cammish v Hughes* [2012] EWCA Civ 1655, [2013] EMLR 13. C's reputation had been vindicated by the interim judgment (no better vindication to be obtained at trial); C had been able to "soothe the apprehension" of the publishees; time had passed; and the "wounds are in our judgment likely to heal more quickly and more completely if sleeping dogs continue to lie than if they are stirred up by the publicity that may result from a trial". C had been "fully justified" in bringing the proceedings, however; and D was required to pay costs: [63-64].
- See also *Jameel* itself: material that, on investigating the extent of publication within the jurisdiction, there were only 5 publishees.

Jameel – plainly not a magic wand to make a good claim vanish

- *Price v MGN Limited* [2018] EWHC 3014 (QB) (Warby J) (8 November 2018)

- J, quoting *Lachaux,* summarised the approach to "serious harm" at [45]:-
  "(1) Proof that [D] has published a serious defamatory imputation will ordinarily justify an inference that the publication has caused serious reputational harm..
  (2) [D] may seek to rebut or challenge the drawing of such an inference" .. and if so [D] "…may in an appropriate case, if the circumstances so warrant, issue a Part 24 summary judgment application or issue a Jameel application"...
  (3) "Once [the inferential] threshold has been reached further evidence will then be likely to be more relevant to quantum and any continuing dispute should ordinarily be left to trial"."

Price (2)

- C's meaning upheld: that 3 articles alleged that, while Chief Constable, C had been party to illegally accessing mobile phone records of *Mirror* journalists investigating him: [16], [31-38].

- D's application for summary judgment / strike out as *Jameel* abuse failed. The allegations were seriously defamatory. D did not suggest they were true (no other defence was suggested). J accepted C's submission that D's argument came down to this: that C's reputation was so damaged that D could "say anything they like about him, with impunity. That would not be a just outcome": [72].

- Compare *Ahmed v Express Newspapers Ltd* [2017] EWHC 1845 (QB) (17 May 2017) (Sir Michael Tugendhat): D published photograph of C (mistakenly) in report of conviction in 2016 of 3 men for serious sexual offence on 16 year old; photo removed within 12 hours; C had been convicted for such an offence against a 17 year old in 2014. J found C had no prospect of showing serious harm to reputation [31].

So what does s1(1) do?
over to the Supreme Court

- Warby J in *Lachaux* found that s1(1) changed the law: "The intention was that [Cs] 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" [45],

- CA in *Lachaux* found that s1(1) "has the effect of giving statutory status to *Thornton..*, albeit also raising the threshold from one of substantiality to one of seriousness: no less, no more but equally no more, no less" [82(1)].

- Of course, the court can infer that serious harm has been caused and/or is likely to be caused: it may be an obvious inference from what is published and the context of publication (by whom, to whom, etc). But, as Warby J observed in *Bode v Mundell* [2016] EWHC 2533 (QB) at [49]: "the court should not allow a willingness to draw inferences to shade into a presumption of serious reputational harm"; that would "undermine the purpose" of the s1 reform.

- Also up for the Sup Ct in considering s1(1): limitation (when does the cause of action arise); and what about issues of causation (eg, where multiple publications) and the rule in *Dingle....*

Multiple publications: a recent example

- *Sube v News Group Newspapers & Express Newspapers* [2018] EWHC 1234 (QB) – Warby J

- Considered serious harm at [53-55]: in a case where C complains of multiple publications, it can be legitimate to set out C's case on serious harm in a single paragraph, so long as (a) it makes clear that the plea relates to each and every publication *and* (b) the statement of case "sufficiently identifies" the basis on which C will invite the court to conclude that the serious harm requirement is met. The case might be confined to gravity of imputation + scale of publication.

- See also same case [2018] EWHC 1961 (QB) (same judge): [21-34] (in general, a published article must be considered individually: not normally appropriate, or possible, to treat a number of articles as a single statement, though, depending on circumstances, other articles may be relevant context [22]). (And note: defamatory opinion can be seriously harmful [41-42]).

Turning to s1(2)

- *Lachaux* was not concerned (directly) with s1(2).
- The CA noted that it had been introduced into the Bill at a "very late stage" [37]. [It was a Lords amendment on 23.4.13; Royal Assent was 25.4.13].
- The CA said that s1(1) does not focus "as section 1(2) does" on whether that harm to reputation has caused or is likely to cause serious financial loss [42].
- The CA noted that "it may be that in some respects the position with regard to bodies trading for profit, under section 1(2), will be different. I say nothing about that subsection which clearly is designed to operate in a way rather different from section 1(1)": [82(7)].

Recent cases under s1(2)

- ***Pirtek*** *(UK) Limited v Jackson* [2017] EWHC 2834 (QB) (Warby J) (9.11.17) [45-53], esp [50-53]
  (Later, there was a failed application to set aside the default judgment & committal for contempt [2018] EWHC 2030 (QB) (Nicklin J) (31.5.18))

- ***Euroeco*** *Fuels (Poland) Ltd v Szczecin and Swinoujscie Seaports Authority SA* [2018] EWHC 1081 (QB), [2018] 4 WLR 133, [2018] EMLR 21 (Nicol J) (9.5.18) [16-17] & [69-71]

- ***Burki*** *v Seventy Thirty Limited* [2018] EWHC 2151 (QB) (HHJ Parkes, sitting as a HCtJ) (15.8.18) [201-220], [245-250], [251].

Not quite so recent (for reference) (1)

Brett Wilson *LLP v Person(s) Unknown, Responsible for the Operation and Publication of the website www.solicitorsfromhelluk.com*
[2015] EWHC 2628 (QB), [2016] 4 WLR 69 (Warby J) (16.9.15)

- Considers s1(2) at [25-29]. Serious allegations about small firm [25].
- Requirement is "financial loss" (not "financial harm") [28]. It was "inevitable" C would lose work: prospective clients would read it; there was evidence of loss of one prospective client; publication was raised by opponent in litigation [29].

Reachlocal UK *Ltd v Bennett*
[2014] EWHC 3405 (QB), [2015] EMLR 7 (HHJ Parkes) (23.10.14)

- Damages assessed after default jmt. C1 had substantial claim for special damages, but C2 (its holding company) did not trade within the jurisdiction. But for the jmt, J noted it would have been "uphill" argument to establish that C2 crossed the s1(2) threshold. C2 awarded nominal damages (£100) [34], [64]

Not quite so recent (for reference) (2)

- ***Undre*** *& Down to Earth (London) Ltd v London Borough of Harrow* [2016] EWHC 931 (QB), [2017] EMLR 3 (Warby J) [77-80]. [**WARNING**: decided before *Lachaux* in the CA].

- C2 ran a vegan/vegetarian restaurant; C1 (its owner/director) was convicted of 5 offences relating to animal welfare. J concluded D's news release did not refer to, and was not defamatory of, C2 [21-38] (not every statement about someone who runs a company defames that company [21]).

- s1 considered [39-41]: it had not changed the rule that the financial loss must be shown to have been caused as a result of the libel of the C (not someone else). The evidence as to financial loss was unsatisfactory [46-55]: no expert evidence and inadequate information about profits. The picture presented was "patchy and inconsistent". It fell short of the threshold. Plus C2 failed to make out a case on causation [56-74]. To prove causation of special damage in defamation was "fraught with difficulty", since there were generally "competing candidates" for causative & confounding factors. C2 failed to prove any loss of profit or other financial loss as a result of publication [56]. J considered other relevant factors [57], [63] ("revulsion" at C1's conduct had led to anger, hostility and resentment amongst customers and potential customers); [65-66] (complaint made about only selective parts of the news release); there were other factors relating to alleged loss that were not related to publication [67-71], [72-74].

What can safely be said about s1(2)?

- “Three things can safely be said about s1(2).

- First, that in this context as in s1(1) "serious" is an ordinary English word, to be given its ordinary meaning; it means something more weighty than "substantial": see *Lachaux* [44], *Brett Wilson* [30].

- Secondly, whether loss is "serious" must depend on the context: *Brett Wilson* [30].

- Thirdly, that the word "likely" in s1(2) bears the meaning of liable to, or having a tendency to: *Lachaux* [50]; the word cannot bear different meanings in two adjacent subsections.”

  Warby J in *Pirtek* at [50]; cited with approval in *Burki* [204-205].

What must C show?

- “[205] ...the pronoun 'it' in s1(2) must stand for 'harm' (that is, 'harm to reputation'). So it is the harm to reputation that must have caused or be likely to cause serious financial loss, by contrast with s1(1), where the court has to consider, as it were one step further back, whether the publication of the words has caused or is likely to cause serious harm.

- [206] It appears, therefore, that the court must be satisfied of two separate matters, namely
  (1) whether publication has caused or is likely to cause serious harm to [C’s] reputation, and
  (2) whether that harm has caused or is likely to cause [C] serious financial loss.
  In either case, the word 'likely' has the same meaning of being liable, or having a tendency, to cause”: *Burki.*

“Serious financial loss” does not mean special damage – and it can be inferred

- “Absent some clearer indication of Parliament's intention, I would not limit “serious financial harm*” to special damage. I also see no reason why “serious financial loss” may not, like other forms of “serious harm”, be capable of inference from the evidence. Loss to investors is not automatically to be viewed as loss to the company, but it can make borrowing more expensive and the raising of equity more difficult. Here, there is also evidence of an adverse impact on suppliers and of management time made necessary by responding to the libels. At a trial there may be issues as to whether these consequences have flowed from the Republications within England and Wales (to which, since [Cs] have adopted the “mosaic alternative” they are limited), rather than publications which were accessed abroad, but there is sufficient evidence at this stage that the source of [Cs’] investment is mainly in the UK. Additionally, Mr Harper says that UK suppliers of waste products no longer offer him such competitive rates, which is evidence of financial loss of a different kind”: Nicol J in Euroeco at [71]; cited in *Burki* at [207].

- *the J must have meant to refer to serious financial “loss” (rather than “harm”).

What is “serious” is relative
(context is everything)

- In *Burki*, J noted that a tendency to cause serious harm should not be confused with proof of special damage; serious financial loss to a company the size of 70/30 “could be caused by even one potential client backing off as a result of a review, and that could not be ruled out by examination of sales figures” [210].

- J inferred that harm from D’s scathing Google review was liable to cause C serious financial loss, so the s1(2) was met [218]. He had applied *Lachaux*:

- The s1(1) threshold was met: there was a very serious defamatory meaning; available to be read for over 4 months; and seen by an unquantifiable (but, it was to be inferred, substantial) number of readers interested enough in searching for 70/30 on Google) [216];
- Reasonable to suppose that some (of the many) considering using 70/30 would have been deterred from doing so (despite other favourable reviews); the loss of even one client (and fees) would have been a serious financial loss to a company the size of 70/30; but “all that has to be shown at this stage is a tendency” [217]

- J rejected the special damages claim [245-250]. Awarded general damages of £5,000: failed truth defence showed Burki had been deceived by 70/30’s MD into paying large fee [261-262].

A reminder of what the Joint Committee said
(la lucha continua?)

- The Committee, acknowledging that corporations may find it difficult to prove *actual* financial loss, favoured requiring proof of a *likelihood* of such loss. This would “often be a matter of legitimate inference from the nature of the allegation **and** the extent of publication [115]. It added:-

- “The test of "substantial financial loss" should focus on whether there has been, or is likely to be, a substantial loss of custom directly caused by defamatory statements.” (The impact of a defamatory statement being most serious, and hardest to mitigate, where it leads to a material reduction in customer numbers and turnover more generally)

- Neither mere injury to goodwill nor any expense incurred in mitigation of damage to reputation should enable a corporation to bring a libel claim. (Goodwill was too vague a concept and any corporation could create its own mitigation costs, eg by spending money on advertising to counter the impact of a defamatory statement, thus making the test ineffectual).

- A corporation should not be entitled to rely on a fall in its share price, since such loss is suffered by shareholders, rather than the corporation itself. (This already settled law).

- If a trading corporation can prove a general downturn in business as a consequence of a libel, even if it cannot prove the loss of specific customers/contracts, that would suffice as a form of actual (albeit unquantified) loss.

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