Case No: A2/2016/1266

Neutral Citation Number: [2018] EWCA Civ 170
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
MR JUSTICE MITTING
HQ13D06031

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/02/2018

Before :

LORD JUSTICE McFARLANE
LADY JUSTICE SHARP DBE
and
SIR JOHN LAWS

- -

Between :

	RONALD TERANCE STOCKER	**Appellant**
	- and -	
	NICOLA STOCKER	**Respondent**

- -
- -

David Price QC and **Jonathan Price** instructed by **David Price** for the **Appellant**
Manuel Barca QC instructed by **SA Law LLP** for the **Respondent**

Hearing date: 30 January 2018

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Judgment **Lady Justice Sharp:**

1. The respondent and appellant in this appeal were married to each other for 13 years. They divorced in 2012. They have a son, now aged 17. Their divorce was acrimonious. These proceedings for libel arose from comments (the Comments) made by the appellant on the Facebook Wall of the respondent's new partner, Ms Deborah Bligh on 23 December 2015.

2. The trial of the action took place before Mitting J between 29 February 2016 and 3 March 2016. The judge heard oral evidence from the parties and from Ms Bligh; and

gave an ex tempore judgment at the conclusion of the trial (see: [2016] EWHC 474 (QB)). He found the respondent had published (in the legal sense) the words complained of to three individuals who it was acknowledged by the appellant at trial had read the relevant Comments. He found the words complained of were defamatory of the respondent, essentially in the meanings that were attributed to the words in the respondent's pleaded claim. He rejected the various defences relied on by the appellant. These were in summary that (i) the claim in respect of the postings was an abuse of the process because it did not disclose a real and substantial tort; (ii) the claim was an abuse of the process because the respondent had a dominant collateral and/or improper purpose in bringing it; (iii) the respondent had consented to the Comments complained of because he had deliberately procured their publication in connivance with Ms Bligh, to obtain materials that could be used to threaten or bring a defamation claim; and (iv) the Comments were true or substantially true and/or the defence of truth should succeed by virtue of section 5 of the Defamation Act 1952.

3. The respondent waived his right to damages. The judge held that had the respondent not done so, he would have awarded him damages of £5000.

4. The respondent had also sued on an email sent by the appellant to Ms Bligh's former partner. No issue arises in this appeal in relation to that part of the claim or the judge's decision that it should be struck out on *Jameel* principles. I need say no more about that aspect of the case, except to say that because that part of the claim failed, the judge's order on costs was that the respondent should have 75 per cent of his costs on a standard basis.

5. By the time the matter came for trial, it had been the subject of two contested interim hearings. On 14 June 2014, HHJ Parkes QC rejected the appellant's application that the respondent be ordered to answer various Part 18 requests: see [2014] EWHC 2402 (QB) and in a judgment dated 10 June 2016, Warby J rejected an application made by the respondent to strike out the defence of consent: see [2015] EWHC 1634 (QB).

6. The trial judge when dealing with the costs expressed his concern about the complexity and cost of the proceedings in which the parties had embroiled themselves, a sentiment with which I would entirely agree. It is unfortunate, to say the least, that attempts to resolve this litigation, including by mediation, which we were told had also taken place, have proved to be unsuccessful.

7. Permission to appeal in this case was given at an oral hearing before Arden LJ on the 5 April 2017. In my view, it is clear from what she said when giving permission, that she considered there were two points only that merited consideration on an appeal: first, whether the judge's conclusions as to one the of the meanings found by him was wrong; and secondly, whether the judge had applied the correct legal test with regard to publication. Mr David Price QC for the appellant nevertheless argues that no formal restrictions were placed on the permission given, and has thus sought to advance a

number of other grounds, more fully set out in his skeleton argument, a recent Addendum, and a supplemental skeleton served in response to a Respondent's Notice. We heard argument on the matters he wished to address, but it is right to say that the focus of this appeal has been on the points identified by Arden LJ which in my view, are dispositive of this appeal in the respondent's favour.

8. I turn first to the issue of meaning. The Facebook exchanges between the appellant and Ms Bligh on the 23 December 2012, including the Comments complained of are set out in a Schedule attached as an Appendix to this judgment. All of these exchanges were made on Ms Bligh's Facebook Wall, and were accessible to her Facebook friends.

9. The Comments were made in the following circumstances. In late November or early December 2012 the appellant made a 'friend request' to Ms Bligh on Facebook, asking Ms Bligh in other words to accept her as a Facebook friend. Ms Bligh accepted the appellant's request. By then, as the appellant accepted in evidence, she had been a user of Facebook for some years, and used it "quite a lot". She was moreover familiar with the different settings that could be used by a Facebook user to set who could and could not see their Facebook Wall. The judge found the appellant's purpose in making the 'friend request' was to find out about Ms Bligh by monitoring her interaction on Facebook with her family and friends.

10. On 23 December 2012 Ms Bligh posted a Status Update on her Facebook Wall (a Status Update is essentially a broadcast to all the Facebook user's Facebook friends). At 12.16 pm the appellant posted a 'comment' on that Status Update. This started an exchange of comments between Ms Bligh and the appellant which continued for the next four minutes. The appellant knew, as the judge found, that these were visible to all Ms Bligh's Facebook Friends. One minute after this, Ms Bligh posted a further Status Update on her Facebook Wall, inviting the appellant to telephone her. The appellant's evidence was that she did not telephone Ms Bligh because she did not want to speak to her and the appellant was at work and it was inconvenient. The judge did not accept this. As he pointed out, the exchanges continued over the course of the next 2 hours and 18 minutes. He found the purpose of the two participants to these various exchanges was plain. The appellant wanted to blacken the respondent in the eyes of his current girlfriend and belittle her; Ms Bligh wanted to find out from the appellant about the respondent's previous history.

11. The particular Comments complained of were these:

Nicola Stocker: "I hear you have been together 2 years? If so u might like to ask him who he was in bed with the last time he was arrested…"

…

Nicola Stocker: "…Wouldn't bring it up last time I accused him of cheating he spent a night in the cells, tried to strangle me. Police don't take too kindly to finding your

wife with your handprints round her neck. But don't worry you will get a nice watch for Christmas!"

…

Deborah Bligh: "why did terry get arrested?"

Nicola Stocker: "…Which time?"

Deborah Bligh: "why has he been arrested???"

Nicola Stocker: "well u know about him trying to strangle me, then he was removed from the house following a number of threats he made and some gun issues I believe and then the police felt he had broken the terms of the non molestation order."

Nicola Stocker: "All quite traumatic really"

12. The meanings attributed by the respondent to the Comments in the Particulars of Claim were that the respondent:

    i) had tried to kill the appellant by strangling her, for which he was arrested by police;

    ii) had also threatened the appellant and breached a non-molestation order protecting her, for which he was also arrested;

    iii) had been arrested countless times and accordingly, it was to be inferred, was a dangerous and thoroughly disreputable man.

13. Of these, the first (to which Arden LJ referred when giving permission) and the third have been the subject of argument before us.

14. At this point I should identify the meanings that the appellant sought to justify (in essence, therefore, the appellant's rival meanings). These were:

    i) The respondent violently gripped the appellant's neck which inhibited her breathing and put her in fear that he intended to kill her.

ii) In consequence, the appellant was arrested.

iii) The respondent threatened the appellant. In consequence, the respondent was arrested.

iv) The respondent breached a non-molestation order, the purpose of which was to protect the appellant.

v) Alternatively, there were reasonable grounds to suspect that the respondent had breached the order, in consequence of which he was arrested.

vi) The respondent has been arrested on another occasion.

vii) The respondent is dangerous and disreputable.

15. The issue between the parties on the first meaning was whether the words meant that the respondent had tried to kill the appellant by strangling her, as the respondent alleged, or the lesser meaning, that he had violently gripped the appellant's neck as contended by the appellant. The criticism of the judge's approach focuses in particular on the judge's use of dictionaries. The judge referred in his judgment, to the Oxford English Dictionary (OED) definition of "strangle" to confirm the meaning in ordinary usage of a single English word, an approach he said he did not think was precluded; and to the two senses in which "strangle" was defined in that dictionary. These were first: "To kill by external compression of the throat" and second "To constrict painfully (of the neck or throat)." Mr Price does not submit that there is an invariable rule that dictionaries should not be referred to. But, he submits, there is a danger where one is considering the ordinary meaning of words that doing so can lead to an overly literal approach, without regard to context, and this is what occurred in this case. The context here was one of domestic abuse, where strangulation in the second sense is often encountered, something of which it would be appropriate, he submits, to take judicial notice, when resolving this aspect of the appeal.

16. Mr Barca QC for the respondent says that the judge was set along the path of looking at external material, as a result of a submission from the appellant in a Note at the beginning of the trial. This Note invited attention to definitions in the criminal law, and to section 21 of the Offences against the Person Act 1861. The Note appears to have been prepared as a result of a rhetorical flourish by Mr Barca in his skeleton argument for the trial which referred to the 'Boston Strangler". Later on in argument, Mr Price referred to section 14 of the same Act and to a case decided in 1962 on the meaning of that section (section 14 was repealed in 1967, though this is not mentioned in the Grounds of Appeal, where it is referred to again).

17. However all this arose, the judge was obviously well aware of the correct approach in law to the determination of the natural and ordinary meaning of words. He set out Sir Anthony Clarke MR's summary of those principles in *Jeynes v News Magazines Limited* [2008] EWCA Civ 130 at para 14 and the qualification of them by me in *Rufus v Elliott* [2015] EWCA Civ 121*;* and he then directed himself explicitly by reference to those principles. The use of dictionaries does not form part of the process of determining the natural and ordinary meaning of words, because what matters is the impression conveyed by the words to the ordinary reader when they are read, and it is this that the judge must identify. As it happened however no harm was done in this case. The judge told Counsel during the course of submissions that he had looked at the OED definitions and what they said, so the parties had the opportunity to address him about it; the judge, as he then said, merely used the dictionary definitions as a check, and no more; those definitions were in substance the rival ones contended for by the parties, and in the event, the judge's ultimate reasoning, not dependent on dictionaries, was sound.

18. This reasoning turned on two points: the use of the words "tried" and the relevant context. The judge considered the reader would not have understood the appellant to be alleging that the respondent had *tried* to compress her neck since it was obvious she was alleging that he *had* compressed her neck (leaving handprints on it); what the reader would have understood from the words, was that the respondent had *tried* but failed to kill the appellant by compressing her neck; strangling her therefore in the first sense. Whilst any explanation might be criticised as over elaborate, the judge had to explain how he had arrived at his conclusion, and this he did. It is quite clear however that he approached his task in the right way, taking proper account of the overall impression created by the Comments, and the context in which the suggestion that the respondent had tried to strangle the appellant (something the appellant said twice) was made. During the course of argument the judge said the impression he gained when first looking at the comments was that there was a real possibility that he was dealing with a gangster; and the overall context here for the ordinary reader included the other allegations made; broadly, arrests on numerous occasion, removal from the house following threats, breach of a non-molestation order and gun issues.

19. The issue is not whether we would have come to the same or a different conclusion had we been trying the case at first instance. That would be to usurp the judge's function. It was open to Mr Price to argue his points on context and domestic violence before the judge as he did, but in my opinion, putting forward what amounts to a re-argument of the appellant's case on meaning does not assist him in this appeal. The judge referred to and applied the correct principles of law, his reference to dictionaries, which was understandable in the circumstances, did not lead him into error, and in my opinion his decision as to meaning was one that was plainly open to him.

20. The second complaint relevant to meaning concerns what Mr Price describes as the judge's detachment of 'dangerousness' from the 'arrests' to which that word was linked in the respondent's pleaded meaning. Mr Price submits the judge was not entitled to decide as he did – that the overall effect of the words complained of was that the respondent was a dangerous man, because this was not a meaning attributed to the words

by the respondent. He says moreover that the fact that the judge did so was unfair because it deprived the appellant of the opportunity to rely on a defence of honest comment and other instances of misconduct by the respondent which might otherwise have been brought into the defence.

21. In general terms, the judge is not bound to accept either of the parties' rival contentions on meaning, albeit the claimant cannot recover damages for a more injurious meaning than that of which he complains: see the classic statement of the law by Diplock LJ in *Slim v Daily Telegraph* [1967) 2 QB at p. 175 F-G. The judge's task is to identify the single meaning of the words complained of within the relevant area of contention. However that may be, the debate on such matters in this case seems to me to be an arid one on the facts. The judge's reference to the appellant's dangerousness was merely his overall characterisation of the impression the Comments conveyed, in the light of the discrete meanings he had found them to bear (the respondent had tried to kill etc.). This was not a freestanding meaning therefore detached from the meanings complained of, nor was this a characterisation which founds an appeal that the judge was wrong; indeed to my mind, in the light of the meanings found by the judge, this overall characterisation of what was alleged was self-evidently correct.

22. I agree with Mr Barca that the appellant's submission of unfairness is, in any event, a hollow one. As can be seen, the appellant sought to justify as a freestanding meaning that the respondent was dangerous and disreputable. There is no basis therefore for the suggestion that the appellant would have run her case differently had such a meaning been complained of by the respondent. Further, as the judge pointed out during the course of argument, the appellant had not been noticeably restrained in making numerous allegations of misconduct against the respondent in the defence (which was more than 20 pages long) and it was to be presumed that she had not left her best examples "under cover."

23. I turn next to an issue raised in relation to Section 5 of the Defamation Act 1952. This section is now abolished (its successor is to be found in section 2(3) of the Defamation Act 2013) but it was relied on in this case, because the words complained of were published before that Act came into force. Section 5 provides that:

> "In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges."

24. The initial submission was that the judge failed to consider this issue at all. However

during the course of argument Mr Price accepted that the judge had done so, albeit the judge had not referred directly to the section itself. Mr Price submits however that having regard to what the appellant had proved to be true in her defence of justification, the judge should have found that defence to be made out. Mr Price acknowledges that the force of this argument would be substantially diminished if his principal argument on (the first) meaning fails; but nonetheless argues that the judge was wrong to find for the respondent, given the nature of what was proved to be true, even if the judge's conclusions on meaning were to be undisturbed.

25. I can see why an issue in relation to section 5 might arise for consideration if the judge was wrong to conclude that the Comments alleged the respondent had tried to kill the appellant by strangling her. In my view however, the failure of the principal argument on meaning deprives the argument on section 5 of any force that it might have had. The judge found in short that there was a real and substantial difference between the allegations made and those proved; and in my view he was entitled to reach that view on the evidence he heard. Having carefully appraised the evidence of justification and dealt with the essential points relating to that defence, the judge put the matter in this way. Though the appellant had proved some justification for the words she used, the allegations made in the Comments were a significant and distorting overstatement of what had in fact occurred. His views were similarly expressed during the course of submissions. It is true that the judge found as a fact that during the course of an argument, the respondent had committed common assault at least, by placing his hand over the appellant's mouth and putting his hand under her chin, to stop her speaking. However there is a material difference in gravity between such conduct, however unpleasant it may be, and an attempt to kill by strangulation; and it was plainly open to the judge to find, as he did, that what the appellant had proved in this and other respects, fell short by some measure of establishing a successful defence of justification, by reference to section 5 or otherwise.

26. I should also address a particular complaint that the judge failed to address part of the appellant's case on justification, namely that the respondent had made various unpleasant threats to her. The judge said he was not satisfied the respondent had made immediate threats of violence to the appellant, though he may well have boasted of threats, whether or not made to others and of his capacity to obtain details of the appellant's private affairs by covert means. The submission is that this did not deal with other threats (including of violence but not immediate violence) on which the appellant relied. It is apparent however that the judge made specific findings on the main points in issue, including as I have said as to what the appellant had established by way of justification; and that insofar there was a conflict of evidence on other matters, including in relation the threats, he was unable to resolve them. As Mr Barca says, having regard to the burden of proof, it followed that the appellant failed to establish those particular matters in support of her case on justification. There is some faint suggestion in this and certain other respects, that the judgment was insufficiently reasoned. I am unable to accept this to be the case since it is apparent from the judgment why the judge reached the decision that he did. In any event, this is a difficult argument for the appellant to pursue since the judge was not asked to give further reasons or clarification, in

accordance with the guidance given in *English v Emery Reimbold* [2002] EWCA 605 at paras 24 and 25.

27. I turn to the second main ground of appeal, namely the issue of publication. There was no expert evidence before the judge on the workings of Facebook, and as he freely acknowledged, this was not an area with which he was familiar. Nevertheless, the differing cases advanced by the parties on publication were, it seems to me, relatively straightforward on the facts and the law, as was their ultimate resolution. The respondent alleged that the appellant had posted the Comments on Ms Bligh's Facebook Wall where they were accessible or visible to all her Facebook friends. This much was common ground at trial. What was not common ground was whether the appellant was thereby responsible in law for their publication to those third parties who had read them.

28. The appellant's case was that though she knew that her comments in response to the Initial Status Update were public (to the extent that they would be visible to Ms Bligh's Facebook friends) she believed that her comments following the Status Update at 12.21pm were private. She said in evidence, this was because the content of the second Status Update, addressed her directly, and the exchanges that followed it appeared in a different format on her telephone to the earlier exchanges that had taken place. The judge had no hesitation in rejecting this part of the appellant's evidence, which he found to be a rationalisation after the event of conduct she had come to regret. As for her state of mind, the judge found, as the appellant accepted, that she knew her responses to the Initial Status Update were visible to Ms Bligh's Facebook Friends *("The Facebook exchanges at and after 12.21 are all of a piece with what went before in the defendant's text messages to the claimant at 10.49 and 11.33 and with her posting on what she knew for certain to be a site accessible to Ms Bligh's Facebook friends at 12.16.")*

29. In relation to the postings that followed a minute or so later, the judge said, perhaps generously, that he believed the appellant (and Ms Bligh for that matter) did not give a moment's thought to the fact that their exchanges were being conducted in a semi-public arena accessible to all Ms Bligh's Facebook friends.

30. The submission of the appellant is that in the light of that finding, the judge erred in law in holding that the appellant was responsible in law for publishing the Comments. In summary, it is submitted that to found liability for publication, or republication (which it is asserted was the position here) there has to be a knowledge based test, alternatively a negligence based test, with the burden of proof on the claimant in order to rebalance the law more fairly in favour of defendants. This submission is founded on an observation made by my Lord, Sir John Laws (Lord Justice Laws as he then was) in *Terluk v Berezovsky* [2011] EWCA Civ. 1534.

31. In *Terluk* the words complained of were first published when the defendant, Mr Terluk, uttered them to an interviewer during an interview in London; their subsequent broadcast by a Russian media organisation from Russia to subscribers in this jurisdiction 3 days

later was therefore a republication: see *Terluk* at para 22. One of the issues raised was whether the defendant was responsible in law for this republication. At paras 27 and 28 Lord Justice Laws said this:

> "27. Mr Davenport [Counsel for the defendant] submits that a party is only liable in defamation for a republication of words uttered by him if he intended or authorised the republication. Mr Browne [Counsel for the claimant] submits it is enough if the party ought reasonably to have foreseen the republication. The debate between them was informed by a distinction between two situations in which the legal consequences of a republication may fall to be considered. The first is where, as here, the claimant sues on the republication: that is to say, his cause of action consists in it. The second is where he sues on the original publication only, and relies on the republication as swelling the damages. It is well established that in the latter case the defendant (who *ex hypothesi* is liable for the original publication) will be responsible for additional damage occasioned by the republication if he should reasonably have foreseen that it would take place: see for example *McManus v Beckham* [2002] 1 WLR 2982. Mr Browne relies in particular on *Broxton v McLelland* [1995] EMLR 485, *Richardson v Schwarzenegger* [2004] EWHC QB 2422 (another decision of Eady J) and *Mahfouz v Brisard* [2005] EWHC QB 2304 to show that in the former case the test is the same: reasonable foreseeability is enough to found liability. Mr Davenport says that the learning betrays some uncertainty on the question, and that so much is demonstrated by the leading textbooks; he refers to the current editions of *Duncan and Neill on Defamation* at paragraphs 8.15 – 8.17 and of *Gatley on Libel and Slander* paragraph 6.36. He submits that "principle and consistency favour [the] higher test... where the claimant seeks to make the original publisher liable as a joint tortfeasor for the separate tort generated by the republication" (supplemental skeleton argument paragraph 106).
>
> 28. As I have indicated, the defendant is in my judgment liable on the facts for the republication (subject to any available defences) whatever the test. By giving the interview in the sure apprehension that it was to be broadcast in the United Kingdom he intended or authorised that event. If my Lord and my Lady agree with that conclusion, it becomes unnecessary to resolve the legal issue as to which test is correct. Nor do I think it appropriate to do so, since it seems to me with respect that these may be deeper waters than counsel have acknowledged. If Mr Browne is right, the tort of defamation would be located (at least in the republication case) closer to the territory of claims in negligence, where reasonable foreseeability of harm is a prime constituent of the duty of care. That might be apt for the protection of reputation

> seen as akin to a right of property. But I incline to think that the modern law in this area should more visibly occupy the legal territory of privacy and free expression, and the tensions between them; and to that end the tort of defamation should excoriate not carelessness, but knowing or deliberate action."

32. The judge said he did not consider the dictum of Laws LJ in *Terluk* assisted the appellant. Whether her Comments were published or republished and whether she was liable for them depended on settled principles of the common law of defamation identified in *Gatley on Libel and Slander,* 12th edition at paras 6.17 and 6.18 and the cases there referred to such as *Pullman v Hill* [1891] 1 QB 521 at 528 and 529. Any person posting a comment on the Wall was publishing it to any friend who may access it electronically. This was publication, not republication. No intervention by any other person was required to permit the friend to read it. The position in principle was the same as a comment placed on an office notice board, which would undoubtedly be published to anyone with access to the board who read it. He went on to say:

> "34. The common law imposes an obligation on the person making a defamatory statement on an electronic notice board to take reasonable steps to ensure that it is not read by persons other than the intended recipient. The defendant's actions were the modern day equivalent of a businessperson sending a defamatory letter in an unsealed envelope not marked "private". The fact that Ms Bligh could have altered her Facebook settings to inhibit access to the exchange by her friends did not absolve the defendant from the obligation to take reasonable steps to ensure privacy herself. She was given the opportunity of a private conversation by telephone which she rejected. Unless therefore she asked Ms Bligh to confirm that the exchange would be private she had no right to assume that it would be and is liable for the consequences if, as happened, it was not. "

33. Mr Price fastens in particular on the last two sentences of para 28 in *Terluk*. He submits the common law position is not clear-cut, and what Lord Justice Laws said represents the test for fixing responsibility for publication whether there is republication, or an original publication.

34. It is convenient to consider the issue of republication first. The case below on republication appears, as I understand it, to have been as follows. The default position is that comments posted in response to a Status Update are visible to all of those Facebook

user's Facebook friends; but because it is open to a user to change those settings to restrict access to a Facebook Wall, or take the comments down, he or she is "actively involved" in the publication of those comments; and in the circumstances, it is appropriate to characterise the publication of such comments as a republication.

35. I do not accept that the publications with this case was concerned were republications. As earlier indicated, the evidence about the workings of Facebook before the judge was extremely limited. Without venturing further than the evidence heard below permits, in my view, as the judge found, the posting of the Comments on Ms Bligh's Facebook Wall was in reality no different in substance or in principle to the putting up of a notice on a conventional notice board, accessible to third parties. When the appellant posted her Comments on Ms Bligh's Facebook Wall, they were instantly accessible to all of Ms Bligh's Facebook Friends; and the appellant published her Comments (in the legal sense) directly to every third party who read on the Facebook Wall what she had posted there. There was no repetition of the Comments (by intervening third parties, to others) involved. The fact that the 'notice board' was an electronic, rather than a physical, one did not call for some fundamental realignment of the well-settled common law approach to this issue.

36. Nor do I accept that there is any reason to 'rebalance' the law, along the lines advocated before us. No authority other than *Terluk* was relied on by Mr Price during the course of his opening submissions in this appeal. The reliance on *Terluk* however seems to me to be inapt for a number of reasons. *Terluk* was a republication case and as I have said, this one is not. Moreover the particular observations of Lord Justice Laws (in the last part of para 28) on which Mr Price relies, were obiter and did not have the benefit of fuller argument, which Lord Justice Laws considered the matter in issue required. There is no basis therefore to contend that what was said represents the law with regard to republication, still less that it should apply more broadly. I should add that the distinction drawn by the law between publication and republication properly reflects the difference between the two situations: an original publisher is directly responsible for his or her own actions; in contrast, in a republication case there are threshold requirements, authorisation for example, for holding that the original publisher (not ordinarily responsible for the voluntary act of a free agent) should be held liable for the repetition of his or her publication by others. I do not accept therefore the bold submission that there is no principled reason why the test for publication should be a common one "across the board."

37. It is to be borne in mind too that the balance between the right to reputation and the right to freedom of expression is a delicate one; and the appellant's submission that the balance of the law should be changed to the benefit of defendants (and this appellant in particular) takes no account of broader considerations involved, including the rights for example of those whose reputation may be damaged by the careless promulgation of serious allegations, so easily done via the internet or by other means.

38. Mr Barca referred us to two cases where defamatory letters in envelopes addressed to

their intended recipients, were 'intercepted' by third parties, who took them out of their envelopes, sealed in one instance and not in the other, to read them. In the first, *Theaker v Richardson* [1962] 1 WLR 151, a husband opened a sealed letter addressed to his wife written by the defendant. The Court of Appeal refused to interfere with the jury's finding that the defendant was responsible for publication. In *Huth v Huth* [1915] 3 KB 32 (CA) a curious butler extracted the content of an unsealed envelope addressed by a husband to his wife in her maiden name. In that case, the Court of Appeal upheld the judge's decision that there was no evidence of publication. In *Theaker* Lord Justice Harman, reviewed a number of earlier decisions including *Pullman v Hill* [1891] 1 QB 524, *Huth* and *Sharp v Skues* [1909] 25 TLR 336, CA. After this review he said at p.157: "*It thus appears that the answer to the question of publication of libel contained in a letter will depend on the state of the defendant's knowledge, either proved or inferred, of the conditions likely to prevail in the place to which the libel is destined."* Pearson LJ said at p. 161, "*Was [Mr Theaker's conduct in reading the letter] something unusual, out of the ordinary and not reasonably to be anticipated, or was it something that could quite easily and naturally happen in the ordinary course of events?"* Ormerod LJ did not disagree with the test, but with its application to the facts.

39. The analogy between those cases and this one is not exact however. The defendants in *Theaker* and *Huth* consciously used both the 'medium and the message' to direct the publication specifically to the intended publishee by using an addressed envelope; whereas the appellant in this case used what she knew to be a semi public mode of publication to make remarks to Ms Bligh, without thinking about the fact that what she said was accessible to others.

40. It seems to me that the various arguments raised for the appellant tend to divert attention away from some basic points: she was the originator of the libel; she was aware that the particular Facebook platform concerned was a semi public one and she deliberately posted on that platform without thinking about who else might see what she posted. It should be emphasised that the judge's finding in this case was not that the appellant failed to appreciate that the Comments were accessible to others; still less that if she had thought about it, she would not have understood that the Comments were accessible. His finding was that she did not have this issue specifically in mind at the material time. There is nothing unjust so it seems to me, in holding that a defendant in these circumstances should be held to be responsible in law for publishing defamatory material to third parties. Nor is it unjust to require such a defendant to establish that care was taken to confine a publication to its intended target, if such a point can properly be taken on the facts. This was in essence the approach of the judge; and in my view it was one he was not wrong to take. In my opinion therefore, the judge did not err in law in determining that the appellant was responsible in law for publication.

41. I would dismiss this appeal.

Sir John Laws:

42. I agree that this appeal should be dismissed for the reasons given by my Lady, Sharp LJ. I would only add that I agree in terms with my Lady's conclusion (paragraph 36) that the appellant's reliance on the Terluk case is inapt, whatever may be said about that decision.

Lord Justice McFarlane:

43. I also agree.

APPENDIX

DB posts status update on own wall	?	cant wait to wake up christmas day with my man and his son xxx missing my children xxx
NS comment on status	12:16	Which one of his sons would that be. May be u should be with your own kids
DB comment	12:18	sorry i do not understand your status would you like to phone me I am at home
NS comment	12:20	Not really no
DB posts status on own wall	?	nicky you can phone me if you wish x
NS comment on status	12.21	Why would I want to do that?
DB comment	12.25	why ask me as a friend on fb ????
NS comment	12.26	Because it was very enlightening and confirmed a lot of my worse fears.

NS comment	12.28	But very useful!
DB comment	12.28	oh and what are they
DB comment	12.29	useful for what ?
NS comment	12.30	Ask Terry I learnt from the best!
NS comment	12.33	I hear you have been together 2 years ? If so u might like to ask him who he was in bed with the last time he was arrested, apparently he really liked her but she packed her bags and left. Sensible girl !
DB comment	12.34	when was this ???
NS comment	12.37	Ask terry if you are at home I presume you mean his house as you don't have one. Is it only one of his sons there for Christmas, probably as don't think he is too popular with the other mums.
DB comment	12.42	terry and josh are out , does terry ave more than one son then ?
NS comment	12.45	Oh yes he has an older one born when he broke his feet and also Charlie has come to light, he is 9
NS comment	12.45	God knows if there are more!
DB comment	12.46	oh I didn't no,
DB comment	12.48	where did Charlie come from ?//
NS comment	12.49	Well lying cheating bastard who refuse to wear condoms tend to get caught out occasionally. Wouldn't bring it up last time I accused him of cheating he spent a night in the cells, tried to strangle me. Police don't take too kindly to finding your wife with your hand prints round her neck. But don't worry you will get a nice watch for Christmas!
DB comment	12.50	a watch ???
DB comment	12.52	there are thing I do not no
NS comment	12.52	Oh yes unless he has already bought you one seems to be his gift of choice. Think its a bit like a badge of ownership, Cartier or even a tag
DB comment	12.54	???
NS comment	12.54	Don't accept any sort of vehicle it will be owned by Eros finance, poor Lyn had hers snatched from the carpark at work god only knows how she got home
NS comment	12.55	Cartier and tag are makes of watches
DB comment	12.56	who is lyn
DB comment	12.57	and eros finance ???

NS comment	12.57	His first wife he was married to her for 27 years
NS comment	12.59	Eros one of his companies god u really haven't done your background research have you! Well ask away
DB comment	13.09	i do not seem to no a lot
NS comment	13.10	It's know and no you don't seem to unfortunately Lyn did not enlighten me she just chose to tell me it wouldn't work
DB comment	13.14	can you enlighten me because i realy didn't know anything about all this ?
NS comment	13.15	What would you like to know? Ask any questions you want
DB comment	13.16	about terry , what he is like / why your marriage didn't work
NS comment	13.19	Our marriage didn't work because we didn't get on we have very different views what a marriage should be.
NS comment	13.21	And I did not want josh growing up in an environment where al he saw was his parents yelling at each other and them being unhappy, I wanted him to grow up understanding that relationships are about love and mutual respect
NS comment	13.23	And I am sure you want your kids to know that too x
DB comment	13.23	i can understand that
NS comment	13.24	That's why I divorced him
DB comment	13.26	and what is terry like as a person ?
NS comment	13.27	In what way?
DB comment	13.27	why did terry get arrested
NS comment	13.28	Clearly I don't like him very much that's why I divorced him ! So my opinion on that is very bias! Which time?
DB comment	13.35	why has he been arrested ???
NS comment	13.38	Well u know about him trying to strangle me, then he was removed from the house following a number of threats he made and some gun issues I believe and then the police felt he had broken the terms of the non molestation order.
NS comment	13.45	All quite traumatic really
DB comment	14.00	sorry to hear that , so what is it you have against me ???

NS comment	14.17	Obviously concerned re the stability for josh giving both Terry's and your history. He was very happy living there and I was hopeful he would have a stable home and build a relationship with his dad, who wanted him 50 percent of the time, now that time seems to involve being looked after by his grandmother or you. thats not really what the court had in mind or me! Now it seems he is getting a big step family, that in truth on paper aren't looking good, a little concerned that you abandon your children in France and only have limited access to them yet you have full access to my son and also I don't want him involved in another failed relationship. I am sure as a mum you understand that.
NS comment	14.39	So you see it's not you per say, it's being a concerned mother who loves her son and wants to protect him. Unlike terry I am quite happy for him to have a relationship, just wish he would remember he is a dad first.