Neutral Citation Number: [2021] EWCA Civ 567

Case No: A2/2020/1286

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
Mr Justice Saini
[2020] EWHC 1848

Royal Courts of Justice
Strand, London, WC2A 2LL

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Date: 20 April 2021

Before :

SIR GEOFFREY VOS, MASTER OF THE ROLLS
DAME VICTORIA SHARP, PRESIDENT OF THE QUEEN'S BENCH DIVISION
and
LORD JUSTICE WARBY

- -

Between :

THE RT HON JEREMY CORBYN MP	**Appellant/ Defendant**
- and –	
RICHARD MILLETT	**Respondent /Claimant**

- -
- -

Anthony Hudson QC and Mark Henderson (instructed by **Howe & Co**) for the **Appellant**
William Bennett QC and John Stables (instructed by **Patron Law**) for the **Respondent**

Hearing date: 16 March 2021

- -

Approved Judgment

Lord Justice Warby:

Introduction

1. This is an appeal by the Rt Hon Jeremy Corbyn MP against decisions made at the trial of preliminary issues in a libel action.

2. Mr Corbyn is the defendant in the action, which relates to words he used in a televised interview on the *Andrew Marr Show* ("the Programme"), first broadcast by the BBC on 23 September 2018. At the time, Mr Corbyn was Leader of the Labour Party and Leader of the Opposition. During a wide-ranging interview, Andrew Marr asked Mr Corbyn if he was an anti-Semite. Mr Corbyn was asked first about an East London mural. He was then shown a recording of a speech he made in 2013, in which he referred to "Zionists" who "don't understand English irony":

> "The other evening we had a meeting in Parliament in which Manuel made an incredibly powerful and passionate and effective speech about the history of Palestine, the rights of the Palestinian people. This was dutifully recorded by the thankfully silent Zionists who were in the audience on that occasion and then came up and berated him afterwards for what he had said. They clearly have two problems. One is they don't want to study history and secondly, having lived in this country for a very long time, and probably all their lives, they don't understand English irony either."

3. Mr Marr suggested this was "A strange thing to say". The words complained of ("the Statement") were spoken by Mr Corbyn in answer to that suggestion. Those words are underlined in this extract from the transcript, which shows the immediate context.

> JC: Well, I was at a meeting in the House of Commons and the two people I referred to had been incredibly disruptive, indeed the police wanted to throw them out of the meeting. I didn't. I said they should remain in the meeting. They had been disruptive at a number of meetings. At the later meeting when Manuel spoke they were quiet, but they came up and were really, really strong on him afterwards and he was quite upset by it. I know Manuel Hassassian quite well. And I was speaking in his defence. Manuel of course is the Palestinian Ambassador to this country.
>
> AM: But why did you say, 'English irony'?
>
> JC: Well, because of the way that Manuel, whose first language is not English, has an incredible command of English and made a number of ironic remarks towards them during the interchange that I had with them. This did happen some years ago, by the way.
>
> AM: And you also said that these people who might have been in this country for a very long time. What's relevant about that?

> JC: That Manuel had come recently to this country and fully understands English humour and irony and the use of language. They were both British born people who clearly obviously had been here all their lives.
>
> AM: But we've just agreed that the people who can identify antisemitism best are Jewish people. Many Jewish people thought that was anti-Semitic.
>
> JC: They were very, very abusive to Manuel. Very abusive. And I was upset on his behalf from what he'd - he'd spoken obviously at the meeting but also the way he was treated by them at the end of it. And so I felt I should say something in his support. And I did.
>
> AM: Given what Jewish comrades, Jewish members of the Labour Party have said about this, do you now accept that what you said was anti-Semitic?
>
> JC: Well, it was not intended to be anti-Semitic in any way and I have no intention and have absolute opposition in every way to anti-Semitism because I can see where it leads to. I can see where it leads to now in Poland, in Hungary, in Central Europe, I can see where it led to in the past. We have to oppose racism in any form and I do …"

4. The claimant is Richard Millett, a "blogger", observer, reporter, and commentator whose subjects of interest include Israel, its policies on Palestine, and the Palestinian people. Mr Millett sued on the basis that, although he was not named in the Statement, he was defamed because national media coverage before the broadcast of the Programme made him identifiable to viewers as one of those referred to by Mr Corbyn's remarks about "Zionists".

5. Mr Corbyn applied for an order for the trial of preliminary issues. Master Cook directed a trial of three issues: "(a) the natural and ordinary meaning of the statement complained of, including whether it refers to Mr Millett, and any reference innuendo; (b) whether that meaning conveys a statement of fact or opinion, or else in part a statement of fact and in part of opinion; and (c) whether the meaning conveys a defamatory tendency at common law."

6. The issues were tried by Saini J. His decision on issue (a) was that the words complained of referred to Mr Millett, and bore the following natural and ordinary meaning about him:

> "The Claimant attended a meeting at the House of Commons. He behaved in so disruptive a way at this meeting that the police wished to remove him from the premises. Mr. Corbyn however asked that the Claimant be allowed to remain. The Claimant had acted in a disruptive way at other meetings. At a further meeting at which Mr. Hassassian was a speaker, the Claimant was extremely abusive in his treatment of Mr. Hassassian after his speech. Such was the nature of this abuse that Mr. Hassassian was caused distress by the Claimant's

> behaviour. These actions of the Claimant so concerned Mr. Corbyn that he felt the need to speak to support Mr. Hassassian. This conduct of the Claimant towards Mr. Hassassian was based on what Mr. Hassassian had said and the views he was expressing."

There is no appeal against that decision. The appeal is against the Judge's further decisions that (b) this meaning is a statement of fact and (c) this meaning is defamatory of the claimant at common law.

The Legal Framework

7. In the past, a case like this would have been resolved by the verdict of a jury after the pleading of a full Defence and a trial of all the issues. By section 11 of the Defamation Act 2013 ("the 2013 Act"), Parliament removed the statutory presumption in favour of jury trial in libel cases. That has enabled judges to try discrete factual issues in these cases without waiting for a full trial. Preliminary trials such as the one in this case are now the norm. They can be held swiftly, and are likely to result in savings of time and costs: see *Greenstein v Campaign Against Antisemitism* [2019] EWHC 281 (QB) [10] (Nicklin J), *Vardy v Rooney* [2020] EWHC 3156 (QB) [8]. The Judge's task is to make findings of fact, applying well-known legal principles.

8. The starting point is to identify the meaning the words would convey to the ordinary reasonable reader or viewer. For that purpose, the Court applies long-established principles conveniently distilled in *Koutsogiannis v The Random House Group Ltd* [2019] EWHC 48 (QB) [2020] 4 WLR 25 [12] (Nicklin J). The practice is to read or watch the offending publication to capture an initial reaction, before reading or hearing argument. That has been approved by this Court as "the correct approach for a judge at first instance": *Tinkler v Ferguson* [2019] EWCA Civ 819 [9].

9. At common law, a meaning is defamatory and therefore actionable if it satisfies two requirements. The first, known as "the consensus requirement", is that the meaning must be one that "tends to lower the claimant in the estimation of right-thinking people generally." The Judge has to determine "whether the behaviour or views that the offending statement attributes to a claimant are contrary to common, shared values of our society": *Monroe v Hopkins* [2017] EWHC 433 (QB), [2017] 4 WLR 68 [51]. The second requirement is known as the "threshold of seriousness". To be defamatory, the imputation must be one that would tend to have a "substantially adverse effect" on the way that people would treat the claimant: *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB), [2011] 1 WLR 1985 [98] (Tugendhat J).

10. Today, there is an additional, statutory, requirement. Section 1(1) of the 2013 Act provides that "A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant". This means that a claimant must now prove not only that the statement had a defamatory tendency, but also that it did as matter of fact cause serious reputational harm or was likely to do so: see *Lachaux v Independent Print Ltd* [2019] UKSC 27 [2020] AC 612. We are not concerned with this issue. Master Cook refused Mr Corbyn's application for a trial of serious harm as a preliminary issue.

11. One defence to a libel claim is the defence of honest opinion, provided for by section 3 of the 2013 Act. Section 3 abolished and replaced the common law defence of fair comment. But, so far as relevant, the section broadly reflects the common law. The terms "comment" and "opinion" are interchangeable. The matters a defendant must prove are identified in sub-sections (1) to (4):

> **"3 Honest opinion**
>
> (1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.
>
> (2) The first condition is that the statement complained of was a statement of opinion.
>
> (3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.
>
> (4) The third condition is that an honest person could have held the opinion on the basis of—
>
> (a) any fact which existed at the time the statement complained of was published;
>
> (b) anything asserted to be a fact in a privileged statement published before the statement complained of."

12. The issue before the Judge was whether the first condition was met. The common law principles developed in relation to this requirement remain applicable to the statutory defence: *Butt v Secretary of State for the Home Department* [2019] EWCA Civ 933, [2019] EMLR 23 [32-33] (Sharp LJ, as she then was). Several cases summarising those common law principles were cited to the Judge, including *Butt* and *Koutsogiannis*, where Nicklin J said this (at [16]):

> "…when determining whether the words complained of contain allegations of fact or opinion, the court will be guided by the following points:
>
> (i) The statement must be recognisable as comment, as distinct from an imputation of fact.
>
> (ii) Opinion is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc.
>
> (iii) The ultimate question is how the word would strike the ordinary reasonable reader. The subject matter and context of the words may be an important indicator of whether they are fact or opinion.
>
> (iv) Some statements which are, by their nature and appearance opinion, are nevertheless treated as statements of fact where, for instance, the opinion implies that a claimant has done something but does not indicate what that something is, ie the statement is a bare comment.
>
> (v) Whether an allegation that someone has acted

> "dishonestly" or "criminally" is an allegation of fact or expression of opinion will very much depend upon context. There is no fixed rule that a statement that someone has been dishonest must be treated as an allegation of fact."

13. Although it may seem logical to consider first whether a statement is defamatory and only then to consider whether a defence of honest opinion is available, this may not always be the best approach. That is because a statement of opinion may be less reputationally damaging than an allegation of fact, so "the answer to the first question may stifle the answer to the second": *British Chiropractic Association v Singh* [2010] EWCA Civ 350, [2011] 1 WLR 133 [32]. It has become common for the two issues to be considered in the reverse order, as Saini J did in this case.

The first issue: fact or opinion?

14. The Judge began by identifying the right approach. He cited *Koutsogiannis* [16] and made clear that he had also had regard to the "comprehensive review of the case law in this area" contained in *Butt*. He indicated that he did not think he could draw assistance from findings in other cases about whether different words amounted to fact or opinion. His conclusion was expressed in this way (at [88]):

> "In my judgment, it is clear that Mr. Corbyn was making factual allegations in the Statement as to Mr. Millett's behaviour on more than one occasion. As to the submission that Mr. Corbyn was merely expressing a view on conduct, in my judgment this is a classic case of a statement which in context implies that a claimant has done something but does not indicate what that something is (a type of bare comment in Nicklin J's summary above). The Claimant succeeds on this issue."

15. For Mr Corbyn it is now argued that the Judge "erred (in law and/or in fact) in ruling that the statement was entirely factual". Mr Hudson QC describes the Statement as an exercise of the right to freedom of expression by a senior politician in the context of discussion about a highly charged and sensitive political issue. He characterises honest opinion as a statutory defence to a claim for libel which is "fundamental to the protection of political speech". With this introduction, Mr Hudson advances three main submissions.

(1) It is said that the Judge's use of the term "bare comment" shows that he must have concluded that Mr Corbyn's words were a statement of opinion but one that he must, as a matter of law, treat as a statement of fact, following point (iv) of the summary in *Koutsogiannis*. This was wrong, submits Mr Hudson: any such rule of law was disapproved of by the Supreme Court in *Joseph v Spiller* [2010] UKSC 53 [2011] 1 AC 852 and survives, if at all, in section 3(3) of the 2013 Act. The Judge's approach wrongly conflated the first two stages of the statutory analysis, when the Judge was only concerned with the first condition.

(2) In the alternative, it is submitted that the Judge was wrong in law and/or in fact to treat this as a case of "bare comment". The viewer could see that Mr Corbyn was

commenting specifically on Mr Millett's conduct during meetings, so the basis for the opinion was indicated, at least in general terms.

(3) Thirdly, it is submitted that the Statement was plainly one of opinion, and we should so hold. As he did before the Judge, Mr Hudson refers to the observation of this Court in *Tinkler v Ferguson* [27] that "an assertion that a person's behaviour is disruptive … is not an assertion of verifiable fact". He submits that the Judge was wrong not to reach the same conclusion.

16. Mr Hudson is right to identify the defence of honest opinion as a bulwark of free speech. It must not be whittled away by artificially treating comments as if they were statements of fact. On the other hand, if a person could use this defence as a means of escaping liability for a false defamatory allegation of fact, the law would fail to give due protection to reputation. That is why the statutory defence only applies to a statement which is one of opinion.

17. The statutory test refers to the "statement complained of", not the meaning of that statement, or the imputation it conveys. It is common ground that for this reason the wording of the preliminary issue in this case was not quite right. But Mr Hudson accepts that the Judge asked himself the right question: whether *the words used* were a statement of opinion or of fact.

18. In this case, the issue is a narrow one: whether, in their context, the words "disruptive" and "abusive" were statements of opinion or statements of fact. The key principle of law is that the answer to that question must always be the one that would be given by the ordinary reasonable reader or – as in this case – viewer. With a broadcast such as this, this is not a matter of studying the transcript, which cannot tell you how words are spoken, in what tone, or with what emphasis. It means watching and listening to the interview as a whole, bearing in mind that the ordinary viewer will do so only once. The Court should avoid over-elaborate analysis and give weight to its own impression. This approach applies equally to the methodology for deciding meaning, and whether the offending statement is fact or opinion. This, as I read the judgment, is precisely how the Judge approached the matter.

19. This is a highly fact-sensitive process that focuses on the particular statement at issue. It is obvious that the Court cannot be bound or guided by findings made in other cases, about different words; Mr Hudson's reliance on *Tinkler v Ferguson* was rightly dismissed by the Judge. Nor can the political role and status of Mr Corbyn, or the political nature of the Programme and its subject-matter, alter the approach required as a matter of law, still less dictate the answer to the question of whether the Statement was one of fact or opinion. These are all important features of the context to which the Court should be alive when deciding how Mr Corbyn's words would have struck the ordinary viewer. But they are no more than that.

20. The simple answer to Mr Hudson's first legal submission is that the Judge did not make the error he contends for. On a fair reading, the Judge's paragraph [88] begins with a clear and unequivocal finding that, in the context of the Statement, the terms "disruptive" and "abusive" were allegations of fact. The rest of paragraph [88] sets out an alternative basis for decision. It records the defence submission that the Statement was "merely expressing a view" and rejects it on the basis that even if (contrary to the Judge's view) the Statement was on its face opinion, the case would

be one of "bare comment" and thus fall within point (iv) of the *Koutsogiannis* summary.

21. So, the Judge's decision on the fact/opinion issue represents an unobjectionable application of accepted principles to the undisputed facts of the case. A decision such as this is a finding of fact: see *Gatley* on Libel and Slander 12th ed, para 34.17 and cases there cited. We do not second guess such findings. Absent legal error, this Court would only interfere if it was satisfied that, allowing for the advantages available to the first instance court, the finding was wrong. That is not my view. I would go further. Having watched the whole interview, I agree with the Judge.

22. Mr Corbyn was giving his explanation as to why he had said that the Zionists in the 2013 meeting did not understand English irony. To do so, he was explaining, from his standpoint, what had happened. He was telling the story. In doing so, he provided factual background and context. In the particular words complained of he was, in my judgment, presenting viewers with a factual narrative: the people referred to had disrupted several meetings at the House of Commons; at one such meeting they had been extremely disruptive; and on the most recent occasion, whilst they had let Mr Hassassian speak, they had subjected him to extreme abuse afterwards. This would all have struck the viewer as Mr Corbyn's explanation of the factual background to his statement about "English irony".

23. In my judgment Mr Hudson's criticism of the Judge's alternative ground of decision is also ill-founded, in law and in fact. First, it is clear that the concept of "bare comment" comes into play at the first step of the analysis, when deciding whether a statement is one of fact or opinion. Put another way, it is an aspect of the first condition (in section 3(2) of the 2013 Act). That is how the Judge treated it, and he was right to do so. The common law on the distinction between fact and comment was summarised by Lord Nicholls in *Cheng v Tse Wai Chun Paul* [2000] HKCFA 35, [2001] EMLR 777 [17] as follows:-

> "… the comment must be recognisable as comment, as distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege. Much learning has grown up around the distinction between fact and comment. For present purposes it is sufficient to note that a statement may be one or the other, depending on the context. Ferguson J gave a simple example in the New South Wales case of *Myerson v Smith's Weekly Publishing Co Ltd* (1923) 24 SR (NSW) 20, 26: 'To say that a man's conduct was dishonourable is not comment, it is a statement of fact. To say that he did certain specific things and that his conduct was dishonourable is a statement of fact coupled with a comment.'"

The first condition (section 3(2) of the 2013 Act) was intended to reflect the common law as stated in this passage: see paragraph 21 of the Explanatory Notes to the Act. *Spiller* does not qualify or undermine this passage or affect the right approach to the first condition. *Spiller* was a decision about the separate common law requirement identified in paragraph [19] of *Cheng*, namely that to be defensible a comment must

"explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made." The second condition (section 3(3) of the 2013 Act) was intended to reflect that common law requirement, as re-stated in *Spiller*: see paragraph 22 of the Explanatory Notes. The preliminary issues in this case did not include the second condition in section 3(3) and the Judge did not address it.

24. Secondly, the Judge's approach to "bare comment" was correct. When deciding whether a statement is one of fact or opinion, as Sharp LJ pointed out in *Butt v SSHD* [39]:

> "The ultimate determinant … is how the statement would strike the ordinary reasonable reader … – that is, whether the statement is discernibly comment (to such a reader) ... In that regard, the subject matter, the nature of the allegation and the context of the relevant words may well be important."

The cases on "bare comment" do not lay down a rigid rule of law that requires a court to depart from this key principle, and artificially treat a statement of opinion as if it was a statement of fact. On the contrary. The authorities show that "bare comment" is a pointer, or guideline, or rule of thumb that *reflects* the key principle. The question is, would the words used strike the ordinary viewer as a statement of fact or opinion? The answer does not turn on whether any given word is an adjective, noun, or verb, or some other part of speech. This is a matter of substance, not a formal, analytical matter of grammar or linguistics. In practice, when someone uses a descriptive word without giving any detail of what he is describing, that will tend to come across as an allegation of fact. That is what the cases on "bare comment" say. That is how the notion of "bare comment" was treated by Lord Nicholls in *Cheng,* and by Nicklin J in *Koutsogiannis*; and that, in my judgment, is how it was approached by Saini J in this case. So, although a statement that "the claimant said X, in Y tone, and in Z manner, and *that was* very, very abusive" would contain a comment on factual allegations, Mr Corbyn's statement was different. He said of the Zionists that *"they had been* incredibly disruptive" and that "*they were* very, very abusive", without more; and those – as Saini J held - were statements of fact.

The second issue: defamatory at common law?

25. Under the heading "Defamatory Tendency/Seriousness", the Judge addressed the twin submissions on behalf of Mr Corbyn, that the Statement "**[a]** did not lower Mr Millett in the estimation of right-thinking people and, separately, **[b]** that it fell below the common law threshold of seriousness". (The lettering has been added by me, for clarity.)

26. On issue [a], the Judge referred to the passage I have cited from *Monroe v Hopkins* and asked himself whether the type of conduct attributed by Mr Corbyn to Mr Millett would be "contrary to the common or shared values of our society and modern community". His answer was that "it is clear that this test is met". He reasoned (at [100]):

> "Mr. Millett was being accused of abusive behaviour in relation to a public speaker on a controversial topic. This is an accusation of a type of conduct which is contrary to the values

> of a modern democracy where freedom of speech is a cherished value. Further, the behaviour of which he was accused was of such a level of seriousness (at the first meeting to which Mr. Corbyn made reference) as to involve the police in potentially ejecting Mr. Millett and the other individual (suggesting criminal misconduct). Again, this suggests conduct falling below the standards expected of citizens in modern British society."

27. The Judge then turned to issue [b], which he dubbed "the issue of seriousness and the *Thornton* threshold". He concluded that this was "a straightforward case when applying the multi-factorial approach summarised in *Gatley* at para. [2.4]." He explained this conclusion, at [102]:

> "Mr. Corbyn, one of the most prominent politicians at the time, accused Mr. Millett of seriously abusive behaviour towards a speaker, in the terms I have found above. Mr. Corbyn did this in careful language in an interview with a political journalist on what is arguably *the* major weekly national political programme, and which is free to air on the BBC, recorded live and aired during a prime time viewing period. The Statement was not a trivial matter and readily meets the *Thornton* standard at common law."

28. Mr Hudson argues that the Judge's decision on defamatory tendency contained five legal flaws: the Judge (1) impermissibly introduced reference to "criminality", when no complaint was made that the words contained any such imputation, and the meaning found by the Judge did not contain this element; (2) was wrong to suggested that Mr Corbyn had accused Mr Millett of interfering with cherished free speech rights, when the Statement did not suggest any interruption or disruption of Mr Hassassian's speech but only "abusive" behaviour after it had concluded; (3) failed to recognise that the reasonable viewer would see the conduct attributed to Mr Millett as a legitimate exercise of the freedom of speech in the context of political disagreement; (4) misdirected himself by dealing separately with the consensus requirement and the threshold of seriousness; (5) took account of matters, such as Mr Corbyn's prominence and the high status and influence of the Programme, that were irrelevant to the question of what is defamatory at common law. In any event, submits Mr Hudson, the Judge's decision on this issue was plainly wrong and should be reversed by us.

29. Again, although the case for Mr Corbyn has been skilfully and attractively presented, my conclusion is that the Judge's decision should stand. This too is a finding on a question of fact: see Lord Devlin in *Lewis v Daily Telegraph* [1964] AC 234, 258 and *Gatley* para 34.5. The Judge made no error of law. His conclusions were not wrong, perverse or otherwise unreasonable. Indeed, I consider he was correct.

30. Mr Hudson's first point relates to the Judge's bracketed reference to "suggesting criminal misconduct". It would be artificial to treat those words as adding to the meaning he had identified only a few paragraphs earlier. The reality, as the ordinary viewer would see it, is that the police could only be justified in wanting to "throw out" a person from an event if they saw evidence of some actual or threatened breach

of the peace, or some other public order offence. I would view the Judge's language as merely reflecting that reality.

31. Mr Hudson's second and third points overlap. At the heart of the argument is the proposition that the judge failed to recognise that this was a highly charged political debate in which strong views are held on both sides, so that what Mr Millett was accused of doing was simply not contrary to common or shared values of our society, as the Judge found. I do not accept that the Judge went wrong in the ways alleged. He seems to me to have been fully alive to the political context. He was clearly right to identify Mr Millett's alleged conduct as an interference with the "cherished value" of free speech. He asked himself if that interference was serious enough to fall "below the standards expected of citizens in modern British society". That is a matter of fact and degree. The Judge rightly focused his attention on the specifics of the case: the ways in which Mr Millett had (allegedly) interfered with speech at public meetings, and the gravity of that interference. It was clearly relevant, in this context, that the disruption was alleged to have been so serious that the law enforcement authorities wished to remove Mr. Millett, and that the abuse was extreme and distressing.

32. I do not agree that right-thinking viewers would regard the conduct attributed to Mr Millett as an acceptable exercise of free speech. The Judge clearly thought otherwise, and the context counts against it. All that viewers knew about the matter was what Mr Corbyn told them about it. They would see that he was telling them about Mr Millett's behaviour in order to explain his own controversial assertion that Mr Millett did not understand English irony. When talking of disruption Mr Corbyn was setting the scene for that explanation. He did not downplay what had happened but emphasised its seriousness. He introduced the fact that the police wanted to throw Mr Millett out of the meeting. And Mr Corbyn gave viewers no reason to think that Mr Hassassian's speech was one that justified the extreme and distressing abuse of which he spoke. On the contrary, he made clear that he warmly approved of the speech, and he emphasised how "very, very, abusive … very abusive… " Mr Millett had been in response.

33. The Judge was not wrong to deal separately with the consensus requirement and the threshold of seriousness. These are normally treated as separate but complementary components of the common law test. That is how they were presented to the Judge in Mr Hudson's skeleton argument below, citing *Allen v Times Newspapers Ltd* [2019] EWHC 1235 (QB) [19(1)]. Moreover, this seems an arid debate. It cannot matter whether the Court approaches the two components separately or in conjunction with one another: the answer should be the same either way.

34. Mr Hudson does have a point when he criticises the Judge's adoption of a "multi-factorial" approach to the common law threshold of seriousness. As Mr Bennett came to accept in oral argument, the question is whether the imputation crosses the threshold. Circumstantial matters are generally left out of account at this stage, though they may come in when it comes to the statutory requirement of serious harm. I think the Judge may have been misled by the passage in *Gatley* to which he referred, which is not firmly grounded in authority, and appears to me to conflate questions about the threshold of seriousness and issues going to the separate question of whether a case that crosses that threshold should be struck out as an abuse under the *Jameel* principle (*Jameel v Dow Jones Inc* [2005] EWCA Civ 75, [2005] QB 946). But I do not believe that the Judge's conclusion can be faulted. Alleging disruptive behaviour that leads

the police to want to remove a person from a public meeting, and alleging such verbal abuse of a public speaker that the Leader of the Opposition was forced to speak up in controversial terms to defend him, crosses the common law threshold of seriousness. The Judge was right to hold that such allegations would tend to have a substantial adverse effect on the attitude that people would take to Mr Millett.

Disposal

35. For the reasons I have given, I would dismiss the appeal.

Dame Victoria Sharp, President of the Queen's Bench Division:

36. I agree.

Sir Geoffrey Vos, Master of the Rolls:

37. I also agree.