

5RB talks 5RB talks 5RB talks

FIRST PRINCIPLES (Part 1)

Miller & Power v Turner [2023] EWHC 2799 (KB) (Collins Rice J)

The serious harm test is a question of fact, and facts must be established by evidence.

Facts and evidence are matters which are entirely case-specific. Lachaux itself confirmed that there is no hard and fast rule as to how serious harm is to be evidenced.

5RB talks 5RB talks 5RB talks

FIRST PRINCIPLES (Part 2)

That is partly because of the nature of the harm in question: the 'harm' of defamation is the effect of a publication in the mind of a third-party publishee, and not any action they may take as a result . . .

And it is partly because of simple practical considerations: particularly in cases of mass newspaper publications, the minds of the publishees are effectively unreachable. [45]

5RB talks 5RB talks 5RB talks

MASS PUBLICATION

A claimant suing on a seriously defamatory article published in a national newspaper article may well be able to satisfy the s.1 requirement by a wholly inferential case. [21]

***Lachaux v Independent* [2019] UKSC 27 (Supreme Court, Lord Sumption)**

5RB talks 5RB talks 5RB talks

LIMITED PUBLICATION STILL COUNTS

... "one well-directed arrow [may] hit the bull's eye of reputation " and cause more damage than indiscriminate firing. [145]

***Amersi v Leslie* [2023] EWHC 1368 (KB) (Nicklin J)**

5RB talks 5RB talks 5RB talks

WHEN INFERENCE NOT ENOUGH

But where a claimant complains of publication of a defamatory statement to either a single publishee or a limited number of publishees, the scope for reliance on inference is likely to be very much reduced . . . [158]

***Amersi v Leslie* [2023] EWHC 1368 (KB) (Nicklin J)**

5RB talks 5RB talks 5RB talks

UNREACHABLE MINDS

In the case of mass newspaper publications, the minds of the publishers are effectively unreachable. [45]

***Miller & Power v Turner* [2023] EWHC 2799 (KB) (Collins Rice J)**

5RB talks 5RB talks 5RB talks

WHY WON'T THEY TALK TO ME?

The difficulties of obtaining evidence about the actual defamatory impact of a publication are well-known. . . . people rarely want to get involved and the more the claimant has been defamed in the eyes of a potential witness the less likely that person is to want to help. [38]

***Amersi v Leslie* [2023] EWCA Civ 1468**

(Court of Appeal, Warby LJ)

5RB talks 5RB talks 5RB talks

INFERENCE AND CAUSATION

5RB talks 5RB talks 5RB talks

CAUSATION PROBLEMS

Without evidence from any publishee, or indeed evidence that any identified or identifiable publishee actually read the publications themselves and/or shared them and that anyone thought any the worse of the Claimants as a result , that requires an examination of the evidence to consider whether other possible causes suggest themselves, and if so whether they might be more probable. [53]

Miller & Power v Turner [2023] EWHC 2799 (KB) (Collins Rice J)

5RB talks 5RB talks 5RB talks

BAD ODOUR

. . . it is not necessary for the claimants to establish the probability of readers being immutably convinced of the truth of an allegation. That is not how reputation works. Serious reputational harm can be caused by a change of view some considerable way short of that. It is often the insidious creation of a 'bad odour', together with the difficulty of establishing a negative, that does the most reputational harm. . . . But the test does require that people's minds were probably changed because of these tweets, and to a degree meriting the description of serious harm. [83]

Blake and Seymour v Laurence Fox [2024] EWHC 146 (KB) (Collins Rice J)

5RB talks 5RB talks 5RB talks

"BIT HARSH"

This is a case, in other words, in which there are very many alternative explanations or sources of causative negative impact on Mr Fox's reputation in general in the matter of racism, and on his career in particular – his own stimulation of controversy, the hostile views of the profession, the pandemic, his diversion into a political career, and the sheer number of other people who had joined in the debate he had publicly stimulated and taken public exception to his pronouncements as being racist. I have to take this into account in considering the probable causative impact of the tweets complained of. [146]

Blake and Seymour v Laurence Fox [2024] EWHC 146 (KB) (Collins Rice J)

5RB talks 5RB talks 5RB talks

BAD REPUTATION

The law presumes that the claimant's reputation before publication of the defamation was good. The presumption is rebuttable, but evidence is admitted for that purpose only if it goes to the relevant sector of the claimant's reputation . . . [51]

Wright v McCormack [2023] EWCA Civ 892 (Court of Appeal, Warby LJ)

5RB talks 5RB talks 5RB talks

THE RULE IN *DINGLE V ASSOCIATED NEWSPAPERS*:

"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." [15(9)]

***Lachaux v Independent Print Limited* [2015] EWHC 2242 (QB)
(Warby J)**

5RB talks 5RB talks 5RB talks

TOP JUDGE AGREES

The judge was entitled to apply (the rule in *Dingle*). [24]

***Lachaux v Independent Print Limited* [2019] UKSC 27
(Supreme Court, Lord Sumption)**

5RB talks 5RB talks 5RB talks

AGGREGATION (Part 1)

Amersi v Leslie [2023] EWCA Civ 1468 (Court of Appeal, Warby LJ)

56. . . . in my view aggregation of reputational harm caused by separate publications is legitimate . . . where the statement complained of is identical, as in the typical case of simultaneous mass publication of the same newspaper article or social media post. I can see that the same might be true where some of the statements complained of differ from one another in ways that are minimal and immaterial to the meaning or imputation conveyed. In such a case it might perhaps be said that the statements are all the same or "substantially the same".

5RB talks 5RB talks 5RB talks

AGGREGATION (Part 2)

That could be so in a case of multiple simultaneous publication or, arguably, in a case where the multiple publications are sequential. In such a case the claimant might be entitled to contend that the defendant published the statement complained of (or substantially the same statement) to numerous individuals and that the "statement" meets the statutory threshold because, whatever might be the position in relation to any individual instance of publication, the overall impact of "its publication" on all these different occasions is to cause serious harm to the claimant's reputation.

5RB talks 5RB talks 5RB talks

THE "GOOD" OLD DAYS

I agree with what Goddard LJ said in *Hough v London Express Newspaper Ltd* [1940] 2 KB 507, 515 : 'If words are used which impute discreditable conduct to my friend, he has been defamed to me, although I do not believe the imputation, and may even know that it is untrue.'

***Morgan v Odhams Press Ltd* [1971] 1 W.L.R. 1239 (House of Lords, Lord Morris of Borth-y-Gest**