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Triviality, Proportionality and the Minimum Threshold of Seriousness in Defamation Law

David Rolph*

Introduction

Where would defamation law be without trivial defamation cases? Many basic principles of defamation law have been established in what may now be regarded as trivial defamation cases. The ‘multiple publication rule’ – the rule that every communication of defamatory matter to a new recipient gives rise to a separate cause of action¹ – was firmly established in *Duke of Brunswick v Harmer*,² a case involving a nobleman’s valet being sent to procure a single copy of a magazine published seventeen years earlier. The classic formulation of the test for what is defamatory – the ‘lowering in the estimation of right-thinking members of society’³ – derives from a dispute over an unpleasant telegram between neighbours concerning a servant. These are not the only examples. Relatively modest defamation claims continue to be litigated in Australia, often successfully, notwithstanding the existence of a defence of triviality under Australian defamation law.⁴

For many prospective plaintiffs, the biggest practical obstacles to suing for defamation are cost, the inherent riskiness of litigation and the financial and emotional stamina required to bring and maintain a claim. The substance of defamation law provides few disincentives to plaintiffs. Australian defamation law can still be properly characterised as plaintiff-friendly. It is relatively easy for a plaintiff to establish that he or she has been defamed and relatively difficult for a defendant to establish a defence. The multiplicity of common law tests for what is defamatory assist the plaintiff in this regard. There are few legal barriers to litigating trivial defamation claims. One of those few, the defence of triviality, is only engaged after the plaintiff has established his or her claim as to liability.

Yet the need to make proper use of the limited resources available for civil litigation has been of heightened importance in Australia and the United Kingdom in recent decades. *** As a consequence, English courts in particular over the last fifteen years have been increasingly concerned about trivial defamation claims and have actively identified and developed doctrines preventing such claims being litigated. The two principal means by which this has been achieved is the principle of proportionality, derived from the English Court of Appeal’s decision in *Jameel v Dow Jones & Co Inc*,⁵ and the minimum threshold of seriousness,

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¹ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 600 [27] (Gleeson CJ, McHugh, Gummow and Hayne JJ), 652 [197] (Callinan J); [2002] HCA 56; *Jameel v Dow Jones & Co Inc* [2005] QB 946 (*per curiam*); [2005] EWCA Civ 75.

² (1849) 14 QB 185; (1849) 117 ER 75. For expressions of judicial doubt as to whether *Duke of Brunswick v Harmer* would still be entertained or deal with in the same way today, see, for example, *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 619 (Kirby J) (‘The idea that this Court should solve the present problem by reference to judicial remarks in England in a case, decided more than a hundred and fifty years ago, involving the conduct of a manservant of a Duke, despatched to procure a back issue of a newspaper of minuscule circulation, is not immediately appealing to me.’); *Jameel v Dow Jones & Co Inc* [2005] QB 946, 966 [55] (*per curiam*) (‘We do not believe that *Duke of Brunswick v Harmer* 14 QB 185 could today have survived an application to strike out for abuse of process.’)

³ *Sim v Stretch* [1936] 2 All ER 1237, 1240 (Lord Atkin).

⁴ See, for example, *Cush v Dillon* (2011) 243 CLR 298; [2011] HCA 30; *Ritson v Burns* [2014] NSWSC 272.

⁵ [2005] QB 946; [2005] EWCA Civ 75.

identified by Tugendhat J in *Thornton v Telegraph Media Group Ltd.*⁶ The former allows a court to stay permanently proceedings, where the disproportion between the costs involved in litigating a claim and the vindication of the rights and interests achieved by such litigation is so significant as to constitute an abuse of process. The latter involves the court determining that the matter is not defamatory because it fails to meet the minimum legal threshold to fulfil that requirement. The concerns of English courts to deal more effectively with marginal defamation claims now finds legislative expression in the *Defamation Act 2013* s 1, which has itself been the subject of not inconsiderable judicial attention, culminating in the recent United Kingdom Supreme Court decision in *Lachaux v Independent Print Media Ltd.*⁷

Australian law has attempted to deal with marginal defamation claims in a different way. For a long time, New South Wales has had a defence of triviality (or, under some legislative regimes, a defence of unlikelihood of harm).⁸ Prior to the introduction of the national, uniform defamation laws, other jurisdictions also had a variant of a defence of triviality or unlikelihood of harm.⁹ Following the introduction of the national, uniform defamation laws, there is now across Australia a defence of triviality.¹⁰ The limitations of the defence of triviality as drafted and in practice have led to some consideration in Australia of both the principle of proportionality and the minimum threshold of seriousness. Neither has received complete acceptance or approval. The purpose of this article is to examine the three means of dealing with marginal defamation claims – the defence of triviality; the principle of proportionality; and the minimum threshold of seriousness – and assess their relative efficacy in effectively addressing such claims, with a view to informing the renewed push for defamation law reform. These three means of dealing with trivial defamation claims all originate from different sources of law. Although they are largely concerned with the same end, they seek to achieve it in different ways and have different scopes of operation. Yet, in order effectively to address trivial defamation claims, it is important to consider the defence of triviality, the principle of proportionality and the minimum threshold of seriousness in a holistic and integrated way.

The Defence of Triviality

The principal way in which Australian defamation law currently deals with trivial defamation claims is through a specific statutory defence of triviality. The defence of triviality is unique to Australian law.¹¹ It can trace its origins back to the first defamation legislation passed in an Australian colony, the *Slander and Libel Act 1847* (NSW) s 2. It has a continuous history in New South Wales for over 170 years.

The current form of the defence of triviality, which is uniform across Australia, is in the following terms:

⁶ [2011] 1 WLR 1985; [2010] EWHC 1414 (QB).

⁷ [2019] UKSC 27; [2019] 3 WLR 18; [2019] 4 All ER 485.

⁸ See *Slander and Libel Act 1847* (NSW) s 2 (repealed); *Defamation Act 1901* (NSW) s 4 (repealed); *Defamation Act 1912* (NSW) s 5 (repealed); *Defamation Act 1958* (NSW) s 20 (repealed); *Defamation Act 1974* (NSW) s 13 (repealed).

⁹ See *Defamation Act 1889* (Qld) s 20 (repealed); *Defamation Act 1957* (Tas) s 9(2) (repealed); *Civil Law (Wrongs) Act 2002* (ACT) s 126 (repealed).

¹⁰ *Civil Law (Wrongs) Act 2002* (ACT) s 139D; *Defamation Act 2006* (NT) s 30; *Defamation Act 2005* (NSW) s 33; *Defamation Act 2005* (Qld) s 33; *Defamation Act 2005* (SA) s 31; *Defamation Act 2005* (Tas) s 33; *Defamation Act 2005* (Vic) s 33; *Defamation Act 2005* (WA) s 33.

¹¹ *Enders v Erbas & Associates Pty Ltd (No 2)* [2013] NSWDC 44, [173] (Gibson DCJ).

‘It is a defence to the publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff is unlikely to suffer any harm.’¹²

The defence is not the most frequently litigated one in defamation law but, through a series of cases in New South Wales, the elements of the defence of triviality are reasonably well-established. The circumstances of publication and the likelihood of harm in those circumstances are the focus of the defence.¹³ The circumstances are considered at the time of publication.¹⁴ The likelihood of harm is assessed prospectively, viewed from the time of publication.¹⁵ Because the focus of the defence is the likelihood of harm in the circumstances of publication, not all the circumstances of the case generally, the fact that a defendant can establish that no harm actually ensued from the publication is not determinative.¹⁶ The plaintiff’s reputation is ordinarily not a relevant circumstance of publication,¹⁷ save perhaps in the instance of a limited publication to persons who know the plaintiff personally.¹⁸ Similarly, the identity of the maker of the statement may, in an exceptional case, be treated as a circumstance of publication.¹⁹ The archetypal scenario in which a defence of triviality may be established is ‘where a slightly defamatory statement is made in jocular circumstances in a private home’.²⁰

This is illustrative, not exhaustive. As the New South Wales Court of Appeal observed in *Morosi v Mirror Newspapers Ltd*, ‘[t]he expression, ‘the circumstances of publication’, seems more apt to describe matters such as the nature of the defamatory matter, the manner in which it is published, the persons to whom it is published and the place where it is published’.²¹ Limited publications are more likely than mass publications to attract the defence.²² Oral publications are more likely than written publications to attract the defence.²³ The more serious the allegation, the less likely the defence of triviality is to be established.²⁴ The formality or

¹² *Civil Law (Wrongs) Act 2002* (ACT) s 139D; *Defamation Act 2006* (NT) s 30; *Defamation Act 2005* (NSW) s 33; *Defamation Act 2005* (Qld) s 33; *Defamation Act 2005* (SA) s 31; *Defamation Act 2005* (Tas) s 33; *Defamation Act 2005* (Vic) s 33; *Defamation Act 2005* (WA) s 33.

¹³ *Chappell v Mirror Newspapers Ltd* (1984) Aust Torts Reports ¶80-691, 68,947 (Moffitt P). See also *Barrow v Bolt* (2015) Aust Torts Reports ¶82-248, 69,698 (Kaye JA); [2015] VSCA 107; *Smith v Lucht* [2017] 2 Qd R 489, 499 (Flanagan J); [2016] QCA 267.

¹⁴ *Chappell v Mirror Newspapers Ltd* (1984) Aust Torts Reports ¶80-691, 68,947 (Moffitt P). See also *Barrow v Bolt* (2015) Aust Torts Reports ¶82-248, 69,698 (Kaye JA); [2015] VSCA 107; *Smith v Lucht* [2017] 2 Qd R 489, 499 (Flanagan J); [2016] QCA 267.

¹⁵ *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749, 799 (*per curiam*); *Chappell v Mirror Newspapers Ltd* (1984) Aust Torts Reports ¶80-691, 68,947 (Moffitt P). See also *Smith v Lucht* [2017] 2 Qd R 489, 499 (Flanagan J); [2016] QCA 267.

¹⁶ *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749, 799 (*per curiam*); *Chappell v Mirror Newspapers Ltd* (1984) Aust Torts Reports ¶80-691, 68,947 (Moffitt P).

¹⁷ *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749, 800 (*per curiam*); *Chappell v Mirror Newspapers Ltd* (1984) Aust Torts Report ¶80-691, 68,947 (Moffitt P); *King and Mergen Holdings Pty Ltd v McKenzie* (1991) 24 NSWLR 305, 311 (Mahoney JA); *Jones v Sutton* (2004) 61 NSWLR 614, 621 (Beazley JA); [2004] NSWCA 439.

¹⁸ *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749, 800 (*per curiam*). See also *Smith v Lucht* [2017] 2 Qd R 489, 499 (Flanagan J); [2016] QCA 267.

¹⁹ *Jones v Sutton* (2004) 61 NSWLR 614, 628 (Beazley JA); [2004] NSWCA 439.

²⁰ *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749, 800 (*per curiam*). See also *Jones v Sutton* (2004) 61 NSWLR 614, 621 (Beazley JA); [2004] NSWCA 439.

²¹ *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749, 800 (*per curiam*).

²² *Chappell v Mirror Newspapers Ltd* (1984) Aust Torts Reports ¶80-691, 68,947 (Moffitt P). See also *Smith v Lucht* [2017] 2 Qd R 489, 499 (Flanagan J); [2016] QCA 267.

²³ *Chappell v Mirror Newspapers Ltd* (1984) Aust Torts Reports ¶80-691, 68,947 (Moffitt P).

²⁴ *Jones v Sutton* (2004) 61 NSWLR 614, 629 (Beazley JA); [2004] NSWCA 439.

informality of the circumstances of publication is a relevant consideration.²⁵ Whether the recipients were well-acquainted with the plaintiff is also a relevant consideration.²⁶

The defence of triviality is not often successful when litigated to judgment. A significant reason for the difficulty in establishing this defence is that the defendant has to negative not merely that the plaintiff was unlikely to suffer harm, but that the plaintiff was unlikely to suffer any harm.²⁷ If there were a real chance or possibility of harm, then the defence would fail. The defendant has to show the absence of any real chance or possibility of harm, not merely that it was more probable than not that the plaintiff would not suffer any harm.²⁸ It is a heavy burden for a defendant to discharge.

It may be that its existence deters plaintiffs from commencing defamation proceedings in the first instance, although the prophylactic effect of the defence of triviality is difficult to assess, other than anecdotally. A rare, recent instance of the defence's success was in *Smith v Lucht*, which is also the most recent intermediate appellate court consideration of triviality in Australia.²⁹

Smith v Lucht

The claim was brought by Brett Smith, an Ipswich solicitor.³⁰ He sued Kenneth Lucht, the former husband of Smith's daughter-in-law, for defamation, arising out of one email and two spoken statements. Smith had agreed to act for his daughter-in-law in her family law dispute with Lucht. In mid-January 2013, Smith emailed Lucht, demanding payment of \$525 in outstanding day care fees and threatening the commencement of recovery proceedings if those fees were not paid within 48 hours. The email also asserted that Lucht had harassed, intimidated and abuse his former wife.

On the following day, Lucht emailed Smith, objecting to direct personal contact and instructing him to refer all correspondence to Lucht's solicitor. Lucht had paid the outstanding day care fees. Notwithstanding his request, Smith sent Lucht another email. This elicited a more forthright response from Lucht, in the following terms:

'Dear Brett, You obviously didn't understand my last email. Fuck off and contact my lawyers. Pretty simple buddy. Contact me again and I will make a complaint to the Legal Services Commission.'

²⁵ *Jones v Sutton* (2004) 61 NSWLR 614, 629 (Beazley JA); [2004] NSWCA 439.

²⁶ *Jones v Sutton* (2004) 61 NSWLR 614, 629 (Beazley JA); [2004] NSWCA 439. See also *Smith v Lucht* [2017] 2 Qd R 489, 499 (Flanagan J); [2016] QCA 267.

²⁷ *King and Mergen Holdings Pty Ltd v McKenzie* (1991) 24 NSWLR 305, 309 (Mahoney JA); *Jones v Sutton* (2004) 61 NSWLR 614, 624-25 (Beazley JA); [2004] NSWCA 439. This is made even clearer by the terms of the defence of triviality under the national, uniform defamation laws, which expressly state that the defendant has to negative 'any harm'. In relation to the position under the national, uniform defamation laws, see *Enders v Erbas & Associates Pty Ltd* (2014) Aust Torts Reports ¶82-161, 67,111 (Tobias AJA); [2014] NSWCA 70. *Barrow v Bolt* (2015) Aust Torts Reports ¶82-248, 69,698 (Kaye JA); [2015] VSCA 107; *Smith v Lucht* [2017] 2 Qd R 489, 499 (Flanagan J); [2016] QCA 267.

²⁸ *Jones v Sutton* (2004) 61 NSWLR 614, 624 (Beazley JA); [2004] NSWCA 439; *Barrow v Bolt* (2015) Aust Torts Reports ¶82-248, 69,698 (Kaye JA); [2015] VSCA 107.

²⁹ See also *Barrow v Bolt* (2015) Aust Torts Reports ¶82-248; [2015] VSCA 107.

³⁰ For a statement of the facts, see *Smith v Lucht* [2017] 2 Qd R 489, 496-98 (Flanagan J); [2016] QCA 267.

At the end of the month, in an email to his former wife, Lucht referred to ‘the barrage I received from Dennis Denuto from Ipswich about stupid things’. His former wife conveyed this to her father. On the same day, Smith emailed Lucht, demanding an apology and retraction by close of business the following day, failing which, Smith would commence proceedings against Lucht, as well as making a complaint to Lucht’s employer, as Lucht’s first email was sent from his work email account and on his employer’s letterhead. Lucht refused to apologise and instead, in late February 2013, complained to the Queensland Legal Services Commission. A few days later, Smith complained to Lucht’s employer about the conduct of their employee.

The second publication occurred on Mothers’ Day, 2013. When his ex-wife and her new husband arrived to collect the children from Lucht’s house that day, Lucht referred to the new husband, to his face, as “Dennis Junior” and asked them both to “Say hello to Dennis Denuto and Jenny”, the latter being his former mother-in-law.

Later that same day, when Lucht was collecting the children from a restaurant in Milton, he and his ex-wife’s new husband got into an argument, described by Flanagan J on appeal as ‘a most unedifying display’, in front of a handful of witnesses. During the altercation, Lucht said more than once, “Just get Dennis Denuto to sort it out, Dennis Junior.”

These statements were brought to Smith’s attention. In early June 2013, Smith commenced defamation proceedings against Lucht in the District Court of Queensland. In mid-November 2014, McGill DCJ determined an application brought by Lucht to have the proceedings permanently stayed on the basis that they were an abuse of process.³¹ In doing so, Lucht relied upon the English Court of Appeal’s decision in *Jameel v Dow Jones & Co Inc*,³² as applied in New South Wales by McCallum J’s judgment in *Bleyer v Google Inc*.³³ McGill DCJ refused that application.³⁴

The matter was tried before Moynihan DCJ in mid-August 2015. In late November 2015, judgment was delivered. Smith had complained that calling a solicitor “Dennis Denuto” conveyed a range of meanings:

- ‘(a) Unprofessional in the exercise of his said profession;
- (b) Inexperienced in the exercise of his said profession;
- (c) Unethical in the exercise of his said profession;
- (d) Without, or without many or sufficient, clients in the exercise of his profession;
- (e) Unable or incapable of discharging, properly, his role as a solicitor;
- (f) Unable or incapable of discharging, properly, his role as a solicitor in large or complex litigation;
- (g) Incompetent, including in the exercise of his said profession;
- (h) Foolish, including in the exercise of his said profession;
- (i) The proper subject of ridicule, humour and / or mirth, including in the exercise of his said profession;³⁵ and, in relation to the email;
- (j) Given to corresponding in an irrelevant, vexatious, stupid or pointless manner.’³⁶

³¹ *Smith v Lucht* [2014] QDC 302, [2]-[3].

³² [2005] QB 946; [2005] EWCA Civ 75. As to *Jameel*, see further below at ***.

³³ (2014) 88 NSWLR 670; [2014] NSWSC 897. As to *Bleyer*, see further below at ***.

³⁴ *Smith v Lucht* [2014] QDC 302, [27].

³⁵ *Smith v Lucht* [2015] QDC 289, [22] (Moynihan DCJ).

³⁶ *Smith v Lucht* [2015] QDC 289, [23] (Moynihan DCJ).

He argued that the matters were defamatory, either in their natural and ordinary meaning or by way of true innuendo. This required consideration of whether knowledge of Dennis Denuto could be attributed to the ordinary, reasonable reader. Under a helpful heading, ‘Who is Dennis Denuto?’, Moynihan DCJ distilled the essence of the character thus:

‘Dennis Denuto is a central character in the popular Australian film *The Castle*, which relates the fictional story of Dale Kerrigan and his family’s fight against the compulsory acquisition of their home. Dennis Denuto is the Kerrigan’s solicitor. He is portrayed as likeable and well-intentioned, but inexperienced in matters of constitutional law and not qualified to appear in person in litigation of that nature. His appearance in the Federal Court portrayed him as unprepared, lacking in knowledge and judgment, incompetent and unprofessional. His submission concerning ‘the vibe’ is a well-known line from the film.’³⁷

The sense in which it was defamatory became a live issue. Moynihan DCJ did not accept that calling a solicitor ‘Dennis Denuto’ was defamatory in the dizzying array of ways pleaded by Smith. Rather, his Honour accepted that such a characterisation was defamatory in a more limited way, by suggesting that such a solicitor was incompetent and unprofessional.³⁸

Having found the statements to be defamatory, albeit in a narrower way than contended for by Smith, Moynihan DCJ then had to consider the sole positive defence relied upon by Lucht, the defence of triviality. His Honour noted that the term, ‘harm’, is not defined by the *Defamation Act 2005* (Qld), but construed in the context of s 33 to mean harm to reputation.³⁹ Moynihan DCJ had little difficulty in concluding that, given the limited extent of publication for each of the matters, to people who were acquainted with Smith and who could make up their own minds, in circumstances where the imputations were not the most serious of their kind and where they were unlikely to be republished, the defence of triviality should succeed.⁴⁰

In the event that he was wrong about the success of the defence of triviality, Moynihan DCJ provisionally assessed the damages at \$10,000.⁴¹

The Decision of the Queensland Court of Appeal

Smith appealed to the Queensland Court of Appeal. The central issue was whether the trial judge was correct to find that the defence of triviality was a complete answer to the claim and specifically, whether, as a matter of statutory construction, ‘harm’ under the *Defamation Act 2005* (Qld) s 33 was limited to damage to reputation or whether it could apply to injury to feelings in the absence of reputational harm.

Giving the leading judgment on appeal, Flanagan J (with whom Philippides JA agreed) noted that Smith had conceded at trial that s 33 only extended to reputational harm and was seeking to raise the point about statutory construction for the first time on appeal.⁴² Nevertheless, their Honours granted leave to appeal, limited to the issue of the proper construction of s 33.⁴³ After

³⁷ *Smith v Lucht* [2015] QDC 289, [17] (Moynihan DCJ).

³⁸ *Smith v Lucht* [2015] QDC 289, [32] (Moynihan DCJ).

³⁹ *Smith v Lucht* [2015] QDC 289, [59] (Moynihan DCJ).

⁴⁰ *Smith v Lucht* [2015] QDC 289, [42].

⁴¹ *Smith v Lucht* [2015] QDC 289, [59].

⁴² *Smith v Lucht* [2017] 2 Qd R 489, 495 (Flanagan J); [2016] QCA 267 [21].

⁴³ *Smith v Lucht* [2017] 2 Qd R 489, 495 (Flanagan J); [2016] QCA 267, [23]-[24].

a comprehensive review of references to ‘harm’ in the *Defamation Act 2005* (Qld), the legislative history of the defence of triviality and its antecedents and noting differing views,⁴⁴ their Honours concluded that ‘harm’ referred to damage to reputation, not injury to feelings *simpliciter*.⁴⁵ In dissent, McMurdo P remained ‘unpersuaded’ on this point.⁴⁶

With respect, the majority view is plainly to be preferred. The principal harm protected by the tort of defamation is reputation. To the extent that injury to feelings is protected by the tort of defamation, it is dependent upon damage to reputation being established. Defamation law does not protect injury to feelings in the absence of reputational harm. Damage to reputation is the gist of the action in defamation. There is a presumption of damage to reputation but no such presumption of injury to feelings. It is difficult to envisage circumstances consistent with the basic principles of defamation law where, in the absence of likelihood of damage, a likelihood of injury to feelings should be sufficient to negative a defence of triviality.

The defence of triviality has not been readily established in the decided cases in Australia. *Smith v Lucht* is an example in which this has occurred but it is one of the very few. It may be that the presence of a defence of triviality has a prophylactic effect, preventing trivial defamation claims from being commenced in the first place, but it may be difficult to prove this.

The Principle of Proportionality – Recognition in English Law

English courts have developed more direct ways of dealing with trivial defamation claims at an early stage. The first of these was the principle of proportionality, which was first identified in the English Court of Appeal’s decision in *Jameel v Dow Jones & Co Inc*.⁴⁷ Consequently, the principle is commonly referred to as the *Jameel* principle.

In *Jameel*, the claimant, Yousef Jameel, brought libel proceedings against Dow Jones & Co Inc in respect of an article published in *The Wall Street Journal Online*. He alleged that the article imputed that he was, or was suspected of being, involved in funding Al-Qaeda. There was a hyperlink in the article to a list of donors, in which the claimant was named.⁴⁸ Dow Jones applied to have Jameel’s proceedings dismissed on the ground that they had no reasonable prospects of success. According to Dow Jones, only five subscribers had accessed the list in which Jameel was named. Of those subscribers, three were associated with Jameel in some way – they were ‘members of the plaintiff’s camp, to put the matter colloquially’.⁴⁹ Dow Jones submitted that, where there was no real and substantial tort committed within the jurisdiction, the service of originating process outside the jurisdiction could be set aside.⁵⁰ It argued that a similar approach should be adopted where there was an application to strike out proceedings. Where there was no real and substantial tort committed within the jurisdiction, the proceedings could be struck out as an abuse of process. Dow Jones pointed to the minimal publication, thus the lack of significant damage, with the jurisdiction and the disproportionate expense involved

⁴⁴ *Smith v Lucht* [2017] 2 Qd R 489, 505-20 (Flanagan J); [2016] QCA 267, [55]-[114].

⁴⁵ *Smith v Lucht* [2017] 2 Qd R 489, 505 (Flanagan J); [2016] QCA 267, [54].

⁴⁶ *Smith v Lucht* [2017] 2 Qd R 489, 493; [2016] QCA 267, [11]-[12].

⁴⁷ [2005] QB 946; [2005] EWCA Civ 75.

⁴⁸ *Jameel v Dow Jones & Co Inc* [2005] QB 946, 953-55; [2005] EWCA Civ 75.

⁴⁹ *Jameel v Dow Jones & Co Inc* [2005] QB 946, 956-57; [2005] EWCA Civ 75.

⁵⁰ *Jameel v Dow Jones & Co Inc* [2005] QB 946, 964-65; [2005] EWCA Civ 75, citing *Kroch v Rossell* [1937] 1 All ER 725, 729 (Slessor LJ), 732 (Scott LJ) and *Chadha v Dow Jones & Co Inc* [1999] EMLR 724, 732 (Roch LJ).

in litigating the action as factors supporting the conclusion that the proceedings were an abuse of process.⁵¹

The court found that there was no ‘real and substantial tort’ committed within England, thus the time and resources involved in allowing Jameel to litigate his claim were so disproportionate to any vindication of his reputation he might achieve as to amount to an abuse of process.⁵² It identified two principal reasons for this approach, the first being the introduction of the new *Civil Procedure Rules* with their emphasis on enhanced, proactive case management, the second being the incorporation of the *European Convention on Human Rights* into domestic law through the enactment of the *Human Rights Act 1998* (UK).⁵³ In relation to the former reason, the court observed that:

‘[i]t is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties chose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.’⁵⁴

In relation to the latter reason,⁵⁵ the court was able to point to cases decided before the introduction of the *Human Rights Act 1998* (UK) in which English courts had set aside permission to serve originating process outside of the jurisdiction, as in *Kroch v Rossell*,⁵⁶ or struck out the claim as an abuse of process, as in *Schellenberg v British Broadcasting Corporation*.⁵⁷ In the latter case, Eady J stated that he was ‘not only entitled, but indeed bound, to ask whether, in the old colloquial phrase, the game is worth the candle’.⁵⁸ Developing the metaphor, in *Jameel*, the court found that the disproportion between the damage done to the claimant’s reputation and the vindication of his reputation on the one hand and the projected cost of the trial on the other hand was so vast that, in their Lordships’ view, ‘[t]he game will not merely not have been worth the candle, it will not have been worth the wick’.⁵⁹ The court itself indicated that occasions permanently to stay proceedings as an abuse of process would be ‘very rare’.⁶⁰

In subsequent cases, English courts have applied the principle in *Jameel* to stay proceedings on the basis that they were an abuse of process or to set aside service of originating process outside of the jurisdiction on the ground that there was no ‘real and substantial tort’ committed within the jurisdiction.⁶¹ The principle in *Jameel* was not limited to defamation proceedings. It has been invoked and, on some occasions, succeeded in relation to other causes of action, such

⁵¹ *Jameel v Dow Jones & Co Inc* [2005] QB 946, 964-65; [2005] EWCA Civ 75.

⁵² *Jameel v Dow Jones & Co Inc* [2005] QB 946, 970; [2005] EWCA Civ 75.

⁵³ *Jameel v Dow Jones & Co Inc* [2005] QB 946, 966; [2005] EWCA Civ 75.

⁵⁴ *Jameel v Dow Jones & Co Inc* [2005] QB 946, 965; [2005] EWCA Civ 75.

⁵⁵ *Jameel v Dow Jones & Co Inc* [2005] QB 946, 964, 966; [2005] EWCA Civ 75.

⁵⁶ [1937] 1 All ER 725.

⁵⁷ [2000] EMLR 296; [1999] EWHC 851 (QB).

⁵⁸ *Schellenberg v British Broadcasting Corporation* [2000] EMLR 296, 318; [1999] EWHC 851 (QB).

⁵⁹ *Jameel v Dow Jones & Co Inc* [2005] QB 946, 969-70; [2005] EWCA Civ 75.

⁶⁰ *Jameel v Dow Jones & Co Inc* [2005] QB 946, 962; [2005] EWCA Civ 75.

⁶¹ For examples of the application of the *Jameel* principle to stay proceedings, see *Williams v MGN Ltd* [2009] EWHC 3150 (QB); *Budu v British Broadcasting Corporation* [2010] EWHC 616 (QB); *Kaschke v Gray* [2010] EWHC 1907 (QB). See also *Ewing v Times Newspapers Ltd* [2011] NIQB 63, [40] (Gillen J). For examples of refusal to apply the *Jameel* principle to stay proceedings, see *Mardas v New York Times Co* [2009] EMLR 8; [2008] EWHC 3135 (QB); *Baturina v Times Newspapers Ltd* [2011] 1 WLR 1526, 1537 (Lord Neuberger of Abbotsbury MR); [2011] EWCA Civ 308.

as breach of confidence and the tort of misuse of private information.⁶² The English jurisprudence on the application of the principle in *Jameel* to strike out or to stay permanently defamation proceedings makes it clear that the proper juridical basis of the principle is abuse of process.⁶³ In cases dealing with *Jameel*, there is frequently no reference to human rights considerations at all and the stated basis of the principle is abuse of process.⁶⁴ Unsurprisingly, given the extremity of characterising any proceedings as an abuse of process, English courts also continued to emphasise that cases where the principle of proportionality would be applied to stay proceedings permanently would be rare.⁶⁵ The features of cases in which English courts acted to stay proceedings on the basis of the *Jameel* principle included limited extent of publication;⁶⁶ publication only to persons known to the plaintiff;⁶⁷ the prospect of minimal damages;⁶⁸ significant delay in bringing defamation proceedings;⁶⁹ and satisfaction that minimal vindication of reputation would be achieved through the defamation proceedings.⁷⁰

The Principle of Proportionality – Reception in Australian Law

The principle in *Jameel* has been considered by Australian courts in a small group of cases. There were a number of cases in which *Jameel* was cited but ultimately did not need to be relied upon to dispose of the matter before the court. In those judgments, it is difficult to discern whether the court accepted the *Jameel* principle as part of Australian law, as there was no need explicitly to consider this point.⁷¹ There was an early application of the *Jameel* principle by Brereton J (as his Honour then was) in *Grizonic v Suttor*. This was not a defamation case but rather was a dispute between former business partners who had been ordered to give an account of the partnership assets.⁷² After protracted interlocutory steps, which did not appear to progress the litigation, Brereton J permanently stayed the proceedings, expressly invoking the *Jameel* principle.⁷³

Subsequent consideration of the *Jameel* principle was less favourable. In *Manefield v Child Care NSW*, Kirby J rejected the submission that proportionality, as applied in *Jameel*, could form part of Australian law. His Honour did so on the basis that proportionality was based on the *Civil Procedure Rules* and the *Human Rights Act 1998* (UK), which did not operate in Australia.⁷⁴ In *Barach v University of New South Wales*, Garling J followed Kirby J's approach

⁶² See, for example, *Abbey v Gilligan* [2012] EWHC 3217 (QB); *Briggs v Jordan* [2013] EWHC 3205 (QB).

⁶³ See, for example, *Adelson v Associated Newspapers Ltd* [2009] EMLR 10, 179 (Tugendhat J); [2008] EWHC 278 (QB); *Bezant v Rausing* [2007] EWHC 1118, [125]-[130] (Gray J); *Ewing v Times Newspapers Ltd* [2011] NIQB 63, [24]-[29] (Gillen J).

⁶⁴ See, for example, *Williams v MGN Ltd* [2009] EWHC 3150 (QB), [11], [22]-[23] (Eady J); *Baturina v Times Newspapers Ltd* [2010] EMLR 18, 484 (Eady J); [2010] EWHC 696 (QB).

⁶⁵ *Bezant v Rausing* [2007] EWHC 1118, [130] (Gray J) (describing the power as 'draconian'); *Budu v British Broadcasting Corporation* [2010] EWHC 616 (QB), [128] (describing the 'abuse jurisdiction' as 'exceptional').

⁶⁶ *Bezant v Rausing* [2007] EWHC 1118, [144] (Gray J).

⁶⁷ *Bezant v Rausing* [2007] EWHC 1118, [144] (Gray J).

⁶⁸ *Bezant v Rausing* [2007] EWHC 1118, [144] (Gray J).

⁶⁹ *Budu v British Broadcasting Corporation* [2010] EWHC 616 (QB), [118] (Sharp J).

⁷⁰ *Bezant v Rausing* [2007] EWHC 1118, [144] (Gray J).

⁷¹ See, for example, *Owners Corporation Strata Plan 61732 v T R Druce Pty Ltd* [2009] NSWSC 1024, [50]-[51] (White J); *Ehiozee v EDO Nigerian Association of New South Wales Inc* [2012] NSWSC 239, [30] (Schmidt J); *Leech v Silvester* [2012] NSWSC 1367, [33] (Nicholas J); *Vizovitis v Ryan t/as Ryans Barristers & Solicitors* [2012] ACTSC 155, [42] (Harper M). See also *Habib v Radio 2UE Sydney Pty Ltd* [2009] NSWCA 231, [146]-[157] (McColl JA) (distinguishing antecedent authorities to *Jameel*).

⁷² *Grizonic v Suttor* [2014] NSWSC 914, [8]-[10].

⁷³ *Grizonic v Suttor* [2014] NSWSC 914, [64].

⁷⁴ [2010] NSWSC 1420, [187].

in *Manefield v Child Care New NSW*.⁷⁵ In *Bristow v Adams*, the respondent sought leave to argue proportionality by way of notice of contention, filed out of time and raising the issue for the first time on appeal. Basten JA refused to permit this. Referring briefly to the substantive issue, his Honour observed that, if or when the availability of the principle of proportionality in Australia arose for determination, ‘careful attention to the differences between English and Australian law’ would be required. He identified three relevant differences, namely, the differences between the statutory language in the *Civil Procedure Act 2005* (NSW) ss 56-58 and the *Civil Procedure Rules* (UK) r 1.1; the availability of a statutory defence of triviality under Australian law, which has no analogue under English law; and the *Human Rights Act 1998* (UK), which conversely has no analogue under Australian law.⁷⁶ The *dicta* in these three cases seemed to tend against the recognition of the principle of proportionality as part of Australian law.

However, in *Bleyer v Google Inc.*, McCallum J (as her Honour then was) applied the principle of proportionality to stay a plaintiff’s proceedings. The plaintiff brought defamation proceedings against the search engine, Google, in respect of snippets and hyperlinks generated as a result of third party users’ searches.⁷⁷ As to publication, he was only able to point to two people who read the matters in Victoria and only one in New South Wales, the latter only being identified after Google had been notified of Bleyer’s concern and had sought further information.⁷⁸ McCallum J closely analysed the relevant provisions of the *Civil Procedure Act 2005* (NSW), asking rhetorically:

‘Can it seriously be doubted that the power conferred by s 67 can properly be exercised to stay proceedings in which the resources required of the court and the parties to determine the claim are vastly disproportionate to the interest at stake?’⁷⁹

Having concluded that considerations of proportionality were relevant to the ways in which courts exercised their procedural powers, her Honour characterised it as ‘a small and logical step’ to hold that courts could stay or dismiss proceedings on the basis of the principle of proportionality.⁸⁰ McCallum J rejected the suggestion that the availability of a defence of triviality was inconsistent with the recognition of the principle of proportionality. As her Honour pithily observed, ‘[d]efences protect defendants’.⁸¹ The purpose of the principle of proportionality was to allow a court to protect itself against an abuse of its own process.⁸² McCallum J expressly stated that such disproportionality can be properly regarded as a species of abuse of process.⁸³ Her Honour emphasised that cases in which the principle of proportionality should be applied to stay or dismiss proceedings should be rare. In applying the principle of proportionality, McCallum J noted that the value of the interest at stake would need to be assessed in some instances by reference to matters other than the amount of money involved. Her Honour identified a defamation proceeding as such an instance, given the importance of non-monetary considerations, such as the vindication of reputation in defamation

⁷⁵ [2011] NSWSC 431, [122], [128]-[129].

⁷⁶ *Bristow v Adams* [2012] NSWCA 166, [41].

⁷⁷ *Bleyer v Google Inc* (2014) 88 NSWLR 670, 672; [2014] NSWSC 897, [7]-[9].

⁷⁸ *Bleyer v Google Inc* (2014) 88 NSWLR 670, 672-73 (McCallum J); *Bleyer v Google Inc* [2014] NSWSC 897, [10]-[12].

⁷⁹ *Bleyer v Google Inc* (2014) 88 NSWLR 670, 679; [2014] NSWSC 897, [51].

⁸⁰ *Bleyer v Google Inc* (2014) 88 NSWLR 670, 680-81 (McCallum J); [2014] NSWSC 897, [56]-[57].

⁸¹ *Bleyer v Google Inc* (2014) 88 NSWLR 670, 681; [2014] NSWSC 897, [59].

⁸² *Bleyer v Google Inc* (2014) 88 NSWLR 670, 681 (McCallum J); [2014] NSWSC 897, [58]-[59].

⁸³ *Bleyer v Google Inc* (2014) 88 NSWLR 670, 681; [2014] NSWSC 897, [62].

cases.⁸⁴ Applying the principle of proportionality to the given facts, McCallum J permanently stayed Bleyer's defamation proceedings against Google.⁸⁵

With respect, there is much to recommend McCallum J's approach in *Bleyer v Google*. It is consistent with the purposes of the *Civil Procedure Act 2005* (NSW) and the modernised approach to case management it sanctions, which has analogues in the other Australian States and Territories.⁸⁶ The statutory defence of triviality may not be the best means by which to deter trivial claims, given the terms of the statutory provision and the fact that it arises for determination after liability has been established. Conversely, as Basten JA suggested in *Bristow v Adams*, an application based on the principle of proportionality should ordinarily be brought prior to trial, rather than at final judgment.⁸⁷ The need for the effective deterrence of trivial claims at the outset is necessary if there is to be the just, quick and cheap resolution of defamation disputes – something for which defamation litigation is not renowned.⁸⁸ More fundamentally, McCallum J recognised that the proper juridical basis of the *Jameel* principle is abuse of process. The recognition that the *Jameel* principle is grounded in abuse of process should allow for the ready acceptance of the principle of proportionality in Australian law.

However, following McCallum J's decision in *Bleyer v Google*, there has been a mixed reception for the principle of proportionality around Australia. In *Lazarus v Azize*, Mossop AsJ was asked to stay proceedings on the basis of the *Jameel* principle, as applied in *Bleyer v Google*. His Honour noted that McCallum J in *Bleyer v Google* treated the principle of proportionality as a form of abuse of process. He noted, however, that there were differences between the civil procedure legislation in the Australian Capital Territory and New South Wales, which made it difficult to accept the principle of proportionality in the Australian Capital Territory. Mossop AsJ pointed out that the overriding purpose of civil procedure arose under statute in New South Wales,⁸⁹ whereas this was only protected under court rules in the Australian Capital Territory.⁹⁰ In addition, civil procedure in the Australian Capital Territory had no analogue to the statutory requirement of the principle of proportionality of costs under the *Civil Procedure Act 2005* (NSW) s 60. Furthermore, his Honour pointed out that the Australian Capital Territory had the *Human Rights Act 2004* (ACT), with its express protection of freedom of expression under s 16, whereas this was lacking in New South Wales. This latter point is difficult to understand, given that one of the objections raised in earlier decisions querying the place of the *Jameel* principle in Australian law was that *Jameel* itself was based on human rights considerations which have no analogue in most Australian jurisdictions. The Australian Capital Territory is one of the few jurisdictions in Australia with a statutory protection of human rights.⁹¹ This should mean that the Australian Capital Territory is more, not less, receptive to the principle of proportionality.⁹² It was, however, unnecessary for

⁸⁴ *Bleyer v Google Inc* (2014) 88 NSWLR 670, 681-82 (McCallum J); [2014] NSWSC 897, [63].

⁸⁵ *Bleyer v Google Inc* (2014) 88 NSWLR 670, 688; [2014] NSWSC 897, [98].

⁸⁶ *Federal Court of Australia Act 1976* (Cth) s 37M; *Court Procedures Act 2004* (ACT) s 5A; *Supreme Court Rules 1987* (NT) r 1.10; *Civil Procedure Act 2005* (NSW) s 56; *Uniform Civil Procedure Rules 1999* (Qld) r 5; *Supreme Court Civil Rules 2006* (SA) r 3; *Supreme Court rules 2000* (Tas) r 414A; *Civil Procedure Act 2010* (Vic) s 10; *Rules of the Supreme Court 1971* (WA) O 1 r 4B.

⁸⁷ [2012] NSWCA 166, [38].

⁸⁸ For an evocative statement of the problems, see Hon. Justice David Ipp, 'Themes in the Law of Torts' (2007) 81 *Australian Law Journal* 609, 615.

⁸⁹ *Civil Procedure Act 2005* (NSW) s 56.

⁹⁰ *Court Procedures Rules 2006* (ACT) r 21. This rule has now been repealed.

⁹¹ *Human Rights Act 2004* (ACT). See also *Human Rights Act 2019* (Qld); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁹² *Lazarus v Azize* [2015] ACTSC 344, [21] (Mossop AsJ).

Mossop AsJ to reach a concluded view on whether the principle of proportionality was part of the law of the Australian Capital Territory because, even if it were, the instant case was not an appropriate one in which permanently to stay the proceedings.⁹³

The *Jameel* principle received more favourable treatment in the Queensland Court of Appeal's decision in *Watney v Kencian*. In this case, a private school principal sued the authors of a letter sent to the Director-General of the Queensland Department of Education, subsequently republished to the Chairperson of the Non-State Schools Accreditation Board.⁹⁴ At trial, the jury found that the imputations were conveyed by the letter but were not defamatory of the principal.⁹⁵ The principal appealed against the verdict. The central issue on appeal was whether the jury verdict was unreasonable, in the sense that it was so unreasonable that no jury, properly directed and acting according to its oath, could have reached that verdict, the test previously described as 'perversity'.⁹⁶ Applegarth J, with whom McMurdo and Morrison JJA agreed, had little difficulty in concluding that the jury verdict was unreasonable in the relevant sense.⁹⁷

The principle of proportionality was raised by the respondents on appeal, as a means of resisting an order for a new trial, which would be the ordinary course where a jury verdict had been set aside on the ground of unreasonableness.⁹⁸ After reviewing the relevant Australian authorities,⁹⁹ Applegarth J concluded that it was 'inappropriate and unnecessary' to determine whether the *Jameel* principle was part of the law of Queensland, as the differences between English, New South Wales and Queensland law had not been the subject of full argument on appeal.¹⁰⁰ Assuming that the principle of proportionality formed part of the law of Queensland, his Honour found that the present case was not a suitable vehicle for determining the issue. The imputations were serious, with the consequences that any damages awarded would be more than nominal. Tellingly, the respondents had not pleaded a defence of triviality.¹⁰¹ Moreover, the respondents were complaining about the disproportionate costs involved in a jury trial in circumstances where the respondents themselves had elected to have a jury trial.¹⁰² Even if the *Jameel* principle applied in Queensland, Applegarth J was of the view that it clearly would not assist the respondents.¹⁰³

To the extent that Applegarth J commented on the acceptance of the *Jameel* principle as part of Australian law, his Honour confined himself to an observation as to the interaction between the defence of triviality and the *Jameel* principle. He noted that:

'The existence of a statutory defence of triviality may be a basis upon which to distinguish the positions in England and in Australia. However, that argument would depend upon an assessment of whether the defence of triviality is adequate to protect defendants and the court system from being vexed by the type of proceeding at which the *Jameel* principle is directed. Arguably, a defendant who has a viable defence of triviality should be able to invoke the *Jameel* principle at any early stage of proceedings

⁹³ *Lazarus v Azize* [2015] ACTSC 344, [22]-[40].

⁹⁴ *Watney v Kencian* [2018] 1 Qd R 407, 413; [2017] QCA 116, [3] (Applegarth J).

⁹⁵ *Watney v Kencian* [2018] 1 Qd R 407, 413-14; [2017] QCA 116, [6] (Applegarth J).

⁹⁶ *Watney v Kencian* [2018] 1 Qd R 407, 413; [2017] QCA 116, [4] (Applegarth J).

⁹⁷ *Watney v Kencian* [2018] 1 Qd R 407, 419-20; [2017] QCA 116, [35]-[36] (Applegarth J).

⁹⁸ *Watney v Kencian* [2018] 1 Qd R 407, 422; [2017] QCA 116, [47] (Applegarth J).

⁹⁹ *Watney v Kencian* [2018] 1 Qd R 407, 423-25; [2017] QCA 116, [51]-[56].

¹⁰⁰ *Watney v Kencian* [2018] 1 Qd R 407, 425; [2017] QCA 116, [61] (Applegarth J).

¹⁰¹ *Watney v Kencian* [2018] 1 Qd R 407, 426; [2017] QCA 116, [62] (Applegarth J).

¹⁰² *Watney v Kencian* [2018] 1 Qd R 407, 426; [2017] QCA 116, [63] (Applegarth J).

¹⁰³ *Watney v Kencian* [2018] 1 Qd R 407, 426-27; [2017] QCA 116, [66]-[67].

so as to avoid the costs associated with defending a matter to trial, and in seeking to uphold a judgment in its favour, upon appeal. If the *Jameel* principle and the defence of triviality may co-exist, then they provide different forms of protection. As Basten JA noted in *Bristow*, the application which succeeded in *Jameel* was a pre-trial application for a stay of proceedings in order to avoid disproportionate expenditure on a trial.’¹⁰⁴

Even clearer endorsement of *Jameel* and *Bleyer* came from the *dicta* of Basten JA in *Farrow v Nationwide News Pty Ltd*. In this case, a former *Penthouse* ‘pet’ and convicted drug smuggler sued Nationwide News over an article published in *The Sunday Telegraph* newspaper.¹⁰⁵ She pleaded a range of imputations including that she was sentenced to a term of imprisonment after she was convicted of criminal offences; that she is in jail and will remain there until at least 2018; and that the plaintiff skipped bail. Farrow admitted that those imputations were true. Nationwide News applied to strike out the proceedings as an abuse of process. The New South Wales Court of Appeal upheld the decision of the trial judge to strike out the proceedings on that ground. In doing so, McCallum J held that, in a defamation proceeding, it is an abuse of process for a plaintiff knowingly to plead imputations which are true.¹⁰⁶ Sitting as an additional judge on appeal, her Honour expressly declined to engage with her earlier decision in *Bleyer*.¹⁰⁷ This did not prevent Basten JA, in his separate reasons for judgment, giving strong support, albeit *obiter*, to the correctness of *Bleyer*. His Honour stated that:

‘... on an application for leave to commence proceedings, the court should have regard to the requirements of Pt 6 of the *Civil Procedure Act 2005* (NSW), and the overriding purpose of the Act and rules in their application to civil proceedings. The grant of leave is an exercise in “the practice and procedure of the court”, for the purposes of s 60. The requirement that “the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute” is a matter to which the court is entitled (and indeed obliged) to have regard, where relevant (as here).

That is not to say that one has regard only to a comparison of the likely financial benefit to the applicant and the likely costs of the parties on both sides. In a defamation case, as in other proceedings designed to assert or defend the human rights of individuals, the element of vindication of reputation which may be achieved by a favourable judgment is not to be disregarded. However, where the applicant cannot demonstrate a *prima facie* case of an entitlement to significant damages, that may be because any damage to reputation which may be made good is itself trivial. Accordingly, in my view the primary judge was correct to adopt an approach which was consistent with the principles stated in *Bleyer v Google Inc*. There would have been no error in expressly applying the principles stated in that case.’¹⁰⁸

More recently, Jagot J, in *Herron v HarperCollins Publishers Australia Pty Ltd*, refused to stay defamation proceedings on the basis of *Bleyer* but at no point questioned its correctness.¹⁰⁹ Indeed, her Honour recognised it as a form of abuse of process.¹¹⁰ The case was brought by two men who were psychiatrists at the notorious Chelmsford Private Hospital in 1970s.¹¹¹ The

¹⁰⁴ *Watney v Kencian* [2018] 1 Qd R 426; [2017] QCA 116, [64].

¹⁰⁵ *Farrow v Nationwide News Pty Ltd* (2017) 97 NSWLR 612, 615 (McCallum J); [2017] NSWCA 246.

¹⁰⁶ *Farrow v Nationwide News Pty Ltd* (2017) 97 NSWLR 612, 617-18 (McCallum J); [2017] NSWCA 246.

¹⁰⁷ *Farrow v Nationwide News Pty Ltd* (2017) 97 NSWLR 612, 618 (McCallum J); [2017] NSWCA 246.

¹⁰⁸ *Farrow v Nationwide News Pty Ltd* (2017) 97 NSWLR 612, 613-14; [2017] NSWCA 246.

¹⁰⁹ [2018] FCA 1495, [32].

¹¹⁰ *Herron v HarperCollins Publishers Australia Pty Ltd*, [2018] FCA 1495, [18] (Jagot J).

¹¹¹ *Herron v HarperCollins Publishers Australia Pty Ltd* [2018] FCA 1495, [3] (Jagot J).

applicants' conduct has been the subject of disciplinary proceedings and had been investigated at a royal commission into 'deep sleep therapy', the controversial treatment used at, and associated with, Chelmsford Private Hospital. The various disciplinary and criminal proceedings against Gill and Herron were stayed as abuses of process during the 1980s and 1990s.¹¹² Herron had also been successfully sued in tort by a former patient.¹¹³ Herron had been struck off the roll of medical practitioners, although Gill remained a doctor.¹¹⁴ Notwithstanding the immense, adverse publicity they received in the 1980s and 1990s, neither Gill nor Herron sued for defamation.¹¹⁵ However, in 2016, HarperCollins published a book, *Fair Game: The Incredible Untold Story of Scientology in Australia*, by journalist, Steve Cannane. The book sold more than 8,500 copies. One of the chapters of the book dealt with the role of the Church of Scientology in exposing the scandal at Chelmsford Private Hospital.¹¹⁶ Herron and Gill commenced defamation proceedings in the Federal Court of Australia. HarperCollins applied to have the proceedings summarily dismissed as an abuse of process.¹¹⁷ Jagot J did not accept that the defamation proceedings should be permanently stayed as an abuse of process. In relation to the *Bleyer* ground of abuse of process, her Honour accepted that the references to the applicants were an incidental part, not the main focus, of the book which sold only modestly.¹¹⁸ She acknowledged that the issues in the case would be complex and that the publishers may have difficulty justifying the allegations. Nevertheless, Jagot J was not satisfied that the disproportion between the costs and resources involved in the litigation, on the one hand, and the vindication of the rights at stake, on the other hand, should mean that the proceedings were permanently stayed as an abuse of process.¹¹⁹ The important point is not that the application failed but that Jagot J proceeded on the basis that *Bleyer* was settled principle.

McCallum J's judgment in *Bleyer* has already been followed, sometimes as the principal ground, sometimes as an alternative ground for staying defamation proceedings otherwise found to be an abuse of process.¹²⁰ Even where it has not been applied, it has been accepted as correct.¹²¹ As Macfarlan JA observed in *Ghosh v NineMSN Pty Ltd*, the power to stay proceedings permanently on the basis of *Bleyer* will only occur rarely,¹²² which is consistent with the approach adopted in the English cases applying the *Jameel* principle but which also implicitly appears to accept the correctness of *Bleyer* and *Jameel*. There are, however, still judicial expressions of doubt as to whether the *Jameel* principle forms part of the common law of Australia.¹²³ It is fair to say then that there is growing acceptance of the *Jameel* principle under Australian law, not that it has been firmly established.

¹¹² *Herron v Harper Collins Publishers Pty Ltd* [2018] FCA 1495, [5]-[7] (Jagot J).

¹¹³ *Herron v Harper Collins Publishers Pty Ltd* [2018] FCA 1495, [4] (Jagot J).

¹¹⁴ *Herron v HarperCollins Publishers Pty Ltd* [2018] FCA 1495, [8] (Jagot J).

¹¹⁵ *Herron v HarperCollins Publishers Pty Ltd* [2018] FCA 1495, [9] (Jagot J).

¹¹⁶ *Herron v HarperCollins Publishers Pty Ltd* [2018] FCA 1495, [10] (Jagot J).

¹¹⁷ *Herron v HarperCollins Publishers Pty Ltd* [2018] FCA 1495, [1] (Jagot J).

¹¹⁸ *Herron v HarperCollins Publishers Pty Ltd* [2018] FCA 1495, [30] (Jagot J).

¹¹⁹ *Herron v HarperCollins Publishers Pty Ltd* [2018] FCA 1495, [32].

¹²⁰ See, for example, *Calabrio v Zappia* [2010] NSWDC 127, [51]-[69] (Gibson DCJ); *Ghosh v TCN Channel Nine Pty Ltd (No 4)* [2014] NSWDC 155, [122] (Gibson DCJ); *YZ v Amazon (No 7)* [2016] NSWSC 637, [56]-[67] (McCallum J). See also *Ghosh v NineMSN Pty Ltd* [2015] NSWCA 334, [44] (Macfarlan JA). For examples where an application to stay proceedings on the basis of *Jameel* / *Bleyer*, see *Burns v Gaynor* [2018] NSWDC 358, [84]-[88] (Gibson DCJ). For another recent incidental consideration of the principle of proportionality, see *Toben v Nationwide News Pty Ltd* [2016] NSWCA 296, [130]-[143] (Ward JA).

¹²¹ *Massoud v Harbour Radio Pty Ltd* [2019] NSWDC 403, [34], [44]-[45] (Mahony DCJ).

¹²² [2015] NSWCA 334, [44].

¹²³ See, for example, *Khalil v Nationwide News Pty Ltd (No 2)* [2018] NSWDC 126, [40] (Gibson DCJ); *Islam v Director General of the Justice and Community Safety Directorate* [2018] ACTSC 323, [20]-[22] (McWilliam AsJ).

The proper juridical basis of the *Jameel* and *Bleyer* principles should be recognised as abuse of process. A superior court of record has, as part of its inherent jurisdiction, the power to protect itself against abuses of its processes.¹²⁴ If it lacked such a power, a court would be ineffective in protecting the administration of justice. Although there are well-established and well-recognised categories of abuse of process, the categories are not closed. It is always open to courts to recognise new forms of abuse of process. Properly understood, that is what has occurred with the discernment of the *Jameel* principle and, in turn, the *Bleyer* principle. Concerns about dealing with abuses of process manifest themselves in civil procedure legislation and rules of court. These can regulate the ways in which a court can address abuses of process but they are not ultimately the source of the courts' power to deal with such abuses.¹²⁵ Therefore, *Jameel* and *Bleyer* do not turn upon the particular civil procedure legislation or the particular rules of court, still less upon human rights considerations.¹²⁶ These may provide additional reasons for recognising the principle of proportionality in *Jameel* and *Bleyer* but ultimately the source of the doctrine is abuse of process. Viewed in this way, there should be no impediment to Australian courts recognising the principle of proportionality.

Perhaps the clearest illustration of the need for the principle of proportionality is *Smith v Lucht*. The case has undoubtedly been useful in providing the opportunity to clarify the proper construction of the *Defamation Act 2005* (Qld) s 33. However, a year before the trial, there was an opportunity to end the proceedings entirely, thereby avoiding substantial costs being incurred and resources being expended in what was ultimately found to be a trivial defamation claim. Had McGill DCJ permanently stayed the proceedings in *Smith v Lucht* as he had been invited to do, the cost and expense of the trial, conducted a year later, and the subsequent appeal, conducted later still, could have been saved, rather than dealt with on the basis of triviality.

A Minimum Threshold of Seriousness

The principle of proportionality is not the only means of dealing with trivial defamation claims derived from English law. A related means of achieving this end is the minimum threshold of seriousness. Compared to the defence of triviality and the principle of proportionality, the approach to dealing with trivial defamation claims by reference to a minimum threshold of seriousness is relatively unexplored in Australian case law. The minimum threshold of seriousness was first identified in terms in the decision of Tugendhat J in *Thornton v Telegraph Media Group Ltd*.¹²⁷ Like the principle of proportionality, the minimum threshold of seriousness, properly understood, has its juridical basis in the common law, although it is buttressed by human rights and civil procedure considerations. Beyond these commonalities, Tugendhat J expressly recognises that the two doctrines are interconnected, with the recognition of the principle of proportionality being the impetus for the discernment of the minimum threshold of seriousness, and that the purpose of a minimum threshold of seriousness was to exclude trivial defamation claims.¹²⁸

¹²⁴ I.H. Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 23, 25.

¹²⁵ I.H. Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 23, 25.

¹²⁶ As to the latter point, see Kim Gould, 'Locating the "Threshold of Seriousness" in the Australian Tests of Defamation' (2017) 39 *Sydney Law Review* 333, 335.

¹²⁷ [2011] 1 WLR 1985; [2010] EWHC 1414 (QB).

¹²⁸ *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985, 2003; [2010] EWHC 1414 (QB).

In *Thornton v Telegraph Media Group Ltd*, the claimant, Sarah Thornton, was an author and researcher who brought defamation proceedings arising out of a review in *The Daily Telegraph* newspaper of her book, *Seven Days in the Art World*. She complained that Lynn Barber's review alleged that she had engaged in the practice of copy approval with interviewees and that the allegation, as conveyed in the review, was damaging both to her professional and her personal reputation.¹²⁹ Telegraph Media Group applied for summary judgment. It argued that Thornton had no real prospect of success in establishing that this allegation was defamatory of her because it did not pass the minimum threshold of seriousness.¹³⁰

Tugendhat J began by reviewing the tests for what is defamatory. It is notorious that there is no single test for what is defamatory.¹³¹ His Lordship quoted at length from Neill LJ's judgment in *Berkoff v Burchill*¹³² (with cross-referencing to the third edition of *Duncan and Neill on Defamation*),¹³³ identifying five different tests for what is defamatory.¹³⁴ In Tugendhat J's view, a common feature of all the tests, save one, was that there must be express mention of the adverse consequences flowing from the publication of the defamatory matter.¹³⁵ In his Lordship's view, the exception was the classic test of 'lowering in the estimation of right-thinking members of society'.¹³⁶ The test was encapsulated by Lord Atkin in *Sim v Stretch* and has been routinely invoked ever since.¹³⁷

With respect, it is difficult to understand why Tugendhat J reaches the conclusion that this test for defamation does not involve an adverse consequence for the plaintiff. His Lordship purports to draw a distinction between a mere 'change of opinion or estimation in the mind of the publishee' and 'some adverse consequence upon the plaintiff'. With respect, this fundamentally misapprehends the basis of the tort. The principal interest protected by the tort of defamation is reputation. Reputation is in essence what other people think of the plaintiff;¹³⁸ it comprehends all aspects of the plaintiff's standing.¹³⁹ To lower the plaintiff in the estimation of 'right-thinking people' by publishing defamatory matter of him or her is to inflict an adverse consequence upon the plaintiff, namely reputational damage, which is the very interest protected by the tort of defamation. Thus, all of the tests for defamation involve an adverse consequence for the plaintiff flowing from the publication of defamatory matter. Lord Atkin's formulation of the classic test for what is defamatory in *Sim v Stretch* is not anomalous in this regard. Indeed, a proper understanding of the test in *Sim v Stretch* fortifies Tugendhat J's reasoning recognising a minimum threshold of seriousness in defamation law.

¹²⁹ *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985, 1988-89 (Tugendhat J); [2010] EWHC 1414 (QB).

¹³⁰ *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985, 1990-92 (Tugendhat J); [2010] EWHC 1414 (QB).

¹³¹ *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985, 1994; [2010] EWHC 1414 (QB).

¹³² [1996] 4 All ER 1008.

¹³³ Brian Neill *et al*, *Duncan and Neill on Defamation*, 3rd ed., LexisNexis Butterworths, London, 2009.

¹³⁴ *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985, 1996-97 (Tugendhat J); [2010] EWHC 1414 (QB).

¹³⁵ *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985, 2002; [2010] EWHC 1414 (QB).

¹³⁶ *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985, 2002-03 (Tugendhat J); [2010] EWHC 1414 (QB).

¹³⁷ However, as to the refinement of the 'lowering in the estimation' test for what is defamatory under Australian law, see *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460, 477-80 (French CJ, Gummow, Kiefel and Bell JJ); [2009] HCA 16.

¹³⁸ *Plato Films Ltd v Speidel* [1961] AC 1090, 1138 (Lord Denning); David Rolph, *Reputation, Celebrity and Defamation Law*, Ashgate, Aldershot, 2008, 4.

¹³⁹ *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460, 477 (French CJ, Gummow, Kiefel and Bell JJ); [2009] HCA 16.

Tugendhat J reasons that the explicit or implicit inclusion of a requirement that there should be adverse consequences for a plaintiff means that there is a threshold of seriousness for all of the tests for what is defamatory. A matter alleged to be defamatory must be able to be characterised as giving rise to the minimum level of adverse consequence. His Lordship expressly noted that the ‘renewed interest’ in whether there was a threshold of seriousness at common law was stimulated by the recognition of the principle of proportionality in *Jameel*.¹⁴⁰ Although the juridical bases of the respective doctrines are distinct, they are both underpinned by a concern to address trivial defamation claims. Like *Jameel*, *Thornton* was not the first case dealing with the doctrine for which it has now become known; there were earlier common law cases raising the issue. Tugendhat J was able to point to his own earlier decision in *John v Guardian News and Media Ltd*¹⁴¹ (in which his Lordship found that allegations that Sir Elton John hosted a charity ball to meet celebrities and for self-promotion, knowing that the event would raise little money for the ostensible charitable cause, was not capable of being defamatory) and *Ecclestone v Telegraph Media Group Ltd*¹⁴² (in which Sharp J found that socialite, Tamara Ecclestone, was disrespectful to, and dismissive of, celebrity vegetarianism was also incapable of being defamatory).¹⁴³ The even earlier precedent was the House of Lords’ decision in *Sim v Stretch* itself. Tugendhat J noted that Lord Atkin’s speech not only included the famous ‘lowering in the estimation’ formulation of the test for what is defamatory.¹⁴⁴ Later in his speech, Lord Atkin also quoted from *Clay v Roberts*, wherein Pollock CB stated that:

‘There is a distinction between imputing what is merely a breach of conventional etiquette, and what is illegal, mischievous, or sinful.’¹⁴⁵

Lord Atkin himself went on to observe that:

‘the protection [of reputation by defamation law] is undermined when exhibitions of bad manners and discourtesy are placed on the same level as attacks on character; and are treated as actionable wrongs.’¹⁴⁶

Tugendhat J reasoned that, properly understood, Lord Atkin’s speech in *Sim v Stretch* illustrated, but did not define, a threshold of seriousness for defamation claims. His Lordship expressly stated that the purpose of such a threshold was to exclude trivial defamation claims.¹⁴⁷ He also reasoned that a threshold of seriousness was required due to the development of the principle of proportionality in *Jameel* and the passage of the *Human Rights Act 1998* (UK), specifically the protection of freedom of expression under Article 10 of the European Convention on Human Rights.¹⁴⁸

As with the principle of proportionality, the minimum threshold of seriousness has a substantial basis in common law principle. *Sim v Stretch* has been frequently applied in Australian defamation cases. To the extent that the minimum threshold of seriousness is based upon human rights considerations, it is grounded in freedom of expression. Whilst it is true that there

¹⁴⁰ *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985, 2003 (Tugendhat J); [2010] EWHC 1414 (QB).

¹⁴¹ [2008] EWHC 3086 (QB).

¹⁴² [2009] EWHC 2779 (QB).

¹⁴³ [2011] 1 WLR 1985, 2004; [2010] EWHC 1414 (QB).

¹⁴⁴ *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985, 2004-05; [2010] EWHC 1414 (QB).

¹⁴⁵ (1863) 8 LT 397, 398.

¹⁴⁶ *Sim v Stretch* [1936] 2 All ER 1237, 1242.

¹⁴⁷ *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985, 2008; [2010] EWHC 1414 (QB).

¹⁴⁸ *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985, 2009; [2010] EWHC 1414 (QB).

is no constitutional or statutory protection of freedom of expression as a fundamental human right, nationally or in most States and Territories,¹⁴⁹ freedom of expression is a fundamental common law right or freedom. More importantly, the common law has long recognised that freedom of speech is one of the fundamental interests protected by the tort of defamation, to be balanced against the protection of reputation.¹⁵⁰ The existence of an enforceable positive human right to freedom of expression in the United Kingdom should not be a ground for not adopting a threshold of seriousness at common law in Australia, given the common law's stated protection of freedom of speech through the tort of defamation.

In his judgment, Tugendhat J addressed an important potential consequence of a minimum threshold of seriousness. In his Lordship's view, such a threshold explains why libel law presumes damage to reputation:

'If the likelihood of adverse consequences for a claimant is part of the definition of what is defamatory, then the presumption of damage is the logical corollary of what is already included in the definition. And conversely, the fact that in law damage is presumed is itself an argument why an imputation should not be held to be defamatory unless it has a tendency to have adverse effects upon the claimant. It is difficult to justify why there should be a presumption of damage if words can be defamatory while having no likely adverse consequence for the claimant.'¹⁵¹

Applying the principles to the pleaded imputation being challenged, Tugendhat J was not satisfied that it was capable of being defamatory of Thornton, personally or professionally.¹⁵²

Serious Harm Under the *Defamation Act 2013*

Unlike the principle of proportionality, the common law threshold of seriousness has not had a substantial application in United Kingdom case law. This is because it was overtaken by the defamation law reform process, which culminated in the passage of the *Defamation Act 2013*. That legislation now includes in its first section a statutory threshold of seriousness in the following terms:

'1. Serious harm.

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

The statutory threshold of serious harm has already been the subject of substantial judicial analysis in English courts. A significant issue of statutory interpretation that has arisen in relation to this provision is whether it impliedly abrogates or otherwise limits the presumption of damage in defamation law. This has been addressed in the recent decision of the United Kingdom Supreme Court in *Lachaux v Independent Print Ltd*.¹⁵³ In this case, the claimant, Bruno Lachaux, was a French aerospace engineer who lived with his British wife, Afsana, and

¹⁴⁹ There is statutory protection of freedom of expression in force in the Australian Capital Territory (*Human Rights Act 2004* (ACT) s 16) and Victoria (*Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15) and soon to be in force in Queensland (*Human Rights Act 2019* (Qld) s 21).

¹⁵⁰ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 568 (*per curiam*); *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 599 (Gleeson CJ, McHugh, Gummow and Hayne JJ); [2002] HCA 56.

¹⁵¹ *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985, 2009; [2010] EWHC 1414 (QB).

¹⁵² *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985, 2010-11; [2010] EWHC 1414 (QB).

¹⁵³ [2019] 3 WLR 18; [2019] UKSC 27.

their son, Louis, in the United Arab Emirates. The marriage broke down and Lachaux commenced divorce proceedings in the UAE. Afsana went into hiding with Louis. The UAE courts awarded custody of Louis to Lachaux. Subsequently, Louis commenced a criminal prosecution against Afsana for child abduction. Lachaux eventually obtained custody of Louis. By this time, *The Independent* and *The Evening Standard* newspapers had published a number of articles making allegations about Lachaux's conduct towards his wife during the marriage and during the divorce and custody proceedings. Lachaux commenced libel proceedings against the publisher of those newspapers in the High Court of Justice in London.

A threshold issue was whether Lachaux had satisfied the statutory requirement of serious harm. At first instance, Warby J found that the *Defamation Act 2013* s 1(1) imposed an additional requirement on a claimant and that it was no longer sufficient for a matter to be inherently injurious. Rather, his Lordship found that, unless the matter was self-evidently defamatory, the claimant would need to adduce evidence to establish that the publication of the matter caused harm in fact. On appeal, the Court of Appeal found that the *Defamation Act 2013* did not affect the common law presumption of damage to reputation and that the statutory requirement was satisfied if the inherent injurious tendency of the matter was likely to cause not mere harm, but serious harm, to the claimant's reputation. On either approach, Lachaux had been able to establish 'serious harm' for the purposes of the *Defamation Act 2013* s 1(1).

On appeal to the United Kingdom Supreme Court, Lord Sumption, giving the judgment of the court, held that the *Defamation Act 2013* s 1(1):

'not only raises the threshold of seriousness above that envisaged in *Jameel*... and *Thornton*, but requires its application to be determined by reference to the actual facts about its impact and not just to the meaning of the words.'¹⁵⁴

His Lordship noted that, at a minimum, the *Defamation Act 2013* s 1(1) impliedly affects the presumption of damage for defamation by raising it from a presumption of damage to a presumption of serious harm. He further reasoned that, as the provision turns upon whether the publication 'has caused or is likely to cause' serious harm, the test now turns upon 'a combination of the inherent tendency of the words and their actual impact on those to whom they are communicated'.¹⁵⁵ Lord Sumption rejected the suggestion that serious harm could only be demonstrated by reference to the inherent tendency of the words, as such an approach would fail to give effect to what the legislature clearly intended to be a significant change to defamation law. His Lordship held that the legislature affected the presumption of damage to the extent that whether a matter was defamatory was no longer dependent merely upon the meaning of the words and their inherent tendency. Lord Sumption concluded:

'... I do not accept that the result is a revolution in the law of defamation, any more than the lower thresholds of seriousness introduced by the decisions in *Jameel* and *Thornton* effected such a revolution.'¹⁵⁶

Whether this assessment is correct is open to challenge. Certainly, the requirement that a plaintiff should bring some evidence about actual reputational damage as a threshold issue, not at the end of the trial during the phase when damages for defamation are assessed, is a substantial, if not a serious, change to the law.

¹⁵⁴ *Lachaux v Independent Print Ltd* [2019] 3 WLR 18, 27; [2019] UKSC 27.

¹⁵⁵ *Lachaux v Independent Print Ltd* [2019] 3 WLR 18, 27 (Lord Sumption); [2019] UKSC 27.

¹⁵⁶ *Lachaux v Independent Print Ltd* [2019] 3 WLR 18, 28-29; [2019] UKSC 27.

The Reception of the Minimum Threshold of Seriousness in Australian Law

Whether the common test for what is defamatory includes, or should include, a minimum threshold of seriousness has been considered by Australian courts in only a small group of cases. The Full Court of the Supreme Court of South Australia considered the issue in *Lesses v Maras*.¹⁵⁷ In this case, the parties were members of the Greek Orthodox Church of South Australia. Theo Maras sued John Lesses over a newsletter and an email, which he claimed imputed that he was untrustworthy. He also sued over a flyer which he claimed conveyed the imputation that he did not care about Greek Orthodox churches in South Australia.¹⁵⁸ At first instance, the trial judge found all the imputations were conveyed and were defamatory of Maras; rejected all the defences relied upon by Lesses; and awarded Maras \$75,000 damages.¹⁵⁹ Lesses appealed against the decision.

In relation to liability, Lesses submitted that the trial judge erred in failing to decide that the claim had reached the minimum threshold of seriousness.¹⁶⁰ On appeal, the Full Court of the Supreme Court of South Australia found that the matters complained of did not convey the imputations of untrustworthiness.¹⁶¹ However, their Honours found that the flyer did convey the imputation that Maras did not care about Greek Orthodox churches in South Australia¹⁶² and that this was defamatory of him.¹⁶³ In the context of addressing the latter issue, their Honours considered the decision of Tugendhat J in *Thornton v Telegraph Media Group*.¹⁶⁴ They observed that:

‘The passage from the judgment of Tugendhat J relied on by Mr Lesses should be understood merely as an elucidation of the requirement that, to be defamatory, an imputation must tend to lower the estimation of the plaintiff by the community and an emphasis that an adverse opinion may be expressed about a person without its having such a tendency. The seriousness of the adverse opinion is obviously a factor to be taken into account in determining whether its expression does tend to lower the estimation of the plaintiff by the community. The passage should not be understood as creating an additional element of the cause of action for defamation.’¹⁶⁵

Their Honours reasoned that they did not need to advert specifically to whether the imputation in question met a minimum threshold of seriousness as this was already taken into account when determining whether the imputation was defamatory.¹⁶⁶

With respect, their Honours’ treatment of Tugendhat J’s judgment in *Thornton* seems to involve a misreading of his Lordship’s careful reasoning. A proper reading of his judgment indicates that Tugendhat J was not merely elucidating a requirement that, to be defamatory, an imputation must tend to lower the estimation of the plaintiff in the eyes of the community. His Lordship was positing a minimum threshold of seriousness as part of the tests for what is

¹⁵⁷ (2017) 128 SASR 292; [2017] SASCFC 48.

¹⁵⁸ *Lesses v Maras* (2017) 128 SASR 292, 294-95 (*per curiam*); [2017] SASCFC 48.

¹⁵⁹ *Lesses v Maras* (2017) 128 SASR 292, 295 (*per curiam*); [2017] SASCFC 48.

¹⁶⁰ *Lesses v Maras* (2017) 128 SASR 292, 295 (*per curiam*); [2017] SASCFC 48.

¹⁶¹ *Lesses v Maras* (2017) 128 SASR 292, 309, 311, 314 (*per curiam*); [2017] SASCFC 48.

¹⁶² *Lesses v Maras* (2017) 128 SASR 292, 312 (*per curiam*); [2017] SASCFC 48.

¹⁶³ *Lesses v Maras* (2017) 128 SASR 292, 316 (*per curiam*); [2017] SASCFC 48.

¹⁶⁴ *Lesses v Maras* (2017) 128 SASR 292, 316-18 (*per curiam*); [2017] SASCFC 48.

¹⁶⁵ *Lesses v Maras* (2017) 128 SASR 292, 317-18 (*per curiam*); [2017] SASCFC 48.

¹⁶⁶ *Lesses v Maras* (2017) 128 SASR 292, 318 (*per curiam*); [2017] SASCFC 48.

defamatory. True it is that Tugendhat J extracted this minimum threshold of seriousness from the common law tests for what is defamatory; that is properly identified as the source of this requirement. However, it is clear that his Lordship was not merely applying the tests for what is defamatory but rather he was restating them with a view to discerning from them a principled basis for excluding trivial claims. That is, Tugendhat J was refining the basic principles of liability for defamation to make it more difficult for a plaintiff to bring a claim than it had been in the past. His Lordship was not merely sanctioning the pre-existing tests but was applying them in a more rigorous way.

More recently, in *Kostov v Nationwide News Pty Ltd*, McCallum J (as her Honour then was), as the Defamation List judge in the Supreme Court of New South Wales, accepted that there was a minimum threshold of seriousness as part of Australian law. The plaintiff sued a media company in respect of reports that she had provided a character reference for her boyfriend who had pleaded guilty to a charge of supplying cocaine.¹⁶⁷ She pleaded a range of imputations arising from the publication, including that she ‘has nothing better to do than to take time off work and plead with a judge for leniency on serious crimes’; ‘was distressed at the sentencing of the accused’; ‘is no longer a high-flyer’; and ‘has had a fall from grace’.¹⁶⁸ Nationwide News applied to have the imputations struck out on the basis of a lack of defamatory capacity. Alternatively, it submitted that the matter failed to meet the minimum threshold of seriousness. McCallum J held that the matters were incapable of being defamatory of the plaintiff.¹⁶⁹ Nevertheless, her Honour proceeded to give separate consideration to whether Australian law recognised a minimum threshold of seriousness and, if so, whether the proceedings should be struck out for failure to satisfy it. Her Honour concluded that:

‘Justice Tugendhat’s carefully reasoned judgment has persuaded me that the definition of “defamatory” adopted in Australia must equally comprehend a qualification of threshold of seriousness so as to exclude trivial defamation claims.’¹⁷⁰

McCallum J was fortified in her conclusion by the fact that one of her tests for defamation – exposure to ridicule – required that the plaintiff should be exposed to more than a trivial degree of ridicule.¹⁷¹

Most recently, in *Armstrong v McIntosh [No 2]*, Le Miere J had the occasion to consider both the minimum threshold of seriousness and the principle of proportionality. In this case, the plaintiff sued his former brother-in-law in respect of four text messages to a friend and one oral statement to the plaintiff’s priest.¹⁷² The defendant applied to have the defamation proceedings permanently stayed either on the basis of that they constituted an abuse of process, applying *Jameel* and *Bleyer*, or that the imputations did not meet the minimum threshold of seriousness required for publications to be actionable.¹⁷³ Dealing with the application, Le Miere J reviewed the major English cases, *Jameel*, *Thornton* and *Lachaux*.¹⁷⁴ His Honour then noted that:

¹⁶⁷ *Kostov v Nationwide News Pty Ltd* (2018) 97 NSWLR 1073, 1075; [2018] NSWSC 858.

¹⁶⁸ *Kostov v Nationwide News Pty Ltd* (2018) 97 NSWLR 1073, 1076; [2018] NSWSC 858.

¹⁶⁹ *Kostov v Nationwide News Pty Ltd* (2018) 97 NSWLR 1073, 1077-78; [2018] NSWSC 858.

¹⁷⁰ *Kostov v Nationwide News Pty Ltd* (2018) 97 NSWLR 1073, 1080; [2018] NSWSC 858.

¹⁷¹ *Kostov v Nationwide News Pty Ltd* (2018) 97 NSWLR 1073, 1080; [2018] NSWSC 858, citing *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443, 448 (Hunt J).

¹⁷² *Armstrong v McIntosh [No 2]* [2019] WASC 379, [1], [10] (Le Miere J).

¹⁷³ *Armstrong v McIntosh [No 2]* [2019] WASC 379, [3], [65] (Le Miere J).

¹⁷⁴ *Armstrong v McIntosh [No 2]* [2019] WASC 379, [53]-[63].

‘There are significant differences between the law of defamation in Australia and the law of defamation in England. Those difference (sic) include differences in the tests of defamation (notwithstanding that the *Radio 2UE Sydney* general test is derived from Lord Atkin’s ‘low (sic) in the estimation of others’ test, the absence of a Human Rights Act in Western Australia and the presence of the statutory triviality defence.’¹⁷⁵

With respect, outside of the minimum threshold of seriousness, it is not entirely clear how the tests for what is defamatory are significantly different in Australia and England. Notwithstanding these reservations, Le Miere J accepted that there is a ‘tenable argument’ that Australian law should recognise a minimum threshold of seriousness in the tests for what is defamatory.¹⁷⁶ Nevertheless, his Honour did not himself determine whether such a threshold existed but rather assumed it for the purposes of the application.¹⁷⁷ Le Miere J held that, in any event, the common law threshold of seriousness is ‘low’, stating:

‘Its purpose is to exclude matter that is adverse to a person in a way that does not substantially affect their reputation.’¹⁷⁸

This suggests that, were *Thornton* to be accepted in Australia, courts may seek to apply it in a way which does not depart significantly from the way in which the common law tests for what is defamatory already apply. This overlooks the fact that, in *Thornton*, Tugendhat J interpreted and applied the tests for what is defamatory in such a way so as to exclude trivial defamation claims. That is to say, the very purpose of the minimum threshold of serious harm at common law was to raise the bar for what is considered to be defamatory. An application of the test in a way which merely continues the existing approach to what is defamatory does not, with respect, give sufficient weight to the reasoning of Tugendhat J in *Thornton*.

Applying the test as he identified it, Le Miere J was not satisfied that the imputations were capable of meeting the minimum threshold of seriousness.¹⁷⁹ In doing so, his Honour expressly contemplated that whether the imputations in fact meet the threshold of seriousness would be a matter for the jury at trial.¹⁸⁰

Le Miere J then proceeded to consider whether the proceedings should be stayed on the grounds of *Bleyer*. In relation to the oral statement made to the parish priest, his Honour was satisfied that the continuation of the defamation proceedings would constitute an abuse of process, in substantial part on *Bleyer* grounds.¹⁸¹ However, Le Miere J was not persuaded that the other claims should be stayed as an abuse of process.¹⁸²

Unlike the principle of proportionality, there has been little consideration of a minimum threshold of seriousness in Australian case law. This seems to be the extent of the judicial consideration of the minimum threshold of seriousness under Australian law thus far. There has been receptivity to such a threshold in New Zealand case law.¹⁸³ It should be noted that,

¹⁷⁵ *Armstrong v McIntosh [No 2]* [2019] WASC 379, [75] (Le Miere J).

¹⁷⁶ *Armstrong v McIntosh [No 2]* [2019] WASC 379, [75].

¹⁷⁷ *Armstrong v McIntosh [No 2]* [2019] WASC 379, [80].

¹⁷⁸ *Armstrong v McIntosh [No 2]* [2019] WASC 379, [83].

¹⁷⁹ *Armstrong v McIntosh [No 2]* [2019] WASC 379, [84]-[99].

¹⁸⁰ *Armstrong v McIntosh [No 2]* [2019] WASC 379, [97], [99] (Le Miere J).

¹⁸¹ *Armstrong v McIntosh [No 2]* [2019] WASC 379, [150]-[151] (Le Miere J).

¹⁸² *Armstrong v McIntosh [No 2]* [2019] WASC 379, [152]-[165].

¹⁸³ See, for example, *CPA Australia Ltd v New Zealand Institute of Chartered Accountants* [2015] NZHC 1854, [104]-[121] (Dobson J); *Opai v Culpan* [2017] NZAR 1142, 1151-53 (Katz J); [2017] NZHC 1036; *X v Attorney-*

unlike Australia, New Zealand has a statutory bill of rights, expressly protecting freedom of expression.¹⁸⁴ The deployment of this consideration in the New Zealand case law is important. As with the English case law, reference to freedom of expression is an additional reason for identifying a minimum threshold of seriousness as part of New Zealand law, the principal reason being the proper interpretation of *Sim v Stretch*.

It is perhaps surprising that there has been so little consideration of the minimum threshold of seriousness in Australian case law. It may be attributable to a lack of awareness of it amongst legal practitioners specialising in defamation law. However, there is clearly an awareness of the statutory requirement of a serious harm threshold under the *Defamation Act 2013* s 1(1). In the current defamation law reform process, there has been strong support expressed for the introduction of such a test under Australian law.

Whether a statutory threshold of serious harm is appropriate in Australia is debatable. As Lord Sumption points out in *Lachaux*, the *Defamation Act 2013* s 1(1) is the culmination of the two lines of authority emanating from *Jameel* and *Thornton*.¹⁸⁵ The reception of *Jameel* and *Thornton* in Australia has been mixed, at best. Whereas the *Defamation Act 2013* s 1(1) builds upon and modifies the existing common law in England, any statutory threshold of serious harm would not have the same footing in the common law. The interpretation of such a statutory threshold then would be somewhat unpredictable. Notably, the national, uniform defamation laws do not attempt to define what is defamatory, nor should they. It proceeds on the basis that such a definition is a complex task best left to the common law. A statutory test of serious harm to reputation would be a partial attempt to legislate a test for what is defamatory. It may be wise for Australian law reformers carefully to consider whether a statutory threshold of seriousness should be introduced for a number of reasons. At this stage, the introduction of a statutory threshold of serious harm would be a legal transplant. There is always a risk with a legal transplant that it will not take in its new jurisdictional home, or that it will not take in the way that its transplanters anticipated, given a different legal climate.

It may be preferable to allow the common law of Australia more fully to develop its jurisprudence on the minimum threshold of serious harm. Such a doctrine is based on an interpretation of well-established common law tests for what is defamatory, most notably *Sim v Stretch*. There is no reason why Australian courts could not interpret these cases in the same way. The common law approach to a threshold of seriousness also preserves, and is consonant with, the presumption of damage, as Tugendhat J makes clear in *Thornton v Telegraph Media Group Ltd*. A common law minimum threshold of seriousness would be an argument which could be raised by a defendant in an appropriate case to deny that a matter is capable of being defamatory, whereas a statutory requirement of serious harm would be an issue which a plaintiff would have to satisfy in every case. It is another means of dealing with trivial defamation claims. It is arguably likely to be of greater relevance and impact than the principle of proportionality, given that it is directed to determining the issue of whether a matter should be regarded as defamatory – a basic issue in every defamation case – rather than characterising it as an abuse of process – a rare and extreme assessment.

General (No 2) [2017] NZAR 1365, 1369-71 (Simon France J); [2017] EWHC 1136; *Sellman v Slater* [2018] 2 NZLR 218, 237-40 (Palmer J); [2017] NZHC 2392; *Craig v Stiekma (No 2)* [2018] NZAR 1003, 1013-18 (Fitzgerald J); [2018] NZHC 838; *Stringer v Craig* [2019] NZHC 1363, [20] (Palmer J). See generally Kim Gould, 'Locating a "Threshold of Seriousness" in the Australian Tests of Defamation' (2017) 33 *Sydney Law Review* 333, 346-47.

¹⁸⁴ *New Zealand Bill of Rights Act 1990* (NZ) s 14.

¹⁸⁵ [2019] UKSC 27; [2019] 3 WLR 18, 25-26; [2019] UKSC 27.

Conclusion

The defence of triviality is a unique creation of Australian defamation law. For that reason, it should not be dispensed with lightly. In addition, defendants should have available to them as many as possible to deal with trivial defamation claims. Plaintiffs already have a range of tests available to them by which to hold defendants liable for defamation, so equally defendants should have a range of means at their disposal to address trivial defamation claims. There is, however, certainly scope to reform the terms of the statutory defence of triviality. A small but important reform would be to make explicit that the relevant harm to which the defence is directed is damage to reputation, not injury to feelings *simpliciter*.

Nevertheless, there is a real limitation to the defence of triviality dealing with trivial defamation claims. In the absence of effective strike-out or summary judgment procedures in defamation claims based on the availability of a defence of triviality, the point in the proceeding at which triviality will fall to be considered is after liability has been determined and the focus has shifted to the defendant. By this stage of the proceedings, substantial time and costs of the parties and the courts may have been expended. It is vital to consider more effective means of dealing with trivial defamation claims at the outset, so that time, costs and other limited resources for the administration of justice will not be wasted.

The growing acceptance of the principle of proportionality in Australia as a threshold means of dealing with trivial defamation claims is encouraging. However, as it is a form of abuse of process, its application will necessarily be rare. A more fruitful avenue for dealing with trivial defamation claims at the outset is a minimum threshold of seriousness. Such a threshold has received insufficient attention in Australian defamation law but it offers the greatest prospect for dealing effectively with trivial defamation claims before they needlessly absorb time, costs and resources. The reason for this is that the minimum threshold of seriousness originates from the common law tests for what is defamatory. It invites courts to take more seriously the effect of finding a matter defamatory and encourages them to be less willing than they have been historically to find a matter to be defamatory. It is intended to increase the difficulty for a plaintiff in establishing that the matter is defamatory. There is an understandable attraction for a statutory test for serious harm in Australia. How such a statutory test may be interpreted and applied, if introduced, will be somewhat unpredictable, given the lack of substantial support in the common law of Australia for *Thornton* in particular.

Ultimately, though, the defence of triviality, the principle of proportionality and the minimum threshold of serious harm should not be viewed as mutually exclusive or contradictory. Despite the disparate sources from which they originate, these doctrines should be treated as mutually reinforcing means of dealing with trivial defamation claims. All of these doctrines should be at a court's disposal when seeking to deal with marginal defamation cases.