Neutral Citation Number: [2019] EWHC 1525 (QB)

Case No: QB-2018-000715

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2019

Before :

MR JUSTICE SOOLE

- -

Between :

ALISON MORGAN	**Claimant**
- and -	
TIMES NEWSPAPERS LIMITED	**Defendant**

- -
- -

William Bennett QC (instructed by **Brett Wilson LLP**) for the Claimant
David Price QC (instructed by **David Price Solicitors and Advocates**) for the Defendant

Hearing dates: 13, 15 May; 14 June 2019

- -

Approved Judgment

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

.....

MR JUSTICE SOOLE

Mr Justice Soole:

1. This is the trial of three preliminary issues in this libel action brought by the Claimant barrister against the Defendant publisher of The Times newspaper and its associated website in respect of an article published on 15 August 2018. The issues are (i) the true meaning of the article; (ii) whether the article in its true meaning is defamatory of the Claimant at common law; and (iii) whether the article in its true meaning has a tendency to cause serious harm to the reputation of the Claimant.

2. The third issue reflects the decision of the Court of Appeal in Lachaux v. Independent Print Ltd [2018] QB 594 on the interpretation of s.1 Defamation Act 2013. For the purposes of the preliminary trial, s.1 was only in play to that extent. On 12 June 2019, two days after my draft judgment was supplied to Counsel, the Supreme Court handed down its judgment which overturned the reasoning of the Court of Appeal: [2019] UKSC 27. On behalf of the Defendant, Mr David Price QC submitted that the third issue had thereby been rendered irrelevant to the limited preliminary trial and should not be determined. Given that the inherent tendency of the words remains a relevant factor in the overall factual issue raised by s.1 (see Lord Sumption at paragraphs [12], [14] and [21]), I have concluded that the issue should be retained and determined.

3. On 15 August 2018 the Defendant published an article, starting at the top of the front page of The Times, headed *'Senior Prosecutor under fire after Stokes is cleared of affray'*. As becomes apparent 'Senior Prosecutor' means the Claimant and 'Stokes' the cricketer Mr Ben Stokes. The article followed Mr Stokes' acquittal the previous day by the jury at Bristol Crown Court on a charge of affray. Its full terms were (like the parties, I have added paragraph numbers for ease of subsequent reference) :

   (1) *A senior government lawyer faces scrutiny over her decisions in the prosecution of Ben Stokes, the England cricketer who was cleared yesterday of affray.*

   (2) *The all-rounder was recalled to the national squad hours after the not-guilty verdict and could play in the third Test against India on Saturday.*

   (3) *Mr Stokes, 27, was acting in self-defence when he punched Ryan Ali, 28, and Ryan Hale, 27, at 2.30am outside a Bristol nightclub last September, the jury concluded. The cricketer walked across to Mr Ali in the dock at Bristol crown court and shook his hand after*[1] *they were both cleared after the jury, had deliberated for two and a half hours.*

   (4) *Minutes before the start of the trial Mr Stokes's legal team had defeated an attempt to charge him with two counts of assault, which could have left him facing total sentences of up to 13 years in jail, it has emerged.*

   (5) *Lawyers for Mr Hale demanded to know why Alex Hales, an England batsman, was also not charged after he was filmed apparently kicking Mr Ali in the head during the fight, it can now be reported.*

   (6) *The initial decision on charges was taken by one of the country's most senior prosecutors, Alison Morgan, who was promoted to first junior treasury counsel in*

[1] Changed to 'when' in the web version

February, decided that Mr Stokes, Mr Ali and Mr Hale should all be charged with affray, which carries a maximum sentence of three years in jail. Nicholas Corsellis, the prosecutor in the trial, applied on Monday last week for Mr Stokes to be charged also with two counts of assault.

(7) *Judge Peter Blair expressed surprise that decisions in the relatively low-level case had been transferred from the local crown prosecution service to the organisation's headquarters in London.*

(8) *He said that Ms Morgan had access to all the key evidence when she made a decision to charge Mr Stokes with affray and indicated that assault charges would have been allowed if requested at a pretrial hearing in February. The judge noted that Ms Morgan had not attended the pretrial hearing but sent a member of her chambers, Lucy Organ.*

(9) *The court was told that Mr Stokes and had gone out with other England players including Mr Hales, James Anderson, Jonny Bairstow, Liam Plunkett and Jake Ball to celebrate their victory over the West Indies in a one-day game.*

(10) *Mr Stokes said that he had "at least ten drinks", including beer, vodka and Jagerbombs but denied that he was "really drunk". He told the court that he had intervened after hearing homophobic abuse directed at two young men, Kai Barry and William O'Connor. They were not called to give evidence.*

(11) *Mr Barry, 27, told ITV News in an interview broadcast yesterday: "When I realised who he [Mr Stokes] was, I thought fair play, because he's obviously put his career at risk for someone that he never knew."*

(12) *Tony Miles, the solicitor for Mr Ali, said that the emergency services worker and Mr Ryan, his best friend, were relieved at the verdict. Both had denied making any homophobic comments and Mr Hale was acquitted on the orders of the judge last week after he ruled that there was no evidence that the former soldier used or threatened violence. Mr Miles said: "Our clients are delighted. They just want to get on with their lives."*

(13) *Mr Ali and Mr Hale were treated in hospital for injuries. Mr Stokes had no obvious injuries except for swelling over the metacarpals on his right hand. The England and Wales Cricket Board announced that it would resume a disciplinary hearing into Mr Stokes and Mr Hales.*

(14) *Paul Stunt, the solicitor for Mr Stokes, said: "Ben would like to thank his friends, team-mates, family and in particular his wife, Clare, for their unerring support. [Ben's] intervention that night has cost him the England vice-captaincy, his place on an Ashes tour and in a number of other England matches." He said Mr Stokes had been the victim of "pre-determined guilty".*

(15) *A Crown Prosecution Service spokeswoman said: "We selected the charge of affray at the outset in accordance with the code for crown prosecutors. Upon further review we considered that additional assault charges would also be appropriate.*

(16) *"The judge decided not to permit us to add these further charges. The original charge of affray adequately reflected the criminality of the case and we proceeded on that."*

4. The article was also published on the newspaper's associated website[2]. The web version also included an embedded video immediately below the headline. If played the video showed CCTV footage from the night of the incident. The Claimant's case is that this shows Mr Stokes punching a man to the ground and then continuing to punch him whilst he is on the ground, whilst another man (Mr Alex Hales) kicks him. Her case is that the reasonable viewer read the text of the web article and watched the video; alternatively that the web version had two groups of readers, those who watched the video and read the article and those who only read the article.

Meaning

5. In any event the Claimant's pleaded meaning is the same for readers of the print version and both groups of readers of the web version, namely that the Claimant is *'reasonably suspected of having been professionally negligent in regard to her decisions as to who should be prosecuted and for what offences in the trial of Ben Stokes and that those decisions had meant that Mr Stokes had not been charged with the correct offences, that Alex Hales had not been charged at all despite film of him kicking one of the victims in the head and that the prosecution had thereby not been properly mounted.'*

6. Whilst noting that it is not required to advance any non-defamatory meaning, the Defendant in its 'Outline Grounds' served pursuant to the Order of Warby J dated 14 March 2019 *'accepts that it is implicit in the information given in the Article that it would have been open to the Claimant, as the person responsible for the charging decisions, to have included charges of assault against Stokes and possibly also Hales, which may have resulted in their convictions. Accordingly, she may have made an error of judgment in not having done so.'*

7. As the parties agree, the relevant law on meaning is conveniently summarised by Nicklin J in Koutsogiannis v. The Random House Group Limited [2019] EWHC 48 (QB) at [10]-[15]. The Court's task is to determine the single natural and ordinary meaning of the words complained of, which is the meaning that the hypothetical reasonable reader would understand the words to bear. The key principles distilled by Nicklin J from the authorities are:

'i) The governing principle is reasonableness.

ii) The intention of the publisher is irrelevant.

iii) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. A reader who always adopts a bad meaning where a less serious or non-defamatory meaning is

[2] See footnote 1

available is not reasonable: s/he is avid for scandal. But always to adopt the less derogatory meaning would also be unreasonable: it would be naïve.

iv) Over-elaborate analysis should be avoided and the court should certainly not take a too literal approach to the task.

v) Consequently, a judge providing written reasons for conclusions on meaning should not fall into the trap of conducting too detailed an analysis of the various passages relied on by the respective parties.

vi) Any meaning that emerges as the produce of some strained, or forced, or utterly unreasonable interpretation should be rejected.

vii) It follows that it is not enough to say that by some person or another the words might be understood in a defamatory sense.

viii) The publication must be read as a whole, and any 'bane and antidote' taken together. Sometimes, the context will clothe the words in a more serious defamatory meaning (for example the classic "rogues' gallery" case). In other cases, the context will weaken (even extinguish altogether) the defamatory meaning that the words would bear if they were read in isolation (e.g. bane and antidote cases).

ix) In order to determine the natural and ordinary meaning of the statement of which the claimant complains, it is necessary to take into account the context in which it appeared and the mode of publication.

x) No evidence, beyond publication complained of, is admissible in determining the natural and ordinary meaning.

xi) The hypothetical reader is taken to be representative of those who would read the publication in question. The court can take judicial notice of facts which are common knowledge, but should beware of reliance on impressionistic assessments of the characteristics of a publication's readership.

xii) Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made on the hypothetical reasonable reader.

xiii) In determining the single meaning, the court is free to choose the correct meaning; it is not bound by the meanings advanced by the parties (save that it cannot find a meaning that is more injurious than the claimant's pleaded meaning).'

8. On behalf of the Claimant Mr William Bennett QC in particular emphasised for the purpose of this case the principles summarised at (i), (iii), (iv), (ix) and (xiii). As to the headline he also pointed to Charleston v. News Group Newspapers Ltd [1995] 2 AC 65 where Lord Nicholls observed that *'Those who print defamatory headlines are playing with fire. The ordinary reader might not be expected to notice curative words tucked away further down in the article'* (p.74). Lord Bridge stated : *'Whether the text of a newspaper article will, in any particular case, be sufficient to neutralise the defamatory implication of a prominent headline will sometimes be a nicely balanced question for the jury to decide and will depend not only on the nature of the libel which the headline*

conveys and the language of the text which is relied on to neutralise it but also on the manner in which the whole of the relevant material is set out and presented.' (p.72).

9. As to the Claimant's pleaded meaning, Mr Bennett submits that this is at 'Chase level 2', i.e. the second of the three broad types of defamatory allegation identified by Brooke LJ in Chase v. News Group Newspapers Ltd [2003] EMLR 11 at [45], viz. (1) the claimant is guilty of the act; (2) reasonable grounds to suspect that the claimant is guilty of the act; and (3) grounds to investigate whether the claimant has committed the act.

10. Starting with the headline, Mr Bennett submitted that the hypothetical reasonable reader would see this as a signpost and summary of what the article is about. The words 'under fire' connoted severe criticism of the Claimant and the immediately following words 'after Stokes is cleared of affray' made the connection between the acquittal of Mr Stokes and the reason why the Claimant was 'under fire'.

11. Paragraph (1) of the article then explained the reasons why the Claimant is under fire, namely her decisions connected with the prosecution of Mr Stokes. The words 'faces scrutiny' did not qualify the headline criticism; rather they added detail, explaining that she was under fire because of her decisions (Mr Bennett emphasised the plural) in the prosecution.

12. Her first decision which was facing such criticism was in respect of Mr Stokes. The article stated that he had punched two people, Mr Ali and Mr Hale (3); and that whereas they had been treated in hospital for injuries, Mr Stokes had no obvious injuries 'except for swelling over the metacarpals on his right hand' (13), i.e. by implication his punching hand. On the website that was reinforced by the embedded video. The Claimant had taken the decision that Mr Stokes should be charged with affray which had a maximum sentence of 3 years (6); it was implicit that the prosecutor at trial (Mr Corsellis) had concluded that, even at that very late stage, it was necessary to add to the indictment two accounts of assault, i.e. for punching Mr Ali and Mr Hale, producing a maximum sentence of 13 years (4)(6). In rejecting the application to amend the judge had made it clear that the Claimant had 'all the key evidence' when she made her initial decision and that the proposed assault charges would have been added at the pre-trial hearing in February if it had been requested (8). The judge's note that the Claimant had not attended the pre-trial hearing but had 'sent a member of her chambers' only added to the flavour of criticism.

13. The reasonable reader would see a real and obvious difference between an affray, suggesting a melee/rumpus/disturbance, and an assault, suggesting physically punching/kicking someone. Thus the first answer to the reader wondering why she was under fire was because she should have advised that the assault charges be added to the indictment at the earlier hearing.

14. The report of the statement from the CPS spokeswoman (15, 16) did not draw the sting. The opening sentence that it had selected the charge of affray 'in accordance with the code for Crown prosecutors' was immediately undermined by the statement that on further review it was considered that additional assault charges 'would also be appropriate'. The CPS must have concluded, on advice, that they needed to be added. Given the contrast between the reasonable reader's understanding of affray and assault and the stated difference in the maximum total sentence, the reasonable reader would not square the final statement that 'the original charge of affray adequately reflected the

criminality of the case' with the decision to try to add the assault charges immediately prior to the commencement of the trial. That action of applying to amend at trial spoke louder than any subsequent words.

15. The second wrong decision was identified in paragraph (5), namely the decision not to charge Mr Alex Hales, despite the fact that 'he was filmed apparently kicking Mr Ali in the head during the fight'; and thus involved in the affray. On the website that was again reinforced by the video. By implication through the article, including the statement that the initial decision on charges was taken by the Claimant (6), that was a further wrong decision for which she was responsible and 'under fire'.

16. Contrary to the Defendant's case the article was not merely pointing out that different Counsel took a different view of the situation. The mischief of the article was to point the finger of blame at the Claimant. The true meaning, as pleaded, was that the Claimant was reasonably suspected of having been professionally negligent in regard to her decisions as to who should be prosecuted and for which offences.

17. On behalf of the Defendant, Mr David Price QC pointed in particular to (iii), (iv), (viii), (ix) and (xii) of the Koutsogiannis principles. With a substitution of The Times for Facebook he also emphasised Lord Kerr of Tonaghmore's statement in Stocker v. Stocker [2019] UKSC 17 [2019] 2 WLR 1033 that the Court's duty is to *'step aside from a lawyerly analysis and… inhabit the world of the typical* [Times] *reader'* [38; also citing 43 and 44]. That typical reader did not have a specialist knowledge of the law.

18. The context of the article, and the reason why it was there on the front page, was Mr Stokes' position as a leading cricketer who had been in trouble. Professionals who advised and acted in this environment must expect to have their decisions questioned; but questioning a decision did not necessarily mean that it was incompetent or professionally negligent. The reasonable reader would regard the decision on charges as a matter of judgment, on which different lawyers could reasonably have different views. Readers of The Times would understand the element of subjectivity in the decision. In circumstances where a second prosecutor had concluded that assault charges should be added to the indictment, and the application to do so had failed, the original decision was bound to come under scrutiny. But the 'territory' was of error of judgment, not professional negligence, let alone a challenge to general competence. As to the difference between professional negligence and errors of judgment, he pointed to the observations of the House of Lords in Saif Ali v. Sydney Mitchell & Co [1980] AC 198.

19. The article included the antidote of the unequivocal statement from the CPS that the code for Crown prosecutors had been followed. Furthermore its repeated use of the first person plural implied a team endeavour. Mr Price observed that the original letter before action had contended that its meaning was that the Claimant had been guilty of professional negligence. The fact that it had now been downgraded to 'reasonable cause to suspect' reflected the Claimant's difficulty in finding a defamatory meaning. In Skuse v. Granada Television Ltd [1996] EMLR 278 the Court of Appeal had stated that the trial judge's distinction between negligence and reasonable grounds to suspect negligence would not occur to the ordinary reasonable viewer of the programme in question (p.290). The same applied to readers of The Times in the present case.

20. Mr Price accepted that the article questioned the Claimant's judgment, at least in respect of the decision concerning the charges to be preferred against Mr Stokes. The report of the judge's remarks (8) would not lead the reasonable reader to conclude that he was thereby criticising the Claimant. The reader would derive only that Mr Stokes could have been charged with assault and that the Claimant had advised on the charges at the initial stage. The worst that could be implied was that the Claimant had made a mistake. It was totally artificial to conclude that the reasonable reader of The Times would understand this article to mean that she had been professionally negligent (as had now been conceded) or that there was reasonable cause to suspect that she had been.

Analysis and conclusion on meaning

21. For the reasons advanced by Mr Bennett, I conclude that the meaning of the article, both in the print and web version, is as pleaded on behalf of the Claimant. In reaching that conclusion I have duly taken account of all the principles summarised in Koutsogiannis; and in particular taken care to read the article as a whole and in its context; to avoid an over-elaborate, too detailed or lawyerly analysis; and to seek to put myself in the position of the hypothetical reasonable reader of The Times without any specialist legal knowledge.

22. In my judgment the clear overall effect of the article is that there is reasonable cause to suspect that the Claimant was professionally negligent in respect of her alleged decisions as to who should be prosecuted in respect of this incident and as to the charges which should be preferred in the case of Mr Stokes. I do not accept that the hypothetical reasonable reader would understand the article to have a more limited meaning, e.g. that the Claimant may have made an excusable mistake or error of judgment, let alone that these were merely decisions on which different prosecutors could reasonably come to different conclusions.

23. As the article makes clear, its focus is upon the Claimant as the senior prosecutor in the case making the initial decision on the charges to be preferred in respect of the incident. Its effect, expressed in particular through the combination of the headline and paragraphs (1), (3)-(6), (8) and (13), is that there is reasonable cause to suspect that she was negligent in her decisions that Mr Stokes should be charged only with affray and not to charge Mr Hales.

24. I do not accept that the implication of a meaning involving the words 'negligence' or 'professional negligence' falls into the error of assuming specialist legal knowledge on the part of the reasonable reader of The Times. Conversely, I consider that the suggested distinction between professional negligence and errors of judgment, and the citation of Saif Ali in support of that distinction, does fall into that error.

25. In Skuse, the Court evidently found the concept of negligence by a professional to be understandable to viewers of the television programme 'World in Action', albeit the Court expressed the defamatory meaning in terms which did not include the word 'negligence', i.e. that Dr Skuse *'failed to show the skill, knowledge, care and thoroughness to be expected of him in that role'* (p.288). Although on the particular facts it considered that the distinction between negligence and reasonable grounds to suspect negligence would not occur to the ordinary reasonable viewer of the programme, it made clear that such a distinction *'may properly be made if the words complained of warrant it'* (p.290). In my judgment, the article in the present case

warrants that distinction and is one which would be readily understood by reasonable readers of The Times.

26. As to the decision in respect of Mr Stokes, it is expressly stated that the Claimant made the decision to charge him with affray; and the implication from those paragraphs is that there is reasonable cause to suspect that the failure to charge him with two assaults was negligent.

27. I do not accept that the report of the CPS statement provides any antidote to that meaning. First, its repeated use of the first person plural does not undermine the essential thrust of the article that the relevant decisions were taken by the Claimant. Secondly, the statement read as a whole would if anything have added to the concern that her decision was negligent. There is no antidote, nor indeed any real coherence, in a statement that the original charge was in accordance with the code for Crown prosecutors; yet that nonetheless a further review concluded that it was appropriate to apply to add two charges of assault; and yet that, the application having failed, the original charge adequately reflected the criminality of the case.

28. As to Mr Hales, the overall implication is that the Claimant was responsible for the decision not to prefer charges against him. Whilst paragraph (1) refers to *'her decisions in the prosecution of Ben Stokes'*, paragraph (6) states that *'the initial decision on charges'* was taken by the Claimant; and follows on from the criticism of a failure to charge Mr Hales (5). The reasonable reader would understand that decisions on charges arising from one incident would be taken by the same prosecutor and that is what the article implies. The overall tenor is that there was again reasonable cause to suspect that the absence of any charge against Mr Hales was the result of negligence on the part of the Claimant as prosecutor. Furthermore the CPS statement does not deal with this decision.

29. I see no reason to distinguish the print and website versions. The embedded video essentially reflected the statements in the article about the conduct of Mr Stokes and Mr Hales, adding some colour for those whose chose to view it.

Whether defamatory at common law

30. The starting point for both parties is the statement in Gatley on Libel and Slander (12th ed.) para.2.35 under the heading 'Reputation in business, trade or profession' : *'Any imputation which may tend to injure a person's reputation in a business, employment, trade, profession, calling or office carried on or held by him is defamatory provided that such imputation meets the necessary threshold of seriousness. To be actionable, words must impute to the claimant some quality which would be detrimental, or the absence of some quality which is essential, to the successful carrying on of his office, profession or trade. The mere fact that words tend to injure the claimant in the way of his office, profession or trade is insufficient. If they do not involve any reflection upon the personal character, or the official, professional or trading reputation of the claimant, they are not defamatory.'*

31. The 'threshold of seriousness' is of course a reference to the requirement identified in Thornton v. Telegraph Media Group Ltd [2011] 1 WLR 1985.

32. Having cited Thornton (*'There is no consequence for prospective readers of Dr Thornton's book which corresponds to the consequences that may be suffered by a patient from the shaky hand or unproven anaesthetic technique of a dental surgeon'*[103]) Gatley para. 2.35 continues *'Of course the "effect upon others" point cannot be the end of the argument in all cases.'*

33. Under the heading 'Insufficient that words damage claimant in business, etc', para.2.36 states: *'To be defamatory the statement complained of must be reasonably capable of conveying "a personal imputation upon them, either upon their character, or upon the mode in which their business is carried on." If the statement does not satisfy these requirements it may be actionable as a malicious falsehood or as negligence but not as defamation… To state that a trader's goods lack desirable qualities may be very damaging but it is only defamatory if it imputes some deficiency in the way that the business is run. It is not, however, necessary that there should be an imputation of conduct which is morally wrong: an imputation of incompetence will do, for: "… words may be defamatory of a trader or a businessman or professional man, though they do not impute any known fault or defect of personal character. They can be defamatory of him if they impute lack of qualifications, knowledge, skill, capability, judgment or efficiency in the conduct of his trade or business or professional activity."* [citing Drummond-Jackson v. British Medical Association [1970] 1 WLR 688 per Lord Pearson at 698H-699A]. *It is defamatory of a surgeon to say that although he is of excellent character he is "past it" and his hands shake…'*

34. Under the heading 'The law', Gatley continues at para.2.41: *'It is defamatory to publish of a barrister that he knows no law, or that he gives bad advice or ought to be disbarred but not that he is not particularly prominent, or to refer to him as one of average ability. It is defamatory to publish of a solicitor that he has been guilty of "sharp practice" in his profession, or a breach of professional confidence, or other disreputable, dishonest, or incompetent conduct, or that she is "downright crooked", or that he has given his client's case away, or that he has no regard to the interests of his clients, or that he knows no law, but not merely to misstate the date on which he was admitted as a solicitor. It is defamatory to say that a solicitor has been struck off the roll, or suspended from practice, or that these things ought to happen to him; but not that he has provided services to a notorious client associated with terrorism.'*

35. Mr Price's central submission is that for there to be defamation of professional reputation in respect of competence the law imposes a threshold that the imputation must be of 'habitual' or 'general' or 'chronic' incompetence in that profession; and that was not (nor could have been) the pleaded meaning in the present case. For this purpose he relies in particular on Gatley and in particular the decisions in Drummond-Jackson, Thornton and Dee v. Telegraph Media Group Ltd [2010] EMLR 20 (Sharp J, as she then was).

36. As to Gatley, the requirement of an habitual or chronic failing was demonstrated by paragraph 2.35, itself a distillation of the relevant authorities, that *'To be actionable, words must impute to the claimant some **quality** which would be detrimental, or the absence of some **quality** which is essential, to the successful carrying on of his office, profession or trade.'* (emphasis added). Likewise the paragraph made clear that *'the "effect upon others"* [e.g. the potential impact of the acts or omissions of a professional on clients or the wider public] *cannot be the end of the argument in all cases.'*

37. Gatley at para.2.36 was to the same effect in its reference to *'an imputation of incompetence'*, citing Drummond-Jackson. He pointed to the footnote to that citation which adds *'Some American cases take the line that it is not defamatory to accuse another of a single mistake even if negligent, because that does not necessarily imply unfitness (though it may do so). See* 50 Am.Jur.2d, Libel and Slander, para.213 and 51 A.L.R. 3d 1300*'.* The examples given under 'The law' in para.2.41 were likewise of general or habitual failing. Mr Price accepted that there could be cases where one mistake implied general/habitual want of competence; but that was not this case, nor was that meaning pleaded.

38. In Drummond-Jackson Lord Pearson distinguished a trader's goods and a professional man's technique : *'I doubt whether the analogy sought to be drawn in the present case between a trader's goods and a professional man's technique is sound. Goods are impersonal and transient. A professional man's technique is at least relatively permanent, and it belongs to him: it may be considered to be an essential part of his professional activity and of him as a professional man. In the case of a dentist it may be said: if he uses a bad technique he is a bad dentist and persons needing dental treatment should not go to him.'* The reference to a 'bad technique' implied an habitual failing, not an individual act of negligence.

39. In Thornton Tugendhat J, under the heading 'A possible ordering of defamation cases', derived from the authorities the proposition that there are two main varieties of each of the torts of libel and slander, namely *'(A) personal defamation, where there are imputations as to the character or attributes of an individual and (B) business or professional defamation, where the imputation is as to an attribute of an individual, a corporation, a trade union, a charity, or similar body, and that imputation is as to the way the profession or business is conducted.'* [34(i)]. He contrasted the position where *'the imputation is as to the product of the business or profession'*, in which case *'it will be the tort of malicious falsehood, not defamation, to which the claimant must look for any remedy.'*(ibid.). Mr Price emphasised the words *'as to the way the… profession is conducted'* and the contrast with its *'product'*. This again demonstrated the requirement, in cases of professional defamation, of an imputation of an habitual failing.

40. Tugendhat J then stated that business or professional defamation comes in a number of sub-varieties, citing amongst others the observations of Lord Pearson in Drummond and including *'Imputations upon a person, firm or other body who provides goods or services that the goods or services are below a required standard in some respect which is likely to cause adverse consequences to the customer, patient or client. In these cases there may be only a limited role for the opinion or attitude of right-thinking members of society, because the required standard will usually be one that is set by the professional body or a regulatory authority.'* [34(iii)]. Mr Price submitted that this meant the imputation must be that the provision of the relevant goods or services is generally below the required standard; for otherwise it would be inconsistent with the judge's previous distinction between the 'attribute' and the 'product' of the relevant professional.

41. This requirement of an habitual attribute was further supported by Tugendhat J's citation of Lord Esher MR in South Hetton Coal Co Ltd v. North-Eastern News Association Ltd [1894] 133 at pp138-139. In that case the Master of the Rolls took the example of the distinction between criticism of a wine merchant in the conduct of his

business and criticism of the product of that business. As to the former, Lord Esher stated that publication of a man in business *'that he conducts his business in a manner which shows him to be a foolish or incapable man of business… would be a libel on him in the way of his business…that is to say, with regard to his conduct of his business…'*; likewise statements *'made with regard to their mode of carrying on business, such as to lead people of ordinary sense to the opinion that they conduct their business badly and inefficiently.'*

42. Tugendhat J pointed to the whole passage as *'… distinguishing between an imputation upon the goods or products of a professional or business person, and an imputation upon that person himself. If it is the former, the only cause of action available would be malicious falsehood.'* [41]. However he added that it must be read subject to the further requirement that *'There must be some effect on the business such as deterring prospective employees or providers of finance'* [42], citing Derbyshire County Council v. Times Newspapers Limited [1993] AC 534 per Lord Keith of Kinkel at 547 : *'The authorities…clearly establish that a trading corporation is entitled to sue in respect of defamatory matters which can be seen as having a* tendency *to damage it in the way of its business.'* Mr Price submitted that adverse effect on the claimant was thus a necessary, but not sufficient, ingredient of professional defamation.

43. Tugendhat J had cited Berkoff v. Burchill [1996] 4 All ER per Neill LJ at 1011-1013 for a list of definitions of the word 'defamatory' [29-30]. These included that *'the publication of which he complains may be defamatory of him because it affects in an adverse manner the attitude of other people towards him'* [30]. Mr Price again submitted that this definition could not apply to a case concerning professional reputation unless the imputation went to the general attribute of the professional and/or the way in which he generally went about his practice.

44. Turning to Dee, Mr Price pointed to Sharp J's observations on claims concerning 'want of skill' by a professional person that *'…cases of this kind or in this category often concern allegations which are defamatory in the conventional sense because of the adverse consequences that lack of skill or competence might have for others. Ordinary members of society would therefore think the less of the professional person who provided such unsatisfactory services as a result. This is so whether one looks at cases of libel or slander.'* [42].

45. Sharp J then referred to three cases cited by Lord Pearson in Drummond-Jackson concerning *'a professional man's technique'* in the fields of an apothecary, an architect and a solicitor [43]. Mr Price pointed to the latter example (Dauncey v. Holloway [1901] 2 KB 441) where the question was whether a slander conveyed an imputation on the plaintiff in his business as a solicitor. Giving the judgment of the Court of Appeal A.L. Smith MR stated at p.447 : *'The words do not… reasonably convey any imputation of impropriety or misconduct on the part of the plaintiff in relation to or in connection with his profession or business, or of unfitness to carry on his business in a proper and satisfactory manner.'* That again indicated the requirement of an imputation of habitual failing by the professional.

46. In the light of Drummond-Jackson Sharp J then observed that *'Incompetence or 'want of skill' by those who hire out their professional or personal skills for a living often involves… consequences for those who hire them and/or pay for their services – and who get less than they might be entitled to expect. In addition, the tendency of such*

words might be to suggest a claimant's fitness or competence falls below the standard generally required for his business or profession (see Radio 2UE Sydney Pty Ltd v Chesterton [2008] NSWCA 66 where the court affirmed that the general test for defamation, namely whether an ordinary reasonable person would think less of the plaintiff because of what was said about him or her, applied to imputations regarding all aspects of a person's reputation, including business reputation)' [48]. She concluded that it was arguable that the words in issue of the claimant professional tennis player *'are defamatory on the grounds that they are capable of suggesting 'want of skill', incompetence and/or on the ground that he is ridiculed by the suggestion he is absurdly bad at tennis.'* [57].

47. Mr Price submitted that these examples and statement all supported the requirement that the imputation was of general or habitual want of skill and competence: as he put it, 'not up to the job'. By contrast, the Claimant's alleged meaning related to the particular and specific 'product' of her professional work, namely her decisions in the Ben Stokes case. There was (and could be) no allegation that this implied reasonable cause to suspect a general/habitual want of skill and competence.

48. The decision in Skuse v. Granada Television Ltd [1996] EMLR 278 was not in conflict with his central proposition. In that case the plaintiff was a forensic scientist employed by the Home Office who had given expert evidence at the trial of the Birmingham Six. He alleged that the meaning of the words in the defendant's television programme was that he had negligently misrepresented to the court the effect of the scientific tests which he had carried out. The judge (Brooke J, as he then was) rejected that meaning, but held that the words meant that there are reasonable grounds to suspect that he was negligent as a forensic scientist and expert witness in the case. The Court of Appeal allowed his appeal, holding that the meaning was that *'as a Home Office forensic scientist investigating the Birmingham bombings and giving evidence for the Crown at the trial, Dr Skuse failed to show the skill, knowledge, care and thoroughness to be expected of him in that role.'* (p.288).

49. Mr Price submitted that the case was distinguishable on two grounds. First, because of the gravity of the allegations and the much greater level of information given to the publishee than in the present case. The Court had emphasised the *'very strong language used about his use of the test result ('totally unrealistic', 'worthless', 'questionable')'*(p.289). Secondly, because the Court had thereby and otherwise treated it as a case of personal defamation. As Tugendhat J had pointed out in Thornton [57], the Court had relied on two definitions of a defamatory statement, i.e. *'if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally* (Sim v. Stretch [1936] 2 All ER 1237 at 1240) *or would be likely to affect a person adversely in the estimation of reasonable people generally* (Duncan & Neill on Defamation, 2nd edition, paragraph 7.07 at p.32)*'*.(p.286; see the application of both at p.288). The Sim v. Stretch definition concerned personal defamation and was so categorised by Tugendhat J [34(ii)(a)].

50. Accordingly Skuse was a case where the conclusion was that right-thinking people would think worse of the claimant; so that the imputation was personally defamatory and connoted moral blameworthiness. By contrast, professional defamation lay in a separate category which did not require moral blame. Within that category, in order to be actionable the imputation had to be in respect of a general or habitual attribute.

Tendency to cause serious harm

51. Mr Price advanced the same essential arguments in respect of the third preliminary issue as on the second. He added that the s.1 threshold might not be passed where the allegations do not concern imputations of impropriety or morally blameworthy conduct.

Analysis and conclusion on whether defamatory at common law

52. For the reasons largely advanced by Mr Bennett, I conclude that the article in its true meaning was defamatory of the Claimant at common law.

53. I do not accept Mr Price's central proposition that it is a necessary condition for defamation of a person's professional (or business) reputation that the imputation should be in respect of an habitual or chronic attribute.

54. First, in my judgment the decision of the Court of Appeal in Skuse is directly at odds with that proposition. That case was solely concerned with Dr Skuse's professional reputation, as a forensic scientist carrying out specialist investigations and giving evidence in that capacity at the trial of the Birmingham Six. The Court of Appeal's conclusion on meaning was that he failed to show the skill and knowledge, etc., to be expected of him *'as a Home Office forensic scientist investigating the Birmingham bombings and giving evidence for the Crown at the trial'* (p.288). The case was pleaded and found as an imputation in respect of Dr Skuse's professional competence in and about the particular trial. It was not presented or found on the basis that the programme involved an attack on his general professional competence nor on his personal character and/or moral culpability. As the Court concluded, a reasonable viewer *'would be left with the clear impression that Dr Skuse had quite simply very seriously fallen down on his job.'* (p.290). That is to be distinguished from an imputation of 'not being up to the job' in the habitual sense identified by Mr Price.

55. I do not accept that there is any significance in the Court of Appeal's use of the Sim v. Stretch meaning of defamatory. This was one of the two alternative tests identified by the Court (p.286); and both were found to be satisfied (p.288). I do not accept that either test is confined to cases of imputation against personal reputation. As to the second, see e.g. the general test for defamation referred to by Sharp J, with apparent approval, in Dee at [48]. As to the first, in Thornton Tugendhat J did not exclude the test of 'right-thinking people' from cases concerning business/professional reputation [34(iii)(a)]; see also its identification as the sole test in Allen v. Times Newspapers Ltd [2019] EWHC 1235 (QB) per Warby J at [19(1)].

56. I conclude that Skuse demonstrates that it is not the case that actionable defamation concerning the competence of a professional person must involve an imputation against that person's general or habitual professional competence. There is good reason why that should be so. Depending on the particular facts and circumstances, an allegation of one particular instance of incompetent professional services (or reasonable cause to suspect the same) may have as adverse an effect on the professional's reputation as an imputation concerning his/her general professional competence. Adapting the test applied by the Court of Appeal in Skuse, such an imputation may well lower the professional in the estimation of ordinary reasonable readers of the newspaper and/or adversely affect the professional in their estimation. That risk may be particularly pronounced in an advisory profession of sole practitioners, such as the referral Bar. I

add that on the facts of this case, the imputation is in respect of two decisions, i.e. as to the charges to be preferred against Mr Stokes and whether to charge Mr Hales.

57. In my judgment this interpretation of Skuse is consistent with the general propositions set out in the various cited paragraphs of Gatley. I do not accept that their summary of the relevant law supports the restrictive requirement advanced by Mr Price. As to the footnote concerning American cases, its natural implication is that English law does not impose that restraint.

58. Skuse is also consistent with the various authorities which have been cited in argument. I do not accept that Dauncey supports the suggested requirement. As to Drummond-Jackson, the ultimate focus was on the potential adverse effect of the statement on the professional. Thus *'In the case of the dentist it may be said: if he uses a bad technique, he is a bad dentist and a person needing dental treatment should not go to him.'* (p.698H). I do not accept that the particular reference to 'technique' in that case indicates that the imputation must be of an habitual or chronic failing.

59. Nor do I accept that the imputation of a particular instance of professional negligence (or reasonable cause to suspect the same) can only be treated, if at all, as an imputation on the professional's 'product'; for which any remedy must be found in the tort of malicious falsehood. As cited above, Lord Pearson in Drummond-Jackson doubted the soundness of the analogy between a trader's goods and a professional's technique (p.698H). Not least in an advisory profession of sole practitioners, e.g. the referral Bar, there is an inherently close link between perceptions of the advice and of the professional reputation.

60. In Dee, Sharp J also placed emphasis on the adverse effect of the imputation on the reputation of a professional. Having observed that cases in this category often concern allegations which are defamatory in the conventional sense because of the adverse consequences that lack of skill or competence might have for others, she continued: *'Ordinary members of society would therefore think the less of the professional person who provided such unsatisfactory services as a result'* [42]. She later referred, with apparent approval, to an Australian decision which *'…affirmed that the general test for defamation, namely whether an ordinary reasonable person would think less of the plaintiff because of what was said about him or her, applied to imputations regarding all aspects of a person's reputation, including business reputation.'* [48]. These observations were not confined to the imputation of habitual incompetence.

61. As to Thornton, I am equally unpersuaded that Tugendhat J, when identifying business or professional defamation as an imputation concerning an *'attribute'* and/or *'as to the way the professional business is conducted'* [34(i)], was indicating that the imputation must be of the professional's habitual or general want of knowledge, skill, competence, etc. Nor is that the implication of the distinction which he drew with the 'product' of the business or profession. Any such interpretation of his judgment is inconsistent with the authorities which he considered, which included Skuse; and with the overriding focus on the adverse effect on professional reputation.

62. Once the Defendant's central proposition falls away, I think it obvious that the article in its true meaning was defamatory of the Claimant's professional reputation at common law. The imputation that the Claimant was reasonably suspected of having been professionally negligent in her prosecutorial decisions in the Stokes case meets

any of the tests for what is defamatory in cases concerning professional reputation; and for that purpose undoubtedly crosses the common law threshold of seriousness.

Conclusion on tendency to cause serious harm

63. The arguments on this third issue were essentially the same as for the second. I consider it equally obvious that the article in its true meaning had a tendency to cause serious harm to the professional reputation of the Claimant.

64. I therefore answer the questions raised in the three preliminary issues : (1) the meaning is as pleaded by the Claimant (2) Yes (3) Yes.