Neutral Citation Number: [2010] EWHC 1414 (QB)

Case No: IHJ/10/0230

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/06/2010

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

Dr. Sarah Thornton	**Claimant**
- and -	
Telegraph Media Group Limited	**Defendant**

- -
- -

Mr Justin Rushbrooke (instructed by **Taylor Hampton Solicitors LLP**) for the **Claimant**
Mr David Price (of **David Price Solicitors & Advocates**)) for the **Defendant**

Hearing dates: 26 May 2010

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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.

.....

THE HONOURABLE MR JUSTICE TUGENDHAT

Mr Justice Tugendhat :

1. The Defendant in this libel action applies for summary judgment, alternatively a ruling on meaning under CPR PD53 para 4.1, in relation to one part of the words complained of and the meaning attributed to those words by the Claimant.

2. The action has been before the court on a number of occasions. It is the subject of a judgment of Sir Charles Gray dated 12 November 2009, Neutral Citation Number: [2009] EWHC 2863 (QB). I gratefully adopt from that judgment parts of what follows by way of background and introduction to this case. I myself gave an ex tempore judgment in the case on 22 January 2010, striking out part of a sub-paragraph containing an allegation of malice in the aggravated damages claim.

3. This application has an unusual procedural background. It is made very late. The Application Notice was issued following the renewed application made orally on 29 March 2010 to the Court of Appeal for permission to appeal from the order of Sir Charles Gray, following the refusal of permission on paper. Sir Charles Gray had held that there was no real prospect of the defence of fair comment succeeding, because the review materially misstated a fact upon which the comment was based. There was an exchange between the bench and Mr Price during that oral application, following which that application was adjourned to give the Defendant the opportunity to make the present application.

THE PARTIES

4. The Claimant, Dr. Sarah Thornton, is the author of a book entitled *Seven Days in the Art World* ("the Book"). According to the flyleaf of the Book it consists of a series of seven fly-on-the-wall narratives based on seven different days covering events in the contemporary art world. In her Particulars of Claim she describes herself as "an author, freelance writer and former full time academic, specialising in the sociology of culture and in ethnography". She states that "Apart from book sales, she currently depends for her income upon writing regularly for *The Economist* …" and other newspapers.

5. The Defendant publishes *The Daily Telegraph* both in printed form and on its dedicated website.

THE WORDS COMPLAINED OF

6. The book review with which this action is concerned was published in the issue of *The Daily Telegraph* for 1 November 2008. It appeared on page 28 of the Saturday edition of the newspaper. The review remained on the *Telegraph* website from the beginning of November 2008 until around late March or early April 2009. The author of the review was Ms Lynn Barber, who is herself an author and journalist. She has not been joined as a Defendant in the action.

7. Dr. Thornton complains of only part of the article, and only part of what she complains of is relevant to the application that is before me. I have italicised the part of the review which is the subject of Dr. Thornton's complaint, and with which this application is concerned. I refer to the words below the title as the first paragraph.

> "**Seven Days in the Art World by Sarah Thornton: review**
>
> **Confronted with reflexive ethnographic research on the art market, Lynn Barber isn't buying**
>
> Sarah Thornton is a decorative Canadian with a BA in art history and a PhD in sociology and a seemingly limitless capacity to write pompous nonsense. She describes her book as a piece of "ethnographic research", which she defines as "a genre of writing with roots in anthropology that aims to generate holistic descriptions of social and cultural worlds". *She also claims that she practices "reflexive ethnography", which means that her interviewees have the right to read what she says about them and alter it. In journalism we call this "copy approval" and disapprove.*

8. Sir Charles Gray held at para [47] and [51] that the review significantly misdescribes or misstates what Dr Thornton says in her Book about the way she deals with interviewees.

9. A second part of the article, of which Dr Thornton also complains, is as follows (and it was to this part of the words complained of that my judgment of 22 January was relevant). This part of the words complained of is not directly relevant to what I have to decide, but Mr Rushbrooke relies on it as part of the context. The context is relevant in deciding the meanings of which the part referred to in the preceding paragraph is capable of bearing. I refer to the following words as the second paragraph. They are the second paragraph in the text:

> "*Thornton claims her book is based on hour-long interviews with more than 250 people. I would have taken this on trust, except that my eye flicked down the list of her 250 interviewees and practically fell out of its socket when it hit the name Lynn Barber. I gave her an interview? Surely I would have noticed? I remember that she asked to talk to me, but I said I had already published an account of my experiences as a Turner Prize juror which she was welcome to quote, but I didn't want to add to*."

DR. THORNTON'S COMPLAINT

10. The meanings of which Dr Thornton complains in relation to this second paragraph are (6.1) that she had dishonestly claimed to have carried out an hour-long interview with Lynn Barber as part of her research for *Seven Days in the Art World*, when the true position was that she had not interviewed Ms Barber at all, and had in fact been refused an interview. She also complains of meaning (6.3) set out below in relation to both paragraphs.

11. In the Defence the Defendant admits that the second paragraph bears meaning (6.1) (but not meaning (6.3)). The defence to this part of the claim is one of offer of amends, both in respect of meaning (6.1) and in respect of meaning (6.3) in so far as it is derived from meaning (6.1).

12. The defamatory meanings attributed on behalf of Dr. Thornton to the part of the article in question before me are the second and third meanings set out in para 6 of the Particulars of Claim:

> (6.2) That [she] had given her interviewees the right to read what she proposed to say about them and alter it, a highly reprehensible practice which, in the world of journalism was known as "copy approval".
>
> (6.3) That [she] had thereby shown herself to be untrustworthy and fatally lacking in integrity and credibility as a researcher and writer.

8. Dr. Thornton frames her claim not only in libel but also in malicious falsehood. Detailed particulars both of falsity and of malice are set out in the Particulars of Claim. Nothing, however, turns on the claim in malicious falsehood. I shall therefore say no more about it. Both compensatory and aggravated damages are claimed but nothing turns on them for present purposes.

THE DEFENCE

13. So far as material, the Defence includes the following:

> "3.2 It is denied that the words relating to reflexive ethnography are defamatory of the Claimant. The reader is told that the Claimant has academic qualifications in art history and sociology and has described the Book as a "piece of ethnographic research" which is defined as "a genre of writing with roots in anthropology that aims to generate holistic descriptions of social and cultural worlds". The granting of copy approval to interviewees for the purpose of such a book does not involve any moral blame, nor would it lead a right-thinking member of society to think the worse of the Claimant. It would simply be regarded by such a person as a practice but which in a journalistic context would, in the opinion of Ms Barber, be subject to disapproval. The words do not attribute to the Claimant the lack of any necessary attribute to carry out ethnographic research and/or publish a book based on it. There is no suggestion that the Claimant seeks to conceal her modus operandi from her readers.
>
> 5.2 It is admitted that the article bears the meaning that the Claimant's practice of reflexive ethnography is comparable to copy approval in journalism which is disapproved of by journalists…
>
> 5.3 The meaning set out in sub-paragraph (3) is sought to be derived from the meanings in sub-paragraphs (1) and (2). It was not identified as an independent meaning in any pre-action correspondence. The Defendant will contend that, in the event that the fair comment and offer of amends defences succeed, the Claimant should not be entitled to a finding in her favour and/or damages in relation to the meaning in sub-paragraph (3).

> Further, it is denied that the words relating to reflexive ethnography suggest that the Claimant is lacking in trust, integrity or credibility. The article suggests that the Claimant is lacking in trust, integrity or credibility. It is denied that anything in the article suggests that the Claimant is "fatally" lacking in any attribute".

THE APPLICATION

14. The Application is on two bases, both bases relating only to the copy approval allegation and both bases being advanced under CPR Part 24 and/or CPR Part 3.4(2)(a). The application is that summary judgement be entered in the Defendant's favour. The first basis is that Dr Thornton has no real prospect of establishing that the relevant words are defamatory of her. The second basis is that the court should first make a determination pursuant to CPR PD53 4.1(2) that the relevant words are not capable of being defamatory of the Claimant and/or not capable of bearing any meaning to the effect that the Claimant has been guilty of "highly reprehensible" conduct, that she is "untrustworthy" or is "fatally lacking in integrity and credibility as a researcher and writer".

15. CPR PD43 4.1(2) provides:

> "At any time the court may decide –
>
> (1) whether a statement complained of is capable of having any meaning attributed to it in a statement of case;
>
> (2) whether the statement is capable of being defamatory of the claimant;
>
> (3) whether the statement is capable of bearing any other meaning defamatory of the claimant."

16. The applicant must satisfy a high standard. This is a case where the action is to be tried by a judge with a jury. The standard is set out in *Jameel v The Wall Street Journal Europe Sprl* [2003] EWCA Civ 1694; [2004] E.MLR 6 as follows:

> "14. But every time a meaning is shut out (including any holding that the words complained of either are, or are not, capable of bearing a defamatory meaning) it must be remembered that the judge is taking it upon himself to rule in effect that any jury would be perverse to take a different view on the question. It is a high threshold of exclusion. Ever since Fox's Act 1792 the meaning of words in civil as well as criminal libel proceedings has been constitutionally a matter for the jury. The judge's function is no more and no less than to pre-empt perversity. That being clearly the position with regard to whether or not words are capable of being understood as defamatory or, as the case may be, non-defamatory, I see no basis on which it could sensibly be otherwise with regard to differing levels of defamatory meaning. Often the question

> whether words are defamatory at all and, if so, what level of defamatory meaning they bear will overlap".

17. In *Berezovsky v Forbes Inc* [2001] EMLR 1030, 1040 Sedley LJ had stated the test this way:

> "16. The real question in the present case is how the courts ought to go about ascertaining the range of legitimate meanings. Eady J regarded it as a matter of impression. That is all right, it seems to us, provided that the impression is not of what the words mean but of what a jury could sensibly think they meant. Such an exercise is an exercise in generosity, not in parsimony."

THE SINGLE MEANING RULE

18. In deciding what meaning the words complained of are capable of bearing the Judge must have in mind guidance of the Court of Appeal. That was given in *Skuse v Granada Television* [1996] EMLR 278 at 286 and *Gillick v BBC* [1996] EMLR 267 at 275. It has most recently been summarised in *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130 (and Gatley on Libel and Slander 11th ed 3.13) where Sir Anthony Clarke MR said at [14]:

> "The governing principles relevant to meaning … may be summarised in this way: (1) The governing principle is reasonableness. (2) 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. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any "bane and antidote" taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, "can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation…" …. (8) It follows that "it is not enough to say that by some person or another the words might be understood in a defamatory sense."".

THE DEFENDANT'S SUBMISSIONS

19. Mr Price for the Defendant submits that there are the following further legal principles to be applied:

    i) *The threshold of seriousness*: The hypothetical reasonable reader must not be unduly sensitive. So there must be a threshold of seriousness, and that

threshold must be interpreted consistently with the Art 10 of the Convention, in particular, with the requirement of necessity in Art 10(2):

> "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such …, restrictions … as are prescribed by law and are necessary in a democratic society, … for the protection of the reputation or rights of others…"

Mr Price's primary argument is based on the words of Lord Atkin in *Sim v Stretch* [1936] TLR 669 at 672; [1936] 2 All ER 1237 at 1242. Lord Atkin gave a speech, with which the other two members of the Appellate Committee agreed. The ratio of that decision is therefore authority binding on all courts. Mr Price submits that this proposition is supported by the following words of Lord Atkin:

> "That juries should be free to award damages for injuries to reputation is one of the safeguards of liberty. But the protection is undermined when exhibitions of bad manners or discourtesy are placed on the same level as attacks on character and are treated as actionable wrongs".

ii) *The business or professional libel*: while a professional person may be defamed by an allegation that does not impute moral blame, nevertheless, a business or professional libel is to be distinguished from a malicious falsehood. In the words of the editors of Gatley 11th ed para 2.26:

> "To be actionable [in defamation], 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". (emphasis original)

20. Mr Price submits that applying these principles, the application should succeed. For a writer to give to an interviewee copy approval is not illegal or contrary to any professional code. It is made clear in the words complained of that Dr Thornton's book does not purport to be a work of journalism, and that she did not conceal the technique she adopted to write the book. So the allegation cannot be a business libel. And it would not make right-thinking members of society generally think the worse of Dr Thornton (the views of a section of a society, such as journalists, being irrelevant). Or if it would, then it would not do so to the extent necessary to surmount the threshold of seriousness that is required. So it cannot be a personal libel.

THE CLAIMANT'S SUBMISSIONS

21. Mr Rushbrooke for Dr Thornton submits that the applicable principle is to be found in *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094 at 1104, [1970] 1 WLR 688 at 698-699:

> "'... words may be defamatory of a trader or business man or professional man, although they do not impute any moral fault or defect of personal character. They [can] be defamatory of him if they impute lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of his trade or business or professional activity… *South Hetton Coal Company Limited v North-Eastern News Association Limited* [1894] 1 QB 133…"

22. Mr Rusbrooke submits that it is generally known to readers of the Defendant's newspapers that it is ethically unacceptable for any serious journalist working in any medium to grant copy approval to her interviewees. As he puts it: "It is just not done". By serious journalist he means a writer working outside what he calls "the field of PR puff". The reason for this, he submits, is that granting copy approval fundamentally devalues the work, and undermines its integrity both from the point of view of the journalist and the consumer who might buy the product. It involves submission to a kind of censorship. The words complained of state as much: they expressly state that journalists disapprove of the practice. The copy approval allegation is an attack on Dr Thornton's integrity as a professional writer. Thus it is a business or professional libel. In addition, Mr Rushbrooke submits, when read in its context it is also a personal attack or libel, going beyond objective criticism of Dr Thornton's professional technique (even if one that does not impute any moral fault or defect in personal character).

23. Mr Rushbrooke further submits that even if Dr Thornton could not succeed on the first paragraph taken by itself, that does not matter, because it is necessary to read the review as a whole, to give the context. And in the context he submits the first paragraph is capable of bearing the meanings relied on by Dr Thornton.

24. As to the submission that there is a threshold of seriousness which is required to be surmounted, Mr Rushbrooke accepts that there must be a threshold of seriousness above bad manners and discourtesy, as stated in *Sim,* but that does not apply to business or professional defamation. In the present case it is a professional libel where there is an attack on Dr Thornton personally, as opposed to an attack on her technique. Mr Rushbrooke refers to *Drummond-Jackson* at p698B-C and 698H, where Lord Pearson doubted whether there could be an analogy between a trader's goods and a professional person's technique:

> "A professional man's technique… may be considered an essential part of … him as a professional man".

25. So it is common ground that the copy approval allegation in the first paragraph complained of by Dr Thornton relates at least to her profession as a writer. In respect of the second paragraph and meaning (6.1) it is common ground that that paragraph relates to Dr Thornton's personal qualities of honesty and integrity. But in respect of the first paragraph and meaning (6.2) that is in issue.

26. To address these submissions it is necessary to consider what in law is meant by the word “defamatory”.

WHAT IS DEFAMATORY?

27. The jury must be directed by the Judge as to the definition of the word defamatory. If the jury do not find the words to be defamatory, then the claimant will fail.

28. In *Berkoff v Burchill* [1996] 4 All ER 1008 Neill LJ set out some of the definitions. As editor of Duncan & Neill on Defamation 3rd ed ch 4 he did so again in 2009. The following is the list given in *Berkoff* (save that I omit the two definitions omitted from ch.4 of Duncan & Neill). I have put in square brackets the corresponding number in the list in Duncan & Neill at para 4.02. And all the emphasis is added. The emphasis in bold type relates to the tendency or likelihood of damage that must be demonstrated. The underlining relates to the effect upon the publishees, and through them upon the claimant, that must be demonstrated:

> “I am not aware of any entirely satisfactory definition of the word 'defamatory'. It may be convenient, however, to collect together some of the definitions which have been used and approved in the past.
>
> (1) [1] The classic definition is that given by Lord Wensleydale (then Parke B) in *Parmiter v Coupland* (1840) 6 M & W 105 at 108, 151 ER 340 at 341-342. He said that in cases of libel it was for the judge to give a legal definition of the offence which he defined as being:
>
> > 'A publication, without justification or lawful excuse, which is **calculated to** injure the reputation of another, by exposing him to <u>hatred, contempt, or ridicule</u> ...'
>
> It is to be noted that in *Tournier v National Provincial Union Bank of England Ltd* [1924] 1 KB 461 at 477, [1923] All ER Rep 550 at 557 Scrutton LJ said that he did not think that this 'ancient formula' was sufficient in all cases, because words might damage the reputation of a man as a business man which no one would connect with hatred, ridicule or contempt. Atkin LJ expressed a similar opinion ([1924] 1 KB 461 at 486-487, [1923] All ER Rep 550 at 561):
>
> > 'I do not think that it is a sufficient direction to a jury on what is meant by "defamatory" to say, without more, that it means: Were the words calculated to expose the plaintiff to hatred, ridicule or contempt, in the mind of a reasonable man? The formula is well known to lawyers, but it is obvious that suggestions might be made very injurious to a man's character in business which would not, in the ordinary sense, excite either hate, ridicule, or contempt--for example, an imputation of a clever fraud which, however much to be

condemned morally and legally, might yet not excite what a member of a jury might understand as hatred, or contempt.'

(2) …

(3) [4] In *Sim v Stretch* [1936] 2 All ER 1237 at 1240 Lord Atkin expressed the view that the definition in *Parmiter v Coupland* was probably too narrow and that the question was complicated by having to consider the person or class of persons whose reaction to the publication provided the relevant test. He concluded this passage in his speech:

'... after collating the opinions of many authorities I propose in the present case the test: would the words **tend to** lower the plaintiff in the estimation of right-thinking members of society generally?'

(4) As I have already observed, both Scrutton and Atkin LJJ in *Tournier*'s case drew attention to words which damage the reputation of a man as a business man. In *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094, [1970] 1 WLR 688 the Court of Appeal was concerned with an article in a medical journal which, it was suggested, impugned the plaintiff's reputation as a dentist. Lord Pearson said:

'... words may be defamatory of a trader or business man or professional man, although they do not impute any moral fault or defect of personal character. They [can] be defamatory of him if they impute lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of his trade or business or professional activity ...' (See [1970] 1 All ER 1094 at 1104, [1970] 1 WLR 688 at 698-699.)

It is therefore necessary in some cases to consider the occupation of the plaintiff.

(5) [2] In *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581 at 587 Slesser LJ expanded the *Parmiter v Coupland* definition to include words which cause a person to be shunned or avoided. He said:

'... not only is the matter defamatory if it brings the plaintiff into hatred, ridicule, or contempt by reason of some moral discredit on [the plaintiff's] part, but also if it **tends to** make the plaintiff be shunned and avoided and that without any moral discredit on [the plaintiff's] part. It is for that reason that persons who have been alleged to have been insane, or to be suffering from certain diseases, and other cases where no direct moral responsibility could be placed upon them,

have been held to be entitled to bring an action to protect their reputation and their honour.'

Slesser LJ added, in relation to the facts in that case:

'One may, I think, take judicial notice of the fact that a lady of whom it has been said that she has been ravished, albeit against her will, has suffered in social reputation and in opportunities of receiving respectable consideration from the world.'

(6) The Faulks Committee in their report recommended that for the purpose of civil cases the following definition of defamation should be adopted (para 65):

'Defamation shall consist of the publication to a third party of matter which in all the circumstances would be **likely to** affect a person adversely in the estimation of reasonable people generally.'

(7) [5] In the American Law Institute's Restatement of the Law of Torts (2nd edn, 1977) § 559 the following definition is given:

'A communication is defamatory if it **tends** so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'

(8)…

It will be seen from this collection of definitions that words may be defamatory, even though they neither impute disgraceful conduct to the plaintiff nor any lack of skill or efficiency in the conduct of his trade or business or professional activity, if they hold him up to contempt, scorn or ridicule or **tend to** exclude him from society. On the other hand, insults which do not diminish a man's standing among other people do not found an action for libel or slander. The exact borderline may often be difficult to define.

The case for Mr Berkoff is that the charge that he is 'hideously ugly' exposes him to ridicule, and/or alternatively, will cause him to be shunned or avoided. I turn therefore to such guidance as can be found in any of the decided cases to which we were either referred by counsel or to which my own limited researches have led me".

29. In *Berkoff* Neill LJ added a further definition of his own at p1018:

> "(9) [6] 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. Definition (4) is abbreviated in the form set out by Neill LJ in *Berkoff*. I will consider it in more detail below under 'Business Defamation'.

31. Neill LJ was giving judgment in *Berkoff* in 1996. A review of the meaning of the word defamatory carried out after the coming into force of the Human Rights Act 1998 now requires some consideration of the effect of the different meanings proposed in the light of the tendency of each meaning to give effect to Art 8 (right to respect for private life) and Art 10. This was anticipated by Neill LJ. He cited at p1017 the following from Canada, which is in language which might well have been used by the ECHR in Strasbourg:

> "In *Manning v Hill (A-G for Ontario and ors, interveners)* (1995) 126 DLR (4th) 129 [also cited as *Hill v Church of Scientology* [1995] 2 SCR 1130] the Supreme Court of Canada was concerned with the relationship between the common law action for defamation and the Canadian Charter of Rights and Freedoms. In the course of his judgment, with which the majority of the court agreed, Cory J considered the nature of actions for defamation and the values which require to be balanced. He traced the history of proceedings designed to protect the reputation of an individual (see 126 DLR (4th) 129 at 160). Starting with the provisions of the Mosaic Code, he came to the origins of the modern law of libel arising out of *De Libellis Famosis* (1605) 5 Co Rep 125a, 77 ER 250. He continued (at 162-163):
>
> > 'Though the law of defamation no longer serves as a bulwark against the duel and blood feud, the protection of reputation remains of vital importance ... reputation is the "fundamental foundation on which people are able to interact with each other in social environments". At the same time, it serves the equally or perhaps more fundamentally important purpose of fostering our self-image and sense of self-worth. This sentiment was eloquently expressed by Stewart J in *Rosenblatt v. Baer* ((1966) 383 US 75 at 92) who stated: "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being-a concept at the root of any decent system of ordered liberty.""

32. To understand the submissions of the parties, I shall attempt some ordering of the authorities.

A POSSIBLE ORDERING OF DEFAMATION CASES

33. There can be derived from the authorities referred to above at least some systematic ordering of the varieties of defamation along the following lines:

i) There are two main varieties of each of the torts of libel and slander: (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. These varieties are not mutually exclusive: the same words may carry both varieties of imputation. By contrast, if the imputation is as to the product of the business or profession, then it will be the tort of malicious falsehood, not defamation, to which the claimant must look for any remedy.

ii) Personal defamation comes in a number of sub-varieties including:

a) Imputations as to what is "illegal, mischievous, or sinful" in Pollock CBs' phrase (in *Clay v Roberts* (1863), 8 LT 397, cited in *Sim v Stretch*). This would perhaps now be expressed as what is illegal, or unethical or immoral, or socially harmful, but will now cover imputations which are less serious than that (see definitions (1), (3) and (6), (7) and (9) and Gatley at para 2.11);

b) Imputations as to something which is not voluntary, or the result of the claimant's conscious act or choice, but rather a misfortune for which no direct moral responsibility can be placed upon the claimant (such as disease - definition (5));

c) Imputations which ridicule the claimant (definition (1) and *Berkoff*).

iii) Business or professional defamation also comes in a number of sub-varieties (definition (4) and the examples given in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 discussed below under the heading Business Defamation):

a) 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;

b) Imputations upon a person, firm or body which may deter other people from providing any financial support that may be needed, or from accepting employment, or otherwise dealing with them. In these cases there may be more of a role for the opinion or attitude of right-thinking members of society.

34. In addition to these varieties, there is a distinction between sub-varieties of business defamation in which:

(a) The action is brought by an individual, where damage may include injury to feelings, and

(b) The action is brought by a corporation, where damage cannot include injury to feelings.

35. For the purposes of this judgment it is not necessary to consider defamation by ridicule. Nor is it necessary to consider defamation by definition (5), that is, where words impute a personal attribute which will cause others to treat the subject less favourably, but an attribute which is involuntary and attracts no moral discredit, such as disease or other misfortune. Cases that come within this definition are now likely to be brought under misuse of private information, although that will not necessarily or always be the case. So the definition still has a role to play.

BUSINESS DEFAMATION

36. In Duncan & Neill on Defamation 3rd ed *Drumond-Jackson* is noted at para 4.03, but the editors deal with business defamation separately in ch 10, almost as if it were a separate species of the tort. There are a number of different parties which may sue in defamation, in addition to individuals. The editors list: Companies and other corporations, partnerships, trade unions and employer's associations. Defamation of professional people, and of these other bodies, is not limited to imputations that they lack qualification, knowledge, skill, capacity, judgment or efficiency. In *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 at 547 there is a passage which was cited in *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2006] UKHL 44; [2007] 1 AC 359 [16]-[17] as explaining why corporations should be entitled to sue for libel. Lord Keith said:

> "The authorities cited above 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. 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. The *South Hetton Coal Co* case [1894] 1 QB 133 [*South Hetton Coal Company Limited v North-Eastern News Association Limited*] would appear to be an instance of the latter kind, The trade union cases are understandable upon the view that defamatory matter may adversely affect the union's ability to keep its members or attract new ones or to maintain a convincing attitude towards employers. Likewise in the case of a charitable organisation the effect may be to discourage subscribers or otherwise impair its ability to carry on its charitable objects".

37. Definition (4) is derived from *Tournier* and *Drummond-Jackson*. It is extended as explained in *Derbyshire*. It envisages a claim for libel succeeding which may not involve any adverse reflection upon the personal qualities of a claimant. In commenting on this meaning the editors of Gatley at para 2.1 say this:

> "Without suggesting that there is a separate tort of 'business defamation', as a practical matter it has been thought necessary where the words denigrate the claimant's business or professional capacity to recognise that the words may be defamatory even though they in no way reflect on the *character* of the claimant. It may be that those 'community standards' of 'right-thinking people' of which the jury is the ultimate guardian have less of a role in these cases and it has been suggested that the correct approach is to ask whether the tendency of the words is to convey to the reader that the claimant's fitness or competence falls short of what are generally necessary for the business or profession (see *Radio 2UE Sydney v Chesterton* [2008] NSWCA 66 at [19])".

38. There is a further reason why cases of business defamation require separate consideration, whether or not there is a separate tort of 'business defamation'. What is at stake in a defamation reflecting on a person's character is now likely to be recognised as engaging that person's rights under Art 8. On the other hand, if an alleged defamation engages only a person's professional attributes, then what is at stake is less likely to engage their rights under Art 8, but may engage only their commercial or property rights (which are Convention rights, if at all, under Art 1 of the First Protocol). See *Pfeiffer v Austria* (2009) 48 EHRR 8 para 35 and *Karako v Hungary* 29 April 2009 No 39311/05, para 22-23 and Duncan & Neill paras 2.19 to 2.31. However, neither party advanced submissions to me on the basis of Art 8. So it is not necessary to consider that aspect of the matter further.

39. Mr Rushbrooke placed reliance upon the *South Hetton* case. In that case the plaintiff was a colliery company which owned a number of cottages. The defendant was a newspaper publisher. The meaning complained of was that the plaintiff maintained the cottages in a state that was insanitary and unfit for habitation. In support of his submission that the first paragraph complained of in the present case goes beyond criticism of Dr Thornton's book, and is a personal attack, Mr Rushbrooke relies in particular on the following words of Lord Esher MR at p 138-9:

> "It may be published of a man in business that he conducts his business in a manner which shews him to be a foolish or incapable man of business. That would be a libel on him in the way of his business, as it is called - that is to say, with regard to his conduct of his business. If what is stated relates to the goods in which he deals, the jury would have to consider whether the statement is such as to import a statement as to his conduct in business. Suppose the plaintiff was a merchant who dealt in wine, and it was stated that wine which he had for sale of a particular vintage was not good wine; that might be so stated as only to import that the wine of the particular year was not good in whosesoever hands it was, but not to imply any reflection on his conduct of his business. In that case the statement would be with regard to his goods only, and there would be no libel, although such a statement, if it were false and were made maliciously, with intention to injure him, and it did injure him,

> might be made the subject of an action on the case. On the other hand, if the statement were so made as to import that his judgment in the selection of wine was bad, it might import a reflection on his conduct of his business, and shew that he was an inefficient man of business. If so, it would be a libel. In such a case a jury would have to say which sense the libel really bore; if they thought it related to the goods only, they ought to find that it was not a libel; but, if they thought that it related to the man's conduct of business, they ought to find that it was a libel. With regard to a firm or a company, it is impossible to lay down an exhaustive rule as to what would be a libel on them. But the same rule is applicable to a statement made with regard to them. Statements may be 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. If so, the law will be the same in their case as in that of an individual, and the statement will be libellous."

40. In this passage Lord Esher was 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. Dr Thornton would prefer not to have to rely on her claim in malicious falsehood, because it requires her to prove malice if she is to succeed.

41. It must be read subject to Lord Keith's observations upon it in *Derbyshire* (para 36 above). There must be some effect on the business such as deterring prospective employees or providers of finance. Given the meaning complained of in that case, it may be assumed that that condition was satisfied in that case.

42. There is a danger of reading too much into Lord Esher's example of the wine merchant: that was not what the case was about. In that example no reference is made to the fact that businessmen, and some professionals (including writers), may choose to deal in, or to produce, different products directed to different markets. Not all shoppers want vintage wine. Some merchants may choose to sell poorer quality wine, because if they did not, many of their customers would buy less wine, or no wine at all. Even a wine lover may be happy to drink vintage champagne on one day, and some other sparkling wine (at a fraction of the price) on another. The same supermarket may be proud to sell wines of both types, displaying them within an arm's length of each other on the same stacks.

43. In my judgment what applies to wine merchants may also apply to some types of professional, including writers. Some professionals, such as dentists must work to only one professional standard or at least to a minimum standard. But others, such as writers, are free to choose among a number of acceptable standards. For example, among historians who work in universities there may be standards as to how much original research is to be expected, and how the product is to be presented. But there are historians who direct their work to readers who want entertainment. Historians who do this may produce works that are based substantially on secondary sources and lack the references, bibliographies, indexes and such like that would be expected in a university. So, if a reader wants a book about the famous Queen M, she may have a choice between the work of Ms G, who does no original research, and omits all the

bits which might be considered boring or difficult, and the work of Professor F, who has done extensive original research on that queen, and covers the subject comprehensively. Is it defamatory to say of a writer Mr H that he writes like Ms G, and not like Professor F? In my judgment, if that is all there is to it, the answer must be No. Of course, in a given context, the answer may be Yes. It may be defamatory of Mr H if Mr H claims to be directing his work to a university readership. But in that case the defamatory imputation arises from the difference between what Mr H is known to claim he does, and what the defendant has said about what Mr H has actually done. It is for that reason that in many libel actions the meaning which the claimant complains of is incompetence, hypocrisy, disloyalty or dishonesty (as for example in *Myroft v Sleight* (1921) 90 LJKB 883 below). But in many cases such a meaning will be available to the claimant, if at all, not as a natural and ordinary meaning, but only as a true innuendo (that is by pleading the special knowledge amongst specified publishees of what Mr H has claimed about his work).

44. It is possible for a single writer (like a single supermarket) to direct different products to different readerships or markets. Dr Thornton describes herself as writing for different readerships on different occasions. There are today a number of well known professors who are renowned not only for their academic works, but also for bringing history to a mass audience in the form of television entertainment. As long as the true position is made clear by the writer to the prospective reading public, the standards to which a writer writes are simply a matter of choice of one product rather than another. They are not, in Lord Esher's words, thereby conducting their business "badly or inefficiently".

45. Mr Price referred to *Dee v Telegraph Media Group Ltd* [2010] EWHC 924 (QB). In that case the claimant was a tennis player who complained of an article to which he attributed the following meaning:

> " … until his win at the Reus tournament near Barcelona, the Claimant had lost 54 consecutive professional tennis matches during his three years on the professional tennis circuit, and had therefore proved himself to be the worst professional tennis player in the world".

46. The Defendant applied for summary judgment on two grounds. First it submitted that the words were not arguably defamatory. Second it submitted that if and in so far as they were, then the claimant had no real prospect of defeating defences of justification and comment.

47. Counsel for the claimant relied on definition (4), submitting that for words to be defamatory of a professional man they do not have to impute any moral fault or defect of personal character, and that it is defamatory to impute incompetence in a claimant's profession.

48. Sharp J at para [43] considered reports of professional libel cases where the claimants had been an apothecary, an architect and a solicitor, in addition to *Drummond-Jackson* where he was a dentist. She then held that such professional claimants were to be distinguished from other business or professional claimants in this way:

> "48. Incompetence or 'want of skill' by those who hire out their professional or personal skills for a living often involves as I have said, 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).
>
> 49. In my view, it is not easy to translate those principles to the sporting arena, even though I entirely accept that many sportsmen and sportswomen, and the Claimant is one of them, are professionals who earn their living through their sporting skill, or endeavour to do so. It is difficult to characterise an allegation of relative lack of sporting skill, even if it leads to the bottom of whichever league the person or team participates in as necessarily imputing incompetence, quite apart from the question which could plainly arise as to whether such a suggestion is purely a value judgment. Such an allegation might be said to dent someone's pride rather than their personal reputation, depending of course on the context. In every race, match or other sporting event, someone has to come last: that is the nature of competitive sport. Losing in sport is, as Mr Price submits, an occupational hazard. Shaky hands for a surgeon, or endangering the lives of your dental patients through an unproven anaesthetic cannot be so characterised."

49. I have a similar difficulty in translating the principles in *Drummond-Jackson* to a professional writer. If a professional writer is free to write to different standards for different readerships or markets (whether the writer in fact does so or not), then to impute to a writer that she writes to one standard rather than another cannot of itself be defamatory.

THE THRESHOLD OF SERIOUSNESS

50. Amongst the definitions given by Neill LJ, definition (3) is distinguishable from the others in that it directs attention to the "estimation" of right-thinking persons, and make no express mention of any adverse consequences that might result. Attention is directed only to what is in the mind of the publishee. The threshold of seriousness in (3) is to be derived from the subsequent passage from Lord Atkin's speech cited above at para 19.i) above.

51. In each of the other definitions, some consequence adverse to the claimant is required, whether explicitly or implicitly. There is therefore in each of these other definitions a threshold of seriousness: there must be some tendency or likelihood of adverse consequences for the claimant.

52. In definition (1) the threshold is that the imputation must tend to lead right- thinking people to hold feelings strong enough to amount to hatred and contempt. These are strong words. If the feelings of the publishee are sufficiently strong to be signified by these words, then adverse consequences must be implicit. Quite how much too high Lord Atkin considered the threshold under definition (1) to be can be inferred from his example of an imputation of a clever fraud, cited in para 29 above, being below the threshold. In definition (5) the adverse consequence is explicit: the imputation must tend to lead a right-thinking person to shun or avoid the claimant. "Shun" and "avoid" are also strong words: so definition (5) sets the threshold of seriousness at a correspondingly high level.

53. In definitions (6) and (9) the adverse consequence for the claimant is also spelt out: the imputation must be likely to affect the claimant adversely. Attention is directed to the effect on the claimant, and not just to the effect upon the mind of the publishee.

54. In definition (7) the adverse consequence for the claimant is again spelt out: the imputation must deter third persons from associating or dealing with the claimant. This is a threshold at a lower level of seriousness than "shun" and "avoid". But again attention is directed to the effect upon the claimant.

55. In definition (4), as explained in *Derbyshire*, adverse consequences for the claimant must be likely.

56. It is definition (3) that has, since 1936, most often been used by judges in directing juries, or themselves (although such directions have commonly not included the subsequent passage in Lord Atkin's speech relied on by Mr Price). But definition (6) has also been used, and Sir Thomas Bingham MR used them both together in one sentence in *Skuse* at p286.

57. The explanation given in the Faulks Report at para 65 for preferring definition (6) to definition (3) is that the words "right-thinking" and "society" might be misunderstood as referring to the political and social meanings of those words. So no difference in substance was intended. In practice no such misunderstanding is known to have occurred, so far as I am aware.

58. I would give a different reason for preferring definition (6) to definition (3). It is that definition (6) expressly requires not just a change of opinion or estimation in the mind of the publishee, but, in addition, some adverse consequence upon the claimant.

59. Mr Price's submission is that there is at common law a qualification or threshold of seriousness which has rarely been relied upon by defendants since 1936, but which has been considered in recent cases. This is an argument he has previously addressed to Sharp J in *Ecclestone v Telegraph Media Group Ltd* [2009] EWHC 2779 (QB), see para [10].

60. What has prompted a renewed interest in whether there is a threshold of seriousness in the definition of "defamatory" is the decision of the Court of Appeal in *Jameel (Youssef) v Dow Jones & Co Inc* [2005] QB 946 ("*Jameel v Dow Jones*"). In that case the Court recognised that it was appropriate to have regard to Art 10 of the Convention in deciding whether a claim should be allowed to proceed at all, and that

consideration of freedom of expression could not be left to be addressed only at the stage when a defendant was serving a defence. The court said:

> "40. We accept that in the rare case where a claimant brings an action for defamation in circumstances where his reputation has suffered no or minimal actual damage, this may constitute an interference with freedom of expression that is not necessary for the protection of the claimant's reputation… 55 There have been two recent developments which have rendered the court more ready to entertain a submission that pursuit of a libel action is an abuse of process. The first is the introduction of the new Civil Procedure Rules. Pursuit of the overriding objective requires an approach by the court to litigation that is both more flexible and more proactive. The second is the coming into effect of the Human Rights Act 1998. Section 6 requires the court, as a public authority, to administer the law in a manner which is compatible with Convention rights, in so far as it is possible to do so. Keeping a proper balance between the article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged".

61. Eady J applied this principle to strike out a claim in *Kaschke v Osler* [2010] EWHC 1075 (QB) (13 May 2010). He did so again in *Brady v Norman* [2010] EWHC 1215 (QB) (26 May 2010) where he referred to *Jameel v Dow Jones* and to a case decided by myself as follows at para [22]:

> "In the later case of *Lonzim Plc v Sprague* [2009] EWHC 2838 (QB) at [33], Tugendhat J cited those passages in *Jameel* and made the important point:
>
> > 'It is not enough for a claimant to say that a defendant to a slander action should raise his defence and the matter go to trial. The fact of being sued at all is a serious interference with freedom of expression … '"

62. I too have made similar rulings on a number of occasions, including in the case of *Elton John v Guardian News & Media Ltd* [2008] EWHC 3066 (QB) cited by Mr Price to Sharp J and referred to by her in *Ecclestone* at para [10] of her judgment. These and other recent cases demonstrate that each of the three judges who are currently hearing most of the defamation cases are applying the principle of *Jameel v Dow Jones* with some frequency, and in a number of different, but related, contexts in defamation actions.

63. It is necessary to revisit *Sim v Stretch* [1936] TLR 669; [1936] 2 All ER 1237. The words complained of in that case were in a telegram referring to the plaintiff. The text referred also to Edith Saville, who was a housemaid. She had been employed at

successive times by both the plaintiff and the defendant. The plaintiff's wife had left her some money to pay some of the household expenses while she was away, but that money was not enough, and Edith Saville had paid 14 shillings (which is equal to about £30 or £40 today) out of her own money on her employer's behalf. She was reimbursed about two weeks later.

64. Meanwhile the telegram complained of was sent. That involved it being published to the Post Office official. The defendant sender wrote:

> "Edith has resumed her service with us today. Please send her possessions and the money you borrowed, also her wages, to [the defendant's home]"

65. The meaning complained of by the plaintiff was that he was in pecuniary difficulties and that by reason thereof he was compelled to borrow and had borrowed money from the housemaid, that he had failed to pay her wages to her, and that he was a person to whom no one ought to give credit.

66. The House of Lords reversed the decision of the courts below and held that the telegram was incapable of bearing a defamatory meaning. Lord Atkin said this at p671:

> "Judges and text book writers alike have found difficulty in defining with precision the word 'defamatory'. The conventional phrase exposing the plaintiff to hatred, ridicule, or contempt is probably too narrow. The question is complicated by having to consider the person or class of persons, whose reaction to the publication is the test of the wrongful character of the words used. I do not intend to ask our Lordships to lay down a formal definition, but after collating the opinions of many authorities I propose, in the present case, the test: Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?" (emphasis added)

67. Although the House of Lords said that they were not laying down a formal definition, those words are the source of the word estimation in definition (6). They have been treated as a formal definition ever since. Few readers of the law report have gone on to link that passage with the rest of the judgment, and the disposal of the appeal.

68. Mr Price submits that it is necessary to read the rest of the judgment. He submits that Lord Atkin was not, by those words, intending to state that there was no threshold of seriousness. What he was intending to do was to widen the definition to include something less than hatred or contempt, while not defining the threshold of seriousness he proposed should be necessary. Mr Price submits that this appears from the fact that Lord Atkin went on to cite (at p672, p1242) the observation of Pollock CB in *Clay v Roberts* (1863), 8 LT 397. Pollock CB said that:

> "There is a distinction between imputing what is merely a breach of conventional etiquette and what is illegal, mischievous, or sinful …"

69. Lord Atkin then went on (on the same page) to conclude his judgment with the words cited in para 19.i) above.

70. This passage, submits Mr Price, gives an example of what would be below the required threshold of seriousness (however defined). It is not itself a definition of what that threshold should be.

71. This passage appears in the headnote of the report in the Times Law Reports as part of the ratio of the judgment. It is not in the headnote of the All England report. In my judgment the reporter for the TLR was correct in including it in that way. It is not always noted that, while Lord Atkin expressly envisaged a threshold of seriousness, he did not include the threshold in the part of his speech which has been the source of his new definition. Instead he included it later on in his speech, and then only by way of example or illustration and not by formulating a test for the degree of seriousness required.

72. This passage has not been overlooked since 1936. It was also cited by counsel for the defendants in *Berkoff* as recorded by Neill LJ at p 1017.

73. Mr Price and Mr Rushbrooke cited, or referred to, a number of cases. It is not said that these are all the cases which may possibly be relevant to showing the history of the development of the definitions of "defamatory". But they do give some indication of that history. They cast light on what Lord Atkin was intending to say in *Sim*. In particular this is so in the case of *Tournier* in which, as Atkin LJ, he had given a judgment making reference to this same point, namely the definition of defamatory.

74. It is clear from *Sim* that as late as 1936 the conventional definition was definition (1). And it is clear from the text books and from *Berkoff* that definition (1) survives at least in part, and has not been wholly disapproved. That is the only definition in Neill LJ's two lists that includes "ridicule". And in *Berkoff* Neill and Phillips LJJ held that an action complaining only of ridicule could succeed: p 1018, 1021. So they must at least to that extent have been accepting the validity of definition (1), albeit Neill LJ preferred definition (9) (which does not expressly include ridicule).

75. In *Myroft v Sleight* (1921) 90 LJKB 883; at 885-6 McCardie J said that:

> "A person is defamed … when words have been spoken or written which injure or tend to injure that person's reputation or to bring him into odium, ridicule, or contempt… But … in what minds is it that the reputation must have been diminished? To what persons is it that the plaintiff must have been brought into odium, ridicule or contempt? … [after citing cases relating to loss of reputation amongst persons of any particular section of society, including *Clay v Roberts*] … These cases seem to show that the words complained of must be such as would injure the plaintiff's reputation in the minds of ordinary, just and reasonable citizens".

76. The word "odium" was on many occasions used by judges as a substitute for hatred. So McCardie J was applying a slightly different definition, not listed in *Berkoff*. But he does introduce the question later asked by Lord Atkin in *Sim*: To what persons is it

that the plaintiff must have been brought into odium, ridicule or contempt? His answer was that it must be a member of society as a whole, and not some of some section of society.

77. In *Myroft v Sleight* the plaintiff was the skipper of a trawlers working from Grimsby. He was a member, but not an official, of the Grimsby Fishermen's Trade Union, and the defendant was on the committee of management of the union. A resolution for a strike at the end of January 1920 was passed, with the plaintiff voting in favour. An unofficial strike followed. The words complained of were that the plaintiff had been down to the owners' offices and asked for a ship to proceed to sea. McCardie J said this:

> "(p885) It seems curious at first sight that the plaintiff should assert the words to be defamatory. He was a free citizen. He was entitled to earn his living and to pursue his calling as a skipper. All that the defendant had alleged was that the plaintiff had been to the docks (which were a perfectly lawful thing to do) and had asked for a ship…(p887) Yet I conceive that an ordinary member of a trade union may claim that the duty of honesty and loyalty rests upon him … I imagine that it would not be defamatory merely to say of an ordinary trade unionist that he had left his union or that he had openly acted against the wishes of his union. It should not be held defamatory to charge a man with independence of thought or courage of opinion or speech… But a charge of trickery or of underhand disloyalty or of hypocrisy is a very different matter… Hence I find that the words here spoken by the defendant were upon the circumstances of this case defamatory. They were spoken of a man who had voted for the strike and supported the strike… The slander was regarded by all who heard it as an imputation on the plaintiff's honour as a straightforward man".

78. In *Tournier* v *National Provincial and Union Bank of England* [1923] 1 KB 461 at p477 and 486-7 Scrutton LJ and Atkin LJ (as he then was) both referred the words to "hatred ridicule and contempt". The extracts from their judgments appear above (para 28), in Neill LJ's judgment in *Berkoff,* under his definition (1) above.

79. It thus appears that the reason why Scrutton and Atkin LJJ considered that definition (1) was insufficient, or too narrow, was because hatred ridicule and contempt were not apt to allow for what I have referred to as business libels, or the example Atkin LJ gave of the clever fraud. Business libels did not require a threshold of seriousness as high as definition (1) would imply. Neither of Scrutton LJ and Atkin LJ stated that the definition "hatred ridicule and contempt" was objectionable in itself. Thus in *Myroft* and *Tournier* the reasonable man was invoked, not to remove the threshold level of seriousness implied by hatred, ridicule or contempt, but to identify the kind of person (namely the right-thinking member of society generally) whose opinion or estimation of the claimant is to be considered.

80. In 1929 in *Tolley v Fry* definition (1) was applied: see [1930] 1 KB 467 at p 486-7. But Greer LJ also said (and this is definition [3] in Duncan & Neill para 4.02) that: "Words that tend to disparage [the claimant] in the eyes of the average sensible

citizen" or "in the eyes of right-thinking men generally" are defamatory. The phrase "right-thinking men generally" makes clear that there has to be disparagement by the standards of society generally. See Duncan & Neill para 4.05.

81. Mr Price's submission therefore amounts to this: the test "would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?" is not a complete definition of what is defamatory. It is part of the definition. The other part of the definition is: would the lowering of the plaintiff in the estimation of such people be sufficiently serious so as to surmount the threshold envisaged (but not defined) by Lord Atkin?

82. In *Ecclestone* Sharp J did clearly apply a threshold of seriousness. In that case the defendant (the same defendant as in this case) published a diary piece about Ms Ecclestone. The meaning that Ms Ecclestone attributed to the words was that she "was disrespectful and dismissive of the McCartneys and Annie Lennox to the point of being willing to disparage them publicly for promoting vegetarianism".

83. The defendants applied for a determination of whether the words were capable of bearing the meaning complained of. Sharp J was also invited to consider whether the words complained of were capable of bearing *any* defamatory meaning. It was on this second question that the argument and the judgment focussed.

84. Sharp J reminded herself at para [17] that the test is not whether a section of the public could think less of the claimant. She held that the imputation was not serious enough to be capable of being defamatory. So she struck out the action. She gave her reasons as follows:

> "[17] … In our society people hold different (and sometimes strong) views on any number of issues including the use of animal products. In a democratic society where freedom of expression is a protected right, people are entitled to hold strong views, and to express them within the limits laid down by the law…
>
> [19] … In my view the ordinary reasonable reader would see this sentence in the context in which it was used, as nothing more than the expression of a permissible view about an issue and matters on which some people hold strong opinions…
>
> [20] … I do not think it could seriously be suggested that it is defamatory of someone to say, without more, that they were dismissive or showed a lack of respect to those individuals, however well-respected they may be. As Mr Price said in argument, there is no obligation on a young person in today's society to be respectful to people such as Sir Paul McCartney; nor are people likely to think the less of the Claimant merely because she expresses herself as not having much time for him because they hold different opinions on vegetarianism…
>
> [22] … a claim for defamation might arise where a claimant is alleged to have expressed views about people with whom he or

> she disagreed in such violent, excessive or abusive language that ordinary reasonable members of society might think the less of him or her for having done so. There may even be cases where a perceived lack of respect for a particular person in certain circumstances might be actionable in defamation. It seems to me however, that if the opinion expressed is an acceptable one there must be significant latitude given as to the manner in which it is expressed before right-thinking members of society would think the less of the person for expressing either their views, or their opinion of someone with whom they disagree…." (emphasis added)

85. There was no authority cited to me to support the proposition that the definition of defamatory contains no threshold of seriousness. *Sim* is authority in the House of Lords for the proposition that the definition does include a threshold, albeit one which Lord Atkin illustrated but did not define.

86. The phrase "Hatred ridicule and contempt" did not fall out of use entirely after 1936. The editors of Gatley still refer to Neill LJ's definition (1) at para 2.2. And that definition still appears at the head of his list of definitions in the latest edition of Duncan & Neill on Defamation 3rd ed (2009) para 4.02.

87. There is, in one sense, nothing wrong with definition (1): if an imputation tends to bring a person into the hatred and contempt of right-thinking persons, then it will certainly be defamatory on any of the other definitions discussed above. The broader definitions include the narrow one. The sense in which definition (1) would be wrong would be if it were understood as setting a threshold of seriousness: on that basis the threshold that it would set would be too high.

88. "Hatred ridicule and contempt" was still the standard phrase being used by pleaders in the last paragraph of a Statement of Claim in libel as late the 1980s. See *Hasselblad (G.B.) Ltd v. Orbinson* [1985] 1 QB 475, 477, and *Polly Peck Plc. v. Trelford* [1986] 1 QB 1000, 1031. That traditional phrase was also used as the definition of defamation by Lord Reid in *Broome v Cassell & Co* [1972] AC1027 at p 1085. However, according to the Faulks Report at para 58, judges stopped using definition (1) after the decision in *Sim* in 1936. The specialist libel counsel who continued to use that phrase were not doing so in conflict with *Sim* or the judges. They were simply pleading the consequences or effects of the libels at a higher level of seriousness than they needed to.

CONCLUSION ON SERIOUSNESS

89. I accept Mr Price's submission that whatever definition of "defamatory" is adopted, it must include a qualification or threshold of seriousness, so as to exclude trivial claims. I accept this submission for two reasons:

    i) It is in accordance with the true interpretation of Lord Atkin's speech in *Sim.* It is also in accordance with the decision of Sharp J in *Ecclestone* with which I respectfully agree;

ii) It is required by the development of the law recognised in *Jameel (Youssef) v Dow Jones* as arising from the passing of the Human Rights Act 1998: regard for Art 10 and the principle of proportionality both require it.

90. Nor can I see any reason for distinguishing business or professional defamation from other defamation in this respect. There must be a similar threshold in all cases.

91. For reasons stated above, in my judgment definitions (6) and (9) do include a threshold of seriousness. They include it by the use of the words "affects" and "adverse". But definition (9) is to be preferred, at least for those personal defamations which are of the variety listed in para 33.ii)a) above. This is because the word "estimation" is not as clear as the word "attitude". The word "attitude" makes clear that it is the actions of the right-thinking persons that must be likely to be affected (so that they treat the claimant unfavourably, or less favourably than they would otherwise have done), not just their thoughts or opinions.

92. But I would suggest that there should be these additional words added to the end of definition (9): *"or has a tendency so to do"*. Definitions (3), (5), (6) and (7) and Lord Keith's words in *Derbyshire* establish that a tendency or likelihood is sufficient. So that the claimant does not have to prove that there has in fact been an affect upon him.

93. There is a further point to be noted if my conclusion in paras 90 and 92 is correct. If this is so, then it explains why in libel the law presumes that damage has been suffered by a claimant. If the likelihood of adverse consequences for a claimant is part of the definition of what is defamatory, then the presumption of damage is the logical corollary of what is already included in the definition. And conversely, the fact that in law damage is presumed is itself an argument why an imputation should not be held to be defamatory unless it has a tendency to have adverse effects upon the claimant. It is difficult to justify why there should be a presumption of damage if words can be defamatory while having no likely adverse consequence for the claimant. The Court of Appeal in *Jameel v Dow Jones* declined to find that the presumption of damage was itself in conflict with Art 10 (see para [37]), but recognised that if in fact there was no or minimal actual damage an action for defamation could constitute an interference with freedom of expression which was not necessary for the protection of the claimant's reputation (see para [40]).

94. If I am wrong in my conclusion that there is a threshold of seriousness in definitions (6) and (9), then I would consider that *Jameel v Dow Jones* requires that these definitions should be varied so as to include a threshold of seriousness. The word that would give effect to this by imposing the lowest threshold that might be envisaged is the word "substantially", as recommended by the Minority of the Faulks Committee in their Report at p197. If there is a higher threshold that ought to be set, then it does not appear from the above mentioned cases what that threshold should be, and I say nothing about it.

95. On that basis definition (9) would read:

> "the publication of which he complains may be defamatory of him because it [*substantially*] affects in an adverse manner the attitude of other people towards him*, or has a tendency so to do*".

APPLICATION OF THESE PRINCIPLES TO THE PRESENT CASE

96. I turn now to apply the foregoing to the application before me in the present case.

97. It is a feature of this case that Dr Thornton appears to share the view, expressed in the first paragraph of the words complained of, that giving copy approval is something to be disapproved of. But that does not take the case any further towards making this a libel. The fact that the two parties to an action may both be members of a section of society holding particular views does not relieve the court from the obligation to try the case by the standards of members of society generally. In the present case there is no suggestion that the need to apply the standards of members of society generally can be satisfied by putting forward a meaning such as disloyalty or hypocrisy. Nothing of that kind is pleaded.

98. In my judgment, if read by itself, the first paragraph containing the copy approval allegation is not capable of being a personal libel. It is not capable of meaning that Dr Thornton had done anything which in ordinary language could be highly reprehensible, or reprehensible at all, or of bearing any meaning defamatory of Dr Thornton on a personal basis.

99. Alternatively, if I am mistaken in that conclusion, the defamatory meaning falls below the threshold required for the words complained of in the first paragraph to be capable of being defamatory of Dr Thornton on a personal basis.

100. I consider next Mr Rushbrooke's alternative submission, namely that the first paragraph is capable bearing the defamatory meanings pleaded by reason of its proximity to the second paragraph which, it is common ground, does bear a meaning which is defamatory of Dr Thornton on a personal basis. In my judgment the two paragraphs clearly convey distinct criticisms on distinct topics. Applying the tests in *Jeynes,* I do not consider that the reasonably hypothetical reader could understand the copy approval allegation to impute personal conduct which is reprehensible on the part of Dr Thornton when read in the context of the review as a whole. It relates only to her professional practices.

101. Next I consider Mr Rushbrooke's submission that the first paragraph is a business or professional libel. Mr Rusbrooke also points out that the first paragraph read in full includes the words set out in para 7 above. These include "a seemingly limitless capacity to write pompous nonsense". It is understandable that Dr Thornton is unhappy about the review.

102. Professional success as a writer does depend to some extent upon the opinion of reviewers published in the Defendant's newspapers. Those reviews may affect the attitude of potential readers (some of whom may be commercial publishers, or others in a position to make decisions affecting a writer professionally). Such reviews may have the effect of discouraging readers from dealing with a writer, whether indirectly, by discouraging them from buying her book, or directly, by discouraging them from dealing with her professionally in other ways. But the law on business libel is set out in *Derbyshire* and Gatley para 2.1 (paras 36 and 37 above).

103. It seems to me that there is some similarity between the position of writers, and the position of sportsmen considered in paras [48]-[49] of Sharp J's judgment in *Dee*. Dr

Thornton is not selling her services to the public: she (through her publishers) is selling her Book. 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. There is no equivalent to the effect upon the colliery which had been said to provide to pitmen the insanitary cottages in the *South Hetton* case. So it is not possible to translate the principles in the cases such as *South Hetton* and *Drummond-Jackson* to the arena of professional writing.

104. This part of Mr Rushbrooke's argument has given me greater pause for thought. I must apply the high standard set in the cases referred to in para 16 and 17 above. But applying that high standard, I remain unable to see how *Drummond-Jackson* and *South Hetton* can be translated to the profession of writing, where professionals are free to write to different standards for different readerships. A journalist is free to make a living in the world of public relations. Absent a pleaded meaning such as hypocrisy, or a true innuendo, neither of which are pleaded in this case, I am unable to see how it can be defamatory of Dr Thornton to allege that she did not apply in her Book the standards of journalists relating to copy approval. Or if it might otherwise be, then it does not overcome the required threshold of seriousness. Her remedy, if any, is in malicious falsehood.

CONCLUSION

105. For the reasons set out above, this application for summary judgment succeeds in relation to the words complained of in the first paragraph relating to copy approval.