

Case No. UKSC 2022/0147

**IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)**

BETWEEN:

Fiona George

Claimant/Respondent

- and -

(1) Linda Cannell

(2) LCA Jobs Limited

Defendants/Appellants

INTERVENTION OF MEDIA DEFENCE

Introduction:

1. The Court's order of 26 July 2023 permits Media Defence ("MD") to intervene in writing in the present appeal on the following matter: The implications of the Court of Appeal's interpretation and application of s.3(1) of the Defamation Act 1952 for press freedom in England and Wales.

2. MD is a non-governmental organisation that provides legal support and helps to defend the rights of journalists, bloggers, and independent media across the world. It is based in London and works closely with a world-wide network of experienced human rights lawyers, as well as local, national, and international organisations, who are all concerned with defending freedom of expression. Many of those MD represents are from small media outlets or are citizen journalists, operating with limited resources and reporting in difficult political circumstances.

3. MD has extensive experience in defending journalists and independent media against criminal prosecutions and civil claims. As part of its mandate, MD intervenes in cases before domestic and international courts around the world. By way of example, it has recently intervened in a number of cases alleging violations of the right to freedom of expression brought against the UK at the European Court of Human Rights (ECtHR) (see [here](#) , [here](#) and [here](#)).

4. A key part of MD's mandate is to provide funding to journalists and media outlets where they face legal proceedings, or the threat of legal proceedings. MD has, over the years, provided support for hundreds of cases. Applications for funding come from journalists operating in countries all over the world, including the UK.

5. In the case of applications for funding where legal proceedings are brought, or threatened, in England and Wales, they often concern the work of journalists who operate outside this jurisdiction. Those journalists are acutely aware of the implications of being sued here, where they can be drawn into lengthy and ruinously costly proceedings. For individuals outside this jurisdiction who want to avoid scrutiny, threatening legal action in England and Wales can be an effective way of chilling speech.

The chilling effect of the laws of England and Wales on press freedom:

6. The prospect of having to pay substantial costs can deter journalists from reporting on matters of public interest and have a chilling effect on press freedom. Small publishers and individual journalists are particularly affected by the cost regimes applicable to defamation and privacy actions in England and Wales.

7. These concerns also apply to foreign journalists reporting on matters of public interest. Examples of stories not published or made available in the UK because of the chilling effect of the laws of this jurisdiction include –

(i) A book about the 1MDB scandal in Malaysia effectively blocked from distribution in the UK when independent bookstores decided not to stock it after receiving threats from a UK law firm on behalf of individuals involved in the scandal that they could be sued in libel for the synopses they had published or might publish - [here](#)

(ii) A story by a journalist investigating a Maltese bank retracted after a UK law firm on behalf of individuals connected to the bank threatened to sue him in this jurisdiction. Some months later the bank was shut down over concerns about money laundering – [here](#)

8. This jurisdiction is attractive to claimants because the costs regime, in the context of lengthy and complex proceedings, is often enough to prevent publication – (See for e.g. UK Parliament Hansard, *Lawfare and UK Court System*, Volume 707: debated on Thursday 20 January 2022, available [here](#)) Historically, the limited harm requirement in defamation cases has contributed to this.

9. Because the laws are procedurally complex and highly technical, cases continue for years before they are resolved. This procedural complexity means legal costs are substantial, making defending defamation and privacy claims prohibitively expensive, which in turn has a chilling effect. The costs will only increase as other causes of action are added to a claim. In addition, journalists are required to expend time and other resources that should be directed to their work.

Malicious falsehood as a more attractive cause of action:

10. Parliament sought to recalibrate the balance between free expression and the right to reputation in the Defamation Act 2013. In the lead up to the introduction of that Act, the Ministry of Justice released an Impact Assessment for the Defamation Bill, which described one of the intended objectives of the Act as aiming to “shift the balance of the law towards freedom of expression in a manner the Government believes will better match the preferences of society” – (Ministry of Justice Impact Assessment on the Defamation Bill, 1 April 2012)

11. The serious harm threshold in s.1 was a key part of the recalibration. The campaign for this threshold was precisely because the cost of claims, where harm was relatively minor, had a chilling effect. In *Lachaux v Independent Print Ltd* this Court held that s.1 was to be determined by reference to the facts concerning the impact of the statement, not merely its inherent tendency. This approach is consistent with the approach of the ECtHR, which has emphasised the need for a claimant to present convincing evidence to satisfy the threshold of seriousness – (ECtHR, *Denisov v. Ukraine*, App. No. 76639/11, 25 September 2018, at paras. 107 to 114).

12. A further relevant consideration concerns jurisdictional protection. Parliament, seeking to restrict so-called ‘libel tourism’, introduced greater protection for defendants not domiciled in this jurisdiction through s.9 of the 2013 Act. However, this protection only applies in defamation claims. It is not available to foreign defendants when a malicious falsehood claim is brought.

13. In MD’s experience, and as documented elsewhere (Foreign Policy Centre Report, *London Calling* p.12 [here](#)) in addition to defamation claims, privacy and data protection laws are increasingly being used by claimants against journalists. This change has become more pronounced since the Defamation Act 2013 (*London Calling* p.28). Those laws can be considered more attractive to claimants as the privacy and data protection legal regimes in this jurisdiction have weaker journalistic exemptions for public interest reporting and longer statutes of limitation than defamation.

14. As a matter of strategy, claimants seeking to chill speech or tie a journalist or media outlet up in litigation, will rely on whichever legal route provides the best means to secure that outcome. The Court of Appeal's narrowly focused test for s.3(1) of the Defamation Act 1952 makes malicious falsehood a more attractive cause of action in cases where there has been little or no loss or other harm.

15. While the Court of Appeal recognised that being sued is an interference with Article 10, it dismissed the prospect of its interpretation of s.3(1) having a chilling effect on 'honest and truthful speech' (para. 70). MD is concerned that this analysis fails to have sufficient regard to the practical realities of how the legal regime in this jurisdiction is used against the media.

16. In MD's experience, claimants seeking to chill speech rely extensively on aggressive and intimidatory legal letters sent to journalists by law firms based in the UK, prior to the issuing of legal proceedings. Those letters are wide ranging, often referencing a number of causes of action. The improper use of this type of correspondence can profoundly affect the exercise of free expression even in the absence of subsequent litigation.

17. Where matters do proceed to litigation, the Court of Appeal's approach to s.3(1) now raises the prospect of journalists being tied up in litigation in courts here in circumstances where there has been no serious reputational harm and no financial loss. In this context, litigation where issues of malice and falsity are disputed would require the parties to expend considerable resources and would use up precious court time.

18. While some journalists and media outlets can rely on the financial support of large publishing houses, that support is not available for independent journalists and publishers. MD's clients are often small, independent media outlets, bloggers, and citizen journalists, who do not have the means to defend themselves.

19. One obvious implication for the press, given the nature of the tort, is that it will be easier for large corporations with considerable resources available to pursue claims in malicious falsehood if they are not required to establish that they have actually

suffered, or are more likely than not to suffer, financial loss as a result of the publication complained of.

20. In *Jameel v the Wall Street Journal* [2007] 1 AC 359, 411, Baroness Hale noted - "These days, the dividing line between governmental and nongovernmental organisations is increasingly difficult to draw. The power wielded by the major multinational corporations is enormous and growing. The freedom to criticise them may be at least as important in a democratic society as the freedom to criticise the government." Section 1(2) of the Defamation Act 2013 enhanced the protection that journalists and media outlets enjoyed against the threat of potentially seriously inhibiting claims by large corporations.

21. The Court of Appeal's interpretation of s.3(1) raises the prospect of that protection being diminished by construing that provision as merely requiring corporations to show a "tendency" to cause financial loss. If this Court upholds the Court of Appeal's judgment, it will lead to an increase in the use of malicious falsehood by corporations, as well as individuals, as a cause of action, either instead of defamation, or in combination with defamation and other claims.

22. In such cases, the press is likely to be further dissuaded from taking part in the discussion of matters of legitimate public concern, with the chilling effect impacting on journalists engaged in newsgathering, investigative journalism, and other related activities. Litigation, regardless of the outcome, affects not just a particular journalist in a particular case, but will have a more general negative effect on other journalists.

23. The UK is required to safeguard the right to freedom of expression by creating a favourable environment for participation in public debate and establishing an effective system of protection of journalists – (ECtHR, *Dink v Turkey*, App. No. 2668/07, 14 September 2010, para 137). One aspect of creating a favourable environment for the expression of opinions and ideas is ensuring that a claimant is required to show meaningful harm in all causes of action where journalists can be sued.

24. This is the approach taken by the ECtHR. In *Tête v France*, a case involving knowingly false speech, the failure of the domestic courts to apply a proportionality

test which would have considered the absence of any consequence on reputation from the publication amounted to a violation of the applicant's Article 10 rights – (ECtHR, *Tête v France*, App. No. 59636/16, 26 March 2020, paras 57-70).

25. The Court of Appeal's interpretation of s.3(1) means that claimants would be able to rely on malicious falsehood as a cause of action notwithstanding that they have not (and are not likely to) suffer harm (for example, because the words complained of had already been published on a number of occasions so that they were incapable of causing financial loss, or the presence of other, true allegations in a publication containing the false allegation).

26. This would signal that costly legal proceedings involving claims in malicious falsehood could be used to interfere with freedom of expression and silence responsible journalism. It would also send a message to journalists that they may now be subject to low value claims in malicious falsehood. This would have a clear chilling effect.

Conclusion:

27. For the reasons set out above, MD respectfully submits that the Court of Appeal's interpretation of s. 3(1) will result in an unacceptable chilling effect on the exercise by the press of its right to free expression.

Padraig Hughes
Media Defence

4 September 2023