

CORPORATE DEFAMATION  
IN ENGLISH LAW:  
CORPORATE REPUTATION,  
FREEDOM OF SPEECH, AND THE  
DEFAMATION ACT 2013

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This thesis is submitted in partial fulfilment of the requirements of the award of the degree of Doctor of Philosophy of the University of Portsmouth.

Whilst registered as a candidate for the above degree, I have not been registered for any other research award. The results and conclusions embodied in this thesis are the work of the named candidate and have not been submitted for any other academic award.

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## Abstract

The aim of this thesis is to assess whether English defamation law strikes an appropriate balance between the conflicting interests in reputation and freedom of speech in cases involving corporate, as opposed to individual, claimants.

The interests in corporate reputation and the freedom to criticize companies and their activities are explored by reviewing both the academic literature and the relevant case law, on the basis of which it is argued that the law should afford less weight to the reputational interests of corporate claimants than is given to the individual interest in reputation; and that defendants' speech typically warrants enhanced protection from companies' defamation claims in light of the public interest value of critical statements about corporate activities.

In s 1(2) of the Defamation Act 2013, Parliament responded to the widespread concerns that had been raised about corporate defamation law by introducing a threshold requirement of 'serious financial loss' which claims brought by for-profit companies must meet in order to succeed. This thesis contains the most detailed critical assessment of that reform to date, which scrutinizes the cases in which the s 1(2) test has been interpreted and applied since it came into force. That analysis concludes that the provision will not resolve the problems with the pre-existing law, in part because the courts have interpreted it too favourably to claimants, and in part because Parliament's decision to focus on financial loss fails to address other fundamental issues with corporate defamation litigation.

In light of that assessment of the 2013 reforms, the thesis considers a range of alternative reforms that might be made, either to the substantive law, to the remedies awarded to successful claimants, or to the procedures used to resolve claims. A number of potentially beneficial reforms are identified, but it is argued that none of them would offer a complete response to the problems caused by corporate defamation claims. Instead, the thesis proposes that the right to sue in defamation should be removed entirely from corporate claimants.

In contrast to most other literature in which a similar approach is proposed, this thesis recommends removing the right to sue from *all* non-human claimants, rather than targeting only larger companies or those trading for profit. The benefits of a rule with a clearly defined scope are argued to outweigh the limited interests that charities and smaller companies have in retaining the right to sue in defamation.

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## **Note on publications**

Aspects of the research undertaken for this thesis have contributed to the following publications:

- ‘The Defamation Act 2013: What Exactly is ‘a Body that Trades for Profit’? (2015) 20(4) Communications Law 72-78.
- ‘Empirical Insights into Corporate Defamation: An Analysis of Cases Decided 2004-2013’ (2016) 8(1) Journal of Media Law 32-66.
- ‘The Economics of Weaponized Defamation Lawsuits’ (2018) 47(2) Southwestern Law Review 335-383 (co-authored with Ansgar Wohlschlegel).
- ‘Corporate Reputation under the European Convention on Human Rights’ (2018) 10(1) Journal of Media Law 49-76.



## Abbreviations and citation of sources

Citation of sources follows the OSCOLA style,<sup>1</sup> except that neutral case citations are preferred to law report citations where available, and the titles of academic journals are given in full rather than in abbreviated form.

All URLs in footnotes were last accessed between 30<sup>th</sup> December 2019 and 2<sup>nd</sup> January 2020.

This thesis is accurate and up-to-date to the best of my knowledge as of 31<sup>st</sup> December 2019.

### *Table of abbreviations*

In alphabetical order.

A1P1	Article 1 of Protocol 1 (to the European Convention on Human Rights)
<i>Al-Ko Kober</i>	<i>Al-Ko Kober Ltd v Sambhi</i> [2019] EWHC 2409 (QB)
<i>Brett Wilson</i>	<i>Brett Wilson LLP v Person(s) Unknown</i> [2015] EWHC 2628 (QB)
CFA	Conditional Fee Agreement
CMS Committee	House of Commons Culture, Media and Sport Committee (in relation to the Committee's report on <i>Press Standards, Privacy and Libel</i> )
<i>Collins Stewart</i>	<i>Collins Stewart Ltd v The Financial Times Ltd (No 1)</i> [2004] EWHC 2337 (QB)
<i>Derbyshire</i>	<i>Derbyshire County Council v Times Newspapers Ltd</i> [1993] AC 534 (HL)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights

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<sup>1</sup> Donal Nolan, Elizabeth Wells and Sandra Meredith (eds), *OSCOLA: Oxford University Standard for the Citation of Legal Authorities* (4<sup>th</sup> edn, Hart 2012).

<i>Euroeco Fuels</i>	<i>Euroeco Fuels (Poland) Ltd v Szczecin and Swinoujscie Seaports Authority</i> [2018] EWHC 1081 (QB)
<i>FSINFS</i>	<i>Free Speech is Not For Sale</i> (the report produced in 2009 by the Libel Reform Campaign)
<i>Gatley</i>	<i>Gatley on Libel and Slander</i> (12 <sup>th</sup> edn, 2 <sup>nd</sup> supp, Sweet & Maxwell 2017)
<i>Hawkins</i>	<i>Metropolitan Saloon Omnibus Co Ltd v Hawkins</i> (1859) 4 H & N 87
<i>Jameel</i>	* see note below table
Joint Committee	Joint Committee on the Draft Defamation Bill
<i>Lachaux</i>	<i>Lachaux v Independent Print Ltd</i> [2015] EWHC 2242 (QB); [2017] EWCA Civ 1334; [2019] UKSC 27
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
<i>Lewis</i>	<i>Lewis v Daily Telegraph Ltd</i> [1964] AC 234 (HL)
Libel Reform Campaign	The pressure group formed by English PEN and Index on Censorship, which produced the report titled <i>Free Speech is Not For Sale</i> in 2009
<i>McLibel</i>	<i>McDonald's Corp v Steel (No 1)</i> [1995] 3 All ER 615 (and related litigation)
<i>Pirtek</i>	<i>Pirtek (UK) Ltd v Jackson</i> [2017] EWHC 2834 (QB)
<i>Reynolds</i>	<i>Reynolds v Times Newspapers Ltd</i> [2001] 2 AC 127 (HL) (and the public interest defence named for that case)
<i>Seventy Thirty</i>	<i>Seventy Thirty Ltd v Burki</i> [2018] EWHC 2151 (QB)
<i>Singh</i>	<i>British Chiropractic Association v Singh</i> [2010] EWCA Civ 350
SLAPP	Strategic Lawsuit against Public Participation
<i>South Hetton</i>	<i>South Hetton Coal Co Ltd v North-Eastern News Association Ltd</i> [1894] 1 QB 133 (CA)
<i>Steel</i>	<i>Steel and Morris v UK</i> [2005] ECHR 103

<i>Sullivan</i>	<i>New York Times v Sullivan</i> 376 US 254 (1964)
<i>Thornton</i>	<i>Thornton v Telegraph Media Group Ltd</i> [2010] EWHC 1414 (QB)
<i>Undre</i>	<i>Undre v London Borough of Harrow</i> [2016] EWHC 931 (QB)

\* There are two cases known as *Jameel*, each of which is significant at different points in this thesis. In Chapters 1, 2, and 5, ‘*Jameel*’ is used to refer to *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44. In Chapters 3 and 4, that case is referred to as ‘*Jameel v WSJ*’, and ‘*Jameel*’ is used to refer to *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75.

# INTRODUCTION

## A. Context and research question

The purpose of defamation law is to protect the claimant's reputation against false allegations published by the defendant. Because liability attaches to the publication of statements, a defamation claim brought to protect the claimant's reputation will necessarily also implicate the defendant's freedom of speech. The core challenge of defamation law therefore consists of finding an appropriate balance between freedom of speech and the right to reputation.<sup>1</sup> This central conflict between the interests in speech and reputation is also present where the claimant is a corporate entity rather than an individual, but the appropriate balance between the two is not necessarily the same in this context. The purpose of this thesis is to assess whether English defamation law appropriately balances the interests at stake in cases involving corporate claimants. The argument presented is that it does not.

In April 2013, Parliament passed the Defamation Act 2013, with the overall intention of rebalancing the law so as to better protect freedom of speech.<sup>2</sup> One of the principal ways in which it sought to achieve this goal was by introducing a threshold test, in s 1 of the Act, that would require defamation claimants to show 'serious harm' to their reputations in order to sue successfully.<sup>3</sup> The treatment of corporate claimants was a 'key battleground' in the ping-pong stages of parliamentary debate on the Bill.<sup>4</sup> The pre-existing law was criticized on two broad grounds. Firstly, it was argued that the reputational interests that corporate defamation claimants sought to protect were financial in nature, and that as such

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<sup>1</sup> Matthew Collins, *Collins on Defamation* (OUP 2014) para 1.01.

<sup>2</sup> Ministry of Justice, *Draft Defamation Bill: Consultation* (Cm 8020, 2011) 5.

<sup>3</sup> *Ibid*, para 4.

<sup>4</sup> James Price and Felicity McMahon, *Blackstone's Guide to the Defamation Act 2013* (OUP 2013) para 1.32.

these claimants should be required to prove financial loss as a prerequisite of liability.<sup>5</sup> Secondly, it was argued that corporations frequently used the threat of defamation litigation to silence legitimate criticism of their activities; and, more generally, that the law had an unacceptable ‘chilling effect’ on speech about companies.<sup>6</sup>

The government initially resisted including any reforms in the 2013 Act specifically targeted at corporate claimants,<sup>7</sup> but eventually settled on a ‘compromise’<sup>8</sup> by which the s 1 ‘serious harm’ threshold would be modified by a requirement to show ‘serious financial loss’ in claims brought by for-profit companies.<sup>9</sup> As a result, s 1 as a whole reads as follows:

- (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.

As the first statutory amendment to English defamation law to be targeted specifically at corporate claimants, the ‘serious financial loss’ threshold in s 1(2) of the Defamation Act 2013 is naturally important to this thesis. As such, the provision is subjected to a sustained and careful critique, both to examine how it is being interpreted and applied in the courts, and to assess its suitability as a response to the complaints raised about corporate defamation law during the reform debates. This analysis reaches the conclusion that the serious financial loss test will not be sufficient to address the significant problems with English corporate defamation law, particularly in relation to its effects on freedom of speech. In light of this assessment of s 1(2), the thesis also discusses various alternative options for reforming corporate defamation law, drawing on approaches taken in other jurisdictions, and on proposals made during debate on the 2013 Act and in the

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<sup>5</sup> Ibid, para 2.12. The House of Lords had declined to develop the common law so as to impose such a requirement in *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44.

<sup>6</sup> eg Culture, Media and Sport Committee, *Press Standards, Libel and Privacy: Report* (HC 361-I 2010) paras 164-76 (‘CMS Committee Report’).

<sup>7</sup> Ministry of Justice, *Consultation* (n 2) paras 136-45; Defamation Bill Deb 26 June 2012, col 206 (Jonathan Djanogly MP); HL Deb 5 February 2013, vol 743, col 174 (Lord Ahmad); HC Deb 16 April 2013, vol 561, col 269 (Helen Grant MP).

<sup>8</sup> Price and McMahon (n 4) para 1.36.

<sup>9</sup> HL Deb 23 April 2013, vol 744, cols 1365-84; HC Deb 24 April 2013, vol 561, cols 913-22.

academic literature. The overall argument presented in the thesis is that the right to sue in defamation should be removed entirely from corporate claimants.

## **B. Contribution to existing literature**

A number of commentators have addressed questions about how defamation law ought to apply in cases involving corporate claimants, either tangentially to a broader discussion of defamation law,<sup>10</sup> or as the central focus of their research. In particular, this thesis builds on previous work on this subject by (in alphabetical order) Gary Chan,<sup>11</sup> Peter Coe,<sup>12</sup> Jan Oster,<sup>13</sup> David Rolph,<sup>14</sup> and Hilary Young.<sup>15</sup> The overall conclusion reached in this thesis – that the right to sue in defamation should be removed from (at least some<sup>16</sup>) corporate claimants – has also been reached by other commentators.<sup>17</sup> The thesis contributes to the existing literature in the following ways.

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<sup>10</sup> eg David Howarth, ‘Libel: Its Purpose and Reform’ (2011) 74(6) *Modern Law Review* 845, 873-75; Gavin Phillipson, ‘The “Global Pariah”, the Defamation Bill and the Human Rights Act’ (2012) 63(1) *Northern Ireland Legal Quarterly* 149; 185-86; Alastair Mullis and Andrew Scott, ‘Something Rotten in the State of English Libel Law? A Rejoinder to the Clamour for Reform of Defamation’ (2009) 14(6) *Communications Law* 173, 179-80; ‘Reframing Libel: Taking (All) Rights Seriously and Where it Leads’ (2012) 63(1) *Northern Ireland Legal Quarterly* 5, 18, 21.

<sup>11</sup> Gary K Y Chan, ‘Corporate Defamation: Reputation, Rights and Remedies’ (2013) 33(2) *Legal Studies* 264.

<sup>12</sup> Peter Coe, ‘The Value of Corporate Reputation and the Defamation Act 2013: A Brave New World or Road to Ruin?’ (2013) 18(4) *Communications Law* 113; ‘The Defamation Act 2013 and CPR 3.4 and 24: A Sting in Causation’s Tail’ (2014) 25(3) *Entertainment Law* 93; ‘The Defamation Act 2013: We Need to Talk about Corporate Reputation’ (2015) 4 *Journal of Business Law* 313; ‘A Comparative Analysis of the Treatment of Corporate Reputation in Australia and the UK’ in András Koltay and Paul Wragg (eds), *Research Handbook on Comparative Defamation and Privacy Law* (forthcoming, Edward Elgar 2020) (on file with author – I am grateful to Pete Coe for providing a copy of this chapter, and for granting me permission to cite it and quote from it in this thesis).

<sup>13</sup> Jan Oster, ‘The Criticism of Trading Corporations and their Right to Sue for Defamation’ (2011) 2(3) *Journal of European Tort Law* 255.

<sup>14</sup> David Rolph, ‘Corporations’ Right to Sue for Defamation: An Australian Perspective’ (2011) 22(7) *Entertainment Law Review* 195.

<sup>15</sup> Hilary Young, ‘Rethinking Canadian Defamation Law as Applied to Corporate Claimants’ (2013) 46(2) *University of British Columbia Law Review* 529; ‘Adding Insult to Injury in Assessing Damages for Corporate Defamation’ (2013) 21 *Tort Law Review* 127; ‘Public Institutions as Defamation Plaintiffs’ (2016) 39(1) *Dalhousie Law Journal* 249.

<sup>16</sup> Some commentators have reached this conclusion only in respect of for-profit trading corporations: see text to notes 37-39.

<sup>17</sup> eg J A Weir, ‘Local Authority v Critical Ratepayer – A Suit in Defamation’ (1972) 30 *Cambridge Law Journal* 238; Fiona Patfield, ‘Defamation, Freedom of Speech and Corporations’ (1993) 3 *Juridical Review* 294; David Howarth (n 10); Young, ‘Rethinking Canadian Defamation Law’ (n 15).

Most importantly, it situates the argument for removing the corporate right to sue in the context of the law of defamation applicable in England and Wales after the commencement of the Defamation Act 2013, which as noted included provision for corporate claimants specifically. Most of the existing literature on English corporate defamation law referred to above was published during the debates leading to the 2013 reforms,<sup>18</sup> with some older literature having been published before the turn of the millennium.<sup>19</sup>

The analysis of corporate defamation law in this thesis includes the most thorough critical examination to date of the serious financial loss test in s 1(2) of the Defamation Act 2013, and its interpretation and application in the courts since the Act came into force.<sup>20</sup> This analysis of the relevant case law informs the assessment of the 2013 reforms as a response to the criticisms of the pre-existing law that have been raised in other academic and official literature. The most significant contributions to the academic literature on English corporate defamation law since the 2013 Act came into force have been Peter Coe's.<sup>21</sup> My analysis of the interests at stake in corporate defamation cases, and my conclusions as to how those cases ought to be dealt with, differ significantly from the position taken by Coe,<sup>22</sup> who is

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<sup>18</sup> eg Chan (n 11); Rolph (n 14).

<sup>19</sup> eg Weir (n 17); Patfield, 'Defamation, Freedom of Speech and Corporations' (n 17); Fiona Patfield, 'The Origins of a Company's Right to Sue for Defamation' (1994) 45(3) Northern Ireland Legal Quarterly 233.

<sup>20</sup> There is, of course, detailed discussion of s 1(2) and relevant case law in Richard Parkes and others, *Gatley on Libel and Slander* (12<sup>th</sup> edn, 2<sup>nd</sup> supp, Sweet & Maxwell 2017) paras 2.8, 3.7, 26.21, 32.3 ('*Gatley*'). But the examination of the provision in *Gatley* is primarily intended for practitioners, and is therefore a descriptive, rather than normative, exercise; the text has also not yet been updated to reflect the impact of the Supreme Court judgment on s 1(1) in *Lachaux v Independent Print Ltd* [2019] UKSC 27: see Ch3.A.iv., text to notes 60-77.

<sup>21</sup> See note 12. Other relevant literature since the 2013 Act primarily includes commentary on specific cases (eg Hugh Tomlinson, '*Brett Wilson LLP v Persons Unknown*, Corporate Damages and Injunction against Unknown Operators of Website' (2016) 27(1) Entertainment Law Review 22; Jennifer Agate, '*The High Cost of Dating – Tereza Burki v Seventy Thirty Ltd*' (2019) 30(1) Entertainment Law Review 32; Thomas D C Bennett, '*An Inferential House of Cards – Serious Financial Loss under section 1(2) Defamation Act 2013: Burki v Seventy Thirty Ltd*' (2019) 24(1) Communications Law 34); and relatively brief and general commentary on the likely effect of the Act on corporate claimants (eg David Rolph, '*A Critique of the Defamation Act 2013: Lessons For and From Australian Defamation Law Reform*' (2016) 21(4) Communications Law 116; Thomas Rudkin, '*Things Get Serious: Defining Defamation*' (2014) 25(6) Entertainment Law Review 201).

<sup>22</sup> As indicated by our discussion of the subject in The Media Law Podcast, 'Episode 11: Corporate Defamation' at <<https://soundcloud.com/user-568422299/episode-11-corporate-defamation>>.

in favour of retaining the corporate right to sue in defamation and has argued that the s 1(2) test may restrict companies' ability to sue too much.<sup>23</sup>

Other existing literature analyses the law of corporate defamation that applies in other common law jurisdictions, such as the United States,<sup>24</sup> Australia,<sup>25</sup> or Canada.<sup>26</sup> There are similarities between the law in these jurisdictions and English law, but there are also significant differences in their approaches to the task of finding an appropriate balance between the competing interests in corporate reputation and freedom of speech. In particular, the approach to corporate defamation law in England assessed in this thesis, as embodied in s 1(2) of the Defamation Act 2013, diverges from the approaches taken to similar problems in each of those other jurisdictions both in substance and in scope.<sup>27</sup>

Removing companies' right to sue in defamation was one of the reform options proposed during the debate prior to the 2013 Act,<sup>28</sup> but Parliament instead opted to introduce the serious financial loss threshold in s 1(2).<sup>29</sup> Parliament's approach appears to have been motivated in part by the perception that denying companies the right to sue in defamation might be incompatible with the European Convention on Human Rights ('the Convention').<sup>30</sup> This interpretation of the Convention has also been adopted in some academic literature on English corporate defamation

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<sup>23</sup> eg Coe, 'Need to Talk' (n 12) 333.

<sup>24</sup> eg Arlen W Langvardt, 'A Principled Approach to Compensatory Damages in Corporate Defamation Cases' (1990) 27 *American Business Law Journal* 491; D Mark Jackson, 'The Corporate Defamation Plaintiff in the Era of SLAPPs: Revisiting *New York Times v Sullivan*' (2001) 9(2) *William & Mary Bill of Rights Journal* 491; Laura A Heymann, 'The Law of Reputation and the Interest of the Audience' (2011) 52 *Boston College Law Review* 1341.

<sup>25</sup> Perry Herzfeld, 'Corporations, Defamation and General Damages: Back to First Principles' (2005) *Media & Arts Law Review* 135; Matt Collins, 'Protecting Corporate Reputations in the Era of Uniform National Defamation Laws' (2008) 13 *Media & Arts Law Review* 447.

<sup>26</sup> Young, 'Rethinking Corporate Defamation Law' (n 15).

<sup>27</sup> See eg Rolph, 'A Critique of the Defamation Act 2013' (n 21) 118-19.

<sup>28</sup> eg Index on Censorship and English PEN, *Free Speech is Not For Sale* (2009) 10.

<sup>29</sup> David J Acheson, 'Corporate Reputation under the European Convention on Human Rights' (2018) 10(1) *Journal of Media Law* 49, 49-50.

<sup>30</sup> eg Joint Committee on the Draft Defamation Bill, *Report* (2010-12, HL 203, HC 930-I) paras 112-14 ('Joint Committee Report'); Joint Committee on the Draft Defamation Bill, *Oral and Associated Written Evidence Volume II* (2010-12, HL 203, HC 930-II) 18-19, 381-86 ('Joint Committee Evidence vol II').



law;<sup>31</sup> it is rejected in this thesis, which argues that a company does not have a Convention right to protect its reputation in domestic defamation law.<sup>32</sup>

The conceptual analysis of the corporate interest in reputation in Chapter 1 is distinguished from most other analyses in the literature because it does not rely on the conceptions of reputation as property, honour, and dignity described by Robert Post.<sup>33</sup> While most commentators on corporate defamation law have adopted Post's theory as a suitable framework within which to conceptualize corporate reputation,<sup>34</sup> I argue that it is not as useful as its influence on the subsequent literature would suggest. That argument is based on a critique of Post's theory as a whole, which differs from the approach taken by most other commentators, who have tended to critique each of Post's conceptions individually while assuming the validity of his theory overall.<sup>35</sup> The conceptual discussion in Chapter 1 also rejects some other arguments that are commonly found in the existing literature, including the claim that corporate reputation is a form of property, or that companies are only capable of having financial interests in reputation.

Finally, the thesis directly addresses the standing of corporate claimants other than trading companies, such as charities and other not-for-profit entities, and argues that they should be treated in the same way as for-profit business corporations.<sup>36</sup> Most existing literature either argues for differential treatment of these bodies relative to trading companies;<sup>37</sup> considers a specific kind of entity separately from corporate

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<sup>31</sup> Chan (n 11) 269; Oster (n 13) 263.

<sup>32</sup> This interpretation of the ECtHR's case law is set out at Ch1.C.i., text to notes 230-255 (Art 8); Ch1.B.ii., text to notes 129-150 (A1P1); Ch4.C.iv., text to notes 331-343 (Art 6); and in full at Acheson, 'Corporate Reputation under the ECHR' (n 29).

<sup>33</sup> Robert C Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74(3) California Law Review 691.

<sup>34</sup> eg Chan (n 11) 268-70; Coe, 'Need to Talk' (n 12) 315-18; Herzfeld (n 25) 139-40; Oster (n 13) 259-60; Young, 'Rethinking Canadian Defamation Law' (n 15) 540-45.

<sup>35</sup> eg David Rolph, *Reputation, Celebrity and Defamation Law* (Ashgate 2008) 41; Dario Milo, *Defamation and Freedom of Speech* (OUP 2008) 26-42.

<sup>36</sup> See Ch5.C., text to notes 262-306.

<sup>37</sup> eg Herzfeld (n 25) 179. cf Chan (n 11) 286-87.

claimants in general;<sup>38</sup> or does not address the issues raised by their ability to sue in defamation.<sup>39</sup>

## C. Chapter structure and methodological approach

The central question that this thesis addresses is whether the English law of defamation is appropriate as applied in cases involving corporate, as opposed to individual, claimants. This question involves both descriptive and normative elements; that is, it entails a comparison between what the law *is* and what the law *ought to be*. The second of these elements is also reform-oriented, in that it involves considering what the law *could be*. As such, the thesis as a whole adopts a combination of methodological approaches to address these various aspects of the central research question.

Chapters 1 and 2 discuss, in turn, the competing interests at stake in corporate defamation cases: corporate reputation and freedom of speech. Chapter 1 consists primarily of a critical review of existing legal and socio-legal research conceptualizing the interest in corporate reputation protected in defamation law. It draws on literature from a range of different disciplinary perspectives, such as business, marketing, finance, and economics, to demonstrate the value of reputation to companies;<sup>40</sup> but argues overall that corporate claimants' reputational interests are more limited than those of individual claimants. Chapter 1 also uses a standard doctrinal methodology<sup>41</sup> to defend the proposition that the case law of the European Court of Human Rights does not establish a right to reputation for companies under the Convention, in contrast to the protection given to individual reputation under

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<sup>38</sup> eg Young, 'Public Institutions as Defamation Plaintiffs' (n 15); Raymond Youngs, 'Should Public Bodies Be Allowed to Sue in Defamation?' (2011) 16(1) Communications Law 19; Jill Cottrell, 'Can a University Sue in Defamation?' (1999) 7(1) Asia Pacific Law Review 45.

<sup>39</sup> eg Oster (n 13) fn 3, excluding 'Public corporations, unincorporated groups, ... and non-trading organisations such as religious communities, political parties and non-profit organisations' from the scope of his analysis; Young, 'Rethinking Canadian Defamation Law' (n 15) 539, whose argument 'focus[es] on medium to large for-profit corporations'.

<sup>40</sup> This methodology is broadly comparable to that outlined in Ian Dobinson and Francis Johns, 'Legal Research as Qualitative Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2017) 42 (arguing that 'the identification of relevant legislation, cases and secondary materials in law can be seen as analogous to a social science literature review').

<sup>41</sup> eg Martha Minow, 'Archetypal Legal Scholarship – A Field Guide' (2013) 63(1) Journal of Legal Education 65.

the Article 8 right to privacy; and argues that, in light of the principles underlying its Art 8 jurisprudence, the Court ought to declare positively that companies do not have a Convention right to reputation.

Chapter 2, similarly, engages in a critical examination of relevant case law and academic literature to explore the speech interests at stake in corporate defamation cases, and in particular the *public* interest in speech about companies and their activities. It argues that there is some significant public interest in the speech at issue in a large majority of corporate defamation cases; that the English courts in practice almost always recognize that public interest; and that the few types of case in which there is little public interest in critical speech about companies are of limited importance to the overall design of corporate defamation law. In addition to this examination of the speech at issue in corporate defamation cases dealt with by the courts, Chapter 2 also reviews the literature on the law's wider impact on speech, discussing arguments about its chilling effect on different speakers, and highlighting the important role that those arguments played in shaping the debate about corporate defamation reform prior to the Defamation Act 2013. The chapter concludes that the range of pernicious effects which corporate defamation law has on speech on matters of public interest, combined with the narrower reputational interests of corporate claimants identified in Chapter 1, presented a compelling case to Parliament that it was necessary to reform the law as it applied to corporate claimants specifically.

Chapter 3 focuses on s 1(2) of the Defamation Act 2013, which was Parliament's response to these calls for reform. It aims to 'analyse, criticise, sift, and synthesise'<sup>42</sup> the relevant case law to further understand how the provision has been interpreted to date, whether and how it has influenced the outcomes of corporate defamation cases, and how it will continue to affect this area of law going forward. The analysis of the interpretation and application of s 1(2) is informed by a close reading of all publicly available judgments in which the provision has been applied or discussed, identified through searches on Westlaw and Lexis Library. This doctrinal analysis is supplemented by reference to critical academic literature, because the intention of the chapter is not only to understand how the s 1(2) test

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<sup>42</sup> Peter Birks, 'The Academic and the Practitioner' (1998) 18(4) *Legal Studies* 397, 399.

will be applied in the courts, but also to assess its suitability as a response to the criticisms of the pre-existing law that were explored in Chapters 1 and 2.<sup>43</sup> The chapter concludes that s 1(2) is likely to have a relatively limited impact, especially because of the courts' claimant-friendly interpretation of the provision to date; and that the reform fails to address fundamental problems with corporate defamation law that were identified in the debates on the 2013 Act.

Chapters 4 and 5 are 'reform-oriented';<sup>44</sup> having argued that the Defamation Act 2013 will not be sufficient to address the problems with English corporate defamation law, Chapter 4 discusses whether there are alternative reform options that would more effectively address those problems. It considers approaches taken in other jurisdictions, proposals that were rejected by Parliament in the debate leading to the 2013 Act, and suggestions made in the academic literature. The chapter explores three broad categories of potential reform: alterations to the substantive law that would make it more difficult for corporate claimants to succeed with defamation claims; restrictions on the remedies available to successful corporate defamation claimants; and procedural reforms aimed at reducing the cost and complexity of litigation. The overall argument presented in Chapter 4 is that, while some of the reforms discussed may be beneficial if adopted in English law, none of them would adequately address the problems with the law.

Chapter 5 argues that the preferable approach would be to remove companies' right to sue in defamation entirely. The argument is again supported primarily by a critical review of relevant academic literature and case law. It is acknowledged that denying corporate claimants standing in defamation would lead to some cases in which companies have no adequate remedy for the harm caused by false allegations; however, it is argued that this would only be true in a small number of cases, and that, notwithstanding those cases, the benefits of removing the right to sue from companies would outweigh the costs of doing so. The final part of the chapter addresses the scope of the proposed reform; that is, *which* claimants should be precluded from suing in defamation. It draws on rules applied in corporate

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<sup>43</sup> eg Dobinson and Johns (n 40) 31.

<sup>44</sup> Terry Hutchinson, *Researching and Writing in Law* (4<sup>th</sup> edn, Thomson Reuters 2018) 7, citing Pearce Committee, 'Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission, Vol 3' (1987) 17.

defamation cases in the US and Australia, as well as Parliament's decision to limit the serious financial loss threshold in s 1(2) of the 2013 Act to claims brought by 'bod[ies] that trade[] for profit', to argue that the preferable approach would be to remove the right to sue from *all* claimants other than human beings, rather than to attempt to target only some categories of corporate claimant. In other words, the part – and the thesis as a whole – argues that the right to sue in defamation should be available exclusively to individual human beings.

As noted, some parts of the thesis, particularly in Chapters 4 and 5, discuss approaches taken to corporate defamation law in other jurisdictions. The jurisdictions discussed in most detail are Australia and the United States, where companies' ability to sue in defamation is restricted relative to English law. These parts of the thesis do not attempt to use a 'comparative' legal research methodology, which requires a deeper and more extensive analysis of the legal cultures and histories of the relevant jurisdictions than it would be possible to undertake in the context of this thesis.<sup>45</sup> I do not suggest that the experiences with alternative approaches to corporate defamation law in other jurisdictions would necessarily be replicated if those approaches were to be adopted in English law.<sup>46</sup> The material is relevant and valuable because it helps to identify the range of options available for reform, and to anticipate potential problems with those options; and because academic literature discussing the law in other jurisdictions can provide insights that *do* translate more directly into the context of English law which is the primary focus of the thesis.<sup>47</sup>

Some parts of the argument presented in this thesis are based on or supported by the results of previously published research that adopted a more empirical methodology, which involved systematically studying all judgments handed down in English corporate defamation cases between 2004 and 2013.<sup>48</sup> The methodology

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<sup>45</sup> Geoffrey Samuel, 'Comparative Law and Its Methodology' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013).

<sup>46</sup> See eg the discussion of David Rolph's argument in relation to the availability of pre-publication injunctions in injurious falsehood actions in Australia, at Ch5.B.i., text to notes 130-137.

<sup>47</sup> See eg Jan M Smits, *The Mind and Method of the Legal Academic* (Edward Elgar 2012) 76-77 (describing other jurisdictions as 'laboratories' for potential solutions to legal problems).

<sup>48</sup> David J Acheson, 'Empirical Insights into Corporate Defamation: An Analysis of Cases Decided 2004-2013' (2016) 8(1) *Journal of Media Law* 32.

used in that research is explained and justified in the journal article in which the results of the study are reported.<sup>49</sup>

## D. Overview of relevant law

The aim of this part is to give a broad outline of the basic principles of English defamation law, in particular as it applies to corporate claimants, to provide the necessary context for the discussion and analysis in the body of the thesis. The description of the law below is by no means comprehensive; further detail or nuance will be provided where necessary throughout the thesis.

The cause of action in defamation is only available in respect of statements that are ‘defamatory’ of the claimant. To decide whether a statement is defamatory, however, it is first necessary to determine its meaning. The common law rule is that a given statement must be attributed a single meaning.<sup>50</sup> Given the variety of potential meanings that any statement could be understood to bear, the meaning attributed to a statement for the purposes of a defamation claim is determined by reference to what a hypothetical ‘ordinary reader’ would understand the statement to mean,<sup>51</sup> taking into account the context in which it was published.<sup>52</sup>

A defamatory statement is one that tends to ‘lower the [claimant] in the estimation of right-thinking members of society generally’;<sup>53</sup> expose him to ‘hatred, contempt, or ridicule’;<sup>54</sup> or ‘affect[] in an adverse manner the attitude of other people towards him’.<sup>55</sup> A statement may be defamatory of a trader (or trading corporation<sup>56</sup>) if it ‘impute[s] lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of [the claimant’s] trade or business or professional activity’.<sup>57</sup>

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<sup>49</sup> *Ibid*, 34-39.

<sup>50</sup> *Slim v Daily Telegraph* [1968] 2 QB 157 (CA).

<sup>51</sup> See *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130, [14].

<sup>52</sup> *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 (HL) 70-71.

<sup>53</sup> *Sim v Stretch* [1936] 2 All ER 1237 (HL) 1240 (Lord Atkin).

<sup>54</sup> *Parmiter v Coupland* (1840) 6 M & W 105, 108 (Parke B).

<sup>55</sup> *Thornton v Telegraph Media Group* [2010] EWHC 1414 (QB) [96] (Tugendhat J). A number of other definitions might also be used: see *Berkoff v Burchill* [1996] 4 All ER 1008 (CA) 1011-13.

<sup>56</sup> The treatment of corporate claimants in defamation law is described below, at text to notes 66-81.

<sup>57</sup> *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094 (CA) 1104 (Lord Pearson).

The claimant must also prove that the statement complained of referred to, and was defamatory of, him personally. He need not be named specifically; the test is ‘whether the words are such as would reasonably lead persons acquainted with the [claimant] to believe that he was the person referred to.’<sup>58</sup> The claimant is also responsible for proving that the statement was published by the defendant to a third party or third parties, although in most cases the fact that the statement has been published, and the defendant’s responsibility for publishing it, will not be disputed. The Defamation Act 2013, s 1, introduced an additional requirement, referred to above, for the claimant to show that the statement complained of ‘has caused or is likely to cause serious harm’ to his reputation; in the case of for-profit corporate claimants, this harm must have caused or be likely to cause ‘serious financial loss’. Those thresholds will be discussed in detail in Chapter 3.

Although a defamatory statement must technically be published with malice in order to be actionable, malice is presumed and this presumption cannot normally be rebutted by the defendant.<sup>59</sup> Defamation is therefore effectively a strict liability tort, except for in the operation of various defences, such as qualified privilege, where proof of malice will rebut the defence.<sup>60</sup> Nevertheless, defamation remains, at core, a tort that ‘looks at the tendency and consequences of the publication rather than the motive or intention of the publisher.’<sup>61</sup> The falsity of the statement complained of is also presumed, although this presumption can be rebutted through the defence of truth.<sup>62</sup> If the veracity of the statement is in issue, therefore, the onus is on the defendant to prove that the defamatory imputation it conveys is ‘substantially’ true.<sup>63</sup> Other than the defence of truth, the main substantive defences to a claim in defamation are ‘[reasonable] publication on [a] matter of public interest’,<sup>64</sup> and ‘honest opinion’.<sup>65</sup>

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<sup>58</sup> *Knupffer v London Express Newspaper Ltd* [1944] AC 116 (HL) 119 (Viscount Simon LC).

<sup>59</sup> *E Hulton & Co v Jones* [1910] AC 20 (HL).

<sup>60</sup> *Wright v Woodgate* (1835) CM & R 573, 577.

<sup>61</sup> *Gatley* (n 20) para 1.8.

<sup>62</sup> Defamation Act 2013, s 2.

<sup>63</sup> *Belt v Laws* (1882) 51 LJQB 359.

<sup>64</sup> Defamation Act 2013, s 4.

<sup>65</sup> *Ibid*, s 3.

Legal persons as well as natural persons have standing to sue in defamation. This includes corporations,<sup>66</sup> partnerships,<sup>67</sup> and charitable and other not-for-profit organizations.<sup>68</sup> All that is required for a corporate entity to have standing is that, at the time the statement complained of is published, it has a trading or business or other relevant reputation in the jurisdiction that is capable of being damaged by a defamatory statement.<sup>69</sup> However, an unincorporated association, having no separate legal personality, cannot sue in its own right,<sup>70</sup> and governmental bodies are precluded from suing on policy grounds.<sup>71</sup>

The basic approach taken to defamation claims brought by corporate, as opposed to individual, claimants stems from Lord Esher's declaration, in *South Hetton Coal Company Ltd v North-Eastern News Association Ltd*,<sup>72</sup> that 'the law of libel is one and the same as to all plaintiffs'.<sup>73</sup> There are few significant exceptions to this principle, other than the 'serious financial loss' test referred to above. There may be some imputations that would be defamatory of an individual claimant but which would be incapable of defaming a company,<sup>74</sup> such as an allegation of infidelity, which would be nonsensical if directed at a corporate entity.<sup>75</sup> A trading corporation may only sue over an imputation that has 'a tendency to damage it in the way of its business.'<sup>76</sup> Similarly, a not-for-profit organization may sue in respect of imputations that 'impair its ability to carry on its charitable [or other] objects.'<sup>77</sup> However, a statement still needs to be 'defamatory' according to one of the common law tests noted above in order to be actionable: the test is whether an imputation tends to injure the claimant's business *reputation*, not whether it tends to injure the claimant's *business*.<sup>78</sup> In common with all defamation claimants, general damages

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<sup>66</sup> *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 (CA).

<sup>67</sup> *Electrical, Electronic, Technical and Plumbing Union v Times Newspapers Ltd* [1980] 1 QB 585, 595.

<sup>68</sup> *Jameel* (n 5) [125] (Lord Scott).

<sup>69</sup> *Atlantis World Group of Companies NV v Gruppo Editoriale L'Espresso SpA* [2008] EWHC 1323 (QB) [49].

<sup>70</sup> *North London Central Mosque Trust v Policy Exchange* [2009] EWHC 3311 (QB).

<sup>71</sup> *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 (HL).

<sup>72</sup> *South Hetton* (n 66).

<sup>73</sup> *Ibid*, 138.

<sup>74</sup> *Multigroup Bulgaria Holding AD v Oxford Analytica Ltd* [2001] EMLR 28 (QB).

<sup>75</sup> Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart 2005) 46; Hilary Young, 'Rethinking Canadian Defamation Law' (n 15) 534.

<sup>76</sup> *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 (HL) 546 (Lord Keith).

<sup>77</sup> *Ibid*, 547.

<sup>78</sup> *Radio 2UE Sydney Pty Ltd v Chesterton* [2009] HCA 16 (Aus) [32]-[36].



for corporate claimants that succeed with their claims are ‘at large’, in the sense that they are not restricted to compensating for specific, quantified financial losses.<sup>79</sup> However, unless a corporate claimant provides evidence of actual loss, the amount of general damages awarded would typically be smaller than the amount that would be awarded to an individual claimant in a comparable case.<sup>80</sup> Companies are also not permitted to recover aggravated damages, which are awarded for distress or humiliation caused by the defendant’s conduct of the lawsuit.<sup>81</sup>

## E. Notes on terminology

The area of law referred to as ‘defamation’ is comprised of the torts of libel and slander. Both torts serve the same basic purpose of protecting the claimant’s reputation against false statements to her discredit, and in most respects they are identical. The distinction between the two is that the cause of action in libel arises in respect of statements published in a permanent or semi-permanent form, whereas the cause of action in slander arises in respect of transient publications, typically spoken words.<sup>82</sup> Actions for slander are further separated into those that fall under the general rule of being actionable only on proof of special damage, and those that fall into one or other of the two exceptions to that general rule,<sup>83</sup> and which are therefore actionable per se (subject to the Defamation Act 2013, s 1<sup>84</sup>). Where proof of special damage is required in order to ground an action in slander, the damage in question must be pecuniary in nature,<sup>85</sup> and cannot include injury to reputation.<sup>86</sup>

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<sup>79</sup> *South Hetton* (n 66).

<sup>80</sup> *Jameel* (n 5) [27].

<sup>81</sup> *Collins Stewart Ltd v The Financial Times Ltd* [2005] EWHC 262 (QB).

<sup>82</sup> Words spoken in the course of a television, radio, or other broadcast are treated as libel: Broadcasting Act 1990, s 166(1).

<sup>83</sup> Statements alleging the commission of a criminal offence for which the defendant could be punished ‘corporally’ (*Webb v Beavan* (1883) 11 QBD 609); statements ‘calculated to disparage the claimant in any office, profession, calling, trade or business’ (Defamation Act 1952, s 2). The term ‘calculated’ in this context relates to the likelihood of disparagement, rather than the defendant’s intention to disparage: *Andre v Price* [2010] EWHC 2572 (QB) [97].

<sup>84</sup> The effect of s 1 on the principle that defamation is actionable per se is discussed at Ch3, text to notes 60-67.

<sup>85</sup> *Chamberlain v Boyd* (1883) 11 QBD 407 (CA).

<sup>86</sup> See James Edelman, Jason Varuhas and Simon Colton (eds), *McGregor on Damages* (20<sup>th</sup> edn, 2<sup>nd</sup> supp, Sweet & Maxwell 2019) para 46-002. The ‘serious harm’ and ‘serious financial loss’ thresholds in s 1 of the 2013 Act are discussed in Ch3.A. (text to notes 7-77) and Ch3.B. (text to notes 78-301) respectively.

Since actions for slander are considerably less common than those for libel,<sup>87</sup> references to ‘defamation’ in this thesis should be understood as referring to libel unless otherwise stated.

While the title of this thesis refers to ‘corporate’ claimants, and the same term is frequently used throughout, the right to sue in defamation is not restricted to bodies that have formally incorporated; for example, a partnership may sue in its own name even if not incorporated as an LLP.<sup>88</sup> The term ‘corporate claimant’ is used to refer to all potential claimants other than natural persons (ie human beings).

A wide variety of different entities are in principle entitled to sue in defamation.<sup>89</sup> Corporate claimants may differ in their form (eg limited liability companies, public companies, partnerships, and so on); or in their objects (eg trading companies, management or holding companies, charitable organizations, hybrid ‘social enterprise’ forms,<sup>90</sup> and so on). A substantial majority of corporate defamation claimants are for-profit business corporations,<sup>91</sup> and the discussion in this thesis tends to use the term ‘corporate claimant’ (and similar terms) to refer to entities of this kind, except where the context indicates otherwise. There are two parts of the thesis in which different kinds of corporate claimant are discussed more directly: not-for-profit entities are considered in most detail in Chapter 5, Part C, section iii.; but there is also some discussion of the reputational interests of corporate claimants other than trading companies in Chapter 1, Part B, section ii.

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<sup>87</sup> Of the 54 corporate defamation claims that were the subject of a reported judgment between 2004 and 2013 (see Acheson, ‘Empirical Insights’ (n 48)), only four were claims in slander rather than libel (*Citation plc v Ellis Whittam Ltd* [2013] EWCA Civ 155; *Club La Costa (UK) plc v Gebhard* [2008] EWHC 2552 (QB); *Howe & Co v Burden* [2004] EWHC 196 (QB); *Jeeg Global Ltd v Hare* [2012] EWHC 773 (QB)). A further three involved claims in both libel and slander (*Cooper v Turrell* [2011] EWHC 3269 (QB); *Lonzim plc v Sprague* [2009] EWHC 2838 (QB); *Marathon Mutual Ltd v Waters* [2009] EWHC 1931 (QB)).

<sup>88</sup> *Gatley* (n 20) para 8.26.

<sup>89</sup> Joint Committee Report (n 30) para 118.

<sup>90</sup> eg Nina Boeger, ‘The New Corporate Movement’ in Nina Boeger and Charlotte Villiers (eds), *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Hart 2018).

<sup>91</sup> Acheson, ‘Empirical Insights’ (n 48) 40.

# CHAPTER ONE: CORPORATE REPUTATION

## Introduction

The defamation torts, libel and slander, provide the principal mechanism in English law with which a claimant can defend her reputation against false allegations published by the defendant.<sup>1</sup> If protecting the claimant's reputation is the 'raison d'être of defamation law',<sup>2</sup> then the justification for its existence lies in the reputational interests that might be harmed by false allegations. But those interests are not the same for corporate and individual claimants. This results in 'a vexed issue at the core of [corporate] defamation law'<sup>3</sup> centring on questions as to 'whether corporations have the type of reputation which should be protected by defamation law.'<sup>4</sup> This chapter discusses the nature of the corporate interest in reputation, and the justifications that have been offered for using defamation law to protect that interest. I argue that companies have some legitimate interests in protecting their reputations, but that their reputational interests are more limited than those of individuals. As such, the law should offer less protection to corporate reputation than to individual reputation.

The chapter is structured as follows. Part A identifies the lack of consensus in the academic literature as to how defamation law ought to conceptualize the interest in corporate reputation, or the interest in reputation more generally. The most influential contribution to that literature has been the theory developed by Robert

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<sup>1</sup> *Spring v Guardian Assurance plc* [1995] 2 AC 296 (HL) 323; *Joyce v Sengupta* [1993] 1 WLR 337 (CA) 341.

<sup>2</sup> Hilary Young, 'Rethinking Canadian Defamation Law as Applied to Corporate Claimants' (2013) 46(2) *University of British Columbia Law Review* 529, 539.

<sup>3</sup> David Rolph, 'Corporations' Right to Sue for Defamation: An Australian Perspective' (2011) 22(7) *Entertainment Law Review* 195, 197.

<sup>4</sup> *Ibid.* See also Gary K Y Chan, 'Corporate Defamation: Reputation, Rights and Remedies' (2013) 33(2) *Legal Studies* 264, 268.

Post, which describes three conceptions of reputation as property, honour, and dignity. I argue that Post's theory does not provide a helpful framework for assessing the law; instead, focusing on the value of reputation to claimants is a clearer way to conceptualize the different reputational interests that might be at stake in defamation cases.

On this basis, the bulk of the chapter is split between Part B and Part C which, respectively, discuss the reputational interests that *are* valuable to corporate claimants as well as individual claimants, and the reputational interests that are *not* valuable to corporate claimants despite their value to individual claimants. The discussion in Part B of interests that companies do have in their reputations focuses primarily on the financial value of corporate reputation. But it also rejects some claims that are frequently made in discussions of companies' financial interests in reputation: firstly, the claim that corporate reputation is a form of property, or that it might be protected as a 'possession' under Article 1 of Protocol 1 to the European Convention on Human Rights; and secondly, the claim that the value of reputation to corporate claimants is *exclusively* financial in nature.

Part C identifies the interests in reputation that can only be enjoyed by human claimants, and not by companies. It explains that these interests have had a crucial influence on the European Court of Human Rights case law establishing a right to reputation under Article 8 of the European Convention on Human Rights. The fact that companies' interests in reputation cannot sensibly be conceptualized in these terms means that corporate defamation claimants have no Convention right to reputation. This is in contrast to the interests at stake both for individual defamation claimants and for all defamation defendants, whose Convention rights to reputation and freedom of speech respectively are affected by the outcomes of defamation cases.

Finally, Part D briefly discusses the arguments that have been put forward in support of the claim that there is a *public* interest in protecting companies' reputations in defamation law. The discussion is brief because those arguments are not considered to be plausible.

## A. Conceptualizing reputation in defamation law

Considering that the proposition that defamation law exists to protect the claimant's reputation has been described as 'axiomatic',<sup>5</sup> there have historically been surprisingly few attempts to explore the nature of the interest, or to analyse the potential justifications for offering it legal protection.<sup>6</sup> The most prominent account of the interest in reputation in the academic literature is that put forward by Robert Post.<sup>7</sup> Post's article 'The Social Foundations of Defamation Law' is 'one of the most widely cited analyses of the nature of reputation',<sup>8</sup> and has been described as 'probably the most influential academic discussion of the concept of reputation'.<sup>9</sup> Most commentators who have explored the concept of reputation in defamation law have used Post's theory as the starting point of their analysis.<sup>10</sup> In the specific context of corporate defamation law, Post's theory has been relied on to support arguments for restricting companies' ability to sue relative to individual claimants in one way or another.<sup>11</sup> Because of its influence on the subsequent literature, any discussion of the interest in reputation protected by defamation law would be incomplete without making at least some reference to Post's analysis. However, as I will explain after briefly outlining the theory below, in my view it does not offer a useful framework within which to consider normative questions about which

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<sup>5</sup> Lawrence McNamara, *Reputation and Defamation* (OUP 2007) 1. The view is not, however, universally accepted: eg Allan Beever, 'What Does Tort Law Protect?' (2015) 27 Singapore Academy of Law Journal 626, 628-31.

<sup>6</sup> Eric Barendt, 'What is the Point of Libel Law?' (1999) 52 Current Legal Problems 110, 114; David Rolph and others, *Media Law: Cases, Materials and Commentary* (2<sup>nd</sup> edn, OUP 2015) 152.

<sup>7</sup> Robert C Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74(3) California Law Review 691.

<sup>8</sup> Young (n 2) 540.

<sup>9</sup> Cameron Doley and Alastair Mullis, *Carter-Ruck on Libel and Privacy* (6<sup>th</sup> Edn, LexisNexis UK 2010) 22. Post's article has been described as 'seminal' by several commentators: McNamara (n 5) 20; Jan Oster, 'The Criticism of Trading Corporations and their Right to Sue for Defamation' (2011) 2(3) Journal of European Tort Law 255, 259; Lyrisa Barnett Lidsky, 'Silencing John Doe: Defamation & Discourse in Cyberspace' (2000) 49(4) Duke Law Journal 855, fn 158.

<sup>10</sup> See eg Barendt (n 6); Tom Gibbons, 'Personality Rights: The Limits of Personal Accountability' in Eric Barendt (ed), *The Yearbook of Media and Entertainment Law 1997/98* (OUP 1998); David Howarth, 'Libel: Its Purpose and Reform' (2011) 74(6) Modern Law Review 845; Oster (n 9) 255; Chan (n 4); David Rolph, *Reputation, Celebrity and Defamation Law* (Ashgate 2008) Part I.

<sup>11</sup> eg Oster (n 9) 278; D Mark Jackson, 'The Corporate Defamation Plaintiff in the Era of SLAPPs: Revisiting *New York Times v Sullivan*' (2001) 9(2) William & Mary Bill of Rights Journal 491, 511-14; Arlen W Langvardt, 'A Principled Approach to Compensatory Damages in Corporate Defamation Cases' (1990) 27 American Business Law Journal 491, 518-20; Perry Herzfeld, 'Corporations, Defamation and General Damages: Back to First Principles' (2005) Media & Arts Law Review 135, 139-42; Young (n 2) 549-50.

reputational interests the law ought to protect, or whether certain aspects of the law should be reformed.

Post describes three conceptions of reputation – as property, honour, and dignity – which he considers to have had the greatest influence on the development of defamation law. The theory is built on the claim that, since reputation is a social phenomenon arising from people’s interaction with one another, the kinds of reputation that the law protects will reflect implicit assumptions about how people *should* interact with one another.<sup>12</sup> As such, Post explains that each of his conceptions of reputation ‘corresponds to an image of the good and well-ordered society.’<sup>13</sup>

The conception of reputation as property corresponds to an image of society in which ‘individuals are connected to each other through the institution of the market.’<sup>14</sup> Reputation is earned in the marketplace through an individual’s conduct, and has measurable pecuniary value,<sup>15</sup> determined by the market.<sup>16</sup> The reputational harm caused by a defamatory publication ‘deprive[s] individuals of the results of their labors of self-creation, and the ensuing injury can be monetarily assessed’.<sup>17</sup> Reputation as honour, in contrast, corresponds to a hierarchical, or ‘deference’,<sup>18</sup> society: Post identifies it as having influenced the early development of defamation law in feudal England.<sup>19</sup> Under this conception, reputation is not earned through conduct, but is ascribed to an individual on the basis of his social position,<sup>20</sup> on the expectation that he will conform to the ‘normative characteristics’ of the role he occupies.<sup>21</sup> A person cannot acquire the honour accorded to a king (the example Post uses) simply by acting like a king – that honour can only be given to the person who actually occupies that position. But if the king fails to act as a king should, he

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<sup>12</sup> Post (n 7) 692-93.

<sup>13</sup> Ibid, 693.

<sup>14</sup> Ibid, 695.

<sup>15</sup> Ibid, 693-94, citing Thomas Starkie, *A Treatise on the Law of Slander, Libel, Scandalum Magnatum, and False Rumours* (Collins and Hannay 1832) xx.

<sup>16</sup> Post (n 7) 694.

<sup>17</sup> Ibid, 695.

<sup>18</sup> Ibid, 702.

<sup>19</sup> Ibid, 701-03.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid, 699-700.

will no longer be granted the honour that attaches to his role.<sup>22</sup> As such, reputation as honour cannot be earned by an individual, but can be lost.<sup>23</sup>

Post's explanation of reputation as dignity is less clear, but I understand it as follows. It corresponds to what Post calls a 'communitarian' image of society, in which individual members are bound together by a shared moral code.<sup>24</sup> Within this code are norms by which 'respect' is given and received through interaction between members of the community – Post calls these norms 'rules of civility' when they are 'embodied in speech'.<sup>25</sup> Since the community is defined by its shared norms, a person cannot be a full member unless she is recognized as conforming to those norms. Each individual's identity is in part constituted by her relationships with others, and relies on her being given the respect she is owed as a full member of the community.<sup>26</sup> The 'dignity' that warrants protection in this type of society, according to Post, is the 'respect (and self-respect) that arises from full membership of society'.<sup>27</sup> A defamatory statement in this context is an imputation that an individual has 'violate[d] the norms which constitute the community',<sup>28</sup> and therefore deserves disrespect or ostracism. If the community believes the allegation, then the victim will be 'subject to "exclusion from belonging as a respected and responsible" member of society',<sup>29</sup> and will thereby suffer a loss of dignity.

Most existing critiques of Post's theory focus on each of these conceptions more or less independently of one another;<sup>30</sup> there has been no significant attempt to critique the theory as a unified whole. The individual conceptions developed by Post do offer some insight into how the interest in reputation has been conceptualized in defamation law at various points in its development. But the structure of his overall theory limits the extent to which it can provide a useful framework for addressing

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<sup>22</sup> Ibid, 700.

<sup>23</sup> Ibid, 701.

<sup>24</sup> Ibid, 711.

<sup>25</sup> Ibid, 710.

<sup>26</sup> Post cites Erving Goffman to support these arguments: Erving Goffman, *Interaction Ritual: Essays on Face-to-Face Behavior* (Penguin 1967): Post (n 7) 709.

<sup>27</sup> Ibid, 711.

<sup>28</sup> McNamara (n 5) 32.

<sup>29</sup> Post (n 7) 711, quoting Kenneth L Karst, 'Paths to Belonging: The Constitution and Cultural Identity' (1986) 64(2) North Carolina Law Review 303, 323.

<sup>30</sup> eg Rolph, *Reputation, Celebrity and Defamation Law* (n 10) 41; Dario Milo, *Defamation and Freedom of Speech* (OUP 2008) 26-42.

normative questions about how the law *ought to* conceptualize the interest in reputation, and how (or whether) it ought to protect different aspects of that interest.

As Post describes it, his intention is to ‘sketch three distinct concepts of reputation that the common law of defamation has at various times in its history attempted to protect’, to ‘analyse the concepts, and to demonstrate their influence on common law defamation.’<sup>31</sup> The conceptions he develops are Weberian ‘ideal types’:<sup>32</sup> they are abstractions that, by accentuating particular features of reality, help us to understand it.<sup>33</sup> Although Post’s theory is initially presented as descriptive, he also makes proposals for reform, designed to make the law internally coherent on the basis of the conceptions of reputation he has already identified.<sup>34</sup> As explained above, the central assumption of Post’s theory is that the conceptions of reputation that have influenced the development of the law correspond to ‘image[s] of how people are tied together, or should be tied together, in a social setting.’<sup>35</sup> Post acknowledges that ‘Our own social world contains important elements of both market and communitarian societies’, corresponding to the property and dignity conceptions of reputation.<sup>36</sup> He argues that to conceive of reputation as a unified concept in a society containing these tensions would make the task of protecting it ‘at once too enormous and too diffuse.’<sup>37</sup> To resolve this problem, he proposes establishing ‘distinct doctrinal structures’ to protect reputation as property and reputation as dignity.<sup>38</sup>

But Post gives no explanation or justification for believing that the analytical level he uses to distinguish between each conception at the descriptive stage of his theory – the level of ‘image[s] of the good and well-ordered society’<sup>39</sup> – is an appropriate level on which to differentiate conceptions of reputation that it would be more realistic for the law to protect. If a claimant’s reputation exists in a social world that

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<sup>31</sup> Post (n 7) 693.

<sup>32</sup> *Ibid.*

<sup>33</sup> Max Weber, ‘The “Objectivity” of Knowledge in Social Science and Social Policy’ in Hans Henrik Bruun and Sam Whimster (eds), *Max Weber: Complete Methodological Writings* (Routledge 2012) 125.

<sup>34</sup> Post (n 7) 721, 741.

<sup>35</sup> *Ibid.*, 693.

<sup>36</sup> *Ibid.*, 721.

<sup>37</sup> *Ibid.*, 719.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, 693.



contains elements of the ideal societies underlying both the property and dignity conceptions, then it is not clear why it would be useful to her for two causes of action to exist, each of which protects a conception of reputation that corresponds to the ideals of a non-existent society.<sup>40</sup>

This point is illustrated by David Howarth's argument that the conception of reputation as property should be abandoned as an influence on defamation law, in part because the idea of a society in which individuals are connected by the marketplace is 'grimly atomistic, distancing and manipulative.'<sup>41</sup> This indicates the problem with applying Post's analytical framework to normative questions about what reputational interests the law *should* protect: the implication of Howarth's argument seems to be that the law should ignore the financial value of a claimant's reputation<sup>42</sup> because of the morally objectionable features of an idealized market society that does not actually exist.<sup>43</sup>

Instead, it seems more sensible to delineate between conceptions of reputation that the law might treat differently on the basis of the different interests claimants have in protecting various aspects of their reputations. This may be why, although he occasionally refers to ways in which defamation law might promote broader interests in a claimant's reputation,<sup>44</sup> Post often seems to focus on the value of

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<sup>40</sup> Milo (n 30) 42: Although he argues that 'A coherent theory of reputation must recognise that our social world contains important elements of both market and communitarian societies', Milo does not seem to see this as conflicting with Post's analysis.

<sup>41</sup> Howarth (n 10) 853. See also David S Ardia, 'Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law' (2010) 45 *Harvard Civil Rights-Civil Liberties Law Review* 261, 291-92.

<sup>42</sup> Except in the assessment of damages, when a claimant suffers financial loss as a consequence of the harm caused to her social relationships by a defamatory statement: Howarth (n 10) 872.

<sup>43</sup> Post's property conception reflects ideals of personal identity and social relations that are 'predicated on an abstract notion of the unencumbered self' (M M Slaughter, 'The Development of Common Law Defamation Privileges: From Communitarian Society to Market Society' (1992) 14 *Cardozo Law Review* 351, 352); this notion is itself an ideal type that does not exist in reality (eg Michael J Sandel, *Liberalism and the Limits of Justice* (2<sup>nd</sup> edn, Cambridge University Press 1998) 74).

<sup>44</sup> eg Post (n 7): 'The preservation of honor in a deference society ... entails more than the protection of merely individual interests. ... honor is "a public good, not merely a private possession."' (at 702, quoting from Robert N Bellah, 'The Meaning of Reputation in American Society' (1986) 74(3) *California Law Review* 743, 745); reputation as dignity implicates 'society's interest in its rules of civility, which is to say its interest in defining and maintaining the contours of its own social constitution' (at 711). Only reputation as property is treated as exclusively valuable to the individual claimant: when conceived of as property, 'reputation's claim to legal protection is neither greater nor less than the claim to public protection of similar private goods' (at 702).

reputation under each conception to the claimant herself.<sup>45</sup> Certainly, most subsequent commentary based on Post's theory has described it in terms that emphasize claimants' interests in the various kinds of reputation more than each conception's relationship with a particular ideal type of society. It is much easier to see the importance of the former than the latter for assessing the approach that defamation law takes to protecting different reputational interests. The discussion below will therefore focus on the various different interests in reputation from the claimant's perspective, rather than attempting to maintain Post's original distinctions between conceptions of reputation considered worthy of protection in different types of society. There will, however, be some overlap between the reputational interests identified and the conceptions of reputation described by Post (especially the property and dignity conceptions) because of the way in which Post's theory has been interpreted in subsequent literature.

## **B. Reputational interests that companies do have**

### ***i. The financial value of corporate reputation***

The most obvious interests that companies have in protecting their reputations are financial: a company can derive significant financial benefits from having a good reputation, and an injury to a company's reputation can cause significant financial loss. The potential for defamatory statements to cause claimants economic loss has historically been an important part of the justification for the existence of libel laws.<sup>46</sup> In *Metropolitan Saloon Omnibus Co Ltd v Hawkins*, Pollock CB thought that it was 'clear that a corporation at common law may maintain an action for libel by which its property is injured', arguing that it 'would be very odd if a corporation had no means of protecting itself against wrong; and if its property is injured by slander it has no means of redress except by action.'<sup>47</sup> Similar arguments were made in *South Hetton Coal Co Ltd v North-Eastern News Association Ltd*,<sup>48</sup> which firmly established the principle that corporations were entitled to sue in defamation

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<sup>45</sup> Laura A Heymann, 'The Law of Reputation and the Interest of the Audience' (2011) 52 Boston College Law Review 1341, 1343.

<sup>46</sup> Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart 2005) 33.

<sup>47</sup> *Metropolitan Saloon Omnibus Co Ltd v Hawkins* (1859) 4 H & N 87, 90

<sup>48</sup> *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 (CA).

without needing to prove any specific financial loss.<sup>49</sup> For example, Kay LJ argued that a trading corporation's 'property or its business may be injured by defamatory statements' against its 'trading character'.<sup>50</sup> A century and a half after the decision in *Hawkins*, English courts continue to stress the financial value that reputation can have, and consider that there is 'nothing repugnant in the notion that this is a value which the law should protect.'<sup>51</sup> In *Jameel v Wall Street Journal Europe SPRL* ('*Jameel*'), Lord Scott endorsed the rule set down in *South Hetton*, saying that the 'reputation of a corporate body is capable of being, and will usually be, not simply something in which its directors and shareholders may take pride, but an asset of positive value to it.'<sup>52</sup>

Literature from other academic disciplines supports these assertions about the financial value of corporate reputation. There is 'a large body of research demonstrating the effects of firm reputations on firm performance'.<sup>53</sup> The potential benefits of a good reputation are such that it has been described as 'the single most valued organizational asset.'<sup>54</sup> Charles Fombrun, whose work on corporate reputation is well-cited in the business literature, identifies various different ways in which a positive reputation (for credibility, reliability, trustworthiness, and responsibility in particular) can offer a financial advantage.<sup>55</sup> He argues that:

'...well-regarded companies generally:

- command premium prices for their products,
- pay lower prices for purchases,
- entice top recruits to apply for positions,
- experience greater loyalty from consumers and employees,
- have more stable revenues,
- face fewer risks of crisis, and
- are given greater latitude to act by their constituents.'<sup>56</sup>

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<sup>49</sup> Mitchell (n 46) 46.

<sup>50</sup> *South Hetton* (n 48) 145.

<sup>51</sup> *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44, [26] (Lord Bingham).

<sup>52</sup> *Ibid*, [120] (Lord Scott).

<sup>53</sup> Violina P Rindova and Luis L Martins, 'Show Me the Money: A Multidimensional Perspective on Reputation as an Intangible Asset' in Michael L Barnett and Timothy G Pollock (eds), *The Oxford Handbook of Corporate Reputation* (OUP 2014) 17.

<sup>54</sup> Dirk Gibson, Jerra Leigh Gonzales and Jaclynn Castanon, 'The Importance of Reputation and the Role of Public Relations' (2006) 51(3) *Public Relations Quarterly* 15, 15.

<sup>55</sup> Charles J Fombrun, *Reputation: Realizing Value from the Corporate Image* (Harvard Business School Press 1996) 72.

<sup>56</sup> *Ibid*, 72-73.

The ability to command higher prices for goods and services, and thereby to increase revenue, is the most direct benefit of a positive corporate reputation. Carl Shapiro's classic economic analysis argued that, when consumers only have imperfect information about product quality, firms with reputations for having produced high quality products in the past are able to charge a premium for their products.<sup>57</sup> This effect has been confirmed by subsequent research demonstrating that 'People prefer to buy products from high reputation companies'.<sup>58</sup>

The reason is that, although 'Consumers expect to pay more for a higher quality product or service',<sup>59</sup> it is not always possible to accurately assess that quality directly (for example, to predict the durability or long-term reliability of a product before purchase). Reputation can help to address this problem, because it 'allows us to make assessments about individuals and entities that we cannot directly observe'.<sup>60</sup> One heuristic that can be expected to provide reasonably reliable information about the future quality of a company's goods or services is the consumer's perception of the quality of similar goods or services produced by the same company in the past (whether that perception is based on personal experience or on reports from others). A company's reputation in these areas, if it is positive, 'promises patrons a high standard of quality and reliability, for which they are prepared to pay'.<sup>61</sup> As such, compared to competitors with weaker reputations for quality, a company with a good reputation in this respect is able to 'charge a higher price for what is objectively an equivalent (or poorer) product or service',<sup>62</sup> although it risks damaging its reputation if the actual quality it provides falls too far below consumers' expectations.<sup>63</sup>

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<sup>57</sup> Carl Shapiro, 'Premiums for High Quality Products as Returns to Reputations' (1983) 98(4) *Quarterly Journal of Economics* 659.

<sup>58</sup> Charles J Fombrun, 'The Building Blocks of Corporate Reputation: Definitions, Antecedents, Consequences' in Barnett and Pollock (n 53) 104. See also Chong Ju Choi and Jai-Boem Kim, 'Reputation, Learning and Quality Uncertainty' (1996) 13(5) *Journal of Consumer Marketing* 47.

<sup>59</sup> D B Bromley, *Reputation, Image and Impression Management* (Wiley 1993) 154.

<sup>60</sup> *Ardia* (n 41) 264.

<sup>61</sup> Fombrun, *Reputation* (n 55) 73.

<sup>62</sup> *Ibid.*

<sup>63</sup> Shapiro (n 57).

A reputation for selling goods or services of a high standard makes it easier for companies to attract new customers,<sup>64</sup> because it ‘reduces [consumers’] insecurity about how well ... products will perform’ by ‘signal[ing] their implicit quality.’<sup>65</sup> A positive reputation can also promote loyalty among existing customers, reducing the probability that a company will lose custom to a competitor. This helps the company to secure ongoing revenue; and customer loyalty can also reinforce the effect of reputation on attracting new customers, as positive evaluations spread through informal social networks: ‘customers are more likely to stay with, recommend and be committed to, a higher reputation company.’<sup>66</sup>

Research suggests that aspects of a company’s reputation that are not directly related to its provision of goods or services, such as its reputation for social responsibility, can also affect demand from consumers. Although there is mixed evidence as to whether customers are willing to reward a firm with a positive social reputation by paying higher prices, and any such effect is more modest than the impact of the firm’s reputation for quality, there is clearer evidence showing that consumers penalize firms with negative social reputations by demanding lower prices, or by withdrawing their custom altogether.<sup>67</sup> A similar effect can be seen in consumer responses to corporate tax strategies: while companies seen as responsible tax-payers are not able to charge higher prices for their products or services, consumers will penalize companies they consider to have irresponsible or unethical tax arrangements.<sup>68</sup>

A good reputation does not only help attract and retain customers: it also makes a company more desirable to prospective employees,<sup>69</sup> allowing it to hire better

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<sup>64</sup> William P Rogerson, ‘Reputation and Product Quality’ (1983) 14 *RAND Journal of Economics* 508.

<sup>65</sup> Fombrun, *Reputation* (n 55) 77.

<sup>66</sup> M Kim Saxton, ‘Where do Reputations Come From?’ (1998) 1(4) *Corporate Reputation Review* 393, 398.

<sup>67</sup> C B Bhattacharya and Sankar Sen, ‘Doing Better at Doing Good: When, Why, and How Consumers Respond to Corporate Social Initiatives’ (2004) 47(1) *California Management Review* 9, 18-19; Magdalena Öberseder, Bodo B Schlegelmilch and Verena Gruber, ‘“Why Don’t Consumers Care About CSR?”: A Qualitative Study Exploring the Role of CSR in Consumption Decisions’ (2011) 104 *Journal of Business Ethics* 449.

<sup>68</sup> Inga Hardeck and Rebecca Hertl, ‘Consumer Reactions to Corporate Tax Strategies: Effects on Corporate Reputation and Purchasing Behavior’ (2014) 123 *Journal of Business Ethics* 309.

<sup>69</sup> Robert D Gatewood, Mary A Gowan and Gary J Lautenschlager, ‘Corporate Image, Recruitment Image, and Initial Job Choice Decisions’ (1993) 36(2) *Academy of Management Journal* 414; Daniel

quality staff at lower cost.<sup>70</sup> This is true both of its reputation *as an employer*, and of its reputation for social responsibility overall, which ‘may attract potential applicants by serving as a signal of working conditions in the organization.’<sup>71</sup> And positive corporate reputation can also help to keep an existing workforce happy, motivated, and productive.<sup>72</sup>

In addition to reducing the costs associated with its workforce, a well-regarded company can lower its outgoings – and thereby improve its profit margins – in its dealings with suppliers.<sup>73</sup> This is because ‘Suppliers would prefer to negotiate supply contracts with credible companies, companies unlikely to renege on orders.’<sup>74</sup> A positive reputation can also help a firm to attract financial investment.<sup>75</sup> This is most obviously true for companies with a strong reputation for financial performance, which signals to investors the prospect of strong future returns on their investments, but good reputation more broadly can also create a beneficial perception that investors face a lower risk of losses on their investments being caused by the company behaving badly.<sup>76</sup> Conversely, it has been shown that firms that have suffered reputational damage have less success when attempting to attract investment by issuing new shares onto the market.<sup>77</sup> As well as investment from

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B Turban and Daniel W Greening, ‘Corporate Social Performance and Organizational Attractiveness to Prospective Employees’ (1997) 40(3) *Academy of Management Journal* 658.

<sup>70</sup> Fombrun, *Reputation* (n 55) 76; David L Deephouse, ‘Media Reputation as a Strategic Resource: An Integration of Mass Communication and Resource-Based Theories’ (2000) 26(6) *Journal of Management* 1091, 1098.

<sup>71</sup> Turban and Greening (n 69) 659.

<sup>72</sup> Fombrun, *Reputation* (n 55) 77; Hua Jiang, ‘Corporate Reputation and Workplace Environment’ in Craig E Carroll (ed), *The Handbook of Communication and Corporate Reputation* (Wiley 2013) 327.

<sup>73</sup> Esther de Quevedo-Puente, Juan Manuel de la Fuente-Sabaté and Juan Bautista Delgado-García, ‘Corporate Social Performance and Corporate Reputation: Two Interwoven Perspectives’ (2007) 10(1) *Corporate Reputation Review* 60, 63.

<sup>74</sup> Fombrun, *Reputation* (n 55) 75.

<sup>75</sup> Fombrun, *Reputation* (n 55) 74-76.

<sup>76</sup> Charles Fombrun and Mark Shanley, ‘What’s in a Name? Reputation Building and Corporate Strategy’ (1990) 33(2) *Academy of Management Journal* 233, 237-38.

<sup>77</sup> Malcolm Baker, Jeremy C Stein and Jeffrey Wurgler, ‘When Does the Market Matter? Stock Prices and the Investment of Equity-Dependent Firms’ (2003) *Quarterly Journal of Economics* 969. It has been argued that the importance of corporate reputation in attracting market investment, relative to other variables such as a company’s physical assets, has in fact increased in the decade since the 2008 financial crisis: Simon Cole, Brian Sturgess and Michael Brown, ‘Using Reputation to Grow Corporate Value’ (2013) 14(3) *World Economics* 43.

capital markets, good reputation can also help firms to secure loans from financial institutions.<sup>78</sup>

A company with a positive reputation, especially in respect of its contributions to the communities in which it operates its business, may face a lower risk of protests against its expansion into new communities, or may weaken the threat posed by such protests by encouraging those communities to be open to the potential benefits of the company's presence as well as the potential costs.<sup>79</sup> And strong corporate social performance can act as a kind of 'reputation insurance' for corporations.<sup>80</sup> If an adverse event happens that is linked to the firm's behaviour, the degree of its perceived culpability amongst stakeholders will depend in part on its prior reputation, and thus firms with a good reputation (described by Fombrun as a 'reservoir of goodwill'<sup>81</sup>) are perceived to be less blameworthy, and stand to lose less and recover more quickly, if and when things do go wrong.<sup>82</sup>

As illustrated by the discussion above, reputation can have significant financial value to companies. But that fact does not justify either of two related claims often found in the literature on corporate reputation: firstly, that corporate reputation is a kind of property; or, secondly, that corporations' *only* interest in reputation is in its financial value. The sections below address each of these claims in turn.

## ***ii. Corporate reputation is not 'property'***

A company's interest in its reputation is frequently characterized as a property interest in the literature on corporate defamation law. In this section I argue that this view is mistaken: a reputation, even that of a corporate claimant, cannot

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<sup>78</sup> Randolph P Beatty and Jay R Ritter, 'Investment Banking, Reputation, and the Underpricing of Initial Public Offerings' (1986) 15 *Journal of Financial Economics* 213.

<sup>79</sup> Charles J Fombrun, Naomi A Gardberg and Michael L Barnett, 'Opportunity Platforms and Safety Nets: Corporate Citizenship and Reputational Risk' (2000) 105(1) *Business and Society Review* 85, 94, 100-01.

<sup>80</sup> Dylan Minor and John Morgan, 'CSR as Reputation Insurance: Primum Non Nocere' (2011) 53(3) *California Management Review* 40; Stephen Brammer and Stephen Pavelin, 'Corporate Reputation and an Insurance Motivation for Corporate Social Investment' (2005) 20 *Journal of Corporate Citizenship* 39.

<sup>81</sup> Charles J Fombrun, 'The Building Blocks of Corporate Reputation' (n 58) 107-08.

<sup>82</sup> Paul C Godfrey, 'The Relationship Between Corporate Philanthropy and Shareholder Wealth: A Risk Management Perspective' (2005) 30(4) *The Academy of Management Review* 777; Jonathan P Doh and others, 'Does the Market Respond to Endorsement of Social Responsibility? The Role of Institutions, Information, and Legitimacy' (2009) 36(6) *Journal of Management* 1461.

meaningfully be characterized as ‘property’. This is true in a theoretical sense, in English defamation law, and under the Article 1, Protocol 1 right to property in the European Convention on Human Rights (‘ECHR’), all for similar reasons.

This view of corporate reputation does make sense within the constraints of Post’s theoretical framework. Post’s claim that the corporate right to sue is only explicable under the property conception<sup>83</sup> has been endorsed by several subsequent commentators. For example, Eric Barendt echoes Post closely in his claim that the ‘concept of reputation as property may explain ... why corporations can sue to protect their good name, an entitlement which is much harder to justify if reputation is considered in terms of personal honour or dignity.’<sup>84</sup>

Jan Oster makes a similar claim about the proprietary nature of corporate reputation, which is based in part on Post’s theory. After noting that companies can make no sensible claim to honour or dignity, Oster concludes that ‘it is a distinctive feature of a company’s suit for defamation that it may *exclusively* be explained by the conception of reputation as property.’<sup>85</sup> But the fact that a corporation has no claim to dignity or honour only leads to the conclusion that its reputation can *exclusively* be conceptualized as property if one accepts, as Oster appears to, that Post’s theory is coherent and exhaustive. Post himself did not claim that his conceptions were exhaustive;<sup>86</sup> and, as explained above,<sup>87</sup> to the extent that his theory is coherent overall, the way in which the conceptions of reputation are distinguished from one another means that it is not particularly helpful as a framework with which to assess the law.

Perry Herzfeld also relies on Post’s theory, to support his assertion that ‘a corporation’s business reputation is entirely described as a tradable commodity’.<sup>88</sup> Herzfeld is correct to say that under the property conception as originally explained

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<sup>83</sup> Post (n 7) 696.

<sup>84</sup> Barendt (n 6) 115. See also Young (n 2) 550.

<sup>85</sup> Oster (n 9) 259 (emphasis in original).

<sup>86</sup> Post (n 7) 693.

<sup>87</sup> At text to notes 30-43.

<sup>88</sup> Herzfeld (n 11) 140. As stated, this assertion is plainly inaccurate: reputation is not ‘tradable’ in any normal sense (see notes 113-120); and, partly *because* it is not tradable, it is not a ‘commodity’ as the term is normally understood (eg Nigar Hashimzade, Gareth Miles and John Black (eds), *Oxford Dictionary of Economics* (5<sup>th</sup> edn, OUP 2017) ‘Commodity’: ‘A standardized good, which is traded in bulk and whose units are interchangeable.’).



by Post the corporate interest in reputation *is* wholly financial; that is, it is reducible entirely to a money value. But that says nothing about the nature of a company's reputation. It is a consequence of Post's decision to derive his conceptions of reputation from ideal types of society, and the property conception in particular from an ideal 'market' society. In this ideal society, *every* injury that the law recognizes is ultimately commensurable with money.<sup>89</sup> We do not live in such a society.

A key component of Post's description of reputation as property<sup>90</sup> is John Locke's 'labour-desert theory',<sup>91</sup> which 'focuses on the right of self-determination and the acquisition of property through the investment of labor.'<sup>92</sup> Jacob Rowbottom argues that the financial benefits of reputation do not in themselves justify legal protection, but that 'One possible argument for protection is that the way the resource is acquired warrants safeguards from its unfair depletion.'<sup>93</sup> This is the essence of the labour-desert theory: that the individual effort that goes into generating a positive reputation justifies protecting that reputation as a kind of property. The notion that developing a good reputation requires an investment of resources over time is reflected in the business literature on corporate reputation. For example, in Fombrun's definition, a company's reputation is to some extent shaped by its conduct: it 'comes into being as constituents struggle to make sense of a company's past and present actions.'<sup>94</sup> There are many more examples in the business literature of emphasis being placed on the importance to companies of proactively investing in reputation, to improve their chances of reaping the financial rewards discussed above.<sup>95</sup>

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<sup>89</sup> Margaret Radin, 'Market-Inalienability' (1987) 100(8) *Harvard Law Review* 1849, 1859-63.

<sup>90</sup> Eric J Mitnick, 'Procedural Due Process and Reputational Harm: Liberty as Self-Invention' (2009) 43 *UC Davis Law Review* 79, 103. See also Rolph, *Reputation, Celebrity and Defamation Law* (n 10) 42; Heymann (n 45) 1342.

<sup>91</sup> John Locke, *Two Treatises of Government*, II (Peter Laslett ed, Cambridge University Press 1988) ch 5.

<sup>92</sup> Julie E Cohen, 'Examined Lives: Informational Privacy and the Subject as Object' (2000) 52 *Stanford Law Review* 1373, 1380.

<sup>93</sup> Jacob Rowbottom, *Media Law* (Hart 2018) 40-41.

<sup>94</sup> Fombrun, *Reputation* (n 55) 72.

<sup>95</sup> eg Fombrun and Shanley, 'What's in a Name?' (n 76); John Martin, William Petty and James Wallace, 'Shareholder Value Maximization – Is There a Role for Corporate Social Responsibility?' (2009) 21(2) *Journal of Applied Corporate Finance* 110, 115-17. The financial benefits of corporate reputation are described at text to notes 53-82 above.

If the reason for protecting reputation in defamation law is to safeguard the claimant's investment of labour, then one would expect a strong causal link between the 'labour' – the behaviour of the claimant – and the resulting reputation. But the reality is not so simple.<sup>96</sup> As an assessment made by third parties, a person's reputation is shaped to a significant extent by what other people think, say, and do:

'... reputation is not something we create ourselves. It is socially constructed. We cannot have a reputation except insofar as it is produced in cooperation with others and relative to our relationships with them. ... We may be able to influence, to a limited extent, the information others use to assess our reputation, but the ultimate opinions that others hold of us are outside our control.'<sup>97</sup>

As a result, according to Tom Gibbons, reputation is 'socially contingent'.<sup>98</sup> Given its dependence on the opinions of others,<sup>99</sup> Gibbons argues that it is not possible for the law to protect reputation 'where that suggests a special claim to a particular *conclusion* about a person's status.'<sup>100</sup> If reputation consists of the perceptions of third parties, then the characterization of reputation as property suggests that one might be able to 'own' another person's mental processes, which is surely absurd.<sup>101</sup>

But the main problem with the labour-desert theory as a basis for treating *corporate* reputation in particular as property is that Locke's theory of property is ultimately based on the premise of individual self-ownership:

'... every Man has a Property in his own Person[,] ... The Labour of his Body, and the Work of his Hands ... . Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property.'<sup>102</sup>

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<sup>96</sup> Cameron Anderson and Aiwa Shirako, 'Are Individuals' Reputations Related to their History of Behavior?' (2008) 94(2) *Journal of Personality and Social Psychology* 320.

<sup>97</sup> *Ardia* (n 41) 267-68 (citations omitted).

<sup>98</sup> Thomas Gibbons, 'Defamation Reconsidered' (1996) 16(4) *Oxford Journal of Legal Studies* 587, 592.

<sup>99</sup> *Ibid*, 592.

<sup>100</sup> *Ibid*, 593 (emphasis added).

<sup>101</sup> See eg Steven J Heyman, 'Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression' (1998) 78(5) *Boston University Law Review* 1275, 1338-39; Murray N Rothbard, *The Ethics of Liberty* (originally published 1982, New York University Press 1998) 126; Richard S Murphy, 'Property Rights in Personal Information: An Economic Defense of Privacy' (1996) 84 *Georgetown Law Journal* 2381, 2384.

<sup>102</sup> Locke (n 91) para 27, pp 287-88.

The Lockean view of property that underpins Post’s property conception, therefore, is ‘tied to the notion of human beings as masters of themselves;’ it is ‘intimately related to the development of the human personality, to the exercise of independent thought and creative powers.’<sup>103</sup> This premise is obviously not applicable to corporations, which are by definition owned and controlled by others. Even if the labour-desert theory can justify treating *individual* reputation as a property right, it cannot justify treating *corporate* reputation in the same way.

Some commentators rely instead on the nineteenth-century case *Dixon v Holden*<sup>104</sup> to support the claim that reputation is a form of property, or that it is treated as such in English defamation law.<sup>105</sup> In that case, Malins VC had described the claimant’s reputation as ‘his property, and, if possible, more valuable than other property.’<sup>106</sup> Post cites this statement as a supposed example of the courts treating reputation as property.<sup>107</sup> But the case needs to be seen in context. Malins VC characterized reputation as ‘property’ in order to justify awarding a pre-publication injunction, and he was criticized soon after for having ‘strained’ the concept of property to do so<sup>108</sup> (in a case which Vanessa Wilcox astutely observes – unlike *Dixon* – involved a corporate claimant<sup>109</sup>). The Court of Appeal later entirely disavowed the statement when it was cited in support of an argument that a trade union did not have standing to sue in defamation. The Court ruled that the fact that the union was precluded by law from holding property was ‘irrelevant’ because ‘The claim in the action is not a claim to property.’<sup>110</sup> Put simply, the decision in *Dixon* ‘conceived reputation as ... property ... for perverse reasons’,<sup>111</sup> and does not reflect any particular

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<sup>103</sup> Laura S Underkuffler, ‘On Property: An Essay’ (1990) 100 Yale Law Journal 127, 138.

<sup>104</sup> *Dixon v Holden* (1869) LR 7 Eq 488.

<sup>105</sup> eg Peter Coe, ‘The Defamation Act 2013: We Need to Talk about Corporate Reputation’ (2015) 4 Journal of Business Law 313, 318-19; Chan (n 4) 269; Gary Chan Kok Yew, ‘The Right to a Good (Business) Reputation and Truth: Re-examining the Declaration of Falsity’ (2016) 23 Torts Law Journal 163, fn 52.

<sup>106</sup> *Dixon* (n 104) 492.

<sup>107</sup> Post (n 7) 696.

<sup>108</sup> *Prudential Assurance Co v Knott* (1875) LR 10 Ch App 142, 146-47; Milo (n 30) 28, fn 105.

<sup>109</sup> Vanessa Wilcox, *A Company’s Right to Damages for Non-Pecuniary Loss* (Cambridge University Press 2016) 118, fn 201.

<sup>110</sup> *National Union of General and Municipal Workers v Gillian* [1946] 1 KB 81 (CA) 88 (Uthwatt J).

<sup>111</sup> Wilcox (n 109) 118.

conceptualization of reputation in English defamation law, either at the time it was handed down or now.<sup>112</sup>

One objection to viewing reputation as a property interest, put forward by David Rolph, is that reputation does not meet all of the criteria by which ‘property’ is commonly defined.<sup>113</sup> In particular, it does not meet the criterion of alienability,<sup>114</sup> the capacity for ownership to be transferred from one person to another, which has been described as the ‘raison d’être of property’.<sup>115</sup> Robert Stevens explains that:

‘... the right to a reputation is not a property right properly so-called. It is inalienable, and although the subject matter of the right may be exploited and ‘sold’, for example through celebrity endorsements, it cannot be transferred.’<sup>116</sup>

This understanding of ‘property’ aligns with the view expressed by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* that a property right must be ‘definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.’<sup>117</sup> Since reputation cannot be assumed by third parties, because it is ‘uniquely referenced to a specific person’,<sup>118</sup> it cannot be a property right by this definition. This applies equally to companies’ reputations. The Australian courts have acknowledged that ‘the reputation of a business cannot be severed from the business itself ... each is inevitably intertwined with the other.’<sup>119</sup> The only way for a company’s reputation to be bought or sold is with the company itself.<sup>120</sup>

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<sup>112</sup> William Cornish and others, *The Oxford History of the Laws of England: Volume XIII: 1820-1914 Fields of Development* (OUP 2010) 850, fn 11.

<sup>113</sup> Rolph, *Reputation, Celebrity and Defamation Law* (n 10) 21.

<sup>114</sup> It has also been pointed out that reputation is non-excludable (Judith A Lachman, ‘Reputation and Risktaking’ in Everette E Dennis and Eli M Noam (eds), *The Cost of Libel: Economic and Policy Implications* (Columbia University Press 1989) 239). However, the same is true of the creations protected by many intellectual property rights (Aaron Perzanowski and others, *The End of Ownership: Personal Property in the Digital Economy* (MIT Press 2016) 19).

<sup>115</sup> Jessica Litman, ‘Information Privacy/Information Property’ (2000) 52 *Stanford Law Review* 1283, 1295.

<sup>116</sup> Robert Stevens, *Torts and Rights* (OUP 2007) 8.

<sup>117</sup> *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) 1247-48.

<sup>118</sup> Kenneth H Craik, *Reputation: A Network Interpretation* (OUP 2009) xvii.

<sup>119</sup> *ConAgra Inc v McCain Foods (Aust) Pty Ltd* (1992) 33 FCR 302, 340 (Lockhart J). See also *R (Malik) v Waltham Forest NHS Primary Care Trust* [2007] EWCA Civ 265, [85].

<sup>120</sup> David L Deephouse, ‘Media Reputation as a Strategic Resource: An Integration of Mass Communication and Resource-Based Theories’ (2000) 26(6) *Journal of Management* 1091, 1099.

Arguably, however, reputation's inalienability does not in itself prevent it from being treated as a property interest. Inalienability has been accepted by the House of Lords as a feature of goodwill in the context of passing off: 'goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business.'<sup>121</sup> The fact that goodwill is still typically considered to be property in that tort suggests that inalienability is not an absolute barrier to characterizing an interest as property.

The treatment of goodwill as a property interest is, in fact, commonly pointed to in support of the claim that *reputation* is a form of property.<sup>122</sup> Although the precise relationship between reputation and goodwill is complicated, it is clear that the two interests are closely related.<sup>123</sup> Reputation is usually seen as 'a core element of the constellation of intangible assets that collectively comprise a corporation's goodwill.'<sup>124</sup> The argument is that, if goodwill is property, and reputation is a part of goodwill, then reputation itself must be property.

But the fact that corporate reputation is a component of goodwill, a property interest, does not mean that corporate reputation is itself property. In English law, not all aspects of a company's reputation count as goodwill.<sup>125</sup> For example, the tort of passing off protects goodwill as a property interest, but 'mere reputation ... does not by itself constitute ... property' in that context.<sup>126</sup> Even the characterization of goodwill more broadly as property in passing off has been described as 'controversial'.<sup>127</sup> Regardless, the treatment of goodwill as property in a distinct

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<sup>121</sup> *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 (HL) 223 (Lord Macnaghten).

<sup>122</sup> eg Oster (n 9) 263; Nessa E Moll, 'In Search of the Corporate Private Figure: Defamation of the Corporation' (1978) 6 Hofstra Law Review 339, 339.

<sup>123</sup> 'Goodwill' has been defined as 'the whole advantage, whatever it may be, of the reputation and connection of the firm': *Trego v Hunt* [1896] AC 7 (HL) 24 (Lord Macnaghten). Lord Macnaghten cites Lord Eldon's description of goodwill as 'the probability that the old customers will resort to the old place' (*Crutwell v Lye* (1810) 32 ER 129, 134), but goes on to say that it is 'much more than that. Often it happens that the goodwill is the very sap and life of the business, without which the business would yield little or no fruit.' (*Trego v Hunt*, at 17).

<sup>124</sup> Meiring de Villiers, 'Quantitative Proof of Reputational Harm' (2010) 15 Fordham Journal of Corporate and Financial Law 567, 581.

<sup>125</sup> *Lonrho plc v Fayed (No 5)* [1994] 1 All ER 188 (CA) 196.

<sup>126</sup> *Anheuser-Busch Inc v Budejovicky Budvar NP* [1984] FSR 413 (CA) 470 (Oliver LJ). See also *Starbucks (HK) Ltd v British Sky Broadcasting Group plc* [2015] UKSC 31, [52].

<sup>127</sup> Michael Bridge and others, *The Law of Personal Property* (2<sup>nd</sup> edn, Sweet & Maxwell 2017) para 9-013.

area of law should not lead to the conclusion that it is appropriate to conceptualize corporate reputation as a property right in the context of defamation law.<sup>128</sup>

*The ‘right to property’ in A1P1, ECHR does not protect corporate reputation*

The relationship between reputation and goodwill is also the main reason some commentators have claimed that corporate reputation might engage the right to property under Article 1 of Protocol 1 (‘A1P1’) to the European Convention on Human Rights. In my view, it does not.<sup>129</sup> The relevant part of A1P1 reads as follows:

‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law ...’

There is uncertainty in the case law of both the European Court of Human Rights (‘ECtHR’) and the English courts as to whether corporate reputation qualifies as a ‘possession’ that could be protected by the A1P1 right to property. In *Firma EDV Für Sie, Efs Elektronische Datenverarbeitung Dienstleistungs GmbH v Germany*, the European Court of Human Rights left open the possibility that it does, but did not conclusively decide the issue.<sup>130</sup> The relevant English case law is also inconclusive. Tugendhat J suggested in *Thornton v Telegraph Media Group Ltd* that defamatory imputations harming corporate claimants’ reputations ‘may engage ... their commercial or property rights (which are Convention rights, if at all, under [A1P1]).’<sup>131</sup> A similar observation – that A1P1 ‘might apply’ – was made in *Building Register Ltd v Weston* with respect to a corporate claimant.<sup>132</sup> However,

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<sup>128</sup> The Court of Appeal has distinguished on a similar basis between a company’s interest in reputation and its right to protect its trade marks against infringement: ‘a trade mark infringement action ... is [not] merely a claim to protect the claimant’s reputation. It is a claim to protect a property right.’ (*Boehringer Ingelheim Ltd v Vetplus Ltd* [2007] EWCA Civ 583, [36] (Jacob LJ)).

<sup>129</sup> The argument presented in this section is developed more fully in David J Acheson, ‘Corporate Reputation under the European Convention on Human Rights’ (2018) 10(1) *Journal of Media Law* 49.

<sup>130</sup> *Firma EDV Für Sie, Efs Elektronische Datenverarbeitung Dienstleistungs GmbH v Germany* App no 32783/08 (ECtHR, 2 September 2014) para 34.

<sup>131</sup> *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB) [38].

<sup>132</sup> *Building Register Ltd v Weston* [2014] EWHC 784 (QB) [19] (Dingemans J) (emphasis added).

in a malicious falsehood case, the existence of an A1P1 right to reputation has been described as ‘doubtful’ by the Court of Appeal.<sup>133</sup>

The ECtHR has ruled in several cases that the goodwill of a professional practice,<sup>134</sup> or of a ‘business engaged in commerce’,<sup>135</sup> can be a possession. Oster argues that the interest in corporate reputation ‘neatly fits’ with these cases, and could therefore be protected under A1P1.<sup>136</sup> Similarly, Alastair Mowbray claims that A1P1 can protect ‘non-material commercial interests such as ... goodwill (ie the financial value of a company’s reputation)’.<sup>137</sup> On closer inspection, however, this line of cases does not support the view that corporate reputation itself constitutes a ‘possession’.

In *Van Marle v The Netherlands*, the Court held that the ‘right to goodwill’ claimed by the applicants ‘may be likened to the right of property’ in A1P1, because ‘by dint of their own work, the applicants had built up a clientele; this had in many respects the nature of a private right and constituted an asset and, hence, a possession’.<sup>138</sup> But the Court’s jurisprudence identifying goodwill as a possession seems to be in conflict with a related line of cases in which it has held that a loss of future income will not engage A1P1,<sup>139</sup> because that Article ‘does not ... guarantee the right to acquire property’.<sup>140</sup> For example, in *Ian Edgar (Liverpool) Ltd v UK*, the Court ruled that the applicant’s claim to property in goodwill ‘based upon the profits generated by the business’ was in substance a complaint of a ‘loss of future income’, and therefore fell outside the scope of A1P1.<sup>141</sup>

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<sup>133</sup> *Ajinomoto Sweeteners Europe SAS v Asda Stores Limited* [2010] EWCA Civ 609 [29] (Sedley LJ).

<sup>134</sup> *Van Marle v The Netherlands* [1986] ECHR 6.

<sup>135</sup> *Malik v UK* [2012] ECHR 438, para 93; *Denimark Ltd v UK* (2000) 30 EHRR CD144, 150.

<sup>136</sup> Oster (n 9) 263. See also Chan (n 4) 269.

<sup>137</sup> Alastair Mowbray, *Cases and Materials on the European Convention on Human Rights* (2<sup>nd</sup> edn, OUP 2007) 906 (the 3<sup>rd</sup> edn does not cover A1P1). Mowbray’s argument is based on the case *Tre Traktörer Aktiebolag v Sweden* [1989] ECHR 15.

<sup>138</sup> *Van Marle* (n 134) para 41. See also *Wendenburg v Germany* App no 71630/01 (ECtHR, 6 February 2003).

<sup>139</sup> Anish Bhasin, ‘Future Income Versus Goodwill under A1P1 – A Distinction without a Difference?’ (2012) 17(3) *Judicial Review* 226.

<sup>140</sup> *JA Pye (Oxford) Ltd v UK* [2007] ECHR 700, para 61.

<sup>141</sup> *Ian Edgar (Liverpool) Ltd v UK* [2000] ECHR 700. See also *Denimark* (n 135) 150; *Levänen v Finland* App no 34600/03 (ECtHR, 11 April 2006).

Because the financial value of a company's reputation lies mainly in its effect on future earnings,<sup>142</sup> and expectations of future income are not 'possessions',<sup>143</sup> reputation should not be considered a 'possession' under A1P1. In Moses LJ's judgment in *R (Malik) v Waltham Forest NHS Primary Care Trust*, the lack of A1P1 protection for future income precluded reputation from falling within the Article's scope:

[Reputation] has no economic value other than being that which a professional man may exploit in order to earn or increase his earnings for the future. If the principle that the ability to earn future income is not a possession within [A1P1] is to be maintained, it must follow that if the element of goodwill which has [been] or may be damaged is reputation, or the loyalty of past clients, that element is not to be identified as a possession.<sup>144</sup>

There is a further reason that corporate reputation should not be protected under A1P1 on the basis of the ECtHR's goodwill jurisprudence. On one interpretation of that jurisprudence, the Court has not been protecting goodwill per se as a possession, but the contribution it makes to the value of a distinct asset. If this interpretation is correct, it is doubtful whether a company could be considered to 'own' any possession whose value might be affected by an injury to the company's reputation.

The Court first appeared to treat goodwill as a possession in cases brought by individual applicants in respect of a loss of goodwill in their professional practices.<sup>145</sup> The Court has since described its decisions in these cases as establishing that 'goodwill may be *an element in the valuation of a professional practice*'.<sup>146</sup> In *Malik v UK*,<sup>147</sup> it stated that these decisions 'tended to regard as a "possession" *the underlying business or professional practice in question*'.<sup>148</sup> In other words, when apparently identifying 'goodwill' as a possession, the Court has

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<sup>142</sup> de Villiers (n 124) 579.

<sup>143</sup> *Marckx v Belgium* [1979] ECHR 2, para 50.

<sup>144</sup> *R (Malik)* (n 119) [86].

<sup>145</sup> eg *Van Marle* (n 134); *Olbertz v Germany* App no 37592/97 (ECtHR, 25 May 1999); *Döring v Germany* App no 37595/97 (ECtHR, 9 November 1999); *Wendenburg* (n 138); *Buzescu v Romania* App no 61302/00 (ECtHR, 24 May 2005).

<sup>146</sup> *Ian Edgar* (n 141); *Denimark* (n 135); *Malik v UK* (n 135) para 93 (emphasis added).

<sup>147</sup> *Malik v UK* (n 135). The application in this case was brought in respect of the Court of Appeal's decision in *R (Malik)* (n 119).

<sup>148</sup> *Malik v UK* (n 135) para 94 (emphasis added).



in fact been identifying its contribution to the value of a *distinct* possession – a business or professional practice – owned by the applicant.

Where goodwill in that sense is injured, the result is a fall in the value of the relevant asset, which can sensibly be described as an interference with the applicant's property in that asset. In contrast, whenever a corporate applicant has complained of a loss of *its own* goodwill, the Court has rejected its application on the basis that it amounted to a complaint of loss of future income, which does not engage A1P1.<sup>149</sup> The reputation of a company attaches to the company itself; any value that it has contributes to the value of the company, not to any of the company's assets. As such, a fall in the value of a company's reputation ultimately manifests itself as a fall in the value of *the company itself*. This cannot represent a diminution of the value of an asset owned by the company, because the company cannot own itself.<sup>150</sup> Since a claim in libel can only properly be brought to protect the reputation of the claimant, not of the claimant's assets,<sup>151</sup> on this interpretation of the Strasbourg jurisprudence the corporate interest in reputation protected in defamation law cannot constitute a possession under A1P1.

*Describing reputation as 'property' does not justify protecting the interest in defamation law*

Commentary that describes reputation as a property right or interest often seems to be using that terminology as little more than shorthand for the idea that a person's or company's reputation can have financial value. There is also a strand of business literature which, in a comparable way, describes reputation as an 'asset' that companies 'own'. Like their counterparts in legal academia, 'Most authors who make the case for organizational reputation being defined as an asset do so by detailing reputation's positive [financial] outcomes for the firm'.<sup>152</sup> In both disciplines, characterizing corporate reputation as property on this basis 'seems to

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<sup>149</sup> *Ian Edgar* (n 141); *Denimark* (n 135).

<sup>150</sup> See eg *Lonrho* (n 125) 196.

<sup>151</sup> See eg *Joyce v Sengupta* (n 1) 341.

<sup>152</sup> Donald Lange, Peggy M Lee and Ye Dai, 'Organizational Reputation: A Review' (2011) 37(1) *Journal of Management* 153, 162.

make the idea of organizational reputation as asset more of a description of the consequences of the concept than a definition of the concept'.<sup>153</sup>

But, as Lawrence McNamara argues, the fact that reputation often has financial value reveals nothing about its essential character.<sup>154</sup> McNamara's view that 'it is neither appropriate nor necessary to stretch the concept of property so far that reputation is to be a form of property simply because it carries material consequences'<sup>155</sup> is entirely reasonable. And the fact that courts and commentators sometimes appear to treat reputation *as if it were* property does not necessarily mean that reputation *is in fact* property.<sup>156</sup> Reputation is not property in any sense in which property is normally conceptualized.<sup>157</sup>

Arguably, this debate about whether reputation should be conceptualized as a property interest somewhat misses the point, in that it often seems to assume that, if reputation *can* be described as property, then this alone justifies offering it similar legal protection to that given to other kinds of property. These descriptions of reputation as property seek to draw on the fact that 'The concept of property has powerful, rhetorical force'.<sup>158</sup> But, as Ernest Weinrib points out, 'property is itself merely the label for that crystallized bundle of economic interests which the law deems worthy of protection.'<sup>159</sup> That is, an interest should not qualify for legal protection because it fits some abstract definition of 'property',<sup>160</sup> or because it shares characteristics with existing property rights. If corporate reputation is worthy of legal protection, there must be a distinct justification for that protection. Characterizing a company's reputation as its 'property' adds nothing to the argument that it has financial value.

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<sup>153</sup> Ibid.

<sup>154</sup> McNamara (n 5) 42.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid, 38.

<sup>157</sup> Heymann (n 45) 1342.

<sup>158</sup> Underkuffler (n 103) 129.

<sup>159</sup> Ernest Weinrib, 'The Fiduciary Obligation' (1975) 25 University of Toronto Law Journal 1, 10.

<sup>160</sup> This is especially true given that there is no clear agreement as to the essential attributes by which an interest qualifies as 'property': in the context of a discussion of whether confidential information can be classed as property, Tanya Aplin is right to recognize that 'one has to acknowledge the fraught nature of the term "property" ... both the conceptual and normative underpinnings of property are highly contested' (Tanya Aplin, 'Confidential Information as Property?' (2013) 24 King's Law Journal 172, 190).

### *iii. Companies' non-financial interests in reputation*

The fact that a company's reputation can have significant financial value is also one reason for the widely held view that the benefits enjoyed by companies with good reputations are *exclusively* financial, and therefore that the only harm that companies can suffer as a result of reputational injuries must also be financial. In this section I will argue that, like the claim that corporate reputation is a form of property, this view is slightly over-simplistic. Companies' reputational interests may, in some cases, be somewhat broader than this.

Among many potential examples of this view is Tony Weir's assertion that 'The *only* kind of harm' that a corporate defamation claimant can suffer is 'harm to its commercial relations'.<sup>161</sup> Nessa Moll contends that 'A corporation's interest in protecting its good name, often referred to as its goodwill, is *solely* economic.'<sup>162</sup> In Canada, David Lepofsky argues that 'For a corporation, especially a large, widely held corporation, the only value which is truly at stake in the defamation context is *purely* economic.'<sup>163</sup> The same claim is made by Arlen Langvardt in the United States: 'corporate reputation translates into monetary value, sometimes directly and other times indirectly, but *such a translation is necessarily present in some form*.'<sup>164</sup>

This view of corporate reputation as an interest with purely financial value is sometimes supported with a citation to a statement made obiter by Lord Reid in *Lewis v Daily Telegraph Ltd*: 'A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money.'<sup>165</sup> However, although fairly sweeping on its face, this statement was made in the context of a decision on a narrow point of law. The issue in question was the applicability in defamation of the rule established in the

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<sup>161</sup> J A Weir, 'Local Authority v Critical Ratepayer – A Suit in Defamation' (1972) 30 Cambridge Law Journal 238, 240 (emphasis added).

<sup>162</sup> Moll (n 122) 339 (emphasis added; citation omitted).

<sup>163</sup> M David Lepofsky, 'Making Sense of the Libel Chill Debate: Do Libel Laws "Chill" the Exercise of Freedom of Expression?' (1994) 4 National Journal of Constitutional Law 168, 200 (emphasis added).

<sup>164</sup> Langvardt (n 11) 519 (emphasis added).

<sup>165</sup> *Lewis v Daily Telegraph Ltd* [1964] AC 234 (HL) 262. See eg Richard Kidner, 'Defaming a Company by Disparaging Its Products' (1992) Journal of Business Law 570, 572-74.

negligence case *British Transport Commission v Gourley*,<sup>166</sup> to the effect that general damages compensating a claimant's loss of earnings must take into account the tax that the claimant would have been liable to pay on those earnings. Holding that defamation juries should be directed to take into account tax liability when awarding corporate claimants damages for lost income, Lord Reid held that 'There can be no difference in principle between loss of income caused by negligence and loss of income caused by a libel ... in so far as the company establishes that the libel has, or has probably, diminished its profits, ... *Gourley's* case is relevant.'<sup>167</sup>

Despite his comment that 'The position with regard to an individual plaintiff is rather different', Lord Reid in fact reached the same conclusion in this respect, holding that any portion of general damages awarded to compensate loss of income should take into account the tax that would be payable on that income.<sup>168</sup> He went on to identify some categories of general damages available to corporate claimants which would not need to be reduced in this way, including damages compensating a general loss of goodwill.<sup>169</sup> The rule is similarly inapplicable to vindictory damages,<sup>170</sup> which can permissibly be awarded to corporate claimants as well as to individuals.<sup>171</sup>

When read in its original context, therefore, Lord Reid's comment is little more than a restatement of the principle that individual claimants may be awarded general damages for types of injury which cannot be suffered by companies, such as hurt feelings or distress. I would argue that it is over-reading the statement to suggest that it should have implications for corporate defamation law beyond the

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<sup>166</sup> [1956] AC 185 (HL). Lord Reid was one of the Law Lords on the bench in *Gourley*; his concurring judgment is at 210-15.

<sup>167</sup> *Lewis* (n 165) 262 (citation omitted).

<sup>168</sup> *Ibid.* Lord Hodson's judgment in *Lewis* in fact went further than Lord Reid's in suggesting that the whole of any general damages award made in favour of a company should be reduced to take income tax into account: '...since a company can only suffer in its pocket by loss of revenue attributable to a libel, so regard must be had to the fact that the profits of the company will in large measure be passed on to the Revenue and not retained for the benefit of the shareholders.' *Ibid.*, 277.

<sup>169</sup> *Ibid.* The Neill Committee expressed some uncertainty about whether such damages should take into account capital gains tax: Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* (July 1991) 186-93.

<sup>170</sup> *Ibid.*, 188.

<sup>171</sup> *Applause Store Productions Ltd v Raphael* [2008] EWHC 1781 (QB) [76]. The practice of awarding vindictory damages to corporate defamation claimants is criticized at Ch4.B.ii., text to notes 126-159.

assessment of damages.<sup>172</sup> It does not support the view that the law of defamation only recognizes companies' reputational interests when they are financial in nature, much less that companies are only capable of having reputational interests of that kind.

At times this view of corporate reputation seems to reflect a particular conception of the nature of corporations more generally.<sup>173</sup> For example, Lord Hoffmann expressed a similar sentiment in *Jameel*,<sup>174</sup> arguing in the minority for the removal of the presumption of harm in respect of corporate claimants:

‘In the case of an individual, his reputation is a part of his personality, the “immortal part” of himself ... But a commercial company has no soul and its reputation is no more than a commercial asset, something attached to its trading name which brings in customers.’<sup>175</sup>

Lord Hoffmann's reasoning in this passage is described by Ailbhe O'Neill as follows:

‘It appears that the rationale for his approach relates to his view that the only interests companies have in this context are interests in property. Implicit in this approach is the idea that the company's only purpose is profit maximisation thus the only function of defamation law as regards a company is to protect property.’<sup>176</sup>

On this view, it is not that corporate *reputation* is an exclusively financial interest. It is that, if corporations exist for exclusively financial purposes, then corporate interests *in general* must be exclusively financial.

But a broader view of the nature and purpose of corporate entities is reflected in the judgments of the majority in *Jameel*. Lord Hope took the view that Lord Reid's comment in *Lewis* simply reflected the principle that defamation law only protects corporate claimants from ‘false statements which reflect on the way they conduct themselves [and] affect the reputation on which they rely to perform their

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<sup>172</sup> *Shevill v Presse Alliance SA* [1992] 2 WLR 1 (CA) 14 (Purchas LJ): ‘this authority only serves to exclude one type of damage in the case of non-personal plaintiffs and does not affect the presumption of damage recognised by English law’ (not commented upon in HL judgment).

<sup>173</sup> eg *Herzfeld* (n 11) 146-47.

<sup>174</sup> *Jameel* (n 51).

<sup>175</sup> *Ibid*, [91].

<sup>176</sup> Ailbhe O'Neill, ‘Corporate Reputation in the House of Lords’ (2007) 28(3) *Company Lawyer* 75, 76-77.

objects.<sup>177</sup> Where, as in most cases, the claimant is a trading corporation with objects relating to the pursuit of profit, this means that the law will protect its reputation only insofar as it ‘affects [the claimant’s] business as a trading company.’<sup>178</sup> But that does not mean that the law will not, in an appropriate case, recognize the effect of an injury to a corporate claimant’s reputation on its ability to pursue any non-financial objects it might have. Corporate entities can have a range of other purposes the pursuit of which might be frustrated by reputational harm caused by defamatory statements. In each case, Lord Scott argued that:

‘If the remarks in question were indeed defamatory, damaging to the reputation of the company and apt to damage its ability to pursue its trading or charitable or other objects, I can see no reason of principle why the long-standing rule of law enabling the company to pursue a remedy in a defamation action without the need to allege or prove actual damage should be changed.’<sup>179</sup>

English company law, embodied in the Companies Act 2006, does not restrict companies to pursuing financial objects.<sup>180</sup> In practice, ‘companies incorporated under the Companies Acts may be used for carrying on not-for-profit businesses, or for purposes which can be only doubtfully characterised as business at all.’<sup>181</sup> The Explanatory Notes to the 2006 Act explicitly acknowledge the possibility of even for-profit companies having non-financial interests, by stating that s 172(2):

‘... addresses the question of altruistic, or partly altruistic, companies. Examples of such companies include charitable companies and community interest companies, but it is possible for any company to have “unselfish” objectives which prevail over the “selfish” interests of members.’<sup>182</sup>

Since ‘Nothing in the basic legal framework of business firms mandates a particular orientation to making money over all other possible values’, any conception of

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<sup>177</sup> *Jameel* (n 51) [101].

<sup>178</sup> *Ibid*, [95].

<sup>179</sup> *Ibid*.

<sup>180</sup> Companies Act 2006, s 31.

<sup>181</sup> Paul L Davies and Sarah Worthington, *Gower & Davies: Principles of Modern Company Law* (9<sup>th</sup> edn, Sweet & Maxwell 2012) para 1-1.

<sup>182</sup> Explanatory Notes to the Companies Act 2006, para 330. Under s 172(1), company directors are required to promote the success of the company for the benefit of its members; s 172(2) provides that ‘Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.’

corporations or their interests in which such an orientation is inherent will not be universally applicable.<sup>183</sup>

Both Gary Chan<sup>184</sup> and Peter Coe<sup>185</sup> suggest that Post's conception of reputation as honour<sup>186</sup> might justify protecting a company's reputation for its 'charitable and social causes',<sup>187</sup> as opposed to its trade or business. Chan argues that:

'... we should not totally foreclose the avenue for a corporation to pursue legitimate claims against defamatory allegations that strike at the corporation's non-business reputation and which may not always be translatable to a loss of goodwill or customers.'<sup>188</sup>

It could be argued in response that a company's incentive to engage in socially beneficial activities is, ultimately, that such activities *are* expected to generate long term financial benefits by enhancing the company's goodwill with its customers.<sup>189</sup>

Coe acknowledges that corporate social responsibility initiatives 'are used to increase market value and financial performance'.<sup>190</sup> To say that this is the sole reason for companies to pursue such activities is also something of an oversimplification. A range of factors drive companies' non-trading activities:<sup>191</sup> they 'may be motivated by a moral duty or by self-interest and may be voluntary or in response to social pressure.'<sup>192</sup>

However, it is important not to overstate the argument that corporate defamation claimants may in some cases have interests at stake that are not purely financial.

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<sup>183</sup> Eric W Orts, *Business Persons: A Legal Theory of the Firm* (OUP 2013) 221.

<sup>184</sup> Chan (n 4) 268-69.

<sup>185</sup> Peter Coe, 'The Value of Corporate Reputation and the Defamation Act 2013: A Brave New World or Road to Ruin?' (2013) 18(4) *Communications Law* 113, 114.

<sup>186</sup> Described above at text to notes 18-23.

<sup>187</sup> Chan (n 4) 268-69.

<sup>188</sup> *Ibid.*, 286.

<sup>189</sup> Herzfeld (n 11) 146.

<sup>190</sup> Coe, 'Need to Talk' (n 105) 315-16.

<sup>191</sup> Accounts differing from the profit maximization model have been offered in, for example: Alan R Muller, Michael D Pfarrer and Laura M Little, 'A Theory of Collective Empathy in Corporate Philanthropy Decisions' (2014) 39(1) *Academy of Management Review* 1; Adrian Sargeant and Helga Stephenson, 'Corporate Giving: Targeting the Likely Donor' (1997) 2(1) *International Journal of Nonprofit and Voluntary Sector Marketing* 64 (finding that individual philanthropy was the strongest driver of corporate charitable giving); Johan Graafland and Corrie Mazereeuw-Van der Duijn Schouten, 'Motives for Corporate Social Responsibility' (2012) 160 *De Economist* 377 (finding that intrinsic motives for giving were more important than extrinsic financial motives).

<sup>192</sup> David P Baron, 'A Positive Theory of Moral Management, Social Pressure, and Corporate Social Performance' (2009) 18(1) *Journal of Economics & Management Strategy* 7, 7.

The reality is that it does not accurately reflect the vast majority of corporate defamation litigation in which, as Dario Milo points out, ‘the issues mainly concern the corporation’s standing in the business in which it is engaged, and how its reputation for honesty, credit, and other business characteristics affects its financial viability.’<sup>193</sup> And even in the minority of cases in which a company might sue to protect an aspect of its reputation unrelated to its business, it is still the case that its interest in that part of its reputation is wholly instrumental to the ability to pursue its objects.<sup>194</sup> Even in this context, a corporate entity cannot claim to have interests in its reputation that are as broad and significant as those at stake for an individual defamation claimant. The next section will discuss the various reputational interests that corporate claimants, unlike individuals, do not have.

### **C. Reputational interests that companies do not have**

Along with Post’s conception of reputation as dignity, which was briefly discussed above,<sup>195</sup> there are a number of theories in the literature which conceptualize reputation in relation to underlying interests such as dignity,<sup>196</sup> autonomy,<sup>197</sup> self-worth,<sup>198</sup> and other interests that companies cannot claim to enjoy. The discussion in this part will demonstrate that the interests which a corporate claimant might have at stake in a defamation case will generally be more limited than those at stake for an individual defamation claimant. The reputational interests that are unique to individual claimants are also significant because they provide the only convincing explanation for protecting the right to reputation under Art 8 ECHR.

The most obvious sense in which corporate defamation claimants differ from individual claimants is that they have ‘no feelings which might [be] hurt and no

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<sup>193</sup> Milo (n 30) 29. See also Oster (n 9) 260.

<sup>194</sup> *Jameel* (n 51) [95].

<sup>195</sup> At text to notes 24-29.

<sup>196</sup> Barendt (n 6) 116. See also David Feldman, ‘Human Dignity as a Legal Value: Part 1’ (1999) Public Law 682, 687; Amy Kristin Sanders and Natalie Christine Olsen, ‘Re-Defining Defamation: Psychological Sense of Community in the Age of the Internet’ (2012) 17 Communications Law and Policy 355, 362; Douglas W Vick and Linda Macpherson, ‘An Opportunity Lost: The United Kingdom’s Failed Reform of Defamation Law’ (1997) 49(3) Federal Communications Law Journal 621, 621.

<sup>197</sup> Filimon Peonidis, ‘Freedom of Expression, Autonomy, and Defamation’ (1998) 17(1) Law and Philosophy 1.

<sup>198</sup> Alastair Mullis and Andrew Scott, ‘Reframing Libel: Taking (All) Rights Seriously and Where it Leads’ (2012) 63(1) Northern Ireland Legal Quarterly 5, 10-11.



social relations which might [be] impaired' by defamatory allegations.<sup>199</sup> To the extent that the law addresses (directly or indirectly) either psychological injuries or harm to social relationships, then companies have no sensible claim to those interests. This is already reflected to some extent in English law,<sup>200</sup> for example in the rule that, where there is no evidence of actual loss, general damages should normally be lower for corporate claimants than they would be for individual claimants.<sup>201</sup>

One function of general damages in defamation is to compensate the claimant for distress; corporations are not entitled to damages under this head.<sup>202</sup> On the same basis, corporations are not entitled to aggravated damages:

‘... the defining characteristic of an award of aggravated damages is that its function is to provide a claimant with compensation ... for injury to his or her feelings caused by some conduct on the part of the defendant ... . If that be the correct analysis of the proper function of aggravated damages, it seems to me to follow that aggravated damages are in principle not available to a corporate claimant.’<sup>203</sup>

But although one aim of the remedies awarded to claimants is to compensate for psychological injuries, that does not mean that protecting claimants from such injuries is the central purpose of defamation law. The nature of the cause of action demonstrates that it is not centrally concerned with psychological harm, because insult is not actionable in its own right.<sup>204</sup> Without publication to a third party, a defamatory statement is not actionable, regardless of the distress it causes the claimant.<sup>205</sup> The capacity for defamatory statements to hurt the feelings of their victims is reflected in the remedies available to successful claimants, but only parasitically, when it results from injury to the claimant's reputation.<sup>206</sup> Corporations' inability to suffer psychological or emotional harms should not be

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<sup>199</sup> Weir (n 161) 240.

<sup>200</sup> Jenny Afia and Phil Hartley, 'Lord Lester's Defamation Bill 2010: A Practical Analysis' (2010) 2(2) *Journal of Media Law* 183, 189.

<sup>201</sup> eg *South Hetton* (n 48) 148; *Jameel* (n 51) [27].

<sup>202</sup> *ReachLocal UK Ltd v Bennett* [2014] EWHC 3405 (QB) [53]; *Euromoney Institutional Investor plc v Aviation News Ltd* [2013] EWHC 1505 (QB) [20].

<sup>203</sup> *Collins Stewart Ltd v Financial Times Ltd* [2005] EWHC 262 (QB) (Gray J).

<sup>204</sup> Wilcox (n 109) 116.

<sup>205</sup> Richard Parkes and others, *Gatley on Libel and Slander* (12<sup>th</sup> edn, 2<sup>nd</sup> supp, Sweet & Maxwell 2017) para 6.1 ('Gatley').

<sup>206</sup> eg *Monroe v Hopkins* [2017] EWHC 433 (QB) [76].

overlooked, because it puts obvious limits on the potential justifications for protecting corporate, as compared to individual, reputation. However, its importance should not be overstated either: the capacity for emotional suffering is not a prerequisite of the right to protect one's reputation, at least not as English law conceptualizes that right.

David Howarth's 'sociality' theory offers another way of conceptualizing reputation that focuses on harms that cannot be suffered by corporations.<sup>207</sup> The theory is significant in this context because Howarth uses it to support his argument that the corporate right to sue in defamation should be removed.<sup>208</sup> Howarth argues that the most convincing reason for the law to protect a claimant's reputation is its importance to her 'interest in the formation and maintenance of social relationships';<sup>209</sup> and that the principal harms with which defamation law ought to be concerned are 'social isolation and rejection', and 'the pain of the threat' thereof.<sup>210</sup> Howarth's view is that, if his argument as to the purposes of defamation law is accepted, then 'it is questionable that pure economic loss in defamation, that is loss entirely unrelated to sociality or the pain of fearing the loss of social relationships, should be actionable at all.'<sup>211</sup> This leads him to the conclusion that companies should not have standing to sue: 'in the case of corporations, the economic losses are all "pure". They are never consequential on social harm, since corporations, being not human or sentient, have no social relations.'<sup>212</sup> Although Howarth's theory is intuitively attractive, in my view it is not entirely convincing as a complete account of the interest in reputation, particularly because the connection between claimants' interests in sociality and reputation is not always clear.<sup>213</sup> Nevertheless, the sociality theory highlights another important aspect of the individual interest in reputation which is inapplicable to corporate claimants.

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<sup>207</sup> Howarth (n 10).

<sup>208</sup> Ibid, 873-75.

<sup>209</sup> Ibid, 849.

<sup>210</sup> Ibid, 850.

<sup>211</sup> Ibid, 874.

<sup>212</sup> Ibid, 874.

<sup>213</sup> The link between the two interests appears to rest primarily on Howarth's assertion that interference with social relationships is the 'most obvious' harm caused by defamation (ibid, 849). But Howarth is particularly concerned with the effects of libel on 'strong social ties' (ibid, 856-57, citing Mark S Granovetter, 'The Strength of Weak Ties' (1973) 78 *American Journal of Sociology* 1360). It seems to me that harm to these strong ties, which are both more resilient and less dependent

Companies' lack of social relationships was also raised by Tony Weir in one of the first significant academic criticisms of the corporate right to sue in defamation,<sup>214</sup> written in response to the judgment in *Bognor Regis UDC v Champion*,<sup>215</sup> in which it was held that the local authority claimant had a "governing" reputation' that it was entitled to protect through a claim in defamation.<sup>216</sup> Weir took issue not only with the decision that a *governmental* corporation had standing to sue, but with the prior case law establishing that *any* corporation had such standing. He argued that the question whether a corporate claimant could sue 'in defamation', in essence, asked whether 'an *institution* should enjoy the benefit of all the legal rules offered to the *human being* for the protection of his esteem in his own eyes and others'.<sup>217</sup> Weir questioned whether it was appropriate for corporations to benefit from the claimant-friendly features of defamation law in the same way as individuals, and in particular the presumption of damage.<sup>218</sup> In his view, that presumption existed in respect of two harms, namely that the claimant 'will feel bad and others will think badly of him'.<sup>219</sup> The presumption could be justified because 'the first need not be proved and the second cannot be.'<sup>220</sup> But a corporate claimant, Weir contended, could not suffer either of these presumed harms, and therefore the presumption should not exist in its case.<sup>221</sup>

Less than a decade before the 2013 Act was passed, the House of Lords was given the opportunity, in *Jameel*,<sup>222</sup> to overturn the long-standing precedent permitting companies to sue in defamation without proof of special damage.<sup>223</sup> Baroness Hale

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on reputation than weaker ties, is one of the *least* obvious harms caused by libel: see eg Leon Green, 'Relational Interests' (1934) 29 Illinois Law Review 460, 474; *Noorani v Calver* [2009] EWHC 561 (QB) [21] (in which Coulson J described the only publishees – the wife and daughter of the claimant – as 'wholly "within [the claimant's] camp"'); Cass Sunstein, *On Rumours* (Allen Lane 2009) 17 (noting that the desire to reduce cognitive dissonance means that 'your family members are not likely to believe a false and damaging rumour about you.').

<sup>214</sup> Weir (n 161).

<sup>215</sup> *Bognor Regis UDC v Champion* [1972] 2 QB 169.

<sup>216</sup> *Ibid*, 177. The decision, as it related to government bodies, was subsequently overruled by the House of Lords in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 (HL). The standing of government bodies and similar claimants will be discussed in more detail at Ch5.C.i.

<sup>217</sup> Weir (n 161) 239 (emphasis in original).

<sup>218</sup> The presumption of damage is described at Ch3.A.i., text to notes 14-18.

<sup>219</sup> Weir (n 161) 239.

<sup>220</sup> *Ibid*.

<sup>221</sup> *Ibid*, 240.

<sup>222</sup> *Jameel* (n 51) [154].

<sup>223</sup> *South Hetton* (n 48).

cited Weir's arguments with approval, and argued that removing the presumption of loss in corporate defamation 'would achieve a proper balance between the right of a company to protect its reputation and the right of the press and public to be critical of it.'<sup>224</sup> Conceptions of the individual interest in reputation that are inapplicable to corporate claimants were also reflected in the passage of Lord Hoffmann's judgment in *Jameel* discussed above,<sup>225</sup> in which the reputational interests of companies were described in contrast to the value of reputation to an individual claimant as 'the "immortal part" of himself'.<sup>226</sup> Partly because of that contrast, Lord Hoffmann ruled in favour of the defendants' argument that the presumption of loss should be abolished for corporate defamation claimants. But Lord Hoffmann and Baroness Hale were in the minority on that issue; by 3 to 2, the Law Lords refused to abolish the presumption. As a result of that decision, the proposal to require proof of financial loss in defamation claims brought by companies could only realistically be acted upon by Parliament.

As will be explained in Chapter 3, Parliament took this step in the Defamation Act 2013, by introducing a requirement for corporate defamation claimants to show 'serious financial loss'.<sup>227</sup> Although the initial draft of the Defamation Bill did not include any provisions specific to corporate claimants,<sup>228</sup> in its report on the Bill, the parliamentary Joint Committee on Human Rights recommended the addition of a clause that would require those claimants to show financial loss.<sup>229</sup> The Committee pointed out that English defamation law must take into account the protection of individual reputation under Art 8 ECHR which, as the section below will explain, does not apply to corporate claimants.<sup>230</sup>

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<sup>224</sup> *Jameel* (n 51) [158].

<sup>225</sup> Text to notes 173-175.

<sup>226</sup> *Jameel* (n 51) [91].

<sup>227</sup> Defamation Act 2013, s 1(2).

<sup>228</sup> See Ministry of Justice, *Draft Defamation Bill: Consultation* (Cm 8020, 2011) paras 136-45.

<sup>229</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Defamation Bill* (2012-13, HL 84, HC 810) para 58.

<sup>230</sup> *Ibid*, para 55.

### *i. Reputation under Art 8 ECHR*

Dignity-based conceptions of reputation are particularly significant because of their prominence in the relevant case law of the European Court of Human Rights,<sup>231</sup> which influences English defamation law through the Human Rights Act 1998.<sup>232</sup> The Court will sometimes protect applicants' reputational interests under the Article 8 right to privacy, even though it does not explicitly refer to reputation:

'Everyone has the right to respect for his private and family life, his home and his correspondence.'

English courts have not interpreted Art 8 to guarantee companies, as opposed to individuals, a right to reputation.<sup>233</sup> In *Euromoney Institutional Investor Plc v Aviation News Ltd*, Tugendhat J stated plainly that 'in the context of a defamation claim, a corporate claimant does not have relevant rights under ECHR Art 8.'<sup>234</sup> Alastair Mullis and Andrew Scott consider this point to be 'uncontroversial', stating that it is 'a commonplace that corporations do not possess Article 8 rights of this type.'<sup>235</sup> It is typical for corporate defamation claimants to accept that Art 8 does not protect their reputations.<sup>236</sup> But, as with the status of companies' reputational interests under A1P1,<sup>237</sup> there is some uncertainty in the ECtHR's case law as to whether the Art 8 right to private life can be engaged by an injury to corporate reputation. In a small number of recent decisions, the Court has either left open the

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<sup>231</sup> This section is derived in part from an article published in the *Journal of Media Law* on 19 April 2018, copyright Taylor & Francis, available online: <http://www.tandfonline.com/10.1080/17577632.2018.1464536>. Acheson, 'Corporate Reputation under the ECHR' (n 129).

<sup>232</sup> See Ch2.B.i., text to notes 32-38.

<sup>233</sup> See *Gatley* (n 205) para 2.3.

<sup>234</sup> *Euromoney* (n 202) [20]. See also *Hays plc v Hartley* [2010] EWHC 1068 (QB) [25]; *Ronaldo v Telegraph Media Group Ltd* [2010] EWHC 2710 (QB) [58].

<sup>235</sup> Alastair Mullis and Andrew Scott, 'The Swing of the Pendulum: Reputation, Expression and the Re-Centring of English Libel Law' (2012) 63(1) *Northern Ireland Legal Quarterly* 27, 46.

<sup>236</sup> *Hays* (n 234) [25]; *Building Register Ltd v Weston* [2014] EWHC 784 (QB) [19]; *Global Torch Ltd v Apex Global Management Ltd* [2013] EWHC 223 (Ch) [73]-[75]. Cf the defendant's submission, not commented upon by Eady J, in *Metropolitan International Schools Ltd v Designtecnica Corp* [2009] EWHC 1765 (QB) [46].

<sup>237</sup> See text to notes 129-132.

question whether a company's reputation can be protected under Art 8,<sup>238</sup> or presumed without affirmatively deciding that it could.<sup>239</sup>

The ECtHR's attempts to explain the relevance of individual reputation to Art 8 have not been entirely clear. It has, for example, claimed that the right to 'private life' under Art 8 extends to interests in 'personal identity',<sup>240</sup> or 'psychological integrity',<sup>241</sup> or that it protects 'the right to establish and develop relationships with other human beings'.<sup>242</sup> It has also linked the right to reputation with the underlying Convention value of human dignity.<sup>243</sup> The lack of clarity and consistency in the Court's jurisprudence means that the precise link (or links) between the interest in reputation and the rights protected under Art 8 remains unclear.<sup>244</sup>

But whichever of the ECtHR's vague justifications for protecting reputation under Art 8 is preferred, it is inapplicable to corporations on a conceptual level:<sup>245</sup> companies have no 'personal identity', no 'psychological integrity',<sup>246</sup> no 'relationships with other human beings',<sup>247</sup> and no personal autonomy.<sup>248</sup> Nor do corporations have dignitary interests of the kind highlighted by Judge Loucaides in his concurring opinion in *Lindon v France*, which was one of the Court's first attempts to explain the rationale for protecting individual reputation under Art 8.<sup>249</sup>

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<sup>238</sup> *Firma EDV Für Sie* (n 129) para 23; *Magyar Tartalomszolgáltatók Egyesülete v Hungary* [2016] ECHR 135, para 67 ('MTE').

<sup>239</sup> *Arztammer für Wien v Austria* [2016] ECHR 179, para 62.

<sup>240</sup> *Ion Cârstea v Romania* [2014] ECHR 1161, para 29.

<sup>241</sup> *Pfeifer v Austria* [2007] ECHR 935, para 35; *Axel Springer AG v Germany* [2012] ECHR 227, para 83; *Putistin v Ukraine* [2013] ECHR 1286, para 32.

<sup>242</sup> *Kyriakides v Cyprus* [2008] ECHR 1087, para 49, citing *Niemietz v Germany* [1992] ECHR 80, para 29.

<sup>243</sup> *Lindon v France* [2007] ECHR 836, pp 39-40 (concurring opinion of Judge Loucaides).

<sup>244</sup> Tanya Aplin and Jason Bosland, 'The Uncertain Landscape of Article 8 of the ECHR: The Protection of Reputation as a Fundamental Human Right?' in Andrew Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press 2016).

<sup>245</sup> Oster (n 9) 262.

<sup>246</sup> Mullis and Scott, 'Swing of the Pendulum' (n 235) 45-46. See also Hugh Tomlinson, 'Case Law, Strasbourg: Firma EDV für Sie v Germany, Article 8, Companies and the Right to Reputation' (*Inform*, 9 October 2014) at <<https://inform.wordpress.com/2014/10/09/caselaw-strasbourg-firma-edv-fur-sie-v-germany-article-8-companies-and-the-right-to-reputation-hugh-tomlinson-qq/>>.

<sup>247</sup> Weir (n 161) 240; Howarth (n 10) 874.

<sup>248</sup> See eg Joint Committee on Human Rights, *Legislative Scrutiny: Defamation Bill* (n 229) para 55.

<sup>249</sup> *Lindon* (n 243).

Companies have no meaningful claim to ‘dignity’,<sup>250</sup> which the Court itself recognized in the Art 10 case *Uj v Hungary*:

‘... there is a difference between the commercial reputational interests of a company and the reputation of an individual concerning his or her social status. Whereas the latter might have repercussions on one’s dignity, ... interests of commercial reputation are devoid of that moral dimension.’<sup>251</sup>

As such, there is no good theoretical reason for the Court to extend the protection of reputation under Art 8 to corporate applicants.<sup>252</sup> This is particularly significant in relation to the status of corporate claimants in domestic defamation law; although these claimants do share some reputational interests with individual claimants, it is precisely the interests that companies *do not* share which elevate individual reputation to the status of a Convention right under Art 8.<sup>253</sup> Given the lack of clarity in the Court’s case law on the Convention status of corporate interests in reputation,<sup>254</sup> and the confusion on this issue that was evident in the debate on corporate defamation reform in 2013,<sup>255</sup> the Court should take its earliest opportunity to unambiguously declare that companies do not have a right to reputation under the ECHR.

## **D. Public interest arguments for protecting corporate reputation**

The justifications for protecting reputation discussed above focus on its value *to the claimant*. But reputation can also be seen as having some value to parties other than the claimant, including to the public at large. It has been argued that, rather than conceptualizing reputation exclusively in terms of its value to individual claimants, ‘a more complete theory of reputation would take into account ... the interests of communities in forming and using the reputations of others, whether individual or

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<sup>250</sup> Post (n 7) 740; Herzfeld (n 11) 140; Langvardt (n 11) 518.

<sup>251</sup> *Uj v Hungary* App no 23954/10 (ECtHR, 19 July 2011) para 22. See also *MTE* (n 238) para 84; *Kharlamov v Russia* [2015] ECHR 860, para 29.

<sup>252</sup> Acheson, ‘Corporate Reputation under the ECHR’ (n 129) 59-68.

<sup>253</sup> As such, corporate reputation is relevant to the Convention only under Art 10(2), as a potential justification for restricting defendants’ freedom of speech: Ch2.A., text to notes 2-18.

<sup>254</sup> See text to notes 129-132 (A1P1); 238-239 (Art 8).

<sup>255</sup> Joint Committee on the Draft Defamation Bill, *Report* (2010-12, HL 203, HC 930-I) paras 112-14 (‘Joint Committee Report’).

corporate.’<sup>256</sup> The classic judicial exposition of the public interest in individual reputation was offered by Lord Nicholls in *Reynolds v Times Newspapers Ltd*:<sup>257</sup>

‘Reputation ... forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or vote for. ... [I]t should not be supposed that the protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. ... In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad.’<sup>258</sup>

Decisions about ‘whom to employ or work for,’ or ‘whom to do business with’, are no less significant when the choice is between companies rather than individuals. In this context, too, it is important ‘to be able to identify the good as well as the bad.’ It might therefore be argued that corporate reputation, and its protection in defamation law, is ‘conducive to the public good.’

It should be emphasized that, on its own, an audience or public interest in a company’s ability to protect its reputation cannot justify the company’s right to sue in defamation. That requires the company itself to have relevant interests in its reputation, otherwise there is no injury to be redressed through a defamation claim. The interests of third parties in corporate reputation can therefore only add weight to a pre-existing justification for the corporate right to sue. The brief discussion in the remainder of this section argues that, even used in this more limited way, most of the arguments purporting to identify a public interest in protecting corporate reputation are not particularly convincing.

One sense in which it has been claimed that there may be a public interest in protecting corporate reputation is that the losses caused by defamatory allegations against a company can have knock-on effects on other groups or on society as a whole. The most prominent example of an argument along these lines was set out

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<sup>256</sup> Heymann (n 45) 1376.

<sup>257</sup> eg Alastair Mullis and Andrew Scott, ‘Something Rotten in the State of English Libel Law? A Rejoinder to the Clamour for Reform of Defamation’ (2009) 14(6) *Communications Law* 173, 174; Howarth (n 10) 847.

<sup>258</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL) 201.



by the European Court of Human Rights in *Steel v UK*.<sup>259</sup> Holding that the claimant's status as a multinational company should not necessarily deprive it of the ability to protect its reputation against defamatory statements, the Court stated that:

‘... in addition to the public interest in open debate about business practices, there is a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good.’<sup>260</sup>

The Court's argument has been echoed in the academic literature. For Mullis and Scott, the proposal<sup>261</sup> to allow corporations to sue only when they can demonstrate financial loss ‘seriously underestimates the value to any economy of the corporate sector’.<sup>262</sup> Coe suggests that companies' financial performance, in which corporate reputation plays a vital role, ‘directly impacts upon the condition of the wider economy, the socio-economic mobilisation of communities, the environment, education and sustainability.’<sup>263</sup>

But, even presuming that the reduced financial performance of a company that has suffered reputational harm would not be counter-balanced by an increase in the performance of its competitors, the implication that the strength of the corporate sector and the ‘wider economic good’ might be significantly affected by a restriction on companies' right to sue in defamation seems far-fetched.<sup>264</sup> Large companies in the United States have faced significant barriers to successfully suing in defamation since the 1960s;<sup>265</sup> that does not seem to have had any effect on the performance of US companies, or the US economy overall, in that period.

A related, but slightly narrower, argument focuses on the effects that injuries to corporate reputation can have on specific groups of individuals, rather than on the

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<sup>259</sup> *Steel and Morris v UK* [2005] ECHR 103. The ECtHR's decision in this case marked the culmination of the *McLibel* litigation, which I will discuss at Ch2.C.iv., text to notes 266-274.

<sup>260</sup> *Steel* (n 259) para 94. This passage of the Court's judgment is discussed further at Ch2.B.i., text to notes 20-26.

<sup>261</sup> In Lord Lester's Private Member's Bill: Defamation HL Bill (2010-12) 3.

<sup>262</sup> Alastair Mullis and Andrew Scott, ‘Lord Lester's Defamation Bill 2010 – A Distorted View of the Public Interest?’ (2011) 16(1) Communications Law 6, 14.

<sup>263</sup> Coe, ‘Brave New World or Road to Ruin?’ (n 185) 119.

<sup>264</sup> This implication is made explicit in Coe, ‘Need to Talk’ (n 105) 333.

<sup>265</sup> Described at Ch4.A., text to notes 7-16, 24-26, and 46-47.

public more broadly. The two particular groups that were identified by the ECtHR in *Steel* – shareholders and employees – have also been mentioned in academic literature. For example, Mullis and Scott note that ‘many thousands of people may depend [on a company] for their jobs’.<sup>266</sup> The suggestion here is that, without recourse to defamation law to recover losses caused by a libel, companies may be forced to cut employment costs by making employees redundant; those employees are unlikely to be able to protect their interests by suing in their own names, because they will not themselves have been defamed.<sup>267</sup> To the extent that this is a plausible possibility, it is unfortunate. However, the same consequences might be felt by, for example, the employees of a publishing company held strictly liable for another company’s losses;<sup>268</sup> in either case, the derivative interests of employees do not seem to add much to the central issue, which is whether the claimant company’s financial interests in its reputation ought to take precedence over the defendant’s freedom of speech.

A company’s shareholders are also sometimes claimed to be at risk from the knock-on effects of defamatory statements about the company.<sup>269</sup> A libel may have a significant impact on the share price of a company,<sup>270</sup> resulting in a depreciation in the value of each investor’s shareholding, which shareholders are unable to recover through their own claims.<sup>271</sup> The share price of a company does not only impact on its shareholders: in his evidence to the House of Commons Culture, Media and Sport Select Committee during its 2010 investigation into press standards, privacy, and libel, Jack Straw MP noted that ‘bodies corporate do have reputations and on their reputations depend the livelihoods of, in large corporations, thousands of people and their share price, in which your pension fund or mine might be invested.’<sup>272</sup> The proliferation of institutional investors means that many people’s finances rely to some extent on the continued performance of a small number of

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<sup>266</sup> Mullis and Scott, ‘Lord Lester’s Defamation Bill’ (n 262) 14.

<sup>267</sup> Joint Committee Report (n 255) para 108.

<sup>268</sup> See eg Ch4.B.iii., text to notes 164-170.

<sup>269</sup> Joint Committee Report (n 255) para 108.

<sup>270</sup> On the difficulty of using a fall in share price as evidence of financial loss to the company itself, see Ch3.B.iii., text to notes 238-256.

<sup>271</sup> *Johnson v Gore Wood & Co* [2002] 2 AC 1 (HL) 61-62.

<sup>272</sup> Culture, Media and Sport Committee, *Press Standards, Privacy and Libel: Oral and Written Evidence* (2009-10, HC 362-II) Ev 231, Q1011.

large publicly traded companies. The implication of Straw's comment is that protecting corporate reputation through defamation law can go some way to safeguarding this performance.<sup>273</sup> But, given that fund managers spread risk across a portfolio of investments, the implication that changes to corporate defamation law might meaningfully affect the security of pension investments seems untenable. More generally, shareholders assume a risk of loss when they invest in a company's shares; the purpose of defamation law is not to minimize that risk, or at least not to do so at any cost to the interests of parties more directly affected by defamation litigation.

The significant financial value of reputation may give rise to another kind of public interest in offering companies some legal protection against baseless allegations, if it produces an incentive for companies to compete with one another in ways that benefit the public. A company can gain a reputational advantage with consumers, and the financial rewards that follow, either by enhancing its own reputation or by devaluing the reputation of its competitors. Defamation law makes the second of those options riskier and less likely to be effective, and thereby 'serves the social function of ensuring robust economic markets through competition based on price and quality rather than on denigration of [another] trader's conduct'.<sup>274</sup> It allows firms to invest in their reputations 'without fear that [they] will be penalized by negative misinformation',<sup>275</sup> whether from competitors or other parties. But to the extent that there is a public interest in incentivizing genuine competition over denigration of competitors, it seems likely that it can be secured through the law of malicious falsehood, and therefore that there is no real need to also use defamation law for the same purpose.<sup>276</sup> The cause of action in malicious falsehood as a potential alternative to defamation for corporate claimants will be discussed in more detail in Chapter 5.<sup>277</sup>

Another way in which a company might seek to gain a reputational advantage over its competitors is by engaging in socially beneficial activities not directly related to

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<sup>273</sup> See also Ministry of Justice, *Consultation* (n 228) para 137.

<sup>274</sup> Clayton P Gillette, 'Reputation and Intermediaries in Electronic Commerce' (2002) 62 *Louisiana Law Review* 1165, 1194-95.

<sup>275</sup> *Ibid*, 1194.

<sup>276</sup> See further Ch2.B.iii., text to notes 140-152.

<sup>277</sup> Ch5.B., text to notes 71-97.

its business.<sup>278</sup> Corporate reputation, according to this view, is an important mechanism through which consumers and other stakeholders are able to regulate the social behaviour of companies, and to incentivize them to engage in activities which benefit the public.<sup>279</sup> It might be argued that, if a company is unable to protect the reputation it would gain by acting altruistically, both the incentive of a good reputation and the disincentive of a bad reputation are weakened. A company's investment in improving its reputation becomes more risky when it will have no effective response if a libel threatens the return on that investment; and the financial disadvantage of a bad reputation may be diluted when a company's competitors are vulnerable to unwarranted reputational harm.<sup>280</sup>

But the converse is also true: too much legal protection for corporate reputation reduces both the risk of socially harmful behaviour and the comparative advantage that can be gained by investing in corporate social responsibility. For example, levels of corporate charitable giving correlate positively with the degree of public scrutiny experienced by a particular company.<sup>281</sup> Coverage in the media has been found to be the most effective form of scrutiny for increasing corporate social performance.<sup>282</sup> Without the 'important oversight mechanism' provided by 'consumer supervision of corporate activity',<sup>283</sup> the reputational gains provided by altruistic behaviour would not be valuable. If corporate defamation laws have a chilling effect on public discourse about how companies behave, then it 'may erode the possibility that consumers may supervise and control corporate activity through

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<sup>278</sup> Arthur Gautier and Anne-Claire Pache, 'Research on Corporate Philanthropy: A Review and Assessment' (2015) 126 *Journal of Business Ethics* 343, 349; Rikki Abzug and Natalie J Webb, 'Rational and Extra-Rational Motivations for Corporate Giving: Complementing Economic Theory with Organization Science' (1997) 41 *New York Law School Law Review* 1035, 1042.

<sup>279</sup> Brammer and Pavelin (n 80).

<sup>280</sup> A similar argument, in the context of the reputations of public figures more generally, is explored in slightly more detail in David J Acheson and Ansgar Wohlschlegel, 'The Economics of Weaponized Defamation Lawsuits' (2018) 47(2) *Southwestern Law Review* 335, 380-82. See also Michael Passaportis, 'A Law and Norms Critique of the Constitutional Law of Defamation' (2004) 90 *Virginia Law Review* 1985.

<sup>281</sup> Ailian Gan, 'The Impact of Public Scrutiny on Corporate Philanthropy' (2006) 69 *Journal of Business Ethics* 217.

<sup>282</sup> *Ibid*, 229. Because it is natural for larger firms to encounter more public scrutiny, and also to have more resources available to spend on socially beneficial behaviour, the relative size of firms was corrected for in this study (*ibid*, 223-24).

<sup>283</sup> Alberto R Salazar V, 'Consumer Counter-Advertising Law and Corporate Social Responsibility' (2010) 58 *Buffalo Law Review* 977, 978.

the exercise of their freedom of expression'.<sup>284</sup> Companies often have substantial opportunities to influence their reputations,<sup>285</sup> and their incentive in doing so will be to enhance their *value*, not their *accuracy*.<sup>286</sup> The public interest, in contrast, is in companies having *accurate* reputations, not necessarily *good* reputations.<sup>287</sup> It is possible that providing companies with strong legal mechanisms with which to protect their reputations, such as the right to sue their critics in defamation, in fact *harms* this public interest by ceding too much control over companies' reputations to companies themselves. Some degree of protection for speech about corporate activity may therefore have a beneficial effect on corporate social performance. To adapt the words of Lord Nicholls in *Reynolds*, for corporate reputation to incentivize companies to do good, the public 'needs to be able to identify the *bad* as well as the *good*.'

## Conclusion

The material discussed in this chapter shows that companies place great value on cultivating and maintaining a positive reputation with their stakeholders, and that there are good financial reasons for them to do so. A positive reputation can offer a company enormous benefits. Conversely, an injury to a company's reputation caused by a defamatory allegation could have significant negative consequences on its financial performance. The fact that corporate reputation can be of financial value does not mean that it should be characterized as a form of property; but, historically, the protection of reputation in English defamation law *has* been justified partly on the basis of its economic value. This rationale for protecting reputation is equally applicable whether the claimant is an individual or a corporate entity. In some cases, albeit a minority, companies may also have reputational interests that relate to their non-financial objects, and to some extent the courts have recognized that companies are entitled to protect these broader reputational interests by suing in defamation.

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<sup>284</sup> *Ibid*, 977.

<sup>285</sup> See further Ch5.B., text to notes 54-63.

<sup>286</sup> Heymann (n 45) 1362. See also Bromley (n 59) 162.

<sup>287</sup> Heymann (n 45) 1362.

But there are a number of justifications for protecting the reputations of *individual* defamation claimants that are by nature inapplicable to *corporate* claimants. This means that the interests at stake in companies' defamation claims are narrower and less compelling than those at stake in cases involving individual claimants. Importantly, while individual claimants' reputational interests will in many cases engage their privacy rights under Art 8 ECHR, companies do not have a Convention right to reputation, whether under Art 8, or under the A1P1 right to property. It may therefore be appropriate to offer less extensive protection against defamatory allegations to corporate, as compared to individual, reputation. In the next chapter, I discuss the competing interests against which the claimant's reputation must be balanced in a corporate defamation case: the defendant's – and the public's – interests in freedom of speech.

# CHAPTER TWO:

## SPEECH ABOUT COMPANIES

### Introduction

The need to find an appropriate balance between claimants' interests in reputation and defendants' freedom of speech arises both in the context of individual defamation cases, and in designing the law as a whole to ensure that its broader effects are not disproportionately unfavourable to one or the other of those interests.<sup>1</sup> In Chapter 1, I argued that, in the overall balance that the law strikes between speech and reputation, corporate reputation should be given less weight than individual reputation. In this chapter, I will argue that the interest in speech should be given greater weight when it comes into conflict with corporate, as compared to individual, interests in reputation. These two arguments reinforce one another, and suggest that defamation law should be more protective of speech, and less protective of reputation, when the claimant is a corporation than when the claimant is an individual.

Part A builds on the argument presented in Chapter 1 that companies do not have a right to reputation either under Article 8 of the European Convention on Human Rights, or under Article 1 of Protocol 1 to the Convention. It explains that, in contrast, defendants in corporate defamation cases *do* have a Convention right at stake: the Article 10 right to freedom of expression. This is significant in the context of domestic defamation law because defendants' Convention rights to freedom of speech are presumed to have priority over corporate claimants' non-Convention interests in reputation, and a convincing argument is therefore required to justify interfering with the former to protect the latter.

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<sup>1</sup> Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press 1982) 135.

In Part B, I argue that it should be presumed that the statements at issue in corporate defamation cases are on matters of public interest. The limited amount of English corporate defamation cases in which public interest defences have been raised reveal that the courts almost always recognize this public interest; and their justifications for doing so are amply supported by arguments put forward in the relevant academic literature. The few cases in which it could be argued that there is little public interest value in critical statements about companies fall into a small number of narrow categories, none of which is important enough to affect the balance between reputation and speech that ought to be struck in corporate defamation law overall.

My argument in Part B is *not* that the public interest in speech about companies is necessarily more important than the public interest that might exist in the speech at issue in other cases (for example, in defamatory statements relating to the official conduct of an elected politician). It is simply that it can and should be presumed that there is *some* significant public interest in the speech at issue in *all* defamation claims brought by companies. This means that it may be appropriate to protect the public interest in criticism of corporations with reforms that would apply in all cases brought by corporate claimants, rather than reforms that would only protect defendants' speech when it is identified as being on a matter of public interest on the particular facts of an individual case.

Then, in Part C, I argue that corporate defamation law has a range of pernicious effects on this public interest speech, both in specific cases and more broadly. The risk of being sued for defamation deters the publication of important information about companies by a range of different speakers; and the cost and complexity of litigation means that those brave enough (or foolish enough) to criticize powerful corporations can suffer consequences that are entirely disproportionate to any harm their statements might cause. The chilling effect of corporate defamation law was one of the most important factors in the debates leading to the Defamation Act 2013. Given the often significant public interest in the subject matter of the speech that is chilled by companies' threats to sue, there was a compelling case that reform to the law applicable to corporate claimants in particular was necessary.



## **A. Protection of corporate reputation as a permissible reason to restrict speech under Art 10(2) ECHR**

I argued in Chapter 1 that, while companies do have some interests in their reputations which might be used to justify a legal right to protection against defamatory falsehoods, those interests do not fall within the scope of either Article 8 or Article 1, Protocol 1 of the European Convention on Human Rights ('ECHR').<sup>2</sup> In other words, neither Article guarantees companies a substantive right to reputation which the United Kingdom would, as a signatory to the Convention, be under an obligation to protect in domestic defamation law.<sup>3</sup> This means that, in terms of the Convention, the reputational interests in a company's defamation claim are only relevant to Art 10(2),<sup>4</sup> which sets out the permissible justifications a member state can offer for restricting the right to freedom of expression guaranteed by Art 10(1), including 'for the protection of the reputation ... of others'. The European Court of Human Rights ('ECtHR') has unambiguously held that the protection of *corporate* as well as *individual* reputation can be a legitimate reason to restrict speech. In *Steel v UK*,<sup>5</sup> the applicants complained that the English courts' handling of a defamation suit brought against them by the McDonald's corporation had violated their Art 10 rights.<sup>6</sup> The Court found that 'the English law of defamation, and its application in this particular case, pursued the legitimate aim of "the protection of the reputation or rights of others"'.<sup>7</sup>

The fact that the interests of corporate defamation claimants do not engage their Convention rights has significant implications for domestic law. To be Convention-

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<sup>2</sup> Ch1.C.i., text to notes 230-255 (Art 8); Ch1.B.ii., text to notes 129-151 (A1P1). These arguments are developed in more depth, and presented together, in David J Acheson, 'Corporate Reputation under the European Convention on Human Rights' (2018) 10(1) *Journal of Media Law* 49.

<sup>3</sup> In Chapter 4, I will briefly explain why companies are also unable to claim a Convention right to reputation by relying on the Art 6 right to a fair trial (Ch4.C.iv., text to notes 331-343). The argument that removing the corporate right to sue in defamation 'would be a breach of Article 6 read with Article 14' (which prohibits discrimination in the protection of Convention rights) was made to the Joint Committee on the Draft Defamation Bill by Lord Lester: Joint Committee on the Draft Defamation Bill, *Oral and Associated Written Evidence Volume II* (2010-12, HL 203, HC 930-II) 19 ('Joint Committee Evidence vol II').

<sup>4</sup> Alastair Mullis and Andrew Scott, 'The Swing of the Pendulum: Reputation, Expression and the Re-Centring of English Libel Law' (2012) 63(1) *Northern Ireland Legal Quarterly* 27, 46.

<sup>5</sup> *Steel and Morris v UK* [2005] ECHR 103.

<sup>6</sup> *McDonald's Corp v Steel (No 1)* [1995] 3 All ER 615. This case is discussed in more detail below, at text to notes 266-274.

<sup>7</sup> *Steel* (n 5) para 86.

compliant, a restriction on expression imposed for a purpose other than the protection of another Convention right must be ‘necessary in a democratic society’,<sup>8</sup> which entails that it addresses a ‘pressing social need’ and is ‘proportionate to the legitimate aim pursued’.<sup>9</sup> The necessity of the restriction ‘must be convincingly established’ by the state if it is challenged in Strasbourg;<sup>10</sup> and the Court’s analysis of its permissibility will start from the presumption that defendants’ Art 10 rights have priority.<sup>11</sup>

This contrasts with the approach taken to assessing the permissibility of a restriction on speech intended to protect another party’s substantive Convention rights,<sup>12</sup> as described by Lord Steyn in *Re S (a child)*.<sup>13</sup> In this context, the court must engage in a balancing exercise, weighing the relative importance of the competing rights in the circumstances of the case, from an initial position of presumptive parity between those rights.<sup>14</sup> As explained in Chapter 1, the reputational interests of individual defamation claimants will often engage the Convention right to privacy under Art 8. Companies’ claims will not; therefore, where defendants’ speech interests are otherwise of equal importance, they will be entitled to *greater* weight relative to corporate, as opposed to individual, claimants’ interests in reputation.

The fact that corporate reputation is not protected under the Convention also means that a company’s ‘right’ to reputation cannot give rise to any Convention duties. As such, protecting the interest in domestic defamation law is *permissible* but not *required*.<sup>15</sup> This can be seen in the ECtHR’s judgment in *Steel*. Holding that a member state ‘enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation’,<sup>16</sup> the Court said: ‘If ... a State decides to provide such a remedy to a corporate body’, then defendants’ Art 10 rights

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<sup>8</sup> ECHR, Art 10(2).

<sup>9</sup> *Sunday Times v UK (No 2)* [1991] ECHR 50, para 50.

<sup>10</sup> *Ibid.*

<sup>11</sup> Jan Oster, ‘The Criticism of Trading Corporations and their Right to Sue for Defamation’ (2011) 2 *Journal of European Tort Law* 255, 263; Mullis and Scott, ‘Swing of the Pendulum’ (n 4) 34.

<sup>12</sup> See *Lindon v France* [2007] ECHR 836, concurring opinion of Judge Loucaides, p 40.

<sup>13</sup> [2004] UKHL 47.

<sup>14</sup> *Ibid.*, [17].

<sup>15</sup> David Howarth, ‘Libel: Its Purpose and Reform’ (2011) 74(6) *Modern Law Review* 845, 874; Oster (n 11) 264.

<sup>16</sup> *Steel* (n 5) para 94.

require ‘a measure of procedural fairness’ in the operation of that remedy.<sup>17</sup> Based on the word ‘if’ in this passage, Lord McNally suggested to the Joint Committee on the Draft Defamation Bill (‘Joint Committee’) that the Court could be interpreted as having ruled that the state’s margin of appreciation ‘extends as far as deciding to offer no remedy’.<sup>18</sup> This interpretation must be correct. Article 1 of the Convention imposes an obligation on member states to ‘secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention’; there is no obligation to protect interests, such as corporate reputation, that do not fall within the scope of a Convention right.

## **B. The public interest in speech about companies**

Unlike the interest in corporate reputation, which I argued in Chapter 1 is typically of value only to the claimant company itself,<sup>19</sup> the individual interests of defendants in corporate defamation cases are often supplemented by a public interest in their speech. In this part, I will first explain why the existence of a public interest in speech is legally significant. Then, in section ii., I will argue that the speech at issue in corporate defamation claims is almost always on a matter of public interest. In section iii, I will argue that the limited exceptions to this general public interest in defamatory speech about corporations should not prevent us accepting that, as a general principle, such speech warrants the enhanced protection offered to public interest speech in defamation law.

### ***i. Why a public interest in speech is significant under Art 10***

As discussed in Chapter 1,<sup>20</sup> the following passage of the ECtHR’s decision in *Steel* is sometimes invoked in support of laws allowing companies to protect their reputations against false allegations:

‘It is true that large public companies inevitably and knowingly lay themselves open to close scrutiny of their acts and ... the limits of acceptable criticism are wider in the case of such companies. However, in addition to the public interest in open debate about business practices, there

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<sup>17</sup> Ibid, para 95 (emphasis added).

<sup>18</sup> Joint Committee Evidence vol II (n 3) 385.

<sup>19</sup> Ch1.D., text to notes 256-287.

<sup>20</sup> Ch1.D., text to notes 259-268.

is a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good.’<sup>21</sup>

However, when the context of these observations is taken into account, it is apparent that they were not intended as an argument in support of offering strong protection to corporate reputation in domestic defamation law. The Court was assessing whether the interference with the applicants’ freedom of expression resulting from a defamation claim brought against them by corporate claimants was permissible under Art 10(2). It recognized the particular importance of ‘promoting the free circulation of information and ideas about the activities of powerful commercial entities’.<sup>22</sup> The Court’s claim that ‘large public companies inevitably and knowingly lay themselves open to close scrutiny’ draws directly on the language it had used in its seminal *Lingens v Austria* decision to explain why Art 10 requires member states to ensure that critical statements about politicians are given greater protection from defamation claims relative to statements about private individuals.<sup>23</sup> By declaring that ‘the limits of acceptable criticism are wider’ where that criticism is of large companies (again adopting language directly from *Lingens*) the Court in *Steel* made clear that the public interest<sup>24</sup> similarly mandates enhanced Art 10 protection for critical statements about corporations.<sup>25</sup> It is not plausible to argue that the Court was purporting to identify ‘an equally strong public interest in allowing companies to protect their commercial assets.’<sup>26</sup>

To the contrary, the existence of a public interest in information about a particular subject is typically seen as a reason to give statements on that subject *more*

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<sup>21</sup> *Steel* (n 5) para 94 (citations omitted).

<sup>22</sup> *Steel* (n 5) para 89.

<sup>23</sup> *Lingens v Austria* [1986] ECHR 7, para 42.

<sup>24</sup> Factors other than the public interest may also influence the Court in the direction of stronger protection for speech in this context, particularly the idea that (some) corporations ‘knowingly lay themselves open to close scrutiny’ or, in other words, that they consent to or assume some risk of heightened public criticism. While this argument often goes hand in hand with arguments from the public interest in speech, strictly speaking it is not itself a ‘public interest’ argument.

<sup>25</sup> cf *Predota v Austria* App no 28962/95 (ECtHR, 18 January 2000) p12 (finding that criticisms of the applicant’s employer, published in breach of his contract of employment, ‘did not contribute to a discussion on issues of interest to the general public but harshly and publicly criticised the services and performance of [the applicant’s] employer in terms which were likely to harm the latter’s reputation in the eyes of its customers.’).

<sup>26</sup> Peter Coe, ‘The Defamation Act 2013: We Need to Talk about Corporate Reputation’ (2015) 4 *Journal of Business Law* 313, 323.

protection from civil claims such as defamation.<sup>27</sup> Speech on matters of public interest will be given greater weight when being balanced against conflicting interests such as reputation; and the greater the public interest, the more the protection of speech will be enhanced.<sup>28</sup> This is in fact the effect that a public interest in the subject matter of speech has on its status under the Convention. When assessing the permissibility of a restriction on expression under Art 10(2), the ECtHR case law dictates that ‘regard *must* be had to the public-interest aspect of the case.’<sup>29</sup> If defendants’ statements are on matters of public interest, then any justification for restricting or penalizing their publication must be subject to the ‘most careful scrutiny’;<sup>30</sup> the Court has declared that Art 10(2) provides ‘little scope ... for restrictions on debate on questions of public interest’.<sup>31</sup>

This ECtHR case law influences the protection of speech in English defamation law. As a result of the Human Rights Act 1998, which requires English courts to act compatibly with litigants’ Convention rights,<sup>32</sup> and in doing so to ‘take into account’ relevant ECtHR decisions interpreting those rights,<sup>33</sup> domestic defamation law ‘is susceptible of change under the direct or indirect impact of the Convention.’<sup>34</sup> For example, in *Culnane v Morris*,<sup>35</sup> Eady J declined to follow a Court of Appeal authority that would otherwise have been binding,<sup>36</sup> because to do so would have been inconsistent with the relevant Art 10 jurisprudence.<sup>37</sup> The importance of the public interest in speech is also reflected in statutory provisions in English law. Most obviously, this is illustrated by the defence for ‘Publication

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<sup>27</sup> Dario Milo, *Defamation and Freedom of Speech* (OUP 2010) 154.

<sup>28</sup> *Ibid*, 94-95.

<sup>29</sup> *Bladet Tromsø v Norway* [1999] ECHR 29, para 62 (emphasis added).

<sup>30</sup> *Ibid*, para 64; *Independent News and Media v Ireland* (2006) 42 EHRR 46, para 114.

<sup>31</sup> *Heinisch v Germany* [2011] ECHR 1175, para 66.

<sup>32</sup> Human Rights Act 1998, s 6.

<sup>33</sup> *Ibid*, s 2(2).

<sup>34</sup> *Berezovsky v Forbes Inc (no 2)* [2001] EWCA Civ 1251, [10] (Sedley LJ). Additionally, s 12(4) of the HRA requires courts considering whether to restrict journalistic expression to take into account ‘the extent to which ... it is, or would be, in the public interest for the material to be published.’ Gavin Phillipson notes that this provision ‘suggests parliamentary acceptance of the notion that, in assessing the legal weight to be given to journalistic speech in particular, its contribution to the public interest is key.’ (‘Press Freedom, the Public Interest, and Privacy’ in Andrew T Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press 2016) 139).

<sup>35</sup> [2005] EWHC 2438 (QB).

<sup>36</sup> *Plummer v Charman* [1962] 1 WLR 1469.

<sup>37</sup> *Culnane* (n 35) [27]. See also *O’Shea v MGN Ltd* [2001] EWHC 425 (QB) [47].

on [a] matter of public interest’ in s 4 of the Defamation Act 2013, which will be discussed below.<sup>38</sup>

The ‘enhanced protection’ of public interest speech referred to above is not meant to specify any particular mechanism or level of protection. There are a number of ways in which the law could give greater protection to defendants’ speech interests: for example, a higher standard of fault could be required to establish defendants’ liability;<sup>39</sup> the burden of proving falsity could be shifted to claimants;<sup>40</sup> or trial courts’ decisions could be subjected to a more stringent standard of appellate review.<sup>41</sup> In particular, the presumption of a public interest in speech about corporations that I advocate in this Chapter does not necessarily justify granting defendants complete immunity from liability for publishing false statements about companies. But laws that restrict defendants’ freedom of speech, such as corporate defamation, should make more room for speech on matters of public interest in one way or another.

## ***ii. Protection of public interest speech in English law***

The emphasis given to the particular importance of ‘public interest’ speech in the case law of both the ECtHR and the English courts, as described above, means that ‘the approach taken to the definition of “public interest” is pivotal to determining the weight of the [defendant’s] ... free speech claim’<sup>42</sup> under Art 10. This section discusses how the courts identify public interest speech, especially in the context of corporate defamation claims. It explores the principal mechanisms by which public interest speech is protected in English defamation law: the defence created in *Reynolds v Times Newspapers Ltd*,<sup>43</sup> and the replacement for that defence in s 4 of

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<sup>38</sup> At text to notes 47-49.

<sup>39</sup> This is the mechanism most typically used in English law (see text to notes 43-49 below); it is also used in the US (Ch4.A., at text to notes 8-12 and 46-47).

<sup>40</sup> As in US defamation law: *New York Times v Sullivan* 376 US 254 (1964).

<sup>41</sup> As, again, in US law: see Susan M Gilles, ‘Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation’ (1998) 58 Ohio State Law Journal 1753. The European Court of Human Rights sometimes adopts a similar approach, by widening or narrowing the ‘margin of appreciation’ within which it allows member states to interpret and protect the right to freedom of expression depending on the kind of speech at issue: see *TV Vest AS v Norway* App no 21132/05 (ECtHR, 11 December 2008) para 64.

<sup>42</sup> Paul Wragg, ‘A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley and Terry*’ (2010) 2(2) Journal of Media Law 295, 298.

<sup>43</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL).

the Defamation Act 2013. I argue that, although there is no general principle in English law recognizing the public interest in defendants' speech in corporate defamation cases, in practice the courts do recognize that public interest in almost all such cases; and, further, that their reasons for doing so would support a strong presumption that the statements complained of in corporate defamation cases will be on matters of public interest.

The House of Lords decision in *Reynolds* was significant because it created, for the first time in English defamation law, what could reasonably be described as a general public interest defence.<sup>44</sup> The new defence reflected the Lords' recognition that the common law strict liability standard imposed too onerous a burden on speech about important subjects, and that it was necessary to relax that standard in some circumstances 'to prevent defamation laws from chilling the dissemination of valuable knowledge.'<sup>45</sup> The relaxed fault standard chosen was that of the 'responsible' publisher. Lord Nicholls set out ten indicative factors for courts to consider when determining whether defendants had acted responsibly, including 'The nature of the information, and the extent to which the subject matter is a matter of public concern.'<sup>46</sup>

In practice, the *Reynolds* defence was not always as useful to publishers as the Lords may have hoped,<sup>47</sup> and concerns about its effectiveness led Parliament to replace it

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<sup>44</sup> *Flood v Times Newspapers Ltd* [2012] UKSC 11, [27] (Lord Phillips). The *Reynolds* defence was developed from the pre-existing 'common law qualified privilege', which exists in circumstances where a defendant is under a 'legal, social, or moral' duty to publish a defamatory statement, and the recipient has 'a corresponding interest or duty to receive it' (*Adam v Ward* [1917] AC 309 (HL) 334 (Lord Atkinson)).

<sup>45</sup> Jacob Rowbottom, 'In the Shadow of the Big Media: Freedom of Expression, Participation and the Production of Knowledge Online' (2014) Public Law 491, 498. The chilling effect is discussed in Ch2.C. below, at text to notes 154-335.

<sup>46</sup> *Reynolds* (n 43) 210. The full list of factors is as follows: '1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing.'

<sup>47</sup> eg Andrew T Kenyon, *Defamation: Comparative Law and Practice* (Routledge 2006) 226; Andrew Scott, 'The Same River Twice? *Jameel v Wall Street Journal Europe SPRL*' (2007) 12(2)

with a statutory defence of ‘Publication on [a] matter of public interest’ in the Defamation Act 2013.<sup>48</sup> The revised defence, in s 4 of the Act, is as follows:

- (1) It is a defence to an action for defamation for the defendant to show that –
  - (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
  - (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

The first element of the s 4 defence requires the court to assess the public interest in the subject of defamatory statements ‘hav[ing] regard to all the circumstances of the case.’<sup>49</sup> This is comparable to the pre-existing *Reynolds* defence, which also left it to courts to determine as a matter of fact whether the speech at issue in a given case qualified for protection as ‘public interest’ speech. Looking at how the courts have applied these defences in cases involving corporate claimants may give a sense of the extent to which English defamation law recognizes a public interest in speech about companies.

The *Reynolds* defence was pleaded in very few defamation cases involving corporate claimants, and the s 4 defence has been pleaded in none to date. Moreover, courts have generally adopted a broad conception of the ‘public interest’ when applying the defence, regardless of whether the claimant is a corporate or natural person.<sup>50</sup> Nonetheless, it is tempting to see some significance in the fact that there does not appear to have been any case in which a court has rejected an assertion that a defamatory statement about a corporate claimant was on a matter of public interest. Instead, courts typically recognize that there *is* a public interest in critical statements about companies. I argue in the remainder of this section that the courts are right to recognize this public interest in individual cases: the limited case law in this area is supported by convincing arguments found in the relevant academic literature. However, I also argue that the law should go a step further and presume that there will be a public interest in the subject matter of the speech at

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Communications Law 52, 54; David Tan, ‘The *Reynolds* Privilege Revisited’ (2013) 129 Law Quarterly Review 27, 27-28. See further Ch4.A.ii., text to notes 50-82.

<sup>48</sup> Defamation Act 2013, s 4(6). See eg HC Deb, 12 June 2012, vol 546, col 181 (Kenneth Clarke MP).

<sup>49</sup> Defamation Act 2013, s 4(2).

<sup>50</sup> Milo (n 27) 111.



issue in all cases brought by corporate claimants, without requiring examination of the particular circumstances of each case.

### *Corporate power*

The House of Lords decision in *Jameel v Wall Street Journal Europe SPRL* (*'Jameel'*)<sup>51</sup> was discussed a number of times in Chapter 1 because of its significance in relation to the presumption of loss in corporate defamation law.<sup>52</sup> But it is also significant in this context, because it is the only time that the House of Lords has considered the *Reynolds* public interest defence in a case involving a corporate claimant. The Supreme Court has not ruled on any corporate defamation cases since it replaced the House of Lords as England's highest court in 2009.

Baroness Hale's *Jameel* judgment focused on the public interest in speech about companies. She drew heavily on the earlier decision in *Derbyshire County Council v Times Newspapers Ltd*, in which the House of Lords had denied a local government body standing to sue in defamation because of the importance of ensuring the freedom to criticize such bodies' conduct.<sup>53</sup> According to Baroness Hale, there was an analogous public interest in criticizing the conduct of *private* companies:

‘These days, the dividing line between governmental and non-governmental organisations is increasingly difficult to draw. The power wielded by the major multi-national corporations is enormous and growing. The freedom to criticise them may be at least as important in a democratic society as the freedom to criticise the government.’<sup>54</sup>

I will explain when I discuss the *Derbyshire* principle in more detail in Chapter 5 why Baroness Hale's argument for extending its scope to private companies was unconvincing.<sup>55</sup> But her broader point – that the influence of corporations on modern society means that speech scrutinizing their activities should receive strong legal protection – is more convincing. Ailbhe O'Neill, commenting on Baroness Hale's judgment, observed that ‘The concern that corporations are powerful and

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<sup>51</sup> *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44.

<sup>52</sup> Ch1., at text to notes 52 and 173-179.

<sup>53</sup> *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 (HL).

<sup>54</sup> *Jameel* (n 51) [158].

<sup>55</sup> Ch5.C.ii., at text to notes 209-214.

need to be curtailed is a commonplace in popular discourse’ and in academic scholarship.<sup>56</sup> Literature across a range of disciplines identifies a trend towards the corporate sector having a greater influence over modern society.<sup>57</sup> That trend means that it may no longer be appropriate to reserve the strongest legal protections for public interest speech to a narrowly defined category of ‘political speech’ limited to scrutiny of government bodies and elected officials. As Dario Milo puts it, ‘To limit the category of protection to political speech in modern circumstances, where there is no clear delineation between private and public power, is so under-inclusive as to pose a threat to freedom of expression.’<sup>58</sup>

A number of commentators have made similar arguments in favour of enhanced protection for speech about corporations in defamation law, claiming that ‘the power of large companies and their influence in the community is such as to make it desirable that their activities be the subject of open discussion.’<sup>59</sup> Because of the need to scrutinize this power, defamation law should restrict speech on the subject as little as possible: ‘The powerful, public, and political nature of corporations demands that we ensure an increased ability to speak about them.’<sup>60</sup>

This argument from corporate power can only be applied to speech about a small proportion of business entities. As Parkinson points out, ‘The possession of power by companies is principally an attribute of size’;<sup>61</sup> and companies large enough to exercise a degree of power comparable to governments are in a tiny minority. But examining the specific facts of *Jameel*, and the other case law on the *Reynolds* defence in corporate defamation claims, reveals strong reasons to treat speech about

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<sup>56</sup> Ailbhe O’Neill, ‘Corporate Reputation in the House of Lords’ (2007) 28(3) *Company Lawyer* 75, 77

<sup>57</sup> eg John Gerard Ruggie, ‘Multinationals as Global Institution: Power, Authority and Relative Autonomy’ (2017) *Regulation & Governance*, 10.

<sup>58</sup> Dario Milo, ‘The Cabinet Minister, the *Mail & Guardian*, and the Report Card: The Supreme Court of Appeal’s Decision in the *Mthembi-Mahanyele* Case’ (2005) 122 *South African Law Journal* 28, 36.

<sup>59</sup> Fiona Patfield, ‘Defamation, Freedom of Speech and Corporations’ (1993) 3 *Juridical Review* 294, 300. See also Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart 2005) 47, citing Patfield’s argument with approval.

<sup>60</sup> Deven R Desai, ‘Speech, Citizenry, and the Market: A Corporate Public Figure Doctrine’ (2013) 98 *Minnesota Law Review* 455, 459.

<sup>61</sup> J E Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Clarendon Press 1993) 3-4.

a broader range of corporate defamation claimants as contributing to debate on matters of public interest.

### *Corporate misconduct*

The specific publication complained of in *Jameel* was a report stating that Saudi Arabian authorities, ‘at the request of the United States Treasury, [were] monitoring the accounts of certain named Saudi companies [including the claimant company] to trace whether any payments were finding their way to terrorist organisations.’<sup>62</sup> Baroness Hale stated her view plainly that ‘If ever there was a story which met the [public interest] test, it must be this one.’<sup>63</sup> Her colleagues agreed: Lord Bingham noted that ‘The subject matter was of great public importance’;<sup>64</sup> Lord Scott, similarly, described the statements published by the defendant as ‘of very high public interest indeed.’<sup>65</sup> Allegations of serious corporate misconduct or criminality are subjects of significant public interest; and it is well accepted that statements imputing claimants’ involvement with terrorist organizations are amongst the most serious allegations of this kind.<sup>66</sup>

Public discussion of corporate activities, particularly in the media, can play an important role in uncovering misconduct, and also ‘in pressing for investigations of concerns that are raised and publicising the fact that wrongdoing has occurred’.<sup>67</sup> Damian Tambini notes that, in the financial sector, the regulatory bodies responsible for holding companies to appropriate standards ‘cannot regulate every aspect of corporate behaviour. They rely also on the public and the media working to expose wrongdoing and expose matters of public interest.’<sup>68</sup> Where suspected criminal activity or other misconduct is already under investigation by public

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<sup>62</sup> *Jameel* (n 51) [37] (Lord Hoffmann).

<sup>63</sup> *Ibid*, [148].

<sup>64</sup> *Ibid*, [35].

<sup>65</sup> *Ibid*, [139].

<sup>66</sup> eg *Cooke v MGN Ltd* [2014] EWHC 2831 (QB) [43].

<sup>67</sup> David Lewis, ‘Whistleblowing and the Law of Defamation: Does the Law Strike a Fair Balance Between the Rights of Whistleblowers, the Media, and Alleged Wrongdoers?’ (2017) *Industrial Law Journal*, 25.

<sup>68</sup> Damian Tambini, ‘What Are Financial Journalists For?’ (2010) 11(2) *Journalism Studies* 158, 160.

authorities, information about the existence and conduct of that investigation is also likely to be in the public interest.<sup>69</sup>

There is also a public interest in scrutinizing how companies respond to allegations of misconduct. This is illustrated by the defendant's attempt to rely on the *Reynolds* defence in *James Gilbert Ltd v MGN Ltd*,<sup>70</sup> in which a rugby ball manufacturer sued in respect of the last in a series of three articles published in the *Sunday Mirror*. The first article had alleged that the claimant's supply chain included an Indian company that used child labour to produce its balls; the second reported the claimant's public announcement that it would send staff to investigate those allegations. The third article, in respect of which the claim was brought, was published one week after the second, and alleged that, contrary to its public statements, the claimant had not sent anyone to investigate the allegations against its sub-contractor.<sup>71</sup>

In his judgment for the High Court, Eady J considered each of Lord Nicholls' ten factors in turn.<sup>72</sup> In relation to the second, concerning the 'nature of the information, and the extent to which the subject matter was a matter of public concern', Eady J commented as follows:

'... it would indeed be a matter of legitimate public interest if a business conducted within this jurisdiction was obtaining its goods as a result of exploitation of labour, particularly exploitation of child labour, within some foreign jurisdiction. But, of course, whether the claimants had in fact sent someone to investigate ... by a certain date was itself of much less importance than the primary child labour allegations already published, although I accept that it was potentially itself a matter of some public interest.'<sup>73</sup>

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<sup>69</sup> As in *Jameel* (n 51). See also *Seray-Wurie v Charity Commission* [2008] EWHC 870 (QB) (in relation to investigations of charitable organizations).

<sup>70</sup> [2000] EMLR 680.

<sup>71</sup> *Ibid*, 687.

<sup>72</sup> See note 46.

<sup>73</sup> *James Gilbert* (n 70) 700 (emphasis removed).

However, these equivocal comments on the public interest in the subject matter of the statement complained of are at odds with the analysis of the ‘seriousness of the allegations’<sup>74</sup> in the preceding passage of Eady J’s decision:

‘The allegation ... that the claimants have broken their promise would be serious in itself, but against the background of the gravity of the allegations contained in the [first two] articles ... it assumes even more seriousness. It rather suggest that the claimants were being cavalier about the matter of their balls being prepared by child labour and, indeed, being dishonest in relation to their public stance on the matter.’<sup>75</sup>

I would argue that the seriousness of an allegation suggesting that a company was ‘being dishonest in relation to [its] public stance’ on the alleged use of child labour by its suppliers reflects the fact that it is an allegation of substantial public interest. Regardless, it is clear that Eady J was willing to recognize some degree of public interest in the subject matter of the statement complained of, regarding the extent to which the claimant had made good on its public commitment to address allegations of a more serious nature. Ultimately, the *Reynolds* defence failed in *James Gilbert* not because there was insufficient public interest in the allegations in question, but because the defendant failed to take a number of fairly basic steps to verify their accuracy and ensure that they were published responsibly.<sup>76</sup> Eady J was right to recognize that the public interest in statements about companies will exist on a spectrum of seriousness; that is not inconsistent with a presumption that all such statements will implicate some meaningful public interest.

### *Corporate business activities*

The successful use of the *Reynolds* defence in *GKR Karate (UK) Ltd v Yorkshire Post Newspapers Ltd*<sup>77</sup> is also indicative of a broader public interest in defamatory criticism of trading companies’ business practices. In that case, the claimant company was alleged to have been mis-selling karate lessons which did not meet normal quality or safety standards.<sup>78</sup> At the time of the judgment in *GKR*, the effect of the House of Lords’ decision in *Reynolds* was still not entirely settled, and this

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<sup>74</sup> The first factor on Lord Nicholls’ checklist: see note 46.

<sup>75</sup> *James Gilbert* (n 70) 700.

<sup>76</sup> *Ibid*, 701-03.

<sup>77</sup> [2000] EMLR 410.

<sup>78</sup> *Ibid*, 414-15.

is reflected in Sir Oliver Popplewell's evaluation of the case in terms of the reciprocal duty/interest framework that governs qualified privilege at common law.<sup>79</sup> This approach meant that his analysis of the public interest issue was restricted to identifying whether members of the public within the circulation area of the defendant local newspaper had an interest in receiving the statements complained of. To my mind, however, it was not necessary to narrow down the relevant 'public' in this way to support the finding that the publishers did in fact have an interest in receiving the defendant's allegations.<sup>80</sup> He accepted the defendant's claim that the story in question was intended to be 'a warning to the community about [the claimant's] salesmen';<sup>81</sup> and that the journalist responsible for producing that story 'was naturally concerned by the dangers, particularly to children, resulting from this organisation.'<sup>82</sup>

The risk of harm that can be created when a company conducts its business illegally, unethically, or irresponsibly is such that there is a public interest in the ability to raise questions and concerns about actual or potential corporate misconduct. But there may also be a public interest in criticism of corporate conduct that does not rise to the level of criminality or failure to adhere to civil or regulatory obligations. *South Hetton Coal Company Ltd v North-Eastern News Association Ltd*,<sup>83</sup> the primary common law authority for the corporate right to sue,<sup>84</sup> is itself an example of a defamation case involving such a matter. The public interest in the statement complained of, a comment on the condition of housing provided by the claimant company for its workers, was recognized by all three Court of Appeal judges.<sup>85</sup>

In the US, Michael Kent Curtis has argued that the level of protection given to speech scrutinizing a given claimant's conduct should be determined according to the influence that their normal activities could have on the lives of others.<sup>86</sup> On this logic, the fact that the carrying on of businesses has the potential to cause a wide

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<sup>79</sup> Ibid, 416-22. See note 44 on common law qualified privilege.

<sup>80</sup> Ibid, 422.

<sup>81</sup> Ibid, 425.

<sup>82</sup> Ibid, 429.

<sup>83</sup> [1894] 1 QB 133.

<sup>84</sup> Fiona Patfield, 'The Origins of a Company's Right to Sue for Defamation' (1994) 45(3) Northern Ireland Legal Quarterly 233, 241; Mitchell (n 59) 46.

<sup>85</sup> *South Hetton* (n 83) 140 (Lord Esher MR), 143 (Lopes LJ), 144-45 (Kay LJ).

<sup>86</sup> Michael Kent Curtis, 'Monkey Trials: Science, Defamation, and the Suppression of Dissent' (1995) 4 William & Mary Bill of Rights Journal 507, 565-67.

range of harms to the public, such as ‘air pollution from cars or water pollution from industrial activity, ... and defective products that produce broad injury’<sup>87</sup> implies that the entities engaging in those activities should be scrutinized closely. Fred Magaziner argues that ‘If a product is defective, useless, dangerous, or harmful to the environment, dissemination of that fact is valuable to society ... . In some cases it may be of *greater* value to society than information about public officials.’<sup>88</sup> Magaziner’s claim that the public interest in criticisms of corporate products or services extends to those that are ‘*useless*’ as well as those that have the potential to be harmful is, in my view, justified. Corporate businesses (at least in a large majority of cases) sell their products and services to the public by claiming that they offer some benefit, not merely that they are not harmful.<sup>89</sup> If it is important that the public has access to sufficient (and sufficiently accurate) information about the market activities of companies, then contributions that reflect negatively on companies must be protected as well as those that would be beneficial to their interests. This public interest in informing consumers of suspicions that a company’s products or services are defective or sub-standard exists regardless of whether the company is at fault; the potential impact on members of the public is what grounds their interest in receiving such information.<sup>90</sup>

The line between criticism of a business’s products or services and criticism of the business itself is often difficult to draw with precision. Although the two are conceptually separate, ‘The distinction between brand image and corporate image can be blurred, especially if the “brand” is a service or a range of products.’<sup>91</sup> It is well-recognized in English law that statements that refer directly to products or services can, by implication, be defamatory of the company providing those products or services.<sup>92</sup> Typically, the criticism of the claimant’s goods or services

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<sup>87</sup> Ibid, 566.

<sup>88</sup> Fred T Magaziner, ‘Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation’ (1975) 75 Columbia Law Review 963, 991 (citations omitted; emphasis added).

<sup>89</sup> See eg David Mangan, ‘Regulating for Responsibility: Reputation and Social Media’ (2015) 29(1) International Review of Law, Computers & Technology 16, 22-23 (criticizing an Employment Tribunal decision, *Crisp v Apple Retail (UK) Ltd* ET/1500258/11, for insufficiently recognizing the value of critical social media comments about Apple’s workplace and products).

<sup>90</sup> eg *Lion Laboratories Ltd v Evans* [1985] QB 526 (CA) 538.

<sup>91</sup> D B Bromley, *Reputation, Image and Impression Management* (Wiley 1993) 159.

<sup>92</sup> *Linotype Co Ltd v British Empire Typesetting Machine Co Ltd* (1899) 15 TLR 524 (HL).

is said to impute some deficiency or malpractice in the claimant's mode of doing business, an imputation which reflects on the company's reputation more broadly than in relation to the specific product or service criticized.<sup>93</sup> In these cases, there is likely to be a public interest in the statements complained of on the same grounds as described above.

Ian Loveland criticized the decision in *GKR* for extending the scope of the *Reynolds* defence to non-political information about corporate activities, arguing that:

‘... the audience interest in the sale of sub-standard goods and services – except in circumstances which pose an immediate threat to people's health and safety – is not remotely comparable to that in knowing whether politicians are dishonest or corrupt. It may be important, but not sufficiently important to justify the risk that substantial amounts of false information be published.’<sup>94</sup>

Loveland is right that members of the public have an interest in knowing about corporate activities that risk causing them harm. But his reference to ‘circumstances which pose an immediate threat to people's health and safety’ conceives of the public interest too narrowly. Most corporations undertake business activities that involve some interaction with the public – usually the selling of products or services.<sup>95</sup> The manner in which these activities are conducted will by definition have some effect on members of the public. There is clearly a public interest in facilitating open discussion about corporate business activities involving the public.<sup>96</sup>

As Jan Oster puts it, ‘Criticism of companies ... contributes to the marketplace of public perception’ about their reputations.<sup>97</sup> The ability for consumers to ‘express their satisfaction or dissatisfaction’ with those companies is a ‘key element in the proper functioning of the marketplace’.<sup>98</sup> This public interest in the ability to

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<sup>93</sup> eg *South Hetton* (n 83) 139 (goods); *Jupiter Unit Trust Managers Ltd v Johnson Fry Asset Managers plc* (QB, 19 April 2000) [15] (services).

<sup>94</sup> Ian Loveland, ‘Freedom of Political Expression: Who Needs the Human Rights Act?’ (2001) Public Law 233, 234.

<sup>95</sup> If a company's business does *not* involve interaction with the public or a section of the public, then it is not clear what interest it has in protecting its reputation.

<sup>96</sup> eg *Law Society v Kordowski* [2011] EWHC 3185 (QB) [15].

<sup>97</sup> Oster (n 11) 268.

<sup>98</sup> Susan Lott, *Corporate Retaliation Against Consumers: The Status of Strategic Lawsuits Against Public Participation (SLAPPs) in Canada* (Public Interest Advocacy Center 2004) 8, available at



challenge the public images cultivated by market participants was recognized in the breach of confidence case *Woodward v Hutchins*.<sup>99</sup> Lord Denning argued that, if claimants:

‘... seek publicity which is to their advantage, it seems to me that they cannot complain if a [defendant] afterwards discloses the truth about them. If the image which they fostered was not a true image, it is in the public interest that it should be corrected.’<sup>100</sup>

The same public interest exists in the context of defamation law. As Oster concisely argues, ‘It is the purpose of every trading corporation to participate in the broader economic sphere by producing and selling goods or services. Therefore, companies operating in the market are per se public figures and as such subject to public interest.’<sup>101</sup> Defamation laws that are too protective of corporate reputation undermine this public interest ‘by strangling or silencing the consumer’s ability to properly participate’ in the marketplace;<sup>102</sup> the law should instead seek to ‘create an atmosphere which would encourage investigation and exposure of product defects and unethical business practices.’<sup>103</sup>

### ***iii. Exceptions to the general public interest in speech about companies***

Importantly, the circumstances in which it can be argued that defamatory statements about companies are not on matters of public interest mostly seem to fall into a small number of categories. I will argue below that these exceptions should not preclude the law from conclusively presuming a public interest in the speech at issue in all corporate defamation cases.

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<<https://www.piac.ca/wp-content/uploads/2014/11/slapps.pdf>>. See also Paul Milgrom and John Roberts, ‘Relying on the Information of Interested Parties’ (1986) 17(1) *Rand Journal of Economics* 18.

<sup>99</sup> [1977] 1 WLR 760 (CA).

<sup>100</sup> *Ibid*, 763-64.

<sup>101</sup> Oster (n 11) 269.

<sup>102</sup> Lott (n 98) 8.

<sup>103</sup> Lisa Magee Arent, ‘A Matter of “Governing” Importance’: Providing Business Defamation and Product Disparagement Defendants Full First Amendment Protection’ (1992) 67 *Indiana Law Journal* 441, 445.

### *Trivial criticisms*

There are some criticisms of corporate business activities in respect of which it would be difficult to claim any real public interest, on grounds of triviality. But such criticisms are also likely to be too trivial to found a claim in defamation. One example is the recent case *Serafin v Malkiewicz*,<sup>104</sup> in which an individual claimant complained of a number of allegations relating to his management of several businesses. One of the statements complained of was held to mean ‘that the Claimant supplied on commercial terms frozen milk and bread which was close to its sell-by date from a source which he did not disclose.’<sup>105</sup> It would be implausible to argue that there was a significant public interest in this information. But Jay J rightly held that the statement did not satisfy the ‘serious harm’ test in s 1 of the Defamation Act 2013; it seems unlikely that, on its own, it would even meet the ‘threshold of seriousness’ required for a statement to be defamatory at common law.<sup>106</sup>

### *Criticism of smaller companies*

The public interest in scrutinizing very large companies, which carry on businesses affecting many people’s lives, is likely to be particularly strong.<sup>107</sup> However, there is still a meaningful public interest in scrutinizing companies’ activities even if they affect a more limited public: ‘a matter can be of “public interest” even if the number of individuals who are directly concerned with it is relatively small.’<sup>108</sup> One example of this is the *GKR Karate* case discussed above,<sup>109</sup> in which there was a public interest in allegations of misconduct by a company that operated regionally. Another relatively recent example can be seen in *Culla Park Ltd v Richards*.<sup>110</sup> That case involved allegations that the claimant company and the individuals who managed it had been dumping toxic waste, which the judge considered ‘impl[ied] a serious disregard for the environment and the health and welfare of people living in

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<sup>104</sup> [2017] EWHC 2992 (QB); [2019] EWCA Civ 852.

<sup>105</sup> *Serafin v Malkiewicz* [2017] EWHC 2992 (QB) [77].

<sup>106</sup> *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB). The *Thornton* ‘threshold of seriousness’ is explained at Ch3.A.i., text to notes 23-27.

<sup>107</sup> As discussed at text to notes 53-60.

<sup>108</sup> *Doyle v Smith* [2018] EWHC 2935 (QB) [70] (Warby J).

<sup>109</sup> At text to notes 77-82.

<sup>110</sup> [2007] EWHC 1850 (QB).

the locality.’<sup>111</sup> Allegations of conduct that poses a risk to public health are clearly in the public interest, even if the activities in question are confined to a relatively limited area.<sup>112</sup> As was pointed out above, to have standing to sue in the English courts, a company must be carrying on business in the jurisdiction,<sup>113</sup> which means that – by definition – a corporate defamation claimant’s activities will have some influence on the community or communities in which it operates.

### *Confidential or ‘private’ information*

Jan Oster recognizes that even when an individual is considered to be a public figure, not all statements about that individual will necessarily be treated as ‘public speech’, which he defines as ‘speech that bears upon matters of public interest’.<sup>114</sup> He suggests that this can be explained by drawing a simple distinction between ‘public’ and ‘private’: the kinds of statement that are not in the public interest are those that infringe individual public figures’ *privacy* interests. He contends that, ‘In contrast, a company has no private life that might be subject to private speech. Criticism of companies is therefore always a matter of public concern, hence public speech.’<sup>115</sup> It is obviously the case that companies do not have many of the privacy interests that individuals have.<sup>116</sup>

However, Oster’s argument seems to blur the distinction between two separate issues; namely, whether there is a public interest in the subject matter of a statement, and whether that statement relates to the public life or private life of the claimant. The two are not equivalent: there can be a public interest in divulging information about a person’s private life, or commercially confidential information, as made clear by the existence of public interest defences to claims in misuse of private information and breach of confidence.<sup>117</sup>

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<sup>111</sup> Ibid, [21].

<sup>112</sup> As in *GKR* (n 77): see text to notes 79-80.

<sup>113</sup> *Multigroup Bulgaria Holding AD v Oxford Analytica Ltd* [2001] EMLR 28 (QB).

<sup>114</sup> Oster (n 11) 268.

<sup>115</sup> Ibid, 269.

<sup>116</sup> eg *OBG Ltd v Allan* [2007] UKHL 21, [118]; *R v Broadcasting Standards Commission, ex p BBC* [2001] QB 885 (CA) [17], [33], [48]; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 (Aus) 226.

<sup>117</sup> See eg *Couderc and Hachette Filipacchi Associés v France* [2015] ECHR 992, para 98.

It is, though, plausible to argue that some limited categories of information about companies are of merely ‘*private* interest’ as opposed to *public* interest: for example, commercially confidential information; or information about the internal workings of a company that are unlikely to have any real effect on people outside the company itself. An illustration might be found in *Doyle v Smith*,<sup>118</sup> one of the first cases in which a defendant has attempted to rely on the reformed public interest defence in s 4 of the Defamation Act 2013. The statements complained of in that case related in part to the claimant’s interactions with a private rugby club and its members. Warby J considered that:

‘... the internal workings of a members’ club are intrinsically a private matter. It will not ordinarily be of legitimate interest to the wider public how the members of such a club decide to organise their affairs, or deal with their property ... . The governance of public bodies is invariably a matter of public concern, but the governance of private clubs not so.’<sup>119</sup>

Warby J did not consider any types of entity sitting somewhere on the spectrum between these two extremes. However, he did make clear his view that it would not invariably be the case that the decision-making processes of even a private club would fall outside the scope of the public interest:

‘If ... a private Club makes or contemplates a decision with significant effects on the outside world, and those who dwell in it – if it proposes some action with important ramifications for others in the wider community, then, as it seems to me, the position may well be different.’<sup>120</sup>

In these circumstances, the internal process by which a private body makes its decision may be a matter of public interest: ‘because a section of the public had a proper interest in the public and outward consequences of the Club’s decision-making, that same section of the public had a legitimate interest in the integrity of the internal, otherwise private process.’<sup>121</sup> In practice, as argued above,<sup>122</sup> most corporate activities do have potential consequences for the wider community or

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<sup>118</sup> *Doyle* (n 108).

<sup>119</sup> *Ibid*, [70].

<sup>120</sup> *Ibid*, [71].

<sup>121</sup> *Ibid*, [72].

<sup>122</sup> At text to notes 95-96.

public, and therefore the internal processes by which those activities are directed will implicate the same public interest.

In some cases, the publication of statements in this category might be more appropriately dealt with under the law of breach of confidence rather than defamation. Although the applicability of breach of confidence law to false statements is unclear,<sup>123</sup> statements falling into this category would, at best, harm some mixture of a claimant company's interests in reputation and secrecy. It is not clear that the law of defamation should be concerned with injuries of this kind.

Moreover, even if there is no public interest in defamatory statements relating to this 'private' sphere of a company's activities, it remains the case that the right to freedom of expression is a fundamental right under Art 10 ECHR, whereas the corporate interests in reputation and commercial confidences are merely permissible justifications for restricting that right under Art 10(2).<sup>124</sup> Even in cases involving statements of this kind, therefore, the balance of the law should favour the defendant's right to publish, and that right should only be restricted in favour of the corporate claimant if it is 'necessary in a democratic society' to do so.

### *Information about companies' financial performance*

A fourth group of cases that might be considered an exception to the general position that defamatory statements about companies will be on matters of public interest involves imputations relating to companies' creditworthiness, solvency, or financial performance, published to a general audience rather than to parties engaging directly in business with the claimant. English defamation law has historically offered substantial protection to claimants against allegations of this kind.<sup>125</sup>

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<sup>123</sup> Compare *Interbrew SA v Financial Times Ltd* [2002] EWCA Civ 274, [27] with *McKennitt v Ash* [2005] EWHC 3003 (QB) [78] (Eady J); [2006] EWCA Civ 1714, [78]-[80] (Buxton LJ), [85]-[86] (Longmore LJ). See generally R G Toulson and Charles Phipps, *Confidentiality* (3<sup>rd</sup> edn, Sweet & Maxwell 2012) paras 3-093-98.

<sup>124</sup> Tanya Aplin, 'Commercial Confidences after the Human Rights Act' (2007) 29(10) *European Intellectual Property Review* 411, 418.

<sup>125</sup> eg *Jones v Jones* [1916] 2 AC 481 (HL) 507 (Lord Wrenbury): 'The law, it appears, will take notice of the fact that solvency is so essential a factor in the existence of a trader that to speak of him as insolvent will necessarily "touch him in his trade"; it is an attack upon a necessary part of his trading equipment.' See generally Richard Parkes and others, *Gatley on Libel and Slander* (12<sup>th</sup> edn, 2<sup>nd</sup> supp, Sweet & Maxwell 2017) paras 2.30-2.31 ('*Gatley*'); A H Hudson, 'Defamatory Allegations

In *FlyMeNow Ltd v Quick Air Jet Charter GmbH*, the statements complained of warned publishees ‘that it would be financially unsafe to do business with the claimant’, based on allegations that the claimant had defaulted on payments owed to the defendant, and that this was because ‘the claimant was insolvent, being unable to pay all its debts as they fell due.’<sup>126</sup> Rejecting a defence of common law qualified privilege,<sup>127</sup> Warby J explained that ‘the authorities [on occasions of privilege] have taken a cautious approach to information about insolvency.’<sup>128</sup> In many instances, this kind of information is published by commercial credit reference agencies and, as ‘commercial speech’, is subject to a wider margin of appreciation within which it can be restricted in compliance with the ECHR.<sup>129</sup> But even where information regarding creditworthiness is shared for non-commercial purposes, the courts seem reluctant to treat it as being on a matter of public interest. While the provision of this kind of information by a trade association, in response to requests from its members, has been held to attract qualified privilege,<sup>130</sup> ‘no authority [was] cited [in *FlyMeNow*] in which the court has upheld an argument that a volunteered communication by one private company about another is protected by qualified privilege, on any basis.’<sup>131</sup> Warby J’s decision was strongly influenced by the extent of the publication:

‘... little care was taken ... to ensure that the audience ... all had a genuine and present legitimate interest in knowing about the financial position and commercial dealings of the claimant. ... It was inherently likely that this method [of choosing recipients] would bring the information to the attention of a substantial number of people with no existing or likely interest in learning about the claimant’s solvency or business conduct.’<sup>132</sup>

The absence of a reciprocal interest in receiving the information prevented the defendant from being able to rely on common law qualified privilege in respect of publication to this section of the audience. This is undoubtedly the correct

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of Insolvency’ (1990) 41(3) Northern Ireland Legal Quarterly 267. Cf *Triaster Ltd v Dun & Bradstreet Ltd* [2019] EWHC 3433 (QB).

<sup>126</sup> *FlyMeNow Ltd v Quick Air Jet Charter GmbH* [2016] EWHC 3197 (QB) [64].

<sup>127</sup> See note 44.

<sup>128</sup> *FlyMeNow* (n 126) [116].

<sup>129</sup> *Hertel v Switzerland* App no 25181/94 (ECtHR, 25 August 1998) para 47.

<sup>130</sup> *London Association for Protection of Trade v Greenlands Ltd* [1916] 1 AC 15 (HL) 25-26.

<sup>131</sup> *FlyMeNow* (n 126) [116].

<sup>132</sup> *Ibid*, [116].

application of the law. However, it gives rise to the question whether any meaningful harm is likely to be caused by publishing statements of this nature to ‘people with no existing or likely interest in learning about the claimant’s solvency or business conduct’, which presumably means people with no intention of doing business with or otherwise dealing with the claimant in the near future. It certainly seems unlikely that publication to this broader audience would be ‘likely to cause ... serious financial loss’, as is now required if a for-profit company is to maintain a claim in defamation.<sup>133</sup> By definition, a statement of this nature *can* only harm a company financially when it is published to people with a ‘genuine and present legitimate interest’ in receiving information about the company’s financial position.<sup>134</sup>

It is also questionable whether publishees without any immediate intention to do business with a company really have no interest at all in information about its financial viability. The more plausible position is surely that expressed by Justice Brennan of the US Supreme Court, in his dissenting judgment in *Dun & Bradstreet, Inc v Greenmoss Builders, Inc*.<sup>135</sup> Justice Brennan argued that the statement complained of in that case, a credit report imputing that the claimant had filed for bankruptcy, ‘falls within any reasonable definition of “public concern”’<sup>136</sup> because:

‘... an announcement of the bankruptcy of a local company is information of potentially great concern to residents of the community where the company is located; ... And knowledge about solvency and the effect and prevalence of bankruptcy certainly would inform citizen opinions about questions of economic regulation.’<sup>137</sup>

Justice Brennan pointed out that the public interest in scrutinizing corporate performance is reflected in laws that require companies to publicly report bankruptcies and other significant financial information.<sup>138</sup> English law, similarly,

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<sup>133</sup> Defamation Act 2013, s 1(2). See further Ch3.B., text to notes 136-264.

<sup>134</sup> *FlyMeNow* (n 126) [116].

<sup>135</sup> 472 US 749 (1985).

<sup>136</sup> *Ibid*, 789.

<sup>137</sup> *Ibid*.

<sup>138</sup> *Ibid*.

imposes extensive obligations on companies to file financial reports that will be made publicly accessible.<sup>139</sup>

*Statements published by claimants' business competitors*

Commercial speech such as advertising is still protected under Art 10 ECHR,<sup>140</sup> and in principle it is capable of making a positive contribution to public discourse on important subjects.<sup>141</sup> But there would seem to be little public interest in disparaging statements published about a company by one of its competitors,<sup>142</sup> especially where those statements are intended to distort the market to the competitor's advantage by misleading consumers.<sup>143</sup> In most cases of this kind, however, malicious falsehood will be a more appropriate mechanism than defamation for the disparaged company to seek redress.<sup>144</sup>

Admittedly, the need to prove falsity, malice, and special damage places a more onerous burden on claimants in malicious falsehood than that imposed in defamation,<sup>145</sup> particularly in respect of proving malice (meaning intention to injure the claimant, or knowledge of or recklessness as to the statement's falsity<sup>146</sup>). However, in the context of disputes between competitors, the burden on claimants to prove special damage is effectively set aside by s 3 of the Defamation Act 1952, by which statements are actionable per se if they are 'calculated to cause pecuniary damage' in respect of the claimant's business.<sup>147</sup> As Jonathan Parker J explained in *Emaco Ltd v Dyson Appliances Ltd*:

'... comparative advertising is by its nature calculated (in the sense of likely) to cause pecuniary damage to suppliers of the competing product, if only by reducing the market share of the competing product whilst

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<sup>139</sup> eg Companies Act 2006, pt 15, ss 380-474.

<sup>140</sup> *Hertel v Switzerland* App no 25181/94 (ECtHR, 25 August 1998) para 47.

<sup>141</sup> *Stambuk v Germany* App no 37928/97 (ECtHR, 17 October 2002) para 46.

<sup>142</sup> Oster (n 11) 273; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (CA) 177.

<sup>143</sup> Patfield, 'Defamation, Freedom of Speech and Corporations' (n 59) 304.

<sup>144</sup> See further Ch5.B., text to notes 71-97.

<sup>145</sup> Jenny Afia and Phil Hartley, 'Lord Lester's Defamation Bill 2010: A Practical Analysis' (2010) 2(2) *Journal of Media Law* 183, 190.

<sup>146</sup> *Spring v Guardian Assurance plc* [1993] ICR 412 (CA) 427-30, citing *Horrocks v Lowe* [1975] AC 135. *Spring* was overturned on other grounds by the House of Lords: [1995] 2 AC 296.

<sup>147</sup> Defamation Act 1952, s 3(1)(b).



increasing that of the product which is the subject of the comparative advertising. That, after all, is the purpose of comparative advertising.<sup>148</sup>

Given that one of the most effective ways for companies to differentiate their products from their competitors' (and one of the most beneficial for consumers) is by improving their comparative quality, there is clear value in allowing space for advertising that communicates the advantages of one product over another – and, in doing so, necessarily disparages the alternative. English law recognizes that 'any trader is entitled to puff his own goods, even though such puff must, as a matter of pure logic, involve the denigration of his rival's goods.'<sup>149</sup>

Further, consumers are seen as being 'used to the ways of advertisers and [to] expect a certain amount of hyperbole[,] ... and the public are reasonably used to comparisons – "knocking copy" as it is called in the advertising world.'<sup>150</sup> This does not mean that competing companies should have carte blanche to 'knock' each other's products. But the line drawn in malicious falsehood seems to appropriately recognize the potential value of comparative advertising as well as not viewing consumers as unduly credulous: to be actionable, denigration of the claimant's products must go beyond 'idle puff' of the defendant's own business so that 'a reasonable man would take the [disparaging] claim being made as a serious claim'.<sup>151</sup> It is fair for a remedy to be available where one company knowingly makes a specific, provably false criticism of another that could reasonably be expected to be taken seriously by consumers, and is therefore likely to harm the other company's business. But that remedy is available in malicious falsehood; an additional remedy in defamation is unnecessary.<sup>152</sup>

Both the decisions made in the limited number of English corporate defamation cases in which a public interest defence has been pleaded, and convincing arguments made in the academic literature, suggest that almost all speech about

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<sup>148</sup> *Emaco Ltd v Dyson Appliances Ltd* [1999] ETMR 903 (Ch).

<sup>149</sup> *De Beers Abrasive Products Ltd v International General Electric Co of New York Ltd* [1975] FSR 323 (Ch) 328 (Walton J).

<sup>150</sup> *Vodafone Group plc v Orange Personal Communications Services Ltd* [1997] FSR 34 (Ch) 38-39 (Jacob J).

<sup>151</sup> *De Beers* (n 149) 329.

<sup>152</sup> This argument is illustrated by the recent case *Al-Ko Kober Ltd v Sambhi* [2019] EWHC 2409 (QB). Malicious falsehood is discussed in more detail as a potential alternative to defamation for protecting companies' reputations at Ch5.B., text to notes 71-97.

companies and their activities should be treated as public interest speech. It is therefore reasonable for the law to presume that the speech at stake in every corporate defamation case warrants protection in the public interest.<sup>153</sup> The few categories of speech about companies that are less likely to implicate the public interest are not sufficient to preclude that presumption from being treated as conclusive: either the public interest in these kinds of speech has typically been underappreciated; or false statements falling within them are more appropriately addressed through an area of law other than defamation, or would be unlikely to ground a successful claim in defamation in the first place. If a public interest in the subject matter of defamatory statements about companies can be conclusively presumed to exist, then that public interest can be recognized and protected in the design of corporate defamation law overall, rather than only when defendants in individual cases raise the issue by pleading a public interest defence under s 4 of the Defamation Act 2013.

### **C. The effect of corporate defamation law on speech about companies**

It may not be immediately obvious why the public interest in speech about companies described above should be a reason to protect statements on the subject from *defamation* claims specifically. Defamation law exists to remedy the reputational harm caused by *false* allegations, and it is often claimed that there is little, if any, public interest in the publication of falsehoods.<sup>154</sup> The necessary consequence of protecting speech from defamation claims based on its subject matter, rather than its veracity, is that some defendants will avoid liability for publishing defamatory allegations that are false, or that cannot be proven to be true.<sup>155</sup> The most convincing explanation for protecting public interest speech in defamation law even though it may be untrue is the ‘chilling effect’ theory, which asserts that imposing penalties on the publication of *false* speech can in practice

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<sup>153</sup> Oster (n 11) 273.

<sup>154</sup> *Reynolds* (n 43) 238; Daniel Bekos and Claire Arthurs, ‘In Tune with the Zeitgeist?’ (2011) 161(7447) *New Law Journal* 35 (in the context of corporate defamation specifically).

<sup>155</sup> Jonathan Coad, ‘*Reynolds* and Public Interest – What About Truth and Human Rights?’ (2007) 18(3) *Entertainment Law Review* 75.

have an unintended and undesirable deterrent effect on the publication of *true* speech.

As will be seen, the chilling effect is more complicated than it is sometimes made out to be. In reality, as Judith Townend has noted, ‘there is no one “chilling effect”’.<sup>156</sup> Instead, the term is used to describe a range of related effects that the law can have on speech. Nonetheless, the overall argument presented in the remainder of this chapter is that the law does have pernicious effects on speech about corporations, and on speakers themselves. There is significant variation in the nature of these negative effects, and their impact on public discourse about the important subjects discussed above is inherently difficult to measure precisely; but arguments which appeal to the law’s effects on speech as a reason to restrict companies’ ability to sue in defamation are compelling regardless of these limitations.

This part is structured as follows. Section i. gives a brief outline of the chilling effect theory, and explains why it supports reforms protecting some false or unproven speech from defamation claims. Section ii. highlights the important role that the cost, complexity, and uncertainty of litigation play in the chilling effect of defamation law. Section iii. discusses the different ways in which the law chills different types of speaker, and identifies a trend towards companies suing less wealthy critics, especially in respect of critical comments posted online. Section iv. demonstrates how factors such as the cost of litigation and the inequality of resources between parties give companies the opportunity to abuse threats of litigation to silence legitimate criticism of their activities. Finally, section v. explains the importance of arguments about the chilling effect of corporate defamation law in the debates that led to the Defamation Act 2013, which will be examined in detail in the following chapter.

### ***i. The chilling effect theory***

The chilling effect theory centres on the claim that laws intended to deter or remedy *harmful* speech, such as the law of defamation, can in practice deter *harmless*, or

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<sup>156</sup> Judith Townend, ‘Online Chilling Effects in England and Wales’ (2014) 3(2) Internet Policy Review, 7. See also Eric Barendt and others, *Libel and the Media: The Chilling Effect* (OUP 1997) 191.

even *beneficial*, speech.<sup>157</sup> Of course, it is not always undesirable for the law to dissuade a person from publishing a defamatory statement. Commentators have noted the importance of distinguishing between the law's deterrent effect on publications that would be unlawful, and its chilling effect on speech that would not.<sup>158</sup> Alastair Mullis and Andrew Scott, for example, point out that 'the creation of a "chilling effect" on freedom of expression is precisely the purpose of libel law.'<sup>159</sup> If the risk of liability deters the publication of false and defamatory allegations, then the quality of public debate will be improved; deterrence 'is undesirable only to the extent that it causes true and important information to be withheld from the public sphere.'<sup>160</sup>

As a critique of defamation law, the chilling effect theory essentially combines an empirical claim with a normative claim. The empirical claim is that the law *does* in fact suppress speech that is true and important, and which therefore 'should see the light of day'.<sup>161</sup> Making the law more defendant-friendly to alleviate this effect would increase the risk that the victims of false allegations will be unable to remedy their reputational injuries through defamation claims.<sup>162</sup> The normative claim therefore depends on an 'ordering of values'<sup>163</sup> in which the harm done by preventing the publication of true statements is believed to be greater than the harm done by failing to provide a remedy for damaging falsehoods. If this is so then, despite their lack of value in their own right, it is desirable for the law to offer *false* defamatory speech some 'strategic protection',<sup>164</sup> in order to allow sufficient 'breathing space'<sup>165</sup> for the publication of *true* speech, and thereby to ensure that society can obtain the benefit of that true speech.

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<sup>157</sup> Frederick Schauer, 'Fear, Risk and the First Amendment: Unraveling the Chilling Effect' (1978) 58 Boston University Law Review 685, 685. Schauer's analysis of the theory has been described as 'seminal': Monica Youn, 'The Chilling Effect and the Problem of Private Action' (2013) 66(5) Vanderbilt Law Review 1473, 1483, fn 37.

<sup>158</sup> eg Schauer, 'Chilling Effect' (n 157) 689-91.

<sup>159</sup> Alastair Mullis and Andrew Scott, 'Something Rotten in the State of English Libel Law? A Rejoinder to the Clamour for Reform of Defamation' (2009) 14(6) Communications Law 173, 174.

<sup>160</sup> Alastair Mullis and Andrew Scott, 'Lord Lester's Defamation Bill 2010 – A Distorted View of the Public Interest?' (2011) 16(1) Communications Law 6, 7.

<sup>161</sup> Barendt and others (n 156) Preface.

<sup>162</sup> Schauer, 'Chilling Effect' (n 157) 709.

<sup>163</sup> *Ibid*, 688.

<sup>164</sup> *Gertz v Robert Welch, Inc* 418 US 323 (1974) 342.

<sup>165</sup> *New York Times Co v Sullivan* 376 US 254 (1964) 271-72.

## ii. *The perceived cost and uncertainty of litigation*

The chilling effect of defamation law is produced by a number of factors,<sup>166</sup> but is driven in particular by the speaker's uncertainty about the outcome of possible litigation, and by the potential costs that she might incur by defending a lawsuit.<sup>167</sup> There is evidence that some publishers, at least, view the cost of litigation as 'much the most disturbing aspect of a defamation claim'.<sup>168</sup> High litigation costs, and their effects on speech, were identified as a significant problem with English defamation law prior to the 2013 reforms, in academic commentary,<sup>169</sup> in Parliamentary reports,<sup>170</sup> and in the courts.<sup>171</sup>

The *actual* cost of libel litigation relative to other areas of law is unclear. A study conducted in 2008 reported that the cost of defending a libel action in England was 140 times the European average.<sup>172</sup> This figure was reproduced in various sources during the debates leading to the 2013 reforms,<sup>173</sup> but has been called 'absurd' by David Howarth, who argues that it was erroneously based on different cost reporting practices across countries.<sup>174</sup> Questioning the portrayal of defamation costs more generally, Howarth contends that 'a small number of very expensive cases [dominate] both the calculation of the average cost of cases and the headlines.'<sup>175</sup> Although there is likely some truth to this claim, in the context of the chilling effect it makes little difference. The over-cautiousness induced in publishers by the fear of being sued for libel is driven by their *perception* of the expense of defending a claim more than by the likely costs that they would in fact

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<sup>166</sup> See eg David Feldman, *Civil Liberties and Human Rights in England and Wales* (2<sup>nd</sup> edn, OUP 2002) 838.

<sup>167</sup> Schauer, 'Chilling Effect' (n 157) 687-88.

<sup>168</sup> Barendt and others (n 156) 189.

<sup>169</sup> Mullis and Scott, 'Something Rotten' (n 159) 180.

<sup>170</sup> Culture, Media and Sport Committee, *Press Standards, Libel and Privacy: Report* (2009-10, HC 361-I) para 115 ('CMS Committee Report'); Joint Committee on the Draft Defamation Bill, *Report* (2010-12, HL 203, HC 930-I) para 26 ('Joint Committee Report'). See further Ch4.C.i., text to notes 251-277.

<sup>171</sup> eg *Turcu v News Group Newspapers Ltd* [2005] EWHC 799 (QB) [7].

<sup>172</sup> T Larson and D Leonardi, 'A Comparative Study of Costs in Defamation Proceedings Across Europe' (2008) Programme in Comparative Media Law and Policy, Centre for Socio-Legal Studies, University of Oxford.

<sup>173</sup> CMS Committee Report (n 170) para 248; Index on Censorship and English PEN, *Free Speech is Not For Sale* (2009) 5 ('FSINFS').

<sup>174</sup> David Howarth, 'The Cost of Libel Actions: A Sceptical Note' (2011) 70(2) *Cambridge Law Journal* 397, 403.

<sup>175</sup> *Ibid*, 418.

incur.<sup>176</sup> Defamation litigation is widely regarded as expensive, and this is what is important.<sup>177</sup>

The general approach to allocating legal costs between the parties to litigation allows for a significant shifting of costs from the winning party to the losing party.<sup>178</sup> In theory this should alleviate the chilling effect for speakers confident of being able to defend a defamation claim successfully,<sup>179</sup> but it also substantially increases the risk of an adverse court ruling. If unsuccessful, publishers may be liable not only for an award of damages and their own costs, but also for claimants' litigation costs.<sup>180</sup> Even successful defendants may only recover part of their actual expenditure through cost-shifting measures,<sup>181</sup> and such measures cannot eliminate the non-financial costs of litigation, which can include, for example, 'emotional trauma, lost wages, credit problems, loss of personal and business reputation, relationship troubles and even insurance cancellations'.<sup>182</sup> These factors can make the decision to defend a lawsuit daunting even for a publisher who would be able to mount a strong defence.<sup>183</sup>

Although in principle defamation law is only concerned with false allegations, the falsity of defendants' statements is presumed. Another potential factor in the chilling effect is the practical difficulty that publishers expect to face in attempting to prove the truth of their statements in court.<sup>184</sup> For example, admissible evidence may not be readily available, especially where there is a significant gap between

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<sup>176</sup> Barendt and others (n 156) 140, 189; Townend, 'Online Chilling Effects' (n 156) 1; Alternative Libel Project, *A Final Report on the Problems Created by Defamation Procedure with Recommendations for Change* (March 2012) 5-6, at <[https://www.englishpen.org/wp-content/uploads/2012/03/Alternative\\_Libel\\_Project\\_FinalMarch2012.pdf](https://www.englishpen.org/wp-content/uploads/2012/03/Alternative_Libel_Project_FinalMarch2012.pdf)>.

<sup>177</sup> David Lewis, 'Whistleblowing and the Law of Defamation: Does the Law Strike a Fair Balance Between the Rights of Whistleblowers, the Media, and Alleged Wrongdoers?' (2017) *Industrial Law Journal*, 23-24.

<sup>178</sup> James Windon, 'Fee Shifting in Libel Litigation: How the American Approach to Costs Allocation Inhibits the Achievement of Libel Law's Substantive Goals' (2010) 3 *Journal of International Media and Entertainment Law* 175, 180-83.

<sup>179</sup> *Ibid*, 194; David A Hollander, 'The Economics of Libel Litigation' in Everette E Dennis and Eli M Noam (eds), *The Cost of Libel: Economic and Policy Implications* (Columbia University Press 1989) 274.

<sup>180</sup> David J Acheson and Ansgar Wohlschlegel, 'The Economics of Weaponized Defamation Lawsuits' (2018) 47 *Southwestern Law Review* 335, 362-65.

<sup>181</sup> See eg the experience of Simon Singh, described at text to note 287.

<sup>182</sup> Brenda Wells and Chad Marzen, 'Getting SLAPPED: A 21<sup>st</sup> Century Business Risk' (2016) 12(1) *Small Business Institute Journal* 28, 29.

<sup>183</sup> *FSINFS* (n 173) 10.

<sup>184</sup> *Derbyshire* (n 53) 548.

the trial and the events to which the statements complained of relate.<sup>185</sup> These practical problems may be particularly likely to affect media companies' ability to defend allegations of corporate misconduct, the reporting of which often relies on anonymous sources or confidential documents.<sup>186</sup>

And publishers must also take into account the possibility of an unexpected or erroneous verdict from the court.<sup>187</sup> There will always be some degree of unpredictability in the legal process by which defamation cases are adjudicated,<sup>188</sup> which 'may stem from ambiguous rules or erroneous applications.'<sup>189</sup> The complexity and fact-sensitivity of defamation litigation in particular aggravates this unpredictability.<sup>190</sup> As a result of this combination of 'risks and uncertainties' in the litigation process, 'a rule that penalizes factual falsity has the effect of inducing some self-censorship as to materials that *are in fact true*.'<sup>191</sup>

### ***iii. Chilling effects on different speakers***

Importantly, the extent to which the law has a chilling effect on speech about companies, and the nature of that effect, might differ significantly between different types of speaker. This is because the effect operates 'through protagonists' perception of the law and its effects; [and] this will vary depending on ... the resources available to the publishers and their prior legal knowledge and experience.'<sup>192</sup> It is sometimes claimed that arguments about the chilling effect of corporate defamation law need to take into account the fact that 'defendants may at times include large media corporations' with sufficient resources to defend themselves against companies' defamation claims.<sup>193</sup> These traditional media

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<sup>185</sup> eg Culture, Media and Sport Committee, *Press Standards, Privacy and Libel: Oral and Written Evidence* (2009-10, HC 362-II) 191 ('CMS Committee Evidence').

<sup>186</sup> Barendt and others (n 156) 69-71. The presumption of falsity is discussed further at Ch4.A.i., text to notes 17-45.

<sup>187</sup> Milo (n 27) 169.

<sup>188</sup> Schauer, 'Chilling Effect' (n 157) 687-88.

<sup>189</sup> Leslie Kendrick, 'Speech, Intent, and the Chilling Effect' (2013) 54 *William & Mary Law Review* 1633, 1652.

<sup>190</sup> Andrew T Kenyon, 'Rethinking *Reynolds*: Defending Public Interest Speech' in Doreen Weisenhaus and Simon N M Young (eds), *Media Law and Policy in the Internet Age* (Hart 2017) 61.

<sup>191</sup> Frederick Schauer, 'Social Foundations of the Law of Defamation – A Comparative Analysis' (1980) 1 *Journal of Media Law & Practice* 3, 11 (emphasis in original).

<sup>192</sup> Townend, 'Online Chilling Effects' (n 156) 1.

<sup>193</sup> Gary K Y Chan, 'Corporate Defamation: Reputation, Rights and Remedies' (2013) 33(2) *Legal Studies* 264, 281.

companies may be less vulnerable to the financial threat of defamation litigation.<sup>194</sup> However, there is ample evidence that defamation law chills traditional reporting on companies in a variety of ways.<sup>195</sup>

Based on the results of one of the most extensive studies of the effect of English libel law on the media, conducted in the 1990s, Eric Barendt and others differentiated between ‘direct’ and ‘structural’ chilling effects on media publishers. The former takes place when decisions relating to specific publications are unduly influenced by legal considerations. Most often, ‘this takes the form of omission of material the author believes to be true’ from a publication because of an ‘unacceptable risk of legal action’.<sup>196</sup> This ‘direct’ chilling effect on specific allegations can be ‘perceived at a variety of stages of the editorial process’.<sup>197</sup> As Mullis and Scott explain, it ‘can bite either before publication to deter criticism, or after the fact to see defendants with solid cases capitulate.’<sup>198</sup> Pre-publication, a story might be abandoned, certain allegations might be omitted from the published version, or changes might be made to the way it is presented in order to minimize the risk of the subject suing.<sup>199</sup> Post-publication, a story might be withdrawn or amended, a correction or apology published, or a lawsuit settled to avoid trial.<sup>200</sup> Settlement might involve the publisher paying damages or costs to the claimant; admitting the falsity of the original allegation; or removing or amending archived versions of the story. For some publishers, ‘it is often not worth fighting a case even though the story is believed to be accurate’;<sup>201</sup> one or more of these outcomes is seen as a preferable, or financially necessary, alternative. The possibility that even claimants with frivolous claims will be able to leverage the uncertainty of litigation to extract undeserved settlements from publishers has been described by the courts

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<sup>194</sup> eg CMS Committee Evidence (n 185) Ev 144 (Paul Dacre); Barendt and others (n 156) 183.

<sup>195</sup> eg Russell L Weaver, ‘British Defamation Reform: An American Perspective’ (2012) 63(1) Northern Ireland Legal Quarterly 97, 107-09.

<sup>196</sup> Ibid.

<sup>197</sup> Townend, ‘Online Chilling Effects’ (n 156) 7.

<sup>198</sup> Alastair Mullis and Andrew Scott, ‘The Defamation Bill 2012: Missing the Wood (with No Excuses)’ (*Inform*, 6 June 2012) <<https://inform.org/2012/06/06/the-defamation-bill-2012-missing-the-wood-with-no-excuses-alastair-mullis-and-andrew-scott/>>.

<sup>199</sup> Barendt and others (n 156) 192-93.

<sup>200</sup> Russell L Weaver and others, *The Right to Speak Ill: Defamation, Reputation and Free Speech* (Carolina Academic Press 2006) 237.

<sup>201</sup> Barendt and others (n 156) 189.



as the ‘ransom factor’<sup>202</sup> or ‘blackmailing effect’.<sup>203</sup> If the cost of even successfully defending a lawsuit might override the perceived public interest in publishing allegations, that is obviously problematic. The House of Commons Culture, Media and Sport Committee (‘CMS Committee’) was right to say that a critic who honestly believes that his criticism of a company is justifiable, and would be defensible in court, ‘should not be forced into a settlement which entails him sacrificing justice on the grounds of cost.’<sup>204</sup>

The ‘structural’ chilling effect influences the media’s decisions not about which specific allegations to publish, but about which subjects to investigate at all. There is evidence that publishers, especially those in the traditional media, base editorial decisions partly on the perceived litigiousness of the subject, being aware of ‘individuals or groups or kinds of material where they or their newspaper “[have] to be extra careful”’.<sup>205</sup> If certain individuals, companies, or topics are considered to be ‘no-go areas’ for journalists because they carry a particularly high risk of defamation litigation, then no publications are ‘directly’ chilled, ‘because nothing is written in the first place.’<sup>206</sup> Barendt and others specifically mentioned ‘exploitative employment practices by various large companies operating in the United Kingdom; [and] bribery and other corrupt practices by British companies bidding for overseas contracts’ as subjects in respect of which these dynamics are particularly ‘effective’ at preventing reporting.<sup>207</sup>

In some cases, even large media companies might find themselves out-gunned in a defamation battle against a corporate claimant.<sup>208</sup> While such companies will often have a significant advantage over individual claimants,<sup>209</sup>

‘... corporate defamation actions can turn the economic tables on media defendants. Not only can the large corporate plaintiffs claim massive

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<sup>202</sup> *Turcu* (n 171) [7].

<sup>203</sup> *Campbell v MGN Ltd (Costs)* [2005] UKHL 61, [31] (Lord Hoffmann). See also *MGN Ltd v UK* [2011] ECHR 66, para 209.

<sup>204</sup> CMS Committee Report (n 170) 6.

<sup>205</sup> Barendt and others (n 156) 68.

<sup>206</sup> *Ibid*, 192.

<sup>207</sup> *Ibid*.

<sup>208</sup> One example might be *Tesco Stores Ltd v Guardian News and Media Ltd* [2008] EWHC 14 (QB), discussed in the CMS Committee Report (n 170) paras 168-171.

<sup>209</sup> Mullis and Scott, ‘Something Rotten’ (n 159) 173; Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* (July 1991) ch XV, para 9.

amounts of damages ... but they also have massive resources with which to pursue defamation claims. Indeed, their resources may dwarf those of many corporate media defendants.<sup>210</sup>

More importantly, as a result of increasing use of the internet, it seems that claims against well-resourced media companies are becoming less typical of corporate defamation litigation overall, and therefore a less appropriate way to think about potential reforms. Hilary Young, for example, warns against assessing corporate defamation law ‘with reference to powerful media defendants’, and argues that the law must take into account ‘the role that information technology has on broadening the range of defamation defendants’.<sup>211</sup> The paradigm defamation case is becoming more likely to be brought against an ordinary individual rather than a traditional media publisher. The ease with which the internet allows individuals to exchange critical information about companies leaves ‘Disgruntled employees, dissatisfied investors, critical financial commentators, and others ... potentially exposed’ to lawsuits for the content they post online.<sup>212</sup>

While there is a dearth of reliable data on defamation litigation available from the Ministry of Justice or HM Courts and Tribunals Service,<sup>213</sup> it is generally accepted that the claims being handled by the courts are increasingly brought against non-media defendants.<sup>214</sup> The results of a survey of judgments in corporate defamation cases between 2004 and 2013 lend some support to this perceived shift in the defendants these claims tend to be brought against: there were individual defendants in around four-fifths of the corporate claims that were the subject of a reported judgment in that period, and slightly less than half of all claims were brought

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<sup>210</sup> John B Attanasio, ‘Foreword: The Economic Contingency of Legal Rights?’ (1995) 39 *Saint Louis University Law Journal* 1163, 1164. Attanasio’s point about the damages that can be claimed by corporate claimants is discussed at Ch4.B.iii., text to notes 160-190.

<sup>211</sup> Hilary Young, ‘Rethinking Canadian Defamation Law as Applied to Corporate Claimants’ (2013) 46(2) *University of British Columbia Law Review* 529, 557-58 (citation omitted).

<sup>212</sup> Gregory J Naples and Meredith Maher, ‘Cybersmearing: A Legal Conflict Between Individuals and Corporations’ (2002) 2 *Journal of Information, Law and Technology*.

<sup>213</sup> See eg Judith Townend, ‘Closed Data: Defamation and Privacy Disputes in England and Wales’ (2013) 5(1) *Journal of Media Law* 31; Judith Townend, ‘A Dearth of Data about Defamation Cases in England and Wales’ (*Inform*, 25 September 2015) <<https://inform.org/2012/09/25/a-dearth-of-data-about-defamation-cases-in-england-and-wales-judith-townend/>>.

<sup>214</sup> Jacob Rowbottom, ‘To Rant, Vent and Converse: Protecting Low Level Digital Speech’ (2012) 71(2) *Cambridge Law Journal* 355, 357-59. An increase in cases of the kind discussed here has been reported by various commentators: eg Jonathan Coad, ‘Defamation: Internet’ (*Westlaw*, 16 November 2018) para 3.

exclusively against individuals.<sup>215</sup> Around half of the cases in that decade involved statements that were only published online rather than in physical form.<sup>216</sup> The limited post-Act case law to date also seems to be consistent with this trend continuing: notably, all of the successful corporate claims reported since the Act came into force were brought against individual defendants,<sup>217</sup> in respect of statements published online.<sup>218</sup>

It is legitimate to be concerned about how these increasingly common claims are affecting online discourse. Some non-media speakers make valuable contributions to public debate, and are able to have a greater influence on that debate as a result of internet communications technology. For example, groups such as “citizen journalist” bloggers and small NGOs’, according to Gavin Phillipson, ‘have increasingly important roles to play in public discourse’.<sup>219</sup> In its *Steel* decision, the ECtHR highlighted the need to protect such non-media publishers’ ability to act as a ‘public watchdog’,<sup>220</sup> a function normally ascribed to traditional news media.<sup>221</sup> More recently, the Court has extended its protection of the ‘watchdog’ role still further, to online speakers such as ‘bloggers and popular users of the social media’.<sup>222</sup>

Further, online speech warrants protection not only because of the *public* interest in additional sources of information about powerful people and institutions, but also because of its value to *individual* speakers. While traditional media publications are typically valued for instrumental reasons, such as their contribution to well-informed democratic deliberation,<sup>223</sup> in contrast, individual expression on matters

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<sup>215</sup> David J Acheson, ‘Empirical Insights into Corporate Defamation: An Analysis of Cases Decided 2004-2013’ (2016) 8(1) *Journal of Media Law* 32, 40.

<sup>216</sup> *Ibid.*

<sup>217</sup> With the exception, technically, of *Brett Wilson v Person(s) Unknown* [2015] EWHC 2628 (QB).

<sup>218</sup> *Brett Wilson* (n 217) [3]-[4]; *Pirtek (UK) Ltd v Jackson* [2017] EWHC 2834 (QB) [6]; *Al-Ko Kober Ltd v Sambhi* [2019] EWHC 2409 (QB) [3]; *Seventy Thirty Ltd v Burki* [2018] EWHC 2151 (QB) [182]-[186].

<sup>219</sup> Gavin Phillipson, ‘The “Global Pariah”, the Defamation Bill and the Human Rights Act’ (2012) 63(1) *Northern Ireland Legal Quarterly* 149, 161.

<sup>220</sup> *Steel* (n 5) para 89.

<sup>221</sup> *Goodwin v UK* (1996) 22 EHRR 123, para 39.

<sup>222</sup> *Magyar Helsinki Bizottság v Hungary* [2016] ECHR 975, para 168. Online discussion can also play an important role in identifying important issues that might otherwise be overlooked by traditional media organizations, allowing them to be brought to the attention of wider audiences: Anthony Ciolli, ‘Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas’ (2008) 63 *University of Miami Law Review* 137, 162.

<sup>223</sup> Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press 2015) 29-33.

of public interest is valuable ‘not solely because it informs the listener, but because it allows the individual to have his or her say.’<sup>224</sup> As Lyrissa Lidsky argues, the internet ‘empowers ordinary individuals with limited financial resources to “publish” their views on matters of public concern’,<sup>225</sup> democratizing influence over public debate on these subjects.<sup>226</sup> The expansion of opportunity for individuals to communicate online is seen as particularly important to this ‘freedom to participate’ in public debate.<sup>227</sup>

A number of commentators have highlighted the reputational risks companies face as a result of the increase in online discussion of their activities,<sup>228</sup> and warned of ‘an increasingly concerning tendency for defamatory allegations, originating from unreliable online sources, say overzealous but under-rigorous bloggers, to spread mushroom-like across the internet.’<sup>229</sup> In recent years, lawmakers in the UK have increasingly recognized the harmful effects that the internet has had on public discourse as well as its benefits. But the concerns that have been raised in relation to the spread of mis- or dis-information on the internet have focused almost exclusively on the ways in which these problems can harm individuals online, or on the potential for online speech to undermine democratic institutions,<sup>230</sup> rather

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<sup>224</sup> Rowbottom, ‘In the Shadow of the Big Media’ (n 45) 496.

<sup>225</sup> Lyrissa Barnett Lidsky, ‘Silencing John Doe: Defamation & Discourse in Cyberspace’ (2000) 49(4) *Duke Law Journal* 855, 860.

<sup>226</sup> Andrew L Roth, ‘Upping the Ante: Rethinking Anti-SLAPP Laws in the Age of the Internet’ (2016) 2 *Brigham Young University Law Review* 741, 751.

<sup>227</sup> *Yildirim v Turkey* [2012] ECHR 2074, para 54. See also David Mangan, ‘Regulating for Responsibility: Reputation and Social Media’ (2015) 29(1) *International Review of Law, Computers & Technology* 16, 23.

<sup>228</sup> eg Corey M Dennis, ‘Social Media Defamation and Reputation Management in the Online Age’ (2013) 17(6) *Journal of Internet Law* 1; Justin O’Brien and Sameer Hosany, ‘Companies Wrestle with New Era of Negative Online Reviews and Spiky Consumers’, *Inform* (11 September 2016) at <<https://inform.org/2016/09/11/companies-wrestle-with-new-era-of-negative-online-reviews-and-spiky-consumers-justin-obrien-and-sameer-hosany/>>; Thomas G Ciarlone Jr and Eric W Wiechmann, ‘Cybersmear May Be Coming to a Website Near You: A Primer for Corporate Victims’ (2003) *Defense Counsel Journal* 51; Christopher J Akin, ‘Protecting Your Company’s Reputation on the Internet’ (2010) 24(3) *In-House Litigator* 8.

<sup>229</sup> Afia and Hartley (n 145) 191.

<sup>230</sup> For example, neither the House of Commons Digital, Culture, Media and Sport Committee’s report on *Disinformation and ‘Fake News’* (HC 2017-19, 1791) nor the report on *Regulating in a Digital World* produced by the House of Lords Select Committee on Communications (HL 2017-19, 299), both published in early 2019, includes any significant reference to concerns about the impact of these phenomena on companies. The same is true of the European Court of Human Rights’ comments on this issue: eg *Delfi AS v Estonia* [2015] ECHR 586, para 110; *Editorial Board of Pravoye Delo v Ukraine* App no 33014/05 (ECtHR, 5 May 2011) para 63.

than on the harm to companies' reputations that might be caused by the spread of false allegations online.

Relatively little attention has been paid to whether the chilling effect theory can be applied to discourse on the internet as it has typically been understood to apply to the news media. For example, the ECtHR case law on the Art 10 rights of online speakers, which frequently refers to chilling effect arguments, has mainly developed in applications made by professional journalists or media companies.<sup>231</sup> In a third party intervention in *Satakunnan Markkinapörssi OY v Finland*,<sup>232</sup> the Nordplus Law & Media Network requested that 'The Court should further elaborate on whether the concept of "chilling effect" should be viewed differently in the new media environment.'<sup>233</sup> However, the Court did not address the comment.

As noted above, the way in which the law affects different speakers depends in part on their resources, and on their awareness and understanding of the legal risks of publishing certain material.<sup>234</sup> By surveying independent online publishers, Townend has found that there is significant variation in the legal expertise and access to legal advice enjoyed by speakers on the internet.<sup>235</sup> Many bloggers, even those who focus on writing about matters of public interest, have no formal journalistic or legal training, and rely for legal advice on informal support networks rather than paying for a lawyer's expertise.<sup>236</sup> Similarly, NGOs and citizen journalists, unlike traditional media companies, 'generally cannot afford routine – or indeed any – access to libel lawyers'.<sup>237</sup> Lidsky argues that, because of this lack of expertise and advice, 'chilling-effect arguments have particular resonance in cases involving "nonmedia" defendants',<sup>238</sup> and that the complexity of defamation doctrine aggravates the problem:

'Defamation law ... is so complex that it is almost impossible to state even the most basic proposition with certainty. Even for those relatively rare

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<sup>231</sup> eg *Yildirim v Turkey* [2012] ECHR 2074.

<sup>232</sup> *Satakunnan Markkinapörssi OY v Finland* App no 931/13 (ECtHR, 27 June 2017).

<sup>233</sup> *Ibid*, para 116.

<sup>234</sup> See text to note 192.

<sup>235</sup> Judith Townend, 'Navigating Digital Publishing Law without a 'Night Lawyer': An Exploration of Informal Legal Support Networks' (2011) 5 Cultural Policy, Criticism and Management Research 27.

<sup>236</sup> *Ibid*.

<sup>237</sup> Phillipson, 'Global Pariah' (n 219) 161.

<sup>238</sup> Lidsky (n 225) 889 (citation omitted).

Internet users who have the resources to defend against a defamation action and who contemplate in advance whether their postings will subject them to liability, [this uncertainty] may itself have a chilling effect'.<sup>239</sup>

The risk of defamation liability will not always deter the dissemination of false content on the internet.<sup>240</sup> As Lidsky implies, many individuals *do not* consider the legal implications of their online speech. For these speakers, the intricacies of defamation doctrine will make no difference in their publication decisions. Individual speakers are less likely to be constrained by professional or ethical commitments to verification, impartiality, objectivity, and balance than professional journalists,<sup>241</sup> and have less ability, resources, or inclination to adopt the rigorous fact-checking methods typically used by journalists.<sup>242</sup> In other words, the 'structural' chilling effect described by Barendt and others<sup>243</sup> is less likely to inhibit contributions to online discussion about companies than it is to affect reporting on the corporate sector in traditional news media.

However, because individual speakers tend to be less well-resourced than media publishers, and are likely to be less certain of the likely outcome of litigation because of a lack of legal expertise or access to lawyers, they are potentially more vulnerable *after* publication to threats of litigation, even when made by companies with meritless claims. Jonathon Penney describes these instances in which speech is chilled by specific legal threats against authors or publishers, rather than by a general awareness that criticizing a company might have unwanted legal consequences, as 'personalized' chilling effects.<sup>244</sup> In this context, these effects might be better described as corporations' 'targeted' chilling of critical speech. Penney argues that the chilling effect of targeted litigation threats is most effective when those threats are used against individual internet users who are unlikely to have much understanding of the law.<sup>245</sup>

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<sup>239</sup> Ibid, fn 261.

<sup>240</sup> Michael Etter, Davide Ravasi and Elanor Colleoni, 'Social Media and the Formation of Organizational Reputation' (2019) 44(1) Academy of Management Review 28, 38.

<sup>241</sup> Ibid, 38.

<sup>242</sup> Andrew J Flanagin, 'Online Social Influence and the Convergence of Mass and Interpersonal Communication' (2017) 43 Human Communication Research 450, 457.

<sup>243</sup> See text to notes 205-207.

<sup>244</sup> Jonathon W Penney, 'Chilling Effects in the Internet Age: Three Case Studies' (DPhil thesis, University of Oxford 2015) 281-83.

<sup>245</sup> Ibid, 279-80.

In a small minority of cases, even a *successful* defamation claim may not be enough to deter the defendant from continuing to publish defamatory allegations about a company – and deterrence may be desirable if those statements are demonstrably false. It would make little sense to say that the law has a ‘chilling effect’ on these speakers. But it is still worth recognizing the potential for corporate defamation claims against individual defendants to have consequences that are disproportionate to the harm done by their statements, or their level of fault in continuing to publish them.<sup>246</sup> As explained above, the ‘proportionality’ of interferences with expression is explicitly required by the ECtHR’s Art 10 jurisprudence.<sup>247</sup> Several recent cases have involved defendants, typically self-represented, who have refused to stop publishing false allegations against companies, and seem incapable of recognizing or accepting the effects of judgments against them. These defendants can cause real harm to the companies they target,<sup>248</sup> but it is questionable whether defamation law is the most appropriate tool with which to address the problem caused by this small number of cases. Tens of thousands of pounds are usually awarded against these individuals in damages, as well as injunctions, and in some cases committals for contempt and even imprisonment for failure to comply with those injunctions.<sup>249</sup> It is not obvious that imposing consequences of this kind is a proportionate response to these defendants’ behaviour – especially given that none of them seems to have been effective in deterring them from continuing to publish their allegations.

#### ***iv. Inequality of arms, abusive claims, and SLAPPs***

When the various aspects of the chilling effect phenomenon discussed above are combined together, they can lead to the most egregious examples of the pernicious effect of corporate defamation law on speech, in which companies exploit their

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<sup>246</sup> In Chapter 4, I will discuss the potential for general damages awards in corporate defamation cases to disproportionately affect individual defendants: Ch4.B.i., text to notes 111-125.

<sup>247</sup> At text to note 9.

<sup>248</sup> Although it is worth noting that, in some cases, they will in fact cause no, or very little, actual harm.

<sup>249</sup> eg *Al-Ko Kober Ltd v Sambhi* [2018] EWHC 3523 (QB) [19] (four months’ imprisonment); *Pirtek (UK) Ltd v Jackson* [2018] EWHC 3284 (QB) [28] (twenty weeks’ imprisonment, suspended for two years); *Fentiman v Marsh* [2019] EWHC 2099 (QB) [10] (reporting previous sentence of eight months’ imprisonment, suspended for two years, in respect of defamatory statements about a corporate claimant).

ability to sue by using the threat of litigation to silence legitimate criticism of their activities. Mullis and Scott explain that:

‘The problem with libel has always been and remains the harm caused by threats and bullying in the shadow of the law. Such threats rely on the fear of the cost of embroilment in libel proceedings, not on the expectation that a case would necessarily be lost.’<sup>250</sup>

The problems caused by the high cost of litigation come into focus most clearly where there is a disparity in resources between a large corporate claimant and a less well-resourced defendant. The so-called ‘inequality of arms’ that exists in such cases, again, featured prominently in the pre-2013 reform debates. For example, the CMS Committee declared that ‘It is clear that a mismatch of resources in a libel action, for example between a large corporation for which money may be no object and a small newspaper or NGO, has already led to a stifling effect on freedom of expression.’<sup>251</sup> The Joint Committee on the Draft Defamation Bill also stressed the importance of this issue, going as far as to say that ‘it is the inequality of financial means between the corporation and the publisher that is at the heart of the problem’ with the law’s chilling effect on speech about companies;<sup>252</sup> and this view was echoed by the Government in its response to the Committee’s report.<sup>253</sup>

As explained above,<sup>254</sup> this tactic can be particularly effective when used against individual critics or small organizations without the resources necessary to defend their allegations in court. According to Fiona Donson:

‘The idea is that most activists have too much to lose to become willing victims of a legal claim. The assumption is therefore that they will run away, agree to make whatever apology or undertaking is required, and be too scared ever again to indulge in business-bashing.’<sup>255</sup>

These claims are primarily filed for the illegitimate purpose of intimidating critics into silence: Young claims that, ‘for many corporations, defamation law has

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<sup>250</sup> Mullis and Scott, ‘Missing the Wood (with No Excuses)’ (n 198).

<sup>251</sup> CMS Committee Report (n 170) para 177.

<sup>252</sup> Joint Committee Report (n 170) para 109.

<sup>253</sup> Ministry of Justice, *The Government’s Response to the Report of the Joint Committee on the Draft Defamation Bill* (Cm 8295, 2012) para 90.

<sup>254</sup> At text to notes 244-245.

<sup>255</sup> Fiona Donson, *Legal Intimidation: A SLAPP in the Face of Democracy* (Free Association Books 2000) 14.



become a weapon in their brand management arsenal.<sup>256</sup> It should also be pointed out that, as well as having a more egregious impact on defendants, defamation claims brought by well-resourced companies will be more likely than other claims to target speech that implicates the particularly important public interest in scrutinizing powerful corporations to which Baroness Hale referred in *Jameel*.<sup>257</sup> The chilling effect of these lawsuits is most problematic when it affects speech on matters of public interest.<sup>258</sup>

The term ‘Strategic Lawsuit Against Public Participation’ (‘SLAPP’) is sometimes used to describe this kind of abusive defamation suit. It was coined in the US by Penelope Canan and George Pring in the late 1980s to describe lawsuits targeted at critics exercising their right to petition government against the interests of corporate claimants.<sup>259</sup> The concept and terminology are most often referred to in the US, but the idea has also gained traction in England and other common law jurisdictions,<sup>260</sup> where the term ‘SLAPP’ has generally been understood more broadly than in Canan and Pring’s original definition, ‘as a useful shorthand for intimidatory litigation.’<sup>261</sup> The focus of more recent literature is usually on ‘the paradigm case in which a meritless defamation lawsuit is filed by a business entity against an ordinary citizen who, on public interest grounds[,] has opposed the entity’.<sup>262</sup> As explained by Susan Lott, ‘The key aspect of the SLAPP, to force individuals into costly litigation, suggests that overall success of a SLAPP does not necessarily require a legal victory but a political one: to intimidate and to suppress criticism.’<sup>263</sup> Such lawsuits can be used as a form of ‘privatised regulation’ of the right to protest, often just as effective

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<sup>256</sup> Young (n 211) 559.

<sup>257</sup> See text to notes 53-54.

<sup>258</sup> Milo (n 27) 162.

<sup>259</sup> Penelope Canan and George W Pring, ‘Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches’ (1988) 22(2) *Law & Society Review* 385, 387.

<sup>260</sup> eg Andrew Scott, ‘Ignoring Domestic Abuse? SLAPPs in the UK’ (*Inform*, 27 January 2011) <<https://inform.org/2011/01/27/opinion-ignoring-domestic-abuse-slapps-in-the-uk-andrew-scott/>>; Greg Ogle, ‘Anti-SLAPP Law Reform in Australia’ (2010) 19(1) *Review of European Community and International Environmental Law* 35; Chris Tollefson, ‘Strategic Lawsuits Against Public Participation: Developing a Canadian Response’ (1994) 73 *Canadian Bar Review* 200; Tumai Murombo and Heinrich Valentine, ‘SLAPP Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa’ (2011) 27 *South African Journal on Human Rights* 82.

<sup>261</sup> Donson, *Legal Intimidation* (n 255) 144.

<sup>262</sup> Joseph W Beatty, ‘The Legal Literature on SLAPPs: A Look Behind the Smoke Nine Years After Pring and Canan First Yelled “Fire!”’ (1997) 9 *University of Florida Journal of Law and Public Policy* 85, 85-86.

<sup>263</sup> Lott (n 98) 7.

as state regulation;<sup>264</sup> and can encourage defendants to ‘self-censor their future contribution to the public sphere’<sup>265</sup> with regard to the abusive claimant, as well as stopping the specific criticisms in respect of which the lawsuits are threatened.

The classic example of a corporate defamation lawsuit involving a huge inequality in resources between claimant and defendant is the *McLibel* case.<sup>266</sup> In September 1990, McDonald’s Corporation and its UK subsidiary McDonald’s Restaurants Ltd sued two members of the protest group ‘London Greenpeace’, Helen Steel and David Morris, for their role in disseminating a leaflet entitled ‘What’s Wrong With McDonald’s?’.<sup>267</sup> The criticisms of McDonald’s contained in the leaflet were wide-ranging, including allegations that it knowingly sold food that could cause cancer; that it caused farmers to be evicted from their land in developing countries; that its advertising exploited children; and that its animal-rearing practices were cruel. The company’s claim that the criticisms in the leaflet were false and defamatory<sup>268</sup> was reasonably successful at first instance: of thirteen broad allegations made in the leaflet, eight were not proved to be true by the defendants. Bell J awarded a total of £60,000 in damages to the two claimants,<sup>269</sup> reduced to £40,000 on appeal.<sup>270</sup>

But McDonald’s was widely criticized for its approach to the litigation, which included hiring private investigators to infiltrate the group.<sup>271</sup> The company’s ‘bullying tactics ... were apparent to the public; furthermore, the inequality in financial and legal resources offended many people’s sense of fair play. The importance of free speech in a democracy was at issue and the corporation appeared

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<sup>264</sup> David Mead, ‘A Chill Through the Back Door? The Privatised Regulation of Peaceful Protest’ (2013) Public Law 100.

<sup>265</sup> Mullis and Scott, ‘Something Rotten’ (n 159) 181.

<sup>266</sup> See generally Anthony Hudson, ‘Free Speech and Equality of Arms – The Decision in *Steel & Morris v United Kingdom*’ (2005) 3 European Human Rights Law Review 301.

<sup>267</sup> McDonald’s in fact threatened to sue *five* members of the group; ‘the other three buckled’ and agreed to stop criticizing the company, leaving only Steel and Morris to defend the claim in court: Marlene Arnold Nicholson, ‘*McLibel*: A Case Study in English Defamation Law’ (2000) 18 Wisconsin International Law Journal 1, 10. The company was already notorious for its litigiousness at the time: John Vidal, *McLibel: Burger Culture on Trial* (Macmillan 1997) 46-47; David Hooper, *Reputations Under Fire: Winners and Losers in the Libel Business* (Little, Brown and Company 2000) 158-61.

<sup>268</sup> A press release issued by McDonald’s entitled ‘Why McDonald’s is Going to Court’, containing the allegation that Steel and Morris had knowingly published untrue statements, was the basis of a counter-suit in defamation by the defendants: *Steel* (n 5) para 17.

<sup>269</sup> *McDonald’s Corp v Steel (No 4)* (QB, 19 June 1997).

<sup>270</sup> *McDonald’s Corp v Steel (No 4)* (CA, 31 March 1999).

<sup>271</sup> Vidal (n 267) 192-96.

to be attempting to suppress a public right.<sup>272</sup> The *McLibel* case culminated in 2005, when the ECtHR ruled that the ‘unacceptable inequality of arms’ between the litigants – exacerbated by the absence of legal aid – had meant that Morris and Steel’s right to a fair trial had been infringed.<sup>273</sup> Further, the Court held that the ‘lack of procedural fairness and the disproportionate award of damages’ had infringed the applicants’ Article 10 right to freedom of expression.<sup>274</sup> The lack of specific reforms enacted in response to the Court’s judgment, however, meant that the potential for similar cases to be brought remained.<sup>275</sup>

**v. *Chilling effect concerns as a catalyst for 2013 reforms***

The *McLibel* case prompted calls for reform while it was still ongoing;<sup>276</sup> but also contributed to a growing recognition of the chilling effect of corporate defamation law. The theory has been an important driver behind the gradual trend over the last several decades towards greater protection for freedom of speech in English defamation law,<sup>277</sup> including developments relating specifically to corporate claimants. For example, in his decision in *Derbyshire* denying the claimant local authority standing to sue in defamation,<sup>278</sup> Lord Keith declared it ‘very important’ to recognize the potential chilling effect of libel actions on public interest speech.<sup>279</sup> In *Jameel*, Baroness Hale expressed support for the defendant’s argument that defamation claims brought by companies in particular could have ‘a disproportionately chilling effect upon freedom of speech.’<sup>280</sup>

Similar arguments also had a significant impact on the reform process leading to the Defamation Act 2013. The concern about the capacity for corporate abuse of defamation claims that had been apparent in the wake of the *McLibel* trial was

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<sup>272</sup> Truda Gray and Brian Martin, ‘Defamation and the Art of Backfire’ (2006) 11(2) Deakin Law Review 115, 132.

<sup>273</sup> *Steel* (n 5) para 72.

<sup>274</sup> *Ibid*, para 98.

<sup>275</sup> Eoin O’Dell, ‘Defamation Reform in England and Ireland after *McLibel*’ (2005) 121 Law Quarterly Review 395; Nicholas J McBride and Roderick Bagshaw, *Tort Law* (4<sup>th</sup> edn, Pearson 2012) 528, fn 20.

<sup>276</sup> eg ‘An Overhaul of the Libel Laws’ (1997) 147 New Law Journal 945.

<sup>277</sup> This trend is noted in, for example, Mullis and Scott, ‘Something Rotten’ (n 159) 174-75.

<sup>278</sup> See further Ch5.C.ii., text to notes 191-200.

<sup>279</sup> *Derbyshire* (n 53) 548.

<sup>280</sup> *Jameel* (n 51) [154]. Cf [21] (Lord Bingham).

revived by the publicity surrounding *British Chiropractic Association v Singh*.<sup>281</sup> In 2008, scientist and freelance journalist Simon Singh wrote a comment piece for the *Guardian* that was critical of the practice of chiropractors. Based on Singh's previous research on alternative therapies,<sup>282</sup> the piece asserted that the British Chiropractic Association ('BCA') made claims about the benefits of its members' treatments for which there was 'not a jot of evidence', and that it 'happily promote[d] bogus treatments.'<sup>283</sup>

In response, the BCA – an incorporated company – sued Singh, but not the *Guardian*, for libel. Given that defamation claims can be expected to more effectively chill speech where there is a disparity in resources between the claimant and the defendant,<sup>284</sup> this suggests that the BCA intended to exploit its comparative advantage against Singh, who would be less well-resourced, and have less access to the expertise of lawyers, than the *Guardian* itself. When the case reached the Court of Appeal, Lord Judge CJ noted that the decision to sue Singh alone, along with the BCA's refusal of the *Guardian*'s offer to publish a response, gave rise to 'the unhappy impression ... that this is an endeavour by the BCA to silence one of its critics.'<sup>285</sup>

The Court of Appeal overruled Eady J's decision at first instance that the statements complained of were assertions of fact, rather than expressions of opinion.<sup>286</sup> However, despite the BCA abandoning its claim after that Court of Appeal decision, Singh subsequently revealed that he had spent an estimated £200,000 of his own money – and two years – defending the lawsuit.<sup>287</sup> He estimated that, had his defence been unsuccessful, his costs would have exceeded £500,000.<sup>288</sup> As Lord Judge CJ observed, the result of both the length and cost of the litigation was 'almost certainly ... a chilling effect on public debate which might otherwise have

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<sup>281</sup> [2009] EWHC 1101 (QB); [2010] EWCA Civ 350.

<sup>282</sup> Simon Singh and Edzard Ernst, *Trick or Treatment? Alternative Medicine on Trial* (Bantam Press 2008).

<sup>283</sup> *British Chiropractic Association v Singh* [2009] EWHC 1101 (QB) [4] ('*Singh* (QB)').

<sup>284</sup> See text to notes 252-258.

<sup>285</sup> *British Chiropractic Association v Singh* [2010] EWCA Civ 350, [12] ('*Singh* (CA)').

<sup>286</sup> *Singh* (QB) (n 283) [13]-[14].

<sup>287</sup> Simon Singh, 'The Libel Minefield' (2010) 57(4) *The Biologist* 190, 190; 'Science Writer Simon Singh Wins Libel Appeal' (*BBC News*, 1 April 2010) <<http://news.bbc.co.uk/1/hi/uk/8598472.stm>>.

<sup>288</sup> Joint Committee Evidence vol II (n 3) p 348, Ev 24; Simon Singh, 'Win or Lose, the Cost of Fighting a Libel Suit Chills Science and Journalism' *Times Higher Education* (11 June 2009).

assisted potential patients to make informed choices about the possible use of chiropractic.<sup>289</sup> That subject is one of obvious public interest, well-illustrated by recent coverage of the death of a man whose neck was broken during chiropractic treatment.<sup>290</sup>

At around the same time as the *Singh* case, controversial corporate defamation claims were also being pursued against other scientists. Cardiologist Peter Wilmshurst was sued by NMT Medical, a US company that manufactured medical devices, in respect of concerns he had raised about one of the company's products at an academic conference, which were republished by a third party on a US website. The suit was eventually withdrawn when the claimant company went into liquidation; but Wilmshurst claimed that his legal costs amounted to £300,000,<sup>291</sup> despite the fact that no court ever handed down a judgment on any aspect of the claim. Similarly, a defamation suit in respect of comments made at an academic conference and in an academic journal, filed in 2008 against radiologist Henrik Thomsen by another US corporation, General Electric Healthcare, and two subsidiary companies, never reached a court room, but still imposed a significant burden on its target.<sup>292</sup> After settling the suit in 2010, Thomsen 'vowed to refuse further speaking engagements in the United Kingdom' for fear of going through a similar experience again.<sup>293</sup> The potential for lawsuits such as these to chill contributions to scientific debate is clear. In 2011, Wilmshurst wrote that:

'... if one is sued for libel, the expedient course is to apologize (even when one is in the right) and offer a relatively small sum as compensation to the claimant. The alternative of fighting a libel case can lead to financial ruin, even if one wins.'<sup>294</sup>

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<sup>289</sup> *Singh* (CA) (n 285) [11].

<sup>290</sup> 'Man "Broke Neck During Chiropractor Treatment" in York' (*BBC News*, 11 November 2019) <<https://www.bbc.co.uk/news/uk-england-york-north-yorkshire-50380928>>.

<sup>291</sup> HL Deb 23 April 2013, vol 744, cols 1371-72.

<sup>292</sup> Fiona Donson, 'Libel Cases and Public Debate – Some Reflections on whether Europe Should Be Concerned about SLAPPs' (2012) 19(1) *Review of European Community & International Environmental Law* 83, 93; Simon Singh, 'The Libel Minefield' (2010) 57(4) *The Biologist* 190, 190.

<sup>293</sup> Tim Wogan, 'A Chilling Effect?' (2010) 328(5984) *Science* 1348, 1348.

<sup>294</sup> Peter Wilmshurst, 'The Effects of the English Libel Laws on Medicine and Research – A Personal View' (2011) 29(1) *Prometheus* 67, 70.

These cases, along with other instances in which companies had brought or threatened defamation claims against scientists,<sup>295</sup> were frequently referred to in the pre-2013 debates.<sup>296</sup> Primarily in response to the *Singh* case, which was ‘widely regarded as one of the main drivers behind the Defamation Bill’,<sup>297</sup> debate about defamation reform became ‘fashionable’ towards the end of the 2000s.<sup>298</sup> The Libel Reform Campaign was formed (before the Court of Appeal’s judgment in *Singh*) by the non-profit organizations Index on Censorship and English PEN, and produced a report entitled *Free Speech is Not For Sale* (*FSINFS*).<sup>299</sup> The Index/PEN inquiry was also partly prompted by a July 2008 report of the UN Human Rights Committee that criticized English libel law for ‘discourag[ing] critical media reporting on matters of public interest, [and] adversely affecting the ability of scholars and journalists to publish their work’.<sup>300</sup> The chilling effect argument became a ‘motif’ of the campaign for reform.<sup>301</sup>

The argument shaped the development of that reform in Parliament. The *FSINFS* report was particularly influential in the early stages of the legislative process,<sup>302</sup> as were broader concerns about companies’ ability to use defamation claims as a weapon with which to silence critics.<sup>303</sup> The Joint Committee on the Draft Defamation Bill, for example, expressed concern that the chilling effect of these

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<sup>295</sup> In evidence to the Joint Committee, Simon Singh identified, in addition to the Wilmshurst and Thomsen cases and his own, four other instances in which scientists or science writers had been threatened with a defamation lawsuit by a company: ‘...Francisco Lacerda, a professor from Stockholm, was sued by a company—well, his journal was; and Dalia Nield was threatened, as were bloggers like Andy Lewis and David Colquhoun.’ (Joint Committee Evidence vol II (n 2) 361, Q450). A number of similar cases involving scientific publications being withdrawn either because of a threat of libel litigation or because of self-censorship driven by fear of being sued, most of which appear to have involved corporate claimants, were mentioned by the charity Sense about Science in a submission to the House of Commons Culture, Media and Sport Committee (CMS Committee Evidence (n 185) 483-84).

<sup>296</sup> Including during the House of Lords debate in which the ‘serious financial loss’ test for corporate claimants was added into the Bill: HL Deb 23 April 2013, vol 744, cols 1365-84.

<sup>297</sup> Eric Descheemaeker, ‘Three Errors in the Defamation Act 2013’ (2015) 6(1) *Journal of European Tort Law* 24, 30.

<sup>298</sup> Howarth, ‘Libel: Its Purpose and Reform’ (n 15) 845.

<sup>299</sup> *FSINFS* (n 173).

<sup>300</sup> UN Human Rights Committee Report, 21 July 2008 (CCPR/C/GBR/CO/6) para 25.

<sup>301</sup> Judith Townend, ‘Freedom of Expression and the Chilling Effect’ in Howard Tumber and Silvio Waisbord (eds), *The Routledge Companion to Media and Human Rights* (Routledge 2017) 74.

<sup>302</sup> For example, it was described by the Ministry of Justice as one of ‘three main reports’ on defamation, alongside one Parliamentary report and one Governmental report: Ministry of Justice, *Draft Defamation Bill: Consultation* (Cm 8020, 2011) 5.

<sup>303</sup> eg National Union of Journalists, ‘Defamation Legislation Needs to be Clearer to Protect Freedom of Speech’ (13 December 2012) <<https://www.nuj.org.uk/news/defamation-legislation-clearer-protect-freedom-of-speech/>>.

claims ‘harms ... wider public debate.’<sup>304</sup> Ken Clarke MP, the Bill’s sponsor in the House of Commons, explained that the ‘first priority’ of the 2013 Act was ‘to reform the law so that trivial and unfounded actions for defamation do not succeed.’<sup>305</sup>

These sentiments were echoed by academic commentators during the reform process. David Howarth, whose ‘sociality’ theory of reputation was discussed in Chapter 1,<sup>306</sup> claimed that denying companies the right to sue in defamation would:

‘... deal with many of the cases where manufacturers of products or professional associations sue scientists, or scientific journalists, for publishing work that calls into question the efficacy of the claimants’ products or profession. In most such cases, the claimant is not a natural human person.’<sup>307</sup>

Similarly, Gavin Phillipson argued that the ‘impact libel law has had on serious journalism and scientific inquiry has been problematic’,<sup>308</sup> and considered it ‘notable that a large majority of the notorious cases of the misuse of libel laws to attack scientists or science writers have involved corporate claimants.’<sup>309</sup> Phillipson did not go as far as adopting Howarth’s recommendation of abolishing the corporate right to sue; he instead suggested that the combination of two reforms proposed by the Joint Committee – the addition of a financial loss test for corporate claimants, and a requirement for such claimants to seek the court’s permission to pursue defamation claims<sup>310</sup> – would ‘be a powerful bulwark against the fear of even unwinnable libel suits that allows corporations to “bully” scientists and writers.’<sup>311</sup>

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<sup>304</sup> Joint Committee Report (n 170) para 109.

<sup>305</sup> HC Deb 12 June 2012, vol 546, col 179. See also HL Deb 17 December 2012, vol 741, col 422 (Lord McNally).

<sup>306</sup> Ch1.C., text to notes 207-213.

<sup>307</sup> Howarth, ‘Libel: Its Purpose and Reform’ (n 15) 875 (citations omitted).

<sup>308</sup> Phillipson, ‘Global Pariah’ (n 219) 150.

<sup>309</sup> Ibid, 185. Cf Jack Grove, ‘Are Legal Concerns Stifling Scientific Debate?’ *Times Higher Education* (7 November 2019) <<https://www.timeshighereducation.com/features/are-legal-concerns-stifling-scientific-debate>> (describing a number of defamation claims brought against scientists or academic journals, all by individual claimants).

<sup>310</sup> Joint Committee Report (n 170) para 116. Discussed further in Ch4.C.ii., at text to notes 307-311.

<sup>311</sup> Phillipson, ‘Global Pariah’ (n 219) 186 (emphasis removed).

The Joint Committee claimed that the abuse of litigation threats was ‘a widespread tactic’<sup>312</sup> which was ‘routinely’ utilized by companies ‘using expensive lawyers to pursue every available method to silence ... critical publisher[s].’<sup>313</sup> But such sweeping claims were not universally accepted. Advocates of reform were occasionally criticized for relying on anecdotal evidence of abusive or trivial lawsuits to support their arguments for broad restrictions on the corporate right to sue. For example, the CMS Committee placed a great deal of emphasis on Tesco’s lawsuit against *The Guardian* in 2008 as an example of corporate abuse of the law,<sup>314</sup> but this appears to have been almost entirely down to one of its members, Paul Farrelly MP. The case was discussed a number of times in the evidence heard by the Committee, but almost always at the instigation of Farrelly.<sup>315</sup> The Committee’s willingness to make assertions about corporate defamation litigation based on limited evidence might be epitomized by a comment made by Farrelly while the Committee was hearing evidence. Farrelly stated that ‘many of the actions taken by large corporations in particular are not primarily about money’, and in support of this assertion cited two cases ‘where the avowed intention of the litigant was to drive the publisher out of business’<sup>316</sup> – *Goldsmith v Pressdram*<sup>317</sup> and *Aitken v Guardian News & Media*<sup>318</sup> – only one of which involved a corporate claimant (which was not a for-profit company).

The CMS Committee’s description of the ‘stifling effect’<sup>319</sup> of corporate defamation law on freedom of speech was criticized by Magnus Boyd on the basis that it was ‘drawn from only two cases over the last eleven years’.<sup>320</sup> However, the evidence relied on by those claiming that the problem was being exaggerated was no less anecdotal. Boyd, for example, went on to assert that the ‘vast majority of

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<sup>312</sup> Joint Committee Report (n 170) para 116

<sup>313</sup> *Ibid*, para 109 (citations omitted).

<sup>314</sup> *Tesco Stores Ltd v Guardian News & Media Ltd* [2009] EMLR 5 (QB). The case is discussed in the CMS Committee Report (n 170) paras 132-33 and 168-72.

<sup>315</sup> See CMS Committee Evidence (n 185) Ev 20, 42, 130, 188, and 247.

<sup>316</sup> *Ibid*, Ev 15, Q17.

<sup>317</sup> [1988] 1 WLR 64.

<sup>318</sup> [1997] EMLR 415.

<sup>319</sup> CMS Committee Report (n 170) para 177.

<sup>320</sup> Magnus Boyd, ‘The Proposed Restriction on Corporate Bodies to Sue for Defamation’ (Reframing Libel Symposium, London, 4 November 2010) 2, at <<http://reframinglibel.com/2011/03/17/the-proposed-restriction-on-corporate-bodies-to-sue-for-defamation/>>. The two cases referred to are *McDonalds Corp v Steel* [1997] EWHC 366 (QB) and *Tesco Stores Ltd v Guardian News & Media Ltd* [2009] EMLR 5 (QB).



corporate claimants' have legitimate cases, and that it was 'abundantly clear that the McLibel case was atypical', without citing any further evidence of his own.<sup>321</sup>

The fact that various contributions to the pre-2013 reform debates relied on chilling effect arguments without convincing supporting evidence reflects more on the nature of the chilling effect problem itself than it does on those invoking the theory in support of their arguments. From its origins in US constitutional law, the empirical evidence supporting the theory's claims about the effect of the law on publishers has been limited.<sup>322</sup> Frederick Schauer argues that the US Supreme Court's judgment in *New York Times v Sullivan*,<sup>323</sup> which will be discussed in Chapter 4,<sup>324</sup> 'was based on what was at best armchair economics and at worst casual speculation, not about the law itself, but about the newspaper industry, its organization, and the incentives of its inhabitants.'<sup>325</sup>

There is a relatively small, but growing, body of empirical research examining the chilling effect of defamation laws in English-speaking jurisdictions,<sup>326</sup> but none of this empirical literature focuses specifically on the chilling effect caused by corporate claims. This lack of empirical evidence mainly reflects the challenges inherent in obtaining reliable data on the chilling effect generally, rather than being a result of anything specific to the effect of *corporate* defamation law. David Mead simply observes that 'Formal evidence is very hard to obtain.'<sup>327</sup> In large part, this is because of the difficulty in systematically identifying instances of the chilling effect, given that by definition they involve a decision *not* to publish certain information. Attempts to measure the incidence of intimidatory lawsuits specifically face similar problems, because 'the purpose of threatening a SLAPP suit will generally be to silence the critic.'<sup>328</sup> If a threat is successful, the target will be intimidated into silence without the need for a lawsuit to be filed. This means that 'focus[ing] only on SLAPPs that proceed to litigation or threatened SLAPPs

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<sup>321</sup> Boyd (n 320) 3.

<sup>322</sup> See eg Kendrick (n 189) 1655-57.

<sup>323</sup> *Sullivan* (n 165).

<sup>324</sup> Ch4.A., text to notes 8-13, 24-26, and 46-47.

<sup>325</sup> Frederick Schauer, 'The Dilemma of Ignorance: *PGA Tour, Inc. v Casey Martin*' (2001) Supreme Court Review 267, 286.

<sup>326</sup> Barendt and others (n 156); Weaver and others (n 200).

<sup>327</sup> Mead, 'A Chill Through the Back Door?' (n 264) fn 80.

<sup>328</sup> Lott (n 98) 11.

that are reported in some kind of public forum ... may [lead to] significant underreporting of the phenomenon.<sup>329</sup>

Even where relevant cases can be identified, another significant problem is that the existing literature, which tends to be based on interviews conducted with journalists and media lawyers, is not able to provide much insight into whether the statements that are chilled would be socially beneficial if published.<sup>330</sup> Surveys, similarly, may be affected by respondents' self-reporting bias and therefore overstate the amount, or the public interest value, of chilled speech.<sup>331</sup> Townend notes that trying to assess the extent to which the chilling effect suppresses publications that are both true and important using these methods would be 'fruitless', because the results would depend on publishers' subjective assessments of the value of the statements that had been self-censored.<sup>332</sup>

One study designed to avoid this reliance on publishers' subjective assessments of the chilling effect provides some insight into corporate defamation law specifically. Chris Dent and Andrew Kenyon conducted a comparative analysis of the effects of US and Australian defamation law, by analysing the content of over 1400 newspaper articles. Their results suggest that US newspaper articles contained potentially defamatory (not necessarily false) material almost three times as frequently as Australian articles, with a particularly significant difference in rates of critical reporting on corporations or their officers.<sup>333</sup> The study may provide some insight into the likely effects of *English* corporate defamation law because the Australian law at the time the study was conducted was broadly equivalent to the

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<sup>329</sup> Ibid.

<sup>330</sup> Judith Townend, 'Freedom of Expression and the Chilling Effect' in Howard Tumber and Silvio Waisbord (eds), *The Routledge Companion to Media and Human Rights* (Routledge 2017) 78-79.

<sup>331</sup> Kendrick (n 189) 1679. Equally, journalists and media companies might seek to downplay the extent to which their reporting is chilled, for fear of encouraging more claims against them. See eg CMS Committee Evidence (n 185) Ev 144, Q497 (asked whether there were certain individuals who were so wealthy and so litigious that 'the *Daily Mail* would not take them on because of the potential consequences', then-editor Paul Dacre responded: 'I cannot give you an answer... If I say we are not going to take them on I am going to give this Committee a green light for every lawyer to think they can get away with it.').

<sup>332</sup> Townend, 'Online Chilling Effects' (n 156) 6.

<sup>333</sup> Chris Dent and Andrew T Kenyon, 'Defamation Law's Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers' (2004) 9 *Media & Arts Law Review* 89.

law that applied in England before 2013, as compared to the law in the US, which is significantly more favourable to defendants than English law.<sup>334</sup>

It is clear that further empirical research investigating the chilling effect of English corporate defamation law would be valuable. However, as Leslie Kendrick has argued, ‘The fact that we cannot measure chilling effects accurately does not mean that they do not exist[, or] ... that we should not care about them.’<sup>335</sup> As demonstrated above, there is a good deal of anecdotal evidence showing that companies can and do abuse the right to sue in defamation to silence legitimate criticism. Further, given that much of the law’s chilling effect is driven by the perceived, rather than actual, risk of criticizing companies, the reluctance to publish such criticism reported by scientists like Henrik Thomsen and Peter Wilmschurst, among many others, shows that the fear of companies pursuing abusive defamation claims does suppress important speech on matters of public interest. Considering the difficulty of collecting reliable empirical evidence of this phenomenon, this anecdotal evidence should be sufficient to prove the existence of a genuine problem, which it is plausible to imagine might be addressed through reforms to the law. Parliament was justified in seeing the chilling effect of corporate defamation law as a significant problem to be addressed in the Defamation Act 2013.

## **Conclusion**

Speech about companies is almost always public interest speech, which deserves special protection against the restrictions imposed by defamation claims. But corporate defamation claims in particular have a range of pernicious effects on speakers, and a tendency to chill critical speech on important subjects. In the debates leading to the Defamation Act 2013, the chilling effect that corporate defamation claims can have on public interest speech was perhaps the most significant argument put forward in favour of reforms specifically aimed at corporate claimants. Parliament’s response to those arguments was to include a provision in the 2013 Act that would require for-profit companies to show ‘serious financial loss’ in order to succeed with defamation claims. In the next chapter, I

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<sup>334</sup> See Ch4.A., at text to notes 7-49.

<sup>335</sup> Kendrick (n 189) 1685-86.

will examine in detail the impact that provision has had since coming into force, with a view to assessing how effective it will be in addressing the criticisms of the pre-existing law described in Chapters 1 and 2.

# CHAPTER THREE:

## THE DEFAMATION ACT 2013

### Introduction

The widespread concern about the effect of defamation law on freedom of speech that was discussed in the previous chapter was the most important catalyst for the reform process that culminated in the Defamation Act 2013.<sup>1</sup> Free speech arguments were also heavily relied on by those advocating reforms specifically targeting corporate claimants.<sup>2</sup> One of the most significant sections of the Act, and the only one in which corporate claimants are addressed directly, is section 1. That section was intended to ‘remove the scope for trivial and unfounded actions succeeding’<sup>3</sup> by requiring claimants to show ‘serious harm’ to reputation. The specific provision relating to corporate claimants in sub-section (2), which further restricts companies’ right to sue by requiring them to also show ‘serious financial loss’, was mainly added to the Act in response to complaints about the chilling effect of corporate defamation claims.<sup>4</sup>

In full, section 1 of the Defamation Act 2013 provides that:

- (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.

The specific nature of the restriction on the corporate right to sue which Parliament chose to impose – a requirement to show financial loss – also reflected a recognition

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<sup>1</sup> Eric Descheemaeker, ‘Three Errors in the Defamation Act 2013’ (2015) 6(1) *Journal of European Tort Law* 24, 25.

<sup>2</sup> See further Ch2.C.v., text to notes 276-335.

<sup>3</sup> Ministry of Justice, *Draft Defamation Bill: Consultation* (Cm 8020, 2011) para 4.

<sup>4</sup> HL Deb 23 April 2013, vol 744, cols 1365-84.

of the limits of the corporate interest in reputation that were identified in Chapter 1.<sup>5</sup> Parliament viewed the burden imposed on speech by corporate defamation claims as particularly problematic in cases ‘where there is no realistic prospect of serious financial loss.’<sup>6</sup> Put simply, with s 1(2), Parliament was attempting to prevent claimants in these cases from succeeding. By demanding that corporate claimants prove that they had suffered an injury to the kind of reputational interest most applicable to companies, ‘financial loss’, the intention was to limit corporate claims to those in which it was at least arguable that restricting defendants’ freedom of speech could be justified in light of claimants’ competing interests.

Whether the reform will be successful in achieving its aims will depend on how the provision is interpreted and applied by the courts. This chapter will look at how the courts have interpreted s 1(2) to date, and how it is likely to be applied going forward. That discussion will inform my assessment of the provision as a response to the criticisms of the pre-existing law that were identified in Chapters 1 and 2. My conclusion will be that the additional hurdle imposed on corporate defamation claimants under s 1(2) has improved the law by making it more difficult for companies to succeed with trivial claims. However, that improvement will probably be relatively limited, because the courts have so far tended to interpret the provision in a way that is favourable to claimants. The serious financial loss test may also increase the cost and complexity of some litigation for defendants; and it does not resolve the fundamental problem of the effect of corporate defamation claims on freedom of speech. Overall, the 2013 Act does not adequately address the problems with corporate defamation law that it was intended to deal with.

As will be explained shortly, the relationship between the ‘serious harm’ test in s 1(1) of the 2013 Act and the ‘serious financial loss’ test in s 1(2) means that the reform targeted at corporate claimants specifically cannot be understood or assessed without an appreciation of the effect of the s 1 threshold on defamation law more generally. This chapter therefore begins, in Part A, by examining the effect of s 1(1). That discussion provides the backdrop for the core of the chapter, which is the

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<sup>5</sup> Explanatory Notes to the Defamation Act 2013, para 12.

<sup>6</sup> Joint Committee on the Draft Defamation Bill, *Report* (2010–12, HL 203, HC 930-I) para 114 (‘Joint Committee Report’).

analysis in Part B of the case law to date on the ‘serious financial loss’ test in s 1(2). Finally, Part C briefly discusses whether the limited data on defamation litigation that is made available by the courts can shed any light on whether s 1(2) has had any effect, not on how corporate defamation claims are handled in the courts, but on which corporate defamation claims are brought at all.

## **A. Interpretation of the s 1(1) ‘serious harm’ test**

The ‘serious financial loss’ provision in s 1(2) ‘links explicitly to the serious harm test’ in s 1(1);<sup>7</sup> and a ‘body that trades for profit’<sup>8</sup> will need to satisfy *both* the ‘serious harm’ test *and* the ‘serious financial loss’ test to successfully sue.<sup>9</sup> The courts’ interpretation of s 1(1) has twice shifted significantly in the six years since the 2013 Act came into force on 1<sup>st</sup> January 2014,<sup>10</sup> which means that the corporate defamation cases in which s 1(2) has been applied to date have been decided against the backdrop of this changing approach to s 1 overall.<sup>11</sup> It is likely that the similar language used in sub-ss (1) and (2) will be given similar interpretation in the courts,<sup>12</sup> and so the application of the s 1(2) test has been shaped, to some extent at least, by the leading interpretation of s 1(1) at the time each case was decided.<sup>13</sup> As such, the impact of s 1(2) on *corporate* claimants cannot be understood without also considering the s 1(1) test that must be satisfied by *all* claimants. Part A explains the effect of s 1(1) on English defamation law, and how the courts’ interpretation of the serious harm test has developed since it came into force.

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<sup>7</sup> HL Deb 23 April 2013, vol 744, col 1366 (Lord McNally)

<sup>8</sup> Parliament’s decision to limit the scope of the s 1(2) test’s applicability to claims brought by ‘bod[ies] that trade for profit’ will be discussed in Ch5.C.iii., at text to notes 254-308.

<sup>9</sup> *Business Energy Solutions Ltd v Scrivener* [2015] EWHC 2948 (QB) [12]-[13].

<sup>10</sup> Defamation Act 2013 (Commencement) (England and Wales) Order 2013, SI 2013/3027, art 2.

<sup>11</sup> See further text to notes 79-99.

<sup>12</sup> *Lachaux v Independent Print Ltd* [2019] UKSC 27, [15]; *Pirtek (UK) Ltd v Jackson* [2017] EWHC 2834 (QB) [50]. When interpreting legislation, in general ‘it is a sound rule of construction to give the same meaning to the same words occurring in different parts of an Act of Parliament’: *Courtauld v Legh* (1869) LR 4 Exch 126, 130 (Cleasby B); *R v Kansal (no 2)* [2001] UKHL 62, [102].

<sup>13</sup> See text to notes 98-99.

### *i. Preceding case law*

To understand the effect of s 1, it is necessary to briefly explain some features of the law as it existed prior to the commencement of the 2013 Act, and in particular the common law ‘presumption of harm’,<sup>14</sup> which applied in cases involving corporate, as well as individual, claimants.<sup>15</sup> The presumption of harm meant that a defamation claimant did not need to prove that the statement complained of had caused *actual* harm to her reputation. Instead, it was sufficient to show that the statement complained of had a *tendency* to harm the claimant’s reputation.<sup>16</sup> That was determined based on the intrinsic quality of the statement itself, by reference to one of a number of tests of ‘defamatory’ meaning.<sup>17</sup> This meant that the cause of action in defamation was complete at the point that the statement was published, and was not reliant on actual harm accruing as a consequence of its publication.<sup>18</sup>

The common law position was criticized for allowing claimants to establish prima facie liability, and in doing so to put the burden on defendants to avoid liability, even when their claims were brought in respect of relatively trivial (but still technically defamatory) statements, or when publication was minimal or unlikely to actually harm the claimant’s reputation for some other reason.<sup>19</sup> As noted above, the ‘serious harm’ test in s 1 of the 2013 Act was intended to reduce claimants’ ability to pursue these more trivial claims, in light of their effect on freedom of expression.<sup>20</sup> The section was based on steps that the courts had already taken to

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<sup>14</sup> The terms ‘presumption of harm’, ‘presumption of loss’, and ‘presumption of damage’ are used interchangeably in the discussion below.

<sup>15</sup> *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44 (*Jameel v WSJ*).

<sup>16</sup> The categories of ‘defamatory’ statement were broadly intended to identify statements that were inherently likely to cause harm: David A Anderson, ‘Reputation, Compensation, and Proof’ (1984) 25(5) *William & Mary Law Review* 747, 751. The view that the categories of statement considered ‘defamatory’ are those with an inherent tendency to harm the claimant’s *reputation* is a reasonable approximation, but it fails to explain some of the common law tests, particularly the ‘ridicule’ and ‘shun or avoid’ tests: Lawrence McNamara, *Reputation and Defamation* (OUP 2007) chs 6-7.

<sup>17</sup> The main tests include whether the statement complained of tends to: ‘lower [the claimant] in the estimation of right-thinking members of society generally’ (*Sim v Stretch* [1936] 2 All ER 1237, 1240); ‘expose the [claimant] to hatred, ridicule, or contempt’ (*Parmiter v Coupland* (1840) 6 M & W 104, 109); cause the claimant to be ‘shunned or avoided’ (*Youssouf v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581); or ‘affect in an adverse manner the attitude of other people towards the claimant’ (*Thornton v Telegraph Media Group* [2010] EWHC 1414 (QB) [96]).

<sup>18</sup> *Shevill v Presse Alliance SA* [1996] AC 959 (HL) 983.

<sup>19</sup> eg Douglas W Vick and Linda Macpherson, ‘An Opportunity Lost: The United Kingdom’s Failed Reform of Defamation Law’ (1997) 49(3) *Federal Communications Law Journal* 621, 624-28.

<sup>20</sup> Ministry of Justice, *Consultation* (n 3) para 4.



address this problem in two cases decided in the preceding decade: *Thornton v Telegraph Media Group Ltd* ('*Thornton*'),<sup>21</sup> and *Jameel v Dow Jones & Co Inc* ('*Jameel*').<sup>22</sup> Although *Jameel* was decided five years before *Thornton*, the cases are discussed in reverse chronological order below for reasons of clarity.

The issue in *Thornton* was whether the statement complained of was capable of bearing a defamatory meaning.<sup>23</sup> Tugendhat J held that, whichever definition of 'defamatory' was applied to that question, it 'must include a ... threshold of seriousness, so as to exclude trivial claims.'<sup>24</sup> The effect of that threshold is that a statement will only be defamatory if it has a tendency to '*substantially*' harm the claimant.<sup>25</sup> However, Tugendhat J made clear that 'the claimant does not have to prove that there has *in fact* been an affect upon him.'<sup>26</sup> The decision in *Thornton* therefore retained the common law principle that harm would be presumed based on the inherently harmful nature of the statement complained of, but 'sought to confine the application of that principle to cases which reached an appropriate level of gravity.'<sup>27</sup>

In *Jameel*, the Court of Appeal also declined to abolish the presumption of damage.<sup>28</sup> But Lord Phillips MR ruled that a defamation claim could be struck out as an abuse of process, even though the statement complained of was presumed to have harmed the claimant's reputation by virtue of its defamatory meaning, if the claimant's reputation had *in fact* 'suffered no or minimal actual damage' as a result of its publication.<sup>29</sup> Where, as in *Jameel*, the statements complained of had been published to very few people and there was no other evidence that the claimant had been harmed, any actual damage to the claimant's reputation would be so minimal that 'the game [would] not [be] worth the candle'.<sup>30</sup> The cost of the litigation for the parties and for the court would be disproportionate to the vindication that the

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<sup>21</sup> *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB).

<sup>22</sup> *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75.

<sup>23</sup> *Thornton* (n 21) [15].

<sup>24</sup> *Ibid*, [90].

<sup>25</sup> *Ibid*, [96] (emphasis in original).

<sup>26</sup> *Ibid*, [93] (emphasis added).

<sup>27</sup> Sir Brian Neill and others, *Duncan and Neill on Defamation* (4<sup>th</sup> edn, LexisNexis UK 2015) para 4.04.

<sup>28</sup> *Jameel* (n 22) [41].

<sup>29</sup> *Ibid*, [55].

<sup>30</sup> *Ibid*, [57], [69].

claimant could realistically hope to achieve if successful. If the litigation was not a necessary and proportionate means of protecting the claimant's reputation, it would be a violation of the defendant's Art 10 right to freedom of expression to allow it to continue.

As Mathilde Groppo explains, these cases provided the courts with 'two independent mechanisms to eliminate trivial claims.'<sup>31</sup> Put simply, the distinction between them is that the *Thornton* test is relevant to whether the statement complained of is 'defamatory', determined at the point of publication by reference to the inherent tendency of the statement to cause harm; the *Jameel* test is relevant to whether the statement is actionable in a procedural sense, determined at the point the issue is tried by reference to extrinsic facts about the actual impact of the statement.

The Explanatory Notes to the 2013 Act state that the 'serious harm' test in s 1 'raises the bar for bringing a claim' compared to the thresholds established in *Thornton* and *Jameel*.<sup>32</sup> But, while they acknowledge the distinction between the two tests to some extent,<sup>33</sup> they do not differentiate between the effect that s 1 was intended to have on each. Nor do they explain precisely how, or to what extent, the threshold for succeeding with a defamation claim is raised by s 1. Those questions were left to the courts to answer.

## ***ii. Ambiguity in the statutory language of s 1***

One of the most significant problems with s 1 of the 2013 Act is the lack of clarity in its language.<sup>34</sup> Parliament did not intend the serious harm test to be used as a definition of 'defamatory', either to supplement or to replace the established common law tests.<sup>35</sup> So, to preserve the requirement for the claimant to show that a statement is defamatory at common law, but add on top of that a requirement to

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<sup>31</sup> Mathilde Groppo, 'Serious Harm: A Case Law Retrospective and Early Assessment' (2016) 8(1) *Journal of Media Law* 1, 3.

<sup>32</sup> Explanatory Notes to the Defamation Act 2013, para 11.

<sup>33</sup> *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB) [50].

<sup>34</sup> *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1334, [62]: Davis LJ describing the 'conceptual impenetrability of s.1(1) as drafted.'

<sup>35</sup> See Richard Parkes and others, *Gatley on Libel and Slander* (12<sup>th</sup> edn, 2<sup>nd</sup> supp, Sweet & Maxwell 2017) para 2.1 ('*Gatley*'): 'The language adopted in the provision – that a publication "is not defamatory unless" – is simply not apt to create a new definition'.

show serious harm to reputation, the section uses the phrase ‘A statement *is not defamatory unless...*’. This has the unnecessarily confusing consequence that a defamation claimant must now show that the statement complained of *is* ‘defamatory’ at common law; and then that the statement is *not* ‘not defamatory’ under s 1.

The ambiguity of s 1 is more than a matter of clumsy language: the decision to make the serious harm requirement relevant to whether a statement is *defamatory*, rather than whether it is *actionable*, introduces conceptual confusion into the test.<sup>36</sup> As explained above, at common law (including under the *Thornton* threshold) whether a statement is ‘defamatory’ is determined by reference to the nature of the statement itself, and can therefore be judged at the point of publication.<sup>37</sup> But the language used in s 1, which requires that the publication of the statement complained of ‘has caused or is likely to cause serious harm to the reputation of the claimant’, seems to suggest ‘that serious harm must be empirically demonstrated’ by reference to evidence extrinsic to the statement itself.<sup>38</sup> If the intention of s 1 is that claimants will need to provide evidence of *actual* harm to reputation, then the test appears to modify the determination of defamatory meaning by reference to events that happen *after* the point of publication. As a result, s 1(1) would have the effect of ‘abrogat[ing], by necessary implication, the presumption of damage’ that arises as a result of a statement’s inherently harmful nature.<sup>39</sup> But this ‘long-standing feature of the common law’ is not explicitly referred to in the Act, and no clear indication is given that Parliament intended to make ‘a profound change to defamation law’ by abolishing it.<sup>40</sup>

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<sup>36</sup> HC Deb 12 September 2012, vol 550, col 373 (Sir Edward Garnier MP); Descheemaeker, ‘Three Errors’ (n 1) 26-27.

<sup>37</sup> Text to notes 23-27.

<sup>38</sup> Northern Ireland Law Commission, *Consultation Paper: Defamation Law in Northern Ireland* (NILC 19, 2014) para 4.19.

<sup>39</sup> David Rolph, ‘A Critique of the Defamation Act 2013: Lessons For and From Australian Defamation Law Reform’ (2016) 21(4) *Communications Law* 116, 117.

<sup>40</sup> *Ibid.* Contrast, for example, the explicit abolition of common law defences in Defamation Act 2013, sub-ss 2(4), 3(8), 4(6).

### *iii. Shifting interpretation of s 1: the Lachaux case*

These ambiguities were central to the most important case on s 1 to date, *Lachaux v Independent Print Ltd* (*Lachaux*), which involved a preliminary dispute as to whether the claimant had satisfied the serious harm threshold. The High Court ruled on the issue in July 2015,<sup>41</sup> followed by the Court of Appeal in September 2017,<sup>42</sup> and finally the Supreme Court in June 2019.<sup>43</sup> Although all three courts ruled in favour of the claimant on the facts of the case, at each level of appeal the legal analysis shifted significantly. The Court of Appeal and Supreme Court judgments marked the first time each of those courts had considered s 1; and the High Court judgment was also effectively the leading authority on s 1 until it was superseded by the Court of Appeal's analysis of the test.<sup>44</sup>

The different analyses of s 1 at each stage of appeal turned mainly on the phrase 'has caused *or is likely to cause*'. Soon after the 2013 Act was passed, James Price and Felicity McMahon noted that this phrase was 'potentially ambiguous: it may refer to the possibility of some future event occurring, or it may be used to describe the situation where the statement itself is of the nature that it is likely to cause serious harm.'<sup>45</sup> In the High Court, Warby J opted for the first of these interpretations. His analysis of the effect of s 1 was as follows:

'... 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.'<sup>46</sup>

However, in the Court of Appeal, Davis LJ took a different view. He rejected the logical implication of Warby J's analysis that Parliament had abolished the common

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<sup>41</sup> [2015] EWHC 2242 (QB) (*Lachaux* (QB)).

<sup>42</sup> [2017] EWCA Civ 1334 (*Lachaux* (CA)).

<sup>43</sup> [2019] UKSC 27 (*Lachaux* (SC)).

<sup>44</sup> Groppo (n 31) 5.

<sup>45</sup> James Price and Felicity McMahon, *Blackstone's Guide to the Defamation Act 2013* (OUP 2013) para 2.34. See also para 2.52.

<sup>46</sup> *Lachaux* (QB) [46].

law presumption of harm without explicitly acknowledging that it was doing so.<sup>47</sup> Warby J's interpretation of s 1 would also mean that Parliament had 'swept away [the] well-established common law principle ... that in defamation the cause of action is complete when the defamatory statement is published'.<sup>48</sup> Requiring extrinsic evidence of harm to the claimant's reputation would mean that the cause of action in respect of a defamatory statement would be inchoate at the point of publication,<sup>49</sup> and the claim may 'drift in and out' of actionability as the circumstances of the case change.<sup>50</sup> This in turn would make it difficult to determine the point from which the one-year limitation period for bringing a claim would run.<sup>51</sup>

According to Davis LJ's interpretation, whether a claimant had satisfied the s 1(1) test could be assessed by reference only to the inherent tendency of the statement to cause 'serious harm' to the claimant's reputation:

'Section 1(1) of the 2013 Act 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. *Thornton* has thus itself been superseded by statute.'<sup>52</sup>

The Court of Appeal judgment made the 'serious harm' test in s 1(1) substantially less demanding for claimants to satisfy than Parliament seems to have intended, and therefore weakened the protection that s 1 offered for freedom of speech.<sup>53</sup> Although Davis LJ asserted that on his interpretation the s 1 test had 'superseded' *Thornton*,<sup>54</sup> the effect of his judgment was to read s 1 as doing little more than codifying the *Thornton* test.<sup>55</sup> Similarly, if the test in s 1(2) could be satisfied by showing that the statement complained of had a tendency to cause serious financial

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<sup>47</sup> *Lachaux* (CA) [57]-[58].

<sup>48</sup> *Ibid*, [63].

<sup>49</sup> *Lachaux* (QB) [45].

<sup>50</sup> *Lachaux* (CA) [60].

<sup>51</sup> *Ibid*, [61].

<sup>52</sup> *Ibid*, [82].

<sup>53</sup> Mathilde Groppo, 'Case Law: *Lachaux v Independent Print*, Supreme Court Abolished Common Law Presumption of Damage in Libel Cases' (*Inform*, 13 June 2019) <<https://inform.org/2019/06/13/case-law-lachaux-v-independent-print-supreme-court-abolished-common-law-presumption-of-damage-in-libel-cases-mathilde-groppo/>>.

<sup>54</sup> *Lachaux* (CA) [82].

<sup>55</sup> Nicola Cain, 'Seriously Limiting Serious Harm' (12 September 2017) <<https://www.rpc.co.uk/perspectives/data-and-privacy/seriously-limiting-serious-harm>>.

loss,<sup>56</sup> it would add little to the existing principle that a company can only sue in respect of statements that have ‘a tendency to damage it in the way of its business,’<sup>57</sup> subject to a threshold of seriousness,<sup>58</sup> so that ‘adverse consequences for the claimant must be likely.’<sup>59</sup>

#### *iv. The Supreme Court’s Lachaux judgment*

The Court of Appeal’s analysis, according to which the common law presumption of damage was left ‘unaffected’ by s 1,<sup>60</sup> was reversed on appeal to the Supreme Court. Delivering the Court’s unanimous verdict, Lord Sumption agreed with Warby J’s conclusion in the High Court<sup>61</sup> that ‘the defamatory character of [a] statement no longer depends only on the meaning of the words and their inherent tendency to damage the claimant’s reputation.’<sup>62</sup> Instead, s 1 introduced ‘a new threshold of serious harm which did not previously exist’:<sup>63</sup>

‘... a statement which would previously have been regarded as defamatory, because of its inherent tendency to cause some harm to reputation, is not to be so regarded unless it “has caused or is likely to cause” harm which is “serious”.’<sup>64</sup>

The serious harm threshold must be applied ‘by reference to the actual facts about [the statement’s] impact and not just to the meaning of the words.’<sup>65</sup> That is not to say that the inherent tendency of a statement to harm the claimant’s reputation is irrelevant to the s 1 test; rather, that it cannot on its own be determinative of whether the serious harm threshold has been met. Whether a statement ‘has caused’ serious harm for the purpose of s 1:

‘... is a proposition of fact which can be established only by reference to the impact which the statement is shown actually to have had. It depends on a

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<sup>56</sup> Although Davis LJ stated (at [82]) that the test in s 1(2) may ‘operate in a way rather different from s 1(1)’, that did not prevent the High Court from applying his analysis of s 1(1) directly to the s 1(2) test in cases involving corporate claimants: *Seventy Thirty Ltd v Burki* [2018] EWHC 2151 (QB) [204]-[205]; *Pirtek (UK) Ltd v Jackson* [2017] EWHC 2834 (QB) [50].

<sup>57</sup> *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 (HL) 547.

<sup>58</sup> *Thornton* (n 21) [91].

<sup>59</sup> *Ibid.*, [56].

<sup>60</sup> *Lachaux* (CA) [82].

<sup>61</sup> *Lachaux* (QB) [60].

<sup>62</sup> *Lachaux* (SC) [17].

<sup>63</sup> *Ibid.*, [13].

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*, [12].

combination of the inherent tendency of the words and their actual impact on those to whom they were communicated.’<sup>66</sup>

Lord Sumption explained that ‘the same must be true’ of the likelihood limb of the s 1 test, since ‘both past and future harm are being treated on the same footing, as functional equivalents. If past harm may be established as a fact, the legislator must have assumed that “likely” harm could be also.’<sup>67</sup> But Lord Sumption also avoided the conflict between s 1 and the principle that the cause of action in defamation accrues at the point of publication, which had troubled Davis LJ in the Court of Appeal, by arguing that:

‘The impact of the publication on the claimant’s reputation will in practice occur at [the] moment [of publication] in almost all cases, and the cause of action is then complete. If for some reason it does not occur at that moment, the subsequent events will be evidence of the likelihood of its occurring. In either case, subsequent events may serve to demonstrate the seriousness of the statement’s impact including, in the case of a body trading for profit, its financial implications. It does not follow that those events must have occurred before the claimant’s cause of action can be said to have accrued. Their relevance is purely evidential.’<sup>68</sup>

Claimants will therefore need to refer to some facts extrinsic to the statement itself to show the ‘actual’ harm to reputation, or the likelihood of actual harm, necessary to surmount the threshold in s 1(1). However, the extrinsic evidence necessary to satisfy the serious harm test does not necessarily need to be *direct* evidence of harm to reputation. Lord Sumption allowed for the possibility that a claimant could demonstrate as a matter of fact that the statement complained of had caused or was likely to cause serious harm to her reputation by inviting the court to draw that inference from other circumstances of the case.<sup>69</sup> A claimant will be ‘entitled to produce evidence from those who [have] read the statement[] about its impact on them’, but that does not mean that ‘his case must necessarily fail for want of such evidence.’<sup>70</sup>

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<sup>66</sup> Ibid, [14].

<sup>67</sup> Ibid.

<sup>68</sup> Ibid, [18].

<sup>69</sup> The same is true in relation to the s 1(2) test: see further text to notes 180-200.

<sup>70</sup> *Lachaux* (SC) [21].

There may be a risk, especially given these comments on the permissibility of drawing an inference of serious harm from the circumstances of publication, that difficulties will arise in the application of these principles by trial courts,<sup>71</sup> similar to those that were faced with the *Reynolds* defence.<sup>72</sup> The *Lachaux* decision could be seen as continuing an emerging trend of Supreme Court judgments in defamation cases (including *Stocker v Stocker*,<sup>73</sup> and to some extent *Flood v Times Newspapers Ltd*<sup>74</sup>) that adopt a common-sense, uncomplicated perspective on the law, which contrasts quite sharply with the often over-elaborate analysis found in High Court defamation judgments.<sup>75</sup> Clare Duffy and Jonathan Price note that both *Lachaux* and *Stocker* ‘overturn more complex Court of Appeal judgments in which a defamation expert (Sharp LJ) was sitting.’<sup>76</sup> Whether High Court judges with defamation expertise will embrace the Supreme Court’s less legalistic approach to this area of law remains to be seen.<sup>77</sup>

## **B. Interpretation of the s 1(2) ‘serious financial loss’ test**

Although the individual claimant in *Lachaux* did not need to satisfy the s 1(2) test that applies to corporate claimants, the Supreme Court judgment does include some discussion of s 1(2) specifically, because Lord Sumption’s interpretation of s 1(1) was partly influenced by its relationship to s 1(2).<sup>78</sup>

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<sup>71</sup> ‘Supreme Court Confirms Defamation Is No Longer Actionable Per Se’ (*Brett Wilson Media Law Blog*, 19 June 2019) <<https://www.brettwilson.co.uk/blog/supreme-court-confirms-defamation-is-no-longer-actionable-per-se/>>.

<sup>72</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL). For further discussion, see Ch4.A.ii., text to notes 53-74.

<sup>73</sup> [2019] UKSC 17.

<sup>74</sup> [2012] UKSC 11.

<sup>75</sup> It is noteworthy that Lord Sumption began his judgment with a criticism of the complexity of defamation law: *Lachaux* (SC) [1].

<sup>76</sup> Clare Duffy and Jonathan Price, “‘No Revolution’ Says the Supreme Court as it Rules on Defamation” (*UK Human Rights Blog*, 17 June 2019) <<https://ukhumanrightsblog.com/2019/06/17/no-revolution-says-the-supreme-court-as-it-rules-on-defamation/>>.

<sup>77</sup> eg *Chandler v O’Connor* [2019] EWHC 3181 (QB): Nicklin J granting summary judgment for the claimant despite ‘no clear evidence of ... damage to the claimant’ ([20]) and no ‘reliable evidence as to the extent of publication’ ([21]). See also the discussion of *Al-Ko Kober Ltd v Sambhi* at text to notes 216-226.

<sup>78</sup> *Lachaux* (SC) [15].



In common with the serious harm test in s 1(1), the tendency of a statement to cause serious financial loss will not be enough to satisfy s 1(2), which:

‘... necessarily calls for an investigation of the actual impact of the statement. A given statement said to be defamatory may cause greater or lesser financial loss to the claimant, depending on his or her particular circumstances and the reaction of those to whom it is published. Whether that financial loss has occurred and whether it is “serious” are questions which cannot be answered by reference only to the inherent tendency of the words.’<sup>79</sup>

Unlike s 1(1), the provision relating specifically to corporate claimants in s 1(2) has not yet been the subject of a reported decision by an appellate court,<sup>80</sup> although at the time of writing a Court of Appeal judgment in *Seventy Thirty Ltd v Burki* remains outstanding.<sup>81</sup> There have also been a relatively small number of first instance decisions in which the courts have needed to apply the test. To date, four corporate claimants have succeeded in the High Court with defamation claims in which they have been required to meet the additional ‘serious financial loss’ hurdle imposed under s 1(2):

- *Brett Wilson LLP v Person(s) Unknown* (‘*Brett Wilson*’);<sup>82</sup>
- *Pirtek (UK) Ltd v Jackson* (‘*Pirtek*’);<sup>83</sup>
- *Seventy Thirty Ltd v Burki* (‘*Seventy Thirty*’),<sup>84</sup> since reversed on appeal,<sup>85</sup> and
- *Al-Ko Kober Ltd v Sambhi* (‘*Al-Ko Kober*’).<sup>86</sup>

Although a corporate claimant was also awarded damages in *Oyston v Ragozzino*,<sup>87</sup> judgment was entered for the claimant by consent, and therefore the judge assessing damages did not consider whether the claimant could satisfy the s 1(2) test.<sup>88</sup> The

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<sup>79</sup> Ibid.

<sup>80</sup> In *Euroeco Fuels (Poland) Ltd v Szczecin and Swinoujscie Seaports Authority SA* [2019] EWCA Civ 1931, the Court of Appeal overturned Nicol J’s decision ([2018] EWHC 1081 (QB)) to decline jurisdiction (at [53]), but on grounds unrelated to his judgment on s 1(2) ([30]).

<sup>81</sup> On appeal from [2018] EWHC 2151 (QB). See Ministry of Justice Case Tracker for Civil Appeals, case ref A2/2018/2133, at <[https://casetracker.justice.gov.uk/getDetail.do?case\\_id=20182133](https://casetracker.justice.gov.uk/getDetail.do?case_id=20182133)>.

<sup>82</sup> [2015] EWHC 2628 (QB).

<sup>83</sup> [2017] EWHC 2834 (QB).

<sup>84</sup> [2018] EWHC 2151 (QB).

<sup>85</sup> See note 81.

<sup>86</sup> [2019] EWHC 2409 (QB).

<sup>87</sup> [2015] EWHC 3232 (QB).

<sup>88</sup> Ibid, [8]. See text to notes 153-155.

same is true of the default judgment in favour of the corporate claimants in *ReachLocal UK Ltd v Bennett* ('*ReachLocal*').<sup>89</sup>

There have been at least two other cases since the 2013 Act came into force in which corporate claimants have been awarded damages, but for which no judgment is publicly available. A successful claim heard at Liverpool Civil Justice Centre was reported by 5RB chambers in May 2017;<sup>90</sup> the fact that no judgment is available in that case is unfortunate, because the claimant was awarded £100,000 in special damages and £75,000 in general damages, both of which are unusually large sums.<sup>91</sup> A default judgment and award of £80,000 to Privilege Wealth plc in respect of a claim against David Marchant, who alleged on his US-based 'Offshore Alert' website<sup>92</sup> that the company was 'a fraud', was also reported in *Private Eye* in May 2017.<sup>93</sup>

As Tom Wright has noted, most of the cases on s 1(2) to date have involved 'unrepresented defendants or defendants not appearing at trial, exposing the proceedings to a one-sided, claimant-friendly interpretation of the subsection.'<sup>94</sup> This may limit the extent to which those cases can be used to predict how the courts will interpret and apply the serious financial loss standard going forward. For example, commenting on the judgment in *Brett Wilson*,<sup>95</sup> Thomas Rudkin was careful to note that, because the claim was not defended, 'The significance of the case should ... not be overstated and more concrete analysis will be likely once further cases involving corporate claimants have been heard and properly contested.'<sup>96</sup> The same applies to *Pirtek*, in which judgment was awarded by

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<sup>89</sup> *ReachLocal UK Ltd v Bennett* [2014] EWHC 3405 (QB).

<sup>90</sup> 'Timeshare Company Wins Libel Damages' (5RB, 18 May 2017) <<http://www.5rb.com/news/timeshare-company-wins-libel-damages>>.

<sup>91</sup> See further Ch4.B.i., text to notes 112-115.

<sup>92</sup> <<http://www.offshorealert.com>>.

<sup>93</sup> Slicker, 'Libel Tourism', *Private Eye* (issue 1443, 5 May 2017) 39-40. The claimant company subsequently went into administration owing creditors over £40m, although its failure does not necessarily prove that its business was fraudulent: 'Privilege Wealth enters administration, £42 million owed to investors and other creditors' (*Bond Review*, 12 March 2018) <<https://bondreview.co.uk/2018/03/12/privilege-wealth-enters-administration-42-million-owed-to-investors-and-other-creditors/>>.

<sup>94</sup> Tom Wright, 'A Body that Trades for Profit v Somebody that Pays for Love' (*Tom Wright's Blog*, 20 September 2018) <<https://tjwrightuk.wordpress.com/2018/09/20/a-body-that-trades-for-profit-v-somebody-that-pays-for-love>>.

<sup>95</sup> *Brett Wilson* (n 82).

<sup>96</sup> Tom Rudkin, 'Defamation Act 2013: You Cannot Be Serious' (*Inform*, 3 March 2016) <<https://inform.org/2016/03/03/defamation-act-2013-you-cannot-be-serious-tom-rudkin/>>. See

default; and *Al-Ko Kober*, in which the claimants were granted summary judgment against a self-represented defendant. More broadly, as Rudkin also pointed out, and as is to be expected with major new pieces of legislation, ‘the Act remains in its early stages, inevitably meaning that the principles will develop further over time.’<sup>97</sup>

Given the direct connection between the ‘serious harm’ test in s 1(1) and the ‘serious financial loss’ test in s 1(2),<sup>98</sup> the developing interpretation of the former will have implications for the ongoing application of the latter.<sup>99</sup> Of the four successful corporate claims noted above, both *Pirtek* and *Seventy Thirty* were decided after the Court of Appeal’s ruling that s 1 could be satisfied by reference to the ‘tendency’ of the statement complained of to cause serious harm; *Brett Wilson* was decided after the High Court judgment, which was closer to the Supreme Court’s decision that the s 1 test relates to the ‘actual impact’ of the statement; and *Al-Ko Kober* was decided after the Supreme Court handed down that judgment.

The following sections discuss the courts’ interpretation to date of the rule in s 1(2) that, where the claimant is a for-profit company, the harm to reputation that must be shown under sub-s (1) ‘is not “serious harm” unless it has caused or is likely to cause the body serious financial loss.’ Each section will discuss one component of this test, as follows:

- i. ‘has caused or is likely to cause’;
- ii. ‘serious’;
- iii. ‘financial loss.’

Finally, section iv. will summarize the effect of s 1(2) on corporate defamation claimants, as compared to the pre-existing law.

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also Hugh Tomlinson, ‘*Brett Wilson LLP v Persons Unknown*, Corporate Damages and Injunction against Unknown Operators of Website’ (2016) 27(1) Entertainment Law Review 22, 24. In *Seventy Thirty*, HHJ Richard Parkes QC commented that *Brett Wilson* was decided ‘on [its] own facts, and [it is] of limited assistance’: *Seventy Thirty* (n 84) [208].

<sup>97</sup> Tom Rudkin, ‘You Cannot Be Serious’ (n 96).

<sup>98</sup> Discussed at text to notes 7-13.

<sup>99</sup> For example, after the Court of Appeal handed down its judgment in *Lachaux*, it was suggested that the High Court’s interpretation of s 1(2) in *Undre* (see text to notes 110-116 and 122-124) ‘may be revisited’ to reflect the changing case law on the s 1(1) test (The Hon Mr Justice Blair and others (eds), *Bullen & Leake & Jacob’s Precedents of Pleadings* (18<sup>th</sup> edn, 1<sup>st</sup> supp, Sweet & Maxwell 2017) para 37-03).

### *i. Causation*

The Supreme Court's *Lachaux* judgment not only means that corporate defamation claimants will need to show actual financial loss, but also that they will need to show a causative link between that loss and the statements complained of. The common law presumption of harm, as well as absolving corporate claimants of the need to identify any *loss*, in effect acted as a presumption of *causation*.<sup>100</sup> By removing the presumption of harm, s 1 has reintroduced the issue of causation into the core of defamation law. That may cause problems for some corporate claimants.

The potential difficulty of proving that a particular loss was caused by the statement complained of, as opposed to some other factor, was one of the main objections to introducing a financial loss test for corporate claimants.<sup>101</sup> According to Watts, Bateman, and Davies, 'Establishing an unbroken chain of causation between the defamatory statement and a subsequent loss of income would be a high hurdle to overcome in many cases.'<sup>102</sup> Peter Coe points to the problems faced by the claimant in *Tesla Motors Ltd v BBC*,<sup>103</sup> a malicious falsehood case in which some damaging statements about the claimant's business were actionable and some were not, to illustrate the uncertainty that might surround the issue of causation under s 1(2).<sup>104</sup> In his judgment for the Court of Appeal in *Tesla*, Moore-Bick LJ highlighted the difficulty 'of establishing that any particular loss was caused by one or more of the actionable falsehoods rather than by one or more of the statements that are not actionable.'<sup>105</sup> As a result of these 'grave difficulties', the claimant had no realistic prospect of success, and its claim was therefore struck out.<sup>106</sup>

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<sup>100</sup> Anderson, 'Reputation, Compensation, and Proof' (n 16) 764.

<sup>101</sup> eg *Report of the Committee on Defamation* (Cmnd 5909, 1975) para 336; *Jameel v WSJ* (n 15) [121]; Gary K Y Chan, 'Corporate Defamation: Reputation, Rights and Remedies' (2013) 33(2) *Legal Studies* 264, 285.

<sup>102</sup> Alan Watts, Anna Bateman and Cathy-Ann Davies, 'Libel Law Reform: Focus on Corporate Defamation' (*UK Practical Law*, 30 June 2010) at <<https://uk.practicallaw.thomsonreuters.com/8-502-6388>>.

<sup>103</sup> [2013] EWCA Civ 152.

<sup>104</sup> Peter Coe, 'The Defamation Act 2013 and CPR 3.4 and 24: A Sting in Causation's Tail' (2014) 25(3) *Entertainment Law* 93; Peter Coe, 'The Defamation Act 2013: We Need to Talk about Corporate Reputation' (2015) 4 *Journal of Business Law* 313, 329.

<sup>105</sup> *Tesla* (n 103) [46].

<sup>106</sup> *Ibid*, [47]-[49].

Similar problems could be expected to arise with s 1(2) in cases involving defamatory statements published at around the same time as statements that are damaging but not actionable (equivalent to the circumstances in *Tesla*); where the defendant issues a prompt apology and correction of the defamatory statement;<sup>107</sup> where the defendant's false allegation is corrected by a third party before any specific harm can be shown to have materialized;<sup>108</sup> or where there were other factors that may have damaged the claimant's business during the relevant time period.<sup>109</sup>

*Undre v London Borough of Harrow* ('*Undre*') gives an indication of how some of these problems might affect a corporate claimant's ability to satisfy the s 1(2) test. Warby J explained that in defamation cases involving alleged financial loss:

'... the issue of causation is often fraught with difficulty ... . There are invariably competing candidates for causative factors, and confounding factors. It can be very difficult to prove that the alleged libel was the cause of any loss of profit or other financial loss that is established.'<sup>110</sup>

The main problem with causation in *Undre* was that the statements complained of only directly referred to the individual who owned the claimant company. Warby J commented that the claimant company provided 'scarcely any evidence that anybody thought badly of the restaurant on any basis other than its association with an individual convicted of neglecting animals.'<sup>111</sup> The press release in respect of which the claimants had sued also contained other damaging allegations against the individual claimant which were not complained of;<sup>112</sup> as had been the case in *Tesla*, there were difficulties in separating the impact of the statement complained of from the effect of related allegations that were either true or not defamatory.

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<sup>107</sup> eg *Cooke v MGN Ltd* [2014] EWHC 2831 (QB) [44].

<sup>108</sup> eg *McGrath v Bedford* [2016] EWHC 174 (QB) [13].

<sup>109</sup> eg *Culla Park Ltd v Richards* [2007] EWHC 1850 (QB) [34] (in which the opening of a new rival business at around the time of publication may have affected the claimant's revenue); *Oyston* (n 87) [34] (in which the claimant's business was already subject to boycotts and protests that were unrelated to the statements complained of: see further text to notes 153-155).

<sup>110</sup> *Undre v London Borough of Harrow* [2016] EWHC 931 (QB) [56] (Warby J).

<sup>111</sup> *Undre* (n 110) [63].

<sup>112</sup> *Ibid*, [65]-[66].

Other factors added to the company's problems. The claimants' business was already struggling financially,<sup>113</sup> and appeared to have suffered financial losses which predated the press release in respect of which the claim was brought.<sup>114</sup> Moreover, there had been a change in the company that owned and operated the business, so that it was a 'now-defunct' company 'that was operating the restaurant business at the time referred to' in the press release,<sup>115</sup> and it was not clear that the specific company that had sued had even existed at that time.<sup>116</sup>

The concerns raised by commentators such as Coe about the possibility that deserving claimants will be unable to overcome these difficulties in proving causation are to some extent understandable, but they should not be overstated. When assessing special damages, requiring claimants to show that pleaded losses were caused by actionable statements rather than other factors is necessary 'to ensure that an award for economic loss does not exceed what is actually caused by the false and defamatory portion of a publication';<sup>117</sup> similarly, if financial loss is a precondition of liability, then proof of causation is necessary to ensure that the statement complained of actually caused an injury of the kind that justifies imposing liability on the defendant for its publication. It is worth remembering that, in some cases at least, the reason claimants find it difficult to prove a causative link between defamatory statements and financial loss is that there is in fact no causative link between them; in those cases there is of course no justification for imposing liability.

### *The structure of causation in s 1 as a whole*

The language of s 1 when read as a whole makes the causative structure of the serious financial loss test slightly more complicated than the above discussion suggests. During the parliamentary debates on the 2013 Act, Lord McNally told the House of Lords that s 1(2) 'make[s] clear that a body trading for profit will satisfy the serious harm test only if it is able to show that *the statement complained of*' has

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<sup>113</sup> Ibid, [57].

<sup>114</sup> Ibid, [62].

<sup>115</sup> Ibid, [30].

<sup>116</sup> Ibid.

<sup>117</sup> Thomas B Kelley and Steven D Zansberg, 'Why Courts Should Require Plaintiffs Claiming Losses to Prove that Falsity Caused Them' (1997) 15 Communications Lawyer 8, 14.

caused or is likely to cause the body serious financial loss”<sup>118</sup>. However, this is not quite what the 2013 Act says. Section 1, as a reminder, reads as follows:

- (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.

The phrasing of this section, intentionally or not, creates a test involving two causative stages. The ‘harm to ... reputation’ that must be shown under s 1(1) will only pass the seriousness threshold if ‘it has caused ... serious financial loss.’ Or, to put the same point in another way, the ‘financial loss’ that a corporate claimant is required to demonstrate under s 1(2) must be caused by the harm to its reputation required under s 1(1), rather than directly by the statement complained of.

After some early judgments that lacked clarity on this point,<sup>119</sup> it seems that this causative structure is now being recognized by the courts. HHJ Richard Parkes QC, in his judgment in *Seventy Thirty*, identified this feature of s 1 more precisely than had any previous judgment:

‘... in my view 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 ... . 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 the claimant’s reputation, and (2) whether that harm has caused or is likely to cause the claimant serious financial loss.’<sup>120</sup>

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<sup>118</sup> HL Deb 23 April 2013, vol 744, col 1365 (emphasis added).

<sup>119</sup> eg *Cartus Corp v Siddell* [2014] EWHC 2266 (QB) [32]; *Business Energy Solutions* (n 9) [14].

<sup>120</sup> *Seventy Thirty* (n 84) [205]-[206].

As a result, there are three ways in which a for-profit corporate claimant can satisfy s 1; namely by proving:

- that the statement complained of *has caused* serious harm to its reputation, which *has caused* serious financial loss;
- that the statement complained of *has caused* serious harm to its reputation, which *is likely to cause* serious financial loss; or
- that the statement complained of *is likely to cause* serious harm to its reputation, which *is likely to cause* serious financial loss.

The fourth alternative – that the statement complained of *is likely to cause* serious harm to the claimant’s reputation, which *has caused* serious financial loss – is nonsensical.

In practice, this quirk in causation is unlikely to affect the majority of cases. Because ‘serious harm to the reputation of the claimant’ must be caused by the defamatory statement, ultimately, the ‘serious financial loss’ that must be shown by a corporate claimant will also have been caused by that statement. However, s 1 makes it necessary to demonstrate that the financial loss caused by the statement has flowed through harm to the claimant’s reputation. Clearly, the proposition that A has caused B and C is not the same as the proposition that A has caused B, which in turn has caused C, even if both are true in most cases.

The need to show causation flowing through reputational harm to financial loss may have implications in some specific situations. As I will explain in section iii. below, it might make it difficult for a company to rely on a loss of goodwill as evidence in support of its case on s 1(2).<sup>121</sup> Two other kinds of case that might be affected are worth briefly discussing here: those involving statements that are also damaging to an individual or other company associated with the claimant; and those involving statements that disparage the claimant’s goods or services.

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<sup>121</sup> At text to note 250.



In *Undre*, Warby J explained the causative structure of s 1 in terms of the pre-existing common law principle that a claimant company can only sue in respect of a statement that refers to, and is defamatory of, the company itself.<sup>122</sup>

‘The issue is ... whether the claimant company can show serious financial loss consequent on serious harm to its reputation caused by a defamatory imputation about the company, contained in the publication complained of.’<sup>123</sup>

The presumption of harm at common law meant that if a company could show that the statement had a tendency to harm its reputation, it would make little difference if the same statement also harmed the reputation of someone or something else. But that may no longer be the case if s 1 is interpreted to mean that a corporate claimant must show that the financial loss caused by a statement was a consequence of the statement’s effect on *its* reputation, rather than the reputation of an individual associated with it. This is reflected in Warby J’s conclusion that:

‘The most potent causal factor [in the financial loss pleaded] was customers shunning the business because it was associated with the first claimant, whose personal reputation had been harmed. That is not actionable by the company.’<sup>124</sup>

Similar issues might arise in defamation claims brought by a number of companies within the same corporate group. For example, the claims in *ReachLocal* were brought by two companies: the first claimant was the UK trading subsidiary of the second claimant, a Dutch holding company.<sup>125</sup> HHJ Richard Parkes QC suggested that, but for the default judgment that the second claimant had already obtained at a previous hearing, ‘there might be an uphill argument to persuade a court that the [s 1] threshold had been crossed.’<sup>126</sup> It is not clear how significantly the interpretation of s 1 described above would add to the difficulties that holding companies already faced before the 2013 Act in establishing that defamatory statements referred to them.<sup>127</sup> The judge in *ReachLocal* also seemed sceptical of

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<sup>122</sup> *Knuppfer v London Express Newspapers* [1944] AC 116 (HL) 121.

<sup>123</sup> *Undre* (n 110) [40].

<sup>124</sup> *Undre* (n 110) [76].

<sup>125</sup> *ReachLocal* (n 89).

<sup>126</sup> *Ibid*, [34].

<sup>127</sup> See David J Acheson, ‘The Defamation Act 2013: What Exactly is ‘a Body that Trades for Profit’? (2015) 20(4) *Communications Law* 72, 76-77.

whether the holding company claimant should have been entitled to a remedy at common law, because it was ‘unlikely that anyone to whom any of the [statements] complained of [were] published will have understood those words to refer to [it].’<sup>128</sup> But in *TheHut.com v Trinity Mirror*,<sup>129</sup> in which there was also uncertainty as to the relationship between two corporate claimants, Nicklin J’s view was that the details of that relationship would not be relevant ‘in relation to the issue of reference’ at common law, but may raise issues for the claimants ‘in relation to the causation of damage’ under s 1(2).<sup>130</sup>

Similar issues of causation may arise in cases involving defamatory statements which also disparage a company’s goods or services. The common law rule on disparagement of goods or services is that ‘if the imputation is as to the product of the [claimant’s] business or profession, then it will be the tort of malicious falsehood, not defamation, to which the claimant must look for any remedy.’<sup>131</sup> However, statements which at face value criticize a company’s products or services may by implication disparage ‘the mode in which [its] business is carried on’, and therefore be defamatory of the company itself.<sup>132</sup> The s 1 test, if interpreted as above, may make it more difficult for a company to rely on this kind of meaning in a defamation claim, even where there is clear evidence that the statement complained of has caused financial loss. The issue facing the claimant would be demonstrating that the financial loss has been caused by harm to *its* reputation, rather than by harm to the reputation of the products or services directly referred to by the statement.

It is not yet clear whether s 1 will be interpreted in this way. In *Al-Ko Kober*,<sup>133</sup> for example, the judge made no attempt to distinguish between the financial impact of defamatory allegations against the claimant company, and the impact of criticisms of its products that had been published at the same time.<sup>134</sup> If s 1 *does* make it more difficult for companies to sue in cases such as these, then that will be a positive

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<sup>128</sup> *ReachLocal* (n 89) [34].

<sup>129</sup> *The Hut.com v Trinity Mirror North West & North Wales Ltd* [2018] EWHC 2480 (QB).

<sup>130</sup> *Ibid*, [21].

<sup>131</sup> *Thornton* (n 21) [34] (Tugendhat J).

<sup>132</sup> *Griffiths v Benn* (1911) 27 CLR 346 (CA) 350 (Cozens-Hardy MR). See also *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 (CA) 138-39.

<sup>133</sup> *Al-Ko Kober* (n 86).

<sup>134</sup> See further text to notes 222-226.

development. The appropriate cause of action in which to recover losses caused by false disparagement of a company's products or services is malicious falsehood, and it is problematic that the law of defamation often provides an opportunity to circumvent the more onerous requirements of a claim in malicious falsehood by pleading a meaning that is defamatory of the company itself.<sup>135</sup> It would seem, however, that if the wording of s 1 leads to this beneficial outcome, it will be more through luck than judgement on Parliament's part.

## *ii. Seriousness*

The courts have so far been unwilling to elaborate in any detail upon the requirement for financial loss to be 'serious'. In *Lachaux*, Davis LJ suggested that the word 'serious', as used in s 1(1), 'means what it says and requires no further gloss.'<sup>136</sup> In s 1(2), similarly, 'serious' is 'an ordinary English word, to be given its ordinary meaning'.<sup>137</sup>

The courts have made it clear, however, that whether financial loss is 'serious' will 'depend on the context',<sup>138</sup> and in particular will be relative to the size and resources of the claimant company in any given case.<sup>139</sup> The corporate claimants in both *Brett Wilson* and *Seventy Thirty* were able to satisfy the serious financial loss test with limited evidence of specific losses in part because both businesses relied on a small number of clients.<sup>140</sup> In *Brett Wilson*, Warby J accepted that the claimant, a small 'boutique' law firm, could lose 'tens of thousands of pounds' by losing a single client.<sup>141</sup> In *Seventy Thirty*, HHJ Richard Parkes QC was of the opinion that 'serious financial loss to a company the size of [the claimant] could be caused by even one potential client backing off as a result of a review' containing defamatory allegations.<sup>142</sup>

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<sup>135</sup> See further Ch5.B., text to notes 71-97.

<sup>136</sup> *Lachaux* (CA) [44].

<sup>137</sup> *Brett Wilson* (n 82) [30]; *Pirtek* (n 83) [50]. See also *Anglia Research Services Ltd v Finders Genealogists Ltd* [2016] EWHC 297 (QB) [38].

<sup>138</sup> *Ibid.*

<sup>139</sup> Thomas Rudkin, 'Things Get Serious: Defining Defamation' (2014) 25(6) *Entertainment Law Review* 201, 202-03.

<sup>140</sup> See further text to notes 188-194 (*Brett Wilson*) and 201-214 (*Seventy Thirty*).

<sup>141</sup> *Brett Wilson* (n 82) [29].

<sup>142</sup> *Seventy Thirty* (n 84) [210].

Tom Wright points out that the claimant in *Seventy Thirty* charged an average client £10,000, but that its annual turnover was over £700,000 in three of the four years prior to the case being heard.<sup>143</sup> This suggests that the loss of one client, which the judge claimed would constitute ‘serious financial loss’, would amount to ‘a loss of turnover of 1.4%’.<sup>144</sup> But it would be unrealistic to expect this to mean that extremely large and well-resourced corporate defamation claimants such as McDonald’s<sup>145</sup> or Tesco<sup>146</sup> will need to point to losses in the millions of pounds in order to satisfy s 1(2). The equivalent loss of revenue for McDonald’s would be around \$300,000,000.<sup>147</sup> According to Rudkin, ‘even larger companies would have legitimate grounds for arguing that the sum of £50,000 constitutes serious financial loss’.<sup>148</sup> If this is correct, which seems likely to be the case, then either the ‘serious’ threshold will be set so low for smaller companies as to be meaningless, or the threshold will be applied inconsistently relative to the size of claimants’ businesses, to the benefit of larger companies.

In *Undre*, Warby J held that, where a claimant seeks to plead a specific loss of business, the evidence relied on must be of a loss of *profit* (or an increase in losses). Especially where, as in *Undre*, the claimant operates in an industry where ‘many costs may be highly variable depending on turnover’,<sup>149</sup> evidence merely showing a loss of *revenue* will not on its own be enough to show that the financial effect on the claimant was ‘serious’, because ‘it does not necessarily follow that a reduction in “net sales” translates into an equivalent, or any, loss of profit’.<sup>150</sup> However, this seems likely to be an evidential, rather than substantive, hurdle for claimants; one would expect that in almost all cases a serious fall in the claimant’s revenue would be reflected in a serious loss of profit. Warby J also claimed in *Undre* that, when assessing whether the claimant had suffered serious financial loss, ‘it might be

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<sup>143</sup> Ibid, [112].

<sup>144</sup> Wright (n 94).

<sup>145</sup> See Ch2.C.iv., text to notes 266-274.

<sup>146</sup> See Ch2.C.v., text to note 314.

<sup>147</sup> Based on annual revenue of just over \$21bn: McDonald’s Corporation, *Annual Report* (2018) 14, available at <<https://corporate.mcdonalds.com/corpmcd/investors-relations/financial-information/annual-reports.html>>.

<sup>148</sup> Rudkin, ‘Things Get Serious’ (n 139) 203.

<sup>149</sup> Ibid.

<sup>150</sup> *Undre* (n 110) [49].

necessary to take into account ... the impact of corporation tax.’<sup>151</sup> Again, however, there will surely be very few cases in which a loss of profit that would otherwise be ‘serious’ would fall below that threshold after taking tax liabilities into account.

The potential problems in relation to causation that were discussed above may also be slightly aggravated because claimants will need to prove causation in respect of sufficient financial loss to meet the ‘serious’ threshold. Even if the claimant has suffered serious financial loss overall, if the element of that loss specifically caused by the claimant’s reputational injury is not serious, then the claim will not satisfy the s 1 test overall.<sup>152</sup> For example, the corporate claimant in *Oyston v Ragozzino*, had it not obtained judgment by consent, may have been unable to establish causation in respect of sufficiently serious financial loss to meet the s 1(2) threshold.<sup>153</sup> Assessing damages, HHJ Stephen Davies pointed to a number of factors that might have affected the company, which was the entity responsible for managing Blackpool Football Club. The club had ‘obviously suffered, and [was] still suffering, commercially’ because of its poor performance in competitions over several years; and had suffered losses as a result of ‘boycott campaigns and match-day protests’ by the club’s supporters that were unrelated to the defamatory statements published by the defendant.<sup>154</sup> As a result of these other factors, the judge was ‘unable to conclude’ that the reputational harm caused by the defendant’s allegations had ‘anything other than a modest financial impact [on the claimant] at most.’<sup>155</sup> It may not be entirely clear yet what ‘serious’ financial loss is; but one thing that is certain is that ‘modest’ loss is not it.

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<sup>151</sup> *Undre* (n 110) [50], citing *British Transport Commission v Gourley* [1956] AC 185.

<sup>152</sup> *Lachaux* (SC) [15]. The wording of s 1 appears to leave open the possibility that harm to the claimant’s reputation which causes serious financial loss might nevertheless not be ‘serious harm’, but it seems unlikely that this situation will arise in practice.

<sup>153</sup> *Oyston* (n 87).

<sup>154</sup> *Ibid*, [34].

<sup>155</sup> *Ibid*, [37].

### *iii. Evidence of financial loss*

In *Pirtek*, Warby J observed that ‘Financial loss is a more concrete and tangible concept than reputational harm.’<sup>156</sup> This might normally be the case, but the question remains what evidence a claimant company might adduce in support of its case on s 1(2). In other words, what will constitute ‘financial loss’ for the purposes of the s 1(2) test, and what evidence will be probative of such loss?

In the House of Lords debate during which s 1(2) was inserted into the Act, Lord Faulks expressed his concern that requiring companies to provide specific evidence of financial loss could lead to genuine claims being denied ‘when it is not easy to produce by reference to a balance sheet an exact equivocation between the damage to a reputation and the damage to a company.’<sup>157</sup> Although these comments were not addressed in full by the Bill’s sponsor Lord McNally, he did suggest that ‘financial loss’ should be interpreted more widely than the ‘balance sheet’ to which Lord Faulks had referred.<sup>158</sup> In contrast, the Joint Committee on the Draft Defamation Bill recommended that the requirement for corporate claimants to show financial loss should be interpreted narrowly. In its report, the Committee suggested that the test:

‘... should focus on whether there has been, or is likely to be, a substantial loss of custom directly caused by defamatory statements. This is because the impact of a defamatory statement reaches its most serious, and hardest to mitigate, where it leads to a material reduction in customer numbers and turnover more generally.’<sup>159</sup>

With ‘little discussion in the parliamentary process’<sup>160</sup> to help interpret s 1(2), when the Act first came into force there was understandable uncertainty as to what kind of evidence companies would need to provide to satisfy the serious financial loss threshold.<sup>161</sup>

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<sup>156</sup> *Pirtek* (n 83) [49].

<sup>157</sup> HL Deb 23 April 2013, vol 744, col 1375.

<sup>158</sup> HL Deb 23 April 2013, vol 744, col 1380.

<sup>159</sup> Joint Committee Report (n 6) para 115.

<sup>160</sup> Price and McMahon (n 45) 21, para 2.38.

<sup>161</sup> Farrer & Co, ‘A Quick Guide to the Defamation Act 2013’ (2014) 25(2) *Entertainment Law Review* 55, 55.

Peter Coe identifies four categories of loss that a corporate claimant may be able to rely on to satisfy s 1(2): direct evidence of financial loss; spending in mitigation of loss; wasted management time or resources in attempted mitigation; and loss of business reputation or goodwill more generally.<sup>162</sup> This section discusses each of these categories in turn, with two differences: I treat inferences of financial loss drawn from other evidence as a separate category (Coe treats this kind of evidence as falling into his first category); and I combine my discussion of direct and indirect spending in mitigation of loss (Coe's second and third categories).

### *Direct evidence of financial loss*

As indicated in the above discussion of the parliamentary debates on s 1(2), the clearest way for a corporate claimant to establish financial loss will be to identify a loss of custom or other business, and to show its effect on the company's financial performance by reference to a balance sheet or company accounts.

Some commentators have warned that, if the courts demand this kind of evidence of financial loss under s 1(2), corporate claimants may need to rely on expert evidence to sue.<sup>163</sup> In *Undre*, Warby J was critical of the nature of the evidence provided by the claimant company,<sup>164</sup> and suggested that its failure to adduce expert evidence had '[left] the court in a difficult position' from which to assess its case on financial loss under s 1(2).<sup>165</sup> Based on these comments, Adele Ashton and Jeremy Clarke-Williams argue that, 'Without such evidence, a claimant company is at risk of failing to establish serious financial loss'.<sup>166</sup> However, this probably overstates the likelihood that expert evidence will be necessary to satisfy s 1(2), for a number of reasons.

Firstly, financial loss will not need to be quantified with absolute precision under s 1(2). Because the 'serious financial loss' test is a threshold requirement, loss will

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<sup>162</sup> Peter Coe, 'A Comparative Analysis of the Treatment of Corporate Reputation in Australia and the UK' in András Koltay and Paul Wragg (eds), *Research Handbook on Comparative Defamation and Privacy Law* (forthcoming, Edward Elgar 2020) 12-13.

<sup>163</sup> eg Alastair Mullis and Andrew Scott, 'Worth the Candle? The Government's Draft Defamation Bill' (2011) 3(1) *Journal of Media Law* 1, 16; Daniel Bekos and Clare Arthurs, 'In Tune with the Zeitgeist?' (2011) 161(7447) *New Law Journal* 8.

<sup>164</sup> *Undre* (n 110) [46]-[55].

<sup>165</sup> *Ibid*, [53].

<sup>166</sup> Adele Ashton and Jeremy Clarke-Williams, '*Lachaux* Must Go On' (2017) 76(Nov/Dec) *Commercial Litigation Journal* 22, 24.

only need to be quantified to the extent necessary to satisfy the court that it is ‘serious’. Once that threshold has been passed, the exact amount of loss caused is no longer relevant to s 1(2); more precise quantification will only be necessary if a company seeks to recover special damages.<sup>167</sup> This has been confirmed in a number of decisions on s 1(2).<sup>168</sup> For example, in *Euroeco Fuels (Poland) Ltd v Szczecin and Swinoujscie Seaports Authority* (‘*Euroeco Fuels*’), Nicol J held that, although the claimants had not pleaded financial loss to the level of specificity required in a plea of special damage, because ‘Parliament [did] not confine[] the expression “serious financial [loss]” to special loss’, there was still a ‘good arguable case that they [would] satisfy the test in s.1(2)’.<sup>169</sup> It is also reflected in the fact that the claimant in *Seventy Thirty*, despite being unsuccessful with a special damages claim,<sup>170</sup> successfully met the s 1(2) threshold.<sup>171</sup>

Lord Sumption’s observation in *Lachaux* that the ‘has caused’ and ‘is likely to cause’ tests are ‘functional equivalents’<sup>172</sup> also supports the argument that s 1(2) cannot require claimants to show that serious financial loss ‘has [been] caused’ with the kind of precision or specificity required when pleading special damage. In Lord Sumption’s view, the question whether a claimant is likely to suffer serious financial loss ‘should be decided on the same basis’ as the question whether a claimant has suffered such loss.<sup>173</sup> Showing that financial loss ‘is likely to [be] cause[d]’ with the precision required for quantifying special damages would be impossible, and therefore cannot be required of claimants seeking to demonstrate that the statements complained of ‘ha[ve] caused ... serious financial loss’.

Secondly, there would be significant costs implications if it were necessary in all cases to adduce expert evidence to satisfy s 1(2). For example, in *Gubarev v Orbis Business Intelligence Ltd*, the corporate claimants estimated their likely costs in respect of expert evidence on the financial loss caused by the publication

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<sup>167</sup> See eg *Suresh v Samad* [2016] EWHC 2704 (QB) [27].

<sup>168</sup> *Euroeco Fuels (Poland) Ltd v Szczecin and Swinoujscie Seaports Authority* [2018] EWHC 1081 (QB) [71]; *Seventy Thirty* (n 84) [207]; *Gubarev v Orbis Business Intelligence Ltd* [2019] EWHC 162 (QB) [14].

<sup>169</sup> *Euroeco Fuels* (n 168) [71].

<sup>170</sup> *Seventy Thirty* (n 84) [250].

<sup>171</sup> *Ibid*, [217]-[220].

<sup>172</sup> *Lachaux* (SC) [14].

<sup>173</sup> *Ibid*, [15].



complained of at over £200,000.<sup>174</sup> It is reasonable to assume the courts will want to avoid unnecessarily inflating the cost and complexity of litigation if possible.<sup>175</sup>

Thirdly, the rule in *Ratcliffe v Evans* is meant to alleviate the problems that might be faced by claimants attempting to show financial loss that is not easy to prove.<sup>176</sup> For example, where a business suffers a drop-off in custom from the general public in circumstances in which it is not possible to identify any specific customers that have been lost, the claimant may rely instead on evidence of a general downturn in business.<sup>177</sup> While losses should be particularized when possible,<sup>178</sup> the principle established in *Ratcliffe* is, ‘In a nutshell, [that] the courts will not shy away from awarding damages just because the loss is difficult to quantify. The key is that the claimant must have done all it reasonably can to address the uncertainty.’<sup>179</sup> That may include adducing expert evidence in some cases, but in others it will not.

Finally, the cases on s 1(2) to date suggest that, rather than demanding direct evidence of financial loss from corporate claimants, the courts will often be willing to find the threshold met by inferring a likelihood of financial loss from other evidence. That is the subject of the following section.

### *Inferences of financial loss drawn from other evidence*

Based on the small number of successful corporate defamation claims since the Act came into force, it seems that courts will be willing in many cases to find that corporate claimants have suffered or are likely to suffer serious financial loss by drawing inferences from other available evidence. While this is perhaps an understandable reaction to some of the issues discussed above with providing direct evidence of loss, the strength of s 1(2) as a mechanism for filtering weaker corporate defamation claims is being undermined by the courts’ willingness to infer that

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<sup>174</sup> *Gubarev* (n 168) [44]. Senior Master Fontaine considered it to be ‘unlikely that expert evidence would be required to establish serious financial loss, or the likelihood of it’, rather than to assess damages (at [46]). However, the case was decided before the Supreme Court ruled on *Lachaux*, so the Master’s comment was based on an interpretation of s 1(2) that only required claimants to prove the ‘tendency’ of the statement to cause serious financial loss (see [13]-[14]).

<sup>175</sup> Watts, Bateman and Davies (n 102). Procedural issues relating to s 1(2) are discussed at Ch4.C.ii., text to notes 288-306.

<sup>176</sup> *Ratcliffe v Evans* [1892] 2 QB 524 (CA) 532-33.

<sup>177</sup> *Ibid*, 533.

<sup>178</sup> *Perestrello E Companhia Lda v United Paint Co Ltd* [1969] 1 WLR 570 (CA).

<sup>179</sup> Kate Hencken and James Pickavance, ‘Prospective Loss in Action’ (2015) 26(6) *Construction Law* 23, 24.

claimants have suffered or are likely to suffer serious financial losses that they have been unable to specifically identify.

As explained above, although claimants must prove serious harm to reputation under s 1(1) by reference to the actual impact of the statement complained of rather than its inherent tendency to cause harm, it will not always be necessary to adduce *direct* evidence of that impact, such as by calling publishers as witnesses.<sup>180</sup> Serious harm to the claimant's reputation may also be inferred from other evidence.<sup>181</sup> In *Lachaux*, Lord Sumption accepted Warby J's finding that s 1(1) had been satisfied 'based on a combination of the meaning of the words, the situation of [the claimant], the circumstances of publication and the inherent probabilities.'<sup>182</sup> In Lord Sumption's view, 'There is no reason why inferences of fact as to the seriousness of the harm done to [the claimant's] reputation should not be drawn from considerations of this kind.'<sup>183</sup> Lord Sumption's analysis of s 1 only ruled out the possibility that a court could find that the test had been met by inference from the statement complained of alone.<sup>184</sup> The same is true of the serious financial loss that corporate claimants must prove under s 1(2);<sup>185</sup> in *Euroeco Fuels*, for example, Nicol J could 'see no reason why "serious financial loss" may not, like other forms of "serious harm", be capable of inference from the evidence.'<sup>186</sup>

In all four of the reported cases since the 2013 Act came into force in which a corporate claimant has successfully sued in defamation, the court relied in part or in full on inferences drawn from this kind of evidence when assessing whether the s 1(2) threshold was met.<sup>187</sup> In *Brett Wilson*,<sup>188</sup> the first post-Act case in which a corporate claimant successfully established liability,<sup>189</sup> the claimant law firm pleaded a range of circumstances in support of its case on s 1(2), including the availability of the statements complained of in Google search results for the firm's

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<sup>180</sup> *Lachaux* (SC) [21].

<sup>181</sup> See text to notes 69-70.

<sup>182</sup> *Lachaux* (SC) [21].

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*, [16].

<sup>185</sup> *Ibid.*, [15].

<sup>186</sup> *Euroeco Fuels* (n 168) [71].

<sup>187</sup> *Brett Wilson* (n 82) [29]; *Pirtek* (n 83) [53]; *Seventy Thirty Ltd* (n 84) [217]-[218]; *Al-Ko Kober Ltd* (n 86) [17].

<sup>188</sup> *Brett Wilson* (n 82).

<sup>189</sup> Tomlinson (n 96) 22.

name, and the likely extent of publication to prospective clients; the financial impact that losing a small number of clients would have on the firm; and two instances in which the defendant's allegations had been referred to by third parties.<sup>190</sup> Warby J held that 'these pleaded allegations taken overall are in my judgment sufficient to make out a case of serious financial loss.'<sup>191</sup> His view seems to have been heavily influenced by the fact that the nature of the firm's business meant that the loss of only a small number of clients would have a significant effect on its income. Nevertheless, Rudkin was right to say that 'there was not an overwhelming amount of specific evidence of financial loss although Brett Wilson did assert that they had lost some business as a result.'<sup>192</sup> Hugh Tomlinson also emphasized that the court 'was prepared to find "serious financial loss" established on limited materials',<sup>193</sup> despite the fact that 'There was no pleaded factual case as to any actual drop off in the conversion of inquiries into instructions or as to any financial loss actually suffered by the claimant.'<sup>194</sup>

Factors that may be considered indicative of a likelihood of financial loss include, for example, the inherent seriousness of the allegation; the extent and duration of publication; evidence of actual or likely republication;<sup>195</sup> the identity of likely publishees and their relationship to the claimant;<sup>196</sup> and the identity and credibility of the defendant publisher.<sup>197</sup> But if courts are too willing to find s 1(2) satisfied based on inferences from this kind of evidence, there is a risk that they will not sufficiently distinguish between the evidence necessary to justify an inference of serious harm to the claimant's reputation, and the evidence necessary to justify the *further* inference that this reputational harm has caused the claimant serious financial loss.

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<sup>190</sup> *Brett Wilson* (n 82) [29].

<sup>191</sup> *Ibid*, [30].

<sup>192</sup> Rudkin, 'You Cannot Be Serious' (n 96).

<sup>193</sup> Tomlinson (n 96) 24.

<sup>194</sup> *Ibid*.

<sup>195</sup> *Lachaux* (CA) [79].

<sup>196</sup> *Dhir v Saddler* [2017] EWHC 3155 (QB) [55].

<sup>197</sup> *eg ibid*, [21]; *Ames v The Spamhaus Project Ltd* [2015] EWHC 127 (QB) [92].

Tom Bennett argues that, if it is too easy for a claimant to satisfy s 1(2) by pointing to the circumstances in which the statement complained of was published, rather than providing direct evidence of financial loss, the result would be that:

‘All that a claimant need provide is sufficient circumstantial evidence for the court to infer from it a tendency to cause serious reputational harm. Once the court infers such a tendency, the *very same* limited, circumstantial evidence can be used to infer a likelihood of serious financial loss.’<sup>198</sup>

Bennett explains that the courts’ willingness to find the s 1 test satisfied by inference from the circumstances of publication has led to the possibility that a corporation could base a successful defamation claim on an inference that financial loss is likely to result from harm to its reputation which *itself* has been inferred from other evidence, rather than proven directly. Bennett is absolutely right to warn against allowing companies to meet the s 1 threshold ‘by stacking inferences on top of one another, creating an inferential house of cards.’<sup>199</sup> As Warby J put it in *Bode v Mundell*, the courts ‘should not allow a willingness to draw inferences to shade into a presumption of serious reputational harm. That would undermine the purpose of the reform which s 1 sought to implement.’<sup>200</sup>

The judgment in *Seventy Thirty*, on which Bennett was commenting, exemplifies this problem. The defendant, a former client of the claimant company’s dating agency business, claimed that the company had misled her about its service to persuade her to become a member. In addition to suing the company to recover the membership fee, she posted critical reviews of its business on Google and Yelp; the company brought claims in defamation and malicious falsehood in respect of those reviews.<sup>201</sup>

Burki’s claims against Seventy Thirty in deceit and misrepresentation were successful; the judge found that the company’s managing director had ‘falsely represented the size of [the agency’s] active membership ... , and induced her to

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<sup>198</sup> Thomas D C Bennett, ‘An Inferential House of Cards – Serious Financial Loss under section 1(2) Defamation Act 2013: *Burki v Seventy Thirty Ltd*’ (2019) 24(1) Communications Law 34, 36-37 (emphasis in original).

<sup>199</sup> *Ibid*, 35.

<sup>200</sup> *Bode v Mundell* [2016] EWHC 2533 (QB) [49].

<sup>201</sup> See generally Jennifer Agate, ‘The High Cost of Dating – *Tereza Burki v Seventy Thirty Ltd*’ (2019) 30(1) Entertainment Law Review 32.

pay a substantial fee on the strength of his deceit.<sup>202</sup> He found that the defendant ‘wrote her reviews in the belief ... that her complaints were well-founded, and not with the motive of doing injury to [the claimant], but rather out of a sense of honest anger at the way that she felt she had been treated.’<sup>203</sup> He found that the credibility to readers of the reviews would be limited by the fact that they were ‘neither literate nor reasoned’, and that their impact on the claimant would be mitigated by the fact that they appeared alongside positive reviews of its business written by other clients.<sup>204</sup> He found that the allegations made in one of the two reviews complained of were either true, or honest opinion.<sup>205</sup> But the judge also found that one part of one of the defendant’s reviews, which he had held to mean that ‘the business was a fundamentally dishonest or fraudulent operation’, had not been proven true.<sup>206</sup> Because this imputation was defamatory, the defendant would be liable for its publication, and the claimant entitled to general damages, as long as the serious financial loss test was satisfied.

HHJ Richard Parkes QC found that the company had not proven special damage for the purpose of its malicious falsehood claim, because he was ‘unable to conclude from the sparse evidence available ... that the [false] review was in reality causative’ of the loss of any prospective clients.<sup>207</sup> He also placed little weight on evidence given by the claimant’s accountant that ‘he could see no particular pattern in the monthly sales figures ... suggestive of a decline in sales which could be linked to publication of either review.’<sup>208</sup> The defendant’s argument that this evidence undermined the claimant’s case on serious financial loss was rejected, because the s 1(2) test was not equivalent to a special damages claim,<sup>209</sup> and the possibility that prospective clients had been lost as a result of the allegation that the claimant’s business was fundamentally dishonest ‘could not be ruled out’ on the available evidence.<sup>210</sup>

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<sup>202</sup> *Seventy Thirty* (n 84) [241].

<sup>203</sup> *Ibid.*, [269].

<sup>204</sup> *Ibid.*, [250].

<sup>205</sup> *Ibid.*, [263]-[265].

<sup>206</sup> *Ibid.*, [241].

<sup>207</sup> *Ibid.*, [250].

<sup>208</sup> *Ibid.*, [209].

<sup>209</sup> *Ibid.*, [207], [210].

<sup>210</sup> *Ibid.*

In my view, the judge's determination not to assess the likelihood of serious financial loss on the same basis as he would assess the special damages claim, while based on a reasonable justification,<sup>211</sup> seems to have led him to exclude from his reasoning on s 1(2) a range of factors that contradicted or undermined the claimant's assertion that the statements had caused any actual financial loss. In making this decision as to serious financial loss, the judge allowed the claimant, having passed the s 1(2) threshold, to establish liability and an entitlement to general damages without the need to address those factors weakening its claim, or to provide any further evidence of loss.

Despite the company's inability to prove that the false and defamatory part of the defendant's statements had caused it any actual loss, and despite the fact that – unlike Burki – it was incapable of having suffered any emotional harm,<sup>212</sup> HHJ Richard Parkes QC described the general damages award of £5,000 as a 'small' sum.<sup>213</sup> It is not a small sum in contrast to the damages awarded to Burki in her deceit claim: aside from reimbursing her the membership fee she had paid to Seventy Thirty, she was awarded just £500 for distress.<sup>214</sup> The effect is that, disregarding litigation costs, Tereza Burki was left £4,500 out of pocket and uncompensated for her distress after, having been fraudulently induced into paying several thousand pounds to a company that had misrepresented its services to her, she wrote two critical reviews of that company, one of which was entirely true or reasonable, and the other of which was mostly true but also contained some ill-judged comments going beyond what she could prove.

Given those facts, Tom Wright's assessment of the decision as 'highly unsatisfactory' is an understatement.<sup>215</sup> It cannot have been Parliament's intention to allow a corporate claimant to recover damages, whether they are 'small' or not, in a case involving criticism of the claimant's proven unlawful conduct, where the balance of evidence is *against* that criticism having had any financial impact on the

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<sup>211</sup> See text to notes 167-173.

<sup>212</sup> *Seventy Thirty* (n 84) [251].

<sup>213</sup> *Ibid*, [262].

<sup>214</sup> *Ibid*, [181].

<sup>215</sup> Wright (n 94).

claimant's business. In fact, *Seventy Thirty* seems to be precisely the type of claim which Parliament intended s 1(2) to prevent from succeeding.

As mentioned above, an appeal against the High Court's ruling in *Seventy Thirty* has now been allowed. At the time of writing, the judgment explaining the Court of Appeal's reasons for allowing the appeal has not been published, meaning that it is not possible to tell what its impact on the law might be. It is possible that the Supreme Court's *Lachaux* judgment on s 1(1) had a strong influence on the Court of Appeal's treatment of s 1(2) in *Seventy Thirty*. If so, then the first appellate court judgment on the serious financial loss test may mark a significant change in direction from the approach taken by the High Court.

If not, then *Al-Ko Kober*,<sup>216</sup> the only successful corporate defamation claim since the Supreme Court ruled on *Lachaux*, suggests that Lord Sumption's judgment on its own may not make much difference to how the s 1(2) test is applied in the High Court. The claimant company was awarded summary judgment by Swift J on its claims in defamation and malicious falsehood, brought in respect of the defendant's ongoing publication of YouTube videos containing serious defamatory allegations against the claimants, which centred around an assertion that the claimant had misled the public about the safety standards of its products, and as a result was endangering its customers. The statements complained of had already been the subject of an interim injunction in malicious falsehood,<sup>217</sup> and the defendant had twice been found in contempt for breaching that injunction.<sup>218</sup>

In the circumstances, Swift J's decision to grant the claimant summary judgment on its claims in defamation and malicious falsehood was perhaps understandable. Nonetheless, his reasoning in respect of s 1(2) was wholly inadequate to support his finding that the test was satisfied:

‘In this case no substantial argument was made to the effect that [the s 1(2)] requirement was not met. The statements made in the four videos were extreme ... . The Claimants do not advance evidence of any specific

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<sup>216</sup> *Al-Ko Kober* (n 86).

<sup>217</sup> *Al-Ko Kober Ltd v Sambhi* [2017] EWHC 2474 (QB). A claim under the Data Protection Act 1998 brought by the claimant company's marketing manager was also successful, both at the interim injunction stage and on summary judgment.

<sup>218</sup> *Al-Ko Kober Ltd v Sambhi* [2018] EWHC 165 (QB); [2018] EWHC 3523 (QB).

financial loss to date. However, the likely effect of [the defendant's] statements on [the claimant] ... in this regard is obvious.<sup>219</sup>

Swift J's first remark is irrelevant: it is for the claimant to prove that the threshold in s 1 has been met, not for the defendant to prove that it has not. He was right to say that the statements complained of bore meanings that were very seriously defamatory of the claimants. But, in the same paragraph, he had stated that the s 1 requirement should be applied 'as explained in the judgment of the Supreme Court' in *Lachaux*;<sup>220</sup> in that judgment, Lord Sumption explicitly declared that 'Whether ... financial loss has occurred and whether it is "serious" are questions which cannot be answered by reference only to the inherent tendency of the words', and that the same was true in respect of 'likely' financial loss.<sup>221</sup>

Based on the information provided in his judgment, Swift J's assertion that it was 'obvious' that the defendant's statements would cause the claimant financial loss also seems questionable as a matter of fact. Given the long history of the case, at the time the defamation claim was decided it was over two years since the videos complained of were first published; and yet, as the judge observed, the claimant provided no evidence that they had caused any specific financial loss. That may in part be because the defendant's allegations, although defamatory, seem to have been wildly implausible and lacking any credibility.

In respect of its claim in malicious falsehood, the claimant relied on s 3 of the Defamation Act 1952, which provides an exception to the normal requirement to prove special damage in cases where the words complained of are likely to cause 'pecuniary damage'.<sup>222</sup> That exception was held to apply because the defendant's statements were made in advertisements for a product he had developed as a competitor to the claimant's.<sup>223</sup> Swift J appears to have decided that the statements were 'likely to cause serious financial loss' for the purposes of s 1(2) on essentially the same basis. But he did not acknowledge the difference between proving that the defendant's statements were likely to cause financial loss, as required under s 3 of

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<sup>219</sup> *Al-Ko Kober* (n 86) [17].

<sup>220</sup> *Ibid*, [17].

<sup>221</sup> *Lachaux* (SC) [15].

<sup>222</sup> *Al-Ko Kober* (n 86) [22].

<sup>223</sup> See Ch2.B.iii., text to notes 140-152, for discussion of malicious falsehood claims in the context of comparative advertising.



the 1952 Act, and proving that they were likely to cause *serious* financial loss, as required under s 1 of the 2013 Act. Nor did he attempt to distinguish the likely financial impact of the defendant's allegation that the claimant's *product* was dangerous from the likely impact of the defamatory allegations against the *company*, which I argued above may now be necessary to satisfy the test in s 1.<sup>224</sup> In any event, it is not obvious that the judge was right to hold that *either* test was satisfied in the circumstances of this case, because the defendant's 'competing' product (as Swift J described it<sup>225</sup>) was not actually available for sale to the public.<sup>226</sup>

### *Direct or indirect expenditure in mitigation of loss*

The claimant's successful arguments in relation to s 1(2) in *Pirtek* were mainly based on a combination of the last two types of evidence to be discussed in this section. The first component, and the only quantified loss pleaded, was a sum of £15,000 spent employing a public relations consultant to help mitigate the loss caused by the defendant's statements.<sup>227</sup> Warby J held that this kind of 'expense incurred in an attempt to mitigate loss' could properly be considered 'financial loss' for the purposes of s 1(2), as long as the attempt was 'reasonable' as in this case.<sup>228</sup> Warby J's decision to treat spending in mitigation of loss as relevant to the s 1(2) test is interesting because it runs counter to the recommendation of the Joint Committee on the Draft Defamation Bill that such expenses should not count as financial loss for the purpose of the provision that eventually became s 1(2).<sup>229</sup> However, it seems right, both in principle and on policy grounds, that the claimant's *direct* expenditure in mitigation of loss should, if reasonable, be relevant to s 1(2).

Expenses incurred as a result of the claimant's reasonable attempts to mitigate loss are generally recoverable in tort, including in corporate defamation claims.<sup>230</sup> In *ReachLocal*, for example, the claimant was awarded special damages to

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<sup>224</sup> At text to notes 131-135.

<sup>225</sup> *Al-Ko Kober* (n 86) [2].

<sup>226</sup> *Al-Ko Kober Ltd v Sambhi* [2017] EWHC 2474 (QB) [2]; [2018] EWHC 165 (QB) [2].

<sup>227</sup> *Pirtek* (n 83) [52].

<sup>228</sup> *Ibid.*, [53].

<sup>229</sup> Joint Committee Report (n 6) para 115.

<sup>230</sup> See James Edelman, Jason Varuhas and Simon Colton, *McGregor on Damages* (20<sup>th</sup> edn, 2<sup>nd</sup> supp, Sweet & Maxwell 2019) para 9-101.

compensate for the cost of credits offered to its existing customers to encourage them to stay, and of employing a PR consultant for twelve months to manage the reputational harm caused by the defendant's statements.<sup>231</sup> It may also be possible for a company to claim that the cost of advertising to counteract the effect of a defamatory statement was a reasonable mitigating expense.<sup>232</sup>

The position as regards *indirect* costs of mitigation, however, should be different. Coe suggests that it may be appropriate to treat staff or management resources that are 'wasted' on mitigating the consequences of reputational harm as 'financial loss' for the purposes of s 1(2). Although most staff costs are relatively fixed, employees would likely be engaged in activities that were more valuable to the company but for the need to mitigate the loss that might be caused by a defamatory statement. In New Zealand, it has been ruled that the 'pecuniary loss' which corporate claimants must show under s 6 of the Defamation Act 1992 'can include the opportunity cost of the time of staff members in dealing with the effect of the statements.'<sup>233</sup> Adopting a similar approach to the (roughly equivalent) s 1(2) test would also seem to be in line with case law on the assessment of damages in other torts, in which it has been held that losses of this kind may be recoverable if staff are 'diverted from their usual activities' in such a way as to cause 'significant disruption to the [claimant's] business',<sup>234</sup> without it being 'necessary to show some additional expenditure or loss of revenue or profit'.<sup>235</sup>

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<sup>231</sup> *ReachLocal* (n 89) [48]-[52].

<sup>232</sup> This seems to have been accepted as a permissible head of damage in principle, but not on the facts of the particular case, in the tort of passing off: *Spalding (A G) & Bros v A W Gamage Ltd* (1918) 35 RPC 101 (CA).

<sup>233</sup> *Low Volume Vehicle Technical Association, Inc v Johnson* [2017] NZHC 2846, [43].

<sup>234</sup> *R+V Versicherung AG v Risk Insurance and Reinsurance Solutions SA* [2006] EWHC 42 (Comm) [77] (Gloster J).

<sup>235</sup> *Nationwide Building Society v Dunlop Haywards (DHL) Ltd* [2009] EWHC 254 (Comm) [15] (Clarke J).

However, there are good reasons for the courts to be cautious about this kind of evidence of indirect expenditure in the context of s 1(2). In *Lonrho v Fayed*,<sup>236</sup> a conspiracy case in which the claimant company sought damages for wasted costs incurred as a result of harm to its reputation, Dillon LJ expressed sympathy for the defendant's argument that:

‘... it would be self-serving to allow the mere cost of staff time or payment to third parties to investigate and uncover the conspiracy to count as damage and warrant the bringing of the action if the acts done by the conspirators have caused no other damage to the victim.’<sup>237</sup>

On similar grounds, it is submitted that evidence of wasted management costs should not be sufficient to satisfy the s 1(2) test on its own. Most prudent companies can be expected to have reputation management strategies that include reallocating staff from other tasks to minimize or prevent losses from reputational threats as they arise. If wasted staff costs alone could constitute ‘financial loss’, there would be a real risk that the s 1(2) threshold could be satisfied on the basis of little more than a claimant company having responded to the risk of reputational harm posed by the defendant's statements according to standard practices. That would undermine Parliament's decision to require corporate claimants to show serious financial loss *in addition to* serious reputational harm.

#### *Fall in share price or loss of goodwill*

The other component of the claimant's case on s 1(2) in *Pirtek* was an assertion that the defendant's allegations had ‘gravely damaged the Claimant in its business reputation and goodwill’.<sup>238</sup> This was the final category of loss identified by Peter Coe as potentially relevant to s 1(2). The term ‘goodwill’ refers to that part of a company's value which cannot be attributed to tangible or identifiable intangible assets; as noted in Chapter 1,<sup>239</sup> a company's reputation will make up a core part of its goodwill, but the two are not entirely synonymous.<sup>240</sup> For a company with publicly-traded shares, a loss of goodwill will be reflected in a fall in the price of

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<sup>236</sup> *Lonrho v Fayed (No 5)* [1994] 1 All ER 188 (CA).

<sup>237</sup> *Ibid.* A similar concern was expressed by the Joint Committee, at para 115 of its Report (n 6).

<sup>238</sup> *Ibid.*, [53].

<sup>239</sup> Ch1.B.ii., notes 122-124 and accompanying text.

<sup>240</sup> Meiring de Villiers, ‘Quantitative Proof of Reputational Harm’ (2010) 15 *Fordham Journal of Corporate and Financial Law* 567, 583.

its shares, and therefore in the overall ‘market capitalization’ value that investors attribute to the company.

There was disagreement during the drafting of the Act as to whether a loss of goodwill or fall in share price should be capable of constituting, or being relied on as evidence of, financial loss under s 1(2). On the one hand, Jonathan Djanogly MP suggested on behalf of the Government that ‘we see no reason why there should be no redress for a defamatory action that has caused a fall in share price.’<sup>241</sup> On the other, the Joint Committee on the Draft Defamation Bill recommended that neither ‘mere injury to goodwill’ nor a fall in share price should be treated as relevant to the s 1(2) test.<sup>242</sup>

There are three ways in which a company might argue that a loss of goodwill caused by a defamatory statement is relevant to the serious financial loss test in s 1(2). Firstly, it might be claimed that a loss of goodwill in itself constitutes financial loss to the company. Secondly, a fall in the value of the company’s goodwill might be relied on as evidence of other financial loss. Finally, it might be claimed that the loss of goodwill has caused or is likely to cause other financial loss. I will argue below that none of these arguments should be accepted, except possibly the third, in some limited, specific circumstances.

A fall in a company’s share price is not a ‘financial loss’ to the company itself, but to the owner(s) of its shares.<sup>243</sup> Companies are not typically permitted to own shares in themselves without cancelling them.<sup>244</sup> Moreover, a claimant seeking to rely on a fall in share price in support of its case on s 1(2) is likely to face significant

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<sup>241</sup> Defamation Bill Deb 26 June 2012, col 206.

<sup>242</sup> Joint Committee Report (n 6) para 115.

<sup>243</sup> *Johnson v Gore Wood* [2002] 2 AC 1 (HL) 61-62; Thomas Rudkin, ‘Things Get Serious’ (n 139) 203.

<sup>244</sup> Companies Act 2006, pt 18. In circumstances in which a company owns shares in itself and is permitted to sell them into the market, there may be an argument that devaluation of those shares could constitute ‘financial loss’ on the same basis that a fall in the share price of an ‘equity-dependent’ firm might cause it financial loss (see discussion at text to notes 258-261), provided that the fall in share price did not merely reflect other losses suffered by the company (in which case it would be double counting to treat both as distinct losses). Those circumstances do not seem particularly likely to arise in the context of a defamation claim.

difficulties in establishing a chain of causation from the statement(s) complained of. Coe argues that:

‘Establishing a causative link between a defamatory statement and a drop in share price would, arguably, be unjustifiable, or ... at the very least open to strong arguments of remoteness, allied to a lack of certainty and precision, as many variable factors can impact upon share valuation at any given time.’<sup>245</sup>

This lack of reliability was the main reason that, in *Collins Stewart Ltd v The Financial Times Ltd* (*‘Collins Stewart’*), the High Court struck out a corporate defamation claimant’s attempts to claim both general and special damages based in large part on a fall in its share price.<sup>246</sup>

The argument that a loss of goodwill more generally might constitute financial loss rests on the fact that there are some legal contexts in which a company’s goodwill is treated as a property interest. But that does not mean that a loss of goodwill will qualify as financial loss for the purposes of s 1(2). In *Lonrho v Fayed*,<sup>247</sup> the claimant company sued in conspiracy in respect of harm to its reputation, which it sought to frame as an injury to its property interest in goodwill in an attempt to circumvent the rule that a claimant can only sue for harm to reputation alone in defamation. The Court of Appeal made clear that for a company’s goodwill to be considered a property interest, such that injury to it could be considered financial loss, it must relate ‘to the buying and selling or dealing with customers which is the essence of the business of any trading company’;<sup>248</sup> it ‘cannot mean some airy-fairy general reputation in the business or commercial community’.<sup>249</sup> This suggests that, to demonstrate that a loss of goodwill constitutes financial loss under s 1(2), a claimant would need to introduce evidence of a loss of custom or loss of contracts with suppliers, to show that the goodwill in question related to ‘buying and selling or dealing with customers’. This evidence would, on its own, probably be enough

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<sup>245</sup> Coe, ‘Need to Talk’ (n 104) 328.

<sup>246</sup> [2004] EWHC 2337 (QB).

<sup>247</sup> *Lonrho* (n 236).

<sup>248</sup> *Ibid*, 196.

<sup>249</sup> *Ibid*.

to prove financial loss, so the characterization of injury to goodwill as financial loss would be redundant in this situation.

Where the claim is that harm to a company's general trading reputation constitutes a loss of goodwill, because reputation is a component of goodwill, this effect is compounded by the construction of s 1. In this case, even if a loss of goodwill *is* capable of constituting financial loss, it still cannot satisfy s 1. As described above,<sup>250</sup> s 1 requires the company to show serious financial loss *caused by* harm to *its* reputation. It cannot be possible to satisfy s 1 by characterizing an injury to goodwill as *both* harm to reputation *and* financial loss, because the loss of goodwill cannot have caused itself. Therefore, it should not be possible for a corporate defamation claimant to rely on a loss of goodwill or a fall in share price as in itself financial loss for the purposes of s 1(2).

There are, as mentioned, two alternative ways in which a fall in share price might be relevant to s 1(2). The first is as evidence of other losses that have been suffered or are likely to be suffered by the claimant, with the extent to which the share price has fallen indicating the seriousness of those losses. The market's valuation of a publicly traded company 'reflects expectations about [the] firm's stream of future profits'.<sup>251</sup> The value of a company's goodwill is affected by its reputation because investors recognize that consumers and other stakeholders will use the available information on a company to determine how they should interact with it. Changes to the value of goodwill can be caused by the market's expectation that 'investors, customers, and suppliers [will] change the terms of trade with which they do business with the firm'<sup>252</sup> in reaction to new information. But the idea that a market valuation representing investors' expectations of long-term profitability could be used as a measure of future loss, or even as evidence that any loss is likely, depends on the assumption that investors are capable of making these assessments accurately, which is not universally agreed upon.<sup>253</sup> This was one of Tugendhat J's

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<sup>250</sup> At text to notes 118-121.

<sup>251</sup> Ioannis Kokkoris, 'A Practical Application of Event Studies in Merger Assessment: Successes and Failures' (2007) 3(1) *European Competition Journal* 65, 65.

<sup>252</sup> Jonathan M Karpoff, D Scott Lee and Gerald S Martin, 'The Cost to Firms of Cooking the Books' (2008) 43 *Journal of Financial and Quantitative Analysis* 581, 582.

<sup>253</sup> eg Jonathan M Karpoff, 'Does Reputation Work to Discipline Corporate Misconduct?' in Michael L Barnett and Timothy G Pollock (eds), *The Oxford Handbook of Corporate Reputation* (OUP 2014) 376.

objections to using a fall in share price as a measure of damages in *Collins Stewart*: he commented that ‘the reasons why a share is traded at a particular price ... are unknown, or, at best, matters of conjecture.’<sup>254</sup> Rudkin suggests that, as a result of the decision in *Collins Stewart*, ‘companies should be cautious about relying on the effects of a publication on share price as the sole measure of financial loss’ under s 1(2).<sup>255</sup> As well as making it difficult for a claimant to show that a fall in its share price was caused by the statement complained of, this also means that the market’s valuation of a company is too imprecise to be used to measure other financial losses.<sup>256</sup> If those other losses are sufficiently serious to meet the s 1(2) threshold, then one would expect there to be *some* evidence of them aside from the reaction of the market.

The final way in which a loss of goodwill might be pleaded in support of a claimant’s case on s 1(2) would be the claim that, although not financial loss in itself, the loss of goodwill is ‘likely to cause’ other financial losses. As Coe notes, a company’s claim in respect of a loss of goodwill ‘relates, first and foremost, to “reputational” loss *that can result in* financial loss.’<sup>257</sup> A potentially interesting observation along these lines was made by Nicol J in *Euroeco Fuels*: ‘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.’<sup>258</sup>

This might, in some specific circumstances, be a tenable argument. For example, a company that was reliant on raising capital through share issues (known as an ‘equity-dependant’ firm) may be able to demonstrate that a fall in the value of its shares was likely to cause serious financial loss.<sup>259</sup> But, as Rudkin notes, this kind of argument ‘is unquestionably somewhat of a jump to make and may prove problematic’ for corporate claimants in practice.<sup>260</sup> In *Tesla*, the claimant attempted to advance a similar argument, alleging that the statements complained of had discouraged investors from taking up shares in the company when it floated on the

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<sup>254</sup> *Collins Stewart* (n 246) [47].

<sup>255</sup> Rudkin, ‘Things Get Serious’ (n 139) 203.

<sup>256</sup> *Collins Stewart* (n 246) [64].

<sup>257</sup> Coe, ‘Treatment of Corporate Reputation in Australia and the UK’ (n 104) 13 (emphasis added).

<sup>258</sup> *Euroeco Fuels* (n 168) [71].

<sup>259</sup> Malcolm Baker, Jeremy C Stein and Jeffrey Wurgler, ‘When Does the Market Matter? Stock Prices and the Investment of Equity-Dependent Firms’ (2003) *Quarterly Journal of Economics* 969.

<sup>260</sup> Rudkin, ‘Things Get Serious’ (n 139) 203.

UK stock market; the judge took the view that ‘it is not at all clear how a reduction in investor confidence, even if it could be shown to be due to the [statements complained of], could have contributed to the losses claimed.’<sup>261</sup>

One aspect of Warby J’s reasoning in *Pirtek* is particularly concerning in this regard. The judge quoted a passage from the particulars of claim which he believed justified his finding that the statements were likely to cause serious financial loss,<sup>262</sup> as follows: ‘The publication of the said words has gravely damaged the Claimant in its business reputation and goodwill and has caused the company serious financial loss.’<sup>263</sup> He went on to explain that:

‘This is not explicitly framed as a case of “likely” financial loss, but such an assertion is implicit in the allegation of damage to “reputation and goodwill”. Goodwill is the ability of a business to generate revenue and profit.’<sup>264</sup>

This seems to suggest that, since reputation has an effect on future revenue, and an injury to reputation will be reflected in a loss of goodwill, a company that has suffered (serious) injury to its goodwill will automatically be ‘likely’ to suffer (serious) financial loss. That is, that satisfying the ‘has caused ... serious harm to ... reputation’ limb of s 1(1) entails that the ‘is likely to cause serious financial loss’ limb of s 1(2) is satisfied. If this logic were to be applied in future cases, the effect would be to make the additional burden imposed by s 1(2) redundant.

#### ***iv. Summary of the effect of s 1(2)***

In a number of the cases discussed above in which corporate claimants have met the threshold in s 1 of the Defamation Act 2013, the courts have drawn inferences of both the serious harm to reputation required under sub-s (1) and the serious financial loss required under sub-s (2) on the basis of substantially the same evidence, or have been willing to infer the latter despite the claimant adducing little

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<sup>261</sup> *Tesla* (n 103) [42]. See also *HRH Prince Alwaleed Bin Talal Bin Abdulaziz Al Saud v Forbes LLC* [2014] EWHC 3823 (QB), in which the corporate claimant’s argument that it had ‘sought significant amounts of financing on London’s capital markets ... [and] been injured in its reputation within the jurisdiction’ was considered insufficient to ‘lead to a finding that [it] had suffered or was likely to suffer serious harm as a result of the publication’ (at [54]-[56]).

<sup>262</sup> *Pirtek* (n 83) [51].

<sup>263</sup> *Ibid*, [52].

<sup>264</sup> *Ibid*, [53].



or no evidence of specific losses. It is true that the inherent difficulty of providing concrete evidence of loss, and of proving causation, will cause problems for some corporate claimants if the s 1(2) test is more strictly applied. But Parliament's *intention* was to make it more difficult for companies to succeed with defamation claims. If a corporate defamation claimant cannot prove that it has suffered any specific loss, it is difficult to identify a sufficient justification for imposing liability on the defendant.

The claimant-friendly interpretation of s 1(2) to date has undermined one of the primary aims of the serious financial loss requirement, which was to provide the courts with a stronger mechanism with which they could dispose of less serious corporate defamation claims.<sup>265</sup> In practice, it seems that the provision has made little difference to the courts' handling of individual cases: almost all of the corporate defamation claimants that have failed to satisfy the s 1(2) threshold would also have failed to establish liability under the pre-existing common law.

The decision in *Cartus Corporation v Siddell*,<sup>266</sup> one of the earliest cases in which s 1(2) was applicable, is a good illustration. The claimants applied to continue an interim injunction restraining the publication of allegedly defamatory statements, which had been obtained without notice to the defendant at a previous hearing. Nicol J found that the claimants had failed to make the judge at that hearing aware of the serious financial loss requirement imposed by s 1(2).<sup>267</sup> But he held that doing so would have made no difference to the judge's decision to grant the injunction:

‘Had his attention been drawn to s 1(2) of the 2013 Act, I have no doubt that the Judge would have considered that the potential harm to the Claimants' reputation within the UK was such that they would be likely to prove this element of their cause of action.’<sup>268</sup>

Similarly, in *HRH Prince Alwaleed Bin Talal Bin Abdulaziz Al Saud v Forbes LLC*, the corporate claimant failed to satisfy the *Thornton* test,<sup>269</sup> and as such the court

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<sup>265</sup> HL Deb 23 April 2013, vol 744, cols 1367-68 (Lord McNally).

<sup>266</sup> *Cartus Corp* (n 119).

<sup>267</sup> *Ibid*, [32].

<sup>268</sup> *Ibid*, [32]. Under the Human Rights Act 1998, s 12, claimants seeking an interim injunction must satisfy the court that they are ‘likely’ to succeed at trial.

<sup>269</sup> *Thornton* (n 21).

did not even consider whether it could satisfy s 1(2).<sup>270</sup> As discussed above,<sup>271</sup> the corporate claimant in *Undre* failed because the statement complained of did not refer to<sup>272</sup> and was not defamatory of<sup>273</sup> that claimant. Warby J stated explicitly that the claim would have failed at common law.<sup>274</sup> Ultimately, the only difference that s 1(2) made in *Undre* was to add significant complexity to the litigation required to dispose of the company's claim.<sup>275</sup>

However, some of s 1's potential benefits relative to the pre-existing *Thornton* and *Jameel* thresholds<sup>276</sup> are illustrated by the judgment in *Alexander-Theodotou v Kounis*,<sup>277</sup> in which the second claimant was a law firm. The statements complained of made serious allegations against the firm, which Warby J held were 'unquestionably defamatory' by the standards set in *Thornton*.<sup>278</sup> But the firm's claim was dismissed under s 1(1) because those statements were only published to a small number of people, who would already have had a poor opinion of the firm, so that despite the inherent seriousness of the allegations they were not likely to cause any actual harm to the firm's reputation.<sup>279</sup> Although an application to strike out the claim on *Jameel* abuse grounds would almost certainly have been successful on these facts, the defendant made no such application.

The threshold in s 1 means that a likelihood of actual (serious) harm to the claimant's reputation 'is now a substantive element in any claim' for defamation, without which 'no such claim will get off the ground.'<sup>280</sup> The burden is on the claimant to provide sufficient evidence of harm to satisfy the court that her claim should be allowed to proceed; not on the defendant to establish that it should be struck out. But s 1 may also be an effective mechanism with which defendants can seek to defeat claims at an early stage: in *McGrath v Bedford*, Eady J explained that

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<sup>270</sup> *Prince Al Saud* (n 261) [56].

<sup>271</sup> At text to notes 110-112.

<sup>272</sup> *Undre* (n 110) [32].

<sup>273</sup> *Ibid*, [34].

<sup>274</sup> *Ibid*, [41], [75].

<sup>275</sup> Discussed further at Ch5.A., text to notes 16-21.

<sup>276</sup> See text to notes 20-33.

<sup>277</sup> *Alexander-Theodotou v Kounis* [2018] EWHC 956 (QB).

<sup>278</sup> *Ibid*, [55]-[56].

<sup>279</sup> *Ibid*, [66]. The firm's failure to meet the threshold in s 1(1) meant that there was no need for Warby J to consider its case on s 1(2): *ibid*, [70].

<sup>280</sup> *McGrath* (n 108) [4] (Eady J).

defendants ‘need to be alert to the possibility that a claimant will not be able to establish [serious harm] and, where appropriate, may raise the point by way of preliminary objection prior to serving a defence.’<sup>281</sup>

It is important to note that any claims that fail or are struck out under s 1(2) will still have been brought, and may only be disposed of after several preliminary hearings, or even a full trial.<sup>282</sup> For example, the claims in *McGrath*,<sup>283</sup> in which the second claimant was a corporation, were the subject of several hearings and decisions in the High Court, despite the statements complained of having been published in the context of a tender for a contract that the claimant company in fact won.<sup>284</sup> For potential defendants with limited means, the expense of having a claim against them struck out at an early stage, although less than the cost of a full trial, is still sufficient to create a significant chilling effect on expression.<sup>285</sup> In this sense, the effect of the 2013 Act, both in the courts and more widely, may only be marginal.

It is more difficult to assess the impact that s 1(2) might have had on cases decided prior to the provision coming into effect, because the parties in those cases would have had no reason to introduce evidence or arguments that might have been relevant to the s 1(2) test. However, of the cases decided between 2004 and 2013 which I have studied in more detail elsewhere,<sup>286</sup> there appear to have been only a small number in which the serious financial loss requirement may have allowed corporate claims to be struck out at an earlier stage. In *Jameel v Times Newspapers Ltd* and *Citation plc v Ellis Whittam Ltd*, permission was granted to appeal against High Court decisions striking out the claims,<sup>287</sup> despite the paucity of evidence of financial loss in each.<sup>288</sup> It is possible that permission to appeal would not have been granted, and therefore that these claims could have been dealt with more efficiently,

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<sup>281</sup> *Ibid.*

<sup>282</sup> Procedural issues relating to s 1(2) are discussed at Ch4.C.ii., text to notes 288-306.

<sup>283</sup> *McGrath* (n 108).

<sup>284</sup> *Ibid.*, [13].

<sup>285</sup> *Gatley* (n 35) para 30.48.

<sup>286</sup> David J Acheson, ‘Empirical Insights into Corporate Defamation: An Analysis of Cases Decided 2004-2013’ (2016) 8(1) *Journal of Media Law* 32.

<sup>287</sup> *Jameel v Times Newspapers Ltd* [2004] EWCA Civ 983; *Citation plc v Ellis Whittam Ltd* [2013] EWCA Civ 155.

<sup>288</sup> *Jameel v Times Newspapers Ltd* [2003] EWHC 2609 (QB) [40]; *Citation plc v Ellis Whittam Ltd* [2012] EWHC 549 (QB) [47].

at lower cost to the parties, under the new law. The case that seems most likely to have been affected by s 1(2) is *Howe & Co v Burden*.<sup>289</sup> In that case, Eady J held that there was insufficient evidence to grant summary judgment in favour of the defendants, even though he found that the statements complained of ‘do not seem to have reached a wider audience or done the Claimants any harm’.<sup>290</sup> It is difficult to see this decision having been made had the claimant been required to show financial loss. However, Eady J’s judgment was handed down in 2004, before the Court of Appeal’s decision in *Jameel*.<sup>291</sup> The claim in *Howe & Co* could almost certainly have been struck out using the abuse of process mechanism established in that case.

It is also possible that a small number of the successful corporate claimants in the decade prior to the 2013 Act would have faced difficulties in relation to s 1(2). In *Applause Store Productions Ltd v Raphael*,<sup>292</sup> claims were brought by a company (the first claimant) and its managing director (the second claimant) in respect of material posted on Facebook that infringed the second claimant’s privacy, and was defamatory of both claimants. All of the claims, including the company’s defamation claim, were successful. However, there appears to have been relatively little evidence that the statements, which were only available on Facebook for sixteen days,<sup>293</sup> had caused the claimant company any loss, and little evidence from which it would have been possible to infer such loss. The evidence as to the number of people who saw the defendant’s posts was ‘not entirely clear’.<sup>294</sup> HHJ Richard Parkes QC acknowledged ‘the limited extent of proved publication’,<sup>295</sup> but inferred that ‘a not insubstantial number of people’ were likely to have seen the material.<sup>296</sup> More specifically, the judge ‘[had] in mind a substantial two-figure, rather than a three-figure, number’ of likely publishees.<sup>297</sup> The second claimant, under cross-examination, ‘accepted that Applause Store was still the market leader, and ...

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<sup>289</sup> *Howe & Co v Burden* [2004] EWHC 196 (QB).

<sup>290</sup> *Ibid*, [10].

<sup>291</sup> *Jameel* (n 22).

<sup>292</sup> [2008] EWHC 1781 (QB).

<sup>293</sup> *Ibid*, [78].

<sup>294</sup> *Ibid*, [70].

<sup>295</sup> *Ibid*, [78].

<sup>296</sup> *Ibid*, [78].

<sup>297</sup> *Ibid*.

could not say that any contract had been lost as a result of the posting of the false material' by the defendant.<sup>298</sup> In fact, 'No-one in the industry had commented on it to him.'<sup>299</sup> However, as there was no requirement for the corporate claimant to show financial loss, and the defendant did not plead any defence, the 'only major issue on liability [was] whether the Defendant was responsible for [publication]'.<sup>300</sup> That question having been answered in the affirmative, the claimant company was awarded £5,000 in general damages.<sup>301</sup> It seems unlikely that, on the evidence referred to in the judgment, the company would have been able to satisfy the s 1(2) test.

### **C. Has s 1(2) made a difference to the cases that reach court?**

The discussion above suggests that, although significant uncertainty remains, it is unlikely that the serious financial loss threshold will prevent many corporate claimants from succeeding with defamation claims that would have been viable before the 2013 Act came into force. However, this does not necessarily mean that the section will not be effective: as Matt Collins notes, it may be that 'the increased threshold has more symbolic and practical, than legal, significance.'<sup>302</sup> By 'symbolic and practical' significance, Collins is alluding to the effect that s 1(2) might have on whether companies decide to bring, or threaten, defamation proceedings against critics. Referring to s 1 generally, Davis LJ claimed in *Lachaux* that 'the very existence of the section should of itself operate to deter the issuing of trifling and unmeritorious claims in the first place.'<sup>303</sup> It is not yet clear how effective s 1 will be in this respect.

Statistics on the number of defamation claims filed each year since 2013 shed little light on whether the Act has been effective in deterring trivial claims. After a 'blip'

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<sup>298</sup> Ibid, [69].

<sup>299</sup> Ibid.

<sup>300</sup> Ibid, [9].

<sup>301</sup> Ibid, [79].

<sup>302</sup> Matthew Collins, *Collins on Defamation* (OUP 2014) para 7.18.

<sup>303</sup> *Lachaux* (CA) [78].

in which the number of claims filed unexpectedly rose in 2014,<sup>304</sup> the year the Defamation Act came into force, the total number of defamation claims issued in London (where the majority of such claims are filed) appeared to have fallen substantially in 2015<sup>305</sup> and 2016.<sup>306</sup> The extent to which the 2013 Act was responsible for this is not clear, given that there had already been a ‘long term downward trend in the number of claims’ since the 1990s.<sup>307</sup> It is even more difficult to delineate the effect of the serious harm requirement in s 1 of the Act from that of other provisions; for example, it has also been suggested that the public interest defence in s 4 may, ‘by encouraging journalistic responsibility, [have] reduced the number of egregious libels and so the number of actions.’<sup>308</sup>

The downward trend now appears to have reversed: the number of claims filed in 2018 was ‘up by 70% on 2017’<sup>309</sup> at 265,<sup>310</sup> compared to 156 in 2017, a figure which itself was 40% higher than the previous year’s.<sup>311</sup> According to a post on the *Inform* blog, the apparent upward trend ‘suggests that the Defamation Act 2013 has not had a significant impact on the number of claims brought. The average number of claims per annum in the 3 years before the Act came into force was 164 and the average for the 5 years after it came into force was 179.’<sup>312</sup> The latest statistics (for 2018) were released shortly before the Supreme Court’s judgment in *Lachaux*; it was also suggested that a ruling overturning the Court of Appeal might

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<sup>304</sup> ‘Judicial Statistics: 2014, Defamation Claims Increase by 60%, the Highest Number since 2009’ (*Inform*, 9 June 2015) <<https://inform.org/2015/06/09/judicial-statistics-2014-defamation-claims-increase-by-60-the-highest-figure-since-2009/>>.

<sup>305</sup> ‘Judicial Statistics, 2015: Issued Defamation Claims Down by 40%, the Second Lowest Number since 1992’ (*Inform*, 4 June 2016) <<https://inform.org/2016/06/04/judicial-statistics-2015-issued-defamation-claims-down-by-40-the-second-lowest-number-since-1992/>>.

<sup>306</sup> ‘Judicial Statistics, 2016: Issued Defamation Claims Down by 17%, Lowest Recorded Number in Modern Times’ (*Inform*, 6 June 2017) <<https://inform.org/2017/06/06/judicial-statistics-2016-issued-defamation-claims-down-by-17-lowest-recorded-number-for-any-year-for-which-records-are-available/>>.

<sup>307</sup> *Ibid.*

<sup>308</sup> *Inform*, ‘Judicial Statistics, 2016’ (n 306).

<sup>309</sup> ‘Defamation Claims in 2018 Up by 70%, the Highest Number for Nine Years, Will *Lachaux* Reverse the Trend?’ (*Inform*, 11 June 2019) <<https://inform.org/2019/06/11/defamation-claims-in-2018-up-by-70-the-highest-number-for-nine-years-will-lachaux-reverse-the-trend/>>.

<sup>310</sup> Royal Courts of Justice Annual Tables 2018, available at <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/806898/2018\\_RCJ\\_tables.xlsx](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806898/2018_RCJ_tables.xlsx)>.

<sup>311</sup> ‘Judicial Statistics, 2017: Issued Defamation Claims Up by 40%, Highest for Three Years’ (*Inform*, 26 June 2018) <<https://inform.org/2018/06/26/judicial-statistics-2017-issued-defamation-claims-up-by-40-highest-for-three-years/>>.

<sup>312</sup> *Inform*, ‘Defamation Claims in 2018 Up by 70%’ (n 309).

reverse the trend.<sup>313</sup> This is a plausible prediction, which possibly fits with prior years' statistics, which show a small reduction in claims filed in 2016, the year after the High Court judgment in *Lachaux*, which – like the Supreme Court judgment in that case – interpreted s 1 favourably to defendants.<sup>314</sup>

However, the data on defamation litigation that the courts make available is very limited and, most importantly in this context, does not distinguish between cases involving corporate and natural claimants. Although there were reports suggesting that there had been a sharp decline in the number of claims brought by companies in the year-and-a-half after the Act came into force,<sup>315</sup> those reports were based on results from legal databases, which record only (some) judgments handed down in court, rather than the number of claims filed.<sup>316</sup> Even the official statistics on claims filed are unhelpful: as well as the lack of detail about the claims recorded, the figures are simply too small and volatile to form the basis of any firm conclusions about the state of defamation litigation in the years since the Act came into force.<sup>317</sup>

Moreover, statistics on the number of defamation claims filed in the courts cannot give an accurate picture of the effect of the law on public discourse about companies. As I discussed in Chapter 2,<sup>318</sup> the chilling effect on speech can be caused by threats of litigation that never reach the public domain, or even by publishers' self-censorship, driven by fear of such threats. These mechanisms mean that critical speech about corporations can be silenced without an actual claim ever reaching the courts; and the chilling effect of lawsuits that are threatened but not filed cannot be captured by statistics from the courts. As Judith Townend points out, 'A lack of incidents in court does not mean that ... journalists and writers do not think about, or react to the pressures of[,] defamation ... law, either as the result of direct threats or anticipated threats.'<sup>319</sup> However, it is difficult to obtain reliable information about companies' use of defamation threats to silence criticism, or the

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<sup>313</sup> Ibid.

<sup>314</sup> See text to notes 41-70.

<sup>315</sup> Marialuisa Taddia, 'Defamation: Libel and Liability' (*Law Society Gazette*, 18 April 2016).

<sup>316</sup> Sarah Webb, 'Defamation: Libel Stats Don't Tell the Whole Story' (*Law Society Gazette*, 7 December 2015).

<sup>317</sup> Andrew Stephenson, 'Libels, Damned Libels and Statistics' (*Inform*, 18 September 2015) <<https://inform.org/2015/09/18/libels-damned-libels-and-statistics-andrew-stephenson/>>.

<sup>318</sup> At Ch2.C., text to notes 157-191.

<sup>319</sup> Judith Townend, 'Online Chilling Effects in England and Wales' (2014) 3(2) *Internet Policy Review*, 6.

extent to which these legal threats are illegitimate. Some practitioners have reported a reduction in litigation threats by companies since the 2013 Act came into force, along with a shift in attention towards critical comments on social media platforms,<sup>320</sup> but the conclusions that can be drawn from these anecdotal accounts are limited.

## **Conclusion**

The introduction of a ‘serious financial loss’ threshold for corporate defamation claimants in s 1(2) of the Defamation Act 2013 was not a sufficient response to the criticisms that had been made of the pre-existing law. In principle, forcing the courts to focus on the financial effects of defamatory statements on corporate claimants does address to some extent the concerns described in Chapter 1 with companies’ ability to sue in defamation even when there were no meaningful reputational interests at stake. But this benefit of the threshold will likely only be marginal in practice. The courts’ interpretation of the provision to date has been too favourable to claimants, and their willingness to allow claimants to satisfy the s 1(2) test without providing any direct evidence of financial loss has undermined the strength of the test as a mechanism for disposing of weaker corporate defamation claims. It is not clear whether the interpretation of the test will improve as the case law continues to develop. But even if it does, the law still gives companies the opportunity to abuse threats of litigation to silence criticism, because of the cost and complexity of the process by which claims that fail to meet the serious financial loss threshold will be adjudicated in favour of defendants. As a result, corporate defamation claims are still able to have the unacceptable chilling effect on freedom of speech that was described in Chapter 2.

One important effect of including s 1(2) in the Defamation Act 2013 does not seem to have been highlighted during the debates, or to have had much influence on Parliament’s decision as to what if any provision it should make in the Act for corporate claimants. As a by-product of requiring for-profit companies to show serious financial loss, with the intention of placing stricter limits on their ability to

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<sup>320</sup> See eg Taddia (n 315).



sue, Parliament in fact gave statutory footing to the corporate right to sue in defamation. It had been open to the Supreme Court before the 2013 Act came into force to remove that right, and although doing so would have required overturning long-standing precedent,<sup>321</sup> it was at least possible that the common law position could have been reversed by the Court. After the 2013 Act came into force, that was no longer the case – the option of removing the right to sue in defamation from companies altogether is now open only to Parliament. I will argue in Chapter 5 that Parliament should do precisely that. Before making that argument, though, a range of alternative options for reforming corporate defamation law will be considered in Chapter 4.

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<sup>321</sup> *Jameel v WSJ* (n 15) [152].

# CHAPTER FOUR:

## ALTERNATIVE REFORM OPTIONS

### Introduction

Having argued in Chapter 3 that introducing a ‘serious financial loss’ threshold in s 1(2) of the Defamation Act 2013 was not a sufficient response to the problems with English corporate defamation law, in this chapter I consider a range of alternative options for reform. The discussion draws on suggestions put forward during the reform debates and in the academic literature, and on approaches taken in other jurisdictions. Given the arguments made so far in this thesis, and Parliament’s intention that the 2013 Act would make the law more favourable to defendants, this chapter discusses potential reform options *which would be designed to benefit defendants*, or which would benefit both parties. I will argue that, although there are strong arguments for adopting some of the reforms discussed, none of them would adequately address the problems with the law. Instead, the most appropriate reform would be to remove the right to sue in defamation from corporations altogether. The following chapter will provide a justification for that approach.

The reform options discussed in this chapter fall into three broad categories. Part A discusses the possibility of amending the substantive law so that corporate defamation claims are less likely to succeed. I argue that it would be reasonable to require corporate claimants to prove the falsity of defamatory allegations, or to prove that the defendant acted with some degree of fault in publishing the statements complained of, in order to succeed with their claims. However, the former option would make little difference to most cases, and the latter may have unintended consequences that it would be preferable to avoid. Part B discusses restrictions that could be placed on the remedies available to successful corporate claimants. I argue that companies should not be entitled to general damages for

defamation, and that there may also be reasons to restrict the availability of special damages. I also discuss the possibility of replacing financial remedies with ‘discursive’ remedies that would, for example, require defendants to correct or retract false allegations. While remedies in corporate defamation are ripe for reform, the benefits of such reform would be limited in practice because it would not address more fundamental problems with the litigation process itself. Part C considers proposed reforms aimed at reducing the cost and complexity of libel litigation, or preventing companies from using the threat of litigation to silence criticism. I argue that the Defamation Act 2013 failed to make substantial improvements in this area, but that more ambitious procedural reforms might raise issues in relation to companies’ fair trial rights under Article 6 of the European Convention on Human Rights.

### **A. Reforming the substantive law to restrict actionability**

The first broad category of potential reform would restrict the circumstances in which companies can successfully sue in defamation, by changing the substantive tests used to determine the outcomes of individual cases. Parliament chose this approach in the Defamation Act 2013, and decided to restrict actionability based on whether a claimant company has suffered, or is likely to suffer, serious financial loss. As discussed in the previous chapter, the effect of s 1 of the Act was to remove the common law presumption of loss.<sup>1</sup> But there are other bases on which the cause of action might be restricted. In particular, removing either of the two other important common law presumptions – of falsity or of malice – would make it more difficult for companies to sue, and thereby limit the circumstances in which the courts would interfere with defendants’ freedom of speech in order to protect companies’ reputational interests.

The presumption of falsity means that, once a claimant has established that the statement complained of is defamatory, it is presumed to be false unless the defendant proves otherwise. As such, although the remedy in defamation is for the

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<sup>1</sup> Ch3.A., at text to notes 14-70.

reputational harm caused by *false* defamatory imputations, claimants do not actually need to prove the falsity of those imputations in court. Instead, the burden is on defendants to prove the truth of the statements complained of, or plead another defence, to avoid liability.<sup>2</sup> The presumption of malice means that defamation is essentially a strict liability tort: the claimant does not need to prove that the defendant acted with any degree of fault to succeed with her claim.<sup>3</sup> The motive or intention of the defendant is only relevant to liability in the context of certain defences.<sup>4</sup>

Together, these presumptions make it ‘relatively easy for a [defamation] claimant to establish the requirements of the tort’.<sup>5</sup> The ease with which the elements of the cause of action can normally be made out is sometimes seen as an important factor in the particularly significant chilling effect that defamation law causes.<sup>6</sup> As a result, the presumptions of falsity and malice have both been identified as aspects of corporate defamation law that could potentially be reformed. The logic is simple: removing either presumption would mean that corporate claimants would need to provide evidence of either falsity or fault, or both, in order to successfully sue. The greater difficulty of suing would mean that fewer corporate claims would succeed, and likely fewer would be brought in the first place, especially those that were relatively weak on their merits. This in turn would alleviate some of the law’s chilling effect on speech about companies.

The discussion of these reform options in the sections below, which begins with the proposal to require corporate claimants to prove that defamatory statements about them are untrue, is informed by the different approaches taken to both falsity and fault in US defamation law. The experience in the US is potentially instructive because, although state libel laws are descended from the same common law

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<sup>2</sup> Defamation Act 2013, s 2. See Elizabeth Samson, ‘The Burden to Prove Libel: A Comparative Analysis of Traditional English and US Defamation Laws and the Dawn of England’s Modern Day’ (2012) 20 *Cardozo Journal of International and Comparative Law* 771, 776.

<sup>3</sup> Richard Parkes and others, *Gatley on Libel and Slander* (12<sup>th</sup> edn, 2<sup>nd</sup> supp, Sweet & Maxwell 2017) para 1.8 (*‘Gatley’*).

<sup>4</sup> Eric Descheemaeker, ‘Protecting Reputation: Defamation and Negligence’ (2009) 29 *Oxford Journal of Legal Studies* 629, 639-40. The most relevant in this context is the public interest defence in s 4 of the Defamation Act 2013: see text to notes 73-83.

<sup>5</sup> Eric Barendt and others, *Media Law: Text, Cases and Materials* (Pearson 2014) 361.

<sup>6</sup> eg Russell L Weaver and David F Partlett, ‘Defamation, Free Speech, and Democratic Governance’ (2005) 50 *New York Law School Law Review* 57, 73.

heritage as English defamation law, the two bodies of law have ‘diverged so greatly that nowadays the resemblance is largely superficial.’<sup>7</sup> This divergence is primarily the result of the constitutional standards imposed on the tort by the US Supreme Court in a series of cases beginning in 1964 with *New York Times v Sullivan* (‘*Sullivan*’).<sup>8</sup> The Supreme Court’s defamation jurisprudence establishes that, to sufficiently protect the right to free speech guaranteed by the first amendment to the US Constitution, the common law presumptions of falsity and malice must be set aside in cases involving ‘public figure’ claimants.<sup>9</sup> Instead, such claimants are required to prove falsity<sup>10</sup> and fault<sup>11</sup> to succeed with their claims.<sup>12</sup> The House of Commons Culture, Media and Sport Committee (‘CMS Committee’) observed in its 2010 report on *Press Standards, Privacy and Libel* that these first amendment protections ‘have made it very difficult for companies – as “public figures” under US law – to succeed in defamation cases.’<sup>13</sup> Importing equivalent standards into English law might therefore help to address some of the problems identified in previous chapters.

Alastair Mullis and Andrew Scott argue that the impact of the first amendment on US libel laws has led to ‘what can be reasonably described as a fundamentalist approach to the value of freedom of expression.’<sup>14</sup> For example, the United States is alone among significant English-language jurisdictions in repudiating the presumption of falsity.<sup>15</sup> As a result, there is ‘a heavy burden placed on those who argue for reform by reference to American law to prove that, of all the jurisdictions in the world, the United States has things right’.<sup>16</sup> I argue below that, at least as regards corporate defamation law, there are good reasons to think that the US

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<sup>7</sup> David A Anderson, ‘Defamation and Privacy: An American Perspective’ in Simon Deakin, Angus Johnston and Basil Markesinis (eds), *Markesinis and Deakin’s Tort Law* (6<sup>th</sup> edn, OUP 2007) 866.

<sup>8</sup> 376 US 254 (1964).

<sup>9</sup> The ‘public figure’ standard is discussed in Ch5.C.iii., at text to notes 222-233.

<sup>10</sup> *Philadelphia Newspapers, Inc v Hepps* 475 US 767 (1986) 776-77.

<sup>11</sup> *Curtis Publishing Co v Butts* 388 US 130 (1967) 155.

<sup>12</sup> Mark A Franklin and Daniel J Bussel, ‘The Plaintiff’s Burden in Defamation: Awareness and Falsity’ (1984) 25 *William & Mary Law Review* 825, 851-58.

<sup>13</sup> Culture, Media and Sport Committee, *Press Standards, Privacy and Libel: Report* (HC 2009-10, 362-I) para 164 (‘CMS Committee Report’). In fact, it is not necessarily the case that corporate claimants will be treated as ‘public figures’ in the US: see Ch5.C.iii., text to notes 225-231.

<sup>14</sup> Alastair Mullis and Andrew Scott, ‘Something Rotten in the State of English Libel Law? A Rejoinder to the Clamour for Reform of Defamation’ (2009) 14(6) *Communications Law* 173, 175.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

approach is in fact preferable to the approach taken in English law. There would be sufficient justification for reforming English defamation law to require corporate claimants to prove either falsity, or fault, or both. However, each reform option has its limitations; neither would be adequate on its own.

*i. Requiring corporate claimants to prove falsity*

The report *Free Speech is Not for Sale* ('*FSINFS*'), commissioned by the NGOs Index on Censorship and English PEN, and influential in the debates leading to the 2013 reforms,<sup>17</sup> identified the presumption of falsity as a particularly problematic feature of English defamation law, and recommended shifting the burden of proof onto claimants to bring the law further into line with the US.<sup>18</sup> There is room for legitimate debate about the appropriate allocation of the burden of proving truth or falsity, but the framing of the issue in the *FSINFS* report was misleading and unhelpful. The report described the perceived problem as being that 'In libel, the defendant is guilty until proven innocent'.<sup>19</sup> A similar criticism levelled at English law from the United States complained that 'England's defamation statute has always required the defendant to prove his innocence.'<sup>20</sup> Even aside from the inappropriate importation of language from criminal law (defamation defendants, successful or otherwise, would not be found 'guilty' of anything) and the inaccurate reference to 'England's defamation statute' (English defamation law has never been codified in a single piece of legislation), when presented in this way the argument is nonsensical. Followed to its logical conclusion, it would mean that the existence of any affirmative defence to a defamation claim would be unacceptable.

Dario Milo recommends placing the burden of proof on claimants in cases involving public interest speech, on the grounds that the presumption of falsity has an unacceptable chilling effect on such speech.<sup>21</sup> Although Milo does not explicitly link his argument to corporate claimants, he does take the position that speech about companies will normally count as 'public speech'.<sup>22</sup> The concern is that, even where

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<sup>17</sup> eg Ministry of Justice, *Draft Defamation Bill: Consultation* (Cm 8020, 2011) 5.

<sup>18</sup> Index on Censorship and English PEN, *Free Speech is Not For Sale* (2009) 8, 15 ('*FSINFS*').

<sup>19</sup> *Ibid*, 2, 8.

<sup>20</sup> Samson (n 2) 777.

<sup>21</sup> Dario Milo, *Defamation and Freedom of Speech* (OUP 2010) 184.

<sup>22</sup> *Ibid*, 145.

defamatory allegations are true, the process of proving their truth at trial can be difficult, expensive, and time-consuming, with no guarantee of success for defendants, all of which factor into the law's chilling effect on speech.<sup>23</sup> In the US, companies that are classed as 'public figures' must prove the falsity of defamatory statements to succeed with their claims,<sup>24</sup> as must companies classed as 'private figures' in cases involving statements on matters of 'public concern'.<sup>25</sup> The Supreme Court decisions that established these standards were mainly aimed at limiting the law's chilling effect on speech protected by the first amendment.<sup>26</sup> The CMS Committee recommended that a similar approach should be adopted in English law, so that corporate defamation claimants would be required to prove the falsity of defendants' statements to succeed with their claims.<sup>27</sup>

The Ministry of Justice rejected this recommendation on the grounds that 'Proving a negative is always difficult, and it may be unduly onerous on a corporate claimant to require them to prove the falsehood of the allegations' complained of.<sup>28</sup> The more convincing argument is that, while the party best placed to prove truth or falsity will vary depending on the nature of the statement complained of,<sup>29</sup> claimants would not normally be significantly disadvantaged by bearing the burden of proving falsity.<sup>30</sup> As Marc Franklin and Daniel Bussel have observed in the US, given that the allegations at issue in a defamation case will by definition relate to the claimant's own conduct, the claimant 'should be in a better position than the defendant to test the truth of a statement made about himself'.<sup>31</sup> In contrast, defendants may be reliant on the disclosure of relevant evidence by claimants.<sup>32</sup> This can be exploited by claimants acting in bad faith, as illustrated by the experience of the defendants

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<sup>23</sup> CMS Committee Report (n 13) paras 130-32; Hilary Young, 'Rethinking Canadian Defamation Law as Applied to Corporate Claimants' (2013) 46(2) *University of British Columbia Law Review* 529, 557. See further Ch2.C.ii., text to notes 172-197.

<sup>24</sup> *Garrison v Louisiana* 379 US 64 (1964) 74.

<sup>25</sup> *Hepps* (n 10) 776-77.

<sup>26</sup> See David J Acheson and Ansgar Wohlschlegel, 'The Economics of Weaponized Defamation Lawsuits' (2018) 47 *Southwestern Law Review* 335, 337-38.

<sup>27</sup> CMS Committee Report (n 13) para 178.

<sup>28</sup> Ministry of Justice, *Consultation* (n 17) para 144.

<sup>29</sup> Mullis and Scott, 'Something Rotten' (n 14) 175.

<sup>30</sup> eg Mariette Jones, 'The Defamation Act 2013: A Free Speech Retrospective' (2019) 24(3) *Communications Law* 117, 120.

<sup>31</sup> Franklin and Bussel (n 12) 859.

<sup>32</sup> Geoffrey Robertson and Andrew Nicol, *Media Law* (5<sup>th</sup> edn, Penguin 2008) paras 3-048-49.

in the *McLibel* case,<sup>33</sup> who ‘found time and again that [McDonald’s] claimed to have very little documentation or none at all in certain areas.’<sup>34</sup> The European Court of Human Rights held that, because of the cost and difficulty of relying on the defence of truth, in the circumstances of that case the presumption of falsity created a disproportionate interference with the defendants’ Art 10 right to freedom of expression.<sup>35</sup> As Milo has argued, ‘The SLAPP strategy is clearly assisted by the presumption of falsity.’<sup>36</sup>

Although the CMS Committee recommended reversing the burden of proof in cases involving corporate claimants, it took the view that the presumption of falsity should be retained in other defamation cases.<sup>37</sup> Abolishing the presumption of falsity in *corporate* claims specifically would mean that, in cases involving both corporate and individuals claimants,<sup>38</sup> a defamatory statement might simultaneously be presumed false as it pertained to the individual claimant, and presumed true as it pertained to the corporate claimant. The extent to which this would cause practical problems is not clear. A similar conflict between presumptions of truth and falsity can already exist in cases where claimants sue in both defamation and malicious falsehood in respect of the same statement.<sup>39</sup> In *Cruddas v Calvert*, in which the claimant sued in both malicious falsehood and defamation, Tugendhat J acknowledged that ‘it would be theoretically possible’ for there to be a different outcome in each claim with respect to the veracity of the statements at issue.<sup>40</sup> However, that possibility was fairly remote, because ‘it is the experience of judges in practice that the burden of proof is very rarely decisive of the outcome of an action.’<sup>41</sup>

This reveals the more significant problem with the proposal to remove the presumption of falsity in corporate defamation law: it would have only a limited effect on the disposition of defamation claims in the courts. In most cases, both

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<sup>33</sup> Discussed at Ch2.C.iv., text to notes 266-274.

<sup>34</sup> John Vidal, *McLibel: Burger Culture on Trial* (Macmillan 1997) 79.

<sup>35</sup> *Steel and Morris v UK* [2005] ECHR 103, para 95.

<sup>36</sup> Milo (n 21) 171. SLAPPs are described at Ch2.C.iv., text to notes 259-265.

<sup>37</sup> CMS Committee Report (n 13) para 178.

<sup>38</sup> See further Ch5.B., text to notes 64-70 and 99-103.

<sup>39</sup> See *Culla Park Ltd v Richards* [2007] EWHC 1687 (QB) [13]. The overlap between defamation and malicious falsehood is discussed further in Ch5.B., at text to notes 71-98.

<sup>40</sup> *Cruddas v Calvert* [2013] EWHC 2298 (QB) [200].

<sup>41</sup> *Ibid*, [201].



parties will adduce evidence in support of their respective positions as to the veracity of the statements complained of, irrespective of the presumption of falsity.<sup>42</sup> Milo points out that ‘a rule requiring the claimant to establish falsity only really bites ... in cases where the evidence is in equipoise.’<sup>43</sup> In these cases, in which there is sufficient uncertainty as to whether the statement complained of is true that the presumption determines the outcome, Milo argues that the importance of freedom of speech justifies erring on the side of protecting defendants;<sup>44</sup> this argument is stronger in cases involving corporate claimants, in light of their more limited reputational interests relative to individual claimants.<sup>45</sup>

Although there is a legitimate argument to be made for removing the presumption of falsity in corporate defamation law, the case for reforming the law that applies to individual claimants in the same way is less clear because of the different interests typically at stake in their claims; and adopting different presumptions in cases brought by corporate and individual claimants might be problematic. As a result, and because of the limited practical impact that removing the presumption of falsity would be likely to have in most cases, this reform should not be seen as a priority.

## ***ii. Introducing a fault requirement***

Another important aspect of the US constitutional law relating to defamation is the Supreme Court’s rejection of the common law strict liability standard. Instead, ‘public figure’ claimants must prove ‘with convincing clarity’<sup>46</sup> that the statement complained of was published with ‘actual malice’; that is, ‘with knowledge that it was false or with reckless disregard of whether it was false or not.’<sup>47</sup> It would be possible to similarly restrict the actionability of corporate defamation in English law by removing the presumption of malice so that liability turns on the defendant’s fault.

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<sup>42</sup> *Metropolitan International Schools Ltd v Designtecnica Corp* [2010] EWHC 2411 (QB) [5].

<sup>43</sup> Milo (n 21) 167.

<sup>44</sup> *Ibid.* In *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL) Lord Nicholls advocated (at 205) a similar approach to cases in which there was uncertainty as to the correct application of the public interest defence.

<sup>45</sup> See generally Ch1.C., text to notes 195-255.

<sup>46</sup> *Sullivan* (n 8) 285-86.

<sup>47</sup> *Ibid.*, 280.

Given the public interest in most speech about corporations, and their more limited reputational interests compared to individual claimants, it would be reasonable to argue that introducing a fault requirement would ensure that the law better balances the conflicting interests in freedom of speech and corporate reputation. English law has already shifted substantially in this direction, not by requiring claimants to prove fault as in the US, but by expanding the fault-based defences available to defendants speaking on matters of public interest. The *Reynolds* and section 4 defences discussed in Chapter 2<sup>48</sup> can be seen as effectively introducing an element of fault into the tests for liability in English defamation law.<sup>49</sup>

But this requires the defendant to actually plead the defence, and places the burden of proving both that the statement was on a matter of public interest, and that its publication was reasonable in the circumstances, on the defendant. As Tugendhat J emphasized in *Flood v Times Newspapers Ltd*, ‘the risk in relation to the *Reynolds* public interest defence lay[s] on [the defendant], and not on the Claimant. It is for a defendant to make good his defence.’<sup>50</sup> The same is true of the s 4 defence. This limits the extent to which fault-based defences can be effective as a response to the law’s chilling effect on speech about companies because, ‘by the time the issue of defences arises, too light a burden has been placed on the plaintiff and too heavy a burden is placed on defendants.’<sup>51</sup> As Hilary Young rightly argues, ‘the onus placed on defendants chills speech.’<sup>52</sup>

This problem is demonstrated by the English courts’ experience with the *Reynolds* defence.<sup>53</sup> Shortly after the House of Lords’ decision, it was predicted that the defence ‘may be dysfunctional [in reducing the chilling effect] if it makes libel litigation more likely, more protracted, and outcomes less predictable.’<sup>54</sup> The prediction turned out to be prescient. Commentators argued that the defence was costly and difficult for media defendants to run, and that its likelihood of success

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<sup>48</sup> At Ch2.B.ii., text to notes 43-50.

<sup>49</sup> *Reynolds* (n 44); Defamation Act 2013, s 4. See Descheemaeker, ‘Protecting Reputation’ (n 4) 639.

<sup>50</sup> *Flood v Times Newspapers Ltd* [2009] EWHC 2375 (QB) [244].

<sup>51</sup> Young, ‘Rethinking Canadian Defamation Law’ (n 23) 577.

<sup>52</sup> *Ibid.*

<sup>53</sup> As noted in Ch2.B.ii., at text to notes 47-48.

<sup>54</sup> Kevin Williams, ‘Defaming Politicians: The Not So Common Law’ (2000) 63 *Modern Law Review* 748, 753.

was unpredictable.<sup>55</sup> Andrew Scott has reported that, at the time of the House of Lords' decision in *Jameel v Wall Street Journal Europe SPRL*, in which it was considered necessary to 'restate the principles' of *Reynolds* in order to encourage lower courts to apply it more flexibly,<sup>56</sup> the defence had succeeded at trial in only three cases, out of almost twenty in which it had been pleaded.<sup>57</sup>

The intense focus on the pre-publication conduct of the defendant necessitated by the 'responsible journalism' fault standard meant that the defence was 'often likely to be fact-sensitive.'<sup>58</sup> Given the chilling effect caused by litigation costs, it was argued that in some instances 'a newspaper which would have had a perfectly good defence would prefer to pay damages and settle than mount a *Reynolds* defence.'<sup>59</sup> As such, despite the defence appearing to be a substantial liberalization of the law, in practice it was not as successful as it might have been in addressing the chilling effect – which was identified in Chapter 2 as one of the central problems with corporate defamation law specifically.<sup>60</sup> As Milo explains:

'The relative uncertainty as to whether the responsible publication [defence] will apply or not, and the parsimonious comfort from the existing precedents, augments, or at least does not mitigate, the undesirable chilling effect that arises from the presumption of falsity.'<sup>61</sup>

Based on interviews with journalists at traditional media organizations, Russell Weaver and others argued in 2006 that '*Reynold's* impact on the English media's ability to report the public interest has been variable',<sup>62</sup> with common concerns including its 'vagueness and uncertainty',<sup>63</sup> the unduly demanding standards

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<sup>55</sup> Andrew Kenyon, *Defamation: Comparative Law and Practice* (UCL Press 2006) 226.

<sup>56</sup> *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44, [38].

<sup>57</sup> Andrew Scott, 'The Same River Twice? *Jameel v Wall Street Journal Europe SPRL*' (2007) 12(2) *Communications Law* 52, 54.

<sup>58</sup> *Seray-Wurie v Charity Commission* [2008] EWHC 870 (QB) [22] (Eady J).

<sup>59</sup> Siamala Krishnan, 'Lord Lester's Defamation Bill: Striking a Balance?' (2012) 23(2) *Entertainment Law Review* 25, 27, citing HL Deb 9 Jul 2010, vol 719, col 432.

<sup>60</sup> Ch2.C., text to notes 154-335.

<sup>61</sup> Milo (n 21) 176.

<sup>62</sup> Russell L Weaver and others, *The Right to Speak III: Defamation, Reputation and Free Speech* (Carolina Academic Press 2006) 226.

<sup>63</sup> *Ibid*, 227.

required of publishers to make use of the defence,<sup>64</sup> and the impact on the potential financial cost of both litigation<sup>65</sup> and the editorial process itself.<sup>66</sup>

Moreover, the defence was likely to be even less useful to non-media defendants.<sup>67</sup> Although in principle it was available to any defendant, in practice the criteria relevant to the issue whether the defendant acted ‘responsibly’ reflected the kind of expectations that would typically be placed on traditional investigative journalism.<sup>68</sup> The *Reynolds* defence was therefore even less effective in dealing with the law’s chilling effect on less well-resourced publishers: defendants such as ‘NGOs, satirical entertainment-style news publications, or individual online critics’ benefited less from the defence than institutional media defendants.<sup>69</sup> Andrew Kenyon’s assessment of the likelihood that the defendants in the *McLibel* case<sup>70</sup> would have benefitted from being able to use the *Reynolds* defence is telling in this regard:

‘In terms of subject matter, the speech in *McLibel* probably could come within the *Reynolds* form of qualified privilege. But, in terms of the activists’ research and inquiries, it would almost certainly fail to meet the 10 illustrative factors listed by Lord Nicholls.’<sup>71</sup>

In Chapter 2, I identified the increasing tendency for corporate defamation claims to be brought against individual defendants or small organizations, and argued that the impact of litigation on these defendants was a particularly pronounced problem with corporate defamation law.<sup>72</sup> Introducing a fault requirement into English defamation law, at least in the form of the *Reynolds* defence, seems not only to have been relatively ineffective in addressing the problems with the law generally, but to

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<sup>64</sup> *Ibid.*, 228-31.

<sup>65</sup> *Ibid.*, 231.

<sup>66</sup> *Ibid.*, 241.

<sup>67</sup> The defence may also have caused problems ‘even for smaller titles within the traditional mass media’, which can typically devote less resources to legal advice and compliance: Jacob Rowbottom, ‘In the Shadow of the Big Media: Freedom of Expression, Participation and the Production of Knowledge Online’ (2014) Public Law 491, 498.

<sup>68</sup> Andrew T Kenyon, ‘Rethinking *Reynolds*: Defending Public Interest Speech’ in Doreen Weisenhaus and Simon N M Young (eds), *Media Law and Policy in the Internet Age* (Hart 2017) 63, 66; Rowbottom, ‘In the Shadow of the Big Media’ (n 67) 498-99.

<sup>69</sup> Kenyon, ‘Rethinking *Reynolds*’ (n 68) 66.

<sup>70</sup> See Ch2.C.iv., text to notes 266-274.

<sup>71</sup> Andrew T Kenyon, ‘Defamation and Critique: Political Speech and *New York Times v Sullivan* in Australia and England’ (2001) 25 Melbourne University Law Review 522, 525 (citations omitted).

<sup>72</sup> Ch.2.C.iii., text to notes 211-249.

have been *particularly* ineffective in addressing those problems which are most pronounced in the context of corporate claims.

These issues with the cost and complexity of running the *Reynolds* defence and the impact on the chilling effect were discussed at length by the CMS Committee,<sup>73</sup> and were the main driver behind the attempt to simplify the defence when it was put into statutory form in s 4 of the 2013 Act. The simpler and more flexible ‘reasonable belief’ standard in s 4 means that the new defence is likely to be applied more leniently in cases involving non-media defendants, to take into account their more limited capacity to verify the accuracy of allegations before publication.<sup>74</sup> The Court of Appeal’s judgment in *Economou v de Frietas*,<sup>75</sup> in which the defendant was a contributor to media publications rather than a journalist, confirmed that, in determining whether a defendant reasonably believed that publishing the statement complained of was in the public interest, the ‘particular role of the defendant in question’ was a factor that should be considered.<sup>76</sup> Andrew Terry and Eileen Weinert argue that, as a result of this decision, the complaints made by reform campaigners that ‘along with driving up costs, the *Reynolds* criteria were not being applied widely enough beyond traditional investigative journalism’ have largely been addressed by the Act; according to Terry and Weinert, ‘That is no longer the case.’<sup>77</sup>

However, Sharp LJ stressed the ‘particular and hard facts’ of the *Economou* case.<sup>78</sup> An important element in the relaxed standard of responsibility applied to the defendant was the fact that he had been acting analogously to a journalist’s source, and therefore ‘may well [have been] entitled to rely on the journalist to carry out at least some of the necessary investigation and to incorporate such additional material as [was] required, in order to ensure appropriate protection for the reputation of others.’<sup>79</sup> Her argument that, as a result of the internet, ‘The implications of the

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<sup>73</sup> CMS Committee Report (n 13) paras 149-63.

<sup>74</sup> Alastair Mullis and Andrew Scott, ‘Tilting at Windmills: The Defamation Act 2013’ (2014) 77(1) *Modern Law Review* 87, 91.

<sup>75</sup> [2018] EWCA Civ 2591.

<sup>76</sup> *Ibid*, [110].

<sup>77</sup> Andrew Terry and Eileen Weinert, ‘In His Defence – Responsible Journalism for Non-Journalists’ (2019) 30(3) *Entertainment Law Review* 75, 78.

<sup>78</sup> *Economou* (n 75) [97].

<sup>79</sup> *Ibid*, [106], quoting from Warby J’s judgment for the High Court in *Economou v de Frietas* [2016] EWHC 1853 (QB) [246].

publication of false information are, if anything, more serious now than they were when *Reynolds* was decided’,<sup>80</sup> and her reference to the danger of ‘fake news’,<sup>81</sup> suggest that there will be a limit to the leniency the courts will be willing to offer citizen journalists, bloggers, social media contributors, and other internet publishers of the kind identified in Chapter 2 as being particularly vulnerable to the chilling effect of corporate threats to sue.<sup>82</sup>

The above discussion suggests that, instead of strengthening fault-based defences, it would be more beneficial to place the burden of proving some level of fault on corporate claimants. The defence in s 4 of the 2013 Act has the effect of imposing a fault standard (‘reasonableness’) in defamation claims involving statements on matters of public interest, albeit that it requires defendants to prove the *absence* of fault. If one accepts the argument that was put forward in Chapter 2 that most defamatory statements about corporations are in fact on matters of public interest,<sup>83</sup> then it follows that in most corporate defamation claims (subject to the s 4 defence being pleaded) the defendant’s fault will be relevant to liability. This makes the proposal to require corporate claimants to prove fault a relatively modest one; its effect would be to free defendants from the necessity of raising a s 4 defence, and to shift the burden of proof with respect to the issue of fault on to the claimant.

As described above, this is the case in US law, which requires ‘public figure’ claimants to prove that the defendant was at fault (specifically, that the statements complained of were published with ‘actual malice’).<sup>84</sup> However, similar problems have been identified in the US to those described above in relation to the fault-based defences in English law. One common criticism of the *Sullivan* actual malice rule is that it shifts the focus of defamation trials away from the veracity of the statements complained of, and on to defendants’ conduct in publishing them. Randall Bezanson notes that as a result of *Sullivan*, ‘As a practical matter, the truth or falsity of the challenged statement is no longer pertinent to the libel action.’<sup>85</sup>

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<sup>80</sup> *Ibid*, [109].

<sup>81</sup> *Ibid*.

<sup>82</sup> Ch2.C.iii., text to notes 211-249.

<sup>83</sup> Ch2.B., text to notes 51-153.

<sup>84</sup> See text to notes 7-13.

<sup>85</sup> Randall P Bezanson, ‘Libel Law and the Realities of Litigation: Setting the Record Straight’ (1985) 71(1) *Iowa Law Review* 226, 230.

This shift can be criticized on the grounds that the truth or falsity of disputed statements is probably what matters most in a defamation claim, both to the parties and to the public,<sup>86</sup> and the focus on fault means that there is often no need for the courts to rule on this issue.<sup>87</sup>

But the English strict liability standard has the additional benefit of meaning that, except in limited circumstances,<sup>88</sup> there is no need for the court to enquire as to the defendant's state of mind at the time of publication. Introducing these factors as relevant, or even central, to liability requires litigants, for example, to gather evidence about the decision to publish and to present arguments as to how that evidence should be interpreted in light of the relevant legal standard of fault. The actual malice standard 'is a cumbersome and expensive way of avoiding liability.'<sup>89</sup> It risks substantially increasing the cost of defending a defamation action, whether the defendant is successful or not.<sup>90</sup> David Hollander argues that the problem with the substantive rules set down in *Sullivan* and subsequent cases is that they 'were designed on the assumption that damage awards, rather than litigation costs, were the primary burden on defendants.'<sup>91</sup> That assumption does not reflect the reality.<sup>92</sup> While the Supreme Court's first amendment jurisprudence has significantly reduced the probability that publishers will be *successfully* sued for libel, it has been 'markedly less successful ... in reducing the chill that results from fear of having to defend a libel case' regardless of the claimant's likelihood of success.<sup>93</sup>

Ultimately, even the introduction of a *Sullivan*-style fault standard may not eliminate the chilling effect of corporate defamation law. Anthony Lewis cites the example of *Immuno AG v Moor-Jankowski*<sup>94</sup> to argue that, even with the *Sullivan*

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<sup>86</sup> Alastair Mullis and Andrew Scott, 'Reframing Libel: Taking (All) Rights Seriously and Where it Leads' (2012) 63(1) Northern Ireland Legal Quarterly 5, 22-23.

<sup>87</sup> Ibid; David A Barrett, 'Declaratory Judgments for Libel: A Better Alternative' (1986) 74(3) California Law Review 847, 855.

<sup>88</sup> For example, in rebutting defences of qualified privilege (*Horrocks v Lowe* [1975] AC 135 (HL)) or honest opinion (Defamation Act 2013, s 3(5)).

<sup>89</sup> David A Anderson, 'The Promises of *New York Times v. Sullivan*' (2015) 20(1) Roger Williams University Law Review 1, 5.

<sup>90</sup> David A Anderson, 'Libel and Press Self-Censorship' (1975) 53(3) Texas Law Review 422, 435-37.

<sup>91</sup> David A Hollander, 'The Economics of Libel Litigation' in Everette E Dennis and Eli M Noam (eds), *The Cost of Libel: Economic and Policy Implications* (Columbia University Press 1989) 271.

<sup>92</sup> See Ch2.C.ii., text to notes 166-191.

<sup>93</sup> Anderson, 'The Promises of *New York Times*' (n 89) 5.

<sup>94</sup> 77 NY 2d 235 (1991).

fault standard, ‘unless judges are alert to the need for summary judgment, a large and ruthless corporation can bring a meritless libel suit and extract money from the defendants by threatening to bankrupt those who resist.’<sup>95</sup> The case has some similarities to the *Singh* and *Wilmshurst* cases discussed in Chapter 2<sup>96</sup> – it was brought in respect of a letter to the editor of the *Journal of Medical Primatology*, and despite successfully defending the suit the defendant reported legal expenses in excess of \$1m.<sup>97</sup>

This case, and others like it, strongly suggest that, while it may make a beneficial difference in some cases, the introduction of a fault requirement would not be sufficient to resolve all of the problems with corporate defamation law. It may even, in some cases, make claimants’ attempts to abuse the cause of action to silence criticism *more* effective, by increasing the financial threat of litigation for defendants – especially those with more limited resources. Given that the cost of litigation, and its impact on access to justice, has been called the area in which ‘the English libel regime can be considered to have been – and to remain – most inadequate’,<sup>98</sup> any substantive reform that unnecessarily or disproportionately adds to costs should not be welcomed.<sup>99</sup>

The proposals to reform corporate defamation law by imposing a requirement on claimants to prove falsity or fault are both reasonable, and adopting either would be justifiable. But neither reform on its own would be sufficient, for the reasons given above. Adopting *both* reforms, together with the ‘serious financial loss test’ in s 1(2) of the Defamation Act 2013, would effectively mean that for corporate claimants the cause of action in defamation would replicate that in malicious falsehood, which would render it redundant.<sup>100</sup>

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<sup>95</sup> Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (Vintage Books 1992) 214 (the case is discussed at 211-14).

<sup>96</sup> Ch2.C.v., text to notes 281-294.

<sup>97</sup> Lewis (n 95) 214.

<sup>98</sup> Alastair Mullis and Andrew Scott, ‘The Swing of the Pendulum: Reputation, Expression and the Re-Centring of English Libel Law’ (2012) 63(1) Northern Ireland Legal Quarterly 27, fn 1.

<sup>99</sup> Potential reforms directly targeted at costs and procedure are discussed in Part C below, at text to notes 238-353.

<sup>100</sup> See further Ch5.B., text to notes 71-97.



## B. Restricting remedies

The second broad category of possible reform would seek to restrict the remedies available to corporate claimants that succeed in meeting the substantive tests for liability on which the previous reforms focused. The serious financial loss threshold discussed in the previous chapter is relevant to the question of liability, and so it has no necessary effect on the remedies to which successful corporate defamation claimants will be entitled to.<sup>101</sup>

However, it seems reasonable to suppose that, as they are ‘closely related issues’,<sup>102</sup> there will be some amount of overlap between the evidence relevant to whether the s 1(2) test has been satisfied and the evidence relevant to the assessment of damages,<sup>103</sup> and that decisions on quantum might be influenced by the court’s assessment of the evidence adduced in support of the claimant’s case on s 1(2). That could work in favour of either claimants or defendants. It is possible that the requirement to provide evidence of loss under s 1(2) will focus judges’ minds on the harmful effect of a defamatory statement on the claimant’s business, and in doing so increase the amount of damages awarded to compensate for that harm.<sup>104</sup> Equally, it may be that in some cases, corporate claimants that only cross the s 1(2) threshold by a small margin will reveal their inability to specify any large financial losses suffered as a result of the publications complained of, and in doing so will encourage judges to award relatively small sums by way of general damages.<sup>105</sup>

Regardless of whether s 1(2) has any indirect effect on damages awards in corporate defamation cases, clearly the provision does not preclude additional reforms targeted directly at the remedies available to corporate claimants. In Part B of this

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<sup>101</sup> *Lachaux v Independent Print Ltd* [2019] UKSC 27, [14]; *Theedom v Nourish Training Ltd* [2015] EWHC 3769 (QB) [31].

<sup>102</sup> *Undre v London Borough of Harrow* [2016] EWHC 931 (QB) [78].

<sup>103</sup> *Gubarev v Orbis Business Intelligence Ltd* [2019] EWHC 162 (QB) [66].

<sup>104</sup> Alexandros Antoniou, ‘When the Litigation Winner Becomes the Loser: Undeserving Claimants and Mitigation of Damages in Libel Claims’ (2018) 10(2) *Journal of Media Law* 128, 157 (in the context of the serious harm test under s 1(1)).

<sup>105</sup> *Seventy Thirty Ltd v Burki* [2018] EWHC 2151 (QB) may be an example of this kind of case: see Ch3.B.iii., text to notes 201-214. Similarly, the award of a substantially lower amount of general damages to the corporate claimant (£1,000) relative to the individual claimants (£20,000 each) in *Oyston v Ragazzino* [2015] EWHC 3232 (QB) appears to have been influenced by the weakness of its case on serious financial loss under s 1(2): Ch3.B.ii., text to notes 153-155.

chapter, I argue that there are good reasons to introduce such reforms. Sections i. and ii. argue that corporate claimants should not be entitled to general damages; and section iii. argues that there are also problems with the availability of special damages for proven financial loss in corporate defamation cases. Section iv. briefly discusses the possibility of using ‘discursive’ remedies, such as orders requiring defendants to retract or correct defamatory falsehoods, as an alternative to financial remedies; but argues that, ultimately, reforming the remedies available to corporate defamation claimants would not address the central problems with the current law.

### *i. General damages*

The primary remedy available to successful defamation claimants is an award of damages;<sup>106</sup> once liability has been established, claimants are ‘entitled to substantial damages’ without proving any specific loss.<sup>107</sup> General damages are intended to fulfil three main functions, stated most concisely by Eady J in *Cleese v Clark*:

‘The purpose of libel damages is threefold:

- (1) to compensate for distress and hurt feelings;
- (2) to compensate for any actual injury to reputation which has been proved or which may reasonably be inferred;
- (3) to serve as an outward and visible sign of vindication.’<sup>108</sup>

It is uncontroversial that the first of these three functions is not applicable in the case of corporate claimants: ‘Corporations, having no feelings, cannot recover damages for humiliation or distress or other injury to feelings.’<sup>109</sup> The sections below argue that neither of the other two purposes described by Eady J provides a convincing justification for awarding damages to corporate claimants, and therefore that companies should not be entitled to financial remedies in defamation without proof of specific losses.

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<sup>106</sup> *Gatley* (n 3) para 9.1.

<sup>107</sup> *English and Scottish Co-Operative Properties Mortgage and Investment Society Ltd v Odhams Press Ltd* [1940] 1 KB 440 (CA) 461; *Broome v Cassell & Co* [1972] AC 1027 (HL) 1071.

<sup>108</sup> *Cleese v Clark* [2003] EWHC 137 (QB) [37]. This formulation reflects the judgment of Sir Thomas Bingham MR in *John v MGN Ltd* [1997] QB 586 (CA) 607.

<sup>109</sup> *Downtex plc v Flatley* [2004] EWHC 333 (QB) [28] (Tugendhat J). See further Ch1.C., text to notes 199-203.

In respect of the second function of general damages identified by Eady J (that is, to compensate for ‘actual injury to reputation’), without evidence that a defamatory statement about a company has affected its financial performance, it is difficult to say with confidence that it has suffered any injury that an award of damages is capable of remedying. As Milo argues, ‘where the claimant’s business reputation is injured, such as is necessarily the case where a claim is brought by a trading corporation ... presumed ... damages are anomalous; they constitute a windfall for the claimant.’<sup>110</sup>

To some extent, English law already recognizes that ‘where a trading corporation has suffered no actual financial loss any damages awarded should be kept strictly within modest bounds.’<sup>111</sup> Unfortunately, the courts’ understanding of what constitutes a ‘modest’ amount of damages is entirely unrealistic, especially when awards are being made against individual defendants of ordinary means. When the Defamation Bill was being debated in the House of Commons, Sir Edward Garnier MP suggested that corporate defamation claimants ‘probably attract £20,000 [in general damages] at the top end and usually no more than £10,000, so we are not talking about hugely extravagant damages claims.’<sup>112</sup> This is, generally, true – although there are exceptions such as *Cooper v Turrell* and *Metropolitan International Schools Ltd v Designtecnica Corp*, in which the corporate claimants were awarded general damages of £30,000 and £50,000 respectively.<sup>113</sup> The average amount of general damages awarded to successful corporate defamation claimants between 2004 and 2013 (discounting cases in which no general damages were awarded) was slightly over £15,000.<sup>114</sup> However, once the awards made to human claimants and the awards made to corporate claimants in alternative causes of action are taken into account, along with the special damages award in *Culla Park Ltd v Richards*,<sup>115</sup> the average *liability* increases to over £40,000, plus costs.

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<sup>110</sup> Milo (n 21) 229, citing Robert C Post, ‘The Social Foundations of Defamation Law: Reputation and the Constitution’ (1986) 74(3) *California Law Review* 691, 697.

<sup>111</sup> *Jameel v WSJ* (n 56) [27] (Lord Bingham). See also *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 (CA) 148.

<sup>112</sup> HC Deb 24 April 2013, vol 561, col 917.

<sup>113</sup> *Cooper v Turrell* [2011] EWHC 3269 (QB) [101]; *Metropolitan International Schools* (n 42) [35].

<sup>114</sup> David J Acheson, ‘Empirical Insights into Corporate Defamation: An Analysis of Cases Decided 2004-2013’ (2016) 8(1) *Journal of Media Law* 32, 51-52.

<sup>115</sup> *Culla Park* (n 39).

These awards were almost all made against human defendants, not well-resourced media companies. These defendants are unlikely to find much comfort in Garnier's claim that general damages awards in corporate defamation cases are 'not ... hugely extravagant'.

Kenyon suggests that defamation remedies should take into account 'whether the defendant is corporate or individual and has large or small resources'.<sup>116</sup> It may be significant that the European Court of Human Rights ('ECtHR') jurisprudence on the Article 10-compliance of remedies or sanctions in defamation, as well as requiring that 'an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered' by the claimant,<sup>117</sup> also makes clear that the consequences of liability for the defendant must not be so severe,<sup>118</sup> or damages awards so unpredictable,<sup>119</sup> as to create a chilling effect on expression on matters of public interest. In *Steel v UK*, the Court held that the general damages awarded in the *McLibel* case disproportionately interfered with the defendants' Art 10 rights,<sup>120</sup> explaining that the awards of £36,000 against one defendant and £40,000 against the other, 'although relatively moderate by contemporary standards in defamation cases in England and Wales, were very substantial when compared to the modest incomes and resources of the two applicants.'<sup>121</sup>

In *Gur v Avrupa Newspapers Ltd*, Dyson LJ claimed that if the decision in *Steel* 'requires a change to a fundamental and long established principle of our law – that the means of a defendant are irrelevant to the assessment of damages for a tort – that change can only be made by the [Supreme Court]'.<sup>122</sup> However, in subsequent cases the ECtHR has declared defamation penalties to be in violation of Art 10 having explicitly compared them to the applicants' salaries and to the minimum wage.<sup>123</sup> It is now sufficiently clear that the Court regards a defendant's means as

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<sup>116</sup> Andrew Kenyon, 'Problems with Defamation Damages?' (1998) 24 Monash University Law Review 70, 91.

<sup>117</sup> *Tolstoy Miloslavsky v UK* App no 18139/91 (ECtHR, 13 July 1995) para 49.

<sup>118</sup> *Cumpănă and Mazăre v Romania* App no 33348/96 (ECtHR, 17 December 2004) paras 111-16.

<sup>119</sup> *Independent News and Media v Ireland* (2006) 42 EHRR 46, para 41.

<sup>120</sup> *Steel* (n 35) para 97.

<sup>121</sup> *Ibid*, para 96.

<sup>122</sup> [2008] EWCA Civ 594, [25].

<sup>123</sup> *Kasabova v Bulgaria* App no 22385/03 (ECtHR, 19 April 2011) para 71; *Bozhkov v Bulgaria* App no 3316/04 (ECtHR, 19 April 2011) para 55.

relevant to the question whether a defamation remedy is a proportional interference with their Art 10 rights that the Human Rights Act requires English courts to take this factor into account.<sup>124</sup> It is entirely possible that even a financial remedy which is proportional to the harm suffered by a corporate defamation claimant may violate Art 10 if awarded against a defendant of limited means.<sup>125</sup>

## *ii. Vindictory damages*

There are particularly strong arguments for eliminating the third kind of general damages referred to by Eady J:<sup>126</sup> so-called ‘vindictory damages’, which successful corporate claimants are entitled to on the same basis as individual claimants.<sup>127</sup> David Rolph has pointed out the ‘lack of clarity’ regarding the vindictory function of damages in defamation.<sup>128</sup> He notes that ‘the award of damages, particularly the size of the award, is commonly cited as the most important factor in securing the vindication of the plaintiff’s reputation.’<sup>129</sup> Not just the finding of liability and the award of damages, but the *amount* of damages awarded, is seen ‘to serve as an outward and visible sign of vindication.’<sup>130</sup> This idea of vindictory damages stems from *Broome v Cassell & Co Ltd*, in which Lord Hailsham explained the rationale for this kind of award as follows:

‘... in case the libel, driven underground, emerges from its lurking place at some future date, [the claimant] must be able to point to a sum awarded by

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<sup>124</sup> Of course, this would require English courts to recognize when an otherwise ‘standard’ award of damages might disproportionately affect a particular defendant. In *Robins v Kordowski*, Tugendhat J stated that, because the claimant was entitled to a maximum of £10,000 damages under the summary judgment procedure, ‘the application of the principle in the Steel case to the present facts is limited’ ([2011] EWHC 1912 (QB) [85]).

<sup>125</sup> Rónán Ó Fathaigh, ‘Article 10 and the Chilling Effect Principle’ (2013) 3 *European Human Rights Law Review* 304, 307. I explored this argument in slightly more depth in David J Acheson, ‘The Digital Defamation Damages Dilemma’ (Society of Legal Scholars Annual Conference 2019) at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3481760](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3481760)>.

<sup>126</sup> See text to note 108.

<sup>127</sup> *Applause Store Productions Ltd v Raphael* [2008] EWHC 1781 (QB) [76]. It has even been asserted, in a case involving both an individual and a firm as claimants, that ‘the *main* purpose of damages in libel is to mark the seriousness of the libel and to demonstrate publicly that the claimants’ reputation has been vindicated’: *Robins v Kordowski* [2011] EWHC 1912 (QB) [82] (Tugendhat J) (emphasis added).

<sup>128</sup> David Rolph, ‘Vindicating Reputation and Privacy’ in Andrew T Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press 2016) 296.

<sup>129</sup> *Ibid.*, 296-97.

<sup>130</sup> *Cleese v Clark* (n 108) [37] (Eady J).

a jury sufficient to convince a bystander of the baselessness of the charge [ie the defendant's defamatory statement].<sup>131</sup>

In *Dingle v Associated Newspapers Ltd*, Lord Radcliffe emphasized this purported link between the amount of damages awarded and the future effects of the defamation on the claimant's reputation: '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.'<sup>132</sup>

This functional view of vindictory damages as having a beneficial effect on the attitudes of people toward the claimant in the future is 'unique to defamation',<sup>133</sup> and contrasts with the more widely applicable notion of vindictory damages, which sees them as 'attesting to, affirming and reinforcing the fundamental nature of the interest [infringed by the defendant] and its inherent value.'<sup>134</sup> This conception of vindictory damages, which is based on claimants' dignitary interests,<sup>135</sup> makes little sense in the context of corporate defamation law. Vindictory damages must be awarded to corporate defamation claimants for the more functional purpose of helping to mitigate future losses.<sup>136</sup>

But there are problems with awarding a company damages for this purpose. Firstly, to the extent that the defamatory publication complained of is liable to cause future financial losses to the claimant, the appropriate remedy ought to be compensatory damages. There is a risk of double counting if the long-term effects of a defamatory statement are addressed by awarding both compensatory damages to make good future losses and vindictory damages to prevent such losses by demonstrating that the defamatory allegation was unfounded.

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<sup>131</sup> *Broome* (n 107) 1071.

<sup>132</sup> *Dingle v Associated Newspapers Ltd* [1964] AC 371 (HL) 396.

<sup>133</sup> Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* (July 1991) ch XXIII, para 9.

<sup>134</sup> Jason N E Varuhas, 'The Concept of 'Vindication' in the Law of Torts: Rights, Interests and Damages' (2014) 34(2) *Oxford Journal of Legal Studies* 253, 255.

<sup>135</sup> Kit Barker, 'Private and Public: The Mixed Concept of Vindication in Torts and Private Law' in Stephen G A Pitel, Jason W Neyers and Erika Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart 2013) 77-78.

<sup>136</sup> For example, in *Downtex* (n 109) [35]-[39], Tugendhat J rightly disregarded the vindictory purpose of damages in a case in which, in between the publications and the verdict, the corporate claimant had restructured and no longer traded under the same name.

Secondly, it is not clear whether an award of vindictory damages, and particularly the size of such an award, actually has the desired effect of improving the claimant's reputation in the future. As Rolph notes, 'There is understandably widespread scepticism about whether an award of damages for defamation can ensure the vindication of a plaintiff's reputation.'<sup>137</sup> Arguably, a successful claim will be sufficient on its own to achieve vindication for some claimants,<sup>138</sup> particularly where a truth defence has been rejected, but courts have disagreed on this point. On one view, 'It seems ... inescapable that the existence of a prior reasoned judgment ... is at least capable of providing some vindication of a Claimant's reputation.'<sup>139</sup> But in *Cairns v Modi*,<sup>140</sup> Lord Judge LCJ explained that, although 'There will be occasions when the judgment will provide sufficient vindication, ... whether it does so is always a fact-specific question.'<sup>141</sup> The fact that the court has rejected an attempted truth defence is sometimes seen as a reason to *increase* the amount of vindictory damages awarded, to counteract the defendant's continued insistence that the allegations complained of were true.<sup>142</sup> The court's reasons for finding the defendant liable may not make much difference either way, if one accepts Eady J's assertion that 'What most interested observers will want to know is, quite simply, "how much did [the claimant] get?"'<sup>143</sup>

But the sum awarded for vindication is not assessed with any great precision, and typically is not even identified separately from the overall damages award.<sup>144</sup> Hilary Young points out that there is 'no evidence of what amount will send a signal sufficient to restore reputation',<sup>145</sup> instead, courts 'essentially award an arbitrary amount.'<sup>146</sup> Young's criticism is borne out by the sums awarded to corporate claimants in recent years. In *Metropolitan International Schools Ltd v*

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<sup>137</sup> Rolph, 'Vindicating Reputation and Privacy' (n 128) 307. See also Kenyon, 'Problems with Defamation Damages?' (n 116) 73.

<sup>138</sup> *Applause Store* (n 127) [76]. This did not prevent the judge awarding £5,000 to the corporate claimant in that case: Ch5.B., text to notes 100-103.

<sup>139</sup> *Purnell v Business F1 Magazine Ltd* [2007] EWCA Civ 744, [27] (Laws LJ).

<sup>140</sup> [2012] EWCA Civ 1382.

<sup>141</sup> *Ibid*, [32].

<sup>142</sup> eg *Turley v Unite the Union* [2019] EWHC 3547 (QB) [182].

<sup>143</sup> *Cruddas v Adams* [2013] EWHC 145 (QB) [43].

<sup>144</sup> Gary K Y Chan, 'Corporate Defamation: Reputation, Rights and Remedies' (2013) 33(2) *Legal Studies* 264, 274.

<sup>145</sup> Hilary Young, 'Adding Insult to Injury in Assessing Damages for Corporate Defamation' (2013) 21 *Tort Law Review* 127, 144.

<sup>146</sup> *Ibid*.

*Designtecnica Corp*, having provided reasons for holding that the statements in question were false, Tugendhat J nevertheless declared that ‘the sum necessary to demonstrate the falsity of the allegations complained of in this case is £50,000.’<sup>147</sup> In *Creative Resins International Ltd v Glasslam Europe Ltd*, Eady J claimed that an award of £15,000 ‘ought to leave no doubt in the minds of anyone who has read the article in question that the allegations are demonstrably false’,<sup>148</sup> although the claimant had not provided any evidence of actual damage.<sup>149</sup> In *Jon Richard Ltd v Gornall*,<sup>150</sup> the statement complained of was only published to a small number of senior managers at the department store through which the claimant company did the majority of its business.<sup>151</sup> Smith J awarded a declaration of falsity,<sup>152</sup> which he made ‘without any doubt or qualification’,<sup>153</sup> but he ruled that the declaration of falsity and the judgment against the defendant were not sufficient to vindicate the claimant’s reputation.<sup>154</sup> Had damages not been capped at £10,000 under the summary judgment procedure,<sup>155</sup> according to Smith J the appropriate award of damages would have been £75,000.<sup>156</sup> He explained that ‘the Court can never know whose minds have been poisoned’,<sup>157</sup> even though the department store to which the statements were published had conducted an investigation and confirmed in writing to the claimant that it was satisfied the defendant’s allegations were untrue.<sup>158</sup>

My intention here is not to argue that any of these awards was more or less appropriate than the others. Empirical research would be necessary to discover whether the size of damages awards has any effect on future audiences’ perceptions of claimants. My point is that, in the absence of any evidence as to whether or not vindicatory damages have their intended effect, they should not be awarded to

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<sup>147</sup> *Metropolitan International Schools* (n 42) [35].

<sup>148</sup> *Creative Resins International Ltd v Glasslam Europe Ltd* [2006] EWHC 3159 (QB) [26].

<sup>149</sup> *Ibid*, [24].

<sup>150</sup> [2013] EWHC 1357 (QB).

<sup>151</sup> *Ibid*, [37].

<sup>152</sup> *Ibid*, [29]. Declarations of falsity and other discursive remedies are discussed in Ch4.B.iv. below.

<sup>153</sup> *Ibid*, [24].

<sup>154</sup> *Ibid*, [44].

<sup>155</sup> Defamation Act 1996, s 9(1)(c).

<sup>156</sup> *Jon Richard* (n 150) [32]-[45]. The claimant company does, however, seem to have incurred some costs in mitigating the effects of the statements complained of; but those costs were not particularized.

<sup>157</sup> *Ibid*, [43].

<sup>158</sup> *Ibid*, [5].



corporate defamation claimants. Given the chilling effect that large damages awards can have on speech,<sup>159</sup> it is obviously problematic that vindictory damages are routinely awarded, often in the tens of thousands of pounds, without any real sense of whether they actually work as intended. While there may be other reasons to continue to award this kind of damages to individual claimants, they relate to the dignitary and emotional harms that can be caused by defamatory statements, and are therefore inapplicable to claims brought by companies. The interference with defendants' Art 10 rights that is caused by awarding these damages to corporate claimants cannot be justified solely on the basis of speculative assertions about their vindictory effect.

In summary, there is no good reason to award general damages to a corporate defamation claimant that is unable to provide proof of specific losses, especially where – as is increasingly the norm – the defendant is not a well-resourced media company. If the corporate right to sue is retained, a finding of liability should not automatically entitle a claimant company to a financial remedy.

### *iii. Special damages*

In addition to the issues with corporate defamation claimants' entitlement to general damages described above, the availability of *special* damages can give rise to serious problems, in particular the risk that defendants can be intimidated by claimant companies making speculative claims for very large sums of money. Unlike damages for individual claimants' non-pecuniary injuries, which are restrained to some extent by comparison to previous defamation awards and standard awards for 'pain and suffering' in personal injury cases,<sup>160</sup> the extent of the financial loss that might be recoverable by a corporate claimant is limited only by the size of its business.<sup>161</sup>

Based on their research on intimidatory litigation in the United States,<sup>162</sup> George Pring and Penelope Canan observe that 'Large claims of monetary injury, out of

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<sup>159</sup> See Ch2.C., text to notes 166-191.

<sup>160</sup> *John v MGN* (n 108) 612-14.

<sup>161</sup> Thomas B Kelley and Steven D Zansberg, 'Why Courts Should Require Plaintiffs Claiming Losses to Prove that Falsity Caused Them' (1997) 15 Communications Lawyer 8, 8.

<sup>162</sup> Discussed at Ch2.C.iv., text to notes 259-265.

proportion to any real harms done, are a hallmark of SLAPPs.<sup>163</sup> Such claims significantly increase the financial threat of unsuccessfully defending a lawsuit, as well as adding to the potential cost and complexity of litigation. A clear example of the problems that might be caused by large special damages claims in corporate defamation cases can be seen in *Collins Stewart Ltd v The Financial Times Ltd*, in which the claimant sought special damages of over £230,000,000.<sup>164</sup> Even for a publisher with the resources of the *FT*, a damages claim of this magnitude must raise the spectre of bankruptcy. It is not unheard of for a publisher or individual defendant to be bankrupted by the cost of unsuccessfully defending a defamation lawsuit. In 2000, the magazine *LM* was forced to close after being sued for libel by the television production company ITN and two of its reporters.<sup>165</sup> In the United States, the media company Gawker filed for bankruptcy<sup>166</sup> after a jury awarded \$140m damages in a privacy lawsuit brought against it by Terry Bollea (better known as Hulk Hogan).<sup>167</sup> Most recently, Katie Hopkins was forced to apply for insolvency<sup>168</sup> after successfully being sued for libel.<sup>169</sup> None of these defendants is at all sympathetic,<sup>170</sup> but the point stands.

The main reason that Collins Stewart's special damages claim was so large appears to have been that the company was huge to begin with. Naturally, the potential losses that might be caused by an injury to reputation will be larger in real terms for companies that have larger turnovers. But it is also likely that there is a greater public interest in the freedom to criticize larger companies without facing the threat

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<sup>163</sup> George W Pring and Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* (Temple University Press 1996) 151.

<sup>164</sup> *Collins Stewart Ltd v The Financial Times Ltd* [2004] EWHC 2337 (QB) [16].

<sup>165</sup> Matt Wells, 'LM Closes after Losing Libel Action' (*The Guardian*, 31 March 2000) <<https://www.theguardian.com/uk/2000/mar/31/medialaw.media>>.

<sup>166</sup> Paul Farhi, 'Gawker Files for Chapter 11 Bankruptcy Protection' (*Washington Post*, 10 June 2016).

<sup>167</sup> *Bollea v Gawker Media LLC* (Fla Cir Ct, 8 June 2016). Bollea's lawsuit was secretly funded by billionaire Peter Thiel: Lili Levi, 'The Weaponized Lawsuit Against the Media: Litigation Funding as a New Threat to Journalism' (2017) 66 *American University Law Review* 761, 769-79.

<sup>168</sup> Jim Waterson, 'Katie Hopkins Applies for Insolvency Agreement to Avoid Bankruptcy' (*The Guardian*, 16 September 2018) <<https://www.theguardian.com/media/2018/sep/16/katie-hopkins-applies-for-insolvency-to-avoid-bankruptcy-after-jack-monroe-twitter-costly-libel-case>>.

<sup>169</sup> *Monroe v Hopkins* [2017] EWHC 433 (QB).

<sup>170</sup> See eg David Campbell, 'Atrocity, Memory, Photography: Imaging the Concentration Camps of Bosnia – the Case of ITN versus Living Marxism, Part 1' (2002) 1(1) *Journal of Human Rights* 1 (on *LM* magazine); Mary-Rose Papandrea, 'Media Litigation in a Post-Gawker World' (2019) 93(5) *Tulane Law Review* 1105, 1107-10 (on Gawker); and almost any public statement ever made by Katie Hopkins.

of a costly defamation suit.<sup>171</sup> In the decade-worth of corporate defamation cases mentioned above,<sup>172</sup> *Collins Stewart* was one of four in which special damages in the millions of pounds were pleaded.<sup>173</sup> The 2013 Act did nothing to prevent the potential for criticism of companies to be chilled in this way, so it is reasonable to think that similar claims will continue to be made from time to time. For example, the two corporate claimants in *Gubarev v Orbis Business Intelligence Ltd*, at the time of writing still awaiting a trial,<sup>174</sup> pleaded a total of approximately €2,000,000 in special and general damages.<sup>175</sup> The first claimant in *Optical Express Ltd v Associated Newspapers Ltd* set out a claim alleging £21,000,000 of financial loss;<sup>176</sup> the combined costs of reaching a settlement<sup>177</sup> were approximately £1,000,000.<sup>178</sup> The claimant company in *Liberty Fashion Wears Ltd v Primark Stores Ltd* initially advanced ‘what on the face of it was a greatly inflated and implausible special damage claim’<sup>179</sup> for ‘just under £13 million’ in its letter before action,<sup>180</sup> although the claim was struck out as an abuse of process, the defendant had by that stage incurred over £100,000 in costs.<sup>181</sup>

A recent decision of the Supreme Court of Appeal of South Africa, in *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd*,<sup>182</sup> might raise some interesting ideas in this context. The claimant company sought both general damages, and special damages ‘in the form of lost profits’, in an action for defamation.<sup>183</sup> The defendant argued

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<sup>171</sup> See Ch2.B.ii., text to notes 53-60.

<sup>172</sup> Acheson, ‘Empirical Insights’ (n 114).

<sup>173</sup> The three others were *Atlantis World Group of Companies NV v Groupo Editoriale L’Espresso SpA* [2008] EWHC 1323 (QB); *Ontulmus v Collett* [2014] EWHC 4117 (QB); and *Tiscali UK Ltd v British Telecommunications plc* [2008] EWHC 2927 (QB).

<sup>174</sup> Rowan Scarborough, ‘Steele’s First Defamation Trial Slated in London Court this Fall’ (*Washington Times*, 24 February 2019) <<https://www.washingtontimes.com/news/2019/feb/24/christopher-steele-libel-trial-to-begin-in-fall/>>.

<sup>175</sup> *Gubarev* (n 103) [36]. See also *Alexander-Theodotou v Kounis* [2018] EWHC 956 (QB): the claimants, two of which were law firms, set out a ‘not especially clear or coherent’ special damages claim ([71]) amounting to £917,000 ([31]), at least some of which was said to have resulted from the defendant’s publication of allegedly defamatory statements ([87]).

<sup>176</sup> *Optical Express Ltd v Associated Newspapers Ltd* [2017] EWHC 2707 (QB) [6]. The claim was subsequently revised down to £17m.

<sup>177</sup> The claim was settled for £125,000: *ibid*, [6].

<sup>178</sup> *Ibid*, [9].

<sup>179</sup> *Liberty Fashion Wears Ltd v Primark Stores Ltd* [2015] EWHC 415 (QB) [55] (HHJ Richard Parkes QC).

<sup>180</sup> *Ibid*, [26].

<sup>181</sup> *Ibid*, [54].

<sup>182</sup> [2011] ZASCA 117.

<sup>183</sup> *Ibid*, [3].

that a claim for special damages could not be made in defamation; the claimant's economic loss could only be recovered in an action that required proof of the defendant's fault. Brand JA agreed that the policy reasons for holding a defamation defendant strictly liable for harm to the claimant's reputation might not be adequate justification for also holding her strictly liable for the claimant's economic loss.<sup>184</sup> He observed that the availability of special damages in defamation gave rise to the potential for 'excessive claims for loss of profits by major corporations which intimidate newspapers by their sheer magnitude.'<sup>185</sup>

The direct relevance of this South African case to English defamation law is limited by the significant differences between the two legal systems, but it nonetheless raises intriguing possibilities for reform in this jurisdiction. The case led to speculation that it was 'almost inevitable that liability for special damages for defamation will, at some point, be queried in the English courts'.<sup>186</sup> It would be worth carefully considering whether malice should be required for a company to obtain special damages in a defamation claim.

The general principle in English tort law that, once liability is established, a claimant is entitled to recover all losses flowing from the defendant's unlawful act<sup>187</sup> has been described as 'profoundly unsatisfactory'.<sup>188</sup> Whether or not this is justifiable as a general assessment, the principle is particularly problematic when applied to corporate defamation, because the law's peculiarly claimant-friendly elements mean that a critic of a large company might be liable for huge losses even though that company does not need to prove that their criticisms are untrue, and even if those criticisms are made in the honest belief that they are true.<sup>189</sup> In this context, the preferable policy would be to preclude companies from being automatically entitled to recover financial losses suffered as a result of defamatory publications – especially since those companies that *can* prove falsity and malice

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<sup>184</sup> Ibid, [11].

<sup>185</sup> Ibid, [14].

<sup>186</sup> John Campbell, 'An Anomaly: Special Damages for Libel' (2011) 3(2) *Journal of Media Law* 193, 197.

<sup>187</sup> eg *Horton v Colwyn Bay Urban Council* [1908] 1 KB 327 (CA) 341. See Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart 2005) 62-64.

<sup>188</sup> Eric Descheemaeker, 'Three Keys to Defamation: *Media 24* in a Comparative Perspective' (2013) 130 *South African Law Journal* 435, 440.

<sup>189</sup> As a result of the presumptions of falsity and fault: see text to notes 1-6.

would be able to obtain compensation for the same losses through a claim in malicious falsehood.<sup>190</sup> However, it may be unrealistic to expect this proposal to gain much traction, given that it would entail creating an exception to such a fundamental principle of English tort law. If the corporate right to sue in defamation is retained, therefore, critics of large companies will continue to face the chilling effect of huge potential damages claims.

#### *iv. Discursive remedies*

Another proposal for reforming defamation remedies, which proponents normally recommend adopting alongside restrictions on financial compensation like those discussed above, is to expand the availability of non-financial ‘discursive’ remedies such as court-ordered corrections, retractions, or apologies. The basic argument in favour of expanding discursive remedies as an alternative to general damages is that it would remove the ‘windfall’ problem described above,<sup>191</sup> and reduce the chilling effect of large damages awards, while still allowing for the vindication of corporate reputation in appropriate cases. Reforms along these lines have periodically been proposed by commentators in the US for several decades,<sup>192</sup> but were also advocated by a number of contributors to the 2013 debates in England, some of whom argued that the reform would be particularly welcome in claims brought by corporations.<sup>193</sup> For example, Mullis and Scott argued that companies should be limited to discursive remedies unless they were able to prove special damage.<sup>194</sup>

At present, English courts can only award remedies of this kind in very limited circumstances. A ‘declaration of falsity’ remedy is available under s 9 of the Defamation Act 1996, but only to claimants who have been granted summary

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<sup>190</sup> J A Weir, ‘Local Authority v Critical Ratepayer – A Suit in Defamation’ (1972) 30 Cambridge Law Journal 238, 239.

<sup>191</sup> Milo (n 21) 229; text to note 110 above.

<sup>192</sup> eg George E Frasier, ‘An Alternative to the General-Damage Award for Defamation’ (1968) 20(3) Stanford Law Review 504; James H Hulme, ‘Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation’ (1981) 30(2) American University Law Review 375; Marc A Franklin, ‘A Declaratory Judgment Alternative to Current Libel Law’ (1986) 74(3) California Law Review 809; Geoffrey C Cook, ‘Reconciling the First Amendment with the Individual’s Reputation: The Declaratory Judgment as an Option for Libel Suits’ (1989) 93(2) Dickinson Law Review 935.

<sup>193</sup> eg Chan (n 144) 274-75.

<sup>194</sup> Mullis and Scott, ‘Taking (All) Rights Seriously’ (n 86) 21. See also Alastair Mullis and Andrew Scott, ‘Lord Lester’s Defamation Bill 2010 – A Distorted View of the Public Interest?’ (2011) 16(1) Communications Law 6, 15.

judgment under s 8 of that Act, on the basis that there is no defence to the claim with a realistic prospect of success. In a recent case,<sup>195</sup> Warby J claimed that the remedy had only actually been awarded once;<sup>196</sup> in circumstances in which the claimants, faced with US-based defendants who refused to acknowledge the proceedings,<sup>197</sup> had provided sufficient evidence to the court to prove the falsity of the defamatory allegations against them.<sup>198</sup> Declarations of falsity were also made in *Jon Richard Ltd v Gornall*<sup>199</sup> and *Robins v Kordowski*,<sup>200</sup> but Warby J's broader observation about the infrequent use of these remedies is still valid. The 1996 Act also allows courts granting summary judgment in favour of claimants to make an order requiring the defendant to publish 'a suitable correction and apology'.<sup>201</sup> As with the declaration of falsity remedy, the limited circumstances in which this provision is relevant means that the power has been used only infrequently.<sup>202</sup>

A variety of different discursive remedies could potentially be introduced alongside, or as an alternative to, the traditional financial remedy for successful corporate defamation claimants. The court itself could be given the power to make a declaration asserting the falsity of the statement complained of or that the defendant acted wrongfully in publishing it; or the court could order that a correction, retraction, or apology be published by the defendant. Of course, any remedy involving a declaration that the statement complained of was false, whether by the court or the defendant, could only be appropriate if its availability were restricted to cases in which claimants had proved falsity.<sup>203</sup>

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<sup>195</sup> *Pirtek (UK) Ltd v Jackson* [2017] EWHC 2834 (QB) [77].

<sup>196</sup> In *Bin Mahfouz v Ehrenfeld* [2005] EWHC 1156 (QB) [75].

<sup>197</sup> *Ibid*, [20].

<sup>198</sup> *Ibid*, [29].

<sup>199</sup> *Jon Richard* (n 150) [22]-[29].

<sup>200</sup> *Robins* (n 127) [88]-[90]. In 'Libel, Damages and Declarations of Falsity' (*Inform*, 2 November 2010) <<https://inform.org/2010/11/02/libel-damages-and-declarations-of-falsity/>> there is a suggestion that a declaration of falsity may also have been made in another case, but the precise circumstances referred to are not entirely clear.

<sup>201</sup> Defamation Act 1996, s 9.

<sup>202</sup> An example of its use in relation to a corporate entity's defamation claim is *Ernst & Young LLP v Coomber* [2010] EWHC 2837 (QB) [45].

<sup>203</sup> *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75, [67]. See also *Quinton v Pierce* [2009] EWHC 912 (QB) [88] (Eady J): holding that it would not be 'necessary or proportionate so to interpret [the Data Protection Act 1998] as to give a power to the court to order someone to publish a correction or apology when the person concerned does not believe he has published anything untrue. Such a scheme could surely only work in respect of factual statements which could be demonstrated uncontroversially and objectively to be false.'

A power for the court to order the defendant to publish an apology for publishing a defamatory statement would not be a suitable option in cases involving corporate claimants. This is partly because any compelled apology would arguably be meaningless,<sup>204</sup> and partly because, as Hilary Young puts it, ‘the very concept of apologising to a corporation is so different from the typical sense of apologising that ... it is somewhat misleading to speak of “apologising” to a corporation at all.’<sup>205</sup> It seems implausible to see corporations as capable of benefiting from an apology, compelled or otherwise, since they ‘cannot feel vindicated or relieved or feel forgiveness.’<sup>206</sup>

Other kinds of discursive remedy, such as those requiring defendants to correct or retract defamatory statements, have the benefit of being directly aimed at redressing the falsity of the allegations, the aspect of defamation cases in which legitimate claimants – and the public – have the greatest interest.<sup>207</sup> Gary Chan, for example, points out that ‘a judicial declaration of the falsity of the allegations *directly* vindicates reputation as compared to the more tenuous link between monetary damages and the vindication of reputation.’<sup>208</sup> However, in common with the lack of understanding of the impact of vindicatory damages on audiences,<sup>209</sup> there are open questions regarding the effectiveness of discursive remedies in reversing reputational harm. It is possible that they might in some cases actually aggravate the harm by repeating the initial allegation.<sup>210</sup> As Cass Sunstein has observed, ‘corrections of false impressions can be futile; they can also actually strengthen those very impressions.’<sup>211</sup> Given the centrality of reputational injuries to the purpose of defamation law, it might be surprising that little effort has been put into investigating whether the law actually works; that is, whether claimants are ‘able to correct the false perceptions created by the defamatory statements about which they

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<sup>204</sup> Andrew Scott, ‘“*Ceci n’est pas une pipe*”: The Autopoietic Inanity of the Single Meaning Rule’ in Andrew T Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press 2016) 53.

<sup>205</sup> Hilary Young, ‘Adding Insult to Injury’ (n 145) 133.

<sup>206</sup> *Ibid.*

<sup>207</sup> Mullis and Scott, ‘Taking (All) Rights Seriously’ (n 86) 19-20.

<sup>208</sup> Chan (n 144) 275 (emphasis added).

<sup>209</sup> See text to notes 137-146.

<sup>210</sup> Laura A Heymann, ‘The Law of Reputation and the Interest of the Audience’ (2011) 52 *Boston College Law Review* 1341, 1437.

<sup>211</sup> Cass Sunstein, *On Rumours* (Allen Lane 2009) 46.

sued.’<sup>212</sup> David Ardia is right to argue that this ‘points to a significant blind spot in the scholarship and commentary concerning the law of defamation.’<sup>213</sup>

Where a remedy involves a declaration made by the court itself, ‘We simply cannot assume that a court’s decision will reach the same audience that saw the defamatory falsehood in the first place or that it will have the hoped-for effect on what people believe’ about the claimant.<sup>214</sup> In fact, a recognition that in many cases a court ruling will not have the same degree of influence on the claimant’s reputation as the original publication has been used as a justification for the availability of vindictory damages,<sup>215</sup> despite the comparable lack of evidence regarding the efficacy of that alternative.<sup>216</sup> There are also obstacles to ensuring the effectiveness of remedies in which the defendant is ordered to publish a correction or retraction of the defamatory statement, for example there may be difficulties with determining a reasonable form for the corrective statement, or an appropriate place, manner, or time for the defendant to publish it.<sup>217</sup> The task of identifying an appropriate discursive remedy in a given case is further complicated by variation in the likely effect of these remedies in cases involving media and non-media defendants.<sup>218</sup> Where awarded against media defendants, Mullis and Scott raise the additional issue that ‘satisfactory performance of this remedy would require to be overseen by some regulatory mechanism.’<sup>219</sup>

The Defamation Act 2013 introduced a new discursive remedy: s 12 gives the court the power to order a losing defendant to publish a summary of its judgment.<sup>220</sup> In *Monir v Wood*, Nicklin J identified problems with ensuring the effectiveness of that remedy, similar to those described above.<sup>221</sup> The Art 10 interference involved in

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<sup>212</sup> David S Ardia, ‘Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law’ (2010) 45 Harvard Civil Rights-Civil Liberties Law Review 261, 312.

<sup>213</sup> Ibid.

<sup>214</sup> Ibid, 314.

<sup>215</sup> *ReachLocal UK Ltd v Bennett* [2014] EWHC 3405 (QB) [55]-[57]; *Rosenblatt v Baer* 383 US 75 (1966) 93 (Justice Stewart).

<sup>216</sup> See text to notes 137-146.

<sup>217</sup> Mullis and Scott, ‘Taking (All) Rights Seriously’ (n 86) 20.

<sup>218</sup> Andrew T Kenyon, ‘Protecting Speech in Defamation Law: Beyond *Reynolds*-Style Defences’ (2014) 6(1) Journal of Media Law 21, 39-40.

<sup>219</sup> Mullis and Scott, ‘Something Rotten’ (n 14) 178.

<sup>220</sup> The wording of the summary, and the manner of publication, are to be agreed by the parties, but if that is not possible can be decided by the court.

<sup>221</sup> *Monir v Wood* [2018] EWHC 3525 (QB) [238]-[244].



forcing the defendant to publish a summary of the court's judgment could not, in his view, be justified 'when there is no realistic prospect that by doing so it will come to the attention of any of those to whom the original libel was published'.<sup>222</sup> Since that could not be guaranteed in the circumstances, Nicklin J refused to grant the order, instead suggesting that the claimant was 'likely to secure vindication of his reputation through the publicity this judgment is likely to receive through other channels.'<sup>223</sup>

As mentioned above, most proponents of discursive remedies see them as an alternative to general damages.<sup>224</sup> By reducing the compensation normally awarded to successful claimants, discursive remedies are seen as a way of mitigating the chilling effect on freedom of speech that results from publishers' fear of the financial implications of losing a defamation lawsuit.<sup>225</sup> Shortly after the 2013 Act was passed, it was suggested that 'damages might be lower when [s 12] orders are made, if vindication is seen to arise through publication of the judgment summary itself and not through the award of damages.'<sup>226</sup> However, awarding the first order under s 12 in *Rahman v ARY Network Ltd*,<sup>227</sup> Eady J appeared to see the remedy mainly as a mechanism for enhancing the vindicatory effect of the damages that had previously been awarded to the claimant,<sup>228</sup> and was equivocal about whether courts awarding s 12 orders and damages at the same time should normally reduce the quantum of damages to reflect the vindication offered by the s 12 summary.<sup>229</sup> Similarly, in *Turley v Unite the Union*, Nicklin J ordered the defendants to publish a summary of his judgment, but explained that 'the vindicatory function of damages [was] particularly important' in his decision to award £75,000.<sup>230</sup> These cases, in combination with *Monir*, suggest that the s 12 remedy may not be particularly useful

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<sup>222</sup> Ibid, [242].

<sup>223</sup> Ibid, [244].

<sup>224</sup> Text to notes 191-194.

<sup>225</sup> Chan (n 144) 275; Mullis and Scott, 'Taking (All) Rights Seriously' (n 86) 19-20; Milo (n 21) 261.

<sup>226</sup> Kenyon, 'Protecting Speech in Defamation Law' (n 218) 23. See also James Price and Felicity McMahon, *Blackstone's Guide to the Defamation Act 2013* (OUP 2013) para 13.10.

<sup>227</sup> *Rahman v ARY Network Ltd* [2016] EWHC 3570 (QB).

<sup>228</sup> Ibid, [20]. Damages of £185,000 had been awarded in *Rahman v ARY Network Ltd* [2016] EWHC 3110 (QB) [106].

<sup>229</sup> Ibid, [18].

<sup>230</sup> *Turley* (n 142) [181]-[188].

as a way of limiting the impact of general damages awards on defendants' freedom of speech.<sup>231</sup>

The possibility of limiting corporate claimants to discursive remedies in cases where there is no proof of specific loss was suggested to the Joint Committee on the Draft Defamation Bill,<sup>232</sup> and considered with a degree of sympathy in its Report.<sup>233</sup> But the Committee identified a significant problem with the reform:

‘... it would not prevent corporations using the threat of litigation to silence publishers, since the chilling expense of a libel claim would be replaced by the chilling expense of fighting a declaration, which would often be similarly costly and complex to resolve.’<sup>234</sup>

The Committee's point is illustrated by the *Rahman* case discussed above. The claimant in that case was awarded £185,000, an unusually large sum of general damages; but even that amount was dwarfed by the costs awarded against the defendant, which were provisionally set at £900,000.<sup>235</sup>

In general, and in common with the substantive reforms discussed above,<sup>236</sup> reforms focusing on remedies will not be sufficient to address the chilling effect, because in practice the majority of the cost of being sued (or of the fear of that cost) results from the litigation process itself, rather than from the damages or other remedies awarded at the end of that process. As Gavin Phillipson pointed out in relation to the lack of procedural reforms in the 2013 Act, ‘it is important to be clear about the limits of what can be done to prevent ... *abuses* of the law by reforming the *content*

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<sup>231</sup> In *Turley*, as in *Monir*, Nicklin J seemed sceptical of the extent to which the s 12 summary would vindicate the claimant's reputation: ‘Although this judgment may serve to vindicate the Claimant, its effectiveness in doing so will depend on the number of people who read it, or read reports of it. In most cases, effective and lasting vindication is most likely to come ... from the size of the award’ (ibid, [182]). If this scepticism is justified, then it also calls into question the benefit of the s 12 remedy in general, as well as Nicklin J's justification for awarding the remedy in this case.

<sup>232</sup> eg by the Libel Reform Campaign: Joint Committee on the Draft Defamation Bill, *Oral and Associated Written Evidence Volume II* (2010-12, HL 203, HC 930-II) 51-52 (‘Joint Committee Evidence vol II’).

<sup>233</sup> Joint Committee on the Draft Defamation Bill, *Report* (2010-12, HL 203, HC 930-I) para 113 (‘Joint Committee Report’).

<sup>234</sup> Ibid. See also Gavin Phillipson, ‘The “Global Pariah”, the Defamation Bill and the Human Rights Act’ (2012) 63(1) Northern Ireland Legal Quarterly 149, 186: even if corporate claimants could only obtain discursive remedies without proof of loss, their claims ‘would still raise the spectre of large legal costs for defendants, continuing the current chilling effect.’

<sup>235</sup> *Rahman* (n 227) [8].

<sup>236</sup> See text to notes 98-99.

of the law.<sup>237</sup> The discussion below, in the final part of this chapter, turns to potential reforms that directly target the problems with costs and procedure which facilitate the abuses to which Phillipson was referring.

### **C. Litigation costs and procedural reforms**

The third broad category of reform option would target the procedures used to handle defamation claims in the courts, or the rules by which litigation costs are assessed and allocated between parties. As discussed in Chapter 2,<sup>238</sup> the high cost of defending defamation claims is one of the most important factors contributing to the law's chilling effect on speech about companies. Given the limited extent to which reforms to the substantive law or to remedies can be expected to reduce the cost of defending defamation claims, as discussed in Parts A and B of this chapter, reforms that directly address the cost and complexity of litigation might be expected to be a more appropriate and effective way to ameliorate the law's chilling effect on speech.<sup>239</sup>

The discussion of potential procedural reforms in this part is relatively limited in its scope, because litigation costs and procedure are complex subjects that would in themselves require thesis-length treatment to explore in full.<sup>240</sup> The reform options discussed are therefore limited to those that would retain corporate defamation in its existing form as part of the law of torts, with claims resolved through adversarial litigation in the courts. The key point I intend to convey is that it would take very substantial, and possibly fundamental, changes to the current system to remove the ability for companies to abuse the right to sue in defamation by threatening litigation for the purpose of silencing legitimate criticism. Changes that substantial do not seem likely to happen in the near future; and, as I will argue in section iv., they may be incompatible with companies' fair trial rights under Art 6 ECHR.

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<sup>237</sup> Phillipson (n 234) 150.

<sup>238</sup> At Ch2.C.ii., text to notes 166-191.

<sup>239</sup> Hollander (n 91) 270.

<sup>240</sup> For example, on alternative dispute resolution schemes: Emily Laidlaw, 'Reputation Systems, ADR, Industry Regulation and Other Extra-Judicial Possibilities for Protecting Reputation in the Internet Age: Proposal for Reform' (Law Commission of Ontario, *Defamation Law in the Internet Age Project*, 2017) at <<http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Laidlaw.pdf>>.

Arguments in favour of procedural reform are typically motivated in particular by the heightened threat to freedom of speech posed by corporate defamation claims involving an inequality of arms between claimants and defendants. For example, Milo argues that the *McLibel* case, discussed in Chapter 2,<sup>241</sup>

‘... shows how some types of defendant – particularly citizen-critics or community and local media, and especially where they are commenting on large multinationals or wealthy public figures – require the law’s assistance to vindicate their rights to freedom of expression.’<sup>242</sup>

The *McLibel* case is an obvious example of the capacity that libel litigation has to interfere with defendants’ freedom of speech,<sup>243</sup> despite being an extreme outlier.<sup>244</sup> But even in cases without this disparity between the resources of corporate claimants and the defendants they sue, the total cost of defending a defamation claim can become so disproportionate that it violates the defendant’s Art 10 rights.<sup>245</sup> Milo argues that the solution is for the courts to engage in active case management in cases involving public interest speech, and to be alert to the potential for defamation claims to disproportionately interfere with defendants’ speech rights.<sup>246</sup>

‘... if a claimant launches vexatious litigation or abuses the process of the court in a defamation claim, or there is evidence that the claimant instituted the claim for the purpose of stifling legitimate criticism, courts should mark their disapproval in the costs order.’<sup>247</sup>

In Milo’s view, this approach would ‘to a large extent ameliorate the chilling effect that large costs awards have on freedom of expression.’<sup>248</sup> Gary Chan, similarly, argues that ‘any civil costs issues should preferably be addressed by modifying the length of defamation proceedings and costs assessment as far as possible’,<sup>249</sup> where

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<sup>241</sup> At Ch2.C.iv., text to notes 266-274.

<sup>242</sup> Milo (n 21) 253.

<sup>243</sup> *Steel* (n 35) para 98.

<sup>244</sup> Magnus Boyd, ‘The Proposed Restriction on Corporate Bodies to Sue for Defamation’ (Reframing Libel Symposium, London, 4 November 2010) 3, at <<http://reframinglibel.com/2011/03/17/the-proposed-restriction-on-corporate-bodies-to-sue-for-defamation/>>.

<sup>245</sup> *MGN Ltd v UK* [2011] ECHR 66, paras 218-20; *Flood v Times Newspapers Ltd* [2017] UKSC 23, [31]-[41].

<sup>246</sup> Milo (n 21) 251.

<sup>247</sup> *Ibid*, 252.

<sup>248</sup> *Ibid*.

<sup>249</sup> Chan (n 144) 282.

criticisms of corporate defamation law relate to procedural issues, ‘the solution ... should not be to deny or restrict all corporations that right to sue under the substantive tort law.’<sup>250</sup>

Chan’s argument is not unreasonable, but the different relative interests in both reputation and speech at stake in defamation claims brought by corporate claimants as opposed to individual claimants – discussed in Chapters 1 and 2 respectively – suggest that substantive restrictions on the corporate right to sue *are* in fact justified on their own terms. Issues relating to the cost and complexity of litigation add to the law’s chilling effect on speech, but they are not the only problems with the law that need to be addressed. As such, procedural reforms like those Chan and Milo propose may be a necessary component of broader reforms, but they would not on their own be a sufficient response to the problems identified in the first two chapters of this thesis.

### *i. Procedural reform and the Defamation Act 2013*

The costs issue was highlighted repeatedly in the parliamentary debate on the 2013 Act.<sup>251</sup> The CMS Committee, for example, noted that ‘The cost of [defamation] litigation has a direct bearing’ on freedom of expression,<sup>252</sup> and argued that the problem ‘urgently need[ed] to be addressed’.<sup>253</sup> However, procedural reforms and changes to the costs regime did not feature heavily in the Act. In its consultation paper on the Draft Defamation Bill, the Ministry of Justice explained its intention to address these aspects of the law through separate legislation.<sup>254</sup>

The Government was referring to ongoing consultation on implementing the recommendations made in Lord Justice Jackson’s Review of Civil Litigation Costs,<sup>255</sup> which applied to civil claims in general, in the specific context of defamation and other ‘publication’ claims.<sup>256</sup> Lord Justice Jackson’s

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<sup>250</sup> Ibid, 281.

<sup>251</sup> See Ch2.C.v., text to notes 276-318.

<sup>252</sup> CMS Committee Report (n 13) para 237.

<sup>253</sup> Ibid, para 262. See also Joint Committee Report (n 233) paras 75-78.

<sup>254</sup> eg Ministry of Justice, *Consultation* (n 17) 3-4.

<sup>255</sup> Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009).

<sup>256</sup> Lord Justice Jackson’s recommendations were endorsed for use in defamation and other publication claims by Lord Justice Leveson: *An Inquiry into the Culture, Practices and Ethics of the Press: Report* (2012, HC 780-IV) pt J, ch 3, paras 2.12-2.17.

recommendation that the ‘success fees’ and ‘after the event’ insurance premiums used to fund conditional fee agreements (‘CFAs’) should no longer be recoverable from the losing party was given effect in most civil claims by s 44 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (‘LASPO’). But these reforms were delayed in respect of defamation claims because of concerns about their possible effect on access to justice, especially for claimants with limited means attempting to sue well-resourced media companies.<sup>257</sup> Those concerns led the government to seek advice on potential alternative reforms from the Civil Justice Council Working Group on Defamation Costs, which published its report shortly before the Defamation Act 2013 was passed.<sup>258</sup> The Ministry of Justice subsequently published a consultation paper, drawing on the Working Group’s report, which proposed costs protection measures intended to protect poorer parties from ‘the fear of exposure to the substantial costs that they might be ordered to pay to the other side’.<sup>259</sup> The government’s intention was that the reforms to the CFA regime recommended in the Jackson Review would be brought into effect in defamation claims after suitable costs protections had been introduced.<sup>260</sup> However, many of the responses to that consultation were critical of the proposed measures,<sup>261</sup> and the government did not revisit the issue of costs in defamation cases until 2018.<sup>262</sup>

As a result, the only explicitly procedural reform in the Defamation Act 2013 was the removal of the presumption in favour of trial by jury in s 11.<sup>263</sup> The rationale for this provision was that jury trials take longer and are more expensive for litigants than trials heard by a judge alone.<sup>264</sup> Although the reform is certainly welcome, in practice it will have very little impact in most cases: even under the pre-existing

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<sup>257</sup> Joint Committee Report (n 233) paras 60-67.

<sup>258</sup> Civil Justice Council, *Costs Protection in Defamation and Privacy Cases: Report of the Working Group* (April 2013) at <[https://www.judiciary.uk/wp-content/uploads/2012/12/Defamation-costs\\_final-report\\_18-4-13-d.pdf](https://www.judiciary.uk/wp-content/uploads/2012/12/Defamation-costs_final-report_18-4-13-d.pdf)>.

<sup>259</sup> Ministry of Justice, *Costs Protection in Defamation and Privacy Claims: The Government’s Proposals* (September 2013) para 9.

<sup>260</sup> *Ibid*, para 8.

<sup>261</sup> ‘Conditional Fee Agreements to be Abolished in Defamation Cases’ (2019) 24(1) *Communications Law* 4.

<sup>262</sup> Ministry of Justice, *The Government’s Response to ‘Costs Protection in Defamation and Privacy Claims: The Government’s Proposals’* (29 November 2018). See text to notes 269-271.

<sup>263</sup> There are also provisions, in ss 9 and 10, which limit the courts’ jurisdiction to hear defamation claims against certain defendants.

<sup>264</sup> Phillipson (n 234) 152.

presumption in favour of jury trials, juries have rarely been used in the last two decades.<sup>265</sup> Further, Simon Singh pointed out in his evidence to the Joint Committee that the mutual agreement that his case against the British Chiropractic Association should be heard by a judge alone did not prevent the preliminary rulings in that case from taking several years and costing the parties a combined total of about £250,000.<sup>266</sup>

A number of commentators criticized the lack of procedural or costs-based measures in the 2013 Act.<sup>267</sup> Mullis and Scott, for example, argued that, as a result of the Act's overwhelming focus on the substantive law:

‘... it will remain the case that the sheer cost of bringing and defending libel claims will deny some litigants access to justice to vindicate their reputations and some publishers the right fully to express themselves as they might otherwise choose.’<sup>268</sup>

As mentioned above, the government returned to the issue of defamation costs in 2018. But the approach it eventually decided on was more limited than those discussed while the 2013 Act was being debated; in particular, the proposal to introduce costs protections for less wealthy litigants was eventually abandoned.<sup>269</sup> The provisions in s 44 of LASPO were brought into force in defamation claims in April 2019, so that CFA success fees are now non-recoverable.<sup>270</sup> However, ATE insurance premiums *will* still be recoverable; the government explained that the ‘ATE regime enables parties with a good case to litigate and discharge their Article 10 rights ... without the fear of having to pay potentially ruinous legal costs if their case fails.’<sup>271</sup>

These reforms have been in effect for too short a time to allow their impact to be properly assessed, but they are unlikely to completely resolve the problems with the

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<sup>265</sup> Joint Committee Report (n 233) para 22.

<sup>266</sup> Joint Committee Report (n 233) para 75, fn 120; Joint Committee Evidence vol II (n 232) 357, 406.

<sup>267</sup> See eg Howard Johnson, ‘The Defamation Act 2013 – Reform or Tinkering?’ (2014) 19(1) Communications Law 1.

<sup>268</sup> Alastair Mullis and Andrew Scott, ‘Tilting at Windmills: The Defamation Act 2013’ (2014) 77(1) Modern Law Review 87, 109.

<sup>269</sup> Ministry of Justice, *The Government's Response* (n 262) 4.

<sup>270</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No 13) Order, SI 2018/1287.

<sup>271</sup> Ministry of Justice, *The Government's Response* (n 262) 4.

cost of corporate defamation litigation, especially considering that the main target for reform is the use of CFAs to finance claims.<sup>272</sup> As David Howarth observed during the debates preceding the 2013 Act, the proportion of corporate claimants that actually use CFAs to fund their claims is not clear,<sup>273</sup> so the impact of reforms to the CFA regime on corporate defamation cases in particular may be limited. What is clear, however, is that companies large enough to use litigation as a way to silence criticism will have sufficient resources to do so without recourse to this kind of funding agreement.

The extensive consultation on, and delay in implementing, costs reforms in defamation cases illustrates the difficulty of finding a solution to these problems within the existing litigation framework. As Jackson LJ pointed out, ‘In the context of a common law jurisdiction ... there are limits on what can be achieved. Adversarial litigation is an inherently expensive process.’<sup>274</sup> This inherent cost of adversarial proceedings is exacerbated by some aspects of defamation law specifically. For example, defamation cases tend to differ from one another on their facts more than other kinds of claim, and outcomes are therefore less predictable;<sup>275</sup> the substantive law is complex and in places arcane, making it more likely that the parties will need specialist lawyers who often ‘charge very high fees’;<sup>276</sup> and cases often turn on fine points of interpretation, such as disputes as to the meaning of a statement and whether that meaning is defamatory of the claimant, which are frequently resolved through separate preliminary hearings.<sup>277</sup> In *Banks v Cadwalladr*, Saini J expressed frustration that the complexity of disputes on these questions ‘diverts [the court] from what should be a simple task in most cases and calls into question whether our normal adversarial processes ... are the appropriate way in which to resolve disputes as to meaning.’<sup>278</sup> Because of these features of

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<sup>272</sup> See *Gatley* (n 3) para 35.14.

<sup>273</sup> David Howarth, ‘Libel: Its Purpose and Reform’ (2011) 74(6) *Modern Law Review* 845, fn 178.

<sup>274</sup> Lord Justice Jackson, *Review of Civil Litigation Costs: Supplemental Report – Fixed Recoverable Costs* (July 2017) para 1.2.

<sup>275</sup> eg *Cassell & Co* (n 107) 1071.

<sup>276</sup> Mathilde Groppo, ‘Serious Harm: A Case Law Retrospective and Early Assessment’ (2016) 8(1) *Journal of Media Law* 1, 12, citing CMS Committee Report (n 13) para 280. See also Mullis and Scott, ‘Taking (All) Rights Seriously’ (n 86) 12.

<sup>277</sup> Scott, ‘The Autopoietic Inanity of the Single Meaning Rule’ (n 204) 50.

<sup>278</sup> *Banks v Cadwalladr* [2019] EWHC 3451 (QB) [11].



defamation law, the high cost of litigation in this area ‘may simply be an intractable problem.’<sup>279</sup>

It is difficult to envisage a workable set of reforms which could reduce costs so significantly that even more impecunious defendants might consider the financial risk of defending a company’s defamation claim to be acceptable. This is all the more so because, as explained in Chapter 2,<sup>280</sup> the most important factor driving the chilling effect of corporate defamation law is not the *actual* cost of defending a claim, but the publisher’s *perception* of the likely cost. Procedural reforms would likely need to be drastic in order to overcome the existing perception of libel litigation as excessively costly, complex, time-consuming, and unpredictable. Otherwise this kind of reform can only go so far in helping to alleviate the law’s chilling effect.

In addition to calls to reduce defendants’ litigation costs generally, there are two particular proposals that are worth discussing: the argument for introducing additional mechanisms with which claims can be resolved at an early stage of the litigation, or strengthening those that already exist; and the possibility of allowing defendants to counter-sue corporate defamation claimants in certain circumstances. The following sections discuss these two proposals in turn, before section iv. discusses the limits of procedural reforms in light of claimants’ right to a fair trial under Art 6 ECHR.

## *ii. Mechanisms encouraging early resolution of claims*

The most obvious objective of reform in this area would simply be to reduce the typical cost of defending defamation claims brought by corporate claimants, especially (although not necessarily exclusively) when the claim is unsuccessful. One way of achieving this goal is to introduce or strengthen mechanisms for defeating weaker claims at an early stage of the litigation, thereby avoiding the need for full trials, which can be long, complex, and expensive for litigants.

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<sup>279</sup> Northern Ireland Law Commission, *Consultation Paper: Defamation Law in Northern Ireland* (NILC 19, 2014) para 1.04.

<sup>280</sup> At Ch2.C.ii., text to notes 176-177.

Although recent decades have seen a number of substantive and procedural developments intended to relieve the financial threat faced by defendants,<sup>281</sup> even the streamlined hearings involved in utilizing mechanisms designed to avoid a full trial can be extremely expensive.<sup>282</sup> The editors of *Gatley on Libel and Slander* note, for example, that an unsuccessful application to strike out on *Jameel* abuse grounds<sup>283</sup> ‘may prove costly: it is not unusual for *Jameel*-based applications to involve in-depth scrutiny of the germane facts, circumstances and evidence.’<sup>284</sup> Phillipson explains the implications that this has for attempts to counter the abuse of defamation litigation using mechanisms that allow the early resolution of weaker claims:

‘Wealthy individuals or large corporations may issue proceedings even if their lawyer advises them that they would be highly likely to succumb to a strikeout application. Such claimants may simply calculate that the case is unlikely to get that far – that the recipient of the threatening letter will publish the desired retraction or simply desist from further criticisms, fearing that once proceedings are issued, even to have the case struck out may cost tens of thousands of pounds.’<sup>285</sup>

One of the main justifications for the substantive reform in s 1 of the Defamation Act 2013, discussed in Chapter 3, was that the ‘serious harm’ and ‘serious financial loss’ tests would provide the courts with an additional mechanism with which to dispose of weaker claims (ie those that would not meet the new thresholds).<sup>286</sup> Unfortunately, it does not appear that s 1 is likely to be particularly effective in this respect.<sup>287</sup>

There has been uncertainty since before the 2013 Act came into force as to the procedure by which disputes relating to the threshold requirements of reputational

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<sup>281</sup> See eg Mullis and Scott, ‘Something Rotten’ (n 14) 179.

<sup>282</sup> The Joint Committee noted that ‘even in cases which are resolved before they reach trial at the High Court, costs for a single party can amount to hundreds of thousands of pounds’: Joint Committee Report (n 233) para 75.

<sup>283</sup> *Jameel* (n 203). See Ch3.A.i., text to notes 28-30.

<sup>284</sup> *Gatley* (n 3) para 30.48.

<sup>285</sup> Phillipson (n 234) 151.

<sup>286</sup> eg Ministry of Justice, *The Government’s Response to the Report of the Joint Committee on the Draft Defamation Bill* (Cm 8295, 2012) para 92.

<sup>287</sup> Mathilde Groppo, ‘Libel Litigation: Jackson, Fixed Costs and Case Management’ (*Inform*, 28 March 2017) <<https://inform.wordpress.com/2017/03/28/libel-litigation-jackson-fixed-costs-and-case-management-mathilde-groppo/>>.

harm or financial loss would be dealt with, and in particular when it would be appropriate to determine these issues in preliminary hearings, and when they should be left to trial instead.<sup>288</sup> This question has the potential to give rise to something of a dilemma: Mathilde Groppo explains that the costs implications of the court's approach to a s 1 dispute will not be clear until after that dispute is resolved:

‘Where the serious harm requirement is not satisfied, the resolving of the issue at an early stage prevents an unnecessary accumulation of costs. However, where the serious harm requirement is satisfied, ... the costs burden is not relieved. Worse, it is increased by the extensive adducing of evidence and cross-examination, and by the additional preliminary issue hearing.’<sup>289</sup>

As pointed out by Athelstane Aamodt, ‘preliminary hearings where claimants would be required to produce evidence of serious harm so as to satisfy the test would have ... the effect of encouraging very costly satellite litigation, in an area that is already costly enough.’<sup>290</sup> It was also anticipated that requiring claimants to provide evidence in support of their cases on s 1 might lead to front-loading of costs towards the start of proceedings.<sup>291</sup> Both of these predictions were reflected in some of the early post-Act cases, in which preliminary hearings on s 1 ‘became costs-laden mini-trials of the facts, with parties struggling to nail the elusive concept of “serious harm”.’<sup>292</sup> In *Theedom v Nourish Training Ltd*, for example, the judge estimated that the parties’ costs had reached £100k on the claimant’s side and £70k on the defendant’s for the preliminary serious harm phase of the dispute alone.<sup>293</sup>

The striking out of the company’s claim in *Undre v London Borough of Harrow* is a good example of the potential for the serious financial loss test to add to litigation costs.<sup>294</sup> To assess whether the corporate claimant had satisfied the s 1(2) test, Warby J engaged in a detailed discussion of its evidence of financial loss, despite having held that it had failed to satisfy the requirement at common law for the

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<sup>288</sup> eg Price and McMahon (n 226) para 2.48.

<sup>289</sup> Mathilde Groppo, ‘Serious Harm: A Case Law Retrospective’ (n 276) 15. See also *McGrath v Bedford* [2016] EWHC 174 (QB) [6].

<sup>290</sup> Athelstane Aamodt, ‘Reputational Damage’ (2017) 1772 *New Law Journal* 13, 14.

<sup>291</sup> eg Ministry of Justice, *Consultation* (n 17) para 142; Joint Committee Report (n 233) para 114; Mullis and Scott, ‘Tilting at Windmills’ (n 268) 105.

<sup>292</sup> Romana Canneti, ‘Rewriting the Defamation Act?’ (2019) 169(7845) *New Law Journal* 7, 7.

<sup>293</sup> *Theedom* (n 101) [31].

<sup>294</sup> *Undre* (n 102).

statement complained of to refer to the claimant.<sup>295</sup> While the same evidence was relied on in support of the claimant's case on damages, it would not have been necessary for the judge to examine that evidence given that liability had not been established.<sup>296</sup>

In his judgment for the High Court in *Lachaux v Independent Print Ltd*, Warby J expressed the view that, in cases in which the defendant contends that the claim against them was too trivial to satisfy the serious harm requirement, 'it will usually be preferable for it to be tried as a preliminary issue'.<sup>297</sup> This was consistent with other cases in which Warby J had tentatively stated a preference for resolving s 1 disputes in pre-trial hearings,<sup>298</sup> including where the claimant was a body trading for profit, and as such would also have had to satisfy s 1(2).<sup>299</sup> However, there had also been cases in which a preliminary hearing was considered to be inappropriate.<sup>300</sup>

In the Court of Appeal, Davis LJ held that preliminary hearings on the issue of serious harm would not normally be appropriate: '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.'<sup>301</sup> In reaching this decision, Davis LJ noted the potential for parties to abuse the cost of complex pre-trial hearings, although his focus was on situations in which an inequality of arms favoured the defendant. He argued that careful consideration of the necessity of preliminary hearings would 'discourage well-resourced defendants from seeking to batter into submission less well-resourced claimants by use of interlocutory process'.<sup>302</sup> The same principle applies where the distribution of resources between parties favours a corporate claimant over a less wealthy critic.

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<sup>295</sup> *Ibid*, [32].

<sup>296</sup> *Ibid*, [67].

<sup>297</sup> *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB) [66] (emphasis removed).

<sup>298</sup> *eg Ames v The Spamhaus Project Ltd* [2015] EWHC 127 (QB) [50].

<sup>299</sup> *Business Energy Solutions Ltd v Scrivener* [2015] EWHC 2948 (QB) [10]-[11].

<sup>300</sup> *eg Brown v Bower* [2017] EWHC 1388 (QB) [57]; *Theedom* (n 101) [31].

<sup>301</sup> *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1334, [82].

<sup>302</sup> *Ibid*, [77].

The Supreme Court judgment in *Lachaux* does not address these procedural questions; on one view, therefore, it ‘does not apparently disturb or detract from the guidance by the Court of Appeal that disputes of fact arising from the serious harm test which require evidence should be resolved at trial of liability and not by preliminary issues trials’.<sup>303</sup> However, Groppo disagrees, arguing that ‘because [the Supreme Court] disagreed with the Court of Appeal and instead endorsed Warby J’s approach, ... it is to be expected that it is the guidance given by Warby J which will prevail’.<sup>304</sup>

The former view seems the more plausible, and the Court of Appeal’s guidance on procedural issues should be followed even though the Supreme Court preferred Warby J’s interpretation of the substance of s 1. However, Lord Sumption’s silence on the issue of procedure will, at the very least, lead to a period of uncertainty as to which of the above positions is correct. It is also not necessarily the case that the approach to the issue of serious financial loss in cases involving corporate claimants should be the same as that taken to disputes relating to the serious harm threshold in individual claims; inevitably, further litigation will be necessary to clarify that point as well.

Regardless of how this uncertainty is eventually resolved, two points will hold true. The first is that neither approach is ideal; both will, in some cases, lead to an escalation of costs. The second is that Parliament’s decision to introduce an additional issue on which the outcome of a corporate defamation claim might turn – that is, whether the statement complained of caused the claimant serious financial loss – will impose the cost of resolving disputes about that issue on litigants in every case in which they arise, whether at a preliminary hearing or at trial. The nature of the evidence relevant to s 1(2) is such that resolving these disputes may be complex

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<sup>303</sup> ‘Supreme Court Hands Down Judgment in *Lachaux*’ (*5RB*, 12 June 2019) <<https://www.5rb.com/defamation-2/supreme-court-hands-down-judgment-in-lachaux/>>. See also Clare Duffy and Jonathan Price, ‘“No Revolution” Says the Supreme Court as it Rules on Defamation’ (*UK Human Rights Blog*, 17 June 2019) <<https://ukhumanrightsblog.com/2019/06/17/no-revolution-says-the-supreme-court-as-it-rules-on-defamation/>>.

<sup>304</sup> Mathilde Groppo, ‘Case Law: *Lachaux v Independent Print*, Supreme Court Abolished Common Law Presumption of Damage in Libel Cases’ (*Inform*, 13 June 2019) <<https://inform.org/2019/06/13/case-law-lachaux-v-independent-print-supreme-court-abolished-common-law-presumption-of-damage-in-libel-cases-mathilde-groppo/>>.

and costly,<sup>305</sup> which presents claimants with an unfortunate opportunity to increase the financial risk of litigation to attempt to pressurize defendants into agreeing a settlement.<sup>306</sup>

A related procedural reform proposal that was put forward several times in the pre-2013 debates would have required corporate claimants to obtain the permission of the court before bringing a defamation action. Permission would be refused unless the claimant could prove that the statement complained of had caused it financial loss (some variations of the proposal also allowed the court to take other factors into account in deciding whether to permit the claim to be brought).<sup>307</sup> The Joint Committee on the Draft Defamation Bill believed that this reform:

‘... would encourage robust and decisive action by the courts to prevent trivial and abusive litigation from being commenced at all, let alone continued for years ... Publishers who know that the corporation must face judicial scrutiny before bringing a claim may feel better protected against empty threats and more able to defend their position.’<sup>308</sup>

However, this proposal suffers from the same problems as those discussed above: a permission stage would still be expensive enough, and its outcome sufficiently uncertain for the defendant, for the threat of litigation to chill the speech of many critics.<sup>309</sup> And if a claimant successfully obtained permission to pursue its claim, the procedure ‘would create unnecessary duplication and additional costs for both parties.’<sup>310</sup> Introducing a *mandatory* permission stage for corporate claimants would impose these additional costs even in cases in which defendants would not have chosen to challenge the claim at a preliminary stage; for example, cases expected to turn on issues that are normally left to a full trial, such as a public interest defence.<sup>311</sup>

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<sup>305</sup> eg *Gubarev* (n 103) [43], [53].

<sup>306</sup> *Ibid*, [21].

<sup>307</sup> Joint Committee Report (n 233) para 116; Defamation Bill Deb 26 June 2012, cols 172-209; HL Deb 5 Feb 2013, vol 743, cols 174-83.

<sup>308</sup> Joint Committee Report (n 233) para 116.

<sup>309</sup> HL Deb 23 April 2012, vol 744, col 1376 (Lord Faulks).

<sup>310</sup> HL Deb 23 April 2012, vol 744, col 1367 (Lord McNally). See also Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill* (Cm 8295, 2012) para 92.

<sup>311</sup> See eg *Gatley* (n 3) para 33.25.

### *iii. Mechanisms allowing defendants to counter-sue corporate claimants*

One particularly interesting option for procedural reform would be to introduce a mechanism to allow defendants to countersue claimants who bring abusive claims with the intention of bullying their critics into silence – the so-called ‘SLAPPs’ discussed in Chapter 2.<sup>312</sup> The idea of ‘anti-SLAPP’ laws is to make the risk of abusive litigation significant enough that it outweighs the economic benefits offered by such litigation. Unlike individual claimants who may be motivated to sue by non-economic concerns, for a trading company the decision to sue in response to criticism ‘is first and foremost a business decision, requiring careful analysis of whether litigation will serve the economic interests of the corporation.’<sup>313</sup> This sensitivity to economic incentives means that anti-SLAPP mechanisms may be a particularly effective way to address the problem of *corporate* misuse of defamation and other claims, but one potential benefit of this kind of reform is that it would not need to be limited to claims brought in defamation, or to claims brought by companies.<sup>314</sup>

Noting that the courts’ existing powers to strike out abusive claims are not necessarily enough to provide a disincentive to those claimants seeking to chill critical speech with the mere threat of litigation,<sup>315</sup> Mullis and Scott suggest that:

‘A more proactive option ... would be for defendants to be allowed some means to counter-sue the claimant both to recover costs expended and to obtain damages on account of the breach of expression rights. The prospect that the defendant might “SLAPP-back” would immediately see a prospective claimant pause to reconsider the advisability of bringing an intimidatory action.’<sup>316</sup>

It may be that this option would be particularly beneficial for the individual or small organization critics who, it was argued in Chapter 2,<sup>317</sup> are made vulnerable to

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<sup>312</sup> At Ch2.C.iv., text to notes 259-265.

<sup>313</sup> Norman Redlich, ‘The Publicly Held Corporation as Defamation Plaintiff’ (1995) 39 Saint Louis University Law Journal 1167, 1168.

<sup>314</sup> This might address some of the concerns that will be discussed in Ch5.B.i., at text to notes 121-161.

<sup>315</sup> Discussed above at text to notes 281-306.

<sup>316</sup> Mullis and Scott, ‘Something Rotten’ (n 14) 181.

<sup>317</sup> At Ch2.C.iii., text to notes 211-249.

abusive corporate defamation claims by their relative lack of resources for legal advice or litigation.<sup>318</sup>

Potential models for anti-SLAPP legislation can be found in various other jurisdictions. These laws have been adopted most extensively in the US, where a significant number of states have enacted anti-SLAPP legislation.<sup>319</sup> This is in part because the concept of SLAPPs has gained the most popular traction in that jurisdiction, and in part because of the strong first amendment tradition of protecting public interest speech.<sup>320</sup> However, Canadian law might be more instructive to look at than US state anti-SLAPP laws, because of the closer resemblance between English and Canadian defamation law.<sup>321</sup> Ontario's Protection of Public Participation Act 2015 ('PPPA'), the subject of a recent article by Hilary Young,<sup>322</sup> introduced an anti-SLAPP measure which is surprisingly favourable to defendants. A defendant only needs to satisfy the court that the proceedings have been brought in respect of expression on a matter of public interest to establish a presumption that the suit will be dismissed. That presumption will only be overturned if the claimant can show that there are grounds to believe the claim would be successful, *and* that the harm for which a remedy is sought is sufficient to outweigh the public interest in the defendant's speech.<sup>323</sup> The PPPA is also defendant-friendly as regards costs, creating a presumption that the plaintiff will bear all of the costs unless the court considers it 'appropriate in the circumstances' to depart from that presumption.<sup>324</sup>

However, there are potential problems with the proposal to introduce a counter-suit mechanism along the lines of the PPPA. For example, Andrew Scott notes 'the difficulty in distinguishing between bona fide actions brought to assert legal rights

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<sup>318</sup> Andrew Scott, 'Opinion: "Ignoring Domestic Abuse? SLAPPs in the UK"' (*Inform*, 27 January 2011) <<https://inform.org/2011/01/27/opinion-ignoring-domestic-abuse-slapps-in-the-uk-andrew-scott/>>.

<sup>319</sup> The 'Public Participation Project' organization lists 33 states with anti-SLAPP legislation, in addition to West Virginia, which has established a broadly comparable countersuit mechanism in case law: 'State Anti-SLAPP Laws' <<https://anti-slapp.org/your-states-free-speech-protection/>>.

<sup>320</sup> See notes 7-16 on the divergence of US and English defamation law.

<sup>321</sup> Fiona Donson, *Legal Intimidation: A SLAPP in the Face of Democracy* (Free Association Books 2000) 15.

<sup>322</sup> Hilary Young, 'Responsible Communication and Protection of Public Participation: Assessing Canada's Newest Public Interest Speech Protections' (2018) 47(2) *Southwestern Law Review* 385.

<sup>323</sup> Protection of Public Participation Act 2015, s 3.

<sup>324</sup> Protection of Public Participation Act 2015, ss 137.1(7) and 137.1(8).



or defend interests and other actions that are designed to chill public participation.<sup>325</sup> As pointed out by the originators of the concept, Pring and Canan, ‘SLAPPs normally do not advertise themselves as such.’<sup>326</sup> If a counter-suit law were to be effective in practice, then courts would be required to identify abusive lawsuits on a case-by-case basis. This may not be a realistic expectation:

‘Whether, in any given case, a libel action is strategically aimed to silence critics or is designed to vindicate injured reputation (or a combination of the two) is an extraordinarily difficult question.’<sup>327</sup>

Even if it were possible to reliably identify problematic claims, the courts would also need to be *willing* to do so.<sup>328</sup> English courts already tend to be fairly conservative in criticizing even those lawsuits that are widely regarded as being abusive.<sup>329</sup> It seems likely that this conservatism would limit the effectiveness of an anti-SLAPP law; and that the more punitive the law was for claimants, the slower judges would be to characterize claims as abusive. In Ontario, Young points out that ‘the serious consequences of a successful PPPA motion mean that courts are sometimes interpreting its provisions unduly narrowly.’<sup>330</sup> The small organizations and individuals (often self-represented in court) that are most disproportionately affected by the cost of being sued would be particularly likely to face an uphill struggle overcoming this judicial conservatism.

#### ***iv. Procedural reform and Art 6 ECHR***

There is another significant limit to the capacity of procedural reform to address the problems with English corporate defamation law: the obligations imposed on the courts by the right to a fair trial in Art 6 ECHR, which is enjoyed by corporations as well as natural persons.<sup>331</sup> In this section I argue, firstly, that Art 6 *does not* require there to be a domestic legal right for corporations to protect their

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<sup>325</sup> Scott, ‘SLAPPs in the UK’ (n 318).

<sup>326</sup> Pring and Canan (n 163) 150.

<sup>327</sup> Michael Kent Curtis, ‘Monkey Trials: Science, Defamation, and the Suppression of Dissent’ (1995) 4 William & Mary Bill of Rights Journal 507, 560.

<sup>328</sup> Donson, *Legal Intimidation* (n 321) 2.

<sup>329</sup> eg *Mama Group Ltd v Sinclair* [2013] EWHC 2374 (QB) [47] (Dingemans J), describing the power to strike out a claim as an abuse of process as a ‘draconian power’; *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 (CA). See also Acheson, ‘Empirical Insights’ (n 114) 45.

<sup>330</sup> Young, ‘Responsible Communication and Protection of Public Participation’ (n 322) 387.

<sup>331</sup> eg *Agrokompleks v Ukraine* App no 23465/03 (ECtHR, 6 October 2011).

reputations; but that, secondly, if there is such a right in domestic law then Art 6 *does* place limits on the procedural reforms that could be made to corporate defamation law. Those limits would likely prevent the adoption of an anti-SLAPP law as protective of defendants as the Ontario legislation discussed above, which Young notes does not need to satisfy comparable standards, because the Canadian Charter of Rights and Freedoms ‘provides few fair trial protections in the civil litigation context.’<sup>332</sup>

Lord Lester’s evidence to the Joint Committee on the Draft Defamation Bill argued that preventing companies from suing in defamation ‘would be a breach of Article 6 read with Article 14’.<sup>333</sup> The relevant part of Art 6 reads as follows:

‘In the determination of his civil rights and obligations ... , everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’

Article 14 prohibits states from discriminating ‘on any ground such as sex, race, colour, ... or other status’ in the way in which they protect Convention rights. Lord Lester’s argument was that the Art 6 right to a fair trial guarantees effective access to the courts for the protection of applicants’ right to reputation,<sup>334</sup> and that failing to allow companies the right to sue in defamation would constitute discrimination in the protection of that right of access, presumably on the ground of companies’ ‘other status’, contrary to Art 14. I argue here that Lord Lester’s view was mistaken.

Art 6 only guarantees a right of access to the courts in respect of *existing* domestic ‘civil rights’; it does not guarantee the existence of any particular substantive right in domestic law.<sup>335</sup> The Court has held that it ‘may not create through the interpretation of [Art 6] a substantive right which has no legal basis in the State concerned’.<sup>336</sup> In *Fayed v UK*, the applicants complained about the limits imposed on their ability to protect their reputations by a statutory qualified privilege defence.<sup>337</sup> The Court ruled that whether Art 6 is engaged by a restriction on the

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<sup>332</sup> Young, ‘Responsible Communication and Protection of Public Participation’ (n 322) 404, fn 82.

<sup>333</sup> Joint Committee Evidence vol II (n 232) 19.

<sup>334</sup> *Golder v UK* [1975] ECHR 1, para 36.

<sup>335</sup> *Roche v UK* [2008] ECHR 926, paras 117-119; *Matthews v Ministry of Defence* [2003] 1 AC 1163 (HL) [3].

<sup>336</sup> *Roche* (n 335) para 117.

<sup>337</sup> *Fayed v UK* App no 17101/90 (ECtHR, 21 September 1990).

right to sue in defamation depends on whether that restriction is ‘substantive’ or ‘procedural’. If a restriction is substantive (ie ‘delimit[ing] the very content of the applicants’ right to a good reputation’) then it does not engage Art 6, because it removes from domestic law any ‘civil right’ to which the Article could apply.<sup>338</sup> As Gray J rightly held in *Loutchansky v Times Newspapers Ltd (No 6)*,<sup>339</sup> the ECtHR judgment in *Fayed* does not establish ‘a legal right to a good reputation’ under Art 6.<sup>340</sup>

It follows that the complete removal of the corporate right to sue in defamation would not engage Art 6. If Art 6 is not engaged, then Art 14 is irrelevant because it only has effect in circumstances where another Convention right is engaged.<sup>341</sup> It is also worth noting that, even if Art 14 was relevant, it is unlikely to protect applicants against discrimination on the basis of their corporate form. Lord McNally, who also gave evidence to the Joint Committee on this point, was unable to identify ‘any cases where it has been said that it would be incompatible with Article 14 to treat legal persons differently from natural persons.’<sup>342</sup> Further, it is permissible for member states to treat certain persons differently if there is an ‘objective and reasonable justification’ for doing so.<sup>343</sup> Chapters 1 and 2 set out justifications for differential treatment of corporate defamation claimants that are more than sufficient to meet this standard.

However, if the right to sue is retained in English law, then the manner in which corporate defamation claims are adjudicated will need to conform to the minimum standards of procedural fairness set by Art 6. The right to access the courts may be restricted to pursue a legitimate aim in the public interest, but there must be ‘a reasonable relationship of proportionality between the means employed and the aim

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<sup>338</sup> Ibid, paras 66-67. Judge Martens rejected this distinction in his concurring opinion, on the grounds that the right to reputation was in reality treated as a ‘civil right’ by all of the Convention’s signatory states. But Judge Martens’s approach would also allow member states the option to completely remove the domestic right to reputation from litigants, with no implications under Art 6, as long as this is achieved by a law that ‘clearly and fully exclude[s] such a right’ (ibid, p 35).

<sup>339</sup> [2002] EMLR 44 (QB).

<sup>340</sup> Ibid, [3].

<sup>341</sup> *EB v France* App no 43546/02 (ECtHR, 22 January 2008) para 47.

<sup>342</sup> Joint Committee Evidence vol II (n 232) 386.

<sup>343</sup> *Van der Musselle v Belgium* (1983) 6 EHRR 163, para 45.

sought to be achieved'.<sup>344</sup> The protection offered by Art 6 extends beyond mere access to the courts; it also provides guarantees in relation to 'the conduct of the proceedings.'<sup>345</sup> These rights cover preliminary hearings as well as those which ultimately determine the outcome of a dispute, and also continue after the court rules on a substantive claim to the assessment of damages<sup>346</sup> and to the execution of the judgment, which 'must ... be regarded as an integral part of the "trial" for the purposes of Article 6'.<sup>347</sup>

Because the Convention 'is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective', Art 6 requires that throughout the various stages of proceedings a litigant 'be able to present [its] case properly and satisfactorily',<sup>348</sup> and to have it 'duly considered by the trial court.'<sup>349</sup> It imposes on the court 'a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant'.<sup>350</sup> In order that litigants can contest their opponents' arguments as well as present their own, 'the concept of fair trial also implies in principle the right for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed'.<sup>351</sup> Importantly, this right cannot be disregarded for the purpose of 'sav[ing] time and expedit[ing] the proceedings'.<sup>352</sup> One of the most important goals of the procedural reforms discussed above would be to ensure that defendants were able to defeat trivial or abusive claims as quickly and inexpensively as possible; the extent to which it would be possible to achieve those goals will be substantially limited by claimants' rights under Art 6 to have their arguments, and their responses to defendants' arguments, fully examined and assessed by the court.

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<sup>344</sup> *Waite and Kennedy v Germany* [1999] ECHR 13, para 59. Note, however, that a restriction is more likely to be permissible if the applicant has 'reasonable alternative means of effectively protecting' its interests (*Cordova v Italy (no 1)* App no 40877/98 (ECtHR, 30 January 2003) para 65; *A v UK* [2002] ECHR 805, para 86). This is likely to be true for many corporate defamation claimants: see Ch5.B., text to notes 99-120.

<sup>345</sup> *Golder* (n 334) para 36.

<sup>346</sup> *Torri v Italy* App no 26433/95 (ECtHR, 1 July 1997) para 19.

<sup>347</sup> *Hornsby v Greece* App no 18357/91 (ECtHR, 19 March 1997) para 40.

<sup>348</sup> *Airey v Ireland* [1979] ECHR 3, para 24.

<sup>349</sup> *Perez v France* [2004] ECHR 72, para 80.

<sup>350</sup> *Ibid.*

<sup>351</sup> *Nideröst-Huber v Switzerland* App no 18990/91 (ECtHR, 18 February 1997) para 24.

<sup>352</sup> *Ibid.*, para 30.

In short, Art 6 ECHR does not require the UK to ensure that its domestic law provides corporations with a right sue in defamation. But, as long as a substantive right to reputation exists for companies in English law, Art 6 guarantees a right of access to an ‘inherently expensive’<sup>353</sup> adversarial process with which they can protect that right.

## **Conclusion**

There are strong arguments in favour of reforming a number of aspects of English corporate defamation law. Despite the introduction of a ‘serious financial loss’ threshold in the Defamation Act 2013 (and especially considering the courts’ interpretation of that threshold described in Chapter 3), the presumptions of falsity and malice in the substantive law mean that it is too easy for many corporate claimants to establish liability and place the burden on critics to defend their statements.

If defendants are unable to avoid liability, the remedies awarded to corporate claimants are also problematic. In particular, companies’ entitlement to substantial presumed and vindictory damages means that the general damages awarded to corporate defamation claimants are often disproportionate to the actual injuries suffered. Given that there is no need for a claimant to prove that the defendant was at fault in publishing the statements complained of, and given the increasing tendency for corporate defamation claims to be brought against relatively impecunious individual defendants, claimants’ automatic entitlement to recover specific financial losses consequent on the publication of defamatory statements potentially leaves ordinary people liable for huge losses even when their criticism of a company is honest and well-intentioned. There may be merit in exploring the potential use of discursive remedies as an alternative to financial compensation, but even when these alternatives are available the courts seem wedded to the idea that substantial damages awards are an appropriate remedy, despite the lack of evidence in support of that position.

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<sup>353</sup> Lord Justice Jackson (n 274).

More fundamentally, reforms to the substantive law or to remedies would not address the problems caused by the litigation process itself. While any reforms that would reduce the cost and complexity of defamation litigation would be welcome, it is difficult to envision those problems being eliminated if corporate defamation claims continue to be dealt with within the existing framework of the law of torts. As Mariette Jones has argued in relation to the reforms introduced in the Defamation Act 2013: ‘Since the reforms did not change the nature and classification of defamation as falling under private law, it comes as no surprise that cost and complexity remain issues vexing this area of law.’<sup>354</sup> Ultimately, as long as corporations retain the right to pursue defamation claims against critics through adversarial litigation in the courts, many of the problems that those claims cause for freedom of speech are likely to be intractable. I will argue in the next, and final, chapter of this thesis that the solution is to deny corporate claimants the right to sue in defamation entirely.

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<sup>354</sup> Jones (n 30) 123.

# CHAPTER FIVE: DENYING COMPANIES THE RIGHT TO SUE IN DEFAMATION

## **Introduction**

In this final chapter, I will argue that the most effective and most conceptually satisfying option for reform would be to remove the right to sue in defamation from companies entirely. The potential for this reform to leave some companies with little effective protection for the reputational interests identified in Chapter 1 is acknowledged, but I argue that this is likely to be true in fewer cases than often thought; and that, on balance, leaving companies without a remedy in this small proportion of cases would be preferable to the consequences of companies' entitlement to sue for freedom of speech that were described in Chapter 2.

As argued in Chapter 3, the introduction of a 'serious financial loss' threshold for corporate defamation claimants in s 1(2) of the Defamation Act 2013 was not a sufficient response to those free speech issues. In Chapter 4, I argued that alternative options for reform which stop short of removing the corporate right to sue entirely would also fail to address the problems with the law. Reforms to the substantive law that restrict companies' ability to sue, or restrictions on the remedies available to corporate claimants, would not adequately address the problems caused by the cost and uncertainty of litigation for defendants; and there are limits to what could be achieved with reforms targeted directly at those procedural issues, because the existence of a right to sue for companies brings with it fair trial rights under Article 6 of the European Convention on Human Rights, including the right of access to an inherently expensive adversarial procedure for resolving claims.

Part A of this chapter clarifies the justification for treating corporate and individual defamation claimants differently even though some of the criticisms of corporate

defamation law discussed in this thesis could also be made of the law applied to individual claimants. Part B argues that there are normally sufficient alternative ways in which companies can protect their reputations against false allegations, and that their right to sue in defamation is therefore unnecessary in most cases. The final part of this chapter addresses the scope of the proposed reform. It argues that all non-human claimants should be denied standing in defamation, including entities such as charities and small businesses which are often excluded from proposals to restrict the corporate right to sue in defamation.

## **A. Treating corporate and individual claimants differently**

It might be argued that the chilling of public interest speech discussed in Chapter 2 is not a problem that is unique to *corporate* defamation law: the threat of defamation claims also chills speech about powerful or wealthy individuals, and such individuals can and do use the law to stifle legitimate criticism of their activities. In fact, by far the most frequently cited example of a litigant abusing defamation claims to hide wrongdoing is Robert Maxwell.<sup>1</sup> The ‘inequality of arms’ that is frequently highlighted by critics of corporate defamation law can equally arise in cases brought by individual claimants, some of whom may be ‘wealthier than most corporations.’<sup>2</sup> It is reasonable to question whether removing the *corporate* right to sue specifically is an appropriate response to these problems. As Sir Edward Garnier MP asked during debate on the 2013 Act, ‘What is the difference between complaints about financial wealth or strength in the hands of individuals being used

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<sup>1</sup> eg Russell L Weaver, ‘British Defamation Reform: An American Perspective’ (2012) 63(1) Northern Ireland Legal Quarterly 97, 108-09; David Hooper, *Reputations Under Fire: Winners and Losers in the Libel Business* (Little, Brown and Company 2000) 41-44; Douglas W Vick and Linda McPherson, ‘Anglicizing Defamation Law in the European Union’ (1996) 36 Virginia Journal of International Law 933, 967; Tom Bower, *Maxwell: The Final Verdict* (Harper Collins 1995) 78; B J Brown, ‘Latent Effects of Law: The Defamation Experience’ (1992) Singapore Journal of Legal Studies 315; David J Acheson and Ansgar Wohlschlegel, ‘The Economics of Weaponized Defamation Lawsuits’ (2018) 47(3) Southwestern Law Review 335, 373, 376.

<sup>2</sup> Joint Committee on the Draft Defamation Bill, *Written Evidence Volume III* (2010-12, HL 203, HC 930-III) Ev 36, p 147 (The Law Reform Committee) (‘Joint Committee Evidence vol III’).



to bully defendants, compared with financial wealth in the hands of corporate claimants being used to do that?’<sup>3</sup>

A number of points could be made in response. Firstly, if it is, in the words of the Joint Committee on the Draft Defamation Bill, ‘unacceptable that corporations are able to silence critical reporting by threatening or starting libel claims which they know the publisher cannot afford to defend’,<sup>4</sup> then it is no less acceptable simply because some other claimants can use the same tactic to suppress criticism.

Secondly, in some instances ‘a corporate claim [that] is viable, but artificial’<sup>5</sup> can be used by powerful individuals to enhance the chilling effect of their own defamation claims. The addition of a claim in the name of a company associated with the individual claimant can increase the cost and complexity of litigation, and add to the financial risk of losing for the defendant. In *Jameel v Times Newspapers Ltd*, Sedley LJ warned of the need for ‘caution’ in allowing companies to claim alongside their owners or directors:

‘If every libel claimant is able to draw in his wake a string of companies claiming that they have been injured because their proprietor has been, English libel litigation, already something of a honeypot, will become a goldrush.’<sup>6</sup>

Moreover, businesses that are structured as corporate groups are uniquely able to inflate costs by adding together several claims, each brought by a distinct entity within the same overall group. Even if only one company within the group is actually entitled to sue in respect of the statement(s) complained of, the ability to join claims by related companies forces defendants to spend time and resources applying to strike out those brought by inappropriate claimants. The potential complexity of these disputes as to corporate claimants’ standing is illustrated by Gray J’s decision in *Turkot v Oxus Gold plc*<sup>7</sup> that the question whether one of the two corporate claimants was entitled to sue should not be left for a jury, because it was ‘overwhelmingly likely that the documents which will have to be considered

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<sup>3</sup> HC Deb 24 April 2013, vol 561, col 917.

<sup>4</sup> Joint Committee on the Draft Defamation Bill, *Report* (2010-12, HL 203, HC 930-I) para 114 (‘Joint Committee Report’).

<sup>5</sup> *Triplark Ltd v Northwood Hall (Freehold) Ltd* [2019] EWHC 3494 (QB) [13] (Warby J).

<sup>6</sup> *Jameel v Times Newspapers Ltd* [2004] EWCA Civ 983, [36].

<sup>7</sup> [2006] EWHC 3361 (QB).

... will be lengthy and complex'.<sup>8</sup> In some cases, it may even be necessary for the court to hear expert evidence as to the relationship between companies;<sup>9</sup> as explained in Chapter 3, this imposes substantial additional costs on litigants.<sup>10</sup> Since complexity is one of the key factors driving up the cost of libel litigation, the possibility of being faced with multiple claims brought by different companies within a group increases the anticipated cost of litigation for defendants, and in doing so aggravates the chilling effect of corporations' threats to sue.

There were a number of defamation cases in the decade before the 2013 Act came into force that were made significantly more complex by the addition of corporate claimants to claims brought either by individuals or by related companies.<sup>11</sup> The 2013 Act does not seem to have addressed this problem.<sup>12</sup> For example, in *TheHut.com v Trinity Mirror*, the defendant complained of a lack of clarity in the particulars of claim as to the relationship between the two corporate claimants, both of which were owned by the same parent company.<sup>13</sup> The second claimant appears to have existed solely to manufacture products for the first claimant to market and sell.<sup>14</sup> There is an obvious question as to what could possibly be gained by the additional claim by the second claimant, given that its success will have been wholly reliant on the first claimant's business; by contrast, the cost of its claim, in terms of the increased complexity and expense of the litigation, is clear.

In Chapter 3, I argued that the test in s 1 of the 2013 Act may be interpreted in a way that makes claims of this kind less likely to succeed, although it is not yet clear from the cases that this will always be true.<sup>15</sup> In any case, these claims can still be brought, and the evidence and argument on the issue of causation that would be necessary for defendants to defeat them might be substantial. *Undre v London*

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<sup>8</sup> Ibid, [15] (Gray J).

<sup>9</sup> See eg *Gubarev v Orbis Business Intelligence Ltd* [2019] EWHC 162 (QB) [43].

<sup>10</sup> Ch3.B.iii., note 174 and accompanying text.

<sup>11</sup> eg *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701; *Atlantis World Group of Companies NV v Gruppo Editoriale L'Espresso SpA* [2008] EWHC 1323 (QB); *Collins Stewart Ltd v Financial Times Ltd* [2004] EWHC 2337 (QB); *McGrath v Dawkins* [2013] EWCA Civ 206. See David J Acheson, 'Empirical Insights into Corporate Defamation: An Analysis of Cases Decided 2004-2013' (2016) 8(1) *Journal of Media Law* 32, 51-52.

<sup>12</sup> eg *Gubarev* (n 9); *Hope not Hate Ltd v Farage* [2017] EWHC 3275 (QB) (*Hope not Hate* is discussed in more detail below at text to notes 289-299).

<sup>13</sup> *The Hut.com v Trinity Mirror North West & North Wales Ltd* [2018] EWHC 2480 (QB) [7]-[8].

<sup>14</sup> Ibid, [10].

<sup>15</sup> See Ch3.B.i., text to notes 122-130.

*Borough of Harrow* ('*Undre*'),<sup>16</sup> in which claims were brought by a company and its individual owner, is an illustration. The company's claim was struck out on the basis that the statements complained of had not referred to it;<sup>17</sup> but the judgment suggests that the preliminary trial of this issue also involved significant argument in relation to meaning,<sup>18</sup> financial loss,<sup>19</sup> and causation.<sup>20</sup> As Warby J recognized, even this process of striking out a company's claim can potentially be complex, time-consuming, and costly for litigants.<sup>21</sup>

Thirdly, although this is not universally the case, in general corporations seem more likely than even wealthy individuals to have the necessary resources to pursue litigation. Fiona Donson claims that 'Business generally has the kind of money required to undertake a legal action and the ready supply of lawyers needed to advise it'.<sup>22</sup> It has also been argued that, regardless of their size, for-profit corporate claimants are likely to benefit from their litigation costs being tax-deductible:

'Not only [do] companies tend to have deep pockets but the cost of bringing a libel action [is] likely to be set off against the company's profits for tax purposes and the Value Added Tax [can] be reclaimed, neither of which advantages tend[s] to be available to non-corporate defendants.'<sup>23</sup>

Finally, as I argued in Chapter 1, the competing interests of individual defamation claimants, which might justify tolerating some chilling of speech as a necessary cost of protecting reputation, are more compelling than the interests at stake for corporate claimants. Defamatory statements are not capable of causing companies the kind of dignitary, emotional, or privacy-related harms that they can cause to individuals.<sup>24</sup> Because companies' reputational interests are more limited, the importance of ensuring their protection can only justify tolerating a more limited chilling effect on speech. Conversely, I argued in Chapter 2 that the speech chilled

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<sup>16</sup> *Undre v London Borough of Harrow* [2016] EWHC 931 (QB).

<sup>17</sup> *Ibid*, [32].

<sup>18</sup> *Ibid*, [34]-[38].

<sup>19</sup> *Ibid*, [42]-[55].

<sup>20</sup> *Ibid*, [56]-[74].

<sup>21</sup> *Ibid*, [77]-[80].

<sup>22</sup> Fiona Donson, *Legal Intimidation: A SLAPP in the Face of Democracy* (Free Association Books 2000) 14.

<sup>23</sup> David Hooper, Kim Waite and Oliver Murphy, 'The Defamation Act 2013 – What Difference Will It Really Make?' (2013) 24(6) *Entertainment Law Review* 199, 200.

<sup>24</sup> See Ch1.B., text to notes 195-252.

by corporate defamation claims is likely to be public interest speech;<sup>25</sup> the chilling effect problem is ‘most acute’ in this context.<sup>26</sup>

Peter Coe argues that, if significant restrictions are placed on companies’ ability to sue in defamation relative to individual claimants, the resulting ‘inequality’ of treatment would be an ‘injustice’.<sup>27</sup> But corporate claimants are already treated differently from individuals in some respects. As the Joint Committee observed, the courts take into account companies’ more limited reputational interests when assessing damages;<sup>28</sup> the Committee was right to point out that ‘it does not follow that corporations should in other respects have the same rights as individuals to sue for defamation.’<sup>29</sup>

Companies are denied standing altogether in a number of other torts that provide remedies for injuries caused by defendants’ speech, on the grounds that the interests protected by those torts cannot be enjoyed by corporations in the same way as by individuals. For example, companies cannot sue in misuse of private information,<sup>30</sup> because they do not have the personal interests in privacy that the tort is supposed to protect.<sup>31</sup> Companies are not entitled to the civil remedies available under the Protection from Harassment 1997.<sup>32</sup> The fact that a company cannot be a ‘data subject’ for the purposes of the Data Protection Act 2018<sup>33</sup> is also significant, given the increasing use of claims alleging unlawful processing of personal data as an alternative to defamation claims for protecting claimants’ reputational interests.<sup>34</sup>

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<sup>25</sup> At Ch2.B., text to notes 51-153.

<sup>26</sup> Dario Milo, *Defamation and Freedom of Speech* (OUP 2008) 162.

<sup>27</sup> Peter Coe, ‘A Comparative Analysis of the Treatment of Corporate Reputation in Australia and the UK’ in András Koltay and Paul Wragg (eds), *Research Handbook on Comparative Defamation and Privacy Law* (forthcoming, Edward Elgar 2020) 10.

<sup>28</sup> *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44, [27]. However, it is arguable that the degree to which damages are reduced for corporate claimants is not sufficient: see Ch4.B.i., text to notes 111-125.

<sup>29</sup> Joint Committee Report (n 4) para 110 (emphasis omitted).

<sup>30</sup> *OBG Ltd v Allan* [2008] 1 AC 1 (HL) [118].

<sup>31</sup> *R v Broadcasting Standards Commission (ex p BBC)* [2001] QB 885 (CA) [17] (Lord Woolf MR), [48] (Lord Musthills). See generally Tanya Aplin, ‘A Right of Privacy for Corporations?’ in Paul Torremans (ed), *Intellectual Property and Human Rights* (Kluwer Law International 2008).

<sup>32</sup> Protection from Harassment Act 1997, s 7(5). A representative action can be brought by a corporate entity, but it is only available to prevent harassment of individuals associated with the company, not of the company itself. *Smithkline Beecham plc v Avery* [2009] EWHC 1488 (QB) [40]-[43].

<sup>33</sup> Data Protection Act 2018, s 3.

<sup>34</sup> eg *HH Prince Moulay Hicham Ben Abdallah Al Alaoui of Morocco v Elaph Publishing Ltd* [2017] EWCA Civ 29, [44]; David Erdos, ‘Data Protection and the Right to Reputation: Filling the “Gaps”

These examples show that there are already a number of protections offered to claimants' personality interests in English law that are, without any significant controversy, categorically denied to corporate entities. As Vanessa Wilcox explains:

‘... although it is true that a company has whatever rights the law says it can have and technically these *could be* all the rights available to natural persons, the current practice is to expand the law only insofar as is consistent with the tort in question (and the interests it seeks to protect) and the nature of companies (i.e. whether they can conceivably suffer the sort of damage in question).’<sup>35</sup>

There is no need, in principle, for companies to have equivalent rights to individuals to protect their reputational interests in defamation law. As argued throughout this thesis, there are in fact good reasons, both in principle and in practice, to offer less protection to companies' reputations than is available to individuals.

A plausible argument has been presented by several commentators that, when companies were initially held to be entitled to sue in defamation in the late nineteenth century, the differences between the reputational interests of companies and individuals described in Chapter 1 were not sufficiently understood or taken into account.<sup>36</sup> These early decisions extended a line of cases recognizing the right of partnerships to sue in respect of allegations with a tendency to affect their ability to obtain credit or carry on a business.<sup>37</sup> Fiona Patfield argues that this extension of the cause of action from partnerships to corporate claimants ‘occurred at a time when the judges were not yet comfortable with the legal and actual character of incorporated ... associations.’<sup>38</sup>

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After the Defamation Act 2013’ (2014) 73 Cambridge Law Journal 536; Jennifer Agate, ‘Data Protection in Media Litigation’ (2016) 21(2) Communications Law 46.

<sup>35</sup> Vanessa Wilcox, *A Company's Right to Damages for Non-Pecuniary Loss* (Cambridge University Press 2016) 95 (emphasis in original). See also John Armour, ‘Companies and Other Associations’ in Andrew Burrows (ed), *English Private Law* (3<sup>rd</sup> edn, OUP 2013) para 3.17.

<sup>36</sup> Those differences are discussed at Ch1.B., text to notes 195-252.

<sup>37</sup> *Cook v Batchellor* (1802) 3 Bos & P 150 (slander); *Foster v Lawson* (1826) 3 Bing 452 (libel). An even earlier decision had applied criminal libel laws to a statement about the East India Company, which was effectively a partnership: *R v Jenour* (1740) 87 ER 1318.

<sup>38</sup> Fiona Patfield, ‘The Origins of a Company's Right to Sue for Defamation’ (1994) 45(3) Northern Ireland Legal Quarterly 233, 233.

Patfield's criticism is well-illustrated by Watson B's judgment in *Metropolitan Saloon Omnibus Co v Hawkins*,<sup>39</sup> the case in which a company's right to sue was 'first asserted unambiguously'.<sup>40</sup> Watson B observed that partnerships had previously been held to have standing to sue in their own right, and argued:

'... suppose the firm becomes incorporated, ... is the law to afford no protection to them? One of the safeguards to individuals against libel is the remedy by action; and I cannot conceive a proposition more dangerous than this, that because a company is incorporated they have no appeal to a court of justice if they are libelled.'<sup>41</sup>

*Hawkins* was decided before the House of Lords' seminal decision in *Salomon v Salomon & Co*,<sup>42</sup> which recognized for the first time that a corporation has a legal personality distinct from its members. The fact that Watson B referred to the claimant company as 'they', and equated *its* right to sue with the interests of its individual members in being protected from libels, supports Patfield's argument that the corporate right to sue in defamation was established before the courts understood the nature that the modern corporation would come to have as a consequence of the *Salomon* decision.

The Court of Appeal's decision in *South Hetton Coal Company Ltd v North-Eastern News Association Ltd*,<sup>43</sup> which has been described as 'the main foundation of the modern rules concerning the ability of the company to sue for defamation',<sup>44</sup> was also made before *Salomon* was decided. In *South Hetton*, the Court held that a trading corporation could sue in defamation without proof of special damage, relying mainly on *Hawkins* and earlier cases in which the courts had held that partnerships or firms were entitled to sue on that basis.<sup>45</sup> Lord Esher concluded that 'the law of libel is one and the same as to all plaintiffs', and that the presumption of loss applies to all claims, whether brought 'by a person, a firm, or a company.'<sup>46</sup>

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<sup>39</sup> *Metropolitan Saloon Omnibus Co Ltd v Hawkins* (1859) 4 H & N 87.

<sup>40</sup> Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart 2005) 43.

<sup>41</sup> *Hawkins* (n 39) 93.

<sup>42</sup> [1897] AC 22.

<sup>43</sup> *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1893] 1 QB 133 (CA).

<sup>44</sup> Patfield, 'Origins of a Company's Right to Sue' (n 38) 241.

<sup>45</sup> eg *Machester Corp v Williams* [1891] 1 QB 94; *Thorley's Cattle Food Co v Massam* (1880) 14 Ch D 763.

<sup>46</sup> *South Hetton* (n 43) 138.

All three Lords Justices in *South Hetton* recognized the public interest in the subject of the defendant's statements, which related to the conditions of the housing provided by the claimant company for its workers, in relation to the question whether a fair comment defence was capable of being put to the jury. But the claimant's standing to sue was treated as an entirely distinct issue;<sup>47</sup> the Court did not consider whether the public interest in speech about companies, or any other policy consideration, might weigh against the corporate right to sue. David Rolph's criticism of these decisions is difficult to find fault with:

‘... the courts in the late nineteenth century ... erred by simply extending the right to sue in defamation to corporations without adequately reflecting on the nature of corporate reputation and the desirability of allowing corporations to have recourse to defamation law. It is not every right and incident of a natural person that is automatically extended to a corporation. ... Likewise, it did not follow ineluctably that, because individuals could sue for defamation, corporations should be allowed to do so as well.’<sup>48</sup>

Given the questionable basis on which it was initially determined that companies were entitled to sue in defamation, it is reasonable to re-examine the corporate right to sue without attaching much weight at all to the fact that it has been a feature of English defamation law for over a century.

This argument for reconsidering the corporate right to sue in modern defamation law is made stronger by other developments in the law since the nineteenth-century cases discussed above; and, in particular, by the fact that individual reputation is now protected in many cases under Article 8 of the European Convention on Human Rights (‘ECHR’), whereas corporate reputation is not.<sup>49</sup> As Gavin Phillipson has argued, ‘given the new Article 8-focused view of defamation, it seems clear that it is incoherent to treat corporate claimants – [which] have neither personal integrity, feelings nor dignity – identically with natural persons.’<sup>50</sup> The influence of the Convention on domestic defamation law highlights the significant differences

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<sup>47</sup> eg *ibid*, 139-40.

<sup>48</sup> David Rolph, ‘A Critique of the National, Uniform Defamation Laws’ (2008) 16 *Torts Law Journal* 207, 220.

<sup>49</sup> See Ch1.B.i., text to notes 230-255.

<sup>50</sup> Gavin Phillipson, ‘The “Global Pariah”, the Defamation Bill and the Human Rights Act’ (2012) 63(1) *Northern Ireland Legal Quarterly* 149, 185. See also Alastair Mullis and Andrew Scott, ‘Reframing Libel: Taking (All) Rights Seriously and Where it Leads’ (2012) 63(1) *Northern Ireland Legal Quarterly* 5, 18.

between the interests of corporate and individual claimants, and makes it more apparent that treating their claims in ‘one and the same’ way can no longer be justified.

## **B. Alternative remedies available to corporate defamation claimants**

It was claimed several times during debate on the Defamation Act 2013 that abolishing the corporate right to sue in defamation would lead to cases in which companies are denied any effective remedy for real damage caused by false allegations.<sup>51</sup> For example, although the Joint Committee on the Draft Defamation Bill considered that there was ‘merit in continuing to explore’ the possibility of completely removing the right to sue from corporations, it declined to recommend that approach, in part because of concern that:

‘... it would fail to take adequate account of the harm that a serious and irresponsible libel can cause to a corporation’s business. Where a libel leads to serious loss, *there is no adequate alternative remedy to a libel claim.*’<sup>52</sup>

The opposite argument, made by those advocating removal of the corporate right to sue, asserts that there *are* sufficient alternative remedies available to companies harmed by false allegations.<sup>53</sup> In this section, I argue that, although not conceptually satisfying, in practice this is a reasonably strong argument. In many cases, torts other than defamation – especially malicious falsehood – offer companies appropriate and sufficient protection against false allegations.

Some critics of corporate defamation law have asserted that corporations can use mechanisms other than litigation – and particularly ‘counterspeech’<sup>54</sup> – to rebut

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<sup>51</sup> eg Joint Committee Report (n 4) para 112; Jenny Afia and Phil Hartley, ‘Lord Lester’s Defamation Bill 2010: A Practical Analysis’ (2010) 2(2) *Journal of Media Law* 183, 190; Alastair Mullis and Andrew Scott, ‘Worth the Candle? The Government’s Draft Defamation Bill’ (2011) 3(1) *Journal of Media Law* 1, 16.

<sup>52</sup> Joint Committee Report (n 4) para 114 (emphasis added). See also *Jameel* (n 28) [102] (Lord Hope).

<sup>53</sup> eg Culture, Media and Sport Committee, *Press Standards, Libel and Privacy: Report* (HC 361-I 2010) para 178 (‘CMS Committee Report’); English PEN and Index on Censorship, *Free Speech is Not For Sale* (2009) 10 (‘*FSINFS*’).

<sup>54</sup> Deven R Desai, ‘Speech, Citizenry, and the Market: A Corporate Public Figure Doctrine’ (2013) 98 *Minnesota Law Review* 455, 469.



false allegations. For example, the House of Commons Culture, Media and Sport Committee ('CMS Committee') partly justified its proposals for restricting the corporate right to sue on the grounds that companies are often able to 'counter falsehoods and unfounded criticism through publicity campaigns.'<sup>55</sup> Similarly, Alastair Mullis and Andrew Scott claim that 'larger corporations may often have other means available – for example through advertising or by utilising sophisticated public relations machinery to access the public sphere through the media and other routes – to counteract inaccurate claims.'<sup>56</sup>

The argument that companies can use their own speech to counter *specific* defamatory falsehoods is not entirely convincing. It is not necessarily true in all cases;<sup>57</sup> and, as Mullis and Scott imply, it seems particularly unlikely to reflect the options available to smaller companies,<sup>58</sup> which may not have the resources necessary to respond to false allegations with 'rehabilitative advertising or public relations campaigns'.<sup>59</sup> Even for companies that are capable of mounting such campaigns, it is not clear how effective they are likely to be.<sup>60</sup> In *Jameel v Wall Street Journal Europe SPRL* ('*Jameel*'), Lord Bingham doubted the strength of a similar argument because, in his view, 'protestations of innocence by the impugned party necessarily carry less weight with the public than the prompt issue of proceedings which culminate in a favourable verdict by judge or jury.'<sup>61</sup>

In common with the debate on vindictory damages discussed in the previous Chapter,<sup>62</sup> these declarations by judges and legislators about the extent to which corporate counterspeech is an effective remedy for the harm caused by false allegations all appear to be made without reference to any supporting evidence, or even any recognition that they rely on empirical claims that are in principle testable,

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<sup>55</sup> CMS Committee Report (n 53) para 176.

<sup>56</sup> Alastair Mullis and Andrew Scott, 'Something Rotten in the State of English Libel Law? A Rejoinder to the Clamour for Reform of Defamation' (2009) 14(6) *Communications Law* 173, 179. See also Joint Committee Report (n 4) para 110.

<sup>57</sup> Eric Barendt, *Freedom of Speech* (2<sup>nd</sup> edn, OUP 2005) 209.

<sup>58</sup> eg Joint Committee Report (n 4) para 110; Peter Coe, 'Treatment of Corporate Reputation in Australia and the UK' (n 27) 5.

<sup>59</sup> Joint Committee Evidence vol III (n 2) Ev 51 (Media and Communications Committee of the Business Law Section of the Law Council of Australia).

<sup>60</sup> Norman Redlich, 'The Publicly Held Corporation as Defamation Plaintiff' (1995) 39 *St Louis University Law Journal* 1167, 1170.

<sup>61</sup> *Jameel* (n 28) [26].

<sup>62</sup> At Ch4.B.ii., text to notes 126-159.

but in fact untested – and may be wrong. For example, Lord Bingham’s claim that litigation is ‘necessarily’ more effective than counterspeech does not account for the possibility that the decision to sue will ‘backfire’ on a company, by drawing attention to the defamatory allegations and evoking public sympathy for defendants.<sup>63</sup> It would take empirical research to provide some insight as to which of these competing claims is more accurate. As I argued in relation to vindictory damages, however, in the absence of any clear evidence one way or the other, we should be cautious about relying on these claims in support of laws that have a demonstrable negative effect on freedom of speech.

It may be possible for an individual who is closely associated with a company to sue in respect of defamatory statements about the company itself, if an ordinary reader would understand those statements to refer to, and be defamatory of, her individually.<sup>64</sup> Where allegations are made against small businesses, it seems more likely that the individuals who own or manage them would have viable alternative claims,<sup>65</sup> because those individuals are more likely to be seen as having personal control over and responsibility for the activities of the company.<sup>66</sup> There will also be some individuals who are closely connected to larger companies in the public imagination,<sup>67</sup> such as, for example, Mark Zuckerberg of Facebook. It has been claimed that in many cases the ability of these individuals to sue in a personal capacity is sufficient to allow companies to vindicate their reputations against falsehoods, without needing the ability to pursue defamation claims themselves.<sup>68</sup>

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<sup>63</sup> eg *Tesla Motors Ltd v BBC* [2013] EWCA Civ 152, [44]; Peter Coe, ‘The Defamation Act 2013: We Need to Talk about Corporate Reputation’ (2015) 4 *Journal of Business Law* 313, 329; Truda Gray and Brian Martin, ‘Defamation and the Art of Backfire’ (2006) 11(2) *Deakin Law Review* 115; Sue Curry Jansen and Brian Martin, ‘The Streisand Effect and Censorship Backfire’ (2015) 9 *International Journal of Communication* 656.

<sup>64</sup> *Knupffer v London Express* [1944] AC 116 (HL) 120.

<sup>65</sup> Coe, ‘Need to Talk’ (n 63) 332; Perry Herzfeld, ‘Corporations, Defamation and General Damages: Back to First Principles’ (2005) *Media & Arts Law Review* 135, 142-43. See eg *Aspro Travel Ltd v Owners Abroad* [1996] 1 WLR 132.

<sup>66</sup> *Undre v London Borough of Harrow* [2016] EWHC 931 (QB) [21].

<sup>67</sup> Magnus Boyd, ‘The Proposed Restriction on Corporate Bodies to Sue for Defamation’ (Reframing Libel Symposium, London, 4 November 2010) 6, at <<http://reframinglibel.com/2011/03/17/the-proposed-restriction-on-corporate-bodies-to-sue-for-defamation/>>.

<sup>68</sup> CMS Committee Report (n 53) para 176; *FSINFS* (n 53) 10. cf Lord Bingham in *Jameel* (n 28) [21] (expressing doubt that defamatory statements about companies would ordinarily reflect on directors or employees as well).

In conceptual terms, this argument is not particularly convincing. A company's reputation is distinct from the reputations of its owners, directors, or employees; and the individual right to sue of a person associated with a company is distinct from the company's right to sue, even in cases where the same statement harms the reputations of the company and the person simultaneously. The purpose of a defamation claim brought by an individual ought to be to vindicate her personal reputation, not the reputation of her company.<sup>69</sup> The obvious correlate of this point is that such claims can only be of limited value to the company itself, because any vindication of its reputation that the claim achieves will be as an indirect result of the vindication of the individual claimant's reputation, and because the individual claimant would not be permitted to recover damages for any losses suffered by the company.<sup>70</sup>

In terms of legal remedies potentially available to corporations themselves, it is most commonly claimed that malicious falsehood provides an adequate alternative to defamation for companies to sue in respect of false statements.<sup>71</sup> The Libel Reform Campaign, for example, recommended 'exempt[ing] large and medium-sized corporate bodies and associations from libel law unless they can prove malicious falsehood.'<sup>72</sup> To sue in malicious falsehood, a claimant must prove that the statement complained of was false;<sup>73</sup> that the defendant published it maliciously, in that they knew of or were reckless as to its falsity,<sup>74</sup> or were motivated by an intention to injure the claimant;<sup>75</sup> and that the publication caused the claimant special damage.<sup>76</sup> 'Special damage' is limited to pecuniary loss;<sup>77</sup> injury to

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<sup>69</sup> See further text to notes 152-160.

<sup>70</sup> Matt Collins, 'Protecting Corporate Reputations in the Era of Uniform National Defamation Laws' (2008) 13 *Media & Arts Law Review* 447, 456.

<sup>71</sup> See Acheson, 'Empirical Insights' (n 11) 50-51 for discussion of alternative causes of action that have been relied on alongside claims in defamation by corporate claimants.

<sup>72</sup> *FSINFS* (n 53) 2, 10. As originally worded, this proposal does not make sense: whether a corporate claimant 'can prove malicious falsehood' is irrelevant to its ability to sue in libel, because they are separate causes of action. The Libel Reform Campaign presumably meant that larger companies' right to sue in defamation should be removed; but that they would retain the ability to sue in malicious falsehood in appropriate cases.

<sup>73</sup> *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2009] EWHC 781 (QB) [13].

<sup>74</sup> *Kaye v Robertson* [1991] FSR 62 (CA) 67

<sup>75</sup> *White v Mellin* [1895] AC 154 (HL) 160.

<sup>76</sup> *Kaye* (n 74) 67.

<sup>77</sup> *Chamberlain v Boyd* (1883) 11 QBD 407.

reputation will not, in itself, be sufficient to meet the requirement.<sup>78</sup> Malicious falsehood claims most obviously arise from disparaging statements made by claimants' commercial rivals,<sup>79</sup> but there is no need for there to be any particular relationship between the parties.<sup>80</sup>

The suggestion that allegations impacting on the business reputation of a company are best dealt with in malicious falsehood rather than defamation has been criticized on the basis that having to prove falsity, malice, and special damage in the former makes it significantly more difficult for claimants to make out their claims; and that as a result limiting corporate claimants to suing in malicious falsehood might prevent companies with legitimate claims from succeeding in court.<sup>81</sup> Three points could be made in response to this argument.

Firstly, the claim that proving these elements would be *prohibitively* difficult for a significant amount of legitimate corporate claimants may be slightly overstated. The law in fact allows for those requirements to be set aside, or moderated, in various circumstances. For example, malice may in some cases be inferred from 'the nature of the [defendant's] unfounded claim'; the statement complained of 'may be so unfounded that the particular fact that it [was] put forward may be evidence that it [was] not honestly believed' by the defendant.<sup>82</sup> As discussed in Chapter 4,<sup>83</sup> proving falsity is unlikely to be a significant additional burden for claimants in malicious falsehood compared to defamation: although the falsity of statements is presumed in defamation, that presumption is rarely determinative of the outcome of cases, and most claimants will adduce evidence of falsity anyway.<sup>84</sup> In most cases the need to prove falsity 'adds only marginally' to the burden of

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<sup>78</sup> *Joyce v Sengupta* [1993] 1 WLR 337 (CA) 348; *Niche Products Ltd v MacDermid Offshore Solutions LLC* [2013] EWHC 3540 (IPEC) [39].

<sup>79</sup> See Michael A Jones, Anthony M Douglas and Mark Simpson (eds), *Clerk & Lindsell on Torts* (22<sup>nd</sup> edn, 2<sup>nd</sup> supp, Sweet & Maxwell 2019) paras 23.18-23.19; Ch2.B.iii., text to notes 144-152.

<sup>80</sup> eg *Calvet v Tomkies* [1963] 1 WLR 1397 (CA).

<sup>81</sup> Joint Committee Report (n 4) para 112; Coe, 'Need to Talk' (n 63) 328-30; Afia and Hartley (n 51) 189.

<sup>82</sup> *Greers Ltd v Pearman and Corder Ltd* (1922) 39 RPC 406 (CA) 417 (Scrutton LJ).

<sup>83</sup> At Ch4.A.i., text to notes 37-45.

<sup>84</sup> *Metropolitan International Schools Ltd v Designtech Corp* [2011] EWHC 2411 (QB) [5].

proving malice, because in practice the evidence required to prove malice ‘will generally encompass evidence of ... falsity’.<sup>85</sup>

The requirement for special damage is subject to an exception, in s 3 of the Defamation Act 1952, in cases involving publications in a permanent form that ‘are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him’.<sup>86</sup> The word ‘calculated’ in this context refers to the likelihood that the statement will cause pecuniary damage, rather than the defendant’s intention, and requires claimants to show that such damage is ‘more likely than not’.<sup>87</sup> If the exception in s 3 applies, then ‘the absence of a claim in respect of special damage’ is rendered ‘wholly irrelevant’ to liability.<sup>88</sup> This effectively removes any requirement to identify specific financial losses (except for the purpose of assessing quantum<sup>89</sup>) in most claims brought by trading corporations: ‘All that is required ... is identification of the nature of the loss and the mechanism by which it is likely to be sustained.’<sup>90</sup> The test in s 3 is in fact less burdensome than the threshold for companies to sue in defamation since the 2013 Act came into force, in the sense that it does not require claimants to show that the loss likely to be caused by the defendant’s statement was ‘serious’.

Secondly, the cause of action in malicious falsehood may offer claimants other advantages relative to a claim in defamation.<sup>91</sup> For example, there is no requirement for a claimant to show that the statement complained of bore a defamatory meaning;<sup>92</sup> and the fact that the ‘single meaning rule’ used in defamation is not applicable in malicious falsehood means that claimants can recover damages for

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<sup>85</sup> *Philadelphia Newspapers Inc v Hepps* 475 US 767 (1986) 776 (Justice O’Connor). *Hepps* was a defamation case, but Justice O’Connor’s observation is equally applicable to malicious falsehood, because of the falsity and fault requirements imposed on most defamation plaintiffs in the US: see Ch4.A., text to notes 7-100, for discussion of these elements of US defamation law and proposals to replicate them in corporate defamation cases in England.

<sup>86</sup> Defamation Act 1952, s 3(1)(b).

<sup>87</sup> *IBM v Websphere Limited* [2004] EWHC 529 (Ch) [74].

<sup>88</sup> *De Beers Abrasive Products Ltd v International General Electric Company of New York Ltd* [1975] FSR 323 (Ch) 329 (Walton J).

<sup>89</sup> eg *Al-Ko Kober Ltd v Sambhi* [2019] EWHC 2409 (QB) [31].

<sup>90</sup> *Tesla* (n 63) [37] (Moore-Bick LJ).

<sup>91</sup> See generally Richard Parkes and others, *Gatley on Libel and Slander* (12<sup>th</sup> edn, 2<sup>nd</sup> supp, Sweet & Maxwell 2017) para 21.3 (‘*Gatley*’).

<sup>92</sup> *Joyce v Sengupta* (n 78) 341.

losses caused by the effects of false allegations on *some*, but not *all*, of its customers.<sup>93</sup> Malicious falsehood claims are also available in respect of false statements about the claimant's 'business, property or other economic interests',<sup>94</sup> such as those disparaging its goods or services, as well as in respect of allegations against the claimant company itself.

Finally, the fact that it is generally more difficult to sue in malicious falsehood than in defamation does not in itself indicate that the requirements of the claim in malicious falsehood are too onerous, as opposed to the law of defamation being too lenient to claimants. The discrepancy between what claimants need to prove in defamation and malicious falsehood has also been pointed to as an argument for making defamation claims *more* onerous for corporate claimants.<sup>95</sup> Given the prevalence of concerns about the effect that corporate defamation claims can have on public interest speech, in my view the additional burden imposed on claimants in malicious falsehood relative to defamation is an argument *in favour* of restricting companies to suing in the former tort. I argued in Chapter 4 that, in principle, it would be entirely reasonable to require corporate defamation claimants to prove falsity, loss, and fault.<sup>96</sup> But, as Tony Weir pointed out in 1972, a company 'can obtain compensation for any *loss* it can prove to have resulted from a *false* statement *improperly* made by the defendant ... under the rubric of malicious falsehood'.<sup>97</sup> There is no good reason why it ought to be absolved of the need to prove any of the elements emphasized by Weir by bringing a claim in defamation instead.

In common with the argument pointing to the ability of individuals associated with a company to sue in their own names, the fact that in some cases disparaged companies may have alternative claims in malicious falsehood, or any other cause of action, has little in principle to do with whether they should be entitled to sue in defamation. The two torts 'have developed with different characteristics; they make

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<sup>93</sup> *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2010] EWCA Civ 609.

<sup>94</sup> *Marathon Mutual Ltd v Waters* [2009] EWHC 1931 (QB) [9] (HHJ Moloney QC).

<sup>95</sup> eg *Jameel* (n 28) [91] (Lord Hoffman); Hilary Young, 'Rethinking Canadian Defamation Law as Applied to Corporate Claimants' (2013) 46(2) *University of British Columbia Law Review* 529, 550-51.

<sup>96</sup> At Ch4.A., text to note 100.

<sup>97</sup> J A Weir, 'Local Authority v. Critical Ratepayer – A Suit in Defamation' (1972) 30(2) *Cambridge Law Journal* 238, 239 (emphasis in original).

different demands on the parties; and they offer redress for different things.’<sup>98</sup> However, in practice, both arguments are in fact stronger than they initially seem: corporate defamation claimants *do* often have alternative remedies with which to vindicate their reputations, whether through other causes of action or through defamation claims brought by associated individuals.

Most companies that succeed with defamation claims in the courts do so alongside individual claimants. Between 2004 and 2013, there were findings of liability in twelve reported corporate defamation cases; in nine of those cases, the corporate claimants sued alongside associated individuals, whose claims in respect of the same or substantially similar publications were also successful.<sup>99</sup> Many of the corporate claims in these cases do not appear to have achieved anything substantial that could not have been achieved through the individual’s claim alone. For instance, in *Applause Store Productions Ltd v Raphael*, the meaning attributed to the statements complained of by the claimant company was ‘that *as a result of [the individual claimant’s] conduct* [as falsely alleged by the defendant] the company is not to be trusted in the financial conduct of its business and represents a serious credit risk.’<sup>100</sup> As the sting of this allegation is entirely ‘consequential’ on the defamatory imputations against the individual claimant,<sup>101</sup> the company’s reputation would have been vindicated by its director’s successful claim. Nevertheless, HHJ Richard Parkes QC awarded the company (which had not proven any actual loss<sup>102</sup>) £5,000 in general damages, in addition to the individual claimant’s award of £15,000.<sup>103</sup>

In many cases, companies themselves also have viable alternatives to their defamation claims. In the decade preceding the 2013 Act, of the three successful

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<sup>98</sup> *Ajinomoto Sweeteners* (n 93) [30] (Sedley LJ).

<sup>99</sup> Acheson, ‘Empirical Insights’ (n 11) 51.

<sup>100</sup> *Applause Store Productions Ltd v Raphael* [2008] EWHC 1781 (QB) [79] (emphasis added).

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*, [76].

<sup>103</sup> *Ibid.*, [79]. Similarly, in *The Bussey Law Firm PC v Page* [2015] EWHC 563 (QB), claims were brought by both a law firm and the sole partner after whom that firm was named, in respect of a single online review which only directly referred to the individual claimant. Although it seems likely that the firm’s reputation would have been substantially vindicated by the finding of liability and £45,000 general damages awarded to the individual claimant, Eady J still considered an additional award of £25,000 necessary to vindicate the reputation of the firm itself ([13]-[14]). See also *Robins v Kordowski* [2011] EWHC 1912 (QB) [19].

corporate defamation claimants that did not sue alongside an individual claimant, two would probably have been able to make out claims in malicious falsehood if necessary.<sup>104</sup> The same theme has continued since the 2013 Act came into force. In *Pirtek (UK) Ltd v Jackson*, the claimant was also awarded default judgment in respect of its malicious falsehood claim.<sup>105</sup> The corporate claimant in *Al-Ko Kober Ltd v Sambhi* succeeded with a claim in malicious falsehood,<sup>106</sup> and sued alongside an individual whose claim under the Data Protection Act succeeded in respect of the same publications;<sup>107</sup> in fact, the company's claim in defamation was not added until *after* an injunction against further publication had been awarded in the malicious falsehood and data protection actions.<sup>108</sup> The claimant in *Seventy Thirty Ltd v Burki*, in contrast, was *not* successful with its alternative claim in malicious falsehood.<sup>109</sup> However, as I argued in Chapter 3, in my view the judge was wrong to find in favour of the company in respect of its defamation claim, so the decision reached on its malicious falsehood claim was the preferable outcome.<sup>110</sup> The verdict in favour of the claimant has since been reversed by the Court of Appeal, although at the time of writing the Court's judgment has not been published.<sup>111</sup>

The claimant law firm in *Brett Wilson LLP v Person(s) Unknown* may have been in a more difficult position. It had acted for the Law Society in its litigation against Rick Kordowski in relation to the Solicitors from Hell website, which had resulted in orders being made to close the website down.<sup>112</sup> Subsequently, Brett Wilson LLP was itself targeted on a new website with a similar name, but it was not possible to ascertain the identity of the party responsible for publishing the new website. Warby J, ruling that the firm's defamation claim could be brought against 'person(s) unknown', expressed the view that 'the reason why the defendants are not present

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<sup>104</sup> *Creative Resins International Ltd v Glasslam Europe Ltd* [2005] EWHC 777 (QB), [2006] EWHC 182 (QB), [2006] EWHC 3159 (QB); *Jon Richard Ltd v Gornall* [2013] EWHC 1357 (QB). See Acheson, 'Empirical Insights' (n 11) 52-53.

<sup>105</sup> *Pirtek (UK) Ltd v Jackson* [2017] EWHC 2834 (QB) [62].

<sup>106</sup> *Al-Ko Kober* (n 89) [23].

<sup>107</sup> *Ibid*, [26].

<sup>108</sup> *Ibid*, [4]. The injunction was awarded in *Al-Ko Kober Ltd v Sambhi* [2017] EWHC 2474 (QB).

<sup>109</sup> *Seventy Thirty Ltd v Burki* [2018] EWHC 2151 (QB) [268]-[270].

<sup>110</sup> At Ch3.B.iii., text to notes 201-215.

<sup>111</sup> See Ch3.B., note 81 and accompanying text.

<sup>112</sup> *Law Society v Kordowski* [2011] EWHC 3185 (QB).



or represented at this hearing is that they wish to remain anonymous, and are “hiding”. They have decided, in my judgment, to avoid engaging with the court process.<sup>113</sup> In the particular circumstances of this case, given that no specific defendant could be identified, it would presumably have been impossible for the claimant firm to prove that the statements complained of had been published maliciously, and therefore an action in malicious falsehood would not have been viable.<sup>114</sup> The judgment contains no reference to any statements on the defendant’s website that referred to specific individuals, so the firm would also have been unable to benefit from the indirect vindication of its reputation that might have resulted from successful individual claims.

There may be rare cases, such as *Brett Wilson*, in which corporate claimants are forced to pursue defamation claims as their ‘last chance’ to obtain vindication against particularly intransigent defendants.<sup>115</sup> A similar example is *Metropolitan International Schools Ltd v Designtecnica Corp*,<sup>116</sup> the only reported case in the decade before the 2013 Act in which a corporate claimant succeeded with a defamation claim and may not have had a viable alternative for vindicating its reputation in the courts.<sup>117</sup> In that case, the US-based defendant had chosen not to respond to the claim (apart from by removing the statement complained of from its website).<sup>118</sup> Claimants in cases like this may, if the corporate right to sue in defamation is removed, be left without a legal remedy for their reputational injuries. But there have been two such claimants in all of the reported corporate defamation cases in the last fifteen years.

In practice it seems that companies often *can* rely on causes of action other than defamation to protect their reputations against false allegations. If in most cases companies can achieve at least some vindication without recourse to defamation claims, then it becomes questionable whether the corporate right to sue in defamation is really necessary to ensure sufficient protection for companies’

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<sup>113</sup> *Brett Wilson LLP v Person(s) Unknown* [2015] EWHC 2628 (QB) [16].

<sup>114</sup> This is because the test for ‘malice’ in malicious falsehood is subjective rather than objective: *Cruddas v Calvert* [2015] EWCA Civ 171, [111].

<sup>115</sup> Acheson, ‘Empirical Insights’ (n 11) 61.

<sup>116</sup> *Metropolitan International Schools* (n 84).

<sup>117</sup> Acheson, ‘Empirical Insights’ (n 11) 53.

<sup>118</sup> *Metropolitan International Schools* (n 84) [9].

reputational interests. Under Art 10(2) ECHR, restrictions on freedom of speech are only permissible if ‘necessary in a democratic society’.<sup>119</sup> Corporate defamation law imposes significant restrictions on defendants’ freedom of speech, as well as having a chilling effect on the freedom to criticize companies more generally, for the purpose of protecting companies’ reputations.<sup>120</sup> If it is not *necessary* for that purpose, then its impact on freedom of speech is unjustifiable.

*i. Potential for corporate claimants to abuse alternative legal remedies*

The converse of the argument that companies can often rely on causes of action other than defamation to protect their reputations is that, because of these alternative claims, removing companies’ right to sue in defamation would not be an effective way to address the chilling effect of corporate defamation law. If companies have alternative options allowing them to sue in respect of reputational harm, then they can abuse those alternative options to chill legitimate criticism in the same way they can currently use defamation claims.<sup>121</sup> To some extent this is true; however, in this section I argue that it is not a convincing argument for retaining the corporate right to sue in defamation.

Reforms to the law of defamation in Australia in 2005, which will be discussed further below,<sup>122</sup> removed the right of most companies to sue in defamation.<sup>123</sup> One of the main motivations for those reforms was the perception that large companies were using the threat of defamation claims to chill critical reporting on their activities.<sup>124</sup> A year after those reforms took effect, Mark Pearson reported anecdotal evidence that journalists felt able to be more robust in their criticism of

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<sup>119</sup> See Ch2.A., text to notes 8-11.

<sup>120</sup> See generally Ch2.C., text to notes 154-335.

<sup>121</sup> eg Jane E Kirtley, ‘Vanity and Vexation: Shifting the Focus to Media Conduct’ (1996) 4(3) William & Mary Bill of Rights Journal 1069, 1080.

<sup>122</sup> At text to notes 234-253.

<sup>123</sup> Civil Law (Wrongs) Act 2002 (Australian Capital Territory) s 121; Defamation Act 2006 (Northern Territory) s 8; Defamation Act 2005 (New South Wales) s 9; Defamation Act 2005 (Queensland) s 9; Defamation Act 2005 (South Australia) s 9; Defamation Act 2005 (Tasmania) s 9; Defamation Act 2005 (Victoria) s 9; Defamation Act 2005 (Western Australia) s 9. Hereafter referred to for simplicity as ‘Defamation Act 2005 (Aus)’.

<sup>124</sup> Attorney General’s Task Force on Defamation Law Reform, *Defamation Law: Proposals for Reform in NSW* (September 2002) 14.

large corporations.<sup>125</sup> This sentiment was echoed in evidence given to the Joint Committee on the Draft Defamation Bill (in the UK) five years later that ‘the corporations provision has had a significant liberalising effect on the ability of the Australian media to report on the activities of corporations.’<sup>126</sup> But others were less confident that the reforms had alleviated the significant chilling effect on newspapers’ reporting about business that had been identified in empirical studies before they were enacted.<sup>127</sup> In a study conducted *after* the reforms, Andrew Kenyon and Tim Marjoribanks identified a similar chill on reporting of the corporate sector.<sup>128</sup> They pointed to the threat of lawsuits asserting other causes of action, or brought by individuals associated with companies, as possible explanations for the continued chilling of speech about corporate activities.<sup>129</sup>

David Rolph has argued that the Australian law removing the right to sue from companies may also have had the unintended consequence of making it *easier*, in some cases, for them to suppress critical speech, in particular by obtaining pre-publication injunctions.<sup>130</sup> Rolph cites the case *Beechwood Homes (NSW) Pty Ltd v Camenzuli*,<sup>131</sup> in which a corporate claimant, unable to sue in defamation, opted instead to file claims for injurious falsehood (equivalent to malicious falsehood in English law) and a statutory cause of action related to fair trading. In doing so, it was able to obtain an injunction prohibiting publication of the statements complained of, even though that remedy would not have been awarded had its claim been for defamation, because of the traditional aversion to prior restraints in that tort.<sup>132</sup> Rolph rightly argues that this decision risks undermining the free speech benefits of the Australian law that removed companies’ right to sue in defamation.<sup>133</sup> However, it seems unlikely that the same outcome would be reached

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<sup>125</sup> Mark Pearson, ‘A Review of Australia’s Defamation Reforms After a Year of Operation’ (2007) 29(1) *Australian Journalism Review* 41.

<sup>126</sup> Joint Committee Evidence vol III (n 2) Ev 51 (The Media and Communications Committee of the Business Law Section of the Law Council of Australia).

<sup>127</sup> Chris Dent and Andrew T Kenyon, ‘Defamation Law’s Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers’ (2004) 9 *Media & Arts Law Review* 89.

<sup>128</sup> Andrew T Kenyon and Tim Marjoribanks, ‘Chilled Journalism? Defamation and Public Speech in US and Australian Law and Journalism’ (2012) 23(2) *New Zealand Sociology* 18, 30.

<sup>129</sup> *Ibid.*

<sup>130</sup> David Rolph, ‘Corporations’ Right to Sue for Defamation: An Australian Perspective’ (2011) 22(7) *Entertainment Law Review* 195, 199-200.

<sup>131</sup> [2010] NSWSC 521.

<sup>132</sup> Rolph, ‘Australian Perspective’ (n 130) 199-200.

<sup>133</sup> *Ibid.*

in England, where the rule in *Bonnard v Perryman*<sup>134</sup> against awarding pre-publication injunctions in (most) defamation cases ‘applies equally to claims of malicious falsehood’.<sup>135</sup> As such, Rolph’s argument that the approach taken to corporate defamation reform in the Defamation Act 2013 was preferable to that adopted in Australia (insofar as that argument is based on the claim that the 2013 Act ‘avoids’ this consequence of the Australian reforms<sup>136</sup>) is mistaken.<sup>137</sup>

The broader argument, that it may be possible for corporations to stifle criticism by threatening to sue in causes of action other than defamation, is not unreasonable. One recent English case that seems to illustrate the potential problem is *Pharmacy2U Ltd v The National Pharmacy Association*,<sup>138</sup> in which the claimant (P2U) applied for an order that would require the defendant (the NPA) to identify all recipients of a notice it had sent to its members for further distribution to their customers. The claimant alleged that the notice, which was critical of its business practices, infringed the trade mark in its brand name. Master Clark refused to grant the order, expressing concern that disclosing the recipients’ names would allow the claimant company to use threats of litigation to “pick off” the individual members, without ever having to submit to a judicial determination of the merits of its claim.’<sup>139</sup> He went on:

‘These concerns are reinforced to a degree by P2U’s conduct to date. When it first wrote to NPA in December 2017, it alleged that the statements in the Notice were untrue, and threatened claims for defamation and malicious falsehood. Following NPA’s solicitors’ response, these were withdrawn.’<sup>140</sup>

The NPA chairperson at the time was also threatened with a defamation suit,<sup>141</sup> and has expressed his belief that the company ‘thought [it] would have better luck

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<sup>134</sup> [1891] 2 Ch 269 (CA). The prohibition on granting interim injunctions in defamation except for in exceptional cases, which stems from the decision in *Bonnard v Perryman*, has not historically been as influential in Australia: *Gatley* (n 91) para 25.7.

<sup>135</sup> *Al-Ko Kober Ltd v Sambhi* [2017] EWHC 2474 (QB) [6] (Whipple J); *Bestobell Paints Ltd v Bigg* [1975] FSR 421 (Ch).

<sup>136</sup> David Rolph, ‘A Critique of the Defamation Act 2013: Lessons for and from Australian Defamation Law Reform’ (2016) 21(4) *Communications Law* 116, 119.

<sup>137</sup> There are some causes of action that might overlap with a company’s defamation claim in which the *Bonnard v Perryman* rule does not apply, including, for example, claims of trade mark infringement: *Boehringer Ingelheim Ltd v Vetplus Ltd* [2007] EWCA Civ 583, [44].

<sup>138</sup> [2018] EWHC 3408 (Ch).

<sup>139</sup> *Ibid.*, [31].

<sup>140</sup> *Ibid.*, [32].

<sup>141</sup> *Ibid.*

threatening an individual, rather than an organisation’, and that it was forced to change its legal strategy to one claiming trade mark infringement when it ‘had to accept that everything in the notice was true and [it] couldn’t sue for defamation.’<sup>142</sup> If companies are denied standing in defamation, it may be that many will use the same tactic, and seek to stifle criticism with other types of claim.

However, there is a reason that P2U initially threatened to sue in defamation. As Rolph notes, companies in Australia that ‘have been compelled to rely on alternative causes of action’ have not usually done so successfully.<sup>143</sup> For a number of reasons, defamation claims are particularly conducive to being used to silence legitimate criticism.<sup>144</sup> Claimants suing in defamation benefit from a number of rules which make it easier for them to construct a claim that can plausibly be presented as having some chance of succeeding in court.<sup>145</sup> For example, the presumption of malice effectively makes defamation a strict liability tort, removing in most cases the need for the claimant to demonstrate the defendant’s fault,<sup>146</sup> and the presumption of falsity also favours claimants.<sup>147</sup> As explained in Chapter 2, the complexity of defamation law results in costly and unpredictable litigation, which enhances the effectiveness of companies’ threats to sue critics.<sup>148</sup> Claimants are able to use the ‘single meaning rule’ to generate extensive technical argument in the preliminary stages of litigation.<sup>149</sup> The Defamation Act 2013 did not address these

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<sup>142</sup> Grace Lewis, ‘Ian Strachan: Pharmacy2U Threatened to Sue and Report Me to the GPhC’ (*Chemist & Druggist*, 17 December 2018).

<sup>143</sup> Rolph, ‘Australian Perspective’ (n 130) 179.

<sup>144</sup> See eg Collins, ‘Protecting Corporate Reputations’ (n 70) 453-55. In their work on SLAPPs in the US, Pring and Canan identified six categories of claim that were used to suppress legitimate criticism of companies, but defamation claims were the most frequently chosen. The other five categories identified were: ‘business torts’, such as unfair interference with contract or unfair competition; conspiracy; ‘judicial or administrative process violations’, such as malicious prosecution; ‘violation of constitutional or civil rights’; and ‘other violations’, such as nuisance, trespass, or invasion of privacy (George W Pring and Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* (Temple University Press 1996) 150-51).

<sup>145</sup> See eg Milo (n 26) 11; Mariette Jones, ‘The Defamation Act 2013: A Free Speech Retrospective’ (2019) 24(3) *Communications Law* 117, 119.

<sup>146</sup> *Gatley* (n 91) para 1.8.

<sup>147</sup> Elizabeth Samson, ‘The Burden to Prove Libel: A Comparative Analysis of Traditional English and U.S. Defamation Laws and the Dawn of England’s Modern Day’ (2012) 20 *Cardozo Journal of International & Comparative Law* 771, 776.

<sup>148</sup> At Ch2.C.ii., text to notes 166-191.

<sup>149</sup> Andrew Scott, ‘“*Ceci n’est pas une pipe*”: The Autopoietic Inanity of the Single Meaning Rule’ in Andrew T Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press 2016) 40. See the critical remarks of Saini J in *Banks v Cadwalladr* [2019] EWHC 3451 (QB) [6]-[11].

elements of the law; and although it did abolish the presumption of harm, the serious financial loss test in s 1(2) has generally been interpreted favourably for claimants,<sup>150</sup> and may in some cases have provided companies with an additional way to increase the complexity of litigation.<sup>151</sup> Even if the abuse of defamation lawsuits by companies is only part of a broader problem with their abuse of litigation generally, it is the most serious part of that problem, and it warrants addressing in its own right.

As well as the potential for companies to abuse laws other than defamation, the CMS Committee also identified the possibility that ‘corporations wishing to exploit libel laws to stifle criticism’ could ‘[make] use of an individual as a “front person” to act for them in defamation litigation’ as a ‘practical difficult[y]’ with removing the corporate right to sue.<sup>152</sup> In a recent example of this strategy being used, Richard Tice, a director of the Brexit Party (which is registered as a private company<sup>153</sup>), threatened to sue MEP Alyn Smith for defamation after he referred to the Party as a ‘shell company that’s a money-laundering front’.<sup>154</sup> Despite the unambiguous authority precluding political parties from suing in defamation,<sup>155</sup> and the fact that Smith’s statement referred directly to the Party itself, Tice’s lawyers asserted in their letter before action that ‘any viewer who was aware that Mr Tice was the chairman of the Brexit Party would conclude that you were alleging that Mr Tice is himself running a money laundering operation’,<sup>156</sup> and Smith issued an apology.<sup>157</sup> But, in a statement released in response to Smith’s apology, Tice declared that he would ‘not hesitate to take action against those who make false claims about the Brexit Party, and by implication those of us who run it’,<sup>158</sup> which raises the suspicion that the central concern motivating the threat to sue Smith was with his criticism of *the Brexit Party*, which is precluded from suing in its own name.

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<sup>150</sup> See Ch3.B.iii., text to notes 156-264.

<sup>151</sup> See Ch3.B.iv., text to notes 282-285.

<sup>152</sup> CMS Committee Report (n 53) para 175.

<sup>153</sup> <<https://beta.companieshouse.gov.uk/company/11694875>>.

<sup>154</sup> Kieran Andrews, ‘Farage Party Threatens to Sue MEP’ (*The Times*, 30 May 2019) 10.

<sup>155</sup> *Goldsmith v Bhojru* [1998] QB 459.

<sup>156</sup> ‘Brexit Party Chief Threatens to Sue SNP MEP over Funding Claim’ (*BBC News*, 29 May 2019) <<https://www.bbc.co.uk/news/uk-scotland-scotland-politics-48445241>>.

<sup>157</sup> ‘Alyn Smith: SNP MEP apologises over Brexit Party “money laundering” claim’ (*BBC News*, 17 June 2019) <<https://www.bbc.co.uk/news/uk-scotland-scotland-politics-48664373>>.

<sup>158</sup> *Ibid.*

For the removal of the corporate right to sue to effectively address the chilling effect of legal threats, the courts would need to be aware of the risk that the reform could be undermined if individuals associated with companies could too easily sue in their own names in respect of critical statements directed at companies themselves. It may not always be easy, or even possible, for courts to distinguish the kind of individual claims discussed in the previous section, which are legitimately brought to protect the reputation of an individual but which also offer some indirect vindication for a company's reputation,<sup>159</sup> from claims brought in the name of an individual for the primary purpose of protecting the reputation of a company with which they are associated. However, cases such as *Duke v University of Salford*, in which a university's claim was struck out on the basis that it was actually brought to protect the reputations of individual managers,<sup>160</sup> suggest that, if necessary, the courts would be capable of identifying individual claimants' attempts to circumvent a rule barring companies from suing in their own names. Similarly, there are a number of cases that illustrate the courts' capacity to identify attempts by corporate claimants to sue in respect of reputational harm in causes of action other than defamation.<sup>161</sup> There will be cases in which companies are able to effectively stifle legitimate criticism by threatening to sue in a cause of action such as malicious falsehood, or by threatening a defamation suit by an individual proxy. But that is no reason for them to retain the ability to sue in defamation in their own right, which is even more effective – and far more frequently used – as a tool with which to silence critics.

### **C. The scope of the proposed reform**

One important question has yet to be answered: *which* claimants should be denied standing to sue in defamation? In what remains of this chapter, I argue that the answer to that question should be: *all* entities other than individual human beings.

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<sup>159</sup> See text to notes 64-88 and 99-103 above.

<sup>160</sup> *Duke v University of Salford* [2013] EWHC 196 (QB) [23].

<sup>161</sup> eg *Service Corporation International plc v Channel Four Television* [1999] EMLR 83 (Ch) 89; *Tillery Valley Foods v Channel Four Television* [2004] EWHC 1075 (Ch) [21]; *Lonrho plc v Fayed (no 5)* [1993] 1 WLR 1489 (CA) 1493.

The Joint Committee on the Draft Defamation Bill recognized the ‘enormous variety in the size, available resources and influence of corporations.’<sup>162</sup> The arguments for denying companies standing that have been presented so far in this thesis will not necessarily be equally convincing across the wide range of possible contexts in which defamation claims might be brought by corporate claimants.<sup>163</sup> Given that defamation cases often vary significantly on their facts,<sup>164</sup> it might be argued that rather than denying standing entirely to a whole class of claimants, examining the particular circumstances of each individual case would be a fairer and more reasonable way to identify and address problematic cases. Gary Chan, for example, cautions against taking ‘a blunderbuss approach to deny all or some corporations their claims in defamation’ based on issues, such as an inequality of arms between the parties, that exist in only some cases.<sup>165</sup>

For Dario Milo, who advocates reforms to strengthen the protection of ‘public speech’ in defamation law, the identity of some corporate claimants will be indicative of the public interest value of speech in their cases. He suggests that ‘most critical speech about large corporations will ... as a matter of general principle’ warrant the enhanced protection from defamation claims that he argues should be given to public interest speech.<sup>166</sup> However, Milo argues that the claimant’s identity ‘can be no more than a point of departure; it would be incorrect to elevate the status of the claimant to a threshold enquiry conclusive of the public nature of the speech’ at issue in the case.<sup>167</sup> The argument I will put forward below is that Milo does not go far enough in treating the fact that a claimant is a (large) corporation as merely *indicative* of the need to protect the defendant’s speech from defamation claims. Instead, the fact that a claimant is a corporation (of *any* size) should be the *determinative* factor that precludes it from suing in defamation.

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<sup>162</sup> Joint Committee Report (n 4) para 118.

<sup>163</sup> See generally Acheson, ‘Empirical Insights’ (n 11) 39-40.

<sup>164</sup> *Cassell & Co Ltd v Broome* [1972] AC 1027 (HL) 1071.

<sup>165</sup> Gary K Y Chan, ‘Corporate Defamation: Reputation, Rights and Remedies’ (2013) 33(2) *Legal Studies* 264, 281.

<sup>166</sup> Milo (n 26) 145 (citation omitted).

<sup>167</sup> *Ibid.*



*i. Categorical vs case-by-case approaches to deciding standing*

The above discussion suggests that there are two broad approaches that might be used to restrict companies' ability to sue in defamation to protect public interest speech.<sup>168</sup> The first, which I will call the 'categorical' or 'definitional' approach, uses a relatively simple rule to define a category of cases in which the right to sue will be restricted. That restriction applies in all cases that fall within the relevant category, regardless of the specific circumstances of each individual case.<sup>169</sup> The second, which I will call the 'case-by-case' or 'circumstantial' approach, requires courts to assess the particular circumstances of each individual case, taking into account various factors that might be relevant to whether it is appropriate to recognize the claimant's standing. I will avoid the term 'ad hoc' balancing, which is used to describe this latter approach in some literature, because it implies that courts will carry out these case-by-case assessments in an unprincipled way.<sup>170</sup> On the contrary, the exercise will be guided by principles developed in the relevant case law.<sup>171</sup> As Eric Barendt notes, these two approaches are not completely distinct from one another.<sup>172</sup> The application of a categorical rule to individual cases will, of course, require some examination of the circumstances of those cases, depending on the criteria by which the category in question is defined.<sup>173</sup>

The key advantage of the definitional approach is that it makes it easier to predict in advance how a given case is likely to be dealt with by the courts.<sup>174</sup> In effect, the categorical rule is used as a heuristic or proxy; allowing a simpler and less fact-

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<sup>168</sup> This account is based on Barendt, *Freedom of Speech* (n 57) 205-26, which in turn draws on Melville B Nimmer, 'The Right to Speak from *Times* to *Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy' (1968) 56(4) California Law Review 935.

<sup>169</sup> Barendt, *Freedom of Speech* (n 57) 205. See also Nimmer (n 168) 944. To clarify, categorical rules will not necessarily offer *absolute* protection to speech (Barendt, *Freedom of Speech* (n 57) 226). The distinction is that, under a categorical approach, whatever mechanism is used to enhance the protection of speech applies in *all* cases in the relevant category, *because* they fall into that category.

<sup>170</sup> Thomas I Emerson, 'Toward a General Theory of the First Amendment' (1963) 72(5) Yale Law Journal 877, 912-14. This negative connotation appears to have been intentional in Nimmer's description of the approach: Nimmer (n 168) 938-42.

<sup>171</sup> Milo (n 26) 139.

<sup>172</sup> Barendt, *Freedom of Speech* (n 57) 226.

<sup>173</sup> See eg the discussion of the US 'public figure' test at text to notes 222-233 below.

<sup>174</sup> Eric Barendt, 'Balancing Freedom of Expression and the Right to Reputation: Reflections on *Reynolds* and Reportage' (2012) 63(1) Northern Ireland Legal Quarterly 59, 55-56.

sensitive test to stand in for a detailed assessment of the relative merits of individual claims and their likely effects on freedom of speech. This predictability allows publishers to make more informed decisions about whether to publish defamatory allegations in the first place.<sup>175</sup> As discussed in Chapter 2, publishers' uncertainty about the outcome of potential defamation litigation is a significant driving force behind the 'chilling effect', which can keep important information about corporate activities hidden from the public.<sup>176</sup> This kind of uncertainty in the law 'is always unfortunate, but it is particularly pernicious where speech is concerned because it tends to deter all but the most courageous ... from entering the market place of ideas.'<sup>177</sup> By reducing uncertainty, the use of clear and predictable categorical rules to protect public interest speech can be an effective way to alleviate the law's chilling effect on publishers.

The alternative 'case-by-case' or 'circumstantial' approach has the benefit of reducing the likelihood that the rigid application of a bright-line rule will lead to unjust outcomes in some cases. It allows courts more flexibility to decide the outcome of a given case on the peculiar features of that case, which one would hope would facilitate fairer decisions.<sup>178</sup> However, one of the arguments in favour of the definitional approach is that this is not always true in practice. Definitional balancing reduces the discretion that judges have to take case-specific factors into account, thereby guarding against the perceived risk that they 'might be inclined ... to place undue emphasis on the particular harm suffered by the [claimant] and so might ignore the long-term effects on free speech brought about by an award of damages.'<sup>179</sup>

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<sup>175</sup> Frederick Schauer, 'Fear, Risk and the First Amendment: Unraveling the Chilling Effect' (1978) 58 *Boston University Law Review* 685, 732.

<sup>176</sup> See Ch2.C.ii., text to notes 166-191.

<sup>177</sup> Nimmer (n 168) 939. See also Wayne Batchis, 'On the Categorical Approach to Free Speech – and the Protracted Failure to Delimit the True Threats Exception to the First Amendment' (2016) 37(1) *Pace Law Review* 1, 36.

<sup>178</sup> Eric Barendt, 'Balancing Freedom of Expression and the Right to Reputation' (n 174) 65-66.

<sup>179</sup> Barendt, *Freedom of Speech* (n 57) 205. Barendt does not necessarily endorse this argument, which he views as a reflection of the primacy of speech in the US legal tradition, which in comparison to European tradition places less value on individual interests in privacy or reputation: Barendt, 'Balancing Freedom of Expression and the Right to Reputation' (n 174) 56-57. For support for this argument from the US, see eg Daniel A Farber, 'The Categorical Approach to Protecting Speech in American Constitutional Law' (2009) 84(3) *Indiana Law Journal* 917, 932; Batchis (n 177) 28-30.

English defamation law has not historically protected public interest speech using categorical rules;<sup>180</sup> instead, courts typically approach the issue on a case-by-case basis.<sup>181</sup> The same is true of the approach that the European Court of Human Rights ('ECtHR') takes to analysing cases in which there is a conflict between reputation and freedom of expression.<sup>182</sup> The ECtHR's Art 10 case law does identify broad categories of speech, such as political speech, that are considered generally to deserve greater protection than other categories, such as commercial speech,<sup>183</sup> and similar categories have been recognized in English law.<sup>184</sup> But these 'categories' of speech are not used as the basis of categorical rules.<sup>185</sup> Even in cases involving 'political' speech, the most-protected category in the ECtHR's 'hierarchy', the type of speech at issue is not the only factor that might influence the outcome of the case: 'the possibility that this factor may be decisive [in the outcome of the case] does not excuse the court from an intense focus upon the facts'.<sup>186</sup> Instead, the type of speech at issue is one factor that courts will consider when assessing the relative importance of speech and reputation in the particular circumstances of each individual case.<sup>187</sup>

It has rightly been pointed out that, because the ECtHR engages in case-by-case balancing to resolve conflicts between speech and reputation, the extent to which it would be consistent with the UK's Convention obligations for the English courts to adopt a definitional approach in defamation cases may be limited.<sup>188</sup> However, this does not represent a barrier to adopting a definitional approach with respect to corporate claimants, because their reputational interests, unlike those of individual claimants, do not engage Art 8 of the Convention.<sup>189</sup> In corporate defamation

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<sup>180</sup> *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277 (HL) 301 (Lord Cooke).

<sup>181</sup> See Defamation Act 2013, s 4(2); *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL) 196-97.

<sup>182</sup> eg *Krasulya v Russia* (2007) 45 EHRR 40, paras 35-36.

<sup>183</sup> eg *Lingens v Austria* [1986] ECHR 7, para 42 (political speech); *Markt Intern Verlag GmbH v Germany* [1989] ECHR 21, para 33 (commercial speech).

<sup>184</sup> eg *R v Secretary of State for the Home Department (ex p Simms)* [2000] 2 AC 115 (HL) 126; *Campbell v MGN Ltd* [2004] UKHL 22, [147].

<sup>185</sup> *Reynolds* (n 181) 204.

<sup>186</sup> *Rocknroll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch) [31] (Briggs J).

<sup>187</sup> See Ch2.B.ii., text to notes 43-50, on the *Reynolds* and s 4 defences (note 181 above).

<sup>188</sup> eg Barendt, 'Balancing Freedom of Expression and the Right to Reputation' (n 174) 67.

<sup>189</sup> See Ch1.C.i., text to notes 230-255. Jan Oster also argues that the ECHR requires the interests in corporate reputation and freedom of expression to be balanced on a case-by-case basis (Jan Oster, 'The Criticism of Trading Corporations and their Right to Sue for Defamation' (2011) 2(3) *Journal of European Tort Law* 255, 263, 266, 270). But the argument is based on his view that A1P1 provides

claims, the balance to be struck is between defendants' fundamental free speech rights and companies' reputational interests devoid of such significance.<sup>190</sup> The law can and should give the former categorical priority over the latter.

**ii. *Derbyshire as a categorical rule denying standing to some claimants***

There is one important instance in which English defamation law uses a categorical rule to deny standing to a whole class of potential claimants. That is the principle, established in *Derbyshire County Council v Times Newspapers Ltd* ('*Derbyshire*'),<sup>191</sup> that a local authority does not have the right to sue in defamation. Lord Keith's judgment for a unanimous House of Lords noted that authorities such as *Hawkins*<sup>192</sup> and *South Hetton*,<sup>193</sup> discussed above,<sup>194</sup> 'clearly establish[ed]' that trading companies were entitled to sue in defamation.<sup>195</sup> However, as a governmental body the claimant was in a 'special position'<sup>196</sup> that ought to preclude it from having the right to sue:

'There are ... features of a local authority which may be regarded as distinguishing it from other types of corporation, whether trading or non-trading. The most important of these features is that it is a governmental body. Further, it is a democratically elected body'.<sup>197</sup>

To clarify, the *Derbyshire* rule is categorical not because it provides absolute protection for the defendant's speech, but because the rule applies in any case where the claimant is a government body, regardless of any other feature of the case, and solely *because* the claimant falls within that category. As Milo puts it, 'The rules that prohibit the government from suing for defamation effectively carve out

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companies with a Convention right to reputation; as I argued in Chapter 1, that view is mistaken (Ch1.B.ii., text to notes 129-151).

<sup>190</sup> See Barendt, *Freedom of Speech* (n 57) 226.

<sup>191</sup> [1993] AC 534 (HL).

<sup>192</sup> (1859) 4 H & N 87.

<sup>193</sup> [1894] 1 QB 133.

<sup>194</sup> At text to notes 36-48.

<sup>195</sup> *Derbyshire* (n 191) 544-47.

<sup>196</sup> *Ibid.*, 547. Lord Keith noted (at 542) that in the 'only two reported cases in which an English local authority has sued for libel' the courts had not considered the possibility that government bodies might be treated differently from trading companies in defamation law. Those cases were *Manchester Corp v Williams* [1891] 1 QB 94, and *Bognor Regis UDC v Campion* [1972] 2 QB 169.

<sup>197</sup> *Derbyshire* (n 191) 547.

enclaves of speech that are classic instances of public speech. Accordingly, this speech enjoys the greatest protection from defamation law.<sup>198</sup>

According to Lord Keith, allowing local authorities to sue in defamation was likely to violate defendants' Art 10 rights, because 'there was no pressing social need that a corporate public authority should have the right to sue in defamation for the protection of its reputation.'<sup>199</sup> To the contrary, 'It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism.'<sup>200</sup> The *Derbyshire* principle therefore demonstrates that it may be appropriate to restrict the right to sue of an entire class of claimants, because of the need to protect the public interest in defamatory statements about those claimants.

The principle is also significant because of the argument that its scope should be extended so as to restrict the ability of a wider range of corporate entities to sue in defamation, which was put forward several times during the Parliamentary debates on the Defamation Act 2013.<sup>201</sup> The argument was that the increasing tendency for governmental functions to be carried out by private companies could justify extending the *Derbyshire* principle beyond bodies that would traditionally be regarded as 'governmental'.<sup>202</sup> Ian Loveland argues that companies which 'choose to pursue profit by providing public services ... should expect to be subject to vigorous (and well-protected) media scrutiny',<sup>203</sup> because 'citizens can claim a legitimate interest in being informed of the integrity and competence of such organisations' activities.'<sup>204</sup>

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<sup>198</sup> Milo (n 26) 99.

<sup>199</sup> *Derbyshire* (n 191) 551. Under Art 10(2), restrictions on freedom of expression may only be imposed in response to a 'pressing social need': eg *Observer and Guardian v UK* [1991] ECHR 49, para 71.

<sup>200</sup> *Derbyshire* (n 191) 547. In this connection, Lord Keith cited with approval cases from the United States (*City of Chicago v Tribune Co* (1923) 139 NE 86 (Supreme Court of Illinois)) and South Africa (*Die Spoorbond v South African Railways* 1946 AD 999 (Supreme Court)), along with a decision of the Privy Council relating to Antigua and Barbuda (*Hector v Attorney-General of Antigua and Barbuda* [1990] 2 AC 312).

<sup>201</sup> eg HC Deb 16 April 2013, vol 561, col 275 (Sadiq Khan MP); HL Deb 23 April 2013, vol 744, cols 1377-84; HC Deb 24 April 2013, vol 561, col 914 (Robert Flello MP).

<sup>202</sup> In *Reynolds* (n 181) Lord Nicholls recognized (at 195) that the circumstances in which speech should be protected in the public interest will 'depend on current social conditions.'

<sup>203</sup> Ian Loveland, *Political Libels: A Comparative Study* (Hart 2000) 179.

<sup>204</sup> *Ibid.*

The courts have shown at least some willingness to extend the *Derbyshire* principle beyond directly elected government authorities, including to political parties in *Goldsmith v Bhoyrul*.<sup>205</sup> In *British Coal Corporation v National Union of Mineworkers* the principle was extended to a government body which was not democratically elected;<sup>206</sup> and in *Sunderland Housing Co Ltd v Baines*, Eady J suggested that there may be an argument for applying the principle to a housing association.<sup>207</sup> However, the same judge refused to rule that a university was precluded from suing in defamation in *Duke v University of Salford*.<sup>208</sup>

In Chapter 2, I discussed Baroness Hale's judgment in *Jameel*,<sup>209</sup> which drew on the *Derbyshire* decision in support of the argument that the common law presumption of loss should be abolished for corporate defamation claimants. Baroness Hale noted that the question whether non-governmental trading organizations should be required to demonstrate loss was not put to the House of Lords in *Derbyshire*,<sup>210</sup> and argued that:

‘We cannot know whether Lord Keith, had the matter been in issue, would have accepted the invitation to require that corporations produce at least some evidence to support the likelihood that their pockets would indeed be injured in some way.’<sup>211</sup>

Baroness Hale's reasoning here is based on a rather unconvincing reading of Lord Keith's *Derbyshire* judgment. As pointed out by both Lord Bingham and Lord Scott in *Jameel*, Lord Keith's approval of *South Hetton* as it related to trading companies' right to sue was an important step in the reasoning by which he reached his conclusion as to the standing of government bodies.<sup>212</sup> In *Shevill v Presse Alliance*

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<sup>205</sup> [1998] QB 459. A similar development of defamation defences relating to political speech was recently made in the New Zealand case *Low Volume Vehicle Technical Association, Inc v Johnson* ([2017] NZHC 2846, at [84]). The High Court extended the qualified privilege defence established in *Lange v Atkinson* ([1998] 3 NZLR 424), which initially applied only to speech about the conduct of those elected to or seeking public office, to protect statements made about a private company exercising public functions.

<sup>206</sup> *British Coal Corp v National Union of Mineworkers* [1996] EWHC 380 (QB).

<sup>207</sup> [2006] EWHC 2359 (QB) [28].

<sup>208</sup> *Duke* (n 160) [5].

<sup>209</sup> *Jameel* (n 28). Ch2.B.ii., text to notes 53-58.

<sup>210</sup> *Ibid*, [157].

<sup>211</sup> *Ibid*.

<sup>212</sup> *Ibid*, [17] (Lord Bingham); [124] (Lord Scott). See also Chan (n 165) 270-72.

*SA*,<sup>213</sup> in which Lord Keith joined the majority,<sup>214</sup> the House of Lords also accepted without comment that a for-profit corporation could benefit from the presumption of damage as a defamation claimant. Lord Keith's argument was that it is the *democratically elected*, rather than *corporate*, nature of local authorities which, along with their exercise of governmental functions, justifies greater protection for speech about their activities.

Fiona Patfield has argued, to the contrary, that the justification for protecting the freedom to criticize private companies 'can only be strengthened by the fact that there is no popular election of corporate management and that in large companies the power of individual shareholders is very small.'<sup>215</sup> This point is not unreasonable: it is important to hold powerful institutions accountable for their actions, whether that is through the ballot box or another mechanism. But extending the *Derbyshire* principle to private companies on this basis would be to depart significantly from the reasoning that led Lord Keith to that principle in the first place.

Parliament declined to legislate to extend the *Derbyshire* principle in the Defamation Act 2013. In the House of Lords, Lord McNally explained the government's position that 'for the moment we should rest on common law to deal with this matter.'<sup>216</sup> It would not be surprising to see the courts gradually extend the *Derbyshire* principle to statements about private companies' conduct of public functions, even after Parliament decided against doing so in legislation, especially because one of the main reasons for that decision was the view that it was better to leave it to the courts to determine the scope of the privilege. This would be a welcome development. But it would have only a relatively minor effect on corporate defamation law overall, because the expanded privilege would still only cover statements about a small proportion of companies, and would likely only cover some speech about that small group of companies. It would not help to protect

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<sup>213</sup> [1996] 3 All ER 929.

<sup>214</sup> *Ibid*, 931.

<sup>215</sup> Fiona Patfield, 'Defamation, Freedom of Speech and Corporations' (1993) 3 *Juridical Review* 294, 300.

<sup>216</sup> HL Deb 23 April 2013, vol 744, col 1379. See also HC Deb 16 April 2013, vol 561, col 270 (Helen Grant MP).

the public interest in open communication about the normal activities of private corporations.<sup>217</sup>

But the categorical approach taken in *Derbyshire* offers a good model for a broader reform that would protect the public interest in critical speech about companies more generally. Of course, denying standing to a class of claimants with a categorical rule means defining the category of claimants affected. As the discussion of *Derbyshire* above indicates, the category need not necessarily include all corporate claimants; in the section below, however, I argue that it should.

### *iii. Category should be defined to include all non-human claimants*

Any rule that draws a line between classes of case that will be treated differently from one another – such as those involving different kinds of claimant – will, to some extent at least, give rise to three problems: uncertainty, arbitrariness, and over- or under-inclusiveness.<sup>218</sup> A rule will be ‘uncertain’ if there are cases in which it is not possible to predict in advance how it will apply; in this context, if it is not clear whether a particular claimant will fall within the category defined by the rule. The problems of arbitrariness and over- or under-inclusiveness are closely related, and both are inevitable results of increasing the certainty of a rule by making it more specific.<sup>219</sup> A rule will be ‘arbitrary’<sup>220</sup> if it draws a precise line between classes of case at one point on a continuum of points, any of which would be equally suitable.<sup>221</sup> A rule will be ‘under-inclusive’ if it does not apply in some cases even

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<sup>217</sup> See generally Ch2.B.ii., text to notes 77-103.

<sup>218</sup> See Frederick Schauer, ‘Commercial Speech and the Architecture of the First Amendment’ (1988) 56(4) *Cincinnati Law Review* 1181, 1188-93; Milo (n 26) 138-43.

<sup>219</sup> Schauer, ‘Commercial Speech’ (n 218) 1189-90.

<sup>220</sup> Frederick Schauer, ‘Slippery Slopes’ (1985) 99 *Harvard Law Review* 361, 378-80. Schauer is, rightly, dubious about using the term ‘arbitrary’ to describe rules of this kind (at fn 51). I use it here because it is the word most frequently used by those criticizing the Australian corporate defamation reforms, as discussed below at text to notes 234-253.

<sup>221</sup> For example, the ‘plastic bag tax’ in England, which requires retailers to charge at least five pence for a single use carrier bag, only applies to sellers with 250 or more employees (Single Use Carrier Bags Charges (England) Order 2015, SI 2015/776). Both the five pence minimum charge (rather than two pence or ten pence) and the threshold of 250 employees (rather than 200 or 300) below which the obligation to charge will not apply, could be described as ‘arbitrary’. The employee threshold was criticized on this basis by Lord Holmes when the House of Lords scrutinized the proposal: ‘[250] is an interesting figure but pity the poor seagull choking to death on a plastic bag, only to be told, “I’m really sorry, pal, but it came from a local store of only 50 employees in the overall chain”’ (HL Deb 4 March 2015, vol 760, cols 57-58).



though it should; and ‘over-inclusive’ if it does apply in some cases even though it should not.

The sections below illustrate how reforms that apply to *some*, but not *all*, corporate claimants can lead to each of these problems, using examples of tests used in corporate defamation cases in the United States, Australia, and England respectively. By comparison to the problems identified with each of those tests, I argue that the rule proposed here – that standing should be denied to all claimants other than human beings – minimizes the problems of uncertainty and arbitrariness; avoids the under-inclusiveness of most alternatives; and is over-inclusive only to a modest extent that can reasonably be accepted in light of the rule’s benefits.

#### *Uncertainty – US ‘public figure’ standard*

In the discussion of potential substantive reforms in Chapter 4, I described the constitutional principles applicable in defamation cases involving ‘public figure’ plaintiffs as a result of the US Supreme Court’s decisions in *New York Times v Sullivan* and subsequent cases.<sup>222</sup> The significant first amendment protections given to defendants in these cases mean that the question whether a plaintiff qualifies as a ‘public figure’ assumes huge importance: in fact, ‘The divide between public and private status for a defamation plaintiff can be – and frequently is – the determinative factor in whether a plaintiff can succeed’.<sup>223</sup>

The *Sullivan* Court’s decision to make the plaintiff’s status determinative of the degree of first amendment protection given to the defendant was largely intended to limit the need for courts to engage in complex and unpredictable balancing exercises when deciding defamation cases.<sup>224</sup> However, applying the ‘public figure’ test in individual cases can itself be a complex and unpredictable exercise that sometimes requires detailed examination of a variety of case-specific factors.<sup>225</sup>

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<sup>222</sup> *New York Times v Sullivan* 376 US 254 (1964). See Ch4.A., text to notes 8-13, 24-26, and 46-47.

<sup>223</sup> Matthew D Bunker, ‘Corporate Chaos: The Muddled Jurisprudence of Corporate Public Figures’ (2018) 23 *Communication Law and Policy* 1, 1.

<sup>224</sup> Barendt, *Freedom of Speech* (n 57) 226; Cynthia L Estlund, ‘Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category’ (1990) 59 *George Washington Law Review* 1, 42.

<sup>225</sup> Gerald R Smith, ‘Of Malice and Men: The Law of Defamation’ (1992) 27 *Valparaiso University Law Review* 39, 70.

This leads to uncertainty as to which companies will be treated as public figures, and therefore face the substantial hurdles set up by *Sullivan* if they sue for defamation; and presents publishers with the risk that expensive litigation will be necessary to resolve the issue. This uncertainty undermines the effectiveness of the substantive rules as a way to address the law's chilling effect on speech about companies.<sup>226</sup>

Norman Redlich notes 'the absence of a clear analytic framework, let alone authoritative guidance from the Supreme Court' on how lower courts should determine whether corporate plaintiffs qualify as public figures.<sup>227</sup> This is in large part because the Court has not directly ruled on the status of corporate plaintiffs. It had the opportunity to do so in the 1985 case *Dun & Bradstreet, Inc v Greenmoss Builders, Inc*,<sup>228</sup> but in deciding that case it did not challenge the agreement of the parties and the state courts to treat the plaintiff as a 'private figure'.<sup>229</sup> The *Dun & Bradstreet* decision has not been overturned despite strong criticism,<sup>230</sup> meaning that corporate defamation plaintiffs can in principle be either public or private figures for first amendment purposes. It is left to state courts, and lower federal courts, to determine the status of various corporate plaintiffs, but these courts 'vary in their approach' to that exercise.<sup>231</sup> In a recent article examining how the Supreme Court's defamation jurisprudence is applied in cases involving corporate plaintiffs, Matthew Bunker concludes that:

'... the corporate public figure doctrine is in a state of serious incoherence. Courts around the country, with no Supreme Court guidance, have wildly varying methodologies for the status determination.'<sup>232</sup>

The practical effectiveness of the protection that the first amendment provides against corporate defamation claims relies to a large extent on how reliable speakers

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<sup>226</sup> Ibid, 93.

<sup>227</sup> Redlich (n 60) 1171.

<sup>228</sup> 472 US 749 (1985).

<sup>229</sup> Ibid, 781.

<sup>230</sup> See generally Ruth Walden and Derigan Silver, 'Deciphering *Dun & Bradstreet*: Does the First Amendment Matter in Private Figure-Private Concern Defamation Cases?' (2009) 14 Communication Law and Policy 1.

<sup>231</sup> Karla K Gower, 'Corporate Reputation and the Discipline of Corporate Communication Law' in Craig E Carroll (ed), *The Handbook of Communication and Corporate Reputation* (Wiley 2013) 145.

<sup>232</sup> Bunker (n 223) 16.

perceive it to be. The variety of different ways in which courts apply the law in individual cases:

‘... is not simply a doctrinal muddle; it can have serious consequences for the ability of corporate critics to hold corporations accountable and to challenge and censure perceived corporate misdeeds. The breathing space provided for critics by the actual malice standard is seriously undermined when the status determination is in such disarray across jurisdictions.’<sup>233</sup>

Some of the strongest arguments for denying companies standing to sue in defamation point to the chilling effect on speech that is caused by publishers’ uncertainty about the legal implications of criticizing companies, and their fear of the costly litigation that might be necessary to defend their criticisms. The category of claimants that is denied standing should not be defined using a rule such as the ‘public figure’ test in US law, which may or may not apply to a given corporate claimant depending on a range of factors that might vary significantly from case to case. The complexity and uncertainty of the litigation that might be necessary to determine that a corporate claimant did not have standing would undermine the effectiveness of the rule denying standing in the first place.

#### *Arbitrariness – Australian ‘excluded corporations’*

Removing the right to sue from corporations was ‘one of the key reforms’ in the Australian national uniform defamation laws of 2005.<sup>234</sup> Australian defamation law, in common with the law in the US, is derived from the English common law; before the national reforms, corporate defamation claimants were treated in substantially the same way in Australia as they were in England.<sup>235</sup> The removal of right to sue in defamation from companies was motivated by similar arguments to those advanced in this thesis.<sup>236</sup> It was targeted at the types of case which were considered to be most problematic, mainly because of concerns that a rule denying standing to

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<sup>233</sup> Ibid. See also Lisa Magee Arent, ‘A Matter of “Governing” Importance”: Providing Business Defamation and Product Disparagement Defendants Full First Amendment Protection’ (1992) 67 Indiana Law Journal 441, 444: uncertainty about corporate plaintiffs’ status ‘create[s] an atmosphere which discourages speech critical of a business’s agents and operations.’

<sup>234</sup> Matt Collins, ‘Five Years On: A Report Card on Australia’s National Scheme Defamation Laws’ (2011) 16(4) Media & Arts Law Review 317.

<sup>235</sup> *Barnes & Co Ltd v Sharp* (1910) 11 CLR 462 (Aus HC).

<sup>236</sup> Attorney General’s Task Force (n 124) 13-14.

small businesses and non-profit organizations would be over-inclusive.<sup>237</sup> Certain categories of ‘excluded corporations’ therefore retained the right to sue, but those categories were precisely defined so as to avoid the uncertainty and case-sensitivity of a rule like the US ‘public figure’ test.

The pertinent section of the uniform legislation reads as follows:

‘A corporation is an excluded corporation if:

- (a) the objects for which it is formed do not include obtaining financial gain for its members or corporators, or
- (b) it employs fewer than 10 persons and is not related to another corporation,

and the corporation is not a public body. ...’<sup>238</sup>

As noted above, the Joint Committee on the Draft Defamation Bill in the UK heard evidence from the Law Council of Australia that, overall, the reform was ‘liberalising’ media coverage of corporate activities.<sup>239</sup> But the Committee was also told of problems with the law: the most significant issue reported was ‘a general consensus that the current corporations provision gives rise to serious anomalies, principally because of the arbitrary nature of the definition of “excluded corporations”’.<sup>240</sup> That is, there was broad agreement among relevant law firms that the *scope* of the Australian ban on corporate defamation claims was problematic. This concern has also been raised in academic commentary on the Australian reforms. In David Rolph’s view, ‘The criticism that the bright-line exclusion based on the number of employees is arbitrary is unanswerable. It is clearly so.’<sup>241</sup> Matt Collins, similarly, argues that ‘There is obvious force in the criticism that a delineation based on the number of employees a corporation has at any particular time is arbitrary’;<sup>242</sup> it means, for example, ‘that corporations with nine full-time

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<sup>237</sup> Rolph, ‘Australian Perspective’ (n 130) 196. This concern with the over-inclusiveness of a rule applying to all corporate claimants will be addressed below, in the context of the UK Defamation Act 2013: text to notes 278-312.

<sup>238</sup> Defamation Act 2005 (Aus) s 9(2).

<sup>239</sup> At text to note 126.

<sup>240</sup> Joint Committee Evidence vol III (n 2) Ev 51.

<sup>241</sup> Rolph, ‘A Critique of the Defamation Act 2013’ (n 136) 119.

<sup>242</sup> Collins, ‘Protecting Corporate Reputations’ (n 70) 450. Collins has also argued that the difficulty of gauging the applicability of the provision to particular companies has to some extent undermined its benefits for freedom of expression: Collins, ‘A Report Card on Australia’s National Scheme Defamation Laws’ (n 234).

employees but very high profits retain the right to sue for defamation, while struggling corporations with eleven full-time employees do not.<sup>243</sup>

The primary criterion used to differentiate those companies which now cannot sue from those which still can – their number of employees at the time of publication – is inevitably imperfect because, as the Joint Committee observed in its report, ‘there may not be a link between the commercial power of a corporation and the number of people it employs.’<sup>244</sup> It might be possible to use a threshold based on a more direct measure of companies’ financial power, such as turnover, profit, or assets, to distinguish between ‘large’ and ‘small’ companies. For example, the European Commission defines ‘small and medium-sized enterprises’ (‘SMEs’) on the basis of an employee number threshold supplemented by ceilings on annual turnover or balance sheet total (which ‘reflects the overall wealth of a business’).<sup>245</sup> However, detailed examination of evidence, and possibly expert evidence, may be needed to apply a similar threshold in individual cases to identify ‘smaller’ companies that would retain the right to sue in defamation. The Commission’s criteria for categorising a business as an SME become considerably more complex when it is part of a group of related entities,<sup>246</sup> which is not uncommon for corporate defamation claimants.<sup>247</sup> More importantly, using a threshold of this kind might make it difficult for publishers to predict in advance whether a given company would be entitled to sue.<sup>248</sup> The primary reason for adopting a bright-line rule to deny standing to companies is to provide certainty to publishers, thereby alleviating the law’s chilling effect on their speech.

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<sup>243</sup> Collins, ‘A Report Card on Australia’s National Scheme Defamation Laws’ (n 234).

<sup>244</sup> Joint Committee Report (n 4) fn 182.

<sup>245</sup> Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises [2003] OJ L 124/36. Thanks to James Hand for bringing this to my attention.

<sup>246</sup> Ibid, arts 3 and 6.

<sup>247</sup> See the discussion of claimants in corporate groups at text to notes 7-14 above.

<sup>248</sup> In Australia it has been reported that, ‘In order to maximise the prospect of being able to rely on the corporations provision, some media organisations now conduct investigations prior to publication as to the size of corporations,’ but that in doing so they can face ‘practical difficulties in ascertaining the number of full-time or equivalent employees some corporations have at particular points in time, and in ascertaining whether a corporation has objects that do not include obtaining a financial gain for its members or corporators’: Collins, ‘A Report Card on Australia’s National Scheme Defamation Laws’ (n 234).

In its consultation paper on defamation reform in Northern Ireland, where the Defamation Act 2013 does not apply, the Northern Ireland Law Commission requested views on ‘introduc[ing] a bar on corporate claims equivalent to that introduced’ in Australia, as a possible alternative to a reform replicating the s 1(2) threshold in English law.<sup>249</sup> Although respondents preferred the latter approach, again the only criticism of the Australian law explicitly mentioned in Andrew Scott’s report on *Reform of Defamation Law in Northern Ireland*, which was produced on the basis of responses to the Law Commission consultation, was a criticism of its scope: ‘the Australian approach ... was considered somewhat arbitrary in design and liable to lead to ancillary litigation regarding its parameters.’<sup>250</sup> In 2019, the Australian Council of Attorneys-General conducted a consultation to review the operation of the 2005 reforms, including the corporations provision.<sup>251</sup> In its report on that consultation, it noted that:

‘Very few stakeholders supported broadening the right of corporations to sue. The vast majority of stakeholders supported either narrowing or recasting the “excluded corporations” test to further restrict the types of corporations able to sue for defamation, or maintaining the current test.’<sup>252</sup>

The Council recommended clarifying the definition of excluded corporations, and also restricting their right to sue by making them subject to a ‘serious financial loss’ test based on s 1(2) of the English Defamation Act 2013.<sup>253</sup>

#### *Under-inclusiveness – the ‘body that trades for profit’ test in s 1(2) of the Defamation Act 2013*

Parliament chose to limit the ‘serious financial loss’ threshold in s 1(2) of the Defamation Act 2013 to cases in which the claimant was ‘a body that trades for profit’. Certainty was a motivating factor in the choice of this test, as was (in

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<sup>249</sup> Northern Ireland Law Commission, *Consultation Paper: Defamation Law in Northern Ireland* (NILC 19, 2014) p79, Q 21.

<sup>250</sup> Andrew Scott, *Reform of Defamation Law in Northern Ireland: Recommendations to the Department of Finance* (2016) para 2.103, at <<http://eprints.lse.ac.uk/67385>>.

<sup>251</sup> Council of Attorneys-General, *Review of the Model Defamation Provisions: Discussion Paper* (February 2019) 12-14, at <<https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/Final-CAG-Defamation-Discussion-Paper-Feb-2019.pdf>>.

<sup>252</sup> Council of Attorneys-General, *Review of the Model Defamation Provisions: Background Paper* (November 2019) 10, at <<https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/defamation-final-background-paper.pdf>>.

<sup>253</sup> *Ibid.*

common with the Australian reforms) the desire *not* to include some kinds of claimant.<sup>254</sup> Lord McNally, the sponsor of the Bill in the House of Lords, argued that the term ‘body that trades for profit’ was a ‘much clearer and simpler definition’ than that used in the Lords’ previously proposed amendment,<sup>255</sup> which had referred to ‘a body corporate; other non-natural legal persons trading for profit; or trade associations representing organisations trading for profit’.<sup>256</sup> Lord McNally also explained that ‘A vaguer formulation ... would have risked inadvertently catching other bodies, such as charities, which are not the subject of concern.’<sup>257</sup> Criticism of the Australian employee-number threshold’s arbitrariness was the main reason that test, or a similar test that would also have excluded smaller companies as well as charities from the scope of s 1(2), was rejected.<sup>258</sup>

It would be fair to say that the ‘body that trades for profit’ test in s 1(2) is clearer, and its application to individual cases more predictable, than the standards used in either Australia or the US.<sup>259</sup> Notwithstanding some initial disagreement among commentators shortly after the Act was passed,<sup>260</sup> it is clear that charities (even those that raise money through commercial activities) will not fall within the scope of s 1(2).<sup>261</sup> But the more serious problem with the scope of the s 1(2) test is that it is under-inclusive: defamation claims brought by entities which are excluded from the requirement to show serious financial loss under s 1(2), such as charities and

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<sup>254</sup> Joint Committee Report (n 4) para 118.

<sup>255</sup> HL Deb 23 April 2013, vol 744, col 1366.

<sup>256</sup> Lords Amendments to the Defamation Bill, 25 February 2013, Amendment 2 (paragraph letters omitted).

<sup>257</sup> HL Deb 23 April 2013, vol 744, col 1366.

<sup>258</sup> Joint Committee Report (n 4) para 111; Ministry of Justice, *Draft Defamation Bill: Consultation* (Cm 8020, 2011) para 143; Rolph, ‘A Critique of the Defamation Act 2013’ (n 136) 119.

<sup>259</sup> There is, in my view, one potentially significant point of uncertainty as to the scope of the s 1(2) test, concerning its application to holding or management companies that conduct business only through subsidiaries. On the most reasonable interpretation of s 1(2), the use of the word ‘trades’ would exclude these companies from the requirement to show ‘serious financial loss’. That outcome would make the s 1(2) test under-inclusive. See David J Acheson, ‘The Defamation Act 2013: What Exactly is ‘a Body that Trades for Profit’? (2015) 20(4) *Communications Law* 72, 76-77.

<sup>260</sup> Compare *Gatley* (n 91) para 2.8 (arguing that some charities may be subject to the s 1(2) test) with James Price and Felicity McMahon, *Blackstone’s Guide to the Defamation Act 2013* (OUP 2013) para 2.39; Thomas Rudkin, ‘Things Get Serious: Defining Defamation’ (2014) 25(6) *Entertainment Law Review* 201, 202.

<sup>261</sup> See eg the parties’ agreement on this issue in *Cooke v MGN Ltd* [2014] EWHC 2831 (QB) [29]; and *Hope not Hate* (n 12) [7]. I have argued elsewhere that this is the correct interpretation of s 1(2): Acheson, ‘Body that Trades for Profit’ (n 259) 72-75.

other not-for-profit organizations, can stifle contributions to debate on matters of genuine public concern.

The Joint Committee on the Draft Defamation Bill recommended that charities be exempt from the requirement for corporate claimants to prove financial loss primarily because it did not ‘anticipate them being able or willing to exploit the inequality of wealth that under[lay its] recommendations on corporations more generally.’<sup>262</sup> It is undoubtedly true that not-for-profit entities are less likely to abuse defamation laws to silence criticism than for-profit corporations.<sup>263</sup> But the chilling effect of defamation claims brought by not-for-profit organizations is still substantial enough to justify removing the right to sue from these claimants as well as from trading companies. Since it is only the ‘non-distribution constraint’ (that is, the prohibition on not-for-profit organizations distributing profits to their members) that distinguishes between the two kinds of entity,<sup>264</sup> the not-for-profit category still ‘captures a wide-ranging assortment of organizations’,<sup>265</sup> some of which may have substantial resources, and a willingness to use them to stifle criticism.

There was an obvious example that ought to have given the Committee pause: *British Chiropractic Association v Singh*,<sup>266</sup> which was one of the most significant cases driving the reform efforts in the first place,<sup>267</sup> and which the Committee referred to several times in its report.<sup>268</sup> As the British Chiropractic Association is a not-for-profit entity, it would not have been subject to the requirement to show serious financial loss under s 1(2).<sup>269</sup> Another defamation claim pursued by a non-profit entity shortly before the 2013 Act was passed (although after the Joint

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<sup>262</sup> Joint Committee Report (n 4) para 118.

<sup>263</sup> eg Alastair Mullis and Andrew Scott, ‘Lord Lester’s Defamation Bill 2010 – A Distorted View of the Public Interest?’ (2011) 16(1) *Communications Law* 6, 14; Herzfeld (n 65) 149.

<sup>264</sup> Henry B Hansmann, ‘The Role of Nonprofit Enterprise’ (1980) 89(5) *Yale Law Journal* 835, 838. If a body is subject to the non-distribution constraint, it is likely to be excluded from the scope of the ‘serious financial loss’ test in the Defamation Act 2013, s 1(2): see Acheson, ‘Body that Trades for Profit’ (n 259).

<sup>265</sup> Elizabeth Pollman, ‘Line Drawing in Corporate Rights Determinations’ (2016) 65 *DePaul Law Review* 597, 622.

<sup>266</sup> [2009] EWHC 1101 (QB); [2010] EWCA Civ 350.

<sup>267</sup> See Ch2.C.v., text to notes 281-301.

<sup>268</sup> eg Joint Committee Report (n 4) para 75.

<sup>269</sup> See Acheson, ‘Body that Trades for Profit’ (n 259) 75-76. The Joint Committee did recommend (at para 118) that the financial loss test should extend to ‘trade associations’, but only explicitly referred to those ‘that represent for-profit organisations’; it is unclear whether this would cover the BCA.



Committee published its report), in *Duke v University of Salford*,<sup>270</sup> also imposed a substantial burden on the defendant,<sup>271</sup> despite the claim being described by Eady J as ‘wholly unreal, and indeed an abuse of the court’s process’ because the statements complained of actually criticized members of the University’s management.<sup>272</sup> The only other not-for-profit entities whose attempted defamation claims were ruled on by the courts in the decade preceding the Act were the Law Society, which failed to bring a representative action on behalf of its members;<sup>273</sup> an unincorporated charity that was held not to have standing to sue in its own name;<sup>274</sup> and a housing association which sued in respect of statements that ‘relate[d] primarily to’ an associated individual claimant.<sup>275</sup>

The Church of Scientology was also raised during parliamentary debate<sup>276</sup> as an example of a not-for-profit body with a history of aggressive use of defamation laws, ‘as a matter of deliberate policy, ... to deter serious criticism’.<sup>277</sup> These examples demonstrate that excluding charities and other not-for-profit organizations from the scope of a reform designed to address the chilling effect of corporate defamation claims would preserve the opportunity for some corporate claimants to abuse the threat of litigation to silence good-faith criticism of their activities, and would therefore be under-inclusive.

It could be argued that the reform advocated here, which would deny standing to *all* claimants other than human beings because of a small number of problematic defamation claims brought by not-for-profit bodies, would instead be over-inclusive. Charities, NGOs, and other not-for-profit bodies are more likely than other corporate claimants to have the broader, non-financial interests in reputation identified in Chapter 1;<sup>278</sup> and injuries to those reputational interests seem less

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<sup>270</sup> *Duke* (n 160).

<sup>271</sup> Acheson, ‘Empirical Insights’ (n 11) 47-48.

<sup>272</sup> *Duke* (n 160) [13].

<sup>273</sup> *Law Society v Kordowski* (n 112).

<sup>274</sup> *North London Central Mosque Trust v Policy Exchange* [2009] EWHC 3311 (QB).

<sup>275</sup> *Sunderland Housing Co Ltd v Baines* [2006] EWHC 2359 (QB) [28] (Eady J).

<sup>276</sup> Defamation Bill Deb 26 June 2012, col 196.

<sup>277</sup> David Boies, ‘The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution’ (1995) 39 St Louis University Law Journal 1207, 1209. See also Pring and Canan (n 144) 142. The Church of Scientology had even attempted to sue a Member of Parliament in the English courts: *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522.

<sup>278</sup> Ch1.B.iii., text to notes 177-192.

likely to cause the financial loss necessary to ground an alternative action in malicious falsehood. If the right to sue in defamation were removed from all non-human claimants, there would inevitably be some cases in which charities were left with no adequate legal remedy for reputational injuries caused by false allegations.<sup>279</sup> But there is no good reason to think that there would be many cases in which this was true.<sup>280</sup> In the six years since the 2013 Act came into force, there have been two reported judgments in cases involving a non-human claimant other than a ‘body that trades for profit’. Since the claimants in those cases were *excluded* from scope of s 1(2), but would be *included* in the scope of the reform proposed here, it is instructive to examine them here.

In *Cooke v MGN Ltd*, one of the first cases in which the serious harm test in s 1 of the 2013 Act was applied, the second claimant was a not-for-profit housing association.<sup>281</sup> It sued (alongside its chief executive) in respect of the sole paragraph in which it was mentioned<sup>282</sup> in a story that covered almost three pages of the defendant’s newspaper,<sup>283</sup> despite the defendant publishing a correction in the next edition,<sup>284</sup> in a ‘more prominent’ position than the relevant paragraph in the original article.<sup>285</sup> The corporate claimant’s case on s 1 relied on an assertion that it was ‘dependent on grant and contract income’ which might be affected by the statement complained of.<sup>286</sup> But it was ‘not aware of any contract being lost’ when the case was heard, half a year after that statement was published,<sup>287</sup> and was unable to convince Bean J that a likelihood of serious harm to its reputation could be inferred from other evidence.<sup>288</sup>

The claimants in the more recent case *Hope not Hate Ltd v Farage* might be more sympathetic.<sup>289</sup> Hope not Hate ‘is split between a charitable trust and a limited

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<sup>279</sup> Joint Committee Report (n 4) para 118; Chan (n 165) 287; Herzfeld (n 65) 148-49.

<sup>280</sup> Acheson, ‘Empirical Insights’ (n 11) 59-60.

<sup>281</sup> *Cooke* (n 261) [5].

<sup>282</sup> *Ibid.*

<sup>283</sup> *Ibid.*, [2].

<sup>284</sup> *Ibid.*, [20].

<sup>285</sup> *Ibid.*, [21].

<sup>286</sup> *Ibid.*, [41].

<sup>287</sup> *Ibid.*, [25].

<sup>288</sup> *Ibid.*, [45].

<sup>289</sup> *Hope not Hate* (n 12).

company’,<sup>290</sup> both of which sued politician Nigel Farage in respect of a comment he made during a radio interview, alleging that the charity ‘masquerade[s] as being lovely and peaceful but actually pursue[s] violent and very undemocratic means.’<sup>291</sup> The case was settled with a retraction of the allegation by Farage.<sup>292</sup> The allegation was seriously defamatory, and its retraction was in the interest of the public as well as the charity itself. However, it is open to question whether the charity’s defamation action was entirely proportionate to the harm that the statement might have caused.

It is not clear that the statement complained of had any actual effect on the charity’s income or other activities;<sup>293</sup> it apparently sought to rely on an inference from the seriousness of the statement to satisfy the threshold in s 1 of the 2013 Act.<sup>294</sup> The charity’s accounts for the year ending 31<sup>st</sup> December 2017 (which corresponds quite closely to the period between publication and settlement) make no mention of Farage’s allegation, or of the legal action against him.<sup>295</sup> While a comparison with the previous year’s accounts show a fall in the charity’s income, this appears to have been caused by reduced income from restricted grants; the charity’s income from unrestricted grants and donations rose from the previous year. It has been reported by *The Guardian* that Hope Not Hate’s ‘charity arm had a total income for 2015 of just over £700,000.’<sup>296</sup> Its income for 2017 was over £900,000, despite the legal action over Farage’s allegation being unresolved for almost the whole year. Nor do the (less extensive) accounts of the related limited company, also a party to the lawsuit against Farage, include any reference to the defamatory statement having any financial effect.<sup>297</sup>

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<sup>290</sup> Peter Walker, ‘Nigel Farage Faces Threat of Legal Action over Hope Not Hate Accusation’ (*The Guardian*, 20 December 2016) <<https://www.theguardian.com/politics/2016/dec/20/nigel-farage-accuses-jo-cox-widower-brendan-cox-of-supporting-extremism>>.

<sup>291</sup> *Hope Not Hate* (n 12) [8].

<sup>292</sup> Peter Walker, ‘Nigel Farage Withdraws ‘Violent Means’ Claim against Hope Not Hate’ (*The Guardian*, 14 November 2017) <<https://www.theguardian.com/politics/2017/nov/14/nigel-farage-withdraws-claim-hope-not-hate-high-court>>.

<sup>293</sup> *Hope Not Hate* (n 12) [14]-[15].

<sup>294</sup> *Ibid*, [37].

<sup>295</sup> Charity Commission Register, at <<https://apps.charitycommission.gov.uk/Showcharity/RegisterOfCharities/CharityWithPartB.aspx?RegisteredCharityNumber=1013880&SubsidiaryNumber=0>>.

<sup>296</sup> Walker, ‘Nigel Farage Faces Threat of Legal Action’ (n 290).

<sup>297</sup> <<https://beta.companieshouse.gov.uk/company/08188502>>

It could reasonably be argued that the reputational interests that the claimant charities were seeking to protect were not financial in nature, and that denying them the right to sue in defamation would have left them without a remedy for the harm Farage's statement may have caused to their ability to pursue their charitable objects more broadly. Nevertheless, their claim was for damages of up to £100,000,<sup>298</sup> an amount which seems wildly excessive in the circumstances. Even though the case never got to trial, the company's chief executive has claimed that Farage's legal costs were 'in excess of £100,000'.<sup>299</sup>

A similar impression is given by the claim in *Life 2009 Ltd v Lambeth LBC*, which was settled by a statement in open court.<sup>300</sup> The claimant, 'an incorporated charity',<sup>301</sup> sued in respect of statements posted on Twitter suggesting that it had given false information on its application to participate in the Lambeth Country Show. Those statements were republished in various media outlets.<sup>302</sup> They had been published by the Council to explain its decision to withdraw the charity's permission to participate after the first day of the Show; that decision formed the basis of additional claims in breach of contract and, under the Human Rights Act 1998, for unlawful interference with the claimant's right to freedom of expression.<sup>303</sup> The limited information revealed by the statement in open court suggests that the core of the charity's complaint was in relation to being ejected from the Show without explanation, and that the Council's misleading statements about the incident, and its failure to correct them, aggravated that initial complaint. While it does seem as though the Council's approach to the situation was problematic, the false impression given by the statements complained of – that the

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<sup>298</sup> 'Nigel Farage Sued for Libel by Anti-Hate Charity' (*Brett Wilson Media Law Blog*, 3 May 2017) <<https://www.brettwilson.co.uk/blog/nigel-farage-sued-libel-anti-hate-charity/>>.

<sup>299</sup> Nick Lowles, 'My Charity's Libel Action against Nigel Farage Marks a Defeat for Fake News' (*The Guardian*, 16 November 2017) <<https://amp.theguardian.com/commentisfree/2017/nov/16/libel-action-nigel-farage-fake-news-hope-not-hate>>.

<sup>300</sup> *Life 2009 Ltd v Lambeth LBC* (Statement in Open Court, 19 February 2019).

<sup>301</sup> *Ibid*, [2].

<sup>302</sup> *Ibid*, [13]. Stephanie Linning, 'Anti-Abortion Group is Kicked Out of Country Fete Amid Claims Its Stand Was Offensive to Mothers and it Displayed Models of Unborn Foetuses' (*MailOnline*, 23 July 2018) <<https://www.dailymail.co.uk/news/article-5982913/Anti-abortion-group-kicked-country-fete.html>>; Owen Sheppard, Isobel Frodsham and Barney Davis, 'Pro-Life Group Kicked Out of Lambeth Country Show for 'Inappropriate' Stand' (*Evening Standard*, 23 July 2018) <<https://www.standard.co.uk/news/london/prolife-group-kicked-out-of-family-show-for-inappropriate-stand-a3893886.html>>.

<sup>303</sup> *Life 2009 Ltd* (n 300) [14].

claimant ‘did not have permission to be at the Show, or had submitted inaccurate information in its application’<sup>304</sup> – hardly seems to go to the core of the charity’s values or to be likely to affect its ability to perform its functions.

Since the law is inevitably an imperfect mechanism for resolving disputes, it must be accepted that some injustice would result either from a rule denying not-for-profit bodies the right to sue, or from a rule allowing their claims. There will either be cases in which organizations such as Hope not Hate are compelled to respond as best they can to damaging falsehoods in the public sphere; or there will be cases in which important speech on matters of public interest is chilled by defamation claims by organizations like the British Chiropractic Association. As Schauer points out, ‘attention must ... be paid to the consequences of the over- and under-inclusion’ of a given rule, and to the relative harm that would be caused by those consequences.<sup>305</sup> If the three claims discussed above are at all typical of defamation claims brought by not-for-profit organizations, then the harm that would be caused by prohibiting such claims seems unlikely to be particularly serious. In contrast, it is clear that the interests of defendants, and the public interest in freedom of speech, can be harmed significantly by the ability of not-for-profit bodies to sue in defamation.<sup>306</sup>

The rule proposed here also minimizes uncertainty. As the discussion of the US ‘public figure’ test above indicated, the broader chilling effect of defamation law is best addressed through reforms that are clear and predictable in their application. The ‘body that trades for profit’ test in s 1(2) of the Defamation Act 2013 is reasonably clear and predictable, but there has been some debate as to its scope;<sup>307</sup> for example, there was some initial uncertainty between the parties in *Cooke* as to whether the serious financial loss requirement applied to the claimant housing association.<sup>308</sup> The fact that the line between human beings and all other potential claimants is almost certainly the easiest line to draw in individual cases means that it is the clearest and most predictable test available. Denying *all* corporate claimants

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<sup>304</sup> *Ibid*, [12].

<sup>305</sup> Schauer, ‘Commercial Speech’ (n 218) 1190. See also Hilary Young, ‘Rethinking Canadian Defamation Law’ (n 95) 586.

<sup>306</sup> cf Herzfeld (n 65) 180.

<sup>307</sup> See note 260 above.

<sup>308</sup> *Cooke* (n 261) [29].

the right to sue would help to reduce the likelihood that expensive litigation would be necessary to resolve uncertainty about the standing of entities close to whatever other dividing line might be drawn. It would therefore most effectively address the chilling effect that fear of such litigation might have on speech.

The rule advocated here is also arguably the least arbitrary option available. As Mullis and Scott note, ‘Inevitably, any line drawn will be artificial’,<sup>309</sup> but it is submitted that the most consistent and conceptually coherent line available is that which separates human and non-human claimants. Young notes that the ‘essential distinction ... between human and non-human’ claimants is that ‘defamation implicates such different reputational interests for humans and non-humans.’<sup>310</sup> Although charities’ reputational interests may be less strictly financial in nature than those of for-profit companies, they have even fewer interests in common with individual claimants.<sup>311</sup> As argued in *Gatley on Libel and Slander*:

‘Bodies that trade for profit cannot sustain harm to their social relations nor suffer distress. The only real harm they can sustain is financial. ... Charities and similar bodies are in a similar position. They have no immortal soul worthy of protection.’<sup>312</sup>

All corporate defamation claimants, even non-profit corporate claimants, are unlike individual claimants in that the interests protected by their defamation claims should *not* be treated as engaging their fundamental rights under the European Convention on Human Rights. In contrast, defamation claims brought by any kind of corporate claimant will interfere with defendants’ Convention right to freedom of expression. In other words, the over-inclusiveness of a reform restricting the right to sue of all corporate claimants will only affect their non-Convention interests in reputation, which would be preferable to the effect on defendants’ Convention rights that results from the under-inclusiveness of reforms targeted at only some corporate claimants.

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<sup>309</sup> Mullis and Scott, ‘Lord Lester’s Defamation Bill’ (n 263) 14.

<sup>310</sup> Hilary Young, ‘Public Institutions as Defamation Plaintiffs’ (2016) 39(1) Dalhousie Law Journal 249, 270.

<sup>311</sup> eg Joint Committee Report (n 4) para 110: ‘Irrespective of their size and available resources, all corporations are different from individuals in that they do not have feelings.’

<sup>312</sup> *Gatley* (n 91) para 2.8.

# CONCLUSION

## A. Summary of thesis conclusions

This thesis set out to assess whether English defamation law strikes an appropriate balance between the competing interests in reputation and freedom of speech in cases involving corporate claimants. The overall conclusion is that, despite the reforms introduced in the Defamation Act 2013, it does not. The reform that would most appropriately reflect those competing interests would be to remove companies' right to sue in defamation entirely.

The interests at stake in defamation claims brought by individuals are different from those at stake in claims brought by corporate entities. As explained in Chapter 1, corporate claimants – unlike many individual claimants – are not protecting a fundamental right to reputation under the European Convention on Human Rights. Rather, their reputational interests are merely instrumental to their ability to pursue their trading or other objects. In contrast, defendants in corporate defamation cases are by definition sued in respect of their exercise of the fundamental right to freedom of speech.

Further, Chapter 2 argued that the statements complained of by corporate defamation claimants are almost always on matters of public interest. As such, defendants' speech interests should be given greater weight in defamation cases involving corporate, as opposed to individual, claimants. This reinforces the argument presented in Chapter 1 that less weight should be afforded to the reputational interests of corporate claimants. If both of those arguments are accepted then, compared to the balance struck in defamation claims brought by individuals, the law applied to corporate defamation claims should account for *both* the higher value of speech *and* the lower value of reputation in that context. This suggests not only that defamation law should provide less protection to the

reputations of corporate claimants, but that it may be appropriate for it to provide *substantially* less protection to those claimants. Tony Weir expressed this sentiment effectively when he wrote that ‘To prefer the interest in maintaining the corporate image to the right of the citizen to say what he reasonably believes to be true is a grim perversion of values.’<sup>1</sup> The evidence set out in Chapter 2 suggests that, before 2013, in many cases the law did in fact prefer the corporate interest in reputation to the free speech rights of critics.

In s 1(2) of the Defamation Act 2013, Parliament attempted to rebalance the law in favour of defendants by introducing a ‘serious financial loss’ threshold for corporate claimants. At the centre of this thesis was a thorough critical examination of that reform, and of the courts’ approach to applying the s 1(2) test in corporate defamation cases since the Act came into force. The results of that analysis indicate that the serious financial loss threshold may benefit defendants in some cases, by providing a mechanism with which weaker claims can be challenged and struck out at an early stage of proceedings. But the 2013 Act will probably make only a marginal difference to corporate defamation law overall, especially if the courts continue to interpret and apply s 1(2) in a way that is unduly favourable to claimants, as they have done in a majority of the cases to date in which the provision has been relevant. The s 1(2) test may also have the counter-productive effect of introducing complex issues relating to loss and causation into corporate defamation litigation, and thereby increasing the cost of even successfully defending a company’s defamation claim.

There are other problems with the substantive law that the 2013 Act did not address, particularly the lack of any requirement for the defendant to have been at fault and the presumption that defamatory statements about a company are false; as well as a tendency for successful corporate claimants to be awarded inappropriate and disproportionate remedies. Even after the Defamation Act 2013 came into force, therefore, English corporate defamation law still fails to strike an appropriate balance between the interests in reputation and speech.

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<sup>1</sup> J A Weir, ‘Local Authority v Critical Ratepayer – A Suit in Defamation’ (1972) 30 Cambridge Law Journal 238, 240.



More fundamentally, the analysis offered in this thesis suggests not only that English corporate defamation law *does not* appropriately balance the interests at stake in individual cases, but that in its current form as a part of the law of torts, it *cannot* do so. The adversarial litigation process itself has a disproportionate impact on defendants, allows corporate claimants to abuse the threat of litigation, and creates an unacceptable chilling effect on speech about companies and their activities.

In light of the public interest in the freedom to speak critically about companies and their activities, and given that corporate defamation claims continue to have the capacity to chill speech on these subjects, it is reasonable to ask what benefit the corporate right to sue provides. The answer, it seems, is very little. In most cases, corporate defamation claimants in fact have alternatives to bringing defamation claims that offer sufficient protection against the reputational harm caused by false allegations. In other words, most companies do not actually *need* to be able to sue in defamation. As a result, there is even less justification for accepting the negative consequences of their right to sue for freedom of speech.

As such, companies should be denied standing to sue in defamation. This rule should not be limited to any particular category of corporate claimants, and no exception should be made for small businesses or not-for-profit entities. While it is true that, in general, defamation claims brought by these types of claimant are less likely to give rise to serious free speech concerns, they are still capable of doing so. Attempting to target larger companies, or to exclude some corporate claimants from the scope of the reform proposed, would create uncertainty and risk being under-inclusive, both of which would have undesirable consequences for freedom of speech. Moreover, regardless of their size or the objects for which they were formed, all non-human claimants lack the dignitary interests in reputation that justify protecting individual reputation as a fundamental right under Article 8 of the European Convention on Human Rights. Therefore, the right to sue in defamation should be removed from *all* non-human claimants.

## B. Limitations and opportunities for further research

There are a number of limitations to the argument presented in this thesis that it was not possible to avoid. Perhaps the most significant is that the analysis of s 1(2) in Chapter 3 was undertaken in the context of a developing body of case law that has remained unsettled since the Act came into force. In particular, there is a significant amount of uncertainty as to how the Supreme Court's judgment in *Lachaux v Independent Print Ltd*<sup>2</sup> will affect the application of the s 1(2) 'serious financial loss' test by trial courts; and at the time of writing the Court of Appeal's judgment in *Seventy Thirty Ltd v Burki*, allowing the defendant's appeal against the High Court verdict in favour of the corporate claimant,<sup>3</sup> remained outstanding.<sup>4</sup> As a result, there is a limit to the certainty with which predictions can be made about how the s 1(2) test will affect the outcomes of corporate defamation cases in the future. Nonetheless, the analysis of the existing case law in this thesis clarifies some areas of dispute, and reveals limits to the effectiveness of the 2013 reforms that will survive any shift towards a more defendant-friendly interpretation of s 1(2) that might result from those recent appellate decisions.

In addition to the uncertain state of the substantive law in this area, it is also difficult to find reliable information that offers any real detail about the litigation that is pursued in the courts. Other commentators have noted the paucity of data made available by the courts.<sup>5</sup> This makes it prohibitively difficult to examine the corporate defamation claims that are filed in court, but that are not the subject of any reported judgments. Similarly, transcripts of the decisions made by Masters in the High Court, and the decisions of County Courts, are rarely made public. This means that there is very little information available in relation to some corporate defamation claims that are resolved in the courts, even when they result in substantial awards of compensation to claimant companies.<sup>6</sup>

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<sup>2</sup> [2019] UKSC 27.

<sup>3</sup> *Seventy Thirty Ltd v Burki* [2018] EWHC 2151 (QB).

<sup>4</sup> See Ch.3.B., note 81 and accompanying text.

<sup>5</sup> Judith Townend, 'Closed Data: Defamation and Privacy Disputes in England and Wales' (2013) 5(1) *Journal of Media Law* 31.

<sup>6</sup> See Ch.3.B., text to notes 90-93.

In Chapter 2, I explained that corporate defamation law can have a chilling effect on speech about companies even when no claim is actually pursued in the courts. Companies' threats of litigation can in themselves be sufficient to pressure speakers into retracting critical statements; and publishers' awareness of the risks involved with criticizing companies can deter them from speaking in the first place. These phenomena are difficult to study and, as noted in Chapter 2, there is a particular lack of empirical evidence in relation to the chilling effect of *corporate* defamation law specifically. There was sufficient anecdotal evidence before the 2013 Act to recognize that the chilling of speech about companies was a significant problem, even if it was not possible to measure that problem precisely. But there have been no studies to date examining the extent of the chilling effect that the law continues to have after the 2013 reforms.

One related theme emerged in the course of researching this thesis which I believe is worthy of closer study: namely, the frequency with which judges' decisions in defamation cases are guided by confident pronouncements that are empirically testable, but in support of which no empirical evidence is offered. The context in which this tendency is most apparent is when judges are assessing the amount of general damages necessary to 'vindicate' a claimant's reputation.<sup>7</sup> It is extremely concerning that tens of thousands of pounds are regularly awarded against defendants for the purpose of signalling to future audiences that their allegations against the claimant were false, when the courts appear to disagree substantially as to how large an award will be sufficient to serve that purpose – or even whether the amount of damages awarded has any effect whatsoever on how the claimant is perceived. Informal conversations with colleagues in psychology departments suggest that it would be relatively simple to test these questions in an experimental setting. That this has not yet been attempted, given the serious interference with defendants' free speech rights that is justified by reference to the vindicatory effect of large compensation awards, is surprising. This is a gap in our understanding of how best to resolve defamation cases that I intend to address in the future.

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<sup>7</sup> See Ch4.B.ii., text to notes 126-159.

## C. Possibility of reform

Although the academic contribution made by this thesis is valuable in its own right, the analysis in Chapters 4 and 5, and the overall conclusion, does make a concrete recommendation for how the law should be reformed. It is reasonable to ask whether the proposed reform is realistically achievable, and if so how it might be achieved. The Defamation Act 2013 made substantial and wide-ranging reforms to this area of law, and came about as the result of a process of consultation and debate that lasted nearly five years.<sup>8</sup> Although the corporate right to sue was a frequent target of criticism throughout that process, Parliament ultimately chose to put that right on a statutory footing for the first time. If it is true that ‘Statutory reform of libel laws ... is a once-in-a-generation phenomenon’,<sup>9</sup> then given that less than seven years have passed since Parliament rejected the approach advocated in this thesis, the prospect of English defamation law being reformed in the near future so as to deny companies the right to sue may seem fanciful.

Douglas Vick and Linda Macpherson cite an observation made in the 1990s, by the authors of *Carter-Ruck on Libel and Slander*,<sup>10</sup> of a pattern of statutory reforms to defamation law happening roughly once every fifty years.<sup>11</sup> But the Defamation Act 2013 bucked this trend, coming less than twenty years after the previous legislative reforms in the Defamation Act 1996. Vick and Macpherson suggest that the periodic need for statutory intervention arises ‘when one generation’s accommodation of [the competing interests in reputation and freedom of speech] is subjected to the pressures of the next generation’s social, economic, and technological transformations.’<sup>12</sup> The impetus behind the 2013 Act was in part due to the extent to which communication technology had developed, even in the relatively short period of time since the 1996 Act. For example, the Joint Committee

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<sup>8</sup> See generally James Price and Felicity McMahon, *Blackstone’s Guide to the Defamation Act 2013* (OUP 2013) ch 1.

<sup>9</sup> Andrew Scott, ‘*Ceci n’est pas une pipe*’: The Autopoietic Inanity of the Single Meaning Rule’ in Andrew T Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press 2016) 55.

<sup>10</sup> Peter F Carter-Ruck, Richard Walker and Harvey N A Starte, *Carter-Ruck on Libel and Slander* (4<sup>th</sup> edn, Butterworths 1992).

<sup>11</sup> Douglas W Vick and Linda Macpherson, ‘An Opportunity Lost: The United Kingdom’s Failed Reform of Defamation Law’ (1997) 49(3) *Federal Communications Law Journal* 621, 622-23.

<sup>12</sup> *Ibid*, 622.

on the Draft Defamation Bill claimed that ‘Modern means of communication represent perhaps the biggest challenge facing the operation of the law on defamation.’<sup>13</sup> The Committee stressed that the law ‘must adapt to modern communication culture,’<sup>14</sup> including, if necessary, through statutory reform.

Just days before this thesis was submitted, the organization Index on Censorship, which along with English PEN played a crucial role in generating the momentum behind the 2013 reforms, issued a press release announcing the launch of a ‘research project into the use of vexatious legal threats against journalists’, and expressing frustration that the reforms introduced in the Defamation Act 2013 had not prevented ‘powerful individuals and companies [from] bring[ing] libel actions or us[ing] other vexatious legal threats designed to stifle investigative journalism’ in the UK.<sup>15</sup> As with any law reform agenda, whether defamation reform becomes a pressing concern again in two years’ time or twenty years’ time is a matter of political will.

It is plausible to think that the increasing pace of change in media and communications technology, and of social change more generally, will present more frequent opportunities for statutory reform of defamation law in the future. If the criticism of the approach taken in s 1(2) of the 2013 Act offered in this thesis continues to hold true, then Parliament may opt for a more decisive approach to corporate defamation reform when the opportunity next arises.

There are also other jurisdictions in which defamation reform processes are ongoing, or where there have recently been calls for reform. For example, in January 2019, the Scottish Law Commission opened a consultation on defamation reform in that jurisdiction,<sup>16</sup> and sought comment on the approach that should be taken to claims brought by for-profit companies.<sup>17</sup> The Commission also invited

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<sup>13</sup> Joint Committee on the Draft Defamation Bill, *Report* (2010-12, HL 203, HC 930-I) 4.

<sup>14</sup> *Ibid*, 3.

<sup>15</sup> Index on Censorship, ‘Urgent Reforms Needed to Protect Journalists from Vexatious Legal Threats’ (3 January 2020) at <<https://www.indexoncensorship.org/2020/01/urgent-reforms-needed-to-protect-journalists-from-vexatious-legal-threats-index-on-censorship/>>.

<sup>16</sup> Scottish Law Commission, *Defamation in Scots Law: A Consultation* (January 2019) at <<https://consult.gov.scot/justice/defamation-in-scots-law/>> (‘Scottish Law Commission, *Consultation*’); *Report on Defamation* (Scot Law Com no 248, December 2017) at <[https://www.scotlawcom.gov.uk/files/7315/1316/5353/Report\\_on\\_Defamation\\_Report\\_No\\_248.pdf](https://www.scotlawcom.gov.uk/files/7315/1316/5353/Report_on_Defamation_Report_No_248.pdf)>.

<sup>17</sup> Scottish Law Commission, *Consultation* (n 16) paras 64-74.

views on the possibility of removing the right to sue from larger companies altogether, although its position was that it would be ‘a radical step to strip such bodies of the rights they currently enjoy, especially as they currently enjoy a similar right in almost all other jurisdictions.’<sup>18</sup> A consultation on defamation reform was run by the Law Commission of Northern Ireland in 2014,<sup>19</sup> and a subsequent report published in 2016.<sup>20</sup> Although no reforms have yet been implemented, there does appear to be growing pressure to do so.<sup>21</sup> In the Republic of Ireland, where the last statutory reform of defamation law was in 2009, calls for further reform also seem to be gaining momentum.<sup>22</sup>

Given that the responses to a recent review of the operation of the Australian uniform defamation laws were overwhelmingly in favour of retaining (and expanding the scope of) the provision barring corporations from suing,<sup>23</sup> it is not unimaginable that a similar reform could be introduced in England, or in one or more other common law jurisdictions in the near future. That, in my view, would be a very welcome development.

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<sup>18</sup> *Ibid*, para 73.

<sup>19</sup> Northern Ireland Law Commission, *Consultation Paper: Defamation Law in Northern Ireland* (NILC 19, 2014).

<sup>20</sup> Andrew Scott, *Reform of Defamation Law in Northern Ireland: Recommendations to the Department of Finance* (2016) at <<http://eprints.lse.ac.uk/67385>>.

<sup>21</sup> eg ‘Government Commits to Report on Defamation Regime in Northern Ireland’ (*News Media Association*, 18 July 2019) at <<http://www.newsmediauk.org/Latest/government-commits-to-report-on-defamation-regime-in-northern-ireland>>.

<sup>22</sup> eg ‘Minister Pledges to Reform Defamation Law in 2020’ (*Law Society of Ireland Gazette*, 14 November 2019) <<https://www.lawsociety.ie/gazette/top-stories/minister-pledges-to-reform-defamation-law-early-in-2020/>>.

<sup>23</sup> Council of Attorneys-General, *Review of the Model Defamation Provisions: Background Paper* (November 2019) 10, at <<https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/defamation-final-background-paper.pdf>>.

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