9

# Homosexuality, Defamatory Meaning and Reputational Injury in English Law

*Alexandros Antoniou and Dimitris Akrivos*
*This chapter was supported by the University of Essex's open access fund.*

## Introduction

In contrast to the law of negligence (which aims to compensate for injuries to the person and property) or the torts of wrongful arrest and false imprisonment (the purpose of which is to provide redress for the deprivation of personal liberty), the tort of defamation aims to deter and remedy unwarranted damage to a person's reputation during their life.[1] The action in defamation is designed to target falsehood.[2] If a defendant can establish the truth of the defamatory statement, they have a complete defence and their motive in publishing the offending words is irrelevant.[3] This long-standing principle of defamation law may be seen as tilting the balance in favour of publication in cases of uncomfortable, reputation-damaging truths, but this issue falls at the centre of the tort of misuse of private information. The structure of defamation does not seem to offer a place for it.[4] Although anyone can theoretically prevent

1 There is no defamation of the dead in England and Wales. The position is the same in Scotland; *Broom v Ritchie & Co* (1904) 12 SLT 205. A deceased's relatives may have a claim if the words in question reflect badly on their reputations. Note that the European Court of Human Rights has held in several cases that an individual's Article 8 rights may be engaged by defamatory references to deceased members of that individual's family; see, for example, *Plon (Société) v France* (2006) 42 EHRR 36; *Genner v Austria* [2016] ECHR 36.

2 See *McPherson v Daniels* (1829) 10 B&C 263, 272 (Littledale J): 'the law will not permit a man to recover damages in respect of an injury to a character which he does not or ought not to possess'.

3 Note, however, the exception arising from sections 8 and 16(1)–(3) of the Rehabilitation of Offenders Act 1974 in cases where a person has a 'spent' conviction for a crime.

4 Jenny Steele, *Tort Law* (5th edn, Oxford University Press, 2022), chapter 5.2.

the publication of (or recover damages for) untrue public statements that make other people think less of them, in reality, a significant number of cases in this area involve public figures,[5] including politicians, celebrities and multinational corporations, either because damaging remarks about them are more likely to reach a broader audience or because they enjoy wide visibility and may have a greater interest in what others think of them.

The chapter examines whether publications misidentifying an individual as homosexual should serve as the basis of a defamation suit. By contrast to other common law jurisdictions,[6] this question has not attracted sustained consideration within contemporary English law. To contextualise the issue, we begin by exploring the evolution of dominant societal norms, key events and pieces of legislation that shaped the trajectory of the LGBT movement in England and Wales. We then proceed to examine the law's treatment of false defamatory allegations imputing homosexuality. We conclude that, within the boundaries of the definitional elements of the tort of defamation, there are still some restrictions around falsely stating or implying that someone has engaged in homosexual conduct, despite the apparent shift in public attitudes towards gay individuals. We argue that in the current socio-political climate, in which echoes of the past stigma, discrimination and persistent stereotyping can still be heard in gay people's everyday lives, preventing them from achieving tangible equality with their heterosexual counterparts, the misidentification of someone as gay should never be treated as a legally recognisable reputational harm. Such recognition would endorse the undesirable idea that homophobia is worthy of law's respect.

## Historical overview

To better understand the law's and courts' approach to false imputations of homosexuality, it is important to first consider the wider social context in which these are interpreted. Throughout history, there is ample evidence demonstrating

[5] For example, a famous New Zealand cricketer won £90,000 in damages over statements on Twitter that he had been involved in match fixing. Such a very serious allegation about a professional sportsman was found to have gone to the core attributes of this personality and could 'entirely destroy his reputation for integrity'; see *Cairns v Modi* [2012] EWHC 756, para 121.

[6] For instance, American and Australian jurisprudence is rich with cases and legal scholarship pertaining to defamation and homosexuality; see further Laurie Phillips, 'Libelous Language Post *Lawrence*: Accusations of Homosexuality as Defamation' (2012) 46(1) *Free Speech Yearbook* 55; Holly Miller, 'Homosexuality as Defamation: A Proposal for the Use of the "Right-Thinking Minds" Approach in the Development of Modern Jurisprudence' (2013) 18(3) *Communication Law and Policy* 349; Matthew Bunker, Drew Shenkman and Charles Tobin, 'Not That There's Anything Wrong With That: Imputations of Homosexuality and the Normative Structure of Defamation Law' (2011) 21(3) *Fordham Intellectual Property, Media and Entertainment Law Journal* 581; Theodore Bennett, 'Not So Straight-Talking: How Defamation Law Should Treat Imputations of Homosexuality' (2016) 35(2) *University of Queensland Law Journal* 313.

how the heteronormative foundations of the law, that is, its intrinsic mechanisms of constructing heterosexuality as natural and normal (for example, in the regulation of marriage, family life, labour, economic support and beyond),[7] favoured a view of gay people as 'deviant outsiders', contributing to their stigmatisation and marginalisation.[8]

The Buggery Act of 1533, the first legislation against sodomy in English criminal law, provided that the '*detestable* and *abominable* vice of buggery committed with mankind or beast' was punishable by death. More than three centuries later, the Offences Against the Person Act 1861 adopted a slightly more lenient approach, still recognising buggery as a criminal offence, but replacing the death penalty with a sentence of penal servitude for any term between ten years and life. In addition, the Criminal Law Amendment Act 1885 (also known as the Labouchere Amendment after the MP who proposed it) widened the net in the clampdown against homosexual acts and became known as 'The Blackmailer's Charter' as it rendered men who engaged in sexual activities with other men particularly vulnerable to extortion.[9] That Act introduced the offence of 'gross indecency', criminalising consensual sexual activity between men in public or private. This offence, which also became part of the statutes of Canada and other British colonies, carried a penalty of up to two years of imprisonment with or without hard labour. Due to the Act's ambiguous wording, 'gross indecency' was often used by the courts to punish sexual activity between men in cases where sodomy could not be proven.[10] It was under the 1885 Act that famous figures including author Oscar Wilde and mathematician Alan Turing were disgraced, convicted and punished for committing homosexual acts.[11]

What was largely regarded as a turning point in the state's treatment of homosexuals but, in actual fact, did little to tackle their dominant image as 'others', was the 1957 publication of the Report of the Departmental Committee on Homosexual Offences and Prostitution (known as the Wolfenden Report).[12] The committee, led by Sir John Wolfenden, recommended the decriminalisation of homosexual acts between consenting adults in private. This was, in principle, a positive development for gay rights, despite the committee making no attempt

7 Marcus Herz and Thomas Johansson, 'The Normativity of the Concept of Heteronormativity' (2015) 62(8) *Journal of Homosexuality* 1009, 1011.

8 Senthorun Raj and Peter Dunne, 'Queering Outside the (Legal) Box: LGBTIQ People in the UK' in Senthorun Raj and Peter Dunne (eds), *The Queer Outside in Law* (Springer, 2021) 4; Meredith Worthen, *Sexual Deviance and Society: A Sociological Examination* (Routledge, 2021) 132.

9 Kath Wilson, 'The Road to Equality: The Struggle of Gay Men and Lesbians to Achieve Equal Rights Before the Law' (2014) 12(3) *British Journal of Community Justice* 81, 81–2.

10 Hugh David, *On Queer Street: A Social History of British Homosexuality, 1895–1995* (HarperCollins, 1997) 17–18.

11 ibid., 5.

12 Home Office and Scottish Home Department, Report of the Committee on Homosexual Offences and Prostitution Cmnd 247, 1957 (The Wolfenden Report).

to challenge the view of homosexuality as immoral, but instead arguing solely that criminal law should only be concerned with homosexual acts taking place in public and that 'there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business'.[13] Moreover, the committee drew a clear line between homosexual and heterosexual sexual acts, proposing that the age of consent for the former be set at 21 as opposed to 16 for the latter. The committee's proposals were met with great scepticism in the House of Commons at the time and it took another decade of continuous lobbying before they were passed into law with the Sexual Offences Act 1967.[14]

In the 1980s, section 28 of the Local Government Act 1988 cast a long and dark shadow over gay lives by legitimising anti-gay institutional discrimination and reinforcing the idea that homosexuality was shameful and a threat to children. The then prime minister, Margaret Thatcher, was quoted at the 1987 Conservative Party Conference as saying that, instead of teaching children to 'respect traditional moral values', schools allegedly taught them they 'had an inalienable right to be gay'.[15] In response to such concerns, 'Section 28', as it became known, was introduced a year later, prohibiting local councils from 'intentionally [promoting] homosexuality' or 'the teaching in any maintained school of the *acceptability of homosexuality as a pretended family relationship*'.[16] Section 28 provided an ineffectual basis for practical law enforcement as no one was entirely sure what 'promoting homosexuality' actually meant.[17] Nonetheless, this homophobic piece of legislation came at a time when gay men were being scapegoated for the AIDS epidemic[18] and further consolidated their vilification.[19] At the same time, however, it constituted a 'defining moment' in British gay and lesbian history – it contributed to the politicisation of a new generation of gay men and women,[20] inadvertently producing what it had aspired to hide

13 ibid., para 61; see also Charles Berg, 'The Wolfenden Report on Homosexual Offences' in Charles Berg (ed), *Fear, Punishment Anxiety and the Wolfenden Report* (Routledge, 2021) 15.

14 Matthew Waites, 'Sexual Citizens: Legislating the Age of Consent in Britain' in Terrell Carver and Véronique Mottier (eds), *Politics of Sexuality: Identity, Gender, Citizenship* (Routledge, 2005) 26.

15 Jeffrey Weeks, *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present* (Quartet Books, 1990) 231.

16 Local Government Act 1988, s 28 (our emphasis); see also Sue Wise, '"New Right" or "Backlash"? Section 28, Moral Panic and "Promoting Homosexuality"' (2000) 5(1) *Sociological Research Online* 148.

17 David Evans, 'Section 28: Law, Myth and Paradox' (1989) 9(27) *Critical Social Policy* 73, 82; Stephen Engel, *The Unfinished Revolution: Social Movement Theory and The Gay and Lesbian Movement* (Cambridge University Press, 2001) 93.

18 Philip Thomas, 'The Nuclear Family, Ideology and AIDS in the Thatcher Years' (1993) 1(1) *Feminist Legal Studies* 23, 24.

19 Stuart Hall, *The Hard Road to Renewal: Thatcherism and the Crisis of the Left* (Verso, 1988) 282.

20 Anya Palmer, 'Lesbian and Gay Rights Campaigning: A Report from The Coalface' in Angelia Wilson (ed), *A Simple Matter of Justice: Theorizing Lesbian and Gay Politics* (Cassell, 1995) 35.

away, namely gay visibility in the public sphere.[21] After continuous efforts to repeal what it considered to be a fundamentally prejudiced piece of legislation, and despite strong opposition from the House of Lords, Tony Blair's Labour government finally succeeded in abolishing Section 28 in England and Wales in 2003.[22] In 2009, the then Conservative Prime Minister David Cameron (who had himself voted against the repeal of Section 28) publicly apologised for the distress the provision had caused to the gay community, stating that his party had 'got it wrong' on this 'emotional' issue and that he hoped gay people could forgive them.[23]

Beyond any attempts to mitigate the dark shadow of Section 28, enormous strides have been made in the 21st century in the fight for the destigmatisation of homosexuality and the legal recognition of gay rights through a wave of progressive legislations: the Sexual Offences (Amendment) Act 2000 lowered the age of consent for men engaging in same-sex sexual activities to 16, equalising it with the age of consent for heterosexual sexual activities. Moreover, several other Acts introduced in the early part of the century extended the definitions of family and marriage beyond the confines of heterosexual relationships. The Adoption and Children Act 2002 allowed unmarried people and same-sex couples in England and Wales to adopt children. The Civil Partnership Act 2004 permitted same-sex couples to form civil partnerships and, later, the Marriage (Same-Sex Couples) Act 2013 provided them with the same right to marry as opposite-sex couples. Importantly, the Equality Act 2010 created an overarching protective framework against discrimination, harassment and victimisation based on sexual orientation – albeit one which is not without limitations as the Act does not prohibit sexual orientation harassment in the context of provision of services, education, public functions and disposal and management of premises.[24] More recently, the government announced in the 2022 Queen's Speech plans to ban sexual orientation conversion therapy practices, stressing that these are 'abhorrent', ineffective and can cause extensive harm.[25]

Such legal developments have brought high visibility to gay people in the public sphere in recent years but, apart from raising the public's awareness over LGBT issues, they also increased the risks of gay people being targeted due to their sexual orientation.[26] Contemporary institutional approaches to LGBT issues

21 Engel, *The Unfinished Revolution*, 93.

22 Kirsty Milne, *Manufacturing Dissent: Single-Issue Protest, The Public and The Press* (Demos, 2005) 40.

23 Andrew Pierce, 'Cameron says sorry to gays for 1980s Section 28 law' *The Daily Telegraph* 2 July 2009.

24 Equality Act 2010, ss 29(8) and 33(6); see also Judicial College, *Equal Treatment Bench Book* (Courts and Tribunals Judiciary, 2021) 289.

25 Prime Minister's Office and HRH The Prince of Wales, 'The Queen's Speech 2022' (2022) 128.

26 Josh Milton, 'Anti-LGBTQ+ hate crime reports explode across UK, damning police figures confirm' *PinkNews* 15 August 2022.

may not be openly discriminatory like Section 28, but do not always go as far as they could to effectively address the LGBT community's concerns. The LGBT advisory panel that was set up as part of the government's plan to act upon the findings of its Equalities Office's 2018 LGBT Survey (one of the most notable government attempts to acquire an insight into the key issues non-heterosexual people in the UK are concerned about today)[27] was disbanded in 2021 with several of its members accusing the then Equalities Ministers Liz Truss and Kemi Badenoch of being 'ignorant' on key LGBT issues and ultimately creating a 'hostile environment' for LGBT people.[28] Almost a year later, several LGBT activists expressed disappointment at the government's failure to bring forward any concrete plans for establishing a 'replacement' LGBT panel.[29] Finally, 2022 presented gay people with new challenges: the ongoing discussions over the exclusion of 'consenting' adults from the proposed ban on conversion therapy,[30] or the stigmatising public discourse framing 'monkeypox' as a 'gay disease',[31] prove that the fight for gay equality is far from over and that any lessons from the past (such as in the case of monkeypox, the consequences of the demonisation of gay men during the AIDS epidemic)[32] cannot be taken for granted. The precariousness currently experienced by LGBT people in the UK is also reflected in the country's continuous drop in the International Lesbian, Gay, Bisexual, Trans and Intersex Association's (ILGA) annual rankings for LGBT rights across Europe: due to its 'ineffective and non-systematic work', the UK – which occupied first place back in 2015 – was the country with 'the most dramatic drop' in its score, falling from 10th place in 2021 to 14th in 2022 and 17th in 2023.[33]

With this contextual background in mind, we now proceed to look at the elements of the tort of defamation and examine how the courts have addressed

27 Government Equalities Office (GEO), National LGBT Survey: Summary Report, 2018.

28 Women and Equalities Committee (WEC), Oral Evidence: The LGBT Advisory Panel (House of Commons, 2021) HC 163 12. See also Aubrey Allegretti, 'Three UK government LGBT advisers quit with rebuke of "ignorant" ministers' *The Guardian* 11 March 2021.

29 Ashley Cowburn, 'Liz Truss faces criticism for failing to set up new LGBT+ advisory panel nine months after scrapping old one' *The Independent* 9 January 2022.

30 Adam Jowett, 'Does the government's plan to allow "consensual" conversion therapy undermine its proposed ban?' *The Conversation* 2 November 2021.

31 UNAIDS press release on monkeypox, 'UNAIDS warns that stigmatizing language on monkeypox jeopardises public health' Geneva, 22 May 2022 (available at https://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2022/may/20220522_PR_Monkeypox).

32 Patricia Devine, Ashby Plant and Kristen Harrison, 'The Problem of "Us" Versus "Them" and AIDS Stigma' (1999) 42(7) *American Behavioral Scientist* 1212, 1215.

33 ILGA-Europe's Rainbow Map ranks all 49 European countries based on their legal and policy practices towards sexual minorities. For a breakdown of the criteria based on which countries are assessed and more information on the latest ranking, see ILGA-Europe, 'Rainbow Europe Map and Index 2023' (11 May 2023) (available at https://www.ilga-europe.org/report/rainbow-europe-2023/).

over the years the question of whether falsely calling someone gay adversely impacts an individual's reputation.

## The elements of a claim generally

The primary function of the law of defamation is to protect individuals' interest in safeguarding and vindicating their reputation. The essence of the tort is the publication of words conveying a defamatory imputation. At common law, the claimant in a defamation action has needed to establish only that the defendant published a statement; with defamatory meaning; referring to the claimant. Liability is limited through several defences specific to defamation, including truth, absolute and qualified privilege,[34] honest opinion and publication on a matter of public interest. There are also special rules concerning website operators[35] and, in certain circumstances, the defendant may choose to apologise and make an offer of amends (rather than contest a case through the courts).[36]

Under English law, determining whether the words complained of are defamatory involves the examination of the following steps. As a starting point, a court must identify the meaning the words would convey to the 'ordinary reasonable' reader or viewer. Then, it must determine whether the meaning found meets the common law requirements for what is defamatory. It will do so if it satisfies what are being referred to as the 'consensus' and 'threshold of seriousness' requirements (discussed later). Finally, there is an additional statutory requirement under section 1 of the Defamation Act 2013, that is, the court must decide whether the claimant has established not only that the statement had a defamatory tendency but also that it did as a matter of fact cause them serious reputational harm (or that it was likely to do so), being harm of the kind represented by general damage, rather than special damage (such as pecuniary loss to interests other than reputation).[37]

This new element was born out of concerns raised over the past few years by campaign groups, academics and media organisations that the law of defamation had tipped the balance too far in favour of protecting claimants' rights and that its heavy-duty tools were used to suppress criticism with disquieting effect. Several of the tort's features, such as the complexity of costly proceedings, the absence of legal aid to support such claims, the reverse burden of proof on the defendant and the relatively limited defences, left the law open to misuse by powerful claimants, often intolerant of criticism. The law was eventually codified and placed on a

34 For statutory privilege, see the provisions in the Defamation Act 1996, ss 14–15, and Schedule 1 (Parts 1 and 2). Note that there are some circumstances in which a defendant can benefit from privilege which exists in common law ('reply to attack').

35 The Defamation (Operators of Websites) Regulations 2013.

36 Defamation Act 1996, ss 2–4.

37 *Lachaux v Independent Print Ltd & Anor* [2019] UKSC 27, para 15.

statutory footing by the reforms that led to the Defamation Act 2013.[38] The new Act intended to 'raise the bar'[39] for defamation claims so that only cases involving 'serious harm' to the claimant's reputation could proceed.[40] But how does the law of defamation (including its reformed version) react when a person is incorrectly and/or unwantedly described as gay?

## Meaning

Defamation disputes often turn on meaning. This is a key issue, from which much follows. Determining meaning has a bearing on whether the 'serious harm' threshold has been met. It is also relevant to potential defences, for example if a publisher wants to defend a claim of corruption by relying on the defence of truth, they need to know what interpretation has to be proven 'substantially true'[41] to defeat that claim. The gravity of the allegation will also be considered in awarding damages. Prior to the 2013 reforms, the meaning of words in libel proceedings was pre-eminently determined by a jury (which represented a cross-section of society) as the tribunal of fact. A judge determined whether a publication was reasonably capable, as a matter of law, of being understood as defamatory and removed the case from the jury if it was not. However, the 2013 Act reversed the presumption in favour of a jury trial to enable better case management and reduce the costs of libel litigation.[42] Modern defamation practice now recognises that the determination of the meaning of the words complained of is a matter for judges to resolve at an early stage in the proceedings.[43]

A difficulty that often arises is that the words published may have multiple interpretations which may or may not have a defamatory meaning. A judge typically addresses the question of meaning by ascribing a single ('the one and only')[44] meaning – sometimes from a spectrum of possible meanings – to the words of an allegedly defamatory communication, that is, the meaning in which

38 The Act came into effect on 1 January 2014. In July 2022, the UK government announced new proposals that would empower courts in England and Wales to dismiss at an early stage intimidatory legal actions by wealthy claimants to stifle free speech, known as Strategic Lawsuits Against Public Participation (SLAPPs). While the 2013 reform package seems to have worked reasonably effectively – on this point see The Lord Chancellor and Secretary of State for Justice, Post-Legislative Memorandum: The Defamation Act 2013 CP 180, 2019 – it was felt that it was not specifically designed to meet the new challenges presented by the growing threat of such tactics; see further Ministry of Justice (MoJ), Strategic Lawsuits Against Public Participation: Government Response to the Call for Evidence, 2022.

39 Explanatory Notes to the Defamation Act 2013, para 11.

40 Defamation Act (DA) 2013, s 1(1). If the claimant is a company, it faces an even higher threshold as it is required to establish actual or likely 'serious financial loss' under section 1(2) of the same.

41 DA 2013, s 2.

42 DA 2013, s 11.

43 *Sharif v Associated Newspapers Ltd* [2021] EWHC 343, para 43.

44 *Slim v Daily Telegraph* [1968] 2 QB 157, 173 (Diplock LJ).

'fair-minded',[45] reasonable people of ordinary intelligence, with the ordinary person's general knowledge and experience of worldly affairs, would be likely to understand them. The publisher's (writer's or speaker's) intention and knowledge are immaterial.[46] The standard practice followed at trials of meaning (without a jury) is that a judge reads the publication complained of in its original format and reaches some preliminary conclusions, but without being bound by the competing meanings contended for.[47] The judge places himself or herself as best as they can in the shoes of the hypothetical ordinary, reasonable reader (not any actual reader of the words),[48] having in mind the established legal principles of interpretation, developed in accumulated case law. These were distilled in the frequently cited judgment of Sir Anthony Clarke MR in *Jeynes*,[49] which was endorsed by the Supreme Court in *Stocker*[50] and more recently elaborated on by Nicklin J in *Koutsogiannis*.[51]

The hypothetical reasonable reader, viewer, listener (and so on) against whom a court is to judge whether the words have the meaning contended for, is admittedly an abstract concept, but there is a good reason why the common law approach excludes evidence of how individual readers actually understood the words. Among the actual audience of a defamatory publication there will normally be great variation in the way the words are understood. Evidence of reputational harm could include, for instance, receiving a torrent of abuse on social media or hateful mail and being called names (or even spat at) on the street. However, such evidence would do little to assist the court in choosing between competing meanings of words. Reasonable readers would not normally resort to such extreme behaviours so the current rule of interpretation introduces an element of fairness by limiting the speaker's responsibility to those meanings which a reasonable person would give the words.[52] The courts accept that the ordinary, reasonable reader is in essence 'a device to control liability and strike a balance between free speech and reputation'.[53]

Although it is not entirely clear what attributes the hypothetical reasonable reader carries, judges have recognised their potential weaknesses: they are unlikely

45 *Lewis v Daily Telegraph* [1964] AC 234, 260 (Lord Reid); *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65, 71 (Lord Bridge). On the concept of the (queer) reasonable person, see further Haim Abraham, Chapter 4, this volume.

46 In practice, this means that it is not a defence for a publisher to claim that they did not mean to defame the claimant or did not realise what the words used implied.

47 See for instance *Lord Mohammed Sheikh v Associated Newspapers Limited* [2019] EWHC 2947, para 26; *Tinkler v Ferguson and Ors* [2019] EWCA Civ 819, para 9.

48 *Triplark Ltd v Northwood Hall (Freehold) Ltd* [2019] EWHC 3494, para 19.

49 *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130, para 14.

50 *Stocker v Stocker* [2019] UKSC 17, para 35.

51 *Koutsogiannis v Random House Group Ltd* [2019] EWHC 48, para 12 (approved by the Court of Appeal in *Corbyn v Millett* [2021] EWCA Civ 567, para 8).

52 Paul Mitchell, *The Making of the Modern English Law of Defamation* (Hart Publishing, 2005) 39.

53 *Oduro v Time-Life Entertainment Group Ltd* [2003] EWHC 1787, para 10.

to engage in an over-elaborate analysis of text, particularly with respect to online communications on social media platforms.[54] They can read between the lines and pick up an implication. They are allowed a certain amount of loose thinking, without, however, being overly suspicious. On the one hand, a reader who always adopts a bad meaning where a less serious is available is not reasonable (they are avid for scandal). But, on the other, always adopting the less derogatory meaning would be naïve and thus unreasonable.[55] Moreover, ascertaining the meaning of a given statement is very much context-dependent;[56] for instance, the word 'mafia' may be understood in a certain context as a narrow exclusive circle held together by common interests or purposes in a metaphorical, rather than literal, sense. The views of the hypothetical reasonable person are also likely to change over time: 'words which 100 years ago did not import a slanderous sense may now; and so vice versa'.[57] It is thus the current general usage of the words that should be looked at when determining meaning. By way of example, the primary popular meaning of 'gay' is now homosexual, and perhaps not the stereotype of a bright and cheerful person, which would have been the case 60 years ago or so.[58]

As the next section discusses, the principal test to determine whether the meaning conveyed is defamatory makes 'right-thinking' persons in society the point of reference. While homosexuality imputations should not negatively affect people's views of the claimant, and in the minds of right-thinking people would not, it can hardly be discounted that unfortunately such imputation may often be considered damaging. Not all people are right-minded and even those who are may hold certain views by reason of their religious convictions which may lead them to see sexual interest in members of one's own sex as diminishing a person's standing. If the law deems a claim actionable in these circumstances, then at some level, it risks lending credence to societal prejudices (for example, that being gay is a negative attribute or that homophobia is right-thinking).[59] Judicial recognition of such claims has the potential to validate these perceptions and carry them forward. Does the tort of defamation provide any mechanisms to safeguard against this concern?

54 *Stocker v Stocker* [2019] UKSC 17, paras 41–6; see also Alexandros Antoniou, 'Libel, social media, and celebrity journalism in the WAG-gate' (2022) 27(4) *Communications Law* 177.

55 *Koutsogiannis v Random House Group Ltd* [2019] EWHC 48, para 12.

56 *Nevill v Fine Arts Co* [1897] AC 68, 72; *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65; *Bukovsky v CPS* [2017] EWCA Civ 1529, para 13; *Stocker v Stocker* [2019] UKSC 17, para 40; *Brown v Bower and Anor* [2017] EWHC 2637, para 29.

57 *Harrison v Thornborough* (1713) 88 ER 691, 691–2.

58 Richard Parkes et al, *Gatley on Libel and Slander* (13th edn, Sweet & Maxwell, 2022) 3029.

59 See also Robert Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74(3) *California Law Review* 691, 737.

## Defamatory imputations

Not every false statement about another person gives rise to a claim. Untrue imputations are only actionable in English law if they are defamatory. The English courts have not so far arrived at a single formulation of what amounts to a defamatory allegation but most courts holding false imputations of homosexuality to be defamatory per se would normally rely upon fitting the statements into one of the traditional common law categories of statements, namely that a publication tends to injure a claimant's reputation, first, by treating them as a figure of fun or an object of ridicule;[60] second, if it causes them to be shunned or avoided;[61] or third, if it 'tends to lower them in the estimation of the right-thinking members of society generally'.[62] These definitions are generally regarded as cumulative, so words falling within any of them are actionable. Although still influential, these distillations do not clearly differentiate between disparaging someone's reputation and wounding one's feelings and arguably offer little help in maintaining a distinction between protecting one's reputation from being impaired and protecting one's feelings or personal dignity. Though it was not suggested in parliament when the 2013 Act was passed that the common law tests for what amounts to a defamatory statement would be abandoned, it is questionable whether some of the old definitions (for example, ridicule) would survive under the new Act if read in the light of the new requirement of 'serious harm' to the claimant's reputation.

The present and dominant position under English law is that a meaning is defamatory and thus actionable if it meets two requirements. The first is known as the 'threshold of seriousness'. That is, to be defamatory, the imputation must be one that would tend to have a 'substantially adverse effect'[63] on the way people would treat the claimant. The second, which is often referred to as 'the consensus requirement',[64] is that the meaning must be one that 'tends to lower the claimant in the estimation of right-thinking people generally'.[65] A judge must determine whether the conduct or views the offending statement attributes to the claimant are contrary to 'common, shared values of our society'.[66]

The consensus requirement envisages that some standard of opinion must be set, and it is that of the 'right-thinking persons' generally. This is, however, questionable because it rests on the presumption of an unstated notion of a homogeneous community of 'right-thinking' people who would react in a uniform and foreseeable manner.[67] Much depends on how this judicial anthropomorphisation

60 *Parmiter v Coupland* (1840) 6 M & W 105, 108.
61 *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581, 587.
62 *Sim v Stretch* [1936] 2 All ER 1237, 1240.
63 *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414, para 98 (Tugendhat J).
64 *Corbyn v Millett* [2021] EWCA Civ 567 para 9 (Warby LJ).
65 ibid.; see also *Scott v Sampson* (1882) 8 QBD 491, 503 (Cave J).
66 *Monroe v Hopkins* [2017] EWHC 433, para 51.
67 Eric Barendt, 'What is the Point of Libel Law?' (1999) 52(1) *Current Legal Problems* 110, 120.

of a legal standard would react. Support for this construct that is conventionally used in shaping outcomes in defamation cases is not universal. In a case heard by the High Court of Australia, Kirby J candidly observed that: 'it would be preferable to drop this fiction altogether. Judges should not hide behind their pretended reliance on the fictitious reasonable recipient of the alleged defamatory material, attributing to such a person the outcome that the judges actually determine for themselves.'[68] In *Monroe v Hopkins*, Warby J (as he then was) summarised the 'right-thinking person' metaphor as referring to 'common standards', meaning that a statement is not defamatory if it would only tend to have an adverse effect on the attitudes to the claimant of a certain section of society.[69] The ordinary right-thinking person does not simply represent the 'majority'; it is a more abstract notion than that. The test sets a benchmark by which some views are excluded from consideration as being unacceptable.[70] Fogle argues that the 'right-mindedness' concept suggests that people whose attitudes directly contradict public policy are excluded and implicitly labels those who might entertain an adverse reaction to a person who had homosexual intercourse as 'wrong-thinking'.[71] These days, only 'wrong-thinking' people would harbour feelings of scorn, contempt or hostility toward gay people (a premise which is, however, susceptible to ever-swinging sociocultural pendulum shifts). From this perspective, if a particular group's attitudes conflict with laws or are at odds with public policy, a court is unlikely to recognise these.

The underlying rationale of Fogle's view is that laws furthering public policy are an external reflection of community attitudes to homosexuality generally. Despite the enactment of an increasing number of legislative provisions which influence a wide array of life facets (including same-sex relationships, rights to parenthood and parental responsibility, adoption, employment, immigration, inclusion in the armed forces and so on)[72] and seek to treat people equally regardless of their sexuality, it is still debatable (as we pointed out earlier in our historical overview) whether a sufficiently solid and consistent legislative regime has been achieved.[73] An implication of this is that gaps in or limits to anti-discrimination legislation could similarly be highlighted as indicators of community standards to be considered when determining the capacity to defame. So, while statutes

68 *Favell v Queensland Newspapers Pty Ltd* [2005] HCA 52, para 24.

69 *Monroe v Hopkins* [2017] EWHC 433, paras 50–1.

70 Some support for this proposition is found in *Monroe v Hopkins* [2017] EWHC 433, para 50, in which Warby J stated that this 'old phrase is … about people who think correctly'.

71 Randy Fogle, 'Is Calling Someone "Gay" Defamatory? The Meaning of Reputation, Community Mores, Gay Rights and Free Speech' (1993) 3 *Law and Sexuality* 165, 173.

72 Judicial College, Sexual Orientation, 2013 (available at https://www.judiciary.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB_SO+_finalised_.pdf); see also section 14 of the Armed Forces Act 2016, which repealed discriminatory laws enacted in the Criminal Justice and Public Order Act 1994 that enabled homosexual men and women to be sacked from the armed forces.

73 Judicial College, *Equal Treatment Bench Book* (Courts and Tribunals Judiciary, 2021).

might serve as an external foundation for legitimising judges' choices in rejecting a statement's capacity to defame, exclusively relying on them is not always a helpful and safe indicator of what standards should be applied by the courts.[74]

But, even if the courts seek to symbolically condemn homophobic attitudes as 'wrong-thinking', this does not eradicate the reality of prejudice,[75] which is amply demonstrated by the high levels of marginalisation and abuse gay people still face. Despite the progress made, homosexuality has not in effect been fully destigmatised and non-compliance with the heterosexual norm can still adversely impact on one's lived experiences: the UK government's 2018 LGBT Survey showed that respondents were less satisfied with their lives than the general UK population.[76] The survey highlighted various instances of inequality which negatively affected non-heterosexual people's quality of life.[77] Moreover, considering the alarming increase in homophobic hate crime figures in recent years, it would be erroneous and rather risky to assume that the road to gay equality is unidirectional. Official data show that police-recorded homophobic hate crime incidents in England and Wales almost doubled between 2016–17 and 2020–21.[78] While the authorities have claimed that this disconcerting trend might be due to a growing public awareness and improved identification of such offences, research indicating that non-heterosexual people remain reluctant to report their victimisation casts doubt over this explanation.[79] Such evidence shows a persistent – or, even more concerningly, widening – gap between legal efforts to promote gay equality and the discrimination, harassment and stigma that continue to constitute a distressing yet inevitable part of many gay people's lives.

---

74 For a detailed critique of Fogle's argument, see Lawrence McNamara, *Reputation and Defamation* (Oxford University Press, 2007) 209–10.

75 Robert Richards, 'Gay Labeling and Defamation Law: Have Attitudes Towards Homosexuality Changed Enough to Modify Reputational Torts?' (2009–10) 18(2) *CommLaw Conspectus: Journal of Communications Law and Technology Policy* 349, 369.

76 That is, by a mean satisfaction score of 6.5 compared to 7.7 out of 10; see GEO, National LGBT Survey: Summary Report, 2018, 10.

77 GEO, National LGBT Survey: Summary Report, 2018, 11–13: in particular, over 68 per cent of the respondents said they had avoided holding hands with their same-sex partner in public due to fear of a negative reaction from others; 65 per cent revealed they were not open about their sexual orientation in their workplace; 40 per cent had experienced an incident due to their sexual orientation (from verbal harassment and insults to disclosure of their LGBT status without permission, physical violence and so on) in the previous 12 months committed by someone they did not live with; finally, almost half of those who had decided to report such incidents to the police (45 per cent) were unsatisfied with the response they received.

78 With 8,569 and 17,135 incidents, respectively: Home Office, Hate Crime: England and Wales 2020 to 2021, 2021 (available at https://www.gov.uk/government/statistics/hate-crime-england-and-wales-2020-to-2021/hate-crime-england-and-wales-2020-to-2021).

79 Luke Hubbard, Hate Crime Report 2021: Supporting LGBT+ Victims of Hate Crime, Galop, 2021, 8: the LGBT anti-abuse organisation Galop found that only 13 per cent of respondents had reported incidents of violence or abuse to the police and even fewer to other agencies: local authorities (5 per cent), housing providers (4 per cent), medical services (7 per cent). Similarly, the aforementioned GEO LGBT Survey revealed that 94 per cent of the

## Homosexuality as defamation

One consequence of the standard of opinion adopted is the variability of the defamatory nature of an imputation depending on time and the state of public opinion. As a result, it is not always easy to say that certain imputations are defamatory whereas others are not. Previous decisions can prove useful in determining whether particular words can convey a defamatory imputation, though it should be remembered that these were decided before the requirement that an allegation must meet the necessary threshold of gravity imported into the law in 2013. As a result, it is entirely possible that imputations once thought to be defamatory are now unlikely to be treated as such.

### *Imputations of homosexuality pre-2013*

Early cases proceeded on the basis that imputations of homosexuality were inherently defamatory. The 1811 case of *Miss Marianne Woods and Miss Jane Pirie v Lady Helen Cumming Gordon*,[80] successfully appealed to the House of Lords in 1820, concerned two boarding school mistresses who were rumoured by a student to have indulged in a romantic affair. The allegation was incontrovertibly accepted as being defamatory, suggesting that romantic relationships between women were not greeted at the time with general societal approval. The judges were confronted with two equally (and evidently rather undesirable) controversial alternatives: whether the two well brought up, middle-class school mistresses had performed sexual acts together, or whether the half-Indian, half-Scottish schoolgirl from a good family had concocted a lurid tale about a rapturous relationship that would make any reader of that period blush. In words indicative of the heavy stigma attached at the time to any deviation from the heterosexual norm, Lord Justice-Clerk captured this dilemma: 'I never saw a cause so disgusting, view it in either light'.[81] Socio-legal analyses of this historical case recount how the subject matter of the proceedings, namely lesbianism, was shrouded with a veil of secrecy[82] and emphasise the judge's denial of the idea of female same-sex eroticism.[83]

---

most serious incidents against LGBT people went unreported if the perpetrator was someone the victim lived with; see GEO, National LGBT Survey: Summary Report, 2018, 13.

80 *Woods & Pirie v Cumming Gordon* (1820) (HL, unreported).

81 Geraldine Friedman, 'School for Scandal: Sexuality, Race, and National Vice and Virtue in Miss Marianne Woods and Miss Jane Pirie Against Lady Helen Cumming Gordon' (2005) 27(1) *Nineteenth Century Contexts* 53, 56.

82 Caroline Derry 'The "Legal" in Socio-legal History: *Woods and Pirie v Cumming Gordon*' (2022) 49(9) *Journal of Law and Society* 778, 792.

83 Lillian Faderman, *Scotch Verdict: Miss Pirie and Miss Woods v Dame Cumming Gordon* (William Morrow and Co, 1983) 148–9.

The issue reappeared in the early 20th century, when two draughtsmen in the employment of a Scottish engineering firm sued in 1917 over allegations they had participated in homosexual acts. Having observed that the two clerks had spent about ten minutes together in a water closet in the works with the door closed, the manager dismissed them summarily, refusing to hear any explanations. He addressed the staff the day after with the following strong language: 'Two of your number were dismissed yesterday at a moment's notice; they left without a shred of character; they are not men, they are beasts.'[84] Although it was accepted that the words were defamatory,[85] there is some debate on whether the harm to the clerks' reputation lay in the imputation of homosexuality per se,[86] or in the implication of criminality, given that homosexuality was at the time illegal in Scotland.[87] Little attempt was made to examine the nature of the imputations themselves. Instead, emphasis was placed on whether in the circumstances the communication was so violent as to afford evidence that it could not have been fairly and honestly made. It was ultimately held that the defendant's statement was privileged in respect of the interest and duty he had to inform the staff of the circumstances of the dismissal. No malice could be inferred either from the language he used or from the fact that he held no inquiry and demanded no explanations in accordance with fair employment procedures. Dismissing the claimants' actions, Lord Dundas stated:

> [i]t is to be regretted that the future careers of these two young men may be hampered by what has occurred. But it seems to me that, if this should be so, they have mainly themselves to blame. Their conduct, assuming the truth of their own averments, appears to have been amazingly foolish; they have augmented the publicity of the matter by raising these (as I think, ill-founded) actions.[88]

A similar approach seems to have been taken in the 1942 case *Kerr v Kennedy*,[89] in which the claimant complained that the defendant communicated to a common acquaintance of the parties that the former was a lesbian. This was found to bear a defamatory meaning on the basis that it implied unchastity within the meaning

84 *AB v XY* [1917] SC 15.
85 ibid., 21 (Lord Salvesen).
86 Lawrence McNamara, 'Bigotry, Community and the (In)Visibility of Moral Exclusion: Homosexuality and the Capacity to Defame' (2001) 6(4) *Media and Arts Law Review* 271, 293.
87 *Quilty v Windsor* (1999) SLT 346, 350K (Lord Kingarth OH).
88 *AB v XY* [1917] SC 15, 21.
89 *Kerr v Kennedy* [1942] 1 KB 409.

of that word in the Slander of Women Act 1891,[90] which included 'impurity' and 'lasciviousness'.[91]

In 'one of the most celebrated libel actions of the century',[92] the American entertainer Wladziu Valentino Liberace sued the *Daily Mirror* gossip columnist William Connor (who wrote under the name 'Cassandra') over two publications in September and October 1956. The first of those referred to the famous pianist with the following words:

> He is the summit of sex - the pinnacle of Masculine, Feminine and Neuter. Everything that He, She or It can ever want. I spoke to sad but kindly men on this newspaper who have met every celebrity arriving from the United States for the past thirty years. They say that this deadly, winking, sniggering, snuggling, chromium-plated, scent-impregnated, luminous, quivering, giggling, fruit-flavoured, mincing, ice-covered, heap of motherlove has had the biggest reception and impact on London since Charlie Chaplin arrived at the same station, Waterloo, on September 12, 1921. … There must be something wrong with us that our teenagers longing for sex and our middle-aged matrons fed up with sex, alike should fall for such a sugary mountain of jingling claptrap wrapped up in such a preposterous clown.[93]

The piece, pejorative and judgmental in its tone, manifestly exposed Liberace to ridicule and contempt. The litigation was about the meaning of these words, and particularly whether they could convey an imputation that the claimant was homosexual. One of the critical words in this passage was 'fruit-flavoured', which in America was slang for being gay. This was not apparently the meaning that the author of the article had attached to it; rather, it was used to bolster the impression of confectionary Liberace conveyed to him (that is, 'over-sweetened, over-flavoured, over-luscious and just sickening').[94] This was, however, immaterial, as the meaning of the statement is derived from an objective assessment to be determined by 'right-thinking members of society'. Liberace, a devout Catholic who considered his meeting with Pope Pius XII as one of the highlights of his life, took the stand in a seven-day hearing and passionately denied he was gay. Being asked in the witness box how the article affected him, the artist

---

90 Section 1 of the 1891 Act read: '[w]ords spoken and published after the passing of this Act which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable.'

91 *Kerr v Kennedy* [1942] 1 KB 409, 413 (Asquith J).

92 Obituary of Lord Salmon *Daily Telegraph* 9 November 1991.

93 'How about refund? Tabloid says of Liberace libel award' *Los Angeles Times* 11 February 1987. See also *Liberace v Daily Mirror Newspapers, The Times*, June 17, 18, 1959.

94 Hugh Cudlipp, 'Laughter in Court' (1992) 3(2) *British Journalism Review* 20, 27. Lord Cudlipp was at the time editorial director of the *Daily Mirror* and recounts the story behind the *Liberace v Cassandra* libel action with reference to hearing transcripts.

replied: '[m]y feelings are the same as anyone else's. I am against the practice because it offends convention and offends society.'[95] The defendant newspaper submitted that, in so far as the words were factual statements, they were true, and to the extent that they consisted of expressions of opinion, they were fair comment. The jury was not, however, persuaded and found that the words meant Liberace was a homosexual, that without that meaning the statements complained of were neither true nor fair comment as expressions of opinion. They awarded £8,000 damages, with £2,000 attributable to the imputation of homosexuality (plus £27,000 in legal costs). Liberace's case makes clear that in the late 1950s, 'right-thinking' people generally would think less well of a person by virtue of their homosexuality.

A closer examination of more modern cases reveals a slightly more complex picture. The courts' initial response to bare assertions of homosexuality appears to have progressed to a more reflective approach. The issue was next raised over three decades later in a highly publicised libel action. Singer and actor Jason Donovan (who initially achieved fame alongside Kylie Minogue in the Australian TV series *Neighbours*) sued music magazine *The Face* in 1992 after it published a doctored photo of a T-shirt imprinted with the artist's face and the words 'Queer as fuck', seemingly doubting the singer's heterosexuality.[96] Rather than pleading an imputation that the publisher had claimed he was gay, Donovan argued that the sting of the libel lay in hypocrisy, namely that the magazine suggested he was deceitful about his sexuality. The case did not, therefore, put to the test the question of whether it is defamatory merely to say someone is gay. The jury was satisfied the publication was defamatory and Donovan was awarded the substantial sum of £200,000. This was subsequently reduced by agreement to £98,000, after the magazine announced that it would have to cease business. Apart from attacking a fashionable magazine, another implication of this lawsuit was that Donovan himself invited accusations of homophobia, despite creatively framing his claim around dishonesty. Although he won, the adverse publicity had a negative impact on his career, with the singer considering the decision to sue *The Face* 'the biggest mistake of his life'.[97]

The dilemma of allowing a false claim of homosexuality to remain unchallenged or rushing to court to set the record straight was once again posed a few years later in the star-studded case of *Cruise and Anor v Express Newspapers Plc and Anor.*[98] In 1999, Hollywood actors Nicole Kidman and Tom Cruise brought libel proceedings in respect of an article which appeared in the magazine section of the

95 ibid., 26.

96 Unreported, but see Julie Scott-Bayfield, 'Libel: Bonanza or Burst Bubble?' (1993) 137 *Solicitors' Journal* 29, 45; and Vincent Graff, 'Gay? Not gay? So, what! Why should it be a matter for the libel lawyers?' *The Independent on Sunday* 11 December 2005.

97 Emine Saner, 'Jason Donovan on Kylie, coolness, and cocaine: "I'm a survivor and I've made mistakes"' *The Guardian* 4 October 2021.

98 [1999] QB 931; [1998] EMLR 780; [1998] EWCA Civ 1269.

*Express on Sunday* and contained several defamatory meanings which provided good reasons to regard the couple as 'hypocrites, frauds and liars',[99] including that they had entered a bogus marriage in a cynical business arrangement which was a cover for their homosexuality. The Court of Appeal seemed to have uncritically accepted Popplewell J's judgment that an imputation of homosexuality was capable of having a defamatory meaning.[100] By contrast, the Court of Session (Scotland's supreme civil court) held in the same year in *Quilty v Windsor* that an imputation of homosexuality was incapable of defaming a person.[101] The dispute involved a letter written by an inmate about a prison officer and alleged, among other things, that the latter was homosexual. Lord Kingarth said that he was 'inclined to agree with counsel for the first defender that merely to refer to a person as being homosexual would not now generally at least be regarded—if it ever was—as defamatory per se'.[102]

In an action remarkably reminiscent of Donovan's some thirteen years earlier, *The People* newspaper, along with Northern & Shell's *Star* magazine and OK!'s *Hot Stars* supplement, had £200,000 in damages awarded against them for wrongly alleging that pop star Robbie Williams was about to deceive the public with the publication of a forthcoming authorised biography which did not include details of a sexual encounter he had had with another man in the toilets of a Manchester nightclub.[103] Williams, whose counsel emphatically stated at trial that his client was not and never had been homosexual,[104] did not frame his case on the grounds that people would think less well of him because he was gay. Instead, his counsel argued that the printed articles meant that Williams, by omitting details of the Manchester episode, 'pretended' that his only sexual relations had been with women, though 'in reality he was a homosexual who had engaged in casual and sordid homosexual encounters with strangers'.[105]

The extent to which the perspective of homosexuality materially affects the defamatory meaning of the imputation may however be questioned. In the cases of Donovan, Cruise and Williams, for instance, the presence or absence of homosexuality arguably played little role in determining whether the meanings of the publications were defamatory. For instance, what gave rise to a defamatory meaning in *Cruise* was the underlying perfidiousness about the true state of the couple's marriage. Likewise, for Robbie Williams, it was the allegation of public

99 [1999] QB 931, 938; [1998] EMLR 780, 786.

100 [1999] QB 931, 939; [1998] EMLR 780, 787.

101 *Quilty v Windsor* (1999) SLT 346.

102 ibid., 355.

103 Graff, 'Gay? Not gay? So, what!'.

104 Duncan Gardham, 'Robbie Williams wins "gay" libel fight' *The Telegraph* 7 December 2005.

105 *Robert Peter Williams v Northern and Shell Plc* (Statement in High Court, 6 December 2005). The case is unreported, but we have drawn on media reports, including for example: Mark Honigsbaum, 'Robbie Williams wins damages over "secret homosexual" claims' *The Guardian* 7 December 2005; Gerard Jasper, 'Robbie's libel pay-out can only harm gay rights' *Sunday Times* 11 December 2005.

deception and the implication of a dishonest attempt to conceal a string of sexual encounters with men he did not otherwise know. And, for Jason Donovan, it was the alleged insincere outward façade the claimant had maintained toward his fan base. However, individuals can be hypocrites or liars without being homosexuals. In these cases, the imputations of homosexuality were purely a conduit through which defamatory allegations were expressed and as such they can be seen as tangential. Nevertheless, their centrality in legal pleadings and considerations served, albeit perhaps unwittingly, to reinforce the erroneous idea of a 'damaged' heterosexual and effectively bolster a dubious and unhelpful hierarchy of sexualities.

### *Imputations of homosexuality post-2013*

In the broader sphere of sexuality and sexual conduct, today's standards have arguably changed more than in any other field. There are therefore certain imputations which would now most likely not lower an individual in the estimation of 'right-minded' members of society. In *CC v AB*, Eady J observed, albeit in the areas of breach of confidence and misuse of private information:

> [a]t one time, when there was, or was perceived to be, a commonly accepted standard in such matters as sexual morality, it may have been acceptable for the courts to give effect to that standard in exercising discretion or in interpreting legal rights and obligations. Now, however, there is a strong argument for not holding forth about adultery or attaching greater inherent worth to a relationship which has been formalised by marriage than to any other relationship.[106]

So, for example, unmarried cohabitation is no longer looked upon as discreditable and having been sexually assaulted or seduced[107] are unlikely to (and obviously should not) lower someone's standing. Likewise, public attitudes towards homosexuality have changed drastically in recent years. We saw earlier the shift towards more inclusive legal initiatives that reflect to some degree societal changes in the ways homosexuality is made sense of in today's Britain. Recent public opinion research suggests that the social stigma attached to homosexuality is gradually but promisingly subsiding. For instance, King's College London's Policy Institute found that the percentage of the British public who viewed homosexual relationships between consenting adults as morally wrong in the past three decades significantly dropped from 40 per cent in 1989 to only 13 per cent in 2019.[108] Similarly, Stonewall's 2022 survey showed that the public sentiment

106 [2006] EWHC 3083, para 25.

107 Compare with *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581.

108 The Policy Institute, *How British Moral Attitudes Have Changed in the Last 30 Years* (King's College London, 2019) 5.

towards gay people in the UK today is much more likely to be one of respect (37 per cent) and admiration (19 per cent) rather than of disgust (9 per cent), fear (4 per cent) or resentment (3 per cent).[109]

The issue of whether statements falsely imputing homosexuality could be defamatory remained dormant for several years until arising again in 2017 in *Brown v Bower and Anor*,[110] a preliminary issues trial of meaning. The case is a more recent example of the constantly moving goal posts of social attitudes and their potential to influence what is defamatory and what is not. Here, the claim was brought by Nick Brown, MP for Newcastle upon Tyne East, against investigative historian Tom Bower and his publisher Faber & Faber over an extract in Mr Bower's book *Broken Vows—Tony Blair, the Tragedy of Power* which concerned the time in 1998 when the *News of the World* outed the claimant as gay. Nicklin J found that the words complained of meant that there were grounds to suspect that Mr Brown engaged in a commercial transaction with young male prostitutes to subject him to 'rough sex' (in the sense of consensually violent intercourse). Although the court ruled on meaning, it was not asked to offer a view on whether that meaning was defamatory, as the defendants made concessions on that point.[111] Both parties agreed that an allegation that the claimant was gay (or that he had had sex with men) was *not* defamatory.[112] It should, however, be emphasised that this issue was not adjudicated upon by the court itself as a matter of law. Whether a judge would today find that an imputation, without more, that someone was a practising homosexual is defamatory must be doubtful. In fact, things have changed so much that a statement imputing antipathy or intolerant attitudes towards sexuality, for example, homophobia, is more likely to be found damaging and thus defamatory.[113] An article describing the appellant's tweet as homophobic and, by inference, that he held homophobic views, was recently held by the Court of Session in Scotland to be defamatory in principle and an award of substantial damages would have been appropriate, in light of the acknowledgement that 'an accusation of homophobia [is] a serious one in contemporary society'.[114]

---

109 Stonewall, Take Pride Report: Public Sentiment Towards Lesbian, Gay, Bi and Trans People in the UK, 2022, 3–4.

110 *Brown v Bower and Anor* [2017] EWHC 2637.

111 Although born out of expediency, the parties' agreement attracted Nicklin J's criticism because their concessions had the effect of keeping the action alive, adding to the courts' workload. On balance, the judge decided not to determine the issue of whether the meaning he had found was defamatory, as ruling on the matter could risk a wasteful expenditure of costs and court resources on an appeal; ibid., paras 57–61.

112 ibid., para 50.

113 Parkes et al, *Gatley on Libel and Slander*, 2025.

114 *Campbell v Dugdale* [2020] CSIH 27, para 47. Note, however, that the defence of fair comment was made out in this case.

### *Serious harm*

Section 1(1) of the Defamation Act 2013 brought about a significant change to the meaning of what is defamatory under English law. A detailed consideration of the consequences of the enactment of section 1(1) is beyond the scope of this chapter,[115] but for present purposes, it suffices to say that section 1(1) builds on the consideration previously given by the courts on what is sufficient to establish that a statement is defamatory[116] and adds to the common law requirements. 'Serious' is not a defined term in the Act. However, in *Lachaux*,[117] the leading authority that considered how the serious harm test should be interpreted and operate in practice, the Supreme Court held that section 1 raises the threshold of seriousness *above* the tendency of defamatory words to cause damage to reputation and focuses on the actual *impact* of the publication.[118] Simply arguing that the words complained of have the tendency substantially to damage the claimant's reputation is no longer sufficient to ground a cause of action.[119] The application of the serious harm test must be determined by reference to the actual facts and not just the meaning of the words. Notably, the causation element features very prominently in the language used in section 1(1). A claimant must establish a causal link between the effect of each specific statement they complain about and serious harm to their reputation (actual or likely). If they cannot show serious reputational harm by a false imputation of homosexuality, the claim is now likely to fail.

Importantly, the new test also makes clear – if it wasn't already – that the (likely) harm must be 'to reputation'. While a person who has been misidentified as a homosexual may claim to have suffered anxiety or have become upset because of the publication, evidence of injury to their feelings, however grave, is not evidence of harm to reputation. A defamation action is concerned with what people think of the claimant and how they judge his or her worth. It is for damage to reputation that a person can sue, and not for damage to their own sense of inner worth or disposition. Section 1(1) is thus a helpful reminder of the distinction between the terms 'reputation' and 'character', which are sometimes used interchangeably. An individual's character is what they in fact are (their actual attributes), whereas their reputation is what other people think they are (others' perception of that person).[120] A reputation is enjoyed when an individual

115 But see Charlie Sewell, 'More Serious Harm Than Good? An Empirical Observation and Analysis of the Effects of the Serious Harm Requirement in Section 1(1) of the Defamation Act 2013' (2020) 12(1) *Journal of Media Law* 47.

116 Explanatory Notes to the Defamation Act 2013, paras 10 and 11; *Lachaux v Independent Print Ltd & Anor* [2019] UKSC 27, para 12; *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414.

117 *Lachaux v Independent Print Ltd & Anor* [2019] UKSC 27.

118 ibid., paras 12–14; see also *Turley v UNITE the Union & Anor* [2019] EWHC 3547, para 107.

119 *Lachaux v Independent Print Ltd & Anor* [2019] UKSC 27, paras 13–17.

120 *Scott v Sampson* (1882) 8 QBD 491.

regularly interacts with others as a member of a community; hence, the law of defamation is about community and social attitudes. The separation between the two becomes even more pronounced by the new statutory test. Defamation law should not be used to remedy wounded feelings and a loss of self-esteem caused by false statements that an individual is gay, when there is no indication that any harm to reputation has occurred.[121] Such an approach would not reflect the harm caused to the interaction and engagement with others[122] and would shift the concern of the law away from how other people evaluate the claimant.

Moreover, under the new statutory test, the existence (and seriousness) of reputational harm are factual questions, and there is no presumption of serious harm. A complainant must demonstrate *as a fact* that the publication of a statement has caused/is likely to cause harm to their reputation that is serious.[123] The relevant facts may be established by evidencing specific instances of serious consequences inflicted on a claimant because of reputational harm. For instance, comments posted online by those who have read, heard or watched the relevant publication can be evidence of reputation harm, 'to the extent they can be said to be a natural and probable consequence of the publication complained of'.[124] Evidence that the claimant has become unemployable or has been excluded from the community of others might also in principle be admissible. Harm to reputation may also manifest itself financially, for example through the loss of an employment opportunity.

However, even though the statutory qualifier 'serious' harm has the effect of raising the bar in terms of the requisite degree of harm to reputation from where it was previously set,[125] a claimant's case will not necessarily fail for want of such evidence.[126] The test may also be satisfied by general *inferences* of fact as to the seriousness of harm, drawn from the evidence as a whole, that is, the combination of the meaning of the words, the claimant's situation as well as the scale and circumstances surrounding the publication.[127] A court will in principle avoid considering the issue of serious harm 'in blinkers'; 'directly relevant background

121 Barendt, 'What is the Point of Libel Law?', 117.

122 David Howarth, 'Libel: Its Purpose and Reform' (2011) 74(6) *Modern Law Review* 845, 853.

123 *Lachaux v Independent Print Ltd & Anor* [2019] UKSC 27, paras 12–16 (Lord Sumption).

124 *Economou v De Freitas* [2016] EWHC 1853, para 129 (Warby J).

125 *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414; see also *George v Cannell* [2021] EWHC 2988, para 117 (Saini J).

126 *Lachaux v Independent Print Ltd & Anor* [2019] UKSC 27, para 21 (Lord Sumption).

127 Generally, the potential of a defamatory statement to cause harm is greater if it is published to the world at large and repeatedly, than if it has been published to a single person on one occasion. But note that the assessment of reputational harm is not purely 'a numbers game; it needs only one well-directed arrow to hit the bull's eye of reputation' in certain circumstances; *King v Grundon* [2012] EWHC 2719, para 40 (Sharp LJ). So, serious harm can be caused by publication to a small number of publishees. In appropriate cases, a claimant can also rely on the 'grapevine effect' of defamatory publications (that is, a metaphor used to recognise the propensity of defamatory material to percolate beyond their immediate audience), which has been 'immeasurably enhanced' with the advent of modern methods of communications and the opportunity they afford for damaging allegations to 'go viral' more quickly and more

facts'[128] which explain the context in which the defamatory publication came to be made may have some bearing on whether the test is met. So, although the new statutory requirement creates a significant hurdle for potential claimants, this is not insurmountable. The shift in public sentiment towards understanding homosexuality does not necessarily mean the lack of a common societal standard in respect of *any* sexual conduct between consenting adults. Public opinion has in fact become less permissive towards some forms of exploitative sexual conduct over recent years.[129] Defamation law could create restrictions with respect to untrue allegations of homosexuality linked to further imputations of favouritism, for example when homosexuality interferes with a prison officer's work, affecting their fitness to hold office in the prison service, particularly in relation to their dealings with young offenders. False statements of homosexuality potentially also hold a seriously defamatory meaning when they impute infidelity or breach of trust at an intimately personal level by suggesting, for instance, that an individual has concealed from their partner a central aspect of their personal identity affecting the very nature of their relationship. Therefore, as section 1(1) creates a multifactorial model of evaluating harm to reputation, it remains possible that contextual factors might clothe the words in further defamatory meaning likely to cross the necessary seriousness threshold.

Understood in this manner, the approach of defamation law to false imputations of homosexuality does not appear to have changed significantly since the 1990s. It is notable for example that the courts' decision-making in *Donovan, Cruise* and *Williams* arguably reflects a tacit recognition that allegations of homosexuality have the capacity to defame but only contingently and instrumentally connected to the claimant's circumstances, personality and traits. Their approach suggests a subtle shift in favour of accepting that such allegations can give birth to correlative defamatory imputations implying lying, dishonesty or hypocrisy. In other words, the determination of whether a statement that an adult was consensually involved in a private homosexual relationship or activity with another adult could carry defamatory meaning was not to be made in an abstract vacuum but instead required a broader understanding and scrutiny of additional contextual factors present in a particular case. Likewise, in the post-2013 defamation landscape, the misidentification of someone as gay could lend defamatory import to the words in question through a secondary or extended defamatory meaning which is understood by publishees with knowledge of certain extrinsic matters relating to the claimant (also known as 'true' or 'legal' innuendo).

---

widely than ever before; see *Slipper v BBC* [1991] 1 QB 283, 300; *Cairns v Modi* [2012] EWHC 756, para 27; *Monir v Wood* [2018] EWHC 3525, para 123.

128 *Burstein v Times Newspapers Ltd* [2000] EWCA Civ 338, para 42 (May LJ); *Umeyor v Ibe* [2016] EWHC 862, para 79 (Warby J).

129 See, for example, *AVB v TDD* [2014] EWHC 1442, in which Tugendhat J highlighted the aspects of exploitation involved in the prostitution industry.

## Damages

An interesting yet comparatively neglected aspect of the debate is the award of damages to a claimant who is presumably heterosexual and has successfully sued under English law for being falsely labelled gay. A successful claimant would be awarded compensatory (general) damages to vindicate their reputation but also remedy their mental distress and any loss flowing from the loss of social standing that is said to come with being incorrectly publicly identified as homosexual. When determining the level of damages, a court usually considers the gravity of the libel, the injury to the claimant's feelings for being thought of or treated like a homosexual, the extent of the publication and perhaps any mitigating (or aggravating) factors.[130] However, the idea that a social status change from heterosexual to homosexual is a legally compensable harm endorses a hierarchical structure which sustains an overarching heteronormative schematism[131] and constructs homosexual people as citizens who qualify as less deserving, 'partial members' of society,[132] reserving full membership for heterosexuals. In this way, defamation law would effectively shield 'damaged' heterosexual people from negative societal attitudes and be complicit in marginalising individuals who are frequently exposed to prejudicial beliefs held by the homophobic parts of society.

If it is accepted that the expressive and symbolic value of the law requires that an imputation of homosexuality (even if shaped by certain contextual factors or related to true innuendo) should no longer be treated as having the capacity to defame, does this mean that a heterosexual claimant who might have suffered serious harm to their reputation or a serious loss as a result of being wrongly identified as a homosexual is left without legal recourse? Not entirely. Reliance on the tort of malicious falsehood, which protects against a defendant's falsehood that causes harm to a claimant's economic (not merely commercial) interests,[133] provides a reasonable alternative.[134] The essentials of this action were defined in *Kaye v Robertson* as being: 'that the defendant has published about the claimant words which are false, that they were published maliciously and that special damage has followed as the direct and natural result of their publication'.[135]

---

130 Compensatory damages can include special damages for actual pecuniary loss (for example, the loss of a potentially lucrative contract or a loss of profit caused by the impact of the publication and so on) and additional damages reflecting the harm caused by the defendant's conduct in case any aggravating circumstances are present (for example, failure to publish an adequate apology). See further Alexandros Antoniou, 'When the Litigation Winner Becomes the Loser: Undeserving Claimants and Mitigation of Damages in Libel Claims' (2018) 10(2) *The Journal of Media Law* 128, 131–9.

131 See also Haven Ward, 'I'm Not Gay, M'Kay? Should Falsely Calling Someone a Homosexual Be Defamatory?' (2010) 44(3) *Georgia Law Review* 739, 761.

132 Roy Baker, *Defamation Law and Social Attitudes: Ordinary Unreasonable People* (Edward Elgar, 2011) 54.

133 *Joyce v Sengupta* [1993] 1 WLR 337 (CA).

134 Bennett, 'Not So Straight-Talking', 325.

135 *Kaye v Robertson* [1991] FSR 62, 67 (Glidewell LJ).

The requirements to prove either actual loss or a statement calculated to cause pecuniary damage and malice[136] severely limit the tort,[137] but they are seen as control devices to preserve legitimate free speech.[138] By contrast to defamation, the tort of malicious falsehood does not rely on the test of 'right-thinking' persons and social attitudes about homosexuality. The requirement to prove special damage,[139] typically understood as actual loss outlined in monetary terms, allows for compensation for actual harm caused to a heterosexual claimant while avoiding likely endorsement of any negative attitudes towards homosexuality. Another potential legal avenue is the tort of intentional infliction of physical harm or distress, provided that a claimant can prove actual psychological harm (such as clinical depression as a result of the defendant's statement) under the criteria established by the Supreme Court in *Rhodes v OPO & Anor.*[140] The action, to which Lord Neuberger referred as 'the tort of making distressing statements',[141] is 'sufficiently contained'[142] by the combination of the conduct element requiring words or conduct directed at the claimant for which there is no justification or excuse; the mental element requiring an intention to cause at least severe mental or emotional distress (recklessness is not sufficient); and the consequence element requiring physical harm or a recognised psychiatric illness.

## Conclusion

Disparagement of reputation is the essence of an action of defamation. The harm at the core of this tort relates to how an individual is seen in the eyes of others. This chapter first looked at the evolution of legal and societal attitudes towards homosexuality over time. Society's increasing acceptance of homosexuality suggests that its right-thinking members would not today estimate the inherent worth of gay people to be less than that of heterosexual people. This shift is also evident in external indicators like legislative developments which reflect improvements in community sentiment and speak strongly to changes in societal values concerning homosexuality. Nevertheless, we argue that the English defamation law still retains restrictions with respect to publications carrying a false imputation that a person is gay.

A line of relatively recent cases (albeit prior to the 2013 legislation) recognised that such an assessment needs to be made on a case-by-case basis. This slightly

136 Malice is understood here to involve known falsehoods or improper and impermissible motives in the sense of aiming to injure rather than further someone's own interests; Andrew Tettenborn (ed), *Clerk & Lindsell on Torts* (23rd edn, Sweet & Maxwell, 2022) 22-13.

137 See *Quinton v Peirce & Another* [2009] EWHC 912 (QB), para 83, in which Eady J emphasised the 'high hurdle' of establishing malice.

138 *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2009] EWHC 1717.

139 Except for those cases falling within section 3 of the Defamation Act 1952.

140 [2015] UKSC 32.

141 ibid., paras 101 and 119.

142 ibid., para 88 (Baroness Hale and Lord Toulson).

altered contemporary form marks a departure from the earlier historical position that a bare imputation of homosexuality is inherently defamatory and can be seen as a gradual evolution of the construction of defamatory words rather than an abrupt change. However, homosexuality appears to have been mainly used as a vehicle to accentuate imputations that are already defamatory (such as disloyalty, hypocrisy, exploitation and so on), adding little, if anything, to determining defamatory meaning. The lack of a contemporary firm judicial pronouncement in English law on whether imputations of homosexuality bear a defamatory meaning somewhat muddles the position. Some legal scholars express the unequivocal view that an allegation would not now be regarded as defamatory if it amounted to no more than that a same-sex couple were in a sexual relationship.[143] In other words, it seems no longer possible to contend that the shared societal standards with which the ordinary reasonable member of the community is imbued include that of holding those who engage in gay sex in lesser regard on account of that fact alone.

We believe however that this proposition is narrowly formulated and qualified in that falsely calling someone gay could raise more complex defamatory imputations, denting someone's image so deeply that 'serious harm' is at stake. Even after the 2013 reforms, which make it less likely to sustain a viable claim than was the case at common law, whether an imputation of homosexuality is capable of being defamatory depends on associating that imputation to extrinsic, contextual factors that can endow otherwise innocent words with defamatory meanings through general inferences of fact. Statements misidentifying someone as homosexual cannot thus always be held to be void of defamatory meaning, unless the importance of inferences in this context is relegated.

This is very worrying as it can result in a dangerous connotative interplay between homosexuality and other conduct like dishonesty or exploitation, which risks perpetuating the stereotypical image of gay people as deceitful and untrustworthy.[144] Although it would be unfair not to recognise how much contemporary British society has moved away from the homophobic legacy of 'The Blackmailer's Charter' or Section 28, the shadows of the past loom over any such implicit association between homosexuality and hypocrisy to the point that it becomes difficult, even for 'right-thinking members of society', not to see the two as intrinsically linked. Imputations of homosexuality should not be treated as defamatory in any situation. Recognising that false imputations of homosexuality can function, even under certain circumstances, as the basis for a legal harm worthy of remedy indirectly endorses and perpetuates a heteronormative culture that treats homosexuality as inherently negative.

143 Parkes et al, *Gatley on Libel and Slander*, 2025.

144 Elizabeth Peel, Sonja Ellis and Damien Riggs, 'Lesbian, Gay, Bisexual and Transgender People: Prejudice, Stereotyping, Discrimination and Social Change' in Cristian Tileagă, Martha Augoustinos and Kevin Durrheim (eds), *The Routledge International Handbook of Discrimination, Prejudice and Stereotyping* (Routledge, 2021) 109.