Holbeck Hall Hotel Ltd v Scarborough Borough Council[49]

11.043 The concept of the measured duty extending to a duty to do or facilitate what is reasonable was considered and explained by the Court of Appeal in *Holbeck Hall Hotel Ltd v Scarborough Borough Council*.

11.044 The plaintiffs' hotel had to be demolished when a massive land slip on the defendants' land caused loss of support. It was held that the owner or occupier of land owed a measured duty of care to prevent danger to a neighbour's land from lack of support due to natural causes, where the owner or occupier knew, or was presumed to know, of the defect or condition on his land giving rise to the danger, even though he had not created it, and where it was reasonably foreseeable that the defect or condition would, if it were not remedied, cause damage to the neighbour's land. The scope of the duty depended not only on the defendant's knowledge of the hazard, the ease and expense of abatement and his ability to abate it, but also on the extent to which the damage which in fact eventuated was foreseeable, and whether it was fair, just and reasonable in the circumstances to impose a duty. Justice did not require that the defendant should be held liable for damage which was vastly more extensive than that which was foreseeable.

11.045 Stuart-Smith LJ derived the concept that the scope of the measured duty of care should have regard to what is fair, just and reasonable from *Caparo Industries Plc v Dickman*.[50] He said:[51]

> "51. *Goldman's case* [1967] 1 AC 645 and *Leakey's case* [1980] QB 485 were decided before the decision of the House of Lords in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, in which the three-stage test for the existence of a duty of care was laid down, namely foreseeability, proximity and the need for it to be fair, just and reasonable. In *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] AC 211 it was held that the three-stage *Caparo* test was appropriate whatever the nature of the damage: see *per* Lord Steyn, at p 235, approving a dictum of Saville LJ The requirement that it must be fair, just and reasonable is a limiting condition where foreseeability and proximity are established. In my judgment very similar considerations arise whether the court is determining the scope of a measured duty of care or whether it is fair, just and reasonable to impose a duty or the extent of that duty. And for my part I do not think it is just and reasonable in a case like the present to impose liability for damage which is greater in extent than anything that was foreseen or foreseeable (without further geological investigation), especially where the defect and danger existed as much on the plaintiffs' land as Scarborough's."

[49] [2000] QB 836.
[50] [1990] 2 AC 605.
[51] [2000] QB 836 at p 862.

Lambert v (1) Barratt Homes Ltd (2) Rochdale MBC[52]

11.046 This case contains a most recent pronouncement of the principle of "measured duty of care" and the extent of that duty. It re-affirmed the test of reasonableness set out in *Goldman v Hargrave* and *Leakey*. The approach now appears to involve a four-stage test: first, proof of defendant's knowledge of the hazard; second, the ease and expense of abatement and his ability to abate it; third, the extent to which the damage was foreseeable; and fourth, whether it was fair, just and reasonable in the circumstances to impose a duty.

11.047 The claimants had bought houses from the 1st defendant, a property developer, who in turn had bought the land from the 2nd defendant authority. In preparing the land for construction the 1st defendant was said to have negligently filled in and blocked part of the drainage ditch and the drain so that the claimants' properties were flooded by water flowing from the land retained by the 2nd defendant authority, over the part owned by the 1st defendant and onto the claimants' properties. The 2nd defendant appealed against the finding of liability on their part. The appeal was allowed.

11.048 The Court of Appeal found that the claimants had an indisputable right to recover the whole of the costs of the works from the 1st defendant was an important factor in determining the scope of the duty of care owed by the 2nd defendant. It was found that the judge had overstated the extent of the 2nd defendant's duty when he said that they were liable to abate the nuisance and to carry out the necessary works. The 2nd defendant had co-operated in giving and obtaining the consents necessary for the works to be carried out; in light of this, it was far from clear that a breach of duty could be established.

11.049 It also held that the duty asserted by the judge went beyond what was described in *Leakey*:[53]

> "It is important in this context to bear in mind that whether a measured duty of care of the kind recognised in *Goldman v Hargrave* and later cases sounds in nuisance or negligence, it is a duty which is owed by one occupier of land to another. In each case, therefore it is necessary to consider what steps it is reasonable to expect the person on whose land the hazard has arisen to take in order to prevent damage to other land liable to be affected by it. Moreover, the duty to act, if it arises, arises as soon as the landowner becomes, or should have become, aware that the hazard has come into existence..... The fact that the hazard was, and was known to have been, created by (1st defendant)'s blocking the ditch on land which it then occupied is one of the factors that has to be taken into account in deciding the scope of (2nd defendant)'s duty, but unless it was also clear that the respondents had a good cause of action against (1st defendant) to recover the cost of any relief works, we do not think that it would have been possible to take that fact into account as being established when assessing the

[52] [2011] HLR 1.
[53] [2011] HLR 1 at pp 9–10.

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scope of (2nd defendant)'s duty at that time. It would, however, have been clear from 1998 or 1999 that (1st defendant)'s works were the cause of the flooding.

20. It is apparent from both *Goldman v Hargrave* and *Leakey v National Trust* that the scope of the duty of care will depend on the particular circumstances of the case.

.....

(The 2nd defendant) was not in the slightest degree responsible for the cause of the flooding but as a result of (the 1st defendant)'s actions the only way of removing the hazard which resulted from the natural accumulation of rainwater at the south eastern corner of the retained land was to construct a catch pit on the retained land and pipe the water to the sewer by a different route. The cost of that work was obviously likely to be considerable. This was not a case like *Sedleigh-Denfield v O'Callaghan*, therefore, where a simple and inexpensive act on the part of the occupier of the land on which the hazard arose could have abated the nuisance."

11.050 It awaits to be seen whether, and if so, how far *Lambert v (1) Barratt Homes Ltd (2) Rochdale MBC*[54] will be adopted in Hong Kong. That underlying principle appears to have been accepted in *Realty Harvest Ltd v Gold Margin Development Ltd*.[55] The case was about an owner's liability in circumstances where the tenant by the use of weaving machines, generated excessive noise and vibration emissions, thereby interfered with the use or enjoyment of the unit below. It was argued by the plaintiffs that the 2nd defendant owner should impose a term in the renewed tenancy to restrict the emissions. Having failed to do so, he had not taken all positive steps to prevent the tenant interfering with the use of building by others. The trial judge accepted the owner has taken all steps within his power to abate the nuisance but still found the owner liable because of his failure to include such a clause in the renewed tenancy. The Court of Appeal disagreed and said that the owner was not in a position to refuse renewal of the tenancy upon the tenant exercising the option, nor was it within his power to vary the term of the renewed tenancy. However, it will be noted that one of the arguments mounted on appeal was that the owner had no obligation to prevent the nuisance at all costs. This argument did not appear to have been rejected by the Court of Appeal.

Interference with the use or enjoyment of land

11.051 Nuisances of this type require no proof of actual financial or physical damage. In *Gaunt v Fynney*,[56] the court stated that:

[54] [2011] HLR 1.
[55] [2001] 1 HKLRD 506.
[56] (1872–1873) LR 8 Ch App 8, 11–12.

"... A plaintiff who wishes to establish a nuisance to personal comfort has a heavier burden of proof to discharge than one who seeks to show a nuisance to property."

11.052 Where the nuisance is caused by smell or noise, the damage in such a case consists of discomfort or annoyance to the occupier of the premises.[57] In *St Helen's Smelting Co v Tipping* Lord Westbury LC said the locality of the thing complained of will be an important factor to consider:

"anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration."

11.053 Guidance can also be found in Luxmoore J's judgment in *Vanderpant v Mayfair Hotel Co Ltd*[58] where he said:

"Apart from any right which may have been acquired against him by contract, grant or prescription, every person is entitled as against his neighbour to the comfortable and healthy enjoyment of the premises occupied by him, and in deciding whether, in any particular case, his right has been interfered with and a nuisance thereby caused, it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions obtaining among English people: see *Walter v Selfe* and the remarks of Knight Bruce, V.-C. It is also necessary to take into account the circumstances and character of the locality in which the complainant is living. The making or causing of such a noise as materially interferes with the comfort of a neighbour, when judged by the standard to which I have just referred, constitutes an actionable nuisance, and it is no answer to say that the best known means have been taken to reduce or prevent the noise complained of, or that the cause of the nuisance is the exercise of a business or trade in a reasonable and proper manner. Again, the question of

[57] *Clerk & Lindsell on Torts* (18th edn, 2000), para 19.25.
[58] [1930] 1 Ch 138 at 165.

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the existence of a nuisance is one of degree and depends on the circumstances of the case."

11.054 In other commonwealth jurisdictions, similar tests are used. For example, in Canada, McIntyre JA in *Royal Anne Hotel Co v Ashcroft*,[59] it was held that:

> "The test then is, has the defendant's use of this land interfered with the use and enjoyment of the plaintiffs' land and is that interference unreasonable? Where, as in the case at bar, actual physical damage occurs it is not difficult to decide that the interference is in fact unreasonable. Greater difficulty will be found where the interference results in lesser or no physical injury but may give offence by reason of smells, noise, vibration or other intangible causes. No finding is required regarding the exercise of care by the defendant and, while its conduct may frequently be such that a finding of negligence could be made, it is not necessary and the existence of due care will afford no defence if the other ingredients are present.
>
> What is an unreasonable invasion of an interest in land? All circumstances must, of course, be considered in answering this question. What may be reasonable at one time or place may be completely unreasonable at another. It is certainly not every smell, whiff of smoke, sound of machinery or music which will entitle the indignant plaintiff to recover. It is impossible to lay down precise and detailed standards but the invasion must be substantial and serious and of such a nature that it is clear according to the accepted concepts of the day that it should be an actionable wrong. It has been said..... that Canadian judges have adopted the words of Knight Bruce V.C. in *Walter v Selfe* 64 E.R. 849 at 852, affirmed on other grounds 19 L.T.O.S. 308 (L.C.), to the effect that actionability will result from an interference with:
>
> > '... the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober ... notions.'
>
> ..... In reaching a conclusion, the court must consider the nature of the act complained of and the nature of the injury suffered. Consideration must also be given to the character of the neighbourhood where the nuisance is alleged, the frequency of the occurrence of the nuisance, its duration and many other factors which could be of significance in special circumstances. ..... The conflicting interests must be weighed and considered against all the circumstances. The social utility of the conduct complained of must be weighed against the significance of the injury caused and the value of the interest sought to be protected."

[59] [1979] 95 DL R (3d) 756.

11.055 The authorities showed that other factors to consider include the location, i.e. reasonableness of actions based on the norm in a particular locale,[60] the intensity or duration of the nuisance[61] and the social utility of the defendant's acts;[62] the social value of the environment; and the sensitivity of the claimant.[63] The courts have indicated some flexibility in allowing various forms of nuisance.[64] In *Hunter v Canary Wharf Ltd*, the court has also restricted nuisance by placing emphasis on reasonableness of interference, not foreseeability.[65] Nuisance can also be incurred by degree. The context and degree of interference will be looked at to determine character.[66] The defence of social utility is only applicable where the activity and/or location and method are mandated, as a result of which, the nuisance must be an inevitable consequence, for example the defence of statutory authority.[67]

11.056 The courts have focused on two important and relevant considerations—the sensitivity of the claimant and the locality of the activity—to determine whether the interference is sufficiently substantial.

11.057 This type of nuisance include the carrying on of an offensive trade or manufacture or otherwise; causing smoke or noxious fumes to pass onto the plaintiff's property; making unreasonable noises or vibration; using a building as a hospital for infectious diseases whereby the adjoining owners live in fear of infection; using a house for prostitution

11.058 The House of Lords in *Hunter v Canary Wharf Ltd*[68] suggests that nuisances of this type:

> "will generally arise from something emanating from the defendant's land. Such an emanation may take many forms—noise, dirt, fumes, a noxious smell, vibrations, and suchlike. Occasionally activities on the defendant's land are in themselves so offensive to neighbours as to constitute an actionable nuisance, as in *Thompson-Schwab v Costaki* [1956] 1 W.L.R.335, where the sight of prostitutes and their clients entering and leaving neighbouring premises were held to fall into that category. Such cases must however be relatively rare."

11.059 The determination of whether the use of the property is reasonable will depend on the nature of interference, the duration and the purpose of the defendant's activity. In *St Helen's Smelting Co v Tipping*,[69] "the law does not regard trifling inconveniences"

[60] *Appleby v Erie Tobacco Co* (1910), 22 OLR 533 at 535–536., *Tock v St John's Metropolitan Area Board* [1989] 2 SCR 1181.
[61] *Ward v Magna International Inc* (1994) 21 CCLT (2d) 178.
[62] *Miller v Jackson* [1977] QB 966.
[63] *Tock v St John's Metropolitan Area Board* [1989] 2 SCR 1181; *Ward v Magna International Inc* (1994) 21 CCLT (2d) 178.
[64] *Nor-Video Services Ltd v Ontario Hydro* (1978) 84 DLR (3d) 221, *Motherwell v Motherwell* (1976) 73 DLR (3d) 62.
[65] See n 60 above.
[66] *Appleby v Erie Tobacco Co* (1910) 22 OLR 533, *St Helen's Smelting Co v Tipping* (1865) 11 H L Cas 642, 11 ER 1483, followed in *Russell Transport Ltd v Ontario Malleable Iron Co* [1952] 4 DLR 719, at 729–730.
[67] *Tock v St John's Metropolitan Area Board* [1989] 2 SCR 1181.
[68] [1997] AC 655 at 685, *per* Lord Goff.
[69] (1865) 11 H L Cas 642, 11 ER 1483.

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20.015 **Elements of tort.** There are three essential elements to the tort of defamation: 1) a defamatory statement; 2) which makes reference to the plaintiff; and 3) has been published.[66]

20.016 **Assent to publication.** If the plaintiff assents expressly or impliedly to the publication of the defamatory matter, the defendant will not be liable.[67] In *Tadd v Eastwood*[68] the Court of Appeal held that a term giving assent to the publication of defamatory allegations, or agreeing to refrain from proceedings in respect of such allegations should be implied into an agreement if the agreement between the parties was otherwise incomplete and that such a term was necessary for the efficacy of the agreement.

2. Defamatory Statements

20.017 **Whether statement defamatory.** There are two general questions to be answered before deciding whether a statement the subject of a defamation action is defamatory. The first one is what meaning could be conveyed to an ordinary and reasonable person. Secondly, the court has to consider whether that meaning is defamatory. There are instances when there would be no doubt as to whether a statement is defamatory, like when someone calls another a thief or adulterer, but if such remarks would have been taken by the hearer as "mere abuse" and not seriously meant, it may not be defamatory.[69] Whilst it may be clear as to what is meant when someone is referred to as "horrendously ugly", it may be open as to whether such a statement is defamatory.[70] The judge must direct the jury, or decide himself if sitting alone, as to whether the statement or words are capable of being defamatory. Whilst a statement may not be defamatory, an action in malicious falsehood may lie if it constitutes a deliberate lie, or if it was negligently made, an action for negligence may be relied on if a duty of care existed.[71] In *Lai Hing Tong v Attorney General*,[72] in an action for negligence against the government, damages were awarded after the police negligently recorded a conviction against an innocent man and as a result he lost a job. In general, a statement may be defamatory in being calculated to hold the plaintiff up to "hatred, contempt,

[66] See also Srivastava and Tennekone on *The Law of Tort in Hong Kong*; Rick Glofcheski on *Tort Law in Hong Kong*.

[67] *Cookson v Harewood* [1932] 2 KB 478; *Chapman v Lord Ellesmere* [1932] 2 KB 431, 451, 464–465; *Cf Beevis v Dawson* [1956] 2 QB 165, 175; [1957] 1 QB 195 (CA); *Stephenson v Donaldson & Sons* (1981) 262 Estates Gazette 148 (defendant estate agents and valuers exceeding authority granted to them by their client in relation to statements made to the local council in the course of compulsory purchase negotiations). *Moore v News of the World Ltd* [1972] 1 QB 441 (CA).

[68] [1985] ICR 132 (CA).

[69] *Parkins v Scott* (1862) 158 ER 839. See also *Greville v Chapman, Henry Lamb and Thomas Lamb* (1844) 144 ER 1425.

[70] In *Berkoff v Burchill* [1997] EMLR 139, the plaintiff being director, actor and writer, was referred to as "horrendously ugly". The court held that the remarks gave the impression that the plaintiff was repulsive, which lowered him in the eyes of the public. *Cf* Millet LJ, dissenting. See also *Winyard v Tatler Publishing Co*, (unrep., *Independent*, Aug 16, 1991).

[71] *Lai Hing Tong v Attorney General* [1990] 1 HKLR 56; *Spring v Guardian Assurance Plc* [1993] ICR 412.

[72] [1990] 1 HKLR 56.

or ridicule".[73] But this test is not exhaustive. Whilst Lord Atkin in *Sim v Stretch*[74] applied the test "would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally", Neill LJ in *Gillick v BBC* considered whether the words would be "likely to affect a person adversely in the estimation of reasonable people generally". But it is not defamatory to criticise a person of being an informant in crime, as reporting crime is considered reputable behaviour by right-thinking people generally, although acting as a police informant is objectionable to the criminal classes.[75] A statement may also be defamatory if it would cause the plaintiff to be "shunned or avoided".[76] In considering whether a statement is capable of a defamatory meaning, the court should give to the material in question its "natural and ordinary meaning".[77]

20.018 **Not apparently defamatory: taking into account circumstances or "juxtaposition".** Whilst words apparently defamatory may be proved to be understood in its innocent meaning in the circumstances,[78] words which are not apparently defamatory may become so if the circumstances are taken into account.[79] In *Co*[80] the jury found the statement that the male plaintiff gave "personalised massages" in his health spa was defamatory as in its ordinary and natural meaning the phrase meant he provided sexual services. Statements as to conduct may be defamatory, but since certain conduct may be viewed differently in different times;[81] the relevant time in considering whether a statement is defamatory is the time of publication.[82] Further, a person may be defamed by juxtaposition, where the circumstances in which the matter is exhibited makes it defamatory. In *Monson v Tussauds Ltd*[83] a wax figure resembling the plaintiff was placed at the entrance to the "Chamber of Horrors" at Madame Tussauds. *Dwek v Macmillan Publishers Ltd*[84] is another example where the plaintiff was shown in a photograph, sitting beside a known prostitute. It was held that the publication was capable of being defamatory.

[73] *Parmiter v Coupland* (1840) 6 M & W 105, 108 (Parke B); *Cf Capital and Counties Bank Ltd v George Henty & Sons* (1882) LR 7 App Cas 741, 762.

[74] (1936) 52 TLR 669, 671; followed by *Holdsworth Ltd v Associated Newspapers Ltd* [1937] 3 All ER 872, 880 (Scott LJ); *Cf Sim v H J Heinz Co Ltd* [1959] 1 WLR 313; see *Skuse v Granada Television Ltd* [1996] EMLR 278 (CA).

[75] *Mawe v Piggot* (1869) Ir 4 CL 54. See also *Berry v Irish Times* [1973] IR 368, 813, 825; *Cf Miller v David* (1874) LR 9 CP 118; *Byrne v Deane* [1937] 1 KB 818; and *Lawson v Thompson* (1969) 1 DLR (3d) 270.

[76] *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581, 587.

[77] *Gillick v British Broadcasting Corporation* [1996] EMLR 267; *Skuse v Granada Television Ltd* [1996] EMLR 278; *Nam Tai Electronics Inc v Pricewaterhouse Coopers* (unrep., HCA 6783/2000, [2005] HKCU 170) Waung J.

[78] *Hankinson v Bilby* (1847) 153 ER 1262 (a case of slander).

[79] See, e.g. *Morrison v Ritchie & Co* (1902) 4 F 645; *Cf Wood v Edinburgh Evening News Ltd*, 1910 SC 895. See also *Australian Newspaper Co Ltd v Bennett* [1894] AC 284; *Cf Gwynne and Small v Wairarapa Times-Age Co* [1972] NZLR 586.

[80] *Independent*, Aug 16, 1991 (CA).

[81] See *Quilty v Windsor* 1999 SLT 346 (an allegation of homosexuality is not necessarily defamatory); *Cf John Reynolds v Malocco* [1990] 1 IRLM 289; and *R v Bishop* (1975) QB 274.

[82] *Mitchell v Faber & Faber Ltd* [1998] EMLR 807.

[83] [1894] 1 QB 671; *Cf Garbett v Hazell, Watson and Viney Ltd* [1943] 2 All ER 359 (CA); *Wheeler v Somerfield* [1966] 2 QB 94 (CA).

[84] [2000] EMLR 284.

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20.019 **Examples of defamatory statements.** The following are examples of statements that are likely to be defamatory.

20.020 **Criminal association.** To allege that a person has committed a crime is highly likely to be defamatory. To impute a suspicion of a person having committed a crime may be libellous,[85] but it may be easier to justify.[86] An allegation that a man has brought a suit with a view to blackmail is defamatory.[87] Whilst it may not be defamatory to allege that someone has been guilty of a minor offence involving no real blame,[88] the suggestion that a plaintiff had been driving negligently on a public highway had been held to be defamatory.[89] There can now be three possible levels of defamatory meaning with imputations of wrongdoing or the commission of a criminal offence: (1) that a person has committed an offence, (2) that there are reasonable grounds to suspect that he has committed an offence, and (3) that there are grounds for investigation into whether he has committed the offence.[90] The imputation that a person has committed, or is suspected of, a crime must be sufficiently clear.[91]

20.021 **Banter or ridicule.** In *Li Yau Wai v Genesis Films Ltd*[92] the plaintiff succeeded in a defamation claim where his photograph was featured in a film as the dead husband of a character, kept in an ancestral shrine in her living room, and where the "son" in the film had accused his "father" of not returning to visit his wife in erotic dreams. Rhind J said that a person may be exposed to light-hearted banter without defamation becoming present, but "[w]here exposure to innocent banter ends and ridicule of a type giving rise to defamation begins is a question of degree and depends on context and circumstances". This is in line with Lord Atkin's statement in *Sim v Stretch* that "the protection [of reputation in defamation] is undermined when exhibitions of bad manners or discourtesy are placed on the same level as attacks on character and are treated as actionable wrongs".[93] Exposing a person to mere ridicule may not be defamatory, but if the plaintiff is exposed to ridicule of sufficient magnitude, defamation can occur.[94] The publication of the name of a person or his photograph in an advertisement in such a way as to induce the public to believe that that person recommends the article advertised,[95] or to depict a person in a cartoon could be defamatory.[96] In *Berkoff v*

[85] *Monson v Tussauds Ltd* [1894] 1 QB 671. See also *Rubber Improvement v Daily Telegraph Ltd, ibid.*

[86] *Rubber Improvement v Daily Telegraph Ltd, ibid.* See also *Leon v Edinburgh Evening News Ltd* 1909 SC 1014; *Cadam v Beaverbrook Newspapers Ltd* [1959] 1 QB 413 (the question whether a true statement that a charge has been made or a writ issued can be defamatory discussed).

[87] *Marks v Samuel* [1904] 2 KB 287.

[88] *Berry v British Transport Commission* [1961] 1 QB 149.

[89] *Groom v Crocker* [1939] 1 KB 194.

[90] See, e.g. *Jameel v Times Newspapers Ltd* [2004] EMLR 31; *Jameel v The Wall Street Journal Europe Sprl* [2004] EMLR 6.

[91] *Mapp v News Group Newspapers Ltd* [1998] QB 520.

[92] [1987] HKLR 711.

[93] (1936) 52 TLR 669, 672.

[94] *Cook v Ward* (1830) 6 Bing 409. See also *Vander Zalm v Times Publishers* (1980) 18 CLR 210, *Blennerhasset v Novelty Sales Services Ltd* (1933) 175 LTJ 393.

[95] *Clarke v Freeman* (1848) 11 Beav 112; *Dockerell v Dougall* (1899) 80 LT 556. *Cf Ridge v English Illustrated Magazine Ltd* (1913) 29 TLR 592 (well-known writer's name appended to story of which he was not the author). Publishing a photograph claiming to be a likeness was not defamatory: *Corelli v Wall* (1906) 22 TLR 532; *Sim v H J Heinz & Co Ltd* [1959] 1 WLR 313.

[96] *Tolley v JS Fry & Sons Ltd* [1931] AC 333 (complaint that cartoon exposed the plaintiff to ridicule).

Burchill[97] the plaintiff, a director, actor and writer, was stated to be "horrendously ugly". The court held that the remarks gave the impression that the plaintiff was not only unattractive in appearance, but actually repulsive, which at least in view of his living as an actor, lowered him in the eyes of the public.[98] However, in *Norman v Future Publishing*[99] the judge ruled that the publishing of an anecdote which attributed a remark referring humorously to the size of a famous singer was not defamatory, and the ruling was upheld on appeal as the words were said to show that the singer was dignified and had a self-deprecating sense of humour, and that the overall tenor of the article was admiring.

20.022 **Imputation of insolvency**. To allege that someone is insolvent is likely to be defamatory, though such an allegation may not carry any moral blame. In *Kiam v Neil (No. 2)*[100] the Court of Appeal reiterated the seriousness with which the courts view such allegations. It may be argued that to allege insolvency of a non-trader may not be defamatory,[101] but to write of a solicitor holding public office that he is "cleaned out" is defamatory as it may injure his credit and reputation.[102] In *Aspro Travel Ltd v Owners Abroad Group Plc*[103] the Court of Appeal held that the statements "they are going bust" and "they will be bankrupt in a few days" could be defamatory as they might imply that the plaintiffs were prepared to run an insolvent company, thus lowering their standing in the eyes of the public. It is not, however, defamatory to say that someone owes a debt, without stating or implying that he is avoiding or delaying payment, or is unable to pay.[104]

20.023 **Imputation affecting profession or employment.** Statements may disparage a person in his profession or employment, calling or office, and hence defamatory.[105] To be defamatory, however, the words must reflect on the personal character, or on the official, professional or trading reputation of the plaintiff.[106] An imputation of insolvency[107] is defamatory if made with reference to the plaintiff's trade or calling. A false accusation that someone is guilty of insider dealing was defamatory,[108] as was publishing an article with the false accusation that a person in a high position in a company which dealt with financial security services was engaging in money laundering to advance one's own

[97] *Ibid.*

[98] Millet LJ dissenting.

[99] [1999] EMLR 325.

[100] [1996] EMLR 493.

[101] *Cf Cox v Lee* (1868–69) LR 4 Ex 284, 288 (Kelly CB).

[102] *AB v CD* (1904) 7 F 22, 25 (Lord MacLaren).

[103] [1996] 1 WLR 132.

[104] *Winstanley v Bampton* [1943] KB 319. See also: *Stubbs Ltd v Russell* [1913] AC 386 (statement that judgment had been entered against the plaintiff). The words "refer to drawer" written on a cheque are also capable of being defamatory: *Jayson v Midland Bank Ltd* [1968] 1 Lloyd's Rep 409.

[105] *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449 (critic); *Greenslade v Swaffer* [1955] 1 WLR 1109 (journalist); *Drummond-Jackson v British Medical Association* [1970] 1 WLR 688 (dentist); *Mutch v Robertson*, 1981 SLT 217. See also: per *Capital and Conties Bank Ltd v George Henty & Sons* (1881–82) LR 7 App Cas 741, 771 (Lord Blackburn).

[106] *Drummond-Jackson v British Medical Association* [1970] 1 WLR 688, 698 (CA) (Lord Pearson). *Cf Ratcliffe v Evans* [1892] 2 QB 524. See also *John Fairfax Publications Pty Ltd v Gacic* [2007] 230 CLR 291.

[107] *Read v Hudson* (1700) 91 ER 1308; *Jones v Littler* (1841) 151 ER 831; *Jones v Jones* [1916] 2 AC 481 (imputation of insolvency of a trader). Also *Aspro Travel Ltd v Owners Abroad Group Ltd* [1996] 1 WLR 132.

[108] Dicta in *Next Magazine Publishing Ltd v Ma Ching Fat* (2003) 6 HKCFAR 63.

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wealth.[109] Likewise, publishing a statement that accuses a solicitor of absconding with client funds[110] or publishing a grossly misleading statement that a senior solicitor was unfit to represent the stock-broking industry[111] are defamatory. Finally, alleging that the head of department at a university had mismanaged the department by exploiting staff and misleading authorities is defamatory.[112] If a retired solicitor was criticised as lacking in integrity, or of carrying out "sharp practice" in his profession, he is not libelled as a solicitor as he has ceased to be one, but he may be libelled as a person for he is accused of dishonesty.[113] Difficulty may arise if the allegation is directed to one's competence, rather than integrity. It is defamatory to allege that someone is incompetent or negligent in his profession or trade[114] but it will not be defamatory of a trader if the statement relates solely to his goods.[115] But an attack on a thing may reflect on a person and become defamatory, for instance if someone is alleged to be habitually selling worthless goods[116] but it is not defamatory to say that a certain article in stock is worthless.[117] Criticisms of the techniques of a professional may amount to defamation.[118] The allegation must be essential the absence of which would affect successful practice of the trade, profession or calling, and since it is not essential to be the "best" to be successful, allegations that someone is of "average ability" or lacking in prominence is not defamatory.[119]

20.024 **Repetition of rumour or hearsay.** Repetition of any defamatory rumour or hearsay is not any less culpable as defamation.[120] A defendant cannot exonerate himself by qualifying his libellous or slanderous statement with a statement that it is hearsay, that he has simply been informed as such.[121]

20.025 **Where language used not clear.** In cases where the language used is clear, there would be much less difficulty in determining whether it carries a defamatory meaning. Where the words do not speak for themselves, the plaintiff must establish the gloss

[109] *Li Wei v Brightec Ltd* (unrep., HCA 4430 /2000, [2001] 1 HKLRD (Yrbk) 615).
[110] *Chu Siu Kuk Yuen v Apple Daily Ltd* [2002] 1 HKLRD 1.
[111] *Sin Cho Chiu v Tin Tin Publication Development Ltd* (unrep., HCA 6662/1997, [2002] 1 HKLRD (Yrbk) 560, [2002] HKEC 50).
[112] *Drummond v Kwaku* [2000] 1 HKLRD 604.
[113] *Boydell v Jones* (1838) 4 M & W 446, 450 (Parke J).
[114] *Skuse v Granada Television Ltd* [1996] EMLR 278; *Slipper v British Broadcasting Corporation* [1991] 1 QB 283; *Blackshaw v Lord* [1984] QB 1.
[115] *South Hetton Coal Co Ltd v North Eastern News Association* [1894] 1 QB 133 (Lord Esher MR). See also: *Dr Mervyn Patterson v ICN Photonics Ltd* [2003] EWCA Civ 343.
[116] *Australian Newspaper Co Ltd v Bennett* [1894] AC 284.
[117] *Evans v Harlow* (1844) 114 ER 1384; approved by Lord Herschell LC in *Timothy White v Gustav Mellin* [1895] AC 154, 161; and *Linotype Co v British Empire Type-Setting Machine Co Ltd* (1899) 81 LT 331 (HL).
[118] See, e.g. *Drummond-Jackson v British Medical Association* [1970] 1 WLR 688 (a dentist criticised in relation to a special technique).
[119] *Thompson v Matthiasen* (1912) 150 AD 739.
[120] Littledale J said in *M'pherson v Daniels* (1829) 10 B & C 263, 272: "Now a defendant by showing that he stated at the time when he published slanderous matter of a plaintiff that he heard it from a third person, does not negative the charge of malice, for a man may wrongfully and maliciously repeat that which another person may have uttered upon a justifiable occasion". Quoted by Blackburn J with approval in *Watkin v Hall* (1867–68) LR 3 QB 396, 400.
[121] See *Harrison v Thornborough* (1713) 10 Mod 196; *M'Pherson v Daniels* (1829) 10 B & C 263; *Watkin v Hall* (1867–68) LR 3 QB 396; *Botterill v Whytehead* (1879) 41 LT 588; *Cadam v Beaverbrook Newspapers Ltd* [1959] 1 QB 413; *Rubber Improvement v Daily Telegraph Ltd* [1964] AC 234; *Truth (NZ) Ltd v Philip North Holloway* [1960] 1 WLR 997 (PC). See also *Shah v Standard Chartered Bank* [1999] QB 241.

or innuendo upon them necessary to prove the defamatory meaning. In cases of foreign language, technical language or slang, they must be properly translated, where appropriate, by suitable expert evidence into plain language.[122] In Hong Kong, if proceedings are conducted in English, words forming the subject of the action in Chinese would be treated as innuendo, and have to be translated. One example is *Yung Chi Kin v Leung Tin Wai*[123] where it is alleged that the words "more savage than Wah Sau's dog", when used to describe a person, are known generally and colloquially in Cantonese in Hong Kong as representing savage and recklessly aggressive behaviour. Where it is alleged that a special defamatory meaning of the words arise by reason of special, extrinsic facts known to the recipients, it is called a true or legal innuendo, which creates a separate cause of action from a cause of action arising from the ordinary and natural meaning of the words used, and particulars are required under O.82, r.3. On the other hand, "popular innuendoes", otherwise known as "false innuendoes", which are meanings commonly known or inferred from words in their ordinary and natural meaning do not require particulars and do not constitute a separate cause of action.[124] In the words of Liu JA in *Beijing Television v Brightec Ltd*:[125]

> "Defamatory words may have innuendoes or indirect meanings in two senses: first, in additional to their nature and ordinary meaning, they may have secondary meanings; these are called popular innuendoes. But if an indirect defamatory meaning only arises because there are other facts known to a class of the recipients, that is called a legal innuendo. Legal innuendoes are, therefore, founded on extrinsic facts to import an additional or altered meaning of the published words. They would depend on facts falling outside the alleged libel. Lord Denning MR described these two forms of indirect meanings with usual clarity in *Fullam v Newcastle Chronicle and Journal Ltd* [1977] 1 WLR 651 at 645H–655D. The Master of the Rolls spoke of legal innuendoes as giving rise to separate and distinct causes of action."

20.026 **Approach**. There are two rules to be observed in construing the language of an alleged libel. First, the whole matter relating to the same defamatory allegation is to be taken into account,[126] and the plaintiff is not allowed to rely on one or two sentences only to prove the defamation,[127] for there may be other parts in the publication which takes away the sting. It is for the jury to decide whether taking the publication as a whole it is injurious to the plaintiff.[128] The second rule is that the words should be taken in their most natural and obvious sense[129] and that the ordinary and natural meaning of

[122] *Fleetwood v Curle* (1620) Hob 267, 268 (Lord Hobart).
[123] [1993] 1 HKC 143.
[124] *Ibid*; *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 (CA).
[125] [1999] 2 HKC 665.
[126] *Broome v Agar* (1928) 44 TLR 339, 341 (Scrutton LJ); *Hayward v Thompson* [1982] QB 47 (CA). See also *Peregrine Investments Holdings Ltd v The Associated Press* [1997] HKLRD 1073.
[127] See, e.g. *Nam Tai Electronics Inc v Pricewaterhouse Coopers* (unrep., HCA 6783/2000, [2005] HKCU 170) (Waung J) (a case involving a statements made in a proposal to creditors by potential liquidators of a company).
[128] *Australian Newspaper Co v Bennett* [1894] AC 284, 288; *Plato Films Ltd v Speidel* [1961] AC 1090; *Grubb v Bristol United Press Ltd* [1963] 1 QB 309 (CA); *S & K Holdings v Throgmorton Publications Ltd* [1972] 1 WLR 1036 (CA).
[129] *Chalmers v Payne* (1835) 150 ER 67.

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