DUNCAN AND NEILL ON

DEFAMATION

and other media and communications claims

Sixth Edition

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As ever, we have not been afraid to rewrite or reorganise material where that has been necessary in order to give a succinct account of the current state of the law.

We have endeavoured to state the law correctly as at 1 September 2025.

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Paragraph references printed in **bold type** indicate where the Statute is set out in part or in full.

Mere presence of a denial of a defamatory allegation may not constitute an antidote sufficient to neutralise the bane[10].

1 The publication complained of may contain several distinct charges against the claimant. In that event, the claimant may wish to bring proceedings in respect of only one or some of those charges. But a claimant cannot seek artificially to circumscribe the claim by selective complaint of words or passages taken out of context, see: *Swan v Associated Newspapers Ltd* [2020] EWHC 1312 (QB) (Warby J) at [24]. As to the effect of such a choice on the position of the defendant, see **12.07** below.

2 (1835) 2 Cr M & R 156 at 159.

3 As Warby J clarified in *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2912 (QB) at [35] a 'bane and antidote' case is one where the poison of the defamatory allegations is wholly neutralised by other material in the same publication.

4 [1995] 2 AC 65 at 72–73. See also *Vince v Associated Newspapers Ltd* [2024] EWHC 1806 (QB) where the court rejected a claim based on the proposition that some readers will have read only the headline, photograph and caption of an article that was not defamatory if read as a whole.

5 A fuller account of the facts of the case is given at **5.09** above. The position may well be different if the publication of material part(s) of an article is restricted (for example, by a 'paywall').

6 [2002] EWCA Civ 772, [2002] EMLR 38 at [42].

7 See **5.16** (n3) above for recent examples where context reduced the Chase level of the meaning. For recent examples where antidote was ineffective to lower the meaning, see *Poulter v Times Newspapers Ltd* [2018] EWHC 3900 (QB); *Hewson v Times Newspapers Ltd* [2019] EWHC 650 (QB); *Sharif v Associated Newspapers Ltd* [2021] EWHC 343 (QB); and *Hawrami v Journalism Development Network Inc* [2024] EWHC 2194 (KB).

8 [2020] UKPC 7, [2020] EMLR 16 at [33]–[48].

9 The Judge's finding of a Chase level 1 meaning was reduced to Chase level 3. The Board took into account the political context: the claimants, who were 'engaged in public life and courted the media', could not expect to be free from public scrutiny or criticism: [37]. It also allowed some leeway for the fact that the statements were made orally, in a conversational style, at a press conference. 'What a person says in those circumstances should be interpreted with a certain degree of understanding and generosity': [38]. For another example, see *Soriano v Societe d'exploitation de l'Hebdomadaire le Point SA* [2020] EWHC 3121 (QB) at [31(v)]. For recent examples where the antidote was held insufficient even to lower the Chase level, see *Sharif v Associated Newspapers Ltd* (n7) (Nicklin J) at [29]–[30] and *Hawrami v Journalism Development Network Inc* (n7) at [155]–[158], [160], [162]–[164]. See also *Simon v Lyder* [2019] UKPC 38, [2020] AC 650 at [34] (observations not part of the decision). The Board aggregated statements made by the same defendant on different occasions (two articles made defamatory allegations, but did not identify anyone; two further articles, published months later, identified the claimants); in determining meaning, the articles had to be read as a whole; 'If the effect of the second statement (or group of statements) is to take away the defamatory sting in the first, then the aggregation may well not be defamatory taken as a whole.' The Board was influenced by the fact that the tenor of the articles which identified the claimants had been exculpatory: [33]. The decision is principally relevant on the question of reference innuendo: see **5.35** and **7.07** below.

10 See *Mark v Associated Newspapers Ltd* [2002] EWCA Civ 772, [2002] EMLR 38 at [36]–[43]. See also for instance *Hawrami v Journalism Development Network Inc* (n7) at [155], [158]–[160], [162]–[165] where the inclusion of statements of denial by the claimant's lawyers had differing impacts on the Chase levels of the various defamatory allegations.

Slander

5.30 In the case of a slander also the meaning of the statement complained of may be affected by the context and mode (or circumstances) of publication. For example, the tone of voice used by the speaker or accompanying gestures or facial expressions may materially alter the sense in which the words would be understood[1]. All the relevant incidents of the publication should be pleaded in order to show the natural and ordinary meaning of the statement complained of in its proper context. Thus, for example, the words 'come with me' said by a police officer in uniform would be likely to have a different meaning from those words when said by a head waiter. In the former case the gestures used and surrounding circumstances might well give the words a defamatory meaning they would not have in the latter[2].

1 See *Broome v Agar* (1928) 138 LT 698 at 702. See now s 15 of the Defamation Act 2013 and **5.01** (n1) above

2 The need to show that publication has caused serious harm can be an insuperable hurdle for a slander claimant, even where the allegation is grave: *Yavuz v Tesco Stores Ltd* [2019] EWHC 1971 (QB) and **4.11** above.

INNUENDO MEANINGS

5.31 The law of defamation recognises:

(a) that some words (and other forms of expression) have technical or slang meanings, or meanings which depend on some special knowledge possessed not by the general public but by a limited number of people; and

(b) that ordinary words may on occasions bear some special meaning other than their natural and ordinary meaning because of some extrinsic facts or circumstances.

These special meanings are called innuendoes[1].

1 At one time, innuendoes were called 'legal' or 'true' innuendoes, to distinguish them from 'popular' or 'false' innuendoes, that is, inferential natural and ordinary meanings: *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 280 (Lord Devlin). Such terminology is now largely obsolete, however.

5.32 The principles governing innuendoes may be stated as follows:

(1) An innuendo[1] may consist of:
  (i) a special meaning which a statement bears because of some facts or circumstances extrinsic to the statement;
  (ii) a special meaning which a statement bears because it contains some technical or slang term, some local meaning or some other meaning which is not known to the generality of people.

(2) In either case, the innuendo meaning may be additional to a defamatory natural and ordinary meaning or meanings; equally, it may be attributable to statements which are not defamatory in their natural and ordinary meaning at all.

(3) The court decides an innuendo meaning as a question of fact by attributing to the statement the meaning which the court considers it would convey to reasonable people[2] who have the knowledge (whether of extrinsic facts or technical terms etc) which is necessary to give the statement a special meaning.

(4) A claimant who seeks to rely on an innuendo meaning has to plead[3] and prove the facts or circumstances (including, where appropriate, the technical terms etc) which gave the statement a special meaning. They also have to prove that the statement was published to one or more persons who knew these facts or circumstances or, where appropriate, the meaning of the technical term etc[4].

(5) In an appropriate case, such proof may be achieved by showing that the extrinsic facts or circumstances had sufficient notoriety to enable an

inference to be drawn that at any rate some of the publishees must have known them; and such an inference will more readily be drawn where the statement complained of has been published to a wide audience, since that increases the likelihood that some amongst that audience will have known the facts or circumstances[5].

(6) Notwithstanding that an innuendo meaning is a meaning attributed to the statement by the court, evidence is admissible where such a meaning is relied upon to show the sense in which individual publishees understood the statement[6]. Such evidence is, however, not conclusive, since the claimant, in order to succeed, must satisfy the court that the meaning attributed to the statement by the individual publishees was one which reasonable people in their position would have derived from it[7].

(7) The sense in which the statement was intended is treated as irrelevant.

(8) Where the statement is defamatory in its natural and ordinary meaning any defamatory innuendo constitutes a further and separate cause of action[8].

1 The word 'innuendo' is also used to include 'any implication that leads to identification of the libel with the plaintiff': see *Grubb v Bristol United Press Ltd* [1963] 1 QB 309 at 328 (Holroyd Pearce LJ). He added: 'It is no doubt strictly correct to refer to the identification as an innuendo ...'. At 336, Davies LJ took a different view: 'It is, of course, necessary in every case for the plaintiff to allege and prove that the libel was understood to refer to him. The averment necessary to establish this is frequently referred to as an innuendo ... But the more accurate description of such an allegation is that it is an allegation of facts and matters from which it is to be inferred that the words were published of the plaintiff.'

2 See *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331; *Tolley v JS Fry & Sons Ltd* [1930] 1 KB 467; *Hough v London Express Newspaper Ltd* [1940] 2 KB 507, [1940] 3 All ER 31, CA. See also *Baturina v Times Newspapers Ltd* [2011] EWCA Civ 308, [2011] 1 WLR 1526, affirming that liability for publication of an innuendo is strict and does not depend on the knowledge or intention of the publisher or on the understanding of the publishees, but on the meaning which the publication would have conveyed to a reasonable person having the special knowledge of the publishees.

3 CPR PD 53B at 4.2(4) provides that, where the claimant relies on any innuendo '[that is, a meaning alleged to be conveyed to some person by reason of knowing facts extraneous to the statement complained of)', the claimant 'must ... identify [in the particulars of claim] the relevant extraneous facts'.

4 *Baturina* (n2) at [49]–[50], [53], [57].

5 *Fullam v Newcastle Chronicle and Journal Ltd* [1977] 3 All ER 32, [1977] 1 WLR 651 at 659A (Scarman LJ), applied in *Baturina v Times Newspapers Ltd* (n2).

6 See *Cassidy v Daily Mirror Newspapers Ltd* (n2); *Hough v London Express Newspaper Ltd* (n2). See, however, *Baturina* (n2) at [56], where Sedley LJ cast doubt on the desirability of calling witnesses 'to say what they made of the publication', but added 'it may be otherwise where for example a special and limited class of reader is relied on, or where it is necessary to prove damage of a particular kind'.

7 See the cases cited at n2.

8 See *Watkin v Hall* (1868) LR 3 QB 396; *Sim v Stretch* [1936] 2 All ER 1237; *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 279 (Lord Devlin).

5.33 The requirement of s 1 of the Defamation Act 2013 that, in order to found a claim in defamation, the statement complained of must be shown to have caused or be likely to cause serious harm to the claimant's reputation and, where the claimant is a body that trades for profit, that it has caused or is likely to cause that body serious financial loss, may mean that the incidence of defamation cases based on innuendo meanings, which generally depend on publication to a limited number of people with special knowledge, will decrease[1]. In consequence, a claimant who is contemplating bringing proceedings based solely on an innuendo will need to be sure that their claim meets the

statutory threshold[2] before they do so. In this regard, the identity of the publishees and, in an appropriate case, evidence of their reaction to the publication[3] may be as important as the nature of the imputation conveyed by the innuendo.

1 It is, however, well recognised that publication of a serious allegation to a small number of people may cause serious damage to the claimant's reputation. See 25.10 below.

2 As to which, see CHAPTER 4 above.

3 See 5.05 and 5.32(6) above. Note, in this connection, the words of Sedley LJ in *Baturina v Times Newspapers Ltd* [2011] 1 WLR 1526 which are quoted in 5.32 (n6) above.

Innuendoes depending on knowledge of extrinsic facts or circumstances

5.34 The law of defamation recognises that the ordinary person will read between the lines and will draw inferences from what they read or are told, and the courts realise that they 'must accept a certain amount of loose-thinking'[1]. These inferences and conclusions which the ordinary person would draw from the statement itself are part of the natural and ordinary meaning of the words. But words, images and gestures may have some other and quite separate meaning in addition to their natural and ordinary meaning because of extrinsic facts and circumstances. This special meaning, which depends on facts or circumstances known only to some people or some classes of people, is an innuendo. In *Lewis v Daily Telegraph Ltd* Lord Devlin gave a simple illustration[2]:

'Thus, to say of a man that he was seen to enter a named house would contain a derogatory implication for anyone who knew that that house was a brothel but not for anyone who did not.'[3]

1 See *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156, [1971] 1 WLR 1239 at 1245.

2 [1964] AC 234 at 278.

3 But not, it is submitted, to those further readers who knew (in addition) that the man was in fact the gasman going in to read the meter.

5.35 In *Grappelli v Derek Block (Holdings) Ltd*[1], the Court of Appeal held that extrinsic facts or circumstances giving rise to a defamatory innuendo[2] must have been known at the time of publication by the people to whom the statement complained of was published. The court held that this followed from the fact that the cause of action in defamation arises upon publication of the statement complained of and must be complete at the time of publication. Therefore, any defamatory meanings attributable to the words by reference only to facts or circumstances coming to the knowledge of the publishees after publication cannot found a cause of action. However, in *Simon v Lyder*, the Privy Council expressed the view that the 'rigorous exclusionary principle' in *Grappelli* 'goes too far', at least insofar as it prevents the aggregation of two publications by the same defendant[3].

1 [1981] 2 All ER 272, [1981] 1 WLR 822, CA.

2 This rule does not apply in all circumstances to 'reference' innuendoes: see *Hayward v Thompson* [1982] QB 47, [1981] 3 All ER 450, CA and 7.06 below.

3 *Simon v Lyder* [2019] UKPC 38, [2020] AC 650 at [25] and see 7.07 below.

5.36 Occasionally, a statement which is on its face defamatory may be published to people who know of facts or circumstances which displace that apparent meaning in favour of one which is innocent (for example, a word

normally derogatory may, to the knowledge of the publishees, be one which the defendant habitually uses as a term of affection). The defendant would succeed in such a contention — sometimes called a 'defendant's innuendo' or 'reverse innuendo' — if they were able to prove that all of the publishees were aware of the extrinsic facts or circumstances which convert what would otherwise be a defamatory statement into one which is innocent[1]. Further, if it could be shown that most (but not all) of the publishees knew the relevant extrinsic facts, the defendant might seek to argue that the publication of the statement to those who did not understand it in an entirely innocent sense had not caused, and was not likely to cause, any serious harm to the claimant's reputation and, therefore, that it was not defamatory within the meaning of s 1 of the Defamation Act 2013[2].

1 cf *Hankinson v Bilby* (1847) 16 M & W 442 at 444–445 (Parke B); and see *Mitchell v Book Sales Ltd* (24 March 1994, unreported), CA. Reliance by a defendant on a 'reverse innuendo' must be pleaded and proved: *Vardy v Rooney* [2020] EWHC 3156 (QB) at [37].

2 Section 1 is discussed in CHAPTER 4.

Innuendoes depending on specialised knowledge

5.37 Some words, phrases, images or gestures may be incomprehensible to the generality of people and may only be understood by those with special knowledge of, for example, a particular dialect[1], or the terms used in a particular trade or profession, or a particular slang expression[2], or a particular literary allusion. Other forms of statement, on the other hand, may have a defamatory meaning naturally derived from their ordinary sense, but also have one or more secondary defamatory meanings which depend on specialised knowledge. In all such cases, where an understanding of the secondary meaning of the statement can be achieved only by recourse to some specialised knowledge, the meaning is an innuendo meaning.

1 For words published in a foreign language, see 5.39 below.

2 The meaning of particular slang words may vary over a period of time, so old cases may be of little assistance. If a word would be understood by the public generally, no innuendo is required and no evidence can be given as to its meanings: see, for example, *Barnett v Allen* (1858) 3 H & N 376, 379 (Pollock CB) ('blackleg' held to be a word generally used and understood, and therefore not susceptible of evidence to prove its meaning). See also *Allsop v Church of England Newspapers Ltd* [1972] 2 QB 161, CA, 'pre-occupation with the bent' requiring the pleading of a natural and ordinary meaning only, rather than an innuendo, to explain the (then) common colloquial connotations of the word 'bent'.

5.38 It may sometimes be difficult to decide whether a particular expression, allusion or reference (verbal or visual) would be understood by people generally or whether it needs specialised knowledge. Thus, whereas an ordinary reasonable person would be likely to understand the significance of likening a person to Hitler, it is less certain whether an ordinary reasonable person at the present day would appreciate the significance of a comparison drawn with Lavrenty Beria[1]. Slang and colloquial expressions present similar difficulties, and, if there is any doubt as to the state of general knowledge, a claimant who wishes to rely on a slang or colloquial expression should be prepared to plead and prove it as an innuendo, at any rate in the alternative[2].

1 Once notorious as head of the NKVD, the secret police in Russia which was instrumental in the reign of terror under Stalin in the 1930s.

2 For discussion of the distinction between what may be ascribed to the ordinary reader as general knowledge and what must be treated as special knowledge requiring an innuendo, see *McAlpine v Bercow* [2013] EWHC 1342 (QB) and *Fox v Boulter* [2013] EWHC 1435 (QB); see also 5.17 (n1) above.

WORDS PUBLISHED IN A FOREIGN LANGUAGE

5.39 It is submitted that statements published in a foreign language are, in general, to be treated in precisely the same way as statements published in a local dialect or in, for example, rhyming slang. In both cases, it is necessary to plead and prove what the words mean in ordinary English[1], and it is also necessary to prove that one or more of the publishees understood the statement in its published form[2]. Thus, no actionable slander would be published by a person who spoke some defamatory words to a group of people, none of whom understood the language in which that person spoke[3].

1 In any event, in England proceedings must be conducted in English: *Re Trepca Mines Ltd* [1960] 1 WLR 24 at 27 (Roxburgh J). Proceedings in Wales may be conducted in Welsh: see the Welsh Language Act 1993, s 22 and Practice Direction Relating to the Use of the Welsh Language in Cases in the Civil Courts in or having a Connection with Wales.

2 Where, for example, the words are published in French to a wholly francophone audience, this rule has an obvious artificiality. For a recent example, involving expert evidence to prove the English translation, see *Soriano v Societe d'exploitation l'Hebdomadaire le Point SA* [2020] EWHC 3121 (QB). In relation to a Welsh language publication made in Wales, where Welsh may be used in court proceedings (Welsh Language Act 1993, s 22; Welsh Language (Wales) Measure 2011), it is arguable that the rule has no application at all.

3 See *Price v Jenkings* (1601) Cro Eliz 865; and cf *Amann v Damm* (1860) 8 CBNS 597 at 600 (Williams J).

THE FUNCTIONS OF THE JUDGE AND THE JURY: THE PRESENT POSITION

5.40 The meaning of the statement complained of is a question of fact. Prior to the 2013 Act, when there was a presumption that defamation actions would be tried by jury, this led to procedural complications since, though it is often logically and practically desirable to determine what a statement means at the outset, this determination usually had to wait until the trial of the action[1]. Under the 2013 Act, trial by jury is no longer presumed and it is likely only to occur very rarely, if at all[2]. Accordingly, judges will generally determine the meaning of a statement as a preliminary issue at a very early stage of the proceedings, before service of a defence[3].

1 CPR PD 53B at 6.1 ('Determination of meaning') now provides that the court may determine the meaning of the statement complained of, whether it is defamatory at common law and whether it is a statement of fact or opinion at any time after service of particulars of claim. This is now conventional: *Duke of Sussex v Associated Newspapers Ltd* [2022] EWHC 1755 (QB) at [4]. The former power to determine in advance of trial whether a statement is 'capable' of bearing a pleaded meaning (which was in CPR 53 PD 4) has been superseded: see *Alsaifi v Amunwa* [2017] EWHC 1443 (QB), [2017] 4 WLR 172 at [40]. And see 32.28 below.

2 In *Stocker v Stocker* [2019] UKSC 17, [2020] AC 593 at [32]–[33] the Supreme Court referred to the 'almost complete abolition' of jury trial by s 11 of the Defamation Act 2013. At the time of writing there have been only two applications for jury trial in defamation claims, both of them refused: see *Yeo v Times Newspapers Ltd* [2014] EWHC 2853 (QB), [2015] 1 WLR 971 at [17]–[40]; *Blake v Fox* [2022] EWHC 1124 (QB), [2022] 4 WLR 77 at [35]–[51].

3 See *Bokova v Associated Newspapers Ltd* [2018] EWHC 2032 (QB), [2019] QB 861 (Nicklin J) at [7]–[10]; as noted at [8], the court nowadays expects a defendant to set out their case as to the meaning of the publication; and see the requirements to do so in pre-action correspondence at paras 3.2 and 3.7 of The Pre-Action Protocol for Media and Communications Claims. On preliminary trial to determine meaning, see further **32.27–32.30** below. For appeals on the issue of meaning, see **33.03** below.

Chapter 6

INGREDIENTS OF THE CAUSE OF ACTION

6.01 In order to establish the ingredients of a cause of action in defamation (libel or slander[1]) it is necessary for the claimant to prove:

(a) that the statement complained of referred to the claimant[2];
(b) that the statement was defamatory of the claimant[3];
(c) that the statement was published by the defendant or in circumstances in which the defendant is responsible for publication[4].

In the case of certain slanders, those not 'actionable per se', the claimant must also prove special damage[5].

1 See CHAPTER 3 above.
2 See CHAPTER 7 below.
3 See CHAPTER 4 and CHAPTER 5 above and **6.02–6.03** below.
4 See CHAPTER 8 below.
5 See **6.03** below.

6.02 In any action for defamation (whether libel or slander[1]) brought in respect of a publication on or after 1 January 2014[2], the claimant must show that the statutory requirement of 'serious harm' to their reputation is fulfilled in order to establish the 'defamatory' ingredient of the cause of action. Section 1(1) of the Defamation Act 2013 provides that a statement is not 'defamatory' unless its publication has caused, or is likely to cause, 'serious harm to the reputation of the claimant'[3]. Further, s 1(2) provides that harm to the reputation of a body that trades for profit will not be 'serious' unless it has caused, or is likely to cause, the body 'serious financial loss'[4].

1 As to the distinction between libel and slander, see CHAPTER 3.
2 The date when the Defamation Act 2013 came into force. For transitional provisions, see s 16. For slander, see **6.03** below.
3 See **4.07–4.19** above.
4 See **4.20–4.24** above.

6.03 There is an additional ingredient in some slander claims. In order to establish a cause of action where the publication was on or after 1 January 2014[1], the claimant has to prove special damage[2], except in the following cases:

(a) where the claim is in respect of an imputation that the claimant has committed a criminal offence punishable by imprisonment[3]; or

(b) where the words are calculated to disparage the claimant in any office, profession, calling, trade or business carried on by the claimant at the time of publication[4].

Before the Defamation Act 2013 came into force, there were two further exceptional cases where proof of special damage was not required to establish the cause of action for slander, namely, where the claim concerned (i) an imputation that the claimant had certain contagious diseases[5] or (ii) an imputation of unchastity or adultery to any woman or girl[6]. The effect of s 14 of the 2013 Act is that these exceptions no longer apply[7].

1 When the Defamation Act 2013 came into force. For transitional provisions, see s 16.

2 See **3.01** above. In libel and in slanders actionable *per se*, the gist of the tort is injury to reputation rather than financial loss; in slanders not actionable *per se* the claimant must still prove that they have suffered (or are likely to suffer) serious harm to their reputation but must additionally show special damage, i.e. financial loss capable of being estimated in money: see *George v Cannell* [2024] UKSC 19, [2024] 3 WLR 153 at [32]–[33]; *Lachaux v Independent Print Ltd* [2019] UKSC 27, [2020] AC 612, [2019] 3 WLR 18 at [5], [15], [18]. See also **25.33–25.34** below.

3 An imputation of a criminal offence punishable by death, or by imprisonment (with or without the option of a fine) was actionable *per se*; an imputation of a crime punishable only by a fine was not: see *Hellwig v Mitchell* [1910] 1 KB 609 at 614 (Bray J). Words imputing a general charge of criminality will suffice, even if they express it in popular or slang terms, providing that, in their context, the words would be reasonably understood as imputing some actual offence for which the claimant could be punished with imprisonment: see, for example, *Dhir v Saddler* [2017] EWHC 3155 (QB), [2018] 4 WLR 1 (Nicklin J) at [26], [30] (words imputing a threat to kill where the context gave the listener no reason to doubt that the imputation was of a threat made with the necessary intent) and compare *Hwang v Kim* [2021] EWHC 3327 (QB) (Collins Rice J) at [3], [33]–[61] (words imputing that the claimant had made a threat to stab with a knife did not, in context, imply that the claimant had intended the threat to be taken literally or that the defendant had been put in real fear). See also the discussions in *Umeyor v Ibe* [2016] EWHC 862 (QB) (Warby J) at [71]–[75]; *Hodges v Naish* [2021] EWHC 1805 (QB) (HH Judge Richard Parkes QC) at [139]–[140].

4 See s 2 of the Defamation Act 1952, which specifies that this is so 'whether or not the words are spoken of the plaintiff [claimant] *in the way of* his office, profession, calling, trade or business' (added emphasis).

5 That exception applied to imputations of venereal disease, leprosy and (probably) the plague. See generally *Bloodworth v Gray* (1844) 7 Man & G 334; and for a possible argument that the imputation of *any* contagious disease was actionable *per se*, see *Watkin v Hall* (1868) LR 3 QB 396 at 399.

6 See Slander of Women Act 1891.

7 Section 14(1) repealed the 1891 Slander of Women Act; s 14(2) provides that, where the imputation is that a person has a 'contagious or infectious disease', the person must prove special damage to establish a cause of action for slander.

Chapter 7

IDENTIFICATION

INTRODUCTION

7.01 In every case it is necessary for the claimant to prove that the statement complained of was published about them. In *Sadgrove v Hole*, AL Smith MR put the matter as follows[1]:

> 'The plaintiff to succeed in the action must prove a publication of and concerning him of libellous matter, and if he does not satisfy the onus of proof which is on him in this respect there is no cause of action.'

In many cases the claimant's task is a simple one because the statement identifies them in such a way as to leave no room for doubt that they are the person referred to[2]. In other cases, however, the position may be less clear[3]. In *Dyson Technology Ltd v Channel Four Television Corpn*, the Court of Appeal helpfully distinguished two different routes by which a claimant may prove their case on identification (or 'reference' as it is sometimes termed)[4].

1 [1901] 2 KB 1 at 4. See also *Bruce v Odhams Press Ltd* [1936] 1 KB 697 at 708 (Slesser LJ); *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 at 1248 (Lord Morris of Borth-y-Gest).

2 For example, 'Mr XY, the managing director of Z Ltd'.

3 See further 7.03 below. There can be particular difficulties, for example, where a claim is brought by a company which is part of a complex corporate structure: see 10.02 below and *Dyson* (n4).

4 [2023] EWCA Civ 884, [2023] 4 WLR 67. See, respectively, 7.02 and 7.03–7.07 below.

IDENTIFICATION WITHOUT RELIANCE UPON EXTRINSIC FACTS

7.02 The test for identification will be satisfied where the statement complained of would reasonably lead persons acquainted with the claimant to believe that the claimant was the person referred to[1]. This requires consideration of the nature and content of the statement and the attributes of the claimant which would be known to the hypothetical acquaintance. Where there is room for doubt about this, the claimant must identify the relevant attributes they say would be known to the hypothetical acquaintance and the court can resolve any dispute, with evidence if necessary. However, any such inquiry will be into what knowledge should be attributed to the hypothetical acquaintance and not what any actual reader/viewer subjectively knew: the test is 'both objective and abstract'. The amount of knowledge to be attributed to the hypothetical acquaintance will be context-dependent. In the case of a company, it is likely to extend to knowledge of when the company was incorporated and the general nature of its business activities[2]. In the case of an individual, it is

likely to extend to their age and outwardly obvious characteristics, but the hypothetical acquaintance is not to be considered omniscient[3]. If reasonable people acquainted with the claimant would understand the statement to refer to the claimant, the defendant will not escape liability though they may have tried to disguise the reference to the claimant by using initials or asterisks or a fictitious name or some other subterfuge[4]. Nor will they escape liability even if they had never heard of the claimant or intended to refer to someone else[5]. The test is an objective one and the intention of the defendant is therefore regarded as irrelevant on the issue of identification in the same way as where the meaning of the statement complained of has to be decided[6].

1 *Knupffer v London Express Newspapers Ltd* [1944] AC 116; *Dyson Technology Ltd v Channel Four Television Corpn* [2023] EWCA Civ 884, [2023] 4 WLR 67 at [38]. At [41] Warby LJ said that describing proof of identification in this way as a case of 'intrinsic' reference is apt to mislead or confuse because, even in this situation (and in contradistinction to the ascertainment of meaning) the court will take into account facts that may not be stated on the face of the statement, specifically, facts about the claimant that would be known to a hypothetical acquaintance.

2 *Dyson* (n1) at [47]. However, it is not necessary that the hypothetical acquaintance should know the legal name of a company. It is enough that they are acquainted with its trading name or the brand name of its product: see *The Hut.com v Trinity Mirror plc* [2018] EWHC 2480 (QB) at [13]–[16]. For claims by companies generally, see **10.02–10.05** below.

3 *Dyson* (n1) at [42]–[47]. By way of illustration, in *Bridgen v Hancock* [2024] EWHC 623 (KB), [2024] EMLR 8 at [71]–[74] it was accepted that acquaintances would have known the claimant to be an MP, but the court rejected the submission that they would have known about his recent parliamentary speeches or the fact that his party had withdrawn the whip hours before the publication complained of. Instead, the claimant was required to rely on a 'reference innuendo' (see **7.03** below).

4 See *Hayward v Thompson* [1982] QB 47 at 60 (Lord Denning MR). This passage is susceptible of being taken to suggest that the intention of the defendant may be relevant. It is submitted, however, that that would constitute a misreading of the passage taken as a whole. In any event, such a proposition would be inconsistent with higher authority: see **7.08** below. See also *Simon v Lyder* [2019] UKPC 38, [2020] AC 650 at [23] and **7.07** below.

5 See further **7.08–7.10** below. In such circumstances, a defendant may be well advised to make an offer of amends under s 2 of the Defamation Act 1996; if made and not withdrawn, the offer will constitute a defence to the action unless the claimant can prove that the defendant knew or had reason to believe that the statement referred or was likely to be understood as referring to the claimant: see s 4 of the 1996 Act; and, further, CHAPTER 21 below.

6 Compare the observations of Diplock LJ in relation to intention and meaning in *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 172, cited at **5.15** above. However, in the exceptional circumstances which arose in *O'Shea v MGN* [2001] EMLR 40, this rule of strict liability was held not to apply: see further **7.10** below.

IDENTIFICATION WHERE RELIANCE IS PLACED ON EXTRINSIC FACTS

7.03 Where the statement complained of, read in its proper context[1], is insufficient to identify the claimant, the claimant may nevertheless be able to prove identification by showing that the statement was read by certain individuals who, through their knowledge of particular facts over and above those that would be known to a hypothetical acquaintance, would reasonably have understood the statement to refer to the claimant. This is sometimes called a 'reference innuendo'[2]. In these cases the claimant is required to plead and prove the extrinsic facts on which they rely to establish identification and, if these facts are proved, the question becomes: would reasonable people knowing these facts

or some of them reasonably believe the statement referred to the claimant? In *Morgan v Odhams Press Ltd*, Lord Donovan put the matter as follows[3]:

> 'The plaintiff must prove that the words of the article would convey a defamatory meaning concerning himself to a reasonable person possessed of knowledge of the extrinsic facts. This requirement postulates (as the plaintiff expressly accepted) not merely a reasonable person but also a reasonable conclusion. Mere conjecture is not enough ...'.

1 As to what may be taken into account as context for the purposes of determining the meaning of a statement, see **5.25–5.26** above. The same approach is applicable when determining the issue of identification/reference: see *Davidoff v Hargrave* [2023] EWHC 1825 (KB), considered at **7.14** below.

2 *Dyson Technology Ltd v Channel Four Television Corpn* [2023] EWCA Civ 884, [2023] 4 WLR 67 at [35].

3 [1971] 1 WLR 1239 at 1264. Though Lord Donovan's speech was a dissenting one it is submitted that this statement of the law is correct.

7.04 Where identification depends on extrinsic facts these extrinsic facts must be pleaded because they form part of the cause of action[1]. In *Bruce v Odhams Press Ltd*[2] the claimant complained of an article about the smuggling activities of 'an Englishwoman', but did not state in the statement of claim the facts from which it was to be inferred that she was the Englishwoman referred to. The Court of Appeal held that these facts were a material part of her cause of action and should be pleaded. Greer LJ said[3]:

> '... it is an essential part of the cause of action of a plaintiff in cases of defamation, whether of slander or libel, that the words are defamatory of the plaintiff. If they are defamatory of some other person, real or imaginary, they do not provide the plaintiff with any cause of action at all. Defamatory statements which are in the air, as it were, and do not appear by their words to refer to the plaintiff, have got to be made referable to the plaintiff by reason of special facts and circumstances which show that the words can be reasonably construed as relating to the plaintiff. It is not sufficient under the existing rules of practice merely to allege in general terms a cause of action ... The material facts on which the plaintiff must rely for her claim in the present case seem to me necessarily to include the facts and matters from which it is to be inferred that the words were published of the plaintiff.'

A claimant whose case on identification is based on extrinsic facts must, as a general rule, identify readers who knew those facts[4].

1 The Court of Appeal noted in *Baturina v Times Newspapers Ltd* [2011] 1 WLR 1526 at [23] that a 'reference innuendo' arises 'where the statement is on its face defamatory, but where knowledge of extrinsic facts is needed to link them to the claimant', while a 'meaning innuendo' arises 'where the statement does not appear to be defamatory on its face, and is only rendered defamatory by knowledge of extrinsic facts'. But see the remarks of Davies LJ in *Grubb v Bristol United Press Ltd* [1963] 1 QB 309 at 336, cited in **5.32** (n1) above.

2 [1936] 1 KB 697. The obligation to plead the extrinsic facts now arises under CPR 16.4(1)(a); and see CPR PD 53B at 2.1.

3 [1936] 1 KB 697 at 705.

4 *Mosley v Focus Magazin Verlag GmbH* [2001] EWCA Civ 1030 at [26]–[30]; see also *Baturina* (n1) at [46]–[47] (the same reasoning was held to apply to both reference and meaning innuendos: see [23]–[26]). See **7.12** below.

7.05 In the light of *Grappelli v Derek Block (Holdings) Ltd*[1], in which the Court of Appeal decided that extrinsic facts coming to the knowledge of publishees after the date of publication could not be relied on in support of an innuendo meaning because the cause of action must be complete at the time of publication, it might be thought that a similar exclusionary principle would

apply in relation to the extrinsic facts relied on by the claimant as showing that the statement complained of would have been understood to refer to them.

1 [1981] 1 WLR 822. See 5.35 above.

7.06 It appears, however, that there may be circumstances in which the exclusionary principle will not be applied to the issue of identification. In *Hayward v Thompson*[1] (decided shortly after *Grappelli v Block*), the claimant had been awarded damages in respect of two articles published in successive weekly issues of the same newspapers. The first article did not name the claimant; the second did. The Court of Appeal held that the claimant was entitled to rely on the second article as showing that the first article referred to him. The court distinguished *Grappelli v Block* on the basis that in the instant case: (a) the words of the first article were defamatory; (b) the two articles appeared within a short time of each other in the same newspaper; and (c) the second article explicitly identified the claimant[2].

1 [1982] QB 47.
2 *Hayward* (n1) at (variously) 59–60 (Lord Denning MR), 66–68 (Sir George Baker), 72–73, 74 (Sir Stanley Rees).

7.07 This issue was considered in the Privy Council in *Simon v Lyder*[1]. The Board concluded that the rigorous exclusionary principle laid down in *Grappelli*[2], namely that a subsequent statement by the same defendant can never be aggregated with an earlier one, although consistent with the conceptual basis of defamation at common law, goes too far. It was said to be unnecessary for the purposes of determining the appeal before the Board to resolve with any precision the question how the exception to the exclusionary principle is to be framed, and that there may well be several different conceptual routes to its identification on different facts[3]. Lord Briggs JSC stated the position as follows:

> '[26] ... It is sufficient to say that the authorities on this question demonstrate that, for two statements made by the same person, but published at different times, to be aggregated for the purpose of giving rise in conjunction to a completed cause of action in defamation, there must in the mind of the reasonable reader be created a sufficient nexus, connection or association between the two of them, so that (where one is defamatory and the other identifies the subject) there comes a moment in time at which, in the mind of that reader, the claimant is identified as the subject of the defamatory accusation. That moment in time will generally be the time of publication (ie reading) of the second statement.
>
> [27]. That nexus or connection between the two statements may be established by varying means. The defendant may, in the first statement, have invited the reader to await further information in a later statement. The two statements may be part of a single saga or series. The second statement may sufficiently refer back to the first statement so as to incorporate it by reference, or its contents as a legal innuendo, in the second statement. But these are not legal categories. They are merely examples of ways in which, as a matter of fact, a claimant may prove the requisite nexus or connection between the two statements.'

Where this issue arises, it is essentially a question of fact or evaluation[4].

1 [2019] UKPC 38, [2020] AC 650.
2 *Grappelli v Derek Block (Holdings) Limited* [1981] 1 WLR 822; see 7.05 above.
3 *Simon* (n1) at [25]–[26].
4 *Simon* (n1) at [27].

THE INTENTION AND KNOWLEDGE OF THE DEFENDANT ARE IRRELEVANT

7.08 For the purpose of deciding whether the statement would be understood to refer to the claimant, the intention and knowledge of the defendant are irrelevant[1]. This point was finally settled by the House of Lords in *E Hulton & Co v Jones*[2], where the claimant (Artemus Jones, a barrister) recovered damages in respect of an article in the *Sunday Chronicle* describing a motor festival at Dieppe, and in which the following sentence appeared: '[T]here is Artemus Jones with a woman who is not his wife, who must be, you know—the other thing!'[3] It was argued on behalf of the newspaper that neither the author nor the editor knew of the existence of the claimant and that as there was no intention to refer to him the defendants were not liable. But Lord Loreburn LC said[4]:

> 'If the intention of the writer be immaterial in considering whether the matter written is defamatory, I do not see why it need be relevant in considering whether it is defamatory of the plaintiff. The writing, according to the old form, must be malicious, and it must be of and concerning the plaintiff. Just as the defendant could not excuse himself from malice by proving that he wrote it in the most benevolent spirit, so he cannot shew that the libel was not of and concerning the plaintiff by proving that he never heard of the plaintiff. His intention in both respects equally is inferred from what he did.'

And Lord Shaw of Dunfermline, rejecting an argument that the case established any new principle, said[5]:

> 'Sufficient expression is given to the same principle by Abbott C.J. in *Bourke v Warren*[6] ... in which that learned judge says: "The question for your consideration is whether you think the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant." I think it is out of the question to suggest that that means "meant in the mind of the writer" or of the publisher; it must mean "meant by the words employed". The late Lord Chief Justice Coleridge dealt similarly with the point in *Gibson v Evans*[7], when in the course of the argument he remarked: "It does not signify what the writer meant; the question is whether the alleged libel was so published by the defendant that the world would apply it to the plaintiff."'

To the same effect were the words used by Lord Alverstone CJ in the Court of Appeal in *Jones v E Hulton & Co*, where he said[8]:

> 'There is abundant authority to shew that it is not necessary for every one to know to whom the article refers; this would in many cases be an impossibility; but if, in the opinion of a jury, a substantial number of persons who knew the plaintiff, reading the article, would believe that it refers to him, in my opinion an action, assuming the language to be defamatory, can be maintained; and it makes no difference whether the writer of the article inserted the name or description unintentionally, by accident, or believing that no person existed corresponding with the name or answering the description. If upon the evidence the jury are of the opinion that ordinary sensible readers, knowing the plaintiff, would be of opinion that the article referred to him, the plaintiff's case is made out.'

1 But see 7.02 (n4) above and *O'Shea v MGN Ltd* [2001] EMLR 40, discussed at 7.10 below.
2 [1910] AC 20.
3 See [1909] 2 KB 444 at 445.

4 [1910] AC 20 at 24.
5 [1910] AC 20 at 26.
6 (1826) 2 C & P 307.
7 (1889) 23 QBD 384 at 386.
8 [1909] 2 KB 444 at 454.

7.09 The decision in *E Hulton & Co v Jones*[1] has not escaped criticism[2], but the principle seems to be well established. Moreover, the principle is in accordance with the law in the United States, Australia, New Zealand, Scotland, Ireland and other countries as well. The principle can also be supported on the basis of the reason given by Lord Greene in *Newstead v London Express Newspaper Ltd*[3]:

> 'If there is a risk of coincidence it ought, I think, in reason to be borne not by the innocent party to whom the words are held to refer, but by the party who puts them into circulation.'

1 [1910] AC 20.
2 See, for example, Sir William Holdsworth in 57 LQR 74. The decision of the House of Lords was not a reserved decision and it may be that even on the issue of liability some weight was attached to the fact that the claimant had been a contributor to the newspaper and that his name was well known in the office. On the question of damages Lord Loreburn LC said: 'The damages are certainly heavy, but I think your Lordships ought to remember two things. The first is that the jury were entitled to think, in the absence of proof satisfactory to them (and they were the judges of it), that some ingredient of recklessness, or more than recklessness, entered into the writing and the publication of this article, especially as Mr. Jones, the plaintiff, had been employed on this very newspaper, and his name was well known in the paper and also well known in the district in which the paper circulated': [1910] AC 20 at 24–25.
3 [1940] 1 KB 377 at 388.

7.10 However, in *O'Shea v MGN Ltd*, the court found that to apply this strict liability principle in the exceptional circumstances of the case would amount to an unjustifiable infringement of the defendant's rights under art 10 of the European Convention on Human Rights. The claim concerned an advertisement for a pornographic website which featured the photograph of a person who was the 'spit and image' of the claimant. Morland J observed that in the case of a 'lookalike' the strict liability principle imposed an impossible burden on a publisher, and the fact that no similar claims had previously brought indicated that there was no pressing social need for the principle to be applied[1]. In *Baturina v Times Newspapers Ltd* Lord Neuberger MR rejected an argument that the strict rules in relation to innuendoes should be reviewed in light of the Human Rights Act 1998[2]. He observed (*obiter*) that the decision in *O'Shea* was correct and its reasoning might be justified as representing a 'small extension' of the *Reynolds* defence[3].

1 [2001] EMLR 40. In a case of unintentional defamation a defendant has the option of making an offer of amends under s 2 of the Defamation Act 1996 (see further CHAPTER 21 below), but Morland J considered that this provided insufficient protection for the publisher. He took the view that the *deliberate* use of a 'lookalike' to identify a person as the subject of a publication would give the person a remedy in malicious falsehood. *O'Shea* was decided before any recognition of the right to reputation as an aspect of art 8 (see further CHAPTER 2 above) and it is possible that more weight may now be given to the rights of the claimant in such a case.
2 [2011] EWCA Civ 308, [2011] 1 WLR 1526 at [20]–[22], [27]–[28] (though the case concerned a meaning innuendo, the court accepted that liability for both types of innuendo was strict: [23]–[26]); Lord Neuberger took the view that art 10 did not compel or justify any change in the law since, save in exceptional circumstances, the publisher would be able to rely on a *Reynolds* defence. The common law *Reynolds* defence has been abolished: see s 4 of the Defamation Act 2013 (creating a defence of publication on matter of public interest) and CHAPTER 14 below.

3 *Baturina* (n2) at [29]–[30]; where his observations included that he could see 'no warrant' for extending *O'Shea* to a case where a newspaper had published an untrue story, but was unable to raise a *Reynolds* defence.

HOW THE IDENTIFICATION TESTS ARE TO BE APPLIED

7.11 The court approaches the question of whether a reasonable person would understand the statement to refer to the claimant in a manner similar to its determination of the meaning of the statement[1]. Thus, in *Morgan v Odhams Press Ltd* Lord Pearson said in relation to a report in a Sunday newspaper[2]:

> 'I do not think the reasonable man—who can also be described as an ordinary sensible man—should be envisaged as reading this article carefully. Regard should be had to the character of the article: it is vague, sensational and allusive; it is evidently designed for entertainment rather than instruction or accurate information. The ordinary, sensible man, if he read the article at all, would be likely to skim through it casually and not give it concentrated attention or a second reading. It is no part of his work to read this article, nor does he have to place any practical decision on what he reads there. The relevant impression is that which would be conveyed to an ordinary sensible man (in this case having knowledge of the relevant circumstances) reading the article casually and not expecting a high degree of accuracy.'

In the same case Lord Reid referred to *Lewis v Daily Telegraph Ltd*[3] and said[4]:

> 'If we ... take the ordinary man as our guide then we must accept a certain amount of loose thinking. The ordinary reader does not formulate reasons in his own mind: he gets a general impression and one can expect him to look again before coming to a conclusion and acting on it. But formulated reasons are very often an afterthought. The publishers of newspapers must know the habits of mind of their readers and I see no injustice in holding them liable if readers, behaving as they normally do, honestly reach conclusions which they might be expected to reach. If one were to adopt a stricter standard it would be too easy for purveyors of gossip to disguise their defamatory matter so that the judge would have to say that there is insufficient to entitle the plaintiff to go to trial on the question whether the matter refers to him, but the ordinary reader with perhaps more worldly wisdom would see the connection and identify the plaintiff with consequent damage to his reputation for which the law would have to refuse him reparation.'

1 As to which, see CHAPTER 5.
2 [1971] 1 WLR 1239 at 1269. See also the speech of Lord Morris of Borth-y-Gest in that case where he said at 1254: 'What must be contemplated is a reading of a newspaper in what a jury would consider to be the ordinary way in which a newspaper article would be read. The average reader does not read a sensational article with cautious and critical analytical care. The plaintiff who successfully complained of an article which described someone as a churchwarden at Peckham was neither a churchwarden nor did he reside at Peckham' (referring to *E Hulton & Co v Jones* [1910] AC 20 and 7.08 above).
3 [1964] AC 234.
4 *Morgan* (n2) at 1245.

EVIDENCE AS TO IDENTIFICATION

7.12 Although the issue of identification is to be decided by the objective test — whether reasonable people acquainted with the claimant (or by reason of knowledge of specific facts) would reasonably understand the statement to refer to the claimant — the claimant is entitled to call witnesses to prove that they in fact understood the statement to refer to them, but is not required to do so.

Nicklin J provided a summary of the position by reference to the authorities in *Monir v Wood*[1]. He said that there were three main categories in which a claimant seeking to establish that the ordinary reader would have understood words to refer to them may rely upon evidence[2]:

> '(i) a solely inferential case – typically publication in a mass circulation newspaper, where, in the particular circumstances, the claimant contends that there must have been at least some publishees who would have known the facts from which an ordinary reasonable reader would conclude that the defamatory publication referred to him: ...;
>
> (ii) direct evidence – witnesses can be called by the claimant to give evidence that they knew the relevant facts and understood the publication to refer to the claimant: ...; and
>
> (iii) indirect evidence – proof of facts from which a reliable inference can be drawn that the claimant had been identified as the subject of the libel: e.g. evidence that the claimant was the subject of ridicule at a public meeting following publication ... or that the claimant had been contacted by people who indicated (directly or indirectly) that they had identified him as the subject of the defamatory publication ...'

Having observed that the authorities showed that, although the test on identification is objective, evidence is admissible, Nicklin J said[3]:

> 'Unlike the issue of meaning (where such evidence has been clearly held to be irrelevant and inadmissible) such evidence is admissible in relation to reference, but it is not determinative. It is advanced by a claimant on the basis that the Court is invited to accept the evidence as a reliable indicator that the hypothetical ordinary reasonable reader would have understood the words to refer to the claimant. But this is subject to two points:
>
> (i) First, a claimant is not required to produce evidence that individual publishees did understand the words to refer to the claimant: ...;
>
> (ii) Second, as it remains always an objective test, it is open to the tribunal of fact to hold that an individual publishee's identification of the claimant was, in the particular circumstances, unreasonable; s/he may be found to be "avid for scandal" or simply to have jumped to an unreasonable conclusion ...'[4]

Nicklin J continued[5]:

> 'Another important principle flows from the fact that the test is objective: it is immaterial, on the issue of liability, that people who were able to identify the claimant as the subject of the libel did not believe the allegations made against him/her to be true. Such evidence is relevant only to damages (and, following the coming into force of s.1 Defamation Act 2013, to the issue of serious harm): ...'

1 [2018] EWHC 3525 (QB) at [101]–[104].
2 *Monir* (n1) at [101].
3 *Monir* (n1) at [103]. At [102], Nicklin J referred to observations by Warby J that a claimant did not have to prove that there were, in fact, people who had understood the words to refer to them: *Economou v de Freitas* [2016] EWHC 1853 (QB), [2017] EMLR 4 at [11], *Lachaux v Independent Print Ltd* [2016] QB 402 at [15]; and *Undre v Harrow LBC* [2016] EWHC 931 (QB) at [24]–[26], [31]; and he referred also to the view expressed (obiter) by the majority in *Baturina v Times Newspapers Ltd* [2011] 1 WLR 1526, CA that such evidence was not admissible at all [56] (Sedley LJ) and [57] (Hooper LJ). His conclusion was, notwithstanding the remarks in *Baturina*, that the decisions in *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239; *Cook v Ward* (1830) 6 Bing 409; *Hayward v Thompson* [1982] QB 47 and *Jozwiak v Sadek* [1954] 1 WLR 275 (cited in [101(ii)–(iii)]), showed that such evidence was admissible: see *Monir* at [103].

4 Nicklin J quoted the observation of Lord Reid in *Morgan* (n3) at 1246B–1246D: 'What has to be decided is whether it would have been unreasonable for a hypothetical sensible reader who knew the special facts proved to infer that this article referred to the [claimant] ...'
5 *Monir* (n1) at [104].

7.13 Where a claimant is not named, but is pictured alongside the words complained of, it has been said that the claimant must prove that the words were read by people who were able to identify them from the photograph (although this may be established by inference in an appropriate case)[1]. It is submitted however that there is no special rule in respect of visual identification and that the question in every case is whether reasonable readers acquainted with the claimant (or by reason of knowledge of specific facts) would reasonably understand the statement to refer to the claimant[2]. In *Dwek v Macmillan Publishers Ltd*, Sedley LJ said[3]:

> 'Identification by appearance can, it seems to me, be at least as potent and as direct as identification by name. Either, in a particular case, may be sufficiently plain to fall for no elaboration by particulars or by evidence. Either, by contrast, may require pleading and proof of extrinsic facts to establish that publication was of and concerning the claimant.'

1 *Dwek v Macmillan Publishers Ltd* [2000] EMLR 284 at 291 (May LJ).
2 See, however, *O'Shea v MGN Ltd* [2001] EMLR 40, discussed at 7.10 above. See also *Monir v Wood* [2018] EWHC 3525 (QB) at [100], where Nicklin J agreed with this submission.
3 *Dwek* (n1) at 294. This passage also makes it clear that it is an oversimplification to say that, merely because a claimant's name is used in the statement complained of, reference will be established without more: see also *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946 at [45].

7.14 As has been noted, when the court determines the natural and ordinary meaning of a statement complained of, it may for that purpose need to determine what other material should be taken into account as forming part of the publication in which the statement is situated and/or relevant context for the statement, ie material which could reasonably be expected to be known to or read or viewed by all publishees[1]. That exercise is undertaken without evidence from publishees. So too, where a claimant contends, for the purpose of establishing identification, that words or images falling outside the statement complained of should be regarded as forming part of the same publication or as relevant context, evidence of what readers actually took into account is inadmissible[2]. Where there is doubt as to whether the court will take identifying material into account as part of the publication or relevant context, the claimant may be well-advised to plead a reference innuendo and identify readers who in fact saw that material. Evidence from such readers (including evidence that they understood the statement to refer to the claimant) would then be admissible.

1 See 5.25–5.26.
2 Neither can evidence be given of readers' characteristics in order to support an inference that they took certain extraneous material into account: *Davidoff v Hargrave* [2023] EWHC 1825 (KB) at [23]–[38], [69].

DEFAMATION OF A CLASS

7.15 Difficult questions may arise where the statement complained of contains defamatory allegations against a group of people. In such cases the test to be