The Defamation Act 2013: We need to talk about Corporate Reputation

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The Defamation Act 2013: we need to talk about corporate reputation

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*J.B.L. 313 Introduction

Large corporations wield huge power and influence. In many instances senior officers within such companies are closely allied to the government of the day. Their views, and arguably preferences, aid ministerial decisions and influence policy.[1] Consequently, the freedom to criticise these corporations is fundamental within a democratically functioning society. According to Baroness Hale in *Jameel v Wall Street Journal Europe Sprl* [2] (*Jameel*), the ability to criticise large companies is at least as important in a democracy as criticising government.[3]

However, it is submitted that the state of our economy, and the socio-economic mobilisation of communities (the continued social and economic performance of a community), is dependent upon the success of such corporations.[4] In turn, the success of a corporation, in most cases, is inextricably linked to its reputation.[5] Indeed, as is submitted below in the second section, the importance of corporate reputation is both explicitly and implicitly enshrined within the Companies Act 2006.

The Defamation Act 2013 came into force on January 1, 2014. According to the Libel Reform Campaign the purpose of the new legislation is to address the "chilling effect" created by pre-2013 Act libel law, which imposed "unnecessary and disproportionate restrictions on free speech", and did not "reflect the interests of a modern democratic society".[6] On receiving Royal Assent in April 2013, the Act was subject to much fanfare from elements of the British media.[7] Indeed, Lord McNally, the Minister responsible for implementing the Act, "emphasised that it should be understood as only part of a wider *array of measures oriented towards* ***J.B.L. 314*** *improving the functioning of the public sphere*."[8] During a House of Lords debate in October 2012, Lord McNally suggested that his "intention … has always been to end up with legislation that works".[9]

Section 1(1) of the 2013 Act has introduced a new test of actual or likely serious harm. This is qualified further for claimants that trade for profit by s.1(2), in that harm to reputation is not serious unless it has caused, or is likely to cause, serious financial loss. This article explores whether, in the case of corporate claimants, where reputation is a valuable asset linked to the financial performance of the company, the s.1(1) and 1(2) provisions may have swung the pendulum too far in favour of defendants and, in seeking to address an "inequality of arms"[10] in favour of corporations, this could undermine the value of corporate reputation.

This article will, first, contextualise corporate reputation as a valuable commercial asset; secondly, consider whether, as the law stood before the Defamation Act 2013, there was an inequality of arms; thirdly, analyse what the requirement of serious harm and the qualification of serious financial loss may mean in practice for corporate claimants, and the right to reputation. Specifically, through the lens of *Tesla Motors Ltd v BBC*,[11] this article considers potential causation issues that corporate claimants may encounter when attempting to establish actual or likely serious harm arising from actual or likely serious financial loss, and consequently, questions whether this may result in an increase in applications by defendants for statements of case to be struck out in accordance with CPR 3.4, and for summary judgment pursuant to CPR 24. Ultimately, in response to Lord McNally's statement, it raises the question: "who does the new legislation work for?"

Contextualising corporate reputation

In *Jameel*, Lord Hoffmann, in his dissenting judgment, articulated the difference between corporate reputation and the reputation of a natural person:

"In the case of an individual, his reputation is a part of his personality, the 'immortal part' of himself and it is right that he should be entitled to vindicate his reputation and receive compensation for a slur upon it without proof of financial loss. 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." [12]

Although there is a clearly recognised distinction between the reputation of a corporation and that of an individual, defining corporate reputation is not easy.[13] This is reflected in the myriad of ways in which it has been described. For example, corporate reputation is considered to be a "multi-stakeholder concept that is ***J.B.L. 315*** reflected in the perceptions that stakeholders have of an organisation".[14] It has also been defined as the "perceptual representation of a company's past actions and future prospects that describes the firm's overall appeal to all of its key constituents when compared with other leading rivals".[15]

Post devised three concepts, or "social foundations", of reputation[16] which have filtered into the law of defamation.[17] These foundations include dignity, property and honour. Reputation as dignity is not applicable to corporations.[18] As Lord Hoffmann said in *Jameel*, a corporation has no soul[19] and, therefore, cannot feel any loss of dignity.[20] Thus, this concept only applies to the reputation of a natural person. However, Post's concepts of reputation as honour and reputation as property are potentially applicable to corporate defamation. This is certainly the case with reputation as property. Post argues that the manifestation of this concept provides a vehicle through which corporations can sue in defamation.[21] Therefore, both concepts require more detailed consideration.

Reputation as honour exists through an individual's identification with the "normative characteristics" of the fulfilment of social roles within their community and the value their community places on those roles.[22] Unlike reputation as property, it is not earned through hard work. Instead it derives from the value placed upon the respective role by the individual's community.[23] Chan argues that although the case law supporting this concept is predominantly linked to the reputation of members of the upper class, politicians and public officials,[24] the concept is not, necessarily, inapplicable to corporations.[25] Chan accepts that a free capitalist market in which trading corporations operate conflicts with a "deference" society based on honour, as advocated by Milo.[26] However, the developing importance placed by corporations upon corporate social responsibility (CSR)[27] means that companies involved with not-for-profit CSR activities may well be regarded as having reputation as honour,[28] as such activities are used to increase market value and ***J.B.L. 316*** financial performance through gains in reputation and legitimacy.[29] Indeed, the Reputation Institute[30] uses a model known as RepTrak, and a measurement tool called RepTrak Pulse, to place a value on reputation through a scoring system that is driven by attributes, centred around dimensions, that describe the common platform through which most companies build reputation.[31] Thus, the RepTrak reports link reputation to specific corporate "activities". According to the 2013 CSR RepTrak 100 Report, 73 per of 55,000 consumers surveyed were willing to recommend companies perceived to be delivering on CSR. This high level of support is in distinct contrast to companies at the other end of the spectrum, where only 17 per cent of consumers are willing to recommend a company perceived as poorly delivering on its CSR.[32]

A prime example of the importance placed on CSR by companies is Business in the Community (BITC),[33] an international business-led charitable organisation that was founded in 1982 by a number of multinational companies in response to the 1981 Brixton and Toxteth riots.[34] The charity brands itself as a "business movement committed to transforming business and transforming communities" by helping member companies to manage their CSR activity.[35] Members of the charity predominantly consist of FTSE 100, FTSE 250 and Fortune 500 companies.[36] One of the key drivers for becoming a member of the charity is improving brand value and reputation.[37] The charity cites case studies involving companies such as the Co-operative Group[38] and Pachacuti[39] to illustrate the correlation between effective implementation of CSR strategies and increased brand value. The fact that so many major corporations are involved with such an established CSR movement illustrates the nexus between CSR and reputation, attained through "the fulfilment of social roles", manifested in CSR activity linked to the environment and conservation, education, sustainability, community development and socio-economic mobilisation. ***J.B.L. 317***

This argument is supported by both s.172(1)(d) and (e) of the Companies Act 2006. Section 172(1)(e) states that a company director's duty to promote the success of the company includes "the desirability of the company maintaining a reputation for high standards of business conduct". Although Professor Keay describes this as a "vague requirement", he acknowledges that it is highly desirable for a

company to be regarded as credible and trustworthy, and to be seen as maintaining high standards of conduct.[40] It is submitted that the 2013 CSR RepTrak 100 Report data, and the success of organisations such as BITC, as referred to above, demonstrate a clear correlation between a company's CSR activity and it being regarded as credible, trustworthy and, at least visibly, conducting itself in accordance with such standards. This correlation is underlined further by s.172(1)(d), which requires directors to take into account "the impact of the company's operations on the community and the environment". Although, as Carney states, the notion of "community" is, potentially, amorphous,[41] it can be regarded as including the people, businesses and institutions located in the vicinity within which the company is based.[42] According to Professor Keay, having regard for the community

"might manifest itself in a number of ways, such as a donation to a local cause or refraining from actions which might deleteriously affect the community … [D]irectors … have to justify any such action as enhancing the success of the company. This does not … mean that success has to be reduced to monetary terms. Having an input in the community might be seen as contributing to the success of the company as a respected local firm, and part of its role as a good citizen. This might enhance its reputation, which could arguably contribute to the company's success[43] … [To the contrary a] company might decline to take on a project that despite being potentially profitable could alienate the local or wider community and lead to the entity being derided, and see its reputation diminish." [44]

Therefore, it is submitted that reputation as honour is a legitimate vehicle through which a corporate defamation claim can be brought. Additionally, BITC works closely with the government[45] to advise on and influence, the UK's CSR agenda. The fact that a collection of large multinational companies can, through a charitable group, such as BITC, influence government policy, legitimises the concept of reputation as honour being used to both criticise a corporation[46] and for a corporation to sue in defamation.

Post advances the argument that the concept of reputation as property is reputation in the marketplace; a notion of reputation that: "can be understood as a form of intangible property akin to goodwill … acquired as result of an individual's efforts and labour".[47] According to Post, there are ***J.B.L. 318**

"aspects of modern defamation law that can be understood only by reference to the concept of reputation as property, as, for example, the fact that corporations and other inanimate entities can sue for defamation." [48]

This proposition is supported by Oster, who, in light of the arguments advanced above surrounding CSR (it is submitted, rather too narrowly), argues that corporate reputation is based only on reputation as property, as opposed to dignity and honour.[49] The right of corporations to reputation as property has been recognised in the jurisprudence of the English courts and Strasbourg. The right received judicial approval in *Metropolitan Saloon Omnibus v Hawkins*,[50] where Pollock CB adjudged that a company could sue for a libel "by which its property is injured".[51] In *Dixon v Holden* [52] an injunction was granted to prevent an allegation, that the claimant was the partner in a bankrupt firm, being published. Sir R. Malins VC stated:

"What is property? One man has property in lands, another in goods, another in a business, another in skill, another in reputation; and whatever may have the effect of destroying property in any one of these things (even in a man's good name) is, in my opinion, destroying property of a most valuable description." [53]

The European Court of Human Rights also recognised the right in *Van Marle v Netherlands*, in that the right to goodwill could be regarded as property for the purposes of art.1 of Protocol 1 ECHR.[54] If, as has been argued by Smythe et al., a corporation's values are kept alive in a collective memory of its behaviour,[55] the concept of reputation as property "acquired as a result of a company's efforts and labour in the marketplace" is applicable to trading-for-profit corporations. Additionally, Chan submits that non-trading corporations, such as charities and social enterprises, should also be entitled to protect their corporate reputation by suing in defamation through the vehicle of reputation as property. The premise of the submission lies in the fact that non-trading corporations expend effort and labour to gain, maintain and develop respective reputations. Just because a corporation is not trading for profit does not mean that damage to its reputation would not detrimentally impact upon it. For example, according to Chan, it could adversely affect its ability to recruit suitable employees and obtain property and facilities.[56] Sequentially, this may impact upon its ability to fulfil its purpose. ***J.B.L. 319** [57]

Despite the varied definitions and conceptualisations of corporate reputation, whatever is subscribed to, there is no doubt that reputation is valuable. As Lord Hoffmann stated above, corporate reputation is an asset which attracts customers.[58] In the same case, Lord Bingham, Lord Hope and Lord Scott all agreed that reputation is a thing of value,[59] and, in *Dixon v Holden*, it was held that reputation is potentially more valuable than other property.[60] Ultimately, a company's reputation is an asset that requires constant care to ensure that it develops positively from generation to generation.[61]

The following part of this section attempts to illustrate the "value" of corporate reputation as an asset, by providing modern contextual examples of its importance to a successful company.[62]

According to the Reputation Institute's 2014 Global RepTrak 100 Report,[63] the Walt Disney Company and Google are the world's joint most reputable companies, with a pulse score of 77.3,[64] in the UK, John Lewis enjoyed the best corporate reputation, with a score of 87.68.[65] The report recognises a clear link between reputation and consumer support for a product or service, thus, for instance, a score of 70–79 translates into 60 per cent of consumers willing to buy the product or use the service.[66] The 2013 UK RepTrak Pulse report illustrates how a negative story can impact upon a company's reputation, as the horsemeat scandal saw Tesco's reputation decline by 11.65 points from 2012.[67] Arguably the most explicit and obvious way to evaluate and quantify the value of reputation as property, and, potentially, honour, to corporations is through examples of incidents that have damaged reputations, and have, consequently, had an impact on financial performance.[68] Two relatively recent incidents, concerning multinational companies, illustrate this point. Group 4 Security (G4S) saw a 2 per cent fall in the value of its shares as a result of its handling of the security contract for the London 2012 Olympics.[69] Similarly, in the aftermath of the Deepwater Horizon oil rig explosion in 2010, and subsequent oil spill,[70] BP spent $90 million on public relations to ***J.B.L. 320*** attempt to improve its damaged reputation.[71] Clearly, this incident impacted upon BP's reputation as property. Arguably, however, it also affected its reputation as honour, as BP is a member of BITC, and a key proponent of the CSR movement.[72] Incidentally, Transocean, the company that owned and operated the Deepwater Horizon rig, experienced a 14 per cent fall in share value.[73] Although this method of analysis garnered support during the House of Commons Parliamentary Debates on the Defamation Bill,[74] and enjoys Court of Appeal authority,[75] as can be seen below,[76] it is subject to conflicting schools of thought as to its accuracy and reliability.

The pre-Defamation Act 2013 landscape

Since *Derbyshire County Council v Times Newspapers Ltd* [77] (*Derbyshire*) it has been accepted that corporate public authorities[78] cannot sue in defamation in relation to governmental and administrative functions, as this could result in criticism of the government being stifled; a position that does not accord with a free democratic society, public interest[79] and, it is submitted, inherently, the right to freedom of expression. However, it is established doctrine that, under English law, commercial corporations are entitled to sue for defamation,[80] a position reaffirmed by Lord Keith in *Derbyshire*, and maintained, albeit with qualification, by the Defamation Act 2013.[81] In his Lordship's judgment

"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. Examples are those that go to credit such as might deter banks from lending to it, or to the conditions experienced by its employees, which might impede the recruitment of the best qualified workers, or make people reluctant to deal with it." [82]

Despite the Defamation Acts of 1952 and 1996, and the recommendations in the *Report of the Faulks Committee on Defamation in 1975*,[83] no statutory definition ***J.B.L. 321*** of the tort existed prior to the Defamation Act 2013.[84] To the contrary, defamation has been shaped and defined by common law. In *Parmiter v Coupland* [85] it was held that defamation constituted "[a] publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule".[86] The next stage in the tort's development emanated from the Court of Appeal in *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd*,[87] It was held that although the film[88] did not expose the claimant to the *Parmiter v Coupland* test of "hatred, contempt or ridicule", the link which could be made by audiences between the claimant and the fictional events depicted caused her to be shunned and avoided by others. Thus, it was held that the claimant's reputation had been defamed. The ambit of defamation was extended again in *Sim v Stretch*,[89] in which Lord Atkin stated that the *Parmiter v Coupland* test was too narrow,[90] instead his Lordship restated the test as: "would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?"[91] Essentially, under the common law regime, the claimant must satisfy the following tests to be successful: prove that the imputation was defamatory[92]: that it identifies the claimant[93]; that it was

communicated to at least one other person than the claimant[94]; and that the imputation tends to: (a) expose the claimant to hatred, contempt or ridicule, or be shunned or avoided by others,[95] or (b) lower the claimant in the estimation of ordinary right thinking people.[96] Under common law, a corporation trading for profit can sue a defendant for defamation where it alleged that its trading or business reputation was attacked.[97] The Defamation Act 2013 has not altered the position that a company can sue in defamation, but it has affected the ability to do so, as is discussed below.

Prior to the 2013 Act coming into force, corporations that made successful defamation claims could recover substantial damages without the need to prove special damage.[98] The ability of corporations to sue in defamation, and recover such damages, had long been the source of debate, owing to the apparent conflict with the right to freedom of expression, pursuant to art.10, and, inherently, the public interest. Indeed, Baroness Hale, in her dissenting judgment in *Jameel*, stated that requiring a corporate claimant to prove special damage

"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. These ***J.B.L. 322*** 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 government." [99]

Baroness Hale's judgment is reflected in the Libel *Reform Campaign's report "Free Speech is not for Sale"*, which argues that "not everything deserves a reputation". The report recommended the exemption of large and medium-sized corporations from suing in defamation unless it could prove malicious falsehood.[100] The Ministry of Justice, in a pre-2013 Act consultation paper,[101] recognised that where a company sues an individual or non-governmental organisation there may be an "inequality of arms"[102] between the parties, which is used to stifle criticism of the claimant company's behaviour through the threat of protracted and costly legal proceedings.[103] According to the paper, even large media organisations could find the cost of such proceedings prohibitive, therefore detrimentally impacting upon public interest reporting.[104] However, the Ministry's concern regarding the erosion of public interest reporting resonates with a contrary, yet arguably more balanced, view from the European Court of Human Rights. In its judgment in *Steel and Morris v United Kingdom* [105] the European Court recognised that just because the claimant was a large multinational company it should not be deprived of a right to defend itself against alleged defamatory statements:

"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." [106]

According to the European Court, the state is subject to 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.[107] Thus, there is undoubtedly a judicially recognised public interest in the activity ***J.B.L. 323*** and practice of a company being open to criticism.[108] However, there is also an equally strong public interest in allowing companies to protect their commercial assets. Ultimately, a company's reputation is inextricably linked to its financial performance, which, in turn, when considering reputation as property, can impact upon the economy, and, if applying reputation as honour, the environment, education and socio-economic mobilisation.

In order to adjust the "inequality of arms" between corporate claimants and non-corporate defendants, identified by the Ministry of Justice in its consultation paper,[109] the Ministry recommended the introduction of a "substantial harm'" requirement into the Draft Defamation Bill, in that the statement complained of is not defamatory, unless it caused substantial harm to the claimant's reputation.[110] However, it did not approve of the introduction of a requirement that, in order to demonstrate "substantial harm", corporations have to prove financial loss.[111] The paper articulated the concern that such a requirement would lead to delays in commencing proceedings as a result of corporate claimant's frontloading costs. The Defamation Act 2013 received Royal Assent, amid much fanfare from elements of the British media,[112] on April 25, 2013. Rather than "substantial harm", the Act includes a "serious harm" requirement. On April 24, 2013 the Government introduced a qualification for this requirement, in that, to meet the serious harm threshold, corporations trading for profit need to demonstrate serious financial loss.[113] Although included late, this qualification was enshrined within the Act, which came into force on January 1, 2014. The following section looks at what the serious harm requirement, and the serious financial loss qualification, may mean for corporate claimants.

The Defamation Act 2013—"serious harm" and "serious financial loss"

Despite the Ministry's forewarning regarding the introduction of the "substantial harm" requirement, demonstrated by financial loss, the Act incorporates a new test of "serious harm" as follows: pursuant to s.1(1):

"A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant."

For a claimant to successfully sue a defendant for defamation under the common law regime multiple tests had to be satisfied.[114] Section 1 adds a further layer. Under the new regime a claimant is required to demonstrate that the words complained ***J.B.L. 324*** of: (i) caused, or are likely to cause, serious harm to the claimant's reputation; and (ii) tend to: (a) expose the claimant to hatred, contempt or ridicule, or; cause the claimant to be shunned and avoided by others[115]; or (b) lowers the claimant in the estimation of ordinary right-thinking people.[116]

For claimants trading for profit, the serious harm requirement is qualified further, by s.1(2), which states:

"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."

This qualification means that corporate claimants need to specify in their Particulars of Claim: (i) that the statement complained of has caused or is likely to cause serious financial loss; (ii) particulars of the loss incurred, and how this has been caused by the defamatory statement(s); and (iii) why the loss incurred is serious.

Actual or likely serious harm

"Serious harm" and "serious financial loss" are not defined or explained explicitly by the Act. For the sake of an individual claimant, there is no guidance on the mechanism for measuring serious harm. For the corporate claimant, there is the same dearth of guidance for serious financial loss.[117] However, as set out below, limited guidance on what is meant by serious harm can be obtained from the common law definitions of defamation and abuse of process, the House of Commons' debates surrounding the insertion of the term into the Draft Defamation Bill, and judicial interpretation of the test in *Cooke and Midland Heart Ltd v MGN Ltd and Trinity Mirror Midlands Ltd*.[118]

In *Thornton v Telegraph Media Group Ltd* [119] Tugendhat J identified Lord Atkin's test from *Sim v Stretch*,[120] whether the words would "tend to lower the plaintiff in the estimation of right-thinking members of society generally",[121] as authority for establishing a threshold of seriousness[122]:

"[W]hatever definition of 'defamatory' is adopted, it must include a qualification or threshold of seriousness, so as to exclude trivial claims." [123]

Incidentally, the jurisprudence surrounding the strike-out of claims for abuse of process in the context of potentially defamatory publications also provides some guidance.[124] In *Dow Jones & Co v Jameel* [125] it was held that a form of abuse of process exists where it can be established that the benefit attainable by the claimant ***J.B.L. 325*** is disproportionate to the cost of the legal proceedings. Therefore, there needs to be a real and substantial wrong.[126] Consequently, the Explanatory Notes to the Act state that the serious harm test "builds on the consideration given by the courts in a series of cases to the question of what is sufficient to establish that a statement is defamatory".[127]

In its Draft Defamation Bill consultation paper[128] the Ministry of Justice recommended the inclusion of a substantial harm requirement, in that the statement complained of is not defamatory unless it caused substantial harm to the claimant's reputation.[129] According to the Lord Chancellor, the new test of serious harm "nudges up" this threshold by a "modest extent"[130] and is drafted to allow the court to consider all the relevant circumstances of the case.[131] *Cooke* provided the first opportunity for judicial interpretation of the s.1(1) test.[132] In this case the court was concerned with determining the meaning of "has caused" as opposed to "is likely to cause" serious harm.[133] Bean J considered the drafting history of s.1(1) and, unsurprisingly, observed that serious harm involved a higher threshold than substantial harm and that, as stated in the Explanatory Notes, this "raises the bar over which a claimant must jump".[134] The extent to which the bar was raised proved more difficult to ascertain. The claimants relied on the modest extent observation.[135] However, the judge was of the opinion that this statement was inadmissible, stating that the words "serious harm" were sufficiently clear, taken in their ordinary meaning. Consequently, there was no ambiguity that would trigger engagement of the

rule in *Pepper v Hart*.[136] Finally, Bean J considered *how* serious harm might be proved, stating:

"I do not accept that in every case evidence will be required to satisfy the serious harm test. Some statements are so obviously likely to cause serious harm to a person's reputation that this likelihood can be inferred. If a national newspaper with a large circulation wrongly accuses someone of being a terrorist or a paedophile, then in either case (putting to one side for the moment the question of a prompt and prominent apology) the likelihood of serious harm to reputation is plain, even if the individual's family and friends knew the allegation to be untrue. In such a case the matter would be taken no further by requiring the claimant to incur the expense of commissioning an opinion poll survey, or to produce a selection of comments from the blogosphere which might in any event be unrepresentative of the population of 'right thinking people' generally." [137]

It is submitted that Bean J's interpretation of serious harm, and how it can be proved, sheds no more light on the test than the limited guidance already provided. ***J.B.L. 326*** Despite rejection at common law,[138] the claimants' arguments to the contrary and, although not applied in this case, the judgment leave open the possibility of a sophisticated analytical approach to determine serious harm in cases where harm is "less obvious". However, as is discussed below, adducing such evidence could prove extremely problematic, especially in light of the fact that no guidance is given as to "what" evidence could be adduced to overcome the serious harm threshold. Although the judgment suggests that "serious harm" is *more* serious than "substantial harm" it does not provide any indication as to how much higher the bar is raised for claimants. The fact that Bean J felt the language to be clear enough so as not to consider the "modest extent" observation is surprising, particularly in light of that fact that the relationship with the approach taken at common law, as set out above, was not explored at all. Consequently, it seems, taking into account the inference that sufficient evidence must now be adduced in some, less obvious, cases, the bar is, potentially, set considerably higher than the pre-Act debates suggested.

Two further elements of Bean J's judgment have potentially serious ramifications for corporate claimants, particularly if considered together. First, in assessing the likelihood of serious harm being caused to the claimant's reputation, significant importance was attached to the defendant's apology.[139] Accordingly:

"I have already held that the apology was sufficient to eradicate or at least minimise any unfavourable impression created by the original article in the mind of the hypothetical reasonable reader who read both." [140]

Secondly, Bean J considered the meaning of "has caused or is likely to cause serious harm to the reputation of the claimant". On this issue, Bean J confirmed that he preferred the claimant's submission that the relevant point in time to assess whether serious harm has been caused is the date on which the claim is issued.[141] Determining whether there is serious harm at this point means that a defendant, such as a newspaper, can publish a defamatory statement, whether knowingly, recklessly or innocently, and then quickly follow the publication with a prominent and unequivocal apology. On Bean J's analysis, so long as no proceedings have been issued, the apology will prevent liability from crystallising as, pursuant to this interpretation, serious harm will not have occurred in accordance with the s.1(1) test. Consequently, any claimant who continues with proceedings in light of an appropriate apology will do so at significant risk of incurring costs. This position could add fuel to the new inequality of arms argument advanced in this article. Although, pursuant to this judgment, an appropriate apology may "repair" any serious harm caused, arguably, this is not, in reality, the case. It is submitted that, quite conceivably, a defendant newspaper, for instance, could purposely publish a defamatory statement, reap the financial reward that ensues from its sales, and then promptly print an apology, preventing liability from arising.

Incidentally, the Explanatory Notes are equally as vague with regard to serious financial loss, stating that: ***J.B.L. 327***

"Subsection (2) reflects the fact that bodies trading for profit are already prevented from claiming damages for certain types of harm such as injury to feelings, and are in practice likely to have to show actual or likely financial loss. The requirement that this be serious is consistent with the new serious harm test in subsection (1)." [142]

Thus, the Lord Chancellor's opinion, the only judicial interpretation to date and the Act's Explanatory Notes are vague and cursory at best, as none provide any guidance as to what is meant by "damaged". For instance, could actual or likely serious harm derive from a decline in a company's share price?

Demonstrating actual or likely serious financial loss

Demonstrating a decline in share price to show actual or likely serious financial loss as a result of a defamatory statement is subject to conflicting schools of thought. During the *House of Commons Parliamentary Debate on the Defamation Bill*, the Public Bill Committee debated whether a decline in a company's share price should be evidence of serious financial loss. Jonathan Djanogly was of the opinion that:

"In order to satisfy the serious harm test … Given the potential effect on shareholders and management, we see no reason why there should be no redress for a defamatory action that has caused a fall in share price." [143]

Support for this view can be garnered from Holroyd Pearce LJ's judgment in *Lewis v Daily Telegraph Ltd* [144]:

"The plaintiffs or their accountants could produce figures of turnover and graphs showing any sudden downward tendency, such as, for instance, that in the week after the libel orders noticeably declined and so forth … Evidence could be called to show that the price of the shares in the stock market had declined." [145]

Rose LJ's judgment[146] in *McCarthy Stone Plc v Daily Telegraph* [147] also supports Djanogly's assertion. His Lordship accepted that evidence of a decline in share price, for the purpose of inferring causation, may be relevant to goodwill and special damages.[148]

However, to the contrary, during the debate, Paul Farrelly argued:

"[W]hether share prices, which go up and down, can be used to establish real loss of reputation. I am afraid that real loss of reputation is demonstrated by an effect on the underlying business. If there is no such effect, in the medium and long run—or the very short run—share prices recover. Nestlé suffered grave damage to reputation in the milk powder situation. Where companies ***J.B.L. 328*** genuinely suffer, it can be seen in their profit and loss and sales. That is where the case must be made." [149]

Farrelly's argument reflects Dillon LJ's judgment in *Lonrho v Fayed (No.5)*,[150] in which, according to Tugendhat J in *Collins Stewart v Financial Times (No.1)*,[151] his Lordship answered the following question in the negative: "do fluctuations in the share price of a company reflect its goodwill and reputation?"[152] Indeed, in *Collins Stewart* the Financial Times argued successfully that using an alleged decline in share price as evidence of financial loss lacked certainty and precision.[153]

In practice, for individual claimants, the courts are likely to use the tests under the common law regime as a starting point for determining serious harm, as the new test only raises the threshold modestly. The number of times a defamatory statement has been published and in what format will also be fundamental factors. As for the utilisation of share prices, there remains uncertainty. Although *Lewis* and *McCarthy* go some way to support the application of a decline in share price as evidence of serious financial loss, it is submitted that these authorities may well be usurped by the more recent judgments in *Lonrho* and *Collins Stewart* owing to an acute issue with causation.[154] Establishing a causative link between a defamatory statement and a drop in share price would, arguably, be unjusticiable, or, as is discussed in the following section, 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.[155]

Applying actual or likely serious financial loss to reputation as property and reputation as honour

The position for corporate claimants is less clear than it is for individuals. Establishing serious financial loss, whether actual or likely, where reputation as property is concerned, should be more straightforward than situations involving reputation as honour. Reputation as property will be considered first, followed by reputation as honour.

Reputation as property[156] —establishing causation

In theory, establishing a serious financial loss to a company due to damage caused to a valuable commercial asset should, in practice, be relatively easily achievable for any corporate claimant. There

are, as has been discussed above, mechanisms in place for measuring the value of corporate reputation.[157] However, it is submitted that there are two particular issues which, in some instances, may prove impossible for corporate claimants to overcome.

First, the claimant will need to establish causation by demonstrating that the defamatory statement caused or is likely to cause the loss. This would not be an ***J.B.L. 329*** issue where, for example, there is one statement clearly linked to an immediate drop in revenue. However, difficulty arises where a loss has been caused by a number of statements, only one of which is defamatory. In this example, in order to establish causation, the claimant would have to prove that the single defamatory statement caused or is likely to cause "a" serious financial loss. The second issue is quantifying the loss caused, or likely to be caused, from that individual defamatory statement. Thus, in this example, it may prove impossible for a company to separate what loss is linked to the defamatory statement and what is linked to other, legitimate damage, to its reputation. This acute issue with causation is illustrated by *Tesla Motors v BBC*.[158] Although this case mainly concerned malicious falsehood, the judgment of Moore-Bick LJ deals with causation of financial harm from a number of statements, some of which were defamatory and untrue, and others that were "defamatory" but true (and accepted as such), and is therefore pertinent to the observations above. According to his Lordship:

"I do not think that there is any real prospect of Tesla's being able to demonstrate at trial that it has suffered any quantifiable loss by reason of any of the actionable statements. Again, this difficulty is one 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." [159]

Secondly, harm caused to a company's reputation can have a catastrophic impact on its financial performance.[160] However, serious financial loss to one company would be a minor dent on the balance sheet of another. Quantifying serious financial loss in any case, particularly where that loss is potential as opposed to real, will be difficult. No guidelines have been provided to attempt to ensure parity and consistency among claimants and cases in the quantification process. It is submitted that, over time, the courts may adopt a percentage approach, whereby only losses or potential losses meeting a percentage threshold will be considered serious. However, until a threshold is established by case law, corporate claimants will remain unclear as to when the right to reputation has been contravened, whereas the right to freedom of expression will enjoy far more, and arguably disproportionate, appreciation. A practical observation by Moore-Bick LJ in *Tesla* articulates this situation. His Lordship was of the opinion that the proceedings instigated by *Tesla* added to the negative press derived from the defamatory statements. In essence, his Lordship was of the opinion that by bringing the claim, *Tesla* made the situation worse.[161] Thus, in some instances, corporate claimants will be in the unfortunate position of not only facing a protracted and costly challenge to establish a causative link between a statement and their actual or likely financial loss, but may also suffer further negative publicity as a result of an attempt to vindicate their reputation. ***J.B.L. 330***

Reputation as honour—establishing causation

As has been discussed above, reputation as honour is as capable of being defamed as reputation as property,[162] owing, to a large extent, to an ever greater emphasis being placed by companies on CSR activities.[163] It is submitted that the requirement to establish serious financial loss, whether actual or likely, will prevent companies from pursuing legitimate claims where reputation as honour has been damaged.

For example, a company may undertake not-for-profit activities as part of its CSR policy. A defamatory statement in relation to these not-for-profit activities may not cause quantifiable serious financial loss or indeed any financial loss at all, actual or likely. In any event, establishing causation for any such actual or potential loss would, it is submitted, be either practically impossible, or uneconomical. The loss the company incurs may not be financial at all, but could still affect it in its "way of its business", as identified by Lord Keith in *Derbyshire*.[164] Instead, for example, the loss may manifest as an inability to continue certain CSR activities, which may, in turn, impact upon the company's ability to attract and recruit talented employees.[165] This point is illustrated by returning to the 2014 Global RepTrak 100 Report, which states that 70 per cent of those interviewed would want to work for a company with a RepTrak score of 80 or above, and 78 per cent would welcome the company into their local community, whereas, for instance, only 16 per cent of interviewees would want to work for a company with a score of 40–49.[166] Incidentally, a damaged reputation could also interfere with marketing campaigns or staff development plans.[167]

The BBC was used to illustrate similar concerns raised by Sir Edward Garnier during the House of Commons debate on the eve of the Act's enactment.[168] The BBC is a corporation that trades for profit. The quality and content of its programmes relate to its reputation as property. However, it also has reputation as honour: it is a source of unbiased news reporting; it supports charities such as Children in Need; and it is a reputable employer. The BBC could be defamed in its trading capacity and it could, subject to the issues discussed above, bring a successful defamation claim through the vehicle of reputation as property. On the other hand, as suggested by Sir Edward Garnier, if it were accused of being "a hotbed of or a magnet for child sex abusers"[169] it would not necessarily be caused, or likely to be caused, serious financial loss. However, notwithstanding any application of the defence of honest opinion pursuant to s.3 of the 2013 Act, or fair comment, it could, potentially, be defamed, and its reputation as a place to ***J.B.L. 331*** work and visit could be damaged. Thus, despite the fact that in this example the BBC could be caused serious reputational loss, vindicating its reputation under the 2013 Act would, it is submitted, prove problematic, prolonged and costly.[170] Indeed, as discussed above with regard to reputation as property, Moore-Bick LJ's observation in *Tesla* is particularly pertinent, as any attempt to vindicate reputation may expose the claimant to further negative publicity, which sequentially could result in a further deterioration in reputation. Demonstrating actual or likely serious financial loss in these circumstances may only be achieved by, for example, establishing a link between the statement and consequent inability to recruit suitably talented employees which, in turn, results in actual or likely serious financial loss. Evidentially this would be hugely challenging, and, it is submitted, is akin to establishing actual or likely serious financial loss by virtue of a decline in share price. As such, it is subject to the same issues of remoteness, reliability and certainty, owing to the number of variable factors that would be involved, for example: establishing that a potential employee chose to look elsewhere for employment because of the defamatory statement; or that an employee's performance is below that of a potential employee who would have applied for a position within the company, but for the statement, and that performance shortfall has had, or is likely to have, a negative financial impact.

A new inequality of arms?

It is submitted that the issues outlined above are clearly concerning, particularly where reputation as honour is concerned. The Ministry of Justice's misgivings about the insertion of a requirement to prove actual or likely financial loss[171] is reflected in Chan's argument that not all corporations that have been subject to alleged defamatory imputations are in a sufficient financial position to fund prolonged litigation, even if they have a realistic prospect of succeeding.[172] To the contrary, not all defendants are financially disadvantaged. They may, at times, include large media corporations.[173] Indeed, in *McDonalds v Steel and Morris* [174] Pill LJ argued that:

"Some corporations may be very powerful commercially and in homely terms well able to look after themselves. But we consider there is no principled basis upon which a line may be drawn between strong corporations and weaker corporations …." [175]

Where, as envisaged by Chan, the defendant is a large media corporation and the claimant is a small company,[176] there is, arguably, significant potential for the serious harm requirement, and the serious financial loss qualification, to tilt the balance in favour of the right to freedom of expression, to the disproportionate disadvantage of the right to corporate reputation, thus creating a new inequality of arms. It is submitted that this added complexity of proving actual or likely ***J.B.L. 332*** serious financial loss is going to lengthen litigation further. The acute difficulty with establishing causation will lead to corporate claimants facing the prospect of having their claims struck out, owing to their being no reasonable grounds disclosed for bringing the claim, pursuant to CPR 3.4(2)(a). Equally, as with *Tesla* 's claim for special damages, claimants will be exposed to CPR 24.2 applications for summary judgment, on the basis that there is no real prospect of being able to demonstrate at trial that it has suffered any quantifiable loss by reason of actionable statements.[177]

Consequently, the threat of increasingly protracted litigation, and the sheer complexity of establishing that the serious harm caused to the company's reputation emanated from a particular statement, will deter some companies, particularly smaller entities, from pursuing a defamation claim, even if they have a realistic (or better) prospect of succeeding, owing to the costs involved and the resources required. The position is worse for corporate claimants where their reputation as honour has been defamed. In these situations it will be almost practically impossible, or simply uneconomical, to vindicate reputation.

This may mean that more claims will come from individuals associated with the respective "defamed"

company, for example the chief executive officer (CEO), or an individual named in the alleged defamatory statement. In this instance, theoretically, the individual could argue that the statement identified and defamed them, unless the statement made it clear that the allegation only criticised the company, as opposed to any individual. It is submitted that this is more likely with smaller companies where individuals are more closely associated with the company itself. By doing this, the serious financial loss requirement is circumvented, although the individual would still have to satisfy the serious harm requirement.[178] This is not an ideal situation for two reasons. First, if the individual is successful, damages may be recovered. However, because the action would have been brought by the individual, rather than the company, its reputation will, arguably, not have been explicitly vindicated. Secondly, claims brought by an individual, such as the CEO, effectively suing to seek vindication of the company's reputation, may be treated by the courts as an abuse of process.[179]

Conclusion

This article has confirmed that reputation is extremely valuable to corporations. Both the concepts of reputation as property and reputation as honour legitimise the protection of corporate reputation as a valuable asset that, in the case of the latter, does not always manifest in financial gain or loss to a company. This notion was recognised by Lord Keith in *Derbyshire* [180] and also by Members of Parliament during the passage of the Defamation Bill through the House of Commons and House of Lords. ***J.B.L. 333** [181]

In *Steel and Morris* the European Court of Human Rights clearly recognised the value of corporate reputation, as it identified a public interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, and also for the wider economy.[182] Corporate reputation is not only valuable to the company itself and its shareholders. As illustrated by s.172(1)(d) and (e) of the Companies Act 2006, reputation is clearly linked to the performance of companies. In turn, it is submitted that this performance directly impacts upon the condition of the wider economy, the socio-economic mobilisation of communities, the environment, education and sustainability.

The inclusion of the requirement to prove serious harm, by demonstrating actual or likely serious financial loss, has the potential to undermine the value of corporate reputation, not only to companies, but also to the wider economy. Thus, Lord McNally's desire for "legislation that works"[183] may, as a result of this requirement amount to a double-edged sword. On the one side it may decrease unmeritorious claims being brought by claimants.[184] Conversely, this article has shown that, in many plausible instances, companies will not be able to vindicate their reputation, despite having legitimate claims, as they will not be able to demonstrate actual or likely serious financial loss, or will struggle to establish a causal link between a defamatory allegation and a quantifiable loss. Because of these causation issues, the new higher threshold may mean this category of claimant is subjected to increased criticism. This would be due to those responsible for the criticism being, first, less concerned that a claimant would even bother to issue proceedings against them, and, secondly, the ability of the claimant to overcome CPR 3.4 and 24.2, should it progress to this stage. This unsatisfactory position could lead to irresponsible reporting and broadcasting, and, potentially, unresearched, spurious comments. If the new regime effectively grants impunity to unjustified defamatory statements, legitimate and justified criticism may be devalued as the public, unable to separate the two, may take the latter less seriously.

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http://www.gov.uk/government/news/business-advisory-group-announced [All accessed March 30, 2015].

2. *Jameel v Wall Street Journal Europe Sprl [2007] 1 A.C. 359 HL*.

3. *Jameel [2007] 1 A.C. 359* at [158].

4. *J. Smythe et al., Corporate Reputation: Managing the New Strategic Asset (London: Random House, 1992), p.4*.

5. *A. Griffin, New Strategies for Reputation Management (London: Kogan Page, 2008), pp.12–16*.

6. *Libel Reform Campaign, Free Speech is Not for Sale (2009)*, http://www.libelreform.org/the-report [Accessed March 30, 2015].

7. For example, see *L. O'Carroll, "Lords pass defamation bill", Guardian, April 23, 2013*; *L. O'Carroll, "Government U-turn on defamation bill heralds libel reform victory", Guardian, April 22, 2013*.

8. A. Mullis and A. Scott, "Tilting at Windmills: the Defamation Act 2013" (2014) 77 M.L.R. 87, 87; *P. Reidy, "Libel Act to commence before the end of the year", Index on Censorship (June 13, 2013)*.

9. *Hansard, HL Vol.739, col.933 (October 9, 2012)*.

10. *Ministry of Justice, "Draft Defamation Bill: Consultation", Consultation Paper CP3/11 (March 2011), paras 138–145*.

11. *Tesla Motors Ltd v BBC [2013] EWCA Civ 152; (2013) 163 N.L.J. 290*.

12. *Jameel [2007] 1 A.C. 359* at [91].

13. *Griffin, New Strategies for Reputation Management (2008), p.16*.

14. A. Smidts et al., "The Impact of Employee Communication and Perceived External Prestige on Organizational Identification" (2001) 44 Academy of Management Journal 1051; C. Hillenbrand and K. Money, "Corporate Responsibility and Corporate Reputation: Two Separate Concepts or Two Sides of the Same Coin?" (2007) 10 Corporate Reputation Review 261, 262; *J. Larkin, Strategic Reputation Risk Management (Basingstoke: Palgrave Macmillan, 2003), p.43*.

15. *C. Fombrun, Reputation: Realizing Value from the Corporate Image (Cambridge, MA: Harvard Business School Press, 1996), p.72*.

16. R.C. Post, "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74 California Law Review 691.

17. Chan, "Corporate Defamation: Reputation, Rights and Remedies" (2013) 33 Legal Studies 268.

18. Post, "The Social Foundations of Defamation Law" (1986) 74 California Law Review 691, 707–721.

19. *Jameel [2007] 1 A.C. 359* at [91].

20. See also, *McDonald's Corp v Steel and Morris [1999] EWCA Civ 1144*; *Hays Plc v Hartley [2010] EWHC 1068 (QB)* at [24].

21. Post, "The Social Foundations of Defamation Law" (1986) 74 California Law Review 691, 696.

22. Post, "The Social Foundations of Defamation Law" (1986) 74 California Law Review 691, 699–700

23. Post, "The Social Foundations of Defamation Law" (1986) 74 California Law Review 691, 699–700. See also: T. Gibbons, "Defamation Reconsidered" (1996) 16 O.J.L.S. 587, 589; V. Veeder, "The History and Theory of the Law of Defamation" (1904) 4 Columbia L.R. 33, 33; L.B. Lidsky, "Defamation, Reputation, and the Myth of Community" (1996) 71 Washington L.R. 1, 12.

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25. Chan, "Corporate Defamation: Reputation, Rights and Remedies" (2013) 33 Legal Studies 268, 268.

26. Chan, "Corporate Defamation: Reputation, Rights and Remedies" (2013) 33 Legal Studies 268, 268 citing *Milo, Defamation and Freedom of Speech (2008), pp.32–33*.

27. *A. Crane et al. (eds), The Oxford Handbook of Corporate Social Responsibility (New York: Oxford University Press, 2008), p.3*; see also Companies Act 2006 s.172(1)(d) and (e).

28. Chan, "Corporate Defamation: Reputation, Rights and Remedies" (2013) 33 Legal Studies 268, 268.

29. *Crane et al. (eds), The Oxford Handbook of Corporate Social Responsibility (2008), p.90*; also, see generally: *N. Craig*

Smith, Morality and the Market: Consumer Pressure for Corporate Accountability (London: Routledge, 1990); C. B. Bhattacharya and S. Sen, "Doing Better at Doing Good: When, Why, and How Consumers Respond to Corporate Social Initiatives" (2004) 47 California Management Review 9; T.J. Brown and P.A. Dacin, "The Company and the Product: Corporate Associations and Consumer Product Responses" (1997) 61 Journal of Marketing 68; S. Sen and C.B. Bhattacharya, "Does Doing Good Always Lead to Doing Better? Consumer Reactions to Corporate Social Responsibility" (2001) 38 Journal of Marketing Research 225.

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32. See http://www.reputationinstitute.com/thought-leadership/csr-reptrak-100 [Accessed March 30, 2015].

33. The author previously worked for this organisation; see http://www.bitc.org.uk [Accessed March 30, 2015].

34. See, generally, *D. Grayson, Business-Led Corporate Responsibility Coalitions: Learning from the Example of Business in the Community in the UK—An Insider's Perspective (Corporate Social Responsibility Initiative/Cranfield School of Management/Business in the Community, 2007)*, http://www.hks.harvard.edu/m-rcbg/CSRI/publications/report_26_GraysonBus-LedCRCoalitions.pdf [Accessed March 30, 2015].

35. See http://www.bitc.org.uk [Accessed March 30, 2015].

36. See http://www.bitc.org.uk/our-network/members-directory [Accessed March 30, 2015].

37. *Business in the Community, "The Business Case for being a Responsible Business" (2013), p.2*, digital.edition-on.net/links/4142_bitc.asp [Accessed March 30, 2015].

38. *Business in the Community, "The Business Case for being a Responsible Business" (2013), p.2*, digital.edition-on.net/links/4142_bitc.asp [Accessed March 30, 2015]. According to the business case, the group's gross direct greenhouse gases have reduced by 21% since 2006. This correlates with a third of the group's customers citing ethics or the environment as a reason for opening and maintaining an account.

39. *Business in the Community, "The Business Case for being a Responsible Business" (2013), p.2*, digital.edition-on.net/links/4142_bitc.asp [Accessed March 30, 2015]. The business case states that since December 2009, when the Pachacuti became the world's first company to be certified by the World Fair Trade Organisation against the Fair Trade Sustainable Management System, the company's representation within the national and international press has increased from one feature in 2008 to 14 in 2010.

40. *A. Keay, Directors' Duties, 2nd edn (Bristol: Jordans, 2014), para.6.127, p.157*.

41. W. Carney, "Does Defining Constituencies Matter?" (1990) 59 University of Cincinnati Law Review 385, 414.

42. *Keay, Directors' Duties (2014), para.6.119, p.155*.

43. *Keay, Directors' Duties (2014), para.6.121, p.156*.

44. *Keay, Directors' Duties (2014), para.6.124, p.157*.

45. Indeed, BITC has actively supported the All Party Parliamentary Group on Corporate Social Responsibility since 2001: see http://www.bitc.org.uk/services/network-partners/working-government/associate-parliamentary-corporate-responsibility-group [Accessed March 30, 2015].

46. Arguably as envisaged by Baroness Hale in *Jameel [2007] 1 A.C. 359*.

47. Post, "The Social Foundations of Defamation Law" (1986) 74 California Law Review 691, 693.

48. Post, "The Social Foundations of Defamation Law" (1986) 74 California Law Review 691, 696.

49. J. Oster, "The Criticism of Trading Corporations and their Right to Sue for Defamation" (2011) 2 Journal of European Tort Law 255, 278.

50. *Metropolitan Saloon Omnibus v Hawkins (1859) 4 Hurl & N. 87*.

51. *Metropolitan Saloon Omnibus (1859) 4 Hurl & N. 87* at 90.

52. *Dixon v Holden (1868–69) L.R. 7 Eq. 488*.

53. *Dixon v Holden (1868–69) L.R. 7 Eq. 488* at 492.

54. *Van Marle v Netherlands (8543/79, 8674/79 and 8685/79) (1986) 8 E.H.R.R. 483* at [40]–[41] and the joint dissenting judgment of judges Evans and Gersing at [3]; see also Oster, "The Criticism of Trading Corporations and their Right to Sue for Defamation" (2011) 2 Journal of European Tort Law 255, 263; Chan, "Corporate Defamation: Reputation,

Rights and Remedies" (2013) 33 Legal Studies 268, 269.

55. *Smythe et al., Corporate Reputation (1992), p.9*.

56. This is clearly illustrated by the 2014 Global RepTrak 100 Report, which states that 70% of those interviewed would be want to work for a company with a RepTrak score of 80 or above, and 78% would welcome the company into their local community, whereas, for instance, only 16% of interviewees would want to work for a company with a score of 40–49: *Reputation Institute, 2014 Global RepTrak 100 Report, p.5*, http://www.reputationinstitute.com/thought-leadership/complimentary-reports-2014 [Accessed March 30, 2015].

57. Chan, "Corporate Defamation: Reputation, Rights and Remedies" (2013) 33 Legal Studies 268, 270.

58. *Jameel [2007] 1 A.C. 359* at [91].

59. *Jameel [2007] 1 A.C. 359* at [26] per Lord Bingham; [101] per Lord Hope; [120] per Lord Scott.

60. *Dixon v Holden (1868–69) L.R. 7 Eq. 488*.

61. *Smythe et al., Corporate Reputation (1992), p.7*.

62. Indeed, reputation has been described as the most important intangible asset of a company. See *Keay, Directors' Duties (2014), para.6.124, p.157*; *J. Dean, Directing Public Companies: Company Law and Stakeholder Society (London: Cavendish, 2001), p.107*; S. Letza, X. Sun and J. Kirkbride, "Shareholding and Stakeholding: A Critical Review of Corporate Governance" (2004) 12 Corporate Governance 242, 255; R. Woolley, "Shareholder Analysis" (2007) 31 Company Secretary's Review 62.

63. According to the Reputation Institute more than 55,000 interviews with consumers were conducted across the 15 largest markets in the world to measure the corporate reputation of the 100 most visible companies.

64. *Reputation Institute, Global RepTrak 100 Report (2014), p.5*, http://www.reputationinstitute.com/thought-leadership/complimentary-reports-2014 [Accessed March 30, 2015].

65. *Reputation Institute, UK National RepTrak Pulse Country Report (2014), p.5*, http://www.reputationinstitute.com/thought-leadership/complimentary-reports-2014 [Accessed March 30, 2015].

66. *Reputation Institute, Global RepTrak 100 Report (2014), p.9*, http://www.reputationinstitute.com/thought-leadership/complimentary-reports-2014 [Accessed March 30, 2015].

67. *Reputation Institute, Global RepTrak 100 Report (2014), p.9*, http://www.reputationinstitute.com/thought-leadership/complimentary-reports-2014; *Reputation Institute, UK RepTrak Pulse 2013 report (April 17, 2013), p.3*, http://www.reputationinstitute.com/thought-leadership/complimentary-reports-2013 [Accessed March 30, 2015].

68. *Griffin, New Strategies for Reputation Management (2008), pp.12–13*.

69. *H. Williams, "G4S admits it is fighting to repair reputation" (August 28, 2012), Independent*, http://www.independent.co.uk/news/business/news/g4s-admits-it-is-fighting-to-repair-reputation-8083662.html [Accessed March 30, 2015].

70. For detailed analysis of the claims brought against BP and the company's compensation scheme, see: C. McDonnell, "The Gulf Coast Claims Facility and the Deepwater Horizon Litigation: Judicial Regulation of Private Compensation Schemes" (2012) 64 Stanford Law Review 765; T.J. Schoenbaum, "Liability for Damages in Oil Spill Accidents: Evaluating the USA and International Law Regimes in the light of Deepwater Horizon" (2012) 24 J Environmental Law 395; see also http://www.bp.com/en/global/corporate/gulf-of-mexico-restoration/deepwater-horizon-accident-and-response.html [Accessed March 30, 2015].

71. *J. Vidal, "BP's PR campaign fails to clean up reputation after Gulf oil spill" (April 14, 2011), Guardian*, http://www.guardian.co.uk/environment/blog/2011/apr/14/bp-pr-campaign-gulf-oil-spill [Accessed March 31, 2015].

72. See http://www.bitc.org.uk/member-company/bp; http://www.bp.com/en/global/corporate/about-bp/bp-worldwide/bp-united-kingdom/bp-in-the-community/building-stronger-communities.html [Both accessed March 30, 2015].

73. *C. Krauss, "Oil Spill's Blow to BP's Image May Eclipse Costs" (April 29, 2010), New York Times*, http://www.nytimes.com/2010/04/30/business/30bp.html?pagewanted=all&_r=1& [Accessed March 31, 2015].

74. *Jonathan Djanogly (HC), Parliamentary Debate, Public Bill Committee, Defamation Bill, Fifth Sitting (June 26, 2012), 206*; see also the views of Ben Gummer at 196.

75. See *Lewis v Daily Telegraph Ltd [1963] 1 Q.B. 340 CA* per Holroyd Pearce LJ at 376; *McCarthy Stone Plc v Daily Telegraph Unreported November 11, 1993 CA* per Rose and Hoffmann LJJ, discussed below.

76. See the section entitled *"The Defamation Act 2013: 'serious harm' and 'serious financial loss'"*, below.

77. *Derbyshire CC v Times Newspapers Ltd [1993] A.C. 534 HL*.

78. See generally, F. Padfield, "Corporate Public Authorities and Freedom of Speech" (1993) 14 Company Lawyer 98.

79. *Derbyshire [1993] A.C. 534* at 547–549; Padfield, "Corporate Public Authorities and Freedom of Speech" (1993) 14 Company Lawyer 98.

80. *Metropolitan Saloon Omnibus [1859] 4 Hurl. & N. 87* at 90 per Pollock CB; *South Hetton Coal v NE News [1894] 1 Q.B. 133 CA*; *Derbyshire [1993] A.C. 534* per Lord Keith at 547.

81. Discussed in more detail below.

82. *Derbyshire [1993] A.C. 534* at 547.

83. The Committee recommended the following definition: "Defamation shall consist of matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally." See *Report of the Committee on the Law of Defamation (HMSO, 1975), Cmnd 5909, para.65*.

84. The Act received Royal Assent on April 25, 2013.

85. *Parmiter v Coupland (1840) 6 M. & W. 105*.

86. *Parmiter v Coupland (1840) 6 M. & W. 105* at 108.

87. *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd (1934) 50 T.L.R. 581 CA*.

88. *MGM Studios' Rasputin, the Mad Monk*.

89. *Sim v Stretch [1936] 2 All E.R. 1237 HL*.

90. *Sim v Stretch [1936] 2 All E.R. 1237* at 1240.

91. *Sim v Stretch [1936] 2 All E.R. 1237* at 1240. See also *Scott v Sampson (1882) 8 Q.B.D. 491* at 503, where the court proposed a similar test of whether the publication tends to lower the claimant in the "estimation in which he stands in the opinion of others".

92. *Sim v Stretch [1936] 2 All E.R. 1237* at 1240.

93. *Morgan v Odhams Press Ltd [1971] 1 W.L.R. 1239 HL*.

94. *Pullman v Walter Hill & Co Ltd [1891] 1 Q.B. 524 CA*.

95. *Youssoupoff (1934) 50 T.L.R. 581*.

96. *Sim v Stretch [1936] 2 All E.R. 1237* at 1240 per Lord Atkin. Thus, the *Sim* test effectively refined the *Parmiter* test by widening its scope.

97. *National Union of General and Municipal Workers v Gillian [1946] K.B. 81 CA*; Chan, "Corporate Defamation: Reputation, Rights and Remedies" (2013) 33 Legal Studies 268

98. *Jameel [2007] 1 A.C. 359*.

99. *Jameel [2007] 1 A.C. 359* at [158].

100. *Libel Reform Campaign, Free Speech is Not for Sale (2009), p.6*, http://www.libelreform.org/the-report [Accessed March 30, 2015]. It is submitted that this position is unsatisfactory owing to the nature of the tort. In claiming malicious falsehood the burden of proof rests on the claimant to prove that the words complained of were: (1) false (whereas, in defamation, the burden of proof is on the defendant to prove the words were true); (2) published maliciously; (3) likely to cause financial loss. Therefore, where criticism is linked to a specific product produced by the claimant company, it may be difficult, or in some cases almost impossible, to establish financial loss (by, for example, demonstrating that sales for that product have declined as a result of the statement), in particular, where the company, generally, is performing well financially. Issues with causation where numerous statements are made, some of which may be damaging but false, and others that are damaging but true, are discussed below in relation to *Tesla Motors v BBC [2013] EWCA Civ 152; (2013) 163 N.L.J. 290*.

101. *Ministry of Justice, "Draft Defamation Bill: Consultation", Consultation Paper CP3/11 (March 2011)*.

102. *Ministry of Justice, "Draft Defamation Bill: Consultation", Consultation Paper CP3/11 (March 2011), paras 138–145*.

103. See also, *House of Commons Culture, Media and Sport Committee, "Press Standards, Privacy and Libel", Second Report of Session 2009–2010, Vol.1, paras 177–178*.

104. Ministry of Justice, *Draft Defamation Bill: Consultation, Consultation Paper CP3/11 (March 2011), para.138*.

105. *Steel and Morris v United Kingdom (2005) 41 E.H.R.R. 22 ECtHR*. For the line of domestic judgments relating to this case, see also *McDonalds' Corp v Steel and Morris [1999] EWCA Civ 1144*; see also *McDonalds' Corp v Steel [1995] 3 All E.R. 615 (CA Civ Div)*; *McDonalds' Corp v Steel and Morris [1997] EWHC (QB) 366*.

106. *Steel and Morris v United Kingdom (68416/01) (2005) 41 E.H.R.R. 22* at [94], citing *Markt Intern Verlag GmbH and Beerman v Germany (A/164) (1990) 12 E.H.R.R. 161* at [33]–[38].

107. *Steel and Morris v United Kingdom (2005) 41 E.H.R.R. 22* at [94].

108. *Steel and Morris v United Kingdom (2005) 41 E.H.R.R. 22* at [89]–[90], citing: *Bowman v United Kingdom (24839/94) (1998) 26 E.H.R.R 1*; *Appleby v United Kingdom (44306/98) (2003) 37 E.H.R.R. 38*; and [95], citing: *Lingens v Austria (A/103) (1986) 8 E.H.R.R. 407* at [44]; *Bladet Tromsø and Stensaas v Norway (21980/93) (2000) 29 E.H.R.R. 125* at [64]; *Thorgeir Thorgeirson v Iceland (A/239) (1992) 14 E.H.R.R. 843* at [68].

109. *Ministry of Justice, Draft Defamation Bill: Consultation, Consultation Paper CP3/11 (March 2011), paras 138–145*.

110. *Ministry of Justice, Draft Defamation Bill: Consultation, Consultation Paper CP3/11 (March 2011), para.139*.

111. Ministry of Justice, *Draft Defamation Bill: Consultation, Consultation Paper CP3/11 (March 2011), para.142*. This requirement was suggested in Lord Lester's Private Member's Bill. See the Defamation Bill c1.11, http://www.publications.parliament.uk/pa/ld201011/ldbills/003/11003.1-7.html#j11 [Accessed March 31, 2015].

112. For example, see *O'Carroll, "Lords pass defamation bill", Guardian, April 23, 2013*; *O'Carroll, Government "U-turn on defamation bill heralds libel reform victory", Guardian, April 22, 2013*.

113. *Hansard, HC, Vol.561, cols 913–923 (April 24, 2013)*.

114. See text accompanying fnn.86–97.

115. *Youssoupoff (1934) 50 T.L.R. 581*.

116. *Sim v Stretch [1936] 2 All E.R. 1237* at 1240; see also *Scott v Sampson (1882) 8 Q.B.D. 491* at 503 where the Court of Appeal proposed a similar test of whether the publication tends to lower the claimant in the "estimation in which he stands in the opinion of others".

117. Reid, "English Defamation Reform: A Scots Perspective" (2012) 18 Scottish Law Review 111, 114.

118. *Cooke v MGN Ltd [2014] EWHC 2831 (QB); [2015] 1 W.L.R. 895*.

119. *Thornton v Telegraph Media Group Ltd [2010] EWHC 1414 (QB); [2012] E.M.L.R. 8*.

120. *Sim v Stretch [1936] 2 All E.R. 1237* at 1240.

121. *Sim v Stretch [1936] 2 All E.R. 1237* at 1240.

122. *Thornton v Telegraph Media Group [2010] EWHC 1414 (QB); [2012] E.M.L.R. 8* at [64]–[68].

123. *Thornton v Telegraph Media Group [2010] EWHC 1414 (QB); [2012] E.M.L.R. 8* at [90]–[91]

124. *Hansard, HC, Jonathan Djanogly, col.16 (June 19, 2012)*; see also: *Mardas v New York Times [2009] E.M.L.R. 8 QBD* per Eady J at [15]; Khan, "The UK Draft Defamation Bill: Will it Actually Address Libel in the Online World?" [2013] C.T.L.R 142, 143.

125. *Dow Jones & Co Inc v Jameel [2005] EWCA Civ 75; [2005] Q.B. 946*.

126. *Dow Jones v Jameel [2005] EWCA Civ 75; [2005] Q.B. 946* at [70].

127. Explanatory Notes to the Defamation Act 2013, para.11.

128. *Ministry of Justice, Draft Defamation Bill: Consultation, Consultation Paper CP3/11 (March 2011)*.

129. *Ministry of Justice, Draft Defamation Bill: Consultation, Consultation Paper CP3/11 (March 2011), para.139*.

130. *Hansard, HC, Lord Chancellor, col.180 (June 12, 2012)*; see also *Hansard, HC, Jonathan Djanogly, col.14 (June 19, 2012)*.

131. *Hansard, HC, Jonathan Djanogly, col.14 (June 19, 2012)*.

132. Section 1(2) was not, on this occasion, engaged, and was therefore not open to interpretation.

133. *Cooke v MGN [2014] EWHC 2831 (QB); [2015] 1 W.L.R. 895* at [33].

134. *Cooke v MGN [2014] EWHC 2831 (QB); [2015] 1 W.L.R. 895* at [37].

135. *Cooke v MGN [2014] EWHC 2831 (QB); [2015] 1 W.L.R. 895* at [38].

136. *Cooke v MGN [2014] EWHC 2831 (QB); [2015] 1 W.L.R. 895* at [39].

137. *Cooke v MGN [2014] EWHC 2831 (QB); [2015] 1 W.L.R. 895* at [43].

138. For example, see generally *Cairns v Modi [2012] EWHC 756 (QB)*.

139. *Cooke v MGN Ltd [2014] EWHC 2831 (QB); [2015] 1 W.L.R. 895* at [44].

140. *Cooke v MGN Ltd [2014] EWHC 2831 (QB); [2015] 1 W.L.R. 895* at [44].

141. *Cooke v MGN Ltd [2014] EWHC 2831 (QB); [2015] 1 W.L.R. 895* at [31]–[32].

142. Explanatory Notes to the Defamation Act 2013, para.12.

143. *Jonathan Djanogly (HC), Parliamentary Debate, Public Bill Committee, Defamation Bill, Fifth Sitting, June 26, 2012, 206* ; see also the views of Ben Gummer at 196.

144. *Lewis v Daily Telegraph Ltd [1963] 1 Q.B. 340 CA*.

145. *Lewis v Daily Telegraph Ltd [1963] 1 Q.B. 340* at 376.

146. With which Hoffmann LJ agreed.

147. *McCarthy Stone v Daily Telegraph Unreported, November 11, 1993 CA (Civ Div)*.

148. *Collins Stewart Ltd v Financial Times Ltd (No.1) [2005] E.M.L.R. 5* at [60] per Tugendhat J, citing *McCarthy Unreported, November 11, 1993 CA (Civ Div)*.

149. *Paul Farrelly, Parliamentary Debate, Public Bill Committee, Defamation Bill, Fifth Sitting, June 26, 2012, 205.*

150. *Lonrho v Fayed (No.5) [1994] 1 All E.R. 188 CA (Civ Div)*.

151. *Collins Stewart v Financial Times (No.1) [2005] E.M.L.R. 5 QBD*.

152. *Collins Stewart [2005] E.M.L.R. 5* at [55], citing *Lonrho v Fayed [1994] 1 All ER 188* at 196 a–g.

153. *Collins Stewart [2005] E.M.L.R. 5* at [39] and [69]–[70].

154. Causation is dealt with in more detail below.

155. *Collins Stewart [2005] E.M.L.R. 5* at [39].

156. Post, "The Social Foundations of Defamation Law" (1986) 74 California Law Review 691, 693 and 696.

157. See text accompanying fnn.30–32, 59–69.

158. *Tesla Motors v BBC [2013] EWCA Civ 152; (2013) 163 N.L.J. 290*.

159. *Tesla Motors v BBC [2013] EWCA Civ 152; (2013) 163 N.L.J. 290* at [46].

160. See text accompanying fnn.67–73.

161. *Tesla Motors v BBC [2013] EWCA Civ 152; (2013) 163 N.L.J. 290* at [44].

162. Chan, "Corporate Defamation: Reputation, Rights and Remedies" (2013) 33 Legal Studies 268, 268; see also *Hansard, HC, Sir Edward Garnier, col.918 (April 24, 2013).*

163. See text accompanying fnn.27–41.

164. *Derbyshire [1993] A.C. 534*.

165. *Keay, Directors' Duties (2014), para.6.124, p.157*; Ribstein, "Accountability and Responsibility in Corporate Governance" (2006) 81 Notre Dame L. Rev. 1431, 1457–1458.

166. *Reputation Institute, 2014 Global RepTrak 100 Report, p.5*, http//www.reputationinstitute.com/thought-leadership/complimentary-reports-2014. As can be seen below, this is a position that, in the UK, companies such as John Lewis, Sainsbury's and Rolls-Royce Aerospace enjoy: *Reputation Institute, UK National RepTrak Pulse Country Report (2014), p.5*, http://www.reputationinstitute.com/thought-leadership/complimentary-reports-2014 [Both accessed March 30, 2015].

167. *Reputation Institute, 2014 Global RepTrak 100 Report, p.5*,

http//www.reputationinstitute.com/thought-leadership/complimentary-reports-2014; *Reputation Institute, UK National RepTrak Pulse Country Report (2014), p.5*, http://www.reputationinstitute.com/thought-leadership/complimentary-reports-2014 [Both accessed March 30, 2015].

168. *Hansard, HC Sir Edward Garnier, col.918 (April 24, 2013).*

169. *Hansard, HC Sir Edward Garnier, col.918 (April 24, 2013).*

170. Although it could potentially pursue a claim for malicious falsehood.

171. *Ministry of Justice, Draft Defamation Bill: Consultation, Consultation Paper CP3/11 (March 2011), para.142.*

172. Chan, "Corporate Defamation: Reputation, Rights and Remedies" (2013) 33 Legal Studies 268, 281.

173. Chan, "Corporate Defamation: Reputation, Rights and Remedies" (2013) 33 Legal Studies 268, 281.

174. *McDonald's v Steel and Morris Unreported March 31, 1999 CA (Civ Div).*

175. *McDonald's v Steel and Morris Unreported March 31, 1999 CA (Civ Div).*

176. Chan, "Corporate Defamation: Reputation, Rights and Remedies" (2013) 33 Legal Studies 268, 281.

177. See generally, P. Coe, "The Defamation Act 2013 and CPR 3.4 and 24: A sting in causation's tail" [2014] Ent. L.R. 93.

178. Similarly, corporations that are not trading for profit will, under the Act, only need to satisfy the serious harm requirement and not have to demonstrate serious financial loss to vindicate reputation.

179. Although, in reverse, see *Duke v University of Salford [2013] EWHC 196 (QB); [2013] E.L.R. 259*, where the university brought a libel action against an individual whose libellous statements focused on the conduct of academic staff. In this case the university's claim was struck out on appeal.

180. *Derbyshire [1993] A.C. 534*.

181. *Hansard, HC Sir Edward Garnier, col.918 (April 24, 2013).*

182. *Steel and Morris v United Kingdom (2005) 41 E.H.R.R. 22*.

183. *Hansard, HL Vol.739, col.933 (October 9, 2012).*

184. See Mullis and Scott, "Tilting at Windmills" (2014) 77 M.L.R. 87, 106.