Trinity Term
[2024] UKSC 19
On appeal from: [2022] EWCA Civ 1067

JUDGMENT

George (Respondent) *v* Cannell and another (Appellants)

before

Lord Hodge, Deputy President
Lord Hamblen
Lord Leggatt
Lord Burrows
Lord Richards

JUDGMENT GIVEN ON
12 June 2024

Heard on 17 and 18 October 2023

Appellant
David Price KC
Jonathan Price
(Instructed by Brabners LLP (Liverpool))

Respondent
William Bennett KC
Godwin Busuttil
(Instructed by Thomson Heath & Associates (London))

LORD LEGGATT (with whom Lord Hodge and Lord Richards agree):

Introduction

1. We are concerned on this appeal with a tort with many names. It embraces actions which have variously been called slander of title, slander of goods, disparagement of goods and trade libel. By the turn of the twentieth century these actions were coming to be seen as examples of a more general wrong, for which Sir John Salmond coined the name "injurious falsehood": see Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries*, 1st ed (1907), p 417. That name is still used by many legal writers; but courts in England and Wales have generally preferred the term "malicious falsehood", which I will use. Whatever name is used, the nature of the wrong is not in doubt. As stated by the Court of Appeal in the leading case of *Ratcliffe v Evans* [1892] 2 QB 524, 527:

> "an action will lie for written or oral falsehoods … where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage …"

2. Equally clear is that "actual damage" in this context means pecuniary damage - that is, loss that can be estimated in money (rather than merely being compensated by an award of money). A more modern term which I will use to mean the same thing is "financial loss." Because financial loss is the basis or "gist" of the tort, malicious falsehood is generally classified as an "economic tort": see eg Hazel Carty, *An Analysis of the Economic Torts*, 2nd ed (2010), p 1.

3. In this case the trial judge found that the first defendant maliciously published falsehoods about the claimant to two individuals; but also that neither publication caused the claimant any financial loss. The claimant asserts that the publications nevertheless caused injury to her feelings for which she is entitled to compensation. Admittedly under the common law such a claim cannot be maintained. But the claimant argues that a statutory modification of the tort made by section 3(1) of the Defamation Act 1952 changed this. She contends that this statutory provision applies here and, where it applies, enables damages to be recovered for injury to feelings even when no financial loss has been sustained.

4. If section 3(1) of the 1952 Act has this radical effect, it had gone unnoticed for 70 years. The Court of Appeal, however, accepted that it does. They decided, first, that section 3(1) applies here but that, as the claimant suffered no financial loss, only nominal damages could be awarded on that account. I agree with this. They then held that it would be open to the judge, on an assessment, to award substantial (as opposed to

nominal) damages to the claimant for her injured feelings. With that, I cannot agree. As I will explain, it was neither the intention nor the effect of the 1952 Act to transform an economic tort into one which protects the claimant's emotional wellbeing.

The facts

5. The second defendant, LCA Jobs Ltd ("LCA"), is a recruitment agency owned and operated by the first defendant, Linda Cannell. The claimant, Fiona George, was employed by LCA as a recruitment consultant. She resigned after eight months and then got a job at another recruitment agency called Fawkes & Reece. Her contract of employment with LCA did not prohibit her from soliciting business from LCA's clients after her employment ended - although she gave Linda Cannell verbal assurances that she would not do so.

6. Fiona George started her new job with Fawkes & Reece at the beginning of January 2019. Right away she began actively targeting LCA's clients. Linda Cannell soon found out. On 21 January 2019 Ms Cannell emailed the claimant threatening to take legal action against her for breach of "your post-employment obligations under the terms of your employment, not to solicit business from LCA clients." Ms Cannell also said that she would be writing to the claimant's employer and contacting LCA's clients "to advise them of your actions and your violation of the terms of your post-employment obligations."

7. The trial judge found that, when she sent this email, Linda Cannell knew that the claimant's contract of employment contained no restriction on soliciting business from LCA's clients. But together with her legal adviser she decided to assert that there was such a legal obligation. Linda Cannell believed that Fiona George did not have the handbook containing the terms of her employment with LCA and hoped that she would not discover the reality of the situation.

8. No claim for defamation or malicious falsehood could be based on the email sent to the claimant because it was not published to any third party. But immediately before and after sending the email, Linda Cannell made similar statements to two other people.

9. The first such statement was made to an individual called Matthew Butler who worked for a client of LCA. Mr Butler's firm had been approached by the claimant to use her services to search for new staff. During a telephone call Linda Cannell told Matthew Butler that in doing this Fiona George was breaking her contract with LCA under which she had agreed that she would not approach LCA's clients.

10. Linda Cannell also sent an email to the claimant's line-manager at Fawkes & Reece called Graeme Lingenfelder. The email said that Fiona George had been approaching LCA's clients for new business in breach of "her legal obligations under the terms of her employment with LCA, not to solicit business from our clients and candidates (and Fiona's absolute assurances that this is something she would never do)." Ms Cannell asked for assurances that this would stop immediately.

11. Very shortly after receiving this email, Mr Lingenfelder spoke to the claimant. They discussed the allegation of breach of contract. Contrary to Linda Cannell's belief, Fiona George did in fact have a copy of the handbook containing her terms of employment with LCA. She showed this to Graeme Lingenfelder so that he could see that, in reality, there was nothing in her contract to prevent her from soliciting LCA's clients. He accepted that this was so.

12. A few days later, on 27 January 2019, the claimant resigned from Fawkes & Reece, despite efforts by Mr Lingenfelder to persuade her to stay. She did so because she supposed (wrongly, as it turned out) that Linda Cannell had carried out her threat to contact other clients of LCA. Fiona George felt that this made her position untenable. She quickly found another job with a recruitment agency operating in a different sector.

The proceedings below

13. Fiona George sued Linda Cannell and LCA for both defamation and malicious falsehood. The claim for defamation failed at trial because the judge, Saini J, found that the statements made by Linda Cannell to Mr Butler and to Mr Lingenfelder had not caused serious harm to the claimant's reputation, as is now required to establish that a statement is defamatory by section 1 of the Defamation Act 2013: see [2021] EWHC 2988 (QB); [2021] 4 WLR 145, paras 133-136. There was no appeal from that decision.

14. On the claim for malicious falsehood the judge found that the statements made by Linda Cannell to the effect that the claimant had breached post-employment obligations in her contract with LCA were false and were made maliciously, as Linda Cannell did not honestly believe that they were true: see paras 160-163. He also found that the statements had not caused any financial loss at all to the claimant. What Linda Cannell had said to Matthew Butler had no financial impact because Mr Butler had in fact already decided not to deal further with the claimant due to an unrelated issue (involving a disagreement about commission). Equally, no loss flowed from the email sent to Graeme Lingenfelder because, straight after receiving the email, he saw for himself that the claimant's employment contract contained no relevant legal obligation. Any restrictions that he imposed on the freedom of the claimant to contact LCA's clients were therefore his own decision and were not affected by the false statement: see paras 180-181.

15. The judge was persuaded that, in the light of his findings that the statements complained of did not cause any financial loss, the claim for damages for malicious falsehood failed under the common law and that section 3(1) of the 1952 Act did not apply. He therefore dismissed the claim.

16. On appeal the Court of Appeal (Warby LJ, with whom Underhill LJ and Snowden LJ agreed) decided that the claim does fall within section 3(1) with the consequence that the claimant is entitled to a judgment for damages to be assessed: see [2022] EWCA Civ 1067; [2023] QB 117, paras 72-73. They also decided that, even though the publications complained of caused the claimant no financial loss, she is not limited on that account to an award of purely nominal damages but is entitled to recover compensation for injury to her feelings: paras 74-79. The Court of Appeal ordered that the case be remitted to the High Court to assess these damages.

The issues on this appeal

17. On this further appeal the defendants dispute each step of the Court of Appeal's reasoning. Their case is put in two alternative ways. They first argue that, on the facts found by the judge, and in particular his finding that the two publications caused no financial loss to the claimant, the claim must fail altogether. Alternatively, they argue that, if the claimant is entitled to a judgment in her favour, it can only be for nominal damages and not for damages for injured feelings. The first of these arguments turns on the proper interpretation of section 3(1) of the 1952 Act, to which I now turn.

Section 3(1) of the 1952 Act

18. Section 3(1) of the 1952 Act states:

> "In an action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage –
>
> (a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or
>
> (b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication."

19. In construing section 3(1), section 2 is also relevant. This states:

> "In an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business."

20. These provisions are largely unintelligible to anyone untutored in the technicalities of the common law of defamation and malicious falsehood. The term "special damage" is not one used in ordinary speech. Nor, unfortunately, does it even have a uniform legal meaning. As Bowen LJ pointed out in *Ratcliffe v Evans*, at p 528, the term "special damage", although "found for centuries in the books, is not always used with reference to similar subject-matter, nor in the same context"; see also JA Jolowicz, "The Changing Use of 'Special Damage' and its Effect on the Law" [1960] CLJ 214. For that reason, the drafter of the Act might have done well to follow the example of the Court of Appeal in *Ratcliffe v Evans* in avoiding the term because of its potential "to encourage confusion in thought" (see p 529).

21. There is another difficulty in the drafting of these provisions. Both section 2 and section 3(1) state that, where they apply, "it shall not be necessary to allege or prove special damage." Yet they do not state for what purpose this shall be unnecessary.

22. These two provisions of the 1952 Act only make sense when interpreted against the background of the common law which the Act was designed to modify. So I need to outline the relevant background to these provisions before I examine their meaning and effect.

The common law background: defamation

23. The term "special damage" derives its original meaning from a feature that is fundamental to the common law of defamation. This is the distinction between statements actionable "on proof of special damage" and statements actionable "without proof of special damage" (also known as statements actionable "per se"). Understanding this distinction requires some knowledge of its history, as its existence and significance are largely a historical accident. The following summary of the relevant history is drawn from the valuable accounts given by: David Ibbetson, *A Historical Introduction to the Law of Obligations* (1999), pp 112-125; Paul Mitchell, *The Making of the Modern Law of Defamation* (2005), chs 1 and 3; and John Baker, *An Introduction to English Legal History*, 5th ed (2019), ch 25.

24. In mediaeval England remedies for defamatory words could be obtained only in the ecclesiastical courts, which could order penance but not damages. The common law courts began to permit a general action on the case for words in the first two decades of the sixteenth century. The essence of the action was not injury to reputation as such but the effect of the words in causing quantifiable economic loss.

25. The earliest actions were brought for accusations of theft and other criminal offences. The next situation where economic loss regularly gave rise to such actions was where the words affected the claimant's income from a profession, trade or calling. A third special category of actions which developed in Elizabethan times concerned imputations of French pox (syphilis) and was later extended to other contagious diseases. Where an allegation fell within one of these three categories, the courts would presume damage from the nature of the words used and it was then left to the jury to decide the amount of damages. In such cases the words were said to be actionable in themselves or "per se." In other actions on the case for words "special damage" had to be proved.

26. The distinction was cemented by the Limitation Act 1623. Section 3(4) of this Act introduced a special limitation period for actions for slanderous words of two years from when the words were spoken. This was interpreted by the courts as applying only if the words were actionable per se. If proof of special damage was required, time did not start to run until the damage occurred, and the normal six-year period applied: see *Saunders v Edwards* (1662) 1 Sid 95; *Littleboy v Wright* (1662) 1 Sid 95.

27. In the eighteenth century the courts introduced a new restriction: that for words to be actionable they should not only cause loss but should also be capable of bearing a defamatory meaning. The test adopted, taken from the criminal law of libel, was that the words must expose the claimant to "hatred, contempt or ridicule." The action for "words" thus became the action for "defamation."

28. Originally the publication of defamatory words in writing was regarded simply as a form of slander. The distinction between slander and libel appears to have developed from an undefined fourth category of words actionable per se by reason of their being particularly malignant or widely disseminated. Widespread distribution of printed words became the paradigm case. Eventually written words were seen as constituting the entire category. The distinction between slander and libel was entrenched by the decision of the Court of Common Pleas in *Thorley v Kerry* (1812) 4 Taunt 355. Giving the judgment of the court, Sir James Mansfield CJ said that he could not, in principle, see any difference between written and spoken words that would allow an action to be maintained for written words when an action could not be maintained if the words were spoken; but that the distinction was too well established by authority for it now to be repudiated.

29. In the nineteenth century the categories of defamatory statements actionable per se came to be seen as closed to further judicial development so that only Parliament could alter them. This attitude was encapsulated by Pollock CB in *Gallwey v Marshall* (1853) 9 Exch 294, 300, when he said that "we ought not to extend the limits of actions of this nature [ie where proof of special damage is not required] beyond those laid down by our predecessors." Parliament did create one new category. The Slander of Women Act 1891 provided that spoken words "which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable." (This Act was repealed by the Defamation Act 2013.)

30. A limitation in the category of statements actionable per se relating to a person's fitness in their profession, trade or calling was highlighted by the decision of the House of Lords in *Jones v Jones* [1916] 2 AC 481. The claimant was the headmaster of a school who was orally accused of adultery with the wife of a school cleaner. Although the allegation was calculated to damage the claimant's reputation in his profession and, as the jury found, put him at risk of being dismissed from his employment, the claimant did not in fact lose his job and no special damage was shown. Following a trial, judgment was entered for the claimant for damages assessed by the jury in a sum of £10. But on appeal the judgment was reversed on the ground that the words spoken were not actionable without proof of special damage. The House of Lords held that the relevant category of slander actionable per se was restricted by precedent to defamatory words spoken of someone "in the way of" their profession or calling. As the allegation made did not relate to the claimant's work as a school master but to his private life, this requirement was not satisfied.

31. All the law lords said that any change in the law could be made only by the legislature: see p 493 (Viscount Haldane), p 499 (Lord Sumner), p 506 (Lord Parmoor), and p 508 (Lord Wrenbury). Ironically, the very illogicality of the law was seen as a reason why the courts could not change it. Viscount Haldane, at p 489, approved this passage in the judgment of Lord Herschell in *Alexander v Jenkins* [1892] 1 QB 797, 801:

> "When you are dealing with some legal decisions which all rest on a certain principle, you may extend the area of those decisions to meet cases which fall within the same principle; but where we are dealing with such an artificial law as this law of slander, which rests on the most artificial distinctions, all you can do is, I think, to say that if the action is to be extended to a class of cases in which it has not hitherto been held to lie, it is the legislature that must make the extension and not the Court."

The legislature did eventually extend this category of slander actionable per se by section 2 of the 1952 Act.

32. The ability to recover damages for any written and some spoken words tending to injure the reputation of the claimant without having to prove special damage allowed the gist of the tort in such cases to come to be seen as injury to reputation rather than financial loss. Until comparatively recent times, damages were assessed by juries and the courts were very reluctant to interfere with a jury's award. In practice, therefore, juries had a broad discretion to award whatever amount of money they thought fit compensation for a form of injury (to reputation) which is inherently non-financial.

33. By contrast, the "special damage" which a claimant must show to found an action for slander where the words are not actionable per se is still limited - as it has always been - to financial loss: see *Lachaux v Independent Print Ltd* [2019] UKSC 27; [2020] AC 612, paras 5, 15, 18. In some old cases the expressions "temporal" or "material" loss were used, but those expressions were synonymous with financial loss as they also meant that the loss was capable of being estimated in money: see *Chamberlain v Boyd* (1883) 11 QBD 407, 412 (Lord Coleridge CJ); *McGregor on Damages*, 21st ed (2021), para 46-003; *Gatley on Libel and Slander*, 13th ed (2022), para 6-002. In *Lachaux*, para 5, Lord Sumption summarised the position in this way:

> "The interest which the law protects in cases where a defamatory statement is actionable per se differs from that which it protects in other cases. The gist of the tort where the statement is not actionable per se is not injury to reputation but … wrongfully inflicted pecuniary loss."

Lord Sumption added that it is an open question, which has given rise to conflicting dicta, whether non-pecuniary damage is recoverable at all when proof of special damage is required.

The common law background: malicious falsehood

34. The earliest actions for malicious falsehood were framed as actions for slander. A false allegation that the claimant did not have a valid title to land, which prevented him from selling or leasing it, was called "slander of title." False statements about the claimant's wares which caused loss of custom were also characterised as a type of slander. When slander became confined more narrowly to words which defamed the claimant's person or character rather than their property, these actions were seen as having a different basis and as requiring proof of actual malice as well as special damage.

35. The question whether it was necessary to show special damage even when the publication was in writing was authoritatively decided in *Malachy v Soper* (1836) 3 Bing NC 371; 132 ER 453. Tindal CJ, giving the judgment of the Court of Common Pleas, observed that the publication in that case was "one which slanders not the person or character of the Plaintiff, but his title [to certain shares in a mine]." It was therefore not an action of a type in which "no special damage need either be alleged or proved." After examining earlier cases, he concluded, at pp 383-384:

> "We hold, therefore, on the authority of these cases, that an action for slander of title is not properly an action for words spoken, or for libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the Plaintiff's title."

36. The question of what constituted special damage for the purpose of the tort of malicious falsehood was closely examined in *Ratcliffe v Evans* [1892] 2 QB 524. The claimant in that case was an engineer and boiler-maker. He sued the owner of a newspaper for falsely and maliciously publishing an article stating that he had ceased to carry on his business. At the trial the claimant proved a general loss of business since the publication but gave no specific evidence of the loss of any particular customers or orders. Judgment was given for the claimant for damages of £120. The defendant appealed on the ground that no special damage had been alleged and proved.

37. The Court of Appeal dismissed the appeal. The impressive judgment of the court, delivered by Bowen LJ, carefully disentangled the different meanings of the term "special damage." Bowen LJ noted that the term had been used in various senses, and that its meaning depended on the context. In its original meaning "special damage" referred simply to the damage which a claimant had to show to found a claim in cases where damage was the basis or gist of the action. As Bowen LJ explained, at p 528:

> "… where no actual and positive right (apart from the damage done) has been disturbed, it is the damage done that is the wrong; and the expression 'special damage', when used of this damage, denotes the actual and temporal loss which has, in fact, occurred."

As with slander actionable only on proof of special damage, such "actual and temporal loss" meant pecuniary loss: see *Gatley on Libel and Slander*, 13th ed (2022), para 22-021; *McGregor on Damages*, 21st ed (2021), para 48-011.

38. Bowen LJ went on to explain how the term "special damage" came also to be used in a narrower sense. This derived from the insistence of the courts, in cases of

slanders not actionable per se, "where actual damage done is the very gist of the action", that "the actual loss must be proved specially and with certainty" (p 531). The same applied in actions for malicious falsehood (where again the damage done was the gist of the action). Bowen LJ said, at p 532:

> "The necessity of alleging and proving actual temporal loss with certainty and precision in all cases of the sort has been insisted upon for centuries …"

As a result of this requirement, the term "special damage" came to have the connotation of damage which is precisely specified. This was associated with a rule of pleading requiring "special damage" in the narrower sense of damage capable of exact calculation to be pleaded with particularity.

39. The conclusion of the Court of Appeal in *Ratcliffe v Evans* was that, although in an action for malicious falsehood it is necessary to allege and prove "special damage" in the original sense of pecuniary loss, it is not always necessary to plead and prove such loss with exactitude. Rather, the degree of precision required depends on the nature and circumstances of the publication. As Bowen LJ memorably put it, at pp 532-533:

> "As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

The Court of Appeal held, at p 533, that where, as in that case, the statement falsely and maliciously published about the claimant's business is one "which in its very nature is intended or reasonably likely to produce, and which in the ordinary course of things does produce, a general loss of business, as distinct from the loss of this or that known customer", evidence of such general loss of business was admissible and could support the action.

40. In two later cases the House of Lords reiterated the need for proof of special damage in an action for malicious falsehood. In *White v Mellin* [1895] AC 154 the House of Lords laid down that words calculated to injure a person in their trade, even if false and maliciously published, were not actionable without proof of special damage if the words were disparaging of the claimant's goods without being defamatory of his character. In *The Royal Baking Powder Co v Wright, Crossley & Co* (1900) 18 RPC 95 the complaint was again that the defendant had maliciously made false statements which were calculated to injure the claimant in its trade but which were not defamatory. While

different views were expressed about whether the evidence was sufficient to establish liability, all four law lords who gave reasoned judgments emphasised that damage was the gist of the action and three of them said that proof of special damage or "specific money damage" was required: see p 99 (Lord Davey); p 101 (Lord James of Hereford); p 103 (Lord Robertson). Lord Robertson stated that:

> "the essential ground, the gist, of the action … is special damage, done maliciously. Unless the Plaintiff has in fact suffered loss which can be and is specified, he has no cause of action. The fact that the Defendant has acted maliciously cannot supply the want of special damage, nor can a superfluity of malice eke out a case wanting in special damage."

Lord Robertson distinguished *Ratcliffe v Evans* on the ground that the claimant had not attempted to show a general loss of business.

The Porter Committee report

41. It was against this legal background that a Committee on the Law of Defamation chaired by Lord Porter was appointed in 1939 "to consider the law of defamation and to report on the changes in the existing law, practice and procedure relating to the matter which are desirable." The Committee treated the law of defamation as including certain "actions on the case" said to comprise slander of title, slander of goods and "other false statements made maliciously and calculated to cause and actually causing pecuniary damage": see report, para 20. After an interruption of its work during the Second World War, the Porter Committee's report was finally published in 1948 (Cmd 7536/48).

42. One subject discussed in the report was the distinction between statements actionable per se and statements actionable only on proof of special damage - taken by the Committee to mean "actual pecuniary loss" (see para 33). The report emphasised the difficulty of proving special damage, so that actions for slander actionable only on proof of special damage and "actions on the case" for false but non-defamatory statements made maliciously and calculated to cause damage were seldom brought (paras 33-35).

43. The report nevertheless recommended that the categories of slander actionable per se should be left unchanged, with one exception. The Committee criticised the requirement that, to be actionable without proof of special damage, words naturally tending to injure or prejudice the reputation of the claimant in his office, profession or trade had to be spoken of the claimant "in the way of" his office, profession, or trade (paras 47-49). The facts of *Jones v Jones* (without mentioning the case by name) were given as an example of how this requirement could cause injustice. The Porter

Committee recommended that the common law definition should be amended by statute to abolish this restriction.

44. With regard to "actions on the case" (ie for malicious falsehood), the report stated, at para 51:

> "The necessity of furnishing proof of special damage has rendered this type of action rare in the extreme; but statements of these kinds may cause very serious damage which, owing to technical rules of evidence, it is impossible to prove strictly as special damage. In the result, the injured person is left without any remedy for the loss which he has suffered. In our view, this constitutes an injustice which should be righted by an amendment of the existing law."

The 1952 Act

45. In response to these (and other) recommendations made by the Porter Committee, Parliament enacted the 1952 Act, described in the preamble as "[a]n Act to amend the law relating to libel and slander and other malicious falsehoods." The sections of the Act relevant on this appeal are sections 2 and 3(1), which I have quoted at paras 18 and 19 above.

46. I will take section 2 first because it helps to clarify the meaning of section 3(1). Even without the aid of the Porter Committee report, it is evident that section 2 is intended to remove the defect in the law exposed by *Jones v Jones*. The clear purpose and effect of section 2 is to extend the category of slander actionable per se where the claim is based on words tending to injure a person in his or her calling etc. It does so by abolishing the restriction that the words must be spoken of the claimant "in the way of" that calling.

The effect of section 3(1)

47. Turning to section 3(1), its clear underlying purpose is to make it easier for claimants to recover damages in actions for malicious falsehood. It is less clear exactly how the statute is intended to achieve this. I must consider three submissions made by counsel for the defendants about what legal consequences follow when the words complained of fall within either (or both) of conditions (a) and (b) of section 3(1).

48. First, they submit that the words "it shall not be necessary to allege or prove special damage" dispense with the requirement under the common law to allege and prove loss with certainty and precision. The defendants acknowledge that in *Ratcliffe v Evans* the Court of Appeal had already relaxed that requirement by allowing a claimant to rely on a general loss of business, without having to prove the loss of specific customers. But they submit that section 3(1) goes further than this by allowing the court to draw an inference that the publication caused financial loss simply from the likelihood of such loss even without evidence of a general loss of business.

49. Second, the defendants submit that the presumption created where section 3(1) applies is rebuttable. They argue that there is nothing in the wording of section 3(1) or in principles of common law to prevent a defendant from relying on specific facts established at the trial to negative the inference of financial loss to which section 3(1) gives rise and thereby defeat the claim.

50. Third, the defendants submit that there is nothing in section 3(1) to suggest any intention to discard the basic principle that financial loss is the gist of an action for malicious falsehood.

The nature of the presumption

51. I agree with the first and third of these submissions but not the second. Although I initially thought otherwise, I have been persuaded that the effect of section 3(1), where it applies, is to create a presumption of law that the publication of the words complained of has caused financial loss. This presumption is irrebuttable as far as liability is concerned but does not necessarily lead to an award of substantial damages. If the court concludes, as the judge did here, that no financial loss has actually been caused, the claimant will be entitled only to nominal damages.

52. As I now see it, this conclusion is inescapable when section 3(1) is read together with section 2. Unless there is some compelling reason to conclude otherwise, it is to be assumed that language in a statute is used consistently and that the same term bears the same meaning wherever it occurs. That inference is reinforced here by the fact that sections 2 and 3(1) not only both contain the term "special damage" but also follow a similar pattern. Each provides that, if the words on which the action is founded are "calculated to" have a specified effect, then "it shall not be necessary to allege or prove special damage."

53. In section 2 the intended effect of this formulation is plainly to make words falling within the scope of the provision actionable per se in the sense discussed above. That is to say, all the claimant need show to establish a cause of action is that words of the relevant kind were spoken by the defendant to a third person. If this is shown, the

damage necessary to found the action is presumed by law and therefore need not be proved: see *Jones v Jones* [1916] 2 AC 481, 500 (Lord Sumner); *Gatley on Libel and Slander*, 13th ed (2022), para 5-002. It is then a matter for the jury (or nowadays the judge) to assess the amount of damages. Thus, if *Jones v Jones* had been decided after the 1952 Act was enacted, the judgment for the claimant in that case would have been upheld.

54. It follows that, when the same formulation ("it shall not be necessary to allege or prove special damage") is used in section 3(1), this does not mean merely that damage need not be alleged and proved with certainty and precision. Rather, these words are to be understood as having the same meaning as they do in section 2. The term "special damage" must therefore likewise refer to the damage which under the common law a claimant would have to allege and prove to establish a cause of action: that is to say, actual pecuniary loss. As with slander actionable per se, where the words published fall within the scope of the statutory provision the damage necessary to found an action is presumed by law and so need not be alleged or proved.

55. There is another aspect of the relationship between the two sections which reinforces this conclusion. The combined effect of conditions (a) and (b) in section 3(1) is to limit the scope of section 3(1) as it applies to spoken words to words calculated to cause pecuniary damage to the claimant "in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication." This language also tracks the language used in section 2. It can be inferred that the reason for this limitation is to avoid inconsistency between the scope of defamatory statements actionable per se and the scope of malicious falsehoods which are similarly actionable per se. If section 3(1) had applied to all words calculated to cause pecuniary damage to the claimant, whether written or spoken, a claimant could have sued for a malicious falsehood spoken orally without the need to prove special damage in circumstances where such an action would not lie for a defamatory statement spoken orally because the words do not fall within one of the categories of slander actionable per se. The legislative aim of avoiding such an inconsistency is corroborated by the Porter Committee report, paras 52-54. This feature of section 3(1) further confirms that the curtailment of the need to allege and prove special damage is intended to operate in the same way and have the same effect in section 3(1) as in section 2.

56. I add that, if the defendants' interpretation were right, it is hard to see when time would begin to run for an action falling within section 3(1). In actions for defamation it remains the law that, for the purposes of section 4A of the Limitation Act 1980 (as under the Limitation Act 1623), the cause of action accrues on publication if the words are actionable per se, and on the occurrence of special damage in other cases (because until then, the cause of action is incomplete): see *Lachaux*, para 18. Where in an action for malicious falsehood, the claimant relies not on evidence of actual damage but on the presumption created by section 3(1), then the time for bringing an action must run from the moment of publication. As in such a case it is unnecessary to allege or prove actual

damage, there is no other possible date. Proof at trial that no loss subsequently occurred can preclude an award of substantial damages but cannot retrospectively extinguish a cause of action that has already accrued.

Financial loss remains the gist of the action

57. Despite the parallels between sections 2 and 3 of the 1952 Act, there is an important difference between claims based on defamatory statements actionable per se and actions for malicious falsehood based on words that fall within section 3(1). This difference lies in the interest which the law protects. As discussed above, where defamatory statements are actionable per se, the gist of the tort is injury to reputation. That is clearly not so in cases of malicious falsehood. Once the distinction was decisively drawn in *Malachy v Soper* (see para 35 above) between slander of someone's person or character and "slander" of their title or goods, it was impossible to characterise actions for slander of title, slander of goods or other malicious falsehood as concerned to protect reputation. Even when a false statement is both defamatory and maliciously published, and so gives rise to claims under both heads, the two causes of action are distinct and damages for injury to reputation cannot be recovered in an action for malicious falsehood. As Sir Donald Nicholls V-C said in *Joyce v Sengupta* [1993] 1 WLR 337, 348:

> "The history of malicious falsehood as a cause of action shows it was not designed to provide a remedy for such injury …"

58. It equally cannot be said that the cause of action for malicious falsehood was ever designed to provide a remedy for injury to the claimant's feelings. Throughout its history, the only interests protected by the various actions which coalesced into the tort of malicious falsehood have been economic interests: see generally, *Clerk & Lindsell on Torts*, 24th ed (2023), paras 22-03, 22-09.

59. Section 3(1) has not altered this. Indeed, it impliedly confirms that the cause of action for malicious falsehood is designed to provide a remedy only for financial loss. That is because section 3(1) can only apply when the words upon which the action is founded are calculated to cause "pecuniary damage" to the claimant. This point was well made in *Mayne and McGregor on Damages*, 12th ed (1961), para 947 - the first edition of the work to be edited by Harvey McGregor:

> "There remains the question of non-pecuniary loss. Although s.3 of the Defamation Act 1952 continues to reflect the association of injurious falsehood with defamation because the statements singled out as not requiring allegation and

> proof of special damage are very similar to those defamatory statements which are actionable per se, there is still an interesting difference between such injurious falsehoods and such defamatory statements in relation to non-pecuniary loss. Whereas with defamatory statements actionable per se the principal head of damage is the injury to reputation which is non-pecuniary loss, with those similar injurious falsehoods which fall within s.3 of the Defamation Act 1952 the principal, and perhaps the only, head of damage is the pecuniary loss that the claimant has suffered. Section 3, by dispensing in these cases with the requirement of allegation and proof of specific pecuniary loss for success in the action, thus impliedly confirms the view that for all injurious falsehoods only pecuniary loss will ground the action …"

This passage has been repeated in all later editions: see now *McGregor on Damages*, 21st ed (2021), para 48-012.

The meaning of "calculated to cause"

60. The next question is whether the words found by the judge to have been false and maliciously published by Linda Cannell were "calculated to" cause pecuniary damage to the claimant. It is common ground that in this context the phrase "calculated to" does not mean "intended to" but "objectively likely to"; and that the test of likelihood is "more likely than not." The dispute is about what facts are to be taken into account in assessing this probability. The defendants put their case in two alternative ways.

The "historical" approach

61. Their primary case is that the question whether the words complained of "are calculated to cause" pecuniary damage to the claimant is to be answered taking into account all relevant facts before, at and after publication, as established at the trial. So if, on the evidence adduced at the trial, it is found to be more probable than not that no pecuniary damage was caused to the claimant, section 3(1) does not apply. This may be called the "historical" approach. In contrast, a "forward-looking" approach limits the inquiry to facts existing at the time of publication.

62. The historical approach suffers from the double disadvantage of being inconsistent with both the language and the purpose of section 3(1). Section 3(1) does not say that there is no need to allege or prove special damage if the words on which the action is founded "probably have caused" pecuniary damage. The test is whether the words "are calculated" (ie are likely) to cause pecuniary damage. Such an assessment

can be made only by looking forward from when the words were published without considering any information about what has subsequently happened and whether any pecuniary damage did in fact result from the publication. The language is inherently forward-looking.

63. The historical approach is also inconsistent with the purpose of section 3(1). As discussed, the aim of the provision is to make it easier to bring actions for malicious falsehood by removing the need to allege and prove (on the balance of probability) that special (ie pecuniary) damage has actually been caused. It would completely defeat that purpose if, to avoid the need to allege and prove that a malicious falsehood - more probably than not - has caused pecuniary damage, it were necessary to prove that it probably has caused pecuniary damage. Such an interpretation would make section 3(1) vacuous.

64. The historical approach also conflicts with the conclusion I have reached above that, where section 3(1) applies, the cause of action accrues at the time of publication of the words complained of and does not depend on anything that happens subsequently.

65. It is not suggested by counsel for the defendants that any court has decided that the historical approach is correct. The most that can be said is that judges have sometimes used language which is either equivocal or suggests that they may have assumed that it was relevant, in considering whether section 3(1) applies, to have regard to events that occurred after publication. In other cases, however, the court clearly treated the operative time for assessing the likelihood of loss as the time of publication. A good example is *Tesla Motors Ltd v British Broadcasting Corpn* [2013] EWCA Civ 152 which, before the present case, was the leading modern authority on section 3(1). I will return to this case but mention now that, as the defendants acknowledge, the claim in *Tesla* was advanced and addressed by both the judge and the Court of Appeal on the basis that whether the publication complained of was calculated to cause financial loss was to be assessed from the perspective of the time of publication.

66. At the trial of this action the judge received little assistance on this point, which was not clearly raised by the defendants until after the hearing had ended and was addressed only in additional written submissions. In accepting the historical approach as correct, the judge did not consider its compatibility with the language and purpose of section 3(1) and referred to only one authority as support for the proposition that facts occurring after publication can be taken into account: see paras 205-206. This was the decision of the Court of Appeal in *Sallows v Griffiths* [2001] FSR 15. There the relevant question was whether allegations of dishonesty made to the claimant himself and two other individuals were calculated to cause financial loss to the claimant so as to engage section 3(1). The claimant succeeded on this point before the judge; but an appeal was allowed on the basis that, apart from damage resulting from the claimant's wrongful dismissal, which had been separately compensated:

> "there was no evidence before the judge that the [claimant] *would have been likely* to suffer any other damage from publication to any of the three persons relied upon." (para 17 - emphasis added)

67. As Warby LJ pointed out, at para 58, this passage does not support the contention that what actually happened after publication may be considered. Rather, the language used shows that the Court of Appeal was looking at the facts at the time of publication and deciding that there was no evidence that it was likely at that time that the claimant would suffer any loss (other than loss for which he had already been compensated). In other words, the approach adopted was forward-looking.

68. I conclude that the Court of Appeal was right to reject the historical approach and to hold that the test is whether, viewed at the time of publication, the words complained of were likely to cause financial loss to the claimant.

The "forward-looking" approach

69. Counsel for the defendants recognised the difficulty - I would say impossibility - of justifying the historical approach. They took their main stand on their alternative argument that it makes no difference to the result here if the test is forward-looking from publication. What is critical, on their case, is that there is no restriction, other than relevance, on the facts existing at that date which can be considered. On the forward-looking approach information about what has actually happened after the date of publication must be left out of account. But this is only likely to lead to a different outcome from the historical approach if loss is avoided as a result of an occurrence which, at the time of publication, was unlikely.

70. The defendants criticise the Court of Appeal for applying what they call a "tendency" test of asking whether the words published had a "natural tendency" (or were "inherently likely") to cause financial loss: see judgment, paras 65, 72. Counsel for the defendants make the point that words do not in themselves have a tendency to cause financial loss. Whether, viewed at the time of publication, words are likely to cause financial loss can be determined only if you know something at least about the factual context in which the words are published. On the facts of *Ratcliffe v Evans*, for example, to form the view that the words published were calculated to cause financial loss to the claimant, you would need to know at least that the claimant was carrying on the business referred to in the publications and had not ceased doing so. You would also need to know that the words were published to people who were actual or potential customers of the claimant.

71. The Court of Appeal accepted, at para 56 of the judgment of Warby LJ, that the question whether the words complained of are calculated to cause financial loss to the claimant cannot be approached in an entirely abstract fashion, detached from the circumstances of publication. Warby LJ thought it permissible to take account of the identity and essential characteristics of the claimant, the publisher and the publishee(s). The defendants submit that there is no principled basis for admitting evidence of these facts while excluding evidence of other facts which bear on the likely consequence of the publication. They argue that a realistic assessment of whether the words published are likely to cause financial loss to the claimant must take into account any relevant fact in existence at the date of publication, whether known to the defendant or not. Such facts include what the publishee(s) already knew or had been told about the subject matter of the publication and any steps which they would be likely to take in response to the publication.

72. An example of a case in which statements previously published were regarded as relevant is *Tesla*. Tesla sued the BBC alleging that statements broadcast on the programme "Top Gear" about the performance of its electric car were malicious falsehoods. Viewed on their own, the statements were calculated to cause financial loss to Tesla by putting off potential purchasers. Yet by the time of the broadcast complained of, the programme had been shown by the BBC on some 28 occasions. No claim could be made in relation to those earlier broadcasts because the time limit had expired. The judge decided that the action was an abuse of process because Tesla had no real prospect of showing that the actionable falsehoods were calculated to cause it any damage over and above that caused by the non-actionable statements. The Court of Appeal was not prepared to go quite that far, but upheld the result on the basis that Tesla had insufficient prospect of recovering substantial damages to justify the costs and the use of court time that would be involved in continuing the proceedings to trial: see [2013] EWCA Civ 152, para 49.

73. In *Tesla* the facts which showed that the publication complained of was unlikely to cause any financial loss to the claimant had occurred before publication. The defendants also point to cases where claims for malicious falsehood have failed because of the likelihood that, after the publication and in response to it, the publishee would take steps to verify the statement and would thereby discover the truth before relying on the statement.

74. In *Stewart-Brady v Express Newspapers plc* [1997] EMLR 192 a convicted murderer compulsorily detained in a secure psychiatric hospital complained of a newspaper article alleging that he had sexually assaulted a female visitor. The publication was said to be false and malicious and calculated to cause the claimant financial loss by inducing the hospital management to withdraw or reduce his discretionary weekly allowance. The judge held that there were no reasonable grounds for alleging that the publication was likely to have that result because the natural and probable response of the hospital management to the allegation would be to conduct an

internal inquiry to determine whether it was true. If the allowance was withdrawn, it would be as a consequence of that inquiry and not of the publication.

75. In *Fage UK Ltd v Chobani UK Ltd* [2013] EWHC 630 (Ch); [2013] FSR 32, para 152, in the context of an allegedly false and malicious complaint to a regulator, it was found to be unlikely that the regulator would take steps of a kind likely to cause damage to a business without first investigating the validity of the complaint. Again, in *Musst Holdings Ltd v Astra Asset Management UK Ltd* [2021] EWHC 3432 (Ch), paras 632 and 640, the judge found that a false statement to a potential investor about the company's financial position was not calculated to cause the company financial loss because it was more likely than not that the investor would make inquiries and ascertain the true position.

76. Applying such reasoning, the defendants submit that, even on a forward-looking test, the statements complained of here do not fall within section 3(1). Viewed at the time of publication, there was no prospect that the words spoken to Matthew Butler would cause financial loss to the claimant because Mr Butler had already decided not to do business with her. The same applies to Graeme Lingenfelder. He did not want the claimant to deal with LCA's clients anyway and had warned her against doing so at the start of her employment. Nor was there any real likelihood that the false allegation about the claimant's terms of employment with LCA made in the email sent to Mr Lingenfelder would cause her any financial loss. The defendants argue that, when the email was received, it was overwhelmingly likely that (as in fact happened) Mr Lingenfelder would discuss that allegation with the claimant, who would then show him her terms of employment with LCA, from which he would see that it contained no relevant post-employment obligation. So Mr Lingenfelder was bound quickly to discover (as he in fact did) that the allegation made in the email was untrue.

Relevance of the defendant's knowledge

77. The validity of these arguments depends on the premise that, in judging whether the words complained of are likely to cause financial loss to the claimant, any relevant fact should in principle be taken into account if at the time of publication it existed or was objectively likely to occur. I do not agree that this premise is correct.

78. In my view, the defendants' case misunderstands the purpose of the test in section 3(1). The aim is not to make the most accurate assessment possible of the likelihood of financial loss to the claimant. If that were the aim, section 3(1) would not have been enacted. The court would have been left to ask in all cases whether (on the balance of probability) the words published were not merely calculated to cause, but actually did cause, financial loss, which is the test under the common law. Starting from

the defendants' premise, the logical end point is the historical approach, which renders section 3(1) redundant.

79. The requirement that the words must be calculated to cause financial loss to the claimant was not introduced by the 1952 Act. It already existed under the common law. Under the common law it is necessary to show both that a false statement maliciously published is "calculated in the ordinary course of things to produce", and that it does produce, pecuniary damage: see the authoritative statement of the law in *Ratcliffe v Evans* [1892] 2 QB 524, 527, quoted at para 1 of this judgment. Thus, the common law does not simply apply a test of actual causation. It also requires the words published to be calculated to cause financial loss to the claimant. If one asks why this is so, the answer must lie in the general principle of the law of tort that a defendant should not be held responsible for consequences of their wrongful act which are too remote in the sense that the defendant should not be blamed for failing to anticipate them. As Viscount Simonds stated in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388, 422-423:

> "It is a principle of civil liability … that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour."

80. As the underlying question is whether the consequence is one for which the defendant ought to be held responsible, the assessment of probability must be based on such facts as the defendant knows or ought reasonably to know. It would defeat the purpose of the test if a defendant were to be held responsible for consequences which would be considered probable only if account is taken of facts which the defendant neither knew nor ought reasonably to have known.

81. If, judged on the facts known or which ought to be known by the defendant, a falsehood would be likely to cause financial loss to the claimant, it may nevertheless turn out that, for unexpected reasons, no loss is actually caused. Under the common law the defendant escapes liability in this situation. The effect of section 3(1) is to remove that escape route. What, if any, loss actually results remains relevant in assessing damages. But to establish liability the claimant need not allege or prove any actual financial loss.

82. Thus, I agree with Lord Hamblen and Lord Burrows that the appropriate test in determining whether the words complained of "are calculated to cause pecuniary damage" to the claimant is to ask whether, on the facts known or which should reasonably have been known to the defendant at the time of publication, it was

objectively likely that the words published would cause financial loss. I also agree that, subject to this constraint, potentially relevant matters include prior publications, other statements made in the same publication, and steps which the publishee would be likely to take in response to the publication. *Tesla* and the cases mentioned at paras 74 and 75 above are all consistent with this test.

83. Here the matters on which the defendants rely to argue that the words published by Linda Cannell were not calculated to cause financial loss to the claimant are not matters which, at the time of publication, Linda Cannell knew or ought reasonably to have known. There is no suggestion that she knew or had reason to know of Matthew Butler's private intention not to deal further with the claimant (because of a disagreement about commission). Nor that she knew or had reason to know of the conversation in which Graeme Lingenfelder had told the claimant at the start of her employment not to deal with LCA's clients. In addition, an important factual finding made by the judge is that Linda Cannell was under the belief that the claimant did not have the handbook containing her terms of employment. This belief was based on the fact that, after leaving LCA, the claimant had asked Linda Cannell to send her a copy of her "contract", which Linda Cannell had evaded doing. When Linda Cannell sent her email to Mr Lingenfelder, therefore, as well as her email sent a few minutes earlier to the claimant herself, it was not likely, based on the facts known to her, that Mr Lingenfelder would discover the truth: see Saini J's judgment, paras 50-51, 61, 153, 155, 159, 163.

84. Judged, therefore, by reference to the facts known (or which ought to have been known) to Linda Cannell, her false statements made to Mr Butler and to Mr Lingenfelder were both calculated to cause financial loss to the claimant. The Court of Appeal was therefore right to conclude that both publications fell within section 3(1).

Article 10

85. I mention article 10 of the European Convention on Human Rights because the defendants set much store by it on this appeal. They emphasise that section 3(1) must be interpreted so that it does not interfere with the right to freedom of expression protected by article 10 in a way that is disproportionate to the legitimate aim of protecting the rights of others. They argue that this requires the court to adopt one of their proposed interpretations of section 3(1). This argument is supported in a written intervention from the organisation Media Defence which is dedicated to defending the rights of journalists and independent media to freedom of expression.

86. The argument made is not so bold as to advocate a right to publish false and malicious words that are calculated to cause financial loss to the person about whom the words are published. Instead, as arguments in this field commonly do, the defendants

postulate a "chilling effect" on legitimate freedom of expression. It is argued that making it easier to establish liability for malicious falsehood would interfere disproportionately with the right to freedom of expression because it would have the consequence, even if unintended, of making it easier to use legal proceedings, or threats of such proceedings, to silence or deter the publication of allegations which are in fact neither malicious nor false.

87. Sometimes arguments of this kind carry real weight. Leading counsel for the defendants, David Price KC, in his reply submissions referred to the classic decision of the United States Supreme Court in *New York Times Co v Sullivan* (1964) 376 US 254. This held that the right to freedom of speech protected by the First Amendment to the United States Constitution precluded an award of damages to a public official for defamatory falsehood relating to his official conduct unless "actual malice" was proved, meaning that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false. Brennan J, giving the judgment of the court, said that erroneous statement is inevitable in free debate, and that it must be protected if "the freedoms of expression are to have the breathing space that they need to survive" (see pp 271-272).

88. That breathing space, however, was provided in *Sullivan* by imposing the requirement to prove malice. Where, as here, such a requirement is already part of what the claimant has to prove, a need for more breathing space is hard to justify. Factual error may be inevitable, but dishonesty is not. It is a demanding test to have to prove that a statement calculated to cause the claimant financial loss was made from a malicious motive or with no honest belief that it was true. Even if that test is satisfied, section 3(1) will not enable the claimant to recover more than nominal damages in the absence of any actual financial loss. And even to bring an action, the claimant must be able to show reasonable grounds for alleging malice. That is itself a substantial hurdle. If that hurdle is not surmounted, the claim may be struck out. The claim can also be struck out as an abuse of process if, in the felicitous phrase used by Eady J in *Schellenberg v British Broadcasting Corpn* [2000] EMLR 296, 318, the game is not worth the candle. That is, the prospect of showing that any significant financial loss was caused is so insubstantial that it would be a disproportionate use of resources to allow the claim to proceed to trial: see *Tesla*, paras 37 and 47-49; *Citation plc v Ellis Whittam Ltd* [2013] EWCA Civ 155, paras 32-34; and, by analogy, *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75; [2005] QB 946. The very limited incursion on freedom of expression to which the possibility of bringing such a claim gives rise represents the very least that is necessary to protect the rights of others.

Conclusion on the effect of section 3(1)

89. It might be thought that all the matters in dispute which I have discussed so far are much ado about nothing. If the defendants' case about how section 3(1) is to be

interpreted and applied were correct, the claim would fail altogether. I have rejected the various iterations of that case and concluded that the claimant was entitled to succeed on the question of liability. But that does not affect the judge's finding that the publications complained of caused her no financial loss. Where an action succeeds but no loss has been sustained, only nominal damages may be awarded. Nominal damages are a token sum of money, usually £1 or £2 or at most £5: see *McGregor on Damages*, 21st ed (2021), para 12-008. If the only significance of the issues about the meaning and effect of section 3(1) which have been argued on this appeal were whether the claimant is entitled to nominal damages or no damages at all, the game would certainly not be worth the candle.

90. The reason these issues have been debated, however, is not as an end in itself. It is because establishing that section 3(1) applies here is the starting point for a further argument which the claimant makes. She argues that, where section 3(1) applies, it does more than give rise to a presumption that at least some, even if only notional, financial loss has been caused to the claimant. On her case it also acts as a gateway to the ability to recover substantial damages for an entirely different type of injury. The claimant contends that, if only she can pass through the gateway of section 3(1), she is entitled to compensation for injury to her feelings caused by the two publications complained of, even though it has been found as a fact that they had no economic effect. This issue has real practical significance.

Damages for injury to feelings

91. Damages may sometimes be awarded in tort for injury to the claimant's feelings - also known as damages for "mental distress." The latter term is somewhat misleading as, when such damages are recoverable, the type of mental harm that may be compensated is not limited to distress in its narrow sense of anxiety or anguish. Other unpleasant emotional reactions such as sorrow, disappointment, shame, humiliation, anger, annoyance and indignation are included within its scope.

92. In considering whether or when damages for injury to feelings / mental distress may be awarded, it is necessary to distinguish between: (1) damages awarded as compensation for mental distress suffered as a foreseeable consequence of the tort; and (2) aggravated damages. Only one case has been cited on this appeal in which damages of either kind have been awarded in an action for malicious falsehood. The award in that case was of aggravated damages. But I will consider first whether or when in principle damages for injury to feelings may be awarded in an action for malicious falsehood in the absence of aggravating conduct.

93. As just mentioned, such an award would be unprecedented. An observation of "high authority" (per Sir Donald Nicholls V-C in *Joyce v Sengupta* [1993] 1 WLR 337,

347) suggests that such damages are never recoverable. In *Fielding v Variety Incorporated* [1967] 2 QB 841, 850, a case where section 3(1) applied, Lord Denning MR stated that the claimants could only recover damages for their probable money loss and not for their injured feelings. This has been followed in Australia and Canada: see *Haines v Australian Broadcasting Corp* (1995) 43 NSWLR 404, 408; *Lysko v Braley* 2006 CanLII 11846; 79 OR (3d) 721, para 135. A similar approach has been taken in the United States: see the Restatement (Second) of Torts (1977), § 633, comment j.

94. The validity of this approach was questioned in *Joyce v Sengupta*, at pp 347-349, by Sir Donald Nicholls V-C in a thoughtful discussion of the subject. The Vice-Chancellor suggested that, if damages for distress are never recoverable in an action for malicious falsehood, this could lead to "a manifestly unsatisfactory and unjust result" in some cases. He gave the example of a person who maliciously spreads rumours that his competitor's business has closed down, causing severe financial loss to the owner of the business. Because of the effect the rumours are having on his business, the owner "is worried beyond measure about his livelihood and his family's future" and thus "suffers acute anxiety and distress." The Vice-Chancellor posed the question:

> "Although injury to feelings alone will not found a cause of action in malicious falsehood, ought not the law to take such injury into account when it is connected with financial damage inflicted by the falsehood?"

95. These remarks were obiter dicta. Sir Donald Nicholls V-C said that the point "bristles with problems" (p 348) and he ultimately concluded that "on the limited argument addressed to us, it would be undesirable to decide this point" (p 349). But it may equally be said that Lord Denning MR's observation in *Fielding* was an obiter dictum. The claims in that case were made by an individual (Mr Fielding) and his company for libel and malicious falsehood; and, when damages were assessed, it was agreed that damages for injury to reputation and feelings should be awarded in the libel action to Mr Fielding and damages for financial loss should be awarded in the malicious falsehood action to the company: see [1967] 2 QB 841, 854. So no question arose about whether damages for injury to feelings could be awarded in an action for malicious falsehood.

96. On this appeal counsel for the defendants have not sought to argue that damages for injured feelings can *never* be awarded in an action for malicious falsehood. Their contention is that such damages are only available where significant financial loss has been caused and the distress relates to the infliction of such loss. In my view, that is in principle the correct approach.

Distinguishing tortious injury from consequential loss

97. In analysing this point it is necessary to distinguish between injury to an interest protected by the law of tort and loss suffered as a consequence of such an injury. In accordance with the principle of full compensation (restitutio in integrum), damages may often be recovered for loss suffered in consequence of an injury to a protected interest even though the loss is not of the type which the relevant tort is designed to protect against.

98. The tort of negligence provides an illustration. This tort gives greater protection to person and property than it does to economic interests. Thus, in general, no claim lies against a person who is negligent in such a way as to cause purely economic loss to another, whereas a claim commonly does lie if the type of harm negligently caused is personal injury or damage to property. Still, when the negligent infliction of personal injury or damage to property causes financial loss, such loss may be compensated (subject to the general principles which limit the recovery of damages in tort): see eg *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27; *Armstead v Royal & Sun Alliance Insurance Company Ltd* [2024] UKSC 6; [2024] 2 WLR 632, paras 19-20.

99. With the possible exception of the tort recognised in *Wilkinson v Downton* [1897] 2 QB 57, the interests protected by the English law of tort do not include freedom from mental distress. Even conduct, as in *Wilkinson v Downton*, which has the deliberate aim of causing the claimant mental distress is probably not actionable unless it results in physical harm or a recognised psychiatric illness: see *O (A Child) v Rhodes* [2015] UKSC 32; [2016] AC 219, paras 83-88. One cogent objection to treating mental distress as grounding a claim in tort, even when it is inflicted with the deliberate intention of causing it, was expressed by Lord Hoffmann in *Wainwright v Home Office* [2003] UKHL 53; [2004] 2 AC 406, para 46:

> "In institutions and workplaces all over the country, people constantly do and say things with the intention of causing distress and humiliation to others. This shows lack of consideration and appalling manners but I am not sure that the right way to deal with it is always by litigation."

McBride and Bagshaw in their book on *Tort Law*, 6th ed (2018), p 672, dub this "the *Wainwright* objection." The *Wainwright* objection applies with even greater force where distress which is the sole harm caused by the defendant's conduct was not intentional in the sense just described.

100. Even so, the fact that mental or emotional well-being is not an interest which is itself protected by the law of tort does not preclude an award of damages which includes compensation for mental distress where this is suffered as a consequence of the wrongful invasion of a protected interest. (For an elaboration of this point, see Eric Descheemaeker, "Rationalising Recovery for Emotional Harm in Tort Law" (2018) 134 LQR 602.)

101. Such awards are indeed often made. Damages have been awarded for injury to feelings caused by torts which protect aspects of personality, such as assault and battery, false imprisonment and now misuse of private information. In defamation cases damage wrongfully done to a person's reputation may naturally cause injury to feelings for which damages can be recovered: see *McGregor on Damages*, 21st ed (2021), para 46-033. This has long been recognised. In *Goslin v Corry* (1844) 7 Man & G 342, 346, for example, Erskine J spoke of awarding damages "for the mental suffering arising from the apprehension of the consequences of the publication." Such damages do not generally feature in awards for interference with property rights. But as pointed out in *McGregor on Damages*, 21st ed (2021), para 48-035:

> "This is because the invasion of a proprietary right is unlikely to lead to such a loss. General principle, however, does not bar recovery …"

Mental distress consequent on pecuniary damage

102. As discussed earlier, the interests protected by the common law tort of malicious falsehood are purely economic interests. Pecuniary damage - meaning loss that can be estimated in money, for which I am using the more modern term "financial loss" as a synonym - is an essential element of the cause of action. The tort consists in the infliction of financial loss by maliciously publishing false words. Where the commission of this tort causes mental distress, then, if the law is to provide full compensation for the wrong done and its consequences, the damages awarded should include compensation for such mental distress.

103. A good example of a case where such an award would thus in principle be justified is the hypothetical example given by Sir Donald Nicholls V-C in *Joyce v Sengupta* [1993] 1 WLR 337, 348, of the claimant whose business is badly damaged by a malicious falsehood and, in consequence, "is worried beyond measure about his livelihood and his family's future" and thus "suffers acute anxiety and distress" (see para 94 above). To turn the question posed rhetorically by the Vice-Chancellor into an affirmative proposition: although injury to feelings will not found a cause of action in malicious falsehood, damages for such injury can be recovered when the injury to feelings is causally connected with financial damage inflicted by the falsehood.

104. The requirement for such a causal connection is critical. If the injury to the claimant's feelings is not causally connected with the financial damage on which the action is founded, then it is not an injury caused by the tort and is therefore not compensable. Doubtless in almost every case of malicious falsehood claimants will experience hurt, indignation or other injured feelings simply from discovering that the defendant has published false and malicious words about them. On principle, however, damages cannot be recovered for this injury because it is not an injury caused by the tort.

105. Assessing damages for injury to feelings where publication of a malicious falsehood has inflicted substantial financial loss should not cause particular difficulty. The court is not required to undertake a psychological inquiry and parse the claimant's mental state. The court's task is to ascertain the financial damage done to the claimant by the defendant's false publication and the further consequences of that financial damage on the claimant's financial and personal situation, and then to decide on a sum of money intended to represent fair recompense for the mental distress which a person in that situation would naturally be expected to feel. It should not be unduly difficult for the judge who carries out this exercise to focus, as required, on the factual consequences of the publication and to put to one side any distress the claimant may naturally feel simply from the knowledge that the defendant has published words about the claimant which the defendant knew to be untrue.

Damages for mental distress where section 3(1) applies

106. The analysis required is no different in principle in a case where section 3(1) of the 1952 Act applies. The difference from a claim based only on the common law is that, to establish a cause of action for malicious falsehood in such a case, financial damage need not be proved as it is presumed from the fact that the words published were calculated to cause such damage. But, as discussed at paras 57-59 above, this statutory modification of the tort has not altered its essential character. There is nothing in the content of the 1952 Act or in the background to the enactment of section 3(1) which provides any reason to infer that it was intended to transform an economic tort into a psychological one. To the contrary, it is clear from the background, including para 51 of the Porter report quoted at para 44 above, that the mischief which section 3(1) was intended to address was perceived evidential difficulty in proving financial damage. Removing or reducing such evidential difficulty makes it easier to establish liability. But relaxing evidential requirements is a very different thing from allowing damages to be recovered for mental distress which is not caused by any financial damage.

107. The tort as modified is still not designed to afford protection against non-pecuniary harm, as the limitation of section 3(1) to a presumption of pecuniary damage where the words published are calculated to cause pecuniary damage serves to confirm.

It is certainly not the purpose of the tort to afford protection against injury to feelings. As I have explained, there is no tort which has that purpose in English law - not even, on the view expressed (obiter) by this court in *O (A Child) v Rhodes*, the tort of intentionally causing physical or psychological harm.

108. In cases where section 3(1) applies, it therefore remains necessary, if an award of damages for injury to feelings is to be justified, to show that financial damage has been suffered which has caused such injury to feelings.

109. It is on this point that I have the misfortune to disagree with the reasoning of Lord Hamblen and Lord Burrows. I share the same starting point (expressed at para 234(i) of their judgment) that, in principle, if a tort has been committed, the claimant should be entitled to compensation for all pecuniary and non-pecuniary loss caused by the tort (subject to normal rules concerning remoteness etc). Where we disagree is that, in their view, if publication of a malicious falsehood has caused *some* financial damage, however small, or if financial damage can be presumed by operation of section 3(1), the claimant can recover damages for all mental distress caused by the publication even if this distress is unrelated to any financial damage suffered. I consider this conclusion to be inconsistent with our shared premise because it disregards the fact that financial damage is an essential element of the tort and allows the claimant to obtain compensation for non-pecuniary loss which was *not* caused by the tort.

110. In my view, it would be illogical for this court to hold that, provided there is a minimal or trivial interference with the interest protected by the tort, this opens the door to the award of compensation for a different type of injury altogether, even though the injuries are causally unrelated. The illogicality would be even more stark if it were held that, in a case where section 3(1) applies but no financial damage at all has actually been inflicted, damages for mental distress can be recovered. This would make the recovery of such damages depend on whether the words published had the potential to cause financial loss (being "calculated" to do so) even though in fact they did not. That would make no sense at all. Why should the creation of a risk of financial loss which does not in fact materialise act as a passport to the award of compensation for a different type of harm altogether? Such a result would be irrational.

111. I therefore agree with Lord Hamblen and Lord Burrows when they say in their judgment, at para 234(vi), that it "would be artificial and arbitrary for the availability of mental distress damages to turn on whether, for example, the claimant can prove that he or she has suffered a small pecuniary loss (say of £10)." The same, however, would be true if their proposed approach to this issue were correct. There is no difference in principle between a case where the claimant can prove that he or she has suffered a small pecuniary loss (say of £10) and one where the claimant cannot prove that she has even sustained a loss of £10 but can rely on the presumption of loss afforded by section 3(1) to obtain nominal damages. It would be artificial and arbitrary for the availability

of mental distress damages to turn on whether the claimant can establish that he or she has suffered a notional pecuniary loss assessed at, say, £5.

112. No such arbitrary and irrational consequences arise when it is recognised that mental distress is compensable only if it flows from financial loss inflicted by the malicious publication of false words (ie when it is a consequence of the wrong done).

113. Here it has been found as a fact that no financial loss was actually caused by the relevant publications. Although section 3(1) applies, the presumption that the words published caused financial damage to the claimant is purely notional and attracts only token damages. So there was no financial loss that could have given rise to injury to feelings for which compensation might be awarded. Although the claimant claims in her particulars of claim to have suffered "huge emotional distress as a result of the publications complained of", and gave evidence at the trial to that effect, such distress could not have been - and on the judge's findings was not - a consequence of financial loss inflicted by those publications. For there was no such financial loss. The claimant's emotional distress is therefore not a matter for which the defendants can be held responsible. It was not suffered as a consequence (foreseeable or otherwise) of the tort of malicious falsehood.

Aggravated damages

114. It remains to consider the possibility of aggravated damages. The general principle is well established. Since Lord Devlin's analysis in *Rookes v Barnard* [1964] AC 1129, 1221, aggravated damages have been recognised as a separate category of damages which may be awarded where the conduct or motives of the defendant aggravate the injury done to the claimant. To adopt the Law Commission's formulation of the principle, such damages may be awarded to compensate mental distress caused by "exceptional or contumelious conduct" of the defendant in committing the tort or subsequent to the wrong: see Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (1997) (Law Com No 247), para 1.4.

115. In *Joyce v Sengupta* [1993] 1 WLR 337, 349-353, Sir Michael Kerr differed from Sir Donald Nicholls V-C in his approach to when damages for mental distress might be recovered in an action for malicious falsehood - while agreeing that it would be undesirable to decide the point. He suggested that such damages are not recoverable as an additional head of loss but could be awarded in an appropriate case in the form of aggravated damages. That suggestion was adopted in *Khodaparast v Shad* [2000] 1 WLR 618. There the claimant, an Iranian school teacher, was a victim of what would now be called "revenge porn." After she ended an affair with the defendant, he faked and circulated images which appeared to be pictures copied from pornographic magazines showing her advertising telephone sex services. As a result, the claimant lost

her job. She brought an action for malicious falsehood. In his defence and in his evidence in the proceedings the defendant compounded the harm already caused by falsely and dishonestly claiming that the images he had published were genuine and concocting a series of further false and defamatory allegations about the claimant designed to blacken her character and discredit her as a witness.

116. The claimant succeeded at trial and was awarded damages of £20,000 which included, as well as damages for financial loss, aggravated damages based on what the judge described as "the malicious, wicked intent of this defendant, further demonstrated by his conduct in relation to these proceedings in blackening the character of the plaintiff": see [2000] 1 WLR 618, para 34. The Court of Appeal upheld the judge's award. Stuart-Smith LJ said he could see no reason why, in an appropriate case, a claimant entitled to sue for malicious falsehood should not recover aggravated damages for injury to feelings; that the judge was entitled to award such damages in respect of the defendant's conduct during the proceedings; and that the sum awarded was not excessive: see paras 42-44. Otton LJ likewise considered that the claimant was entitled to damages for "the aggravation caused by the defendant's insulting behaviour", involving as it did a "cruel, ruthless and relentless attack" on the claimant's character: pp 632-633. Potter LJ agreed with both judgments.

117. The defendant's conduct in *Khodaparast* was by any standard exceptional and contumelious. The same cannot be said here. Admittedly, Linda Cannell was found to have made statements to third parties which she did not honestly believe to be true. But that is the least required to prove "malice" for the purposes of the tort. The commission of a tort is not aggravated by conduct or a state of mind which is an inherent part of the tort, necessary to establish liability. The judge made no finding that Linda Cannell acted out of malice in the sense of malevolence or spite. Nor did the judge make any other finding about her conduct or motives or the circumstances in which the tort was committed which might support an award of aggravated damages.

118. As for subsequent conduct, I note that the judge struck out at the start of the trial parts of the defendants' pleading and evidence which he described as an attempt at "character assassination" with little if any relevance to the issues (para 14). But this was in a context where both parties approached their evidence on the (misguided) basis that the court "would be conducting a form of 'moral accounting' of meritorious and unmeritorious conduct of each of the parties in the course of the [claimant's] employment" (para 15). The judge did not find that in defending the claim the defendants adduced any evidence or made allegations about the claimant's conduct which were not either true or honestly believed by Linda Cannell to be true. Nor was he otherwise critical of her subsequent conduct.

119. In short, there is nothing in the circumstances of this case which could reasonably be said to justify an award of aggravated damages.

Conclusion

120. For these reasons, I would allow the appeal, set aside the order made by the Court of Appeal for an assessment of damages for injury to feelings and direct that the judgment entered for the claimant should be a judgment for nominal damages only, in a sum of £5.

LORD HAMBLEN AND LORD BURROWS (dissenting):

1. Introduction

121. This case is about the tort of malicious falsehood. It raises important questions about the effect of the reform of that tort made by section 3(1) of the Defamation Act 1952 ("the 1952 Act"). That subsection reads:

> "**Slander of title, etc**
>
> 3. (1) In an action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage-
>
> (*a*) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or
>
> (*b*) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication."

122. The central issue is whether, in the circumstances where section 3(1) applies, the tort of malicious falsehood is a tort actionable per se (Issue 1). That central issue has not been determined in any previous case let alone a case coming before the highest court. It arises in this case because of the unusual feature that the defendants have disproved, on the facts known at trial, that the claimant has been caused any pecuniary loss by reason of the malicious falsehood. That central issue is a matter of statutory interpretation of section 3(1) in a context where the statutory words have effected a reform of the common law tort. It is not in dispute that at common law malicious falsehood is a tort actionable only on proof of "special damage".

123. Two further issues raised by the appeal submissions are as follows. First, what is meant by the statutory words "calculated to cause pecuniary damage to the plaintiff" which appear in both subsections of section 3(1)? (Issue 2). More specifically, what is the test that those words lay down that needs to be satisfied by the claimant? Secondly, when, if at all, is a claimant, who is relying on section 3(1), entitled to mental distress damages for malicious falsehood? (Issue 3).

2. The relevant facts

124. Fiona George, who is the claimant (and the respondent in this appeal), worked as a recruitment consultant for a recruitment agency, LCA Jobs Ltd ("LCA"), owned and operated by Linda Cannell. Linda Cannell and LCA are the first and second defendants (and the first and second appellants in this appeal). LCA specialised in recruiting for estate agents and property companies. The claimant left her employment with LCA in November 2018. Under the terms of her employment there was no post-employment restrictive covenant or other term preventing her soliciting LCA's clients.

125. In January 2019, the claimant commenced employment with Fawkes & Reece ("F & R"), another recruitment agency. F & R specialised in recruiting for the construction industry. Linda Cannell discovered that the claimant was soliciting LCA's clients. She sent an email to the claimant threatening her with legal action and informing her that she would be contacting her employer and LCA's clients advising them that the claimant was in breach of her post-employment obligations.

126. On 21 January 2019, in the course of a telephone conversation with Matthew Butler of Balgores estate agents, Linda Cannell said words to the following effect:

> "The Claimant signed a contract with the Defendants by which she agreed not to contact companies for whom the Defendants had worked. By searching for new staff for Balgores she had breached that contract. Therefore, Balgores should stop using the Claimant to find candidates".

These words were labelled "the Butler words" by the trial judge, Saini J. As found by Saini J, the Butler words were false and Linda Cannell knew them to be false.

127. Almost immediately after his phone call with Linda Cannell, Mr Butler emailed the claimant as follows:

> "Please can you put our search for staff from you on hold. I have spoken again to Lyn Cannell today she advises that as part of your terms you should not be approaching her clients. As you know, I have dealt with Lyn for 10 yrs and until you have come to a resolution with her I think its best we put on hold for now".

128. Saini J found that, even before the Butler words were spoken, Mr Butler had decided not to do business with the claimant because of an issue relating to double commission, having regarded her as a nightmare from the start. Accordingly, as Saini J found, the allegation of breach of contract in the Butler words did not cause the claimant any pecuniary loss.

129. On 21 January 2019, Linda Cannell sent an email to Mr Lingenfelder, who was the line-manager for the claimant at F & R. That email, which Saini J labelled "the Lingenfelder email", included the following:

> "…I write to inform you that despite making clear to Fiona, both verbally and in writing, of her legal obligations under the terms of her employment with LCA, not to solicit business from our clients and candidates (and Fiona's absolute assurances that this is something she would never do), that she has been proactively approaching our clients for new business as well as contacting candidates of LCA. I am writing to you firstly to ask if this is something you are aware of and secondly to ask from one business owner to another to ensure that post-employment restrictions preventing her from contacting our clients and candidates is respected by you and ask for your assurances that this will stop immediately…"

130. Shortly after the receipt of that email, the claimant showed Mr Lingenfelder LCA's handbook so that he could see that, in truth, there was no contractual restriction preventing her from soliciting LCA's clients and he accepted that this was the case. In any event, Mr Lingenfelder had decided that he did not want the claimant to deal with LCA's clients and had told her beforehand not to do so. Therefore, as Saini J found, the allegation of breach of contract in the Lingenfelder email did not cause the claimant any pecuniary loss.

131. Saini J found that Linda Cannell was aware that there was no post-employment restrictive covenant (or any other equivalent restriction) in the claimant's terms of employment. She and her legal advisers at LCA had formulated a strategy with the clear knowledge that they did not have in place restrictive covenants but would assert

something sufficiently vague thereby binding the claimant to the same substantive effect.

132. The claimant resigned from F & R on 27 January 2019 because of her erroneous belief that Linda Cannell had contacted other clients of LCA (apart from Balgores), as she had threatened. On 25 February 2019, she commenced new employment with a recruitment agency in the education sector.

3. Judgments below

(1) At first instance

133. The claimant brought proceedings against the defendants for libel, slander and malicious falsehood. This appeal is concerned only with the last of these claims. As regards libel and slander, there was an initial hearing before Richard Spearman KC, siting as Deputy judge of the High Court, in which he determined, as preliminary issues, the meaning of the words, in the Butler words and the Lingenfelder email, and decided that they were defamatory at common law. At trial, Saini J decided, [2021] EWHC 2988 (QB), [2021] 4 WLR 145, at paras 132-133, that the claims for libel and slander failed because the claimant had not discharged the burden of establishing, under section 1 of the Defamation Act 2013, that the Butler words or the Lingenfelder email caused or were likely to cause "serious harm" to the reputation of the claimant.

134. As regards malicious falsehood, Saini J decided as follows:

> (i) The Butler words and the Lingerfelder email were untrue and were made maliciously by the first defendant. She did not have any honest or positive belief that the claimant had acted in breach of post-termination non-solicitation contractual terms by soliciting LCA's clients. She, together with her lawyers, worked out a way of making assertions as to the claimant's legal obligations which had, to their knowledge, no proper basis.
>
> (ii) The claimant's claim for "special damage" failed. She was claiming the sum of £1433 for loss of earnings during the short period of time she was out of work between 27 January 2019 and 25 February 2019. But Saini J held that no pecuniary loss flowed from the Butler words or the Lingenfelder email. That was because Mr Butler decided not to deal with the claimant because of the double commission issue and not because of the Butler words. And as regards the Lingenfelder email, F & R wanted the claimant to remain in its employment and Mr Lingenfelder did not want her to deal with LCA's clients and knew that there were no contractual restraints on the claimant doing so.

(iii) At the time of distributing his draft judgment, Saini J had thought that it was not in dispute that, applying section 3(1) of the 1952 Act, the claimant was entitled to general damages, including for injured feelings, and that he should therefore assess these in due course. More specifically, this was because he had understood that, in respect of general damages, the defendants were not disputing that, where section 3(1) applied, no causation-focused factual inquiry as to financial loss was required. But having distributed his draft judgment, counsel for the defendants made clear that they were disputing that such general damages were available as a matter of law.

(iv) Having had further written submissions on the point, and having considered relevant authorities, Saini J decided that the claimant's case on section 3(1) of the 1952 Act failed. This was essentially because, for the same reasons as set out above in respect of the special damages, the Butler words and the Lingenfelder email did not cause the claimant any pecuniary loss. The examination of causation of pecuniary loss required an inquiry into the facts, including historical facts. Saini J said, at para 205:

> "In my judgment, causation must require an examination of the facts as they were before, at and after publication."

And at paras 208-209, he said:

> "On the facts of this case, I find that no element of the pleaded pecuniary damage was caused by the publications. The circumstances of the publications as I have found them are fatal to the claim based on section 3(1) of the 1952 Act.
>
> There is another route to this conclusion. If a claimant can satisfy the court that the words were, on their own, and therefore in the abstract, more likely than not to cause pecuniary loss, it is open to a defendant to show that no such loss actually occurred."

(v) The claim for malicious falsehood, relying on section 3(1) of the 1952 Act, therefore failed.

(2) Court of Appeal

135. The claimant appealed against the dismissal of her claim in malicious falsehood. The Court of Appeal allowed the appeal: [2022] EWCA Civ 1067, [2023] QB 117. The judgment was given by Warby LJ, with whom Snowden and Underhill LJJ agreed. Warby LJ's essential reasoning, to which we pay tribute for its clarity and rigour, was as follows:

(i) He identified the main issue as being what the claimant needs to prove to take advantage of section 3(1) of the 1952 Act.

(ii) He regarded the 1948 report of the Committee chaired by Lord Porter on the Law of Defamation ("the Porter Committee") (Cmd 7536), which led to the 1952 Act, as being a significant interpretative aid. Saini J had not been referred to this report.

(iii) He interpreted the Porter Committee's recommendation, that led to section 3(1), as being concerned to turn malicious falsehood, in the circumstances set out, into a tort actionable per se. He said at para 41:

> "In short, the Committee was recommending that a false and malicious statement should be actionable per se, if it had a natural tendency to cause financial loss and was written, or had a natural tendency to cause financial loss in an office, profession or trade, however it was made."

Similarly, he later said, at para 78, "the tort is complete on proof of a publication that has a natural tendency to cause financial loss and that is false and malicious".

(iv) Warby LJ also drew on section 2 of the 1952 Act, which is concerned with slander actionable per se (and is set out at para 138 below), and hence the general context of the recommended reform of malicious falsehood. He pointed to the Porter Committee as having sought to assimilate the recommendation for reform of malicious falsehood with the recommendation for the reform of slander actionable per se (where the recommended reform became section 2 of the 1952 Act).

(v) Although (applying *Pepper v Hart* [1993] AC 593) he did not consider there to be any ambiguity so as to justify reliance on what the Bill's sponsor, Harold Lever MP, had to say about the purpose of the relevant clause when promoting it, the MP's words (for example, the reference to what became section

3(1) providing the claimant with "an automatic remedy"), if admissible, fortified his view as to the meaning of section 3(1).

(vi) It was established in the case law, and was not in dispute, that the words in section 3(1), "calculated to cause pecuniary damage to the plaintiff", did not mean that the defendant intended to cause pecuniary damage. Rather they meant that pecuniary damage was objectively likely and that the degree of likelihood required was that of probability. It was also established, and not in dispute, that a claimant relying on section 3(1) must plead the nature of the damage and the causal mechanism.

(vii) The words "calculated to cause pecuniary damage to the plaintiff" in section 3(1) imposed a forward-looking test and Saini J had been wrong to adopt an historic approach. But it was not an entirely abstract test because the identity and characteristics of the publisher and publishee were relevant.

(viii) The Court of Appeal decisions relied on by the defendants, *Sallows v Griffiths* [2001] FSR 15, *Tesla Motors Ltd v British Broadcasting Corpn* [2013] EWCA Civ 152, and *Tinkler v Fergu*son [2021] EWCA Civ 18, [2021] 4 WLR 27, did not support the historic approach.

(ix) Malicious falsehood, based on section 3(1), remains an economic tort because the acts complained of must have a natural tendency to cause pecuniary damage; and that was so even though the defendant may have proved as a fact that there was no pecuniary loss. Warby LJ also pointed out that it will be a rare case where a publication that is inherently likely to cause financial loss will fail to produce any.

(x) The forward-looking and natural tendency interpretation of section 3(1) that Warby LJ was adopting did not constitute an unjustified interference with freedom of speech contrary to article 10 of the European Convention of Human Rights ("ECHR") and section 3 of the Human Rights Act 1998. The freedom to make false and malicious statements did not merit significant protection.

(xi) The claimant therefore satisfied the test in section 3(1) and succeeded in establishing liability for the tort of malicious falsehood.

(xii) On a separate point on damages, Warby LJ held that damages for mental distress could be awarded. He referred to obiter dicta in *Joyce v Sengupta* [1993] 1 WLR 337 and the decision in *Khodaparast v Shad* [2000] 1 WLR 618 as supporting the view that, as a matter of law, damages for injured feelings could

be awarded under section 3(1). Although those cases were not dealing with facts, as in this case, where no pecuniary loss had been caused by the malicious falsehood, in principle such damages could be awarded even though there was, in the event, no pecuniary loss.

(xiii) The appeal was therefore allowed with the case being remitted for damages, including for injured feelings, to be assessed.

4. Issue 1: is malicious falsehood under section 3(1) of the 1952 Act a tort actionable per se?

(1) The wording of the 1952 Act in its statutory context

136. As stated by Lord Hodge in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255, "statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered" (para 31). The primary source by which meaning is to be ascertained are the words used in their statutory context, which may include the section as a whole, the group of sections in which they are contained, other provisions of the statute and the statute as a whole (para 29). External aids to interpretation, such as Explanatory Notes, Law Commission or other advisory committee reports and Government White Papers, may also play an important role. They "may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty…" (para 30).

137. The full text of section 3(1) has been set out in para 121 above. The crucial wording is that "it shall not be necessary to allege or prove special damage" if "the words upon which the action is founded" are "calculated to cause pecuniary damage to the plaintiff". As Warby LJ in the Court of Appeal observed (para 48), it is well established that "calculated" means objectively likely rather than intended and that the degree of likelihood required is that of probability. What is less clear, however, is the meaning conveyed by dispensing with the need to allege or prove "special damage".

138. It is to be noted that the same wording is used in section 2 of the 1952 Act which provides as follows:

> "**Slander affecting official, professional or business reputation**

> 2. In an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business."

139. Section 2 expands the tort of slander affecting official, professional or business reputation, which at common law is actionable per se, by removing the requirement that the words be spoken of the plaintiff "in the way of his office, profession, calling, trade or business". In relation to the expanded tort, it similarly "shall not be necessary to allege or prove special damage". On the face of it, those words should be given the same meaning in both section 2 and section 3. In order to understand that meaning it is necessary to have regard to the wider context of the tort of malicious falsehood at common law prior to the 1952 Act and the report of the Porter Committee which led to its enactment.

140. Before we turn to that wider context, we should make clear, for completeness, that, by section 1 of the Defamation Act 2013, a statement is not defamatory (whether under the tort of libel or slander) unless its publication has caused or is likely to cause "serious harm" to the reputation of the claimant. But that reform does not affect the issues in this case because the 2013 Act is confined to defamation, whether the tort of libel or slander, and does not extend to the tort of malicious falsehood; and there is nothing in the 2013 Act that purports to affect the interpretation of the 1952 Act.

(2) Background to section 3(1)

(a) The tort of malicious falsehood at common law prior to the 1952 Act

141. Most torts are actionable only on proof of damage. But some (for example, trespass to land, goods and the person, libel at common law, and some exceptional categories of slander at common law) are actionable per se. For a helpful general discussion, see *Clerk and Lindsell on Torts* (24th ed, 2023) paras 1-63 – 1-64. See also *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395, in which the House of Lords overturned the Court of Appeal's decision that, in some circumstances, the tort of misfeasance in public office is a tort actionable per se. One feature of a tort actionable per se is that it triggers an award of nominal damages (as discussed at para 160 below).

142. It has long been accepted that for malicious falsehood, at common law, the claimant needs to prove "special damage". For example, in *Malachy v Soper* (1836) 3 Bing NC 371 the claim for slander of title (an early form of what we could now call

malicious falsehood) failed because the claimant could not prove "special damage". Tindal CJ said of slander of title, at pp 383-384:

> "We hold … that an action for slander of title is not properly an action for words spoken, or for libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the Plaintiff's title."

143. At common law, therefore, it is clear that malicious falsehood is not a tort actionable per se because the claimant has to prove "special damage".

144. In *Ratcliffe v Evans* [1892] 2 QB 524 the defendant had maliciously published in the local newspaper, which he owned, the false statement that the claimant had ceased to carry on business as an engineer and boiler-maker and that the firm of Ratcliffe & Sons no longer existed. The claimant proved a general loss of business but gave no evidence of the loss of any particular customer or contract. The jury awarded the claimant damages of £120. The question at issue on appeal was whether the claimant's evidence of general loss of business was sufficient for the purposes of the tort of malicious falsehood. The Court of Appeal held that it was.

145. Bowen LJ in that case preferred to avoid using the language of "special damage". He said that it had different meanings in different contexts and therefore tended "to encourage confusion in thought" (p 529).

146. In relation to the distinction between general loss of business and loss of particular customers, Bowen LJ referred to the old case of *Hargrave v Le Breton* 4 Burr 2422.

> "An instructive illustration, and one by which the present appeal is really covered, is furnished by the case of *Hargrave v Le Breton* decided a century and a half ago. It was an example of slander of title at an auction. The allegation in the declaration was that divers persons who would have purchased at the auction left the place; but no particular persons were named. The objection that they were not specially mentioned was, as the report tells us, 'easily' answered. The answer given was that in the nature of the transaction it was impossible to specify names; that the injury complained of was in effect that the bidding at the auction had been prevented and stopped, and that everybody had gone away. It had, therefore, become impossible to tell with

> certainty who would have been bidders or purchasers if the auction had not been rendered abortive. This case shews, what sound judgment itself dictates, that in an action for falsehood producing damage to a man's trade, which in its very nature is intended or reasonably likely to produce, and which in the ordinary course of things does produce, a general loss of business, as distinct from the loss of this or that known customer, evidence of such general decline of business is admissible. In *Hargrave v Le Breton* it was a falsehood openly promulgated at an auction. In the case before us to-day, it is a falsehood openly disseminated through the press —probably read, and possibly acted on, by persons of whom the plaintiff never heard. To refuse with reference to such a subject matter to admit such general evidence would be to misunderstand and warp the meaning of old expressions; to depart from, and not to follow, old rules; and, in addition to all this, would involve an absolute denial of justice and of redress for the very mischief which was intended to be committed."

147. One might argue that the reasoning in *Ratcliffe v Evans* removed the need to prove "special damage" for the tort of malicious falsehood provided the claimant could prove pecuniary loss, including by proving general loss of business. But that is not how the case was subsequently interpreted. Rather the courts continued to talk of the need for "special damage" to establish the common law tort: see, for example, within ten years of *Ratcliffe v Evans*, the two House of Lords cases of *White v Mellin* [1895] AC 154 and *The Royal Baking Powder Co v Wright, Crossley & Co* (1900) 18 RPC 95.

148. Therefore, rather than saying that *Ratcliffe v Evans* removed the need for special damage to be proved, it is more consistent with the case law to say that *Ratcliffe v Evans* made the proof of special damage easier by accepting that evidence of a general loss of business counts as well as the loss of particular customers or contracts.

149. But, putting to one side the undoubted difficulty of the terminology of "special damage" (and, for a wide-ranging discussion of the terminological difficulty, see JA Jolowicz, "The Changing Use of 'Special Damage' and its Effect on the Law" [1960] CLJ 214), what is clear about the tort of malicious falsehood, at common law, is that the claimant must prove that pecuniary loss has been caused for the tort to be actionable. This explains why, in several cases, it was stressed that damage, by which was meant pecuniary loss, is "the gist of the action": see, eg, *Ratcliffe v Evans* at p 532; and *The Royal Baking Powder Co* at p 99. To ground an action for malicious falsehood, it would not be sufficient at common law to prove that the claimant had suffered non-pecuniary loss (for example, loss of reputation or mental distress). What had to be proved was pecuniary loss.

150. Consistently with the need to prove pecuniary loss, the common law tort has traditionally been viewed as an economic tort. That is, it is concerned to protect the claimant's economic interest and, in contrast to defamation (whether the tort of libel or slander), it is not concerned to protect the claimant's reputation. As is said in *Clerk and Lindsell on Torts* at para 22-03:

> "…defamation protects the claimant's reputation, while malicious falsehood protects the claimant's interest in his property or trade (or economic interests more generally)."

In line with this, while damages for loss of reputation as such (ie as a non-pecuniary loss) are clearly recoverable for defamation (see, eg, *McCarey v Associated Newspapers Ltd (No 2)* [1965] 2 QB 86, 108), they are not available for the tort of malicious falsehood even if pecuniary loss has been caused: *Joyce v Sengupta* [1993] 1 WLR 337, 348, and *Khodaparast v Shad* [2000] 1 WLR 618, 631, 632; *McGregor on Damages,* 21st ed (2021), para 5-011.

(b) The report of the Porter Committee

151. Section 3(1) of the 1952 Act was enacted on the recommendation made in the report of the Porter Committee ("the Report"). In understanding the purpose of section 3(1) (or, as one might otherwise put it, the mischief that was being addressed), it is relevant and important to consider the reasoning in the Report. Moreover, we agree with Warby LJ in the Court of Appeal that considerable insight is to be gained by looking at the thinking behind what became section 2 as well as section 3(1) of the 1952 Act.

152. The relevant part of the Report is headed "The assimilation of libel, slander and actions on the case" and it begins by explaining the distinction of "great practical importance" (para 33) between libel and some limited forms of slander which are actionable per se, on the one hand, and ordinary slander and malicious falsehood which are actionable only on proof that "actual pecuniary loss" has directly resulted. Importantly, it is implicit in para 33 that to say that libel or some forms of slander are actionable per se means that they are "actionable without proof that special damage (ie actual pecuniary loss) has thereby been caused to the plaintiff" (para 33).

153. The Report then links together as being problematic, because of the difficulty of proving "special damage", ordinary slander and malicious falsehood.

154. As regards ordinary slander, the recommendation is to expand the most important category of slander actionable per se, which is where the words are spoken of the plaintiff "in the way of his office, profession or trade and naturally tending to injure or

prejudice his reputation therein". The words "in the way of" are thought to be needlessly narrow and would mean that, for example, statements that a headmaster had committed adultery, even if calculated to cause him injury in his profession, would not constitute slander actionable per se. Hence the recommendation that the requirement that the words must be spoken of the plaintiff "in the way of his calling" should be abolished. "Any words naturally tending to injure or prejudice the reputation of the plaintiff in his office, profession or trade, should be actionable without proof of special damage, whether or not they are spoken of him in the way of his office, profession or trade" (para 49). It is therefore clear that the purpose of the recommendation was to make this category of slander actionable per se. This became section 2 of the Act.

155. The Report then turns to malicious falsehood. It recommends avoiding injustice – which is pinpointed as being that the claimant should not be "left without any remedy for the loss which he has suffered" (para 51) – by amending the existing law, in the specified circumstances, by removing the necessity of furnishing proof of special damage. It is implicit from what has gone before that this means that malicious falsehood in the specified circumstance should be actionable per se. Indeed, in respect of malicious falsehoods calculated to cause pecuniary damage to the plaintiff in his office, profession or trade, a direct analogy is expressly drawn in para 53 with the recommended reform to the tort of slander. In respect of other false statements, the recommendation in para 54 is that they should be actionable in so far as they would have been actionable as a libel if the words had been defamatory; and libel is actionable per se. The recommendation in para 54 reads as follows:

> "[The law on malicious falsehood] should be amended so as to provide that *an action should lie* without proof of special damage-
>
> (a) for any false statement of fact made maliciously and calculated to cause actual pecuniary damage to the plaintiff otherwise than in his office, profession or trade, if such false statement is published in such manner *as would constitute, if the words were defamatory, the publication of a libel*; and
>
> (b) for any false statement of fact, however published, made maliciously and calculated to cause actual pecuniary damage to the plaintiff in his office, profession or trade." (emphasis added)

This became section 3(1)(a) and (b) of the 1952 Act. It is also noteworthy that, in the brief summary of the recommendations at the end of the Report (at p 49), the relevant phrase used for both the reforms to slander and to malicious falsehood was that the law

was being amended to make the relevant statements "actionable without proof of special damage".

156. It is therefore clear that the relevant part of the Report:

(i) Had a focus from the start on the distinction between torts actionable on proof of special damage and torts actionable per se.

(ii) Treated special damage as meaning actual pecuniary loss.

(iii) Used the words "actionable without proof of special damage" as meaning "actionable per se".

(3) What is the proper interpretation of section 3(1)?

157. Against that background, what is the effect of the words in section 3(1) removing the need to allege or prove "special damage"?

158. The starting point is section 2 which has been set out at para 138 above. As is clear from its terms, the effect of section 2 is to expand the definition of the tort of slander affecting official, professional or business reputation. As is apparent from the Report, and in accordance with the Report's recommendations, this involves the expansion of an established category of a slander actionable per se. As such, there can be no doubt that section 2 creates a tort which is so actionable. The verbal formulation which it uses to do so, as recommended in the Report, is to state that "it shall not be necessary to allege or prove special damage". This is exactly the same formulation which is then used in relation to malicious falsehood in section 3(1). The use of the same words in both sections leads inexorably to the conclusion that they should be given the same meaning in both sections and, as it is indisputable that section 2 creates a tort actionable per se, so does section 3(1).

159. We accept that, if one were to look just at the words of section 3(1), there may be thought to be some doubt as to the meaning of the subsection. This is because of the difficulty of the words "special damage". But in the light of the Report, as explained in detail above, and taking into account section 2 of the 1952 Act, it is clear that section 3(1) has turned malicious falsehood within the specified circumstances into a tort actionable per se. The removal of the need to allege and prove special damage means that pecuniary loss does not need to be proved and that in turn means that the malicious falsehood is actionable per se.

(4) Nominal damages, general damages and an inference or presumption of pecuniary loss

160. There is a distinction between the tort being actionable per se and the damages that are recoverable for that tort. Nevertheless, a consequence of section 3(1) rendering malicious falsehood actionable per se is that nominal damages in the strict sense of a small sum of money (normally between £2 and £10) may be awarded under section 3(1). Nominal damages in that strict sense (in contrast to a small sum of compensatory damages) can be awarded only for wrongs actionable per se. As is said in *McGregor on Damages,* 21st ed (2021), para 12-002: "nominal damages may be awarded in all cases of breach of contract and in torts actionable per se". An authoritative judicial statement on nominal damages was given by Lord Halsbury LC in *The Mediana* [1900] AC 113, 116:

> "Nominal damages is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed."

161. Turning to compensatory damages for pecuniary loss, in *Tesla Motors Ltd v British Broadcasting Corpn* [2013] EWCA Civ 152 (*"Tesla"*) the section 3(1) claim was characterised as one for "general damages". See also, for example, *Calvet v Tomkies* [1963] 1 WLR 1397. What is meant by that phrase in this context is that the damages are for general pecuniary loss as opposed to specifically itemised pecuniary loss.

162. Linked to this is that, in assessing damages under section 3(1), pecuniary loss will be inferred or (rebuttably) presumed under section 3(1). It is because pecuniary loss is the natural and probable consequence of a claimant establishing that the words used were calculated to cause pecuniary loss as required by section 3(1) that pecuniary loss will be inferred or (rebuttably) presumed. As stated by Lord Macnaghten in *Ströms Bruks Aktie Bolag v Hutchison* [1905] AC 515, 525:

> "'General damages'…are such as the law will presume to be the direct natural or probable consequence of the act complained of."

This is consistent with *McGregor on Damages* in a passage at para 48-011, which has appeared in every edition since the 1952 Act was passed. It describes the effect of section 3(1), in relation to damages, as follows:

> "With statements falling within s.3 the claimant need not allege and prove specific pecuniary loss as the court will infer the existence of pecuniary loss and the damages will be at large in a similar sense to that in inducement of breach of contract. With statements falling outside s.3 the claimant must still allege and prove specific pecuniary loss, although the court will be satisfied with general evidence of such loss where this is all that the circumstances of the case will allow".

163. The reference to the like inference of pecuniary loss in cases of inducement of breach of contract is explained further at para 48-005 of *McGregor on Damages* in which the following passage from the judgment of Neville J in *Goldsoll v Goldman* [1914] 2 Ch 603, 615 is cited:

> "…in such a case the damage may be inferred, that is to say, that if the breach which has been procured by the defendant has been such as must in the ordinary course of business inflict damage upon the plaintiff, then the plaintiff may succeed without proof of any particular damage which has been occasioned him."

164. Under section 3(1), there is therefore no need for a claimant to allege pecuniary loss or provide evidence even of a general loss of business in order to establish the tort. Rather, provided the claimant can show that the words were calculated to cause pecuniary loss in the two circumstances set out in section 3(1)(a) and (b), the tort is actionable per se. Furthermore, in relation to damages, the claimant is given the benefit of an inference or (rebuttable) presumption that the claimant has suffered pecuniary loss. But it is open to the defendant, as has happened on the facts of this case, to disprove the inference or to rebut the presumption of pecuniary loss by evidence, taking into account all matters known at trial, that the claimant has suffered no pecuniary loss. Where the pecuniary loss has been so disproved, the claimant will not be entitled to any damages for pecuniary loss. But the claimant will be entitled to nominal damages. Whether mental distress damages are recoverable is Issue 3.

(5) Why we reject the principal arguments of the defendants

165. The principal arguments relied upon by the defendants in support of their case that it is necessary to prove pecuniary loss to establish actionability, so that malicious falsehood is not actionable per se under section 3(1), are: (1) pecuniary loss is the gist of the tort; (2) Court of Appeal authorities; (3) textbooks and (4) article 10 ECHR, section 3 of the Human Rights Act 1998 ("HRA") and the chilling effect.

(i) The defendants' reliance on pecuniary loss being the gist of the tort

166. It is correct that, at common law, financial loss is the gist of the tort but in a significant sense that remains so under our interpretation of section 3(1). As Warby LJ in the Court of Appeal stated, to establish liability it is necessary to prove that pecuniary damage is "objectively likely" (para 48). In the vast majority of cases probable loss will become actual loss. The tort therefore remains concerned with the protection of economic interests. So, for example, it is clear that, unless the requirements of section 3(1) are satisfied, there is no possible cause of action even if loss of reputation or mental distress is proved to have been caused by the malicious falsehood.

167. The defendants also rely on the categorisation of malicious falsehood as an economic tort and the general requirement of proof of pecuniary loss as an essential ingredient of such torts.

168. While we accept that at least most of the so-called economic torts are actionable only on proof of pecuniary loss, there is a view that that is not true of passing off which is an economic tort that is very closely related to malicious falsehood. The essence of this tort is that it is an actionable wrong for a defendant trader so to conduct business as to lead to the belief that the defendant's goods, services or business are the goods, services or business of the claimant. The relatively recent cases of *Erven Warnick BV v J Townend & Sons (Hull) Ltd* [1979] AC 731 (*"Advocaat"*) and *Reckitt & Colman Products Ltd v Borden Inc* [1990] 1 WLR 491 confirm the conventional view that, for the tort of passing off to be actionable, damage must be proved other than where the claimant is seeking a quia timet injunction. Nevertheless there is some support in older case law and in textbooks for the view that passing off is actionable per se. *Wadlow on The Law of Passing Off,* 6th ed (2021) comments as follows:

> "4-18 There may still be a degree of uncertainty as to whether actual damage must have occurred for the cause of action in passing–off to have accrued. In other words, can nominal damages be awarded if a misrepresentation calculated to cause damage has been made but no damage can yet have been caused? Lord Diplock's choice of words in *Advocaat* suggests that in such circumstances any action is quia timet, but there are reasons for believing that his formulation is, for once, too narrow. Lord Parker, in *Spalding v Gamage* [(1915) 32 RPC 273], preferred the view that there was a prima facie right to at least nominal damages upon the misrepresentation being made: 'It is sufficient to say that the misrepresentation being established, and being in its nature calculated to produce damage, the plaintiffs are prima facie entitled both to an

> injunction and to an inquiry as to damage, the inquiry, of course, being at their own risk in respect of costs.'
>
> 4-20 …It is likely that the law has developed on the basis that acts which were originally only restrained quia timet, or under the equitable protective jurisdiction, subsequently came to be regarded as actionable per se…"

169. *McGregor on Damages* at para 48-016, having cited from Goddard LJ's judgment in *Draper v Trist* [1939] 3 All ER 513, 525, says the following:

> "The result is that, although it may be said that technically damage remains the gist of the action, the presumption of substantial damage not only makes passing off from a practical standpoint actionable per se but puts the claimant into an even better position than with torts technically actionable per se in which the presumption of damage need only reach as far as an award of nominal damages."

170. In our view, the tort of passing off indicates that, first, it may not necessarily be the case that all the economic torts are actionable only on proof of pecuniary loss; and, secondly, that in any event there is nothing irrational about recognising that an economic tort can be actionable per se at least where that is combined with there being a (rebuttable) presumption of pecuniary loss because pecuniary loss is objectively likely to be caused by the tort.

(ii) The defendants' reliance on Court of Appeal authorities

171. The three cases relied upon by the defendants are *Sallows v Griffiths* (*"Sallows"*) [2001] FSR 15, *Tesla* and *Tinkler v Ferguson* ("*Tinkler"*) [2021] EWCA Civ 18, [2021] 4 WLR 27. They argue that, as these cases applied standard tortious principles of causation to section 3(1), this shows that the tort of malicious falsehood in section 3(1) is not actionable per se. We agree that in all three cases ordinary principles of causation were applied. That, however, is consistent with such principles being applied at the stage of assessment of damages. If pecuniary loss has not been caused, damages for pecuniary loss should not be awarded. But none of those cases focus on whether causation goes to actionability - ie none focus on the question of whether the tort is actionable per se.

172. In *Sallows* a section 3(1) claim was advanced based on false statements made about the claimant at a board meeting which were said to have been published to the

company solicitor, the company and to a personal assistant. A separate claim against the company for wrongful dismissal was subsequently settled with a payment of damages. The judge awarded £5,000 damages for malicious falsehood. The Court of Appeal held that the only evidence of loss suffered was as a result of the claimant's wrongful dismissal, for which he had been compensated, and that there was no evidence of any other loss. The appeal against that part of the judge's award of damages was therefore allowed. The focus was on the circumstances in which damages for malicious falsehood are recoverable rather than actionability.

173. In *Tesla* a section 3(1) claim was made in relation to a review in the television programme, "Top Gear", of the Tesla Roadster which was alleged to have included false statements that one of the Roadsters had run out of charge and that its brakes had failed. The judge, Tugendhat J, refused permission to amend to include this claim because it had no real prospect of success and/or disclosed no real and substantial tort on causation grounds. In particular, the damages claimed did not distinguish between the damage caused by the false statements and that caused by earlier broadcasts containing the same statements (about which no complaint could be made because any claim was outside the limitation period and so time barred) and also damaging statements made in the broadcast which were true.

174. The Court of Appeal acknowledged that the claim involved "acute" issues of causation. Moore-Bick LJ (with whom Kay and Rimer LJJ agreed) explained as follows at para 36:

> "…The difficulty for Tesla is that over a period of some 15 months between the first broadcast of the programme in December 2008 and the beginning of the one year limitation period at the end of March 2010 there had been numerous further broadcasts. Even if the programme had contained no unfavourable, but true, statements about the Roadster, the fact remains that there had been a very wide publication of (what must be assumed to be) false statements that were no longer actionable. The need to distinguish their effect from that of the actionable falsehoods raises the issue of causation in an acute form…"

175. It was held that the claim for general damages under section 3(1) was adequately pleaded as it identified the nature of the loss and the mechanism by which it was likely to be sustained. In a helpful passage at para 37, with which we agree, Moore-Bick LJ stated as follows:

> "…Since the claim is for general damages it is unnecessary for the claimant to identify the amount of pecuniary of loss which it is said the falsehoods were calculated to cause. All that is required in order to make the nature of the case clear is identification of the nature of the loss and the mechanism by which it is likely to be sustained. In the ordinary course of things derogatory statements about any commercial product are likely to put off some potential customers with a consequent loss of revenue from sales and (depending on the nature of the business) increases in unit costs of manufacturing, storage and distribution. Although the overall effect of the statements complained of has to be judged in the context of the non-actionable statements, I can see that the court might find it likely that some potential customers would be deterred from buying a Roadster by the actionable statements, even though they had not been deterred by any of the non-actionable statements…"

176. Although it was held that the claim for damages was adequately pleaded, Moore-Bick LJ considered that "this is a case in which there are grave difficulties in identifying any pecuniary loss that the actionable false statements were calculated to cause" and that: "It is at this point that the principles enunciated in *Jameel v Dow Jones* are potentially relevant" (para 47). This is a reference to the Court of Appeal decision in *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946 in which it was held that a claim in defamation could be struck out for abuse of process where no real and substantial wrong had been committed and the proceedings would serve no useful purpose. The nature and juridical basis of the so-called *Jameel* jurisdiction has yet to be addressed by this Court but arose for consideration in the recent appeal of *Mueen-Uddin v Secretary of State for the Home Department.* In *Tesla* Moore-Bick LJ applied the principles set out in *Jameel* and concluded at para 49 that: "I do not think that Tesla has sufficient prospect of recovering a substantial sum by way of damages to justify continuing the proceedings to trial". Although Moore-Bick LJ also stated that he was "not persuaded that the case which Tesla seeks to make by the proposed amendment has any real prospect of success" the main focus of the judgment on the claim for general damages is the *Jameel* jurisdiction and the fact that the claim, if successful, was unlikely "to yield any benefit to Tesla that can justify the devotion of the substantial resources in terms of costs and the use of court time that its determination would require" (para 49).

177. In *Tinkler* the section 3(1) claim related to an allegedly false statement made by the defendants on the London Stock Exchange's Regulatory News Service ("the Announcement"). An application to strike out the section 3(1) claim was made on the grounds that Mr Tinkler had not particularised a sufficient case to come within section 3(1) and that, even if his pleaded case were allowed to continue, Mr Tinkler would, in any event, only be awarded nominal or near nominal damages even if he succeeded in

the claim. In all the circumstances the claim should therefore be struck out under the *Jameel* jurisdiction as disclosing no substantial tort.

178. In his judgment Nicklin J set out a helpful summary of the law relating to damages for malicious falsehood at para 44:

> "(i) A claimant can recover general damages under section 3(1) Defamation Act 1952 if s/he can show that the alleged false statements were more likely than not to cause him pecuniary damage: *Cruddas v Calvert* [2013] EWHC 2298 (QB) at [195] per Tugendhat J; *Niche Products Ltd v MacDermid Offshore Solutions LLC* [2013] EWHC 3540 (IPEC); [2014] EMLR 9, para 14(1) per Birss J.
>
> (ii) Pecuniary damage is financial loss or damage capable of being estimated in money (as opposed to compensated in money, eg general damages in defamation): *Niche Products*, at para 39.
>
> (iii) If the claimant's claim falls within section 3(1) Defamation Act 1952, the fact that s/he cannot demonstrate actual financial loss does not mean that the court must award only nominal damages: *Joyce v Sengupta* [1993] 1 WLR 337, 346H–347C per Sir Donald Nicholls VC; *Niche Products*, at para 14(2); but the size of the award will necessarily be dependent upon the established impact of the publication of the falsehood and may, in some cases, be only modest: *Fielding v Variety Inc* [1967] 2 QB 841.
>
> (iv) The Court of Appeal in *Joyce v Sengupta* (p 349A–B) left open the question of whether damages for hurt feelings could be awarded in a malicious falsehood action, but subsequently in *Khodaparast v Shad* [2000] 1 WLR 618 held that, if the claimant establishes an entitlement to damages for malicious falsehood, either on proof of special damage or by reason of section 3(1), then the award of general damages may reflect injury to the claimant's feelings: para 42 per Stuart-Smith LJ.
>
> (v) Harm to the claimant's reputation cannot form part of the basis of an award of damages for malicious falsehood: *Khodaparast*, at p 631H per Otton LJ; *Joyce v Sengupta*, at p

348F–G per Sir Donald Nicholls VC; and *Niche Products*, at para 39."

179. On the strike out application Nicklin J ruled that the pleaded case did not disclose a properly arguable case that pecuniary damage was likely to be caused by the Announcement. He held that any pecuniary damage was much more likely to be caused by other matters, in particular his justified dismissal and an adverse court judgment (the "Russen judgment") which held that he had acted in serious breach of his fiduciary and contractual duties.

180. The judge's decision was upheld on appeal. As Peter Jackson LJ stated at para 81:

> "As to causation, it will be recalled that the Judge found that subsequent events in the form of Mr Tinkler's sacking and the Russen Judgment were objectively much more likely to have caused pecuniary damage to Mr Tinkler than the publication of the 'fairly anodyne' meaning of the RNS Announcement…It seems to me that the case that Mr Tinkler was in reality making was that the RNS Announcement was a key event in the struggle leading to his dismissal, with all the resulting losses that followed…The difficulty for Mr Tinkler is that as the dismissal has been held to be justified he is not entitled to recover for losses arising from it."

181. This decision is particularly relevant to Issue 2, which addresses what evidence is admissible in applying the statutory test under section 3(1). But the conclusion reached is unexceptionable. If, on the pleadings, there is no properly arguable case that pecuniary loss is likely to be caused by the words used, then no claim can succeed under section 3(1).

182. Therefore, in none of these three Court of Appeal cases is there any support for the view that malicious falsehood under section 3(1) is actionable only on proof of damage. It follows that we do not consider that those cases are contrary to our interpretation of section 3(1).

(iii) The defendants' reliance on textbooks

183. The defendants rely in particular on the following passages from leading textbooks:

(1) *Gatley on Libel and Slander,* 13th ed (2022) at para 22-026:

> "Whether the claim is made for special damage or under s.3, the damage must be such as directly and naturally (or naturally and probably) results from the words. The defendant will not be liable where the damage is attributable not to his words but to some other unconnected fact or circumstance."

(2) *McGregor on Damages* at para 48-012:

> "Section 3, by dispensing in these cases with the requirement of allegation and proof of specific pecuniary loss for success in the action, thus impliedly confirms the view that for all injurious falsehoods only pecuniary loss will ground the action, a view negatively supported by the absence of decisions awarding non-pecuniary loss, occasionally hinted at in the cases, and generally prevalent in this area of tort. The view now obtains positive support from *Sallows v Griffiths*, where no damages for malicious falsehood were awarded as there was a failure to show pecuniary loss".

184. It is not clear in the passage from *Gatley* whether the reference to the defendant not being "liable" is a reference to liability in terms of actionability or liability for damages. Even if it refers to the former, as explained when addressing Issue 2, we agree that, if it cannot be shown that pecuniary loss is likely to be caused by the words used, then there is no section 3(1) claim, as is illustrated by *Tinkler.*

185. As to the passage from *McGregor on Damages*, we agree that non-pecuniary loss will not ground an action under section 3(1) and that to do so it is necessary to prove the likelihood of pecuniary loss under section 3(1). But that does not indicate that the tort is actionable only on proof of damage rather than being actionable per se. And it would appear that that passage in *McGregor on Damages* is more concerned with whether damages for non-pecuniary loss can ever be awarded for malicious falsehood (which we discuss under Issue 3 below) rather than whether damage must be proved for the tort to be actionable.

(iv) The defendants' reliance on Article 10 ECHR, section 3 HRA, and the chilling effect

186. This will be addressed after Issue 2 has been determined.

5. Issue 2: what is meant by the statutory words "calculated to cause pecuniary damage to the plaintiff" which appear in both subsections of section 3(1)?

187. As stated by Warby LJ in the Court of Appeal (para 48), it is common ground between the parties and well established by authority that:

> "(1) in this context 'calculated' does not mean intended but objectively likely; (2) the degree of likelihood required is that of probability; and (3) it is incumbent on a claimant who relies on s 3 to plead the nature of the damage which they are claiming to be more probable than not, and the causal mechanism: see, among other cases, *Ferguson v Associated Newspapers Ltd* (unreported, 3 December 2001) (Gray J), and *Tesla Motors Ltd v BBC (No 1)* [2011] EWHC 2760 (QB) [7], [66], [73] (Tugendhat J)."

188. The principal arguments advanced before the judge and the Court of Appeal focused on whether this statutory test of what is objectively likely falls to be judged by reference to all relevant evidence available at the time of trial or by reference only to relevant evidence at the time of publication. This was described as the difference between "historic" and "forward-looking" approaches.

189. The defendants' case is that the approach is historic in that it involves asking whether, as at the time of trial, pecuniary loss has been caused by the publication complained of, although there is no need to quantify the amount of such loss. This was the interpretation accepted by the judge – "…causation must require an examination of the facts as they were before, at and after publication" (para 205).

190. The claimant's case is that the approach is forward-looking in that it involves asking whether, as at the time of publication, pecuniary loss is likely to be caused by the publication. This was the interpretation upheld by the Court of Appeal (para 27):

> "The statutory test is forward-looking. It is enough for a claimant to prove the publication by the defendant of a false and malicious statement of such a nature that, viewed objectively in context at the time of publication, financial loss is an inherently probable consequence or, putting it another way, financial loss is something that would probably follow naturally in the ordinary course of events".

191. If the statutory test is forward-looking, further issues arise as to what evidence is admissible for determining what is objectively likely. The defendants contend that it should take into account any relevant fact on likely loss in existence at the date of publication and the likely response of the publishee(s) in order to make a realistic assessment of the likely impact of publication. The claimant contends that it should only take into account evidence which is probative of whether the offending words were inherently likely in the ordinary course of events to cause the claimant some pecuniary damage if published, judging the issue by reference to how matters presented themselves objectively at the time that the defendant publisher made the impugned publication. The Court of Appeal's approach was that it was appropriate to have regard to "the context and circumstances of the statement" and that this includes "the identities and essential characteristics of the publisher and publishees" (para 56).

192. As to whether the test is forward-looking, the starting point is the words used and the statutory language strongly supports a forward-looking approach. The question raised under section 3(1) is whether the words are objectively likely "to cause pecuniary damage", not whether they are likely "to have caused" such damage. As the defendants accept, the words "calculated to cause" are more consistent with a forward-looking test.

193. Turning to the wider context, this is also supported by the Report of the Porter Committee. The Report defined the common law tort of malicious falsehood in the following terms: "false statements made maliciously and calculated to cause and actually causing pecuniary damage" (para 20). In accordance with the Report's recommendations, in section 3(1) the wording "calculated to cause" is retained but the requirement of the false statement "actually causing pecuniary damage is omitted".

194. There are also a number of authorities in which statements of principle have been made which support a forward-looking test, such as *Ferguson v Associated Newspapers Ltd* (unreported) 3 December 2001 (Gray J) (see the Court of Appeal's judgment at paras 49 and 50), *Quinton v Peirce* [2009] EWHC 912 (QB), [2009] FSR 17 (Eady J) at paras 50 and 86, and *Tesla Motors Ltd v British Broadcasting Corpn (No 1)* [2011] EWHC 2760 (QB) (Tugendhat J) at paras 66 and 73.

195. While it is correct that there are authorities, as discussed in paras 171-182 above, which have taken into account events after publication when considering a section 3(1) claim, that is the orthodox and correct approach when considering the assessment of damages. None of these clearly address whether such evidence is admissible in relation to actionability under section 3(1) and therefore how the statutory test is to be applied.

196. For all these reasons we agree with the Court of Appeal that the statutory test in section 3(1) is forward-looking and requires the objective likelihood of pecuniary loss to be determined as at the time of publication.

197. The next question is what evidence is admissible in order to answer the statutory test as at the time of publication. This is not addressed by the statutory wording. The defendants contend that any evidence of relevant existing fact is admissible. There are a number of difficulties with this approach. First, it may well be difficult to determine whether or not a fact is existing at the material time. For example, in relation to the impact of the Butler words the defendants rely upon the fact that Mr Butler had decided not to do business with the claimant anyway. In some cases there might be real difficulty in determining when such a decision was made, or it might have been made and then unmade. Secondly, arbitrary consequences are likely to follow from the precise timing of when a material fact came into existence, such as five minutes before or after publication. Thirdly, it means that liability may be determined by reference to facts which were neither known to nor reasonably contemplated by anyone at the time of publication. The potential arbitrary consequences are well illustrated in this case by the significance of when the claimant showed Mr Lingenfelder the terms and conditions of her employment. Assuming that this was critical to the impact of the words used then everything would turn on the happenstance of whether they were shown to him five minutes before or after the Lingenfelder email.

198. The approach of the claimant and the Court of Appeal is also fraught with difficulty. Although they focus on the natural tendency of the words used, they realistically recognise that the inquiry cannot be so limited. As they acknowledge, it is clearly relevant to consider context and the circumstances in which the publication is made. They then seek, however, to limit the contextually relevant matters to the identity and characteristics of the publisher and publishee in order to seek to ensure that facts "extraneous" to the words used are not admissible. Quite apart from definitional issues which arise from such categorisations, such an approach means that facts of obvious causal significance potentially fall out of consideration. Examples given by the defendants are: (1) the fact that the imputation complained of has been repeatedly published previously and lost its capacity to cause loss; (2) the steps the publishee would ordinarily take to establish the truth or falsity of the statement; (3) the existence of a true imputation (not complained of) within the publication that is likely to cancel out the impact of the false imputation complained of, and (4) in cases of limited publication, the publishee's existing estimation of the claimant or particular knowledge, which may be a far more reliable indicator of their likely reaction than their identity and essential characteristics.

199. In our judgment, a principled approach, which avoids difficulties such as those outlined above, is to determine the objective likelihood of the words causing pecuniary loss by reference to all causally relevant facts and matters which are or should reasonably have been known to the publisher as at the time of publication. This would include prior publications, other statements made in the publication, and steps which are likely to be taken by the publishee.

200. As the case law illustrates, the likelihood of the publishee seeking to ascertain its truth or falsity before taking any action is often of importance. Indeed, in a number of cases it has been treated as being determinative. For example, *Stewart-Brady v Express Newspapers plc* [1997] EMLR 192 (the hospital would not have acted on the newspaper article without conducting an inquiry); *Fage UK Ltd v Chobani UK Ltd* [2013] EWHC 630 (Ch), [2013] FSR 32 (the regulator would not take steps likely to cause damage to a business without first conducting some investigation) and *Musst Holdings Ltd v Astra Asset Management UK Ltd* [2021] EWHC 3432 (Ch) (the potential investor would have established the falsity of the imputation by contacting the company, before pulling out).

201. Our proposed approach would cover such cases. It would exclude, however, facts known only to the publishee, such as the private decision of Mr Butler that he would not deal with the appellant anyway. Such a matter is rightly to be regarded as being "extraneous".

202. Whilst there is no case which has adopted this approach, there is no prior case which has addressed this specific issue. The matter is open and in our judgment is best approached in a principled and practical manner. Such an approach is consistent with the tort being concerned with the publisher's state of mind and statements: even though "calculated" does not mean "intended", it does indicate that matters should be looked at from the perspective of the publisher and what the publisher knew or ought reasonably to have known at the date of the publication. It also provides a workable test with clear boundaries.

203. In summary, section 3(1) requires the objective likelihood of the words used causing pecuniary loss to be judged at the time of publication by reference to all causally relevant facts and matters which are or should reasonably have been known to the publisher.

6. The defendants' reliance on Article 10 ECHR, section 3 of the HRA, and the chilling effect

204. Having (provisionally) answered Issues 1 and 2, it is now appropriate to consider whether any modification of our interpretation of section 3(1) is required by reason of article 10 of the ECHR and section 3 of the HRA. It is recognised that article 10 needs to be taken into account in the interpretation of section 3 of the 1952 Act as it involves a restriction on free speech. This has been stated in a number of cases, such as *Ferguson v Associated Newspapers Ltd* (unreported) 3 December 2001 at p 15 (Gray J), *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2009] EWHC 1717 (QB), [2010] QB 204 at paras 28-29 and 38 (Tugendhat J), and *IBM Corpn v Websphere Ltd* [2004] EWHC 529 (Ch), [2004] FSR 39 at para 74 (Lewison J).

205. It is also recognised that regard should be had to the potential chilling effect of threatened or actual litigation in relation to torts involving publication. On this matter the court was provided with written submissions of Media Defence as interveners.

206. The defendants submitted that these considerations mandated a meaningful harm threshold in all torts involving publication, a course which has been taken in relation to the torts of libel and slander through the imposition of the serious harm threshold in section 1(1) of the Defamation Act 2013 (see para 140 above).

207. The Court of Appeal rejected the defendants' argument that article 10 of the ECHR and section 3(1) of the HRA impose any duty on the court beyond that already recognised in the authorities. Warby LJ acknowledged that section 3(1) is an interference with freedom of speech but observed that false and malicious speech that is inherently likely to cause financial loss is not the kind of speech which attracts a high level of protection under article 10. He considered that section 3 had the legitimate aim of protecting the rights of others and that its method of so doing was rational, necessary and proportionate. As a very experienced media law judge, he also considered that the court's interpretation of section 3(1) was unlikely to have a significant chilling effect, observing as follows at para 70:

> "Experience suggests that claims for malicious falsehood are relatively rare and that the main brakes upon them are the need to prove falsity and, in particular, malice. This is notoriously hard to plead (allegations of malice are frequently struck out at the interim stage) and to prove. There are safeguards against abuse, including the *Jameel* jurisdiction."

208. The main focus of the criticism of both the defendants and Media Defence of the Court of Appeal's judgment was the low threshold involved in the application of what they described as the "tendency test" adopted by the Court of Appeal. Under such a test it would be sufficient to establish liability if the words complained of have a natural tendency to cause financial loss and relevant factors beyond the words used were limited to the context and circumstances of the statement and the identities and essential characteristics of the publisher and publishee. The claimant disputed this characterisation of the Court of Appeal's decision but, in any event, we have held that the test is likelihood of loss and that the evidence admissible in the application of that test is not to be limited by categorisation. The main criticisms made of the Court of Appeal decision therefore fall away. So, for example, the defendants submitted that: "the threshold of seriousness in a tort that seeks to compensate for financial loss must be, at a minimum, the likely existence of such loss". We have held that there is such a threshold. Further, in the vast majority of cases probable loss will result in actual loss. Yet further, although Media Defence noted the increasing use of privacy and data protection claims no evidence was put forward to show increasing use of malicious

falsehood claims. Warby LJ's stated experience would therefore appear to be borne out. For all these reasons we are satisfied that our interpretation of section 3(1) is in conformity with the duties of the court under article 10 and section 3(1) of the HRA.

7. Issue 3. When, if at all, is a claimant, who is relying on section 3(1), entitled to mental distress damages for malicious falsehood?

(1) Introduction

209. The term "mental distress damages" (or synonymously "damages for injured feelings") means damages concerned to compensate the claimant for mental distress caused by the tort, whether that be, for example, upset, anxiety, worry, annoyance, or humiliation. Mental distress damages can only be awarded to a human and not a company because a company is not capable of experiencing mental distress: *Collins Stewart Ltd v The Financial Times Ltd* [2005] EWHC 262 (QB), [2006] EMLR 5; *Eaton Mansions (Westminster) Ltd v Stinger Cia de Inversion SA* [2013] EWCA Civ 1308, [2014] HLR 4. Mental distress damages may be awarded as a separate head of loss; or as an aspect of "aggravated damages" where there has been particularly reprehensible conduct by the defendant either by the commission of the tort or subsequently. In *Rookes v Barnard* [1964] AC 1129, it was made clear that aggravated damages are compensatory – albeit compensating for mental distress – and not punitive. That is, aggravated damages are different from punitive (sometimes called exemplary) damages. In the light of continued confusion, the Law Commission in Report No 247 (1997) *Aggravated, Exemplary and Restitutionary Damages* para 1.42 recommended that the law would be improved in terms of clarity if aggravated damages were regarded as nothing more than "mental distress damages" or "damages for injured feelings" and that the very term "aggravated damages" should be replaced by either of those phrases. But the important point for this judgment is that aggravated damages, if that phrase is to be retained, are best viewed as a sub-category of mental distress damages where the defendant's behaviour has been particularly reprehensible.

(2) The Court of Appeal's reasoning and the parties' submissions on the availability of mental distress damages

210. As explained above (at para 135 (xii)), Warby LJ held that damages for injured feelings (ie mental distress damages) could be awarded to the claimant in this case for the malicious falsehood, established by the claimant relying on section 3(1), even though she had suffered no pecuniary loss. She was not restricted merely to nominal damages. He explained, at para 74, that the claimant had pleaded that she had suffered non-pecuniary loss in the form of "huge emotional distress" as a result of the publications "exacerbated and/or aggravated by the fact that the defendants acted maliciously"; and that those averments were supported by evidence in her witness

statement. Warby LJ referred to obiter dicta of Sir Donald Nicholls V-C and Sir Michael Kerr in *Joyce v Sengupta* and to the decision of the Court of Appeal in *Khodaparast v Shad* as supporting the view that mental distress damages could be awarded for malicious falsehood under section 3(1). But he accepted that he was not bound so to find because, in the latter case, pecuniary loss had been proved whereas that was not so on the facts of this case. Looking at the matter as one of principle, he considered that damages for mental distress should be available, if proved, irrespective of whether there was any pecuniary loss. He said, at para 78:

> "I would decline to rule out, as a matter of law, an award in a case where the publication caused no actual pecuniary loss in the event. I think it would be wrong to do so when the tort is complete on proof of a publication that has a natural tendency to cause financial loss and that is false and malicious. It cannot be said that such publications are inherently incapable of causing distress. In principle, such an award may be made."

211. In other words, Warby LJ was saying that, given that under section 3(1) malicious falsehood is actionable per se, there is no reason to deny damages for mental distress caused by that malicious falsehood even though, as it happens, there was no pecuniary loss.

212. In his oral and written submissions to this court, William Bennett KC supported the reasoning of Warby LJ. Against that, David Price KC submitted that mental distress damages are only recoverable for malicious falsehood, both at common law and under section 3(1), where pecuniary loss has been caused and the distress relates to that pecuniary loss.

(3) The case law

213. There has been little case law on the question of whether mental distress damages can be awarded for the tort of malicious falsehood, whether at common law or under section 3(1). There are three main cases to consider.

(a) *Fielding v Variety Inc* [1967] 2 QB 841 ("*Fielding*")

214. In *Fielding*, the claimant was an impresario who had put on a successful musical show in London's West End called "Charlie Girl". Variety was a New York based periodical which had falsely stated that the show had been a disastrous flop. The claimant and his company brought claims for the torts of libel and malicious falsehood. As regards malicious falsehood, the defendant did not put in any defence to the section

3(1) claim and so judgment was entered for damages to be assessed. The Master had awarded damages of £10,000 for malicious falsehood but on appeal this was reduced to a nominal sum of £100. The basis of the claim was the "probable money loss" (p 850) resulting from the lost chance of a production of the show in the United States. The Court of Appeal held that there was no evidence that the chances of production in the United States had been adversely affected since, by the time of the hearing, everyone knew that the show had been a great success. It would appear that the award of £100 was not viewed as nominal damages in the strict sense but was rather being awarded as a small sum of compensation for pecuniary loss: see Lord Denning MR at p 850; Harman LJ at p 853; and Salmon LJ at p 856.

215. However, the important point for present purposes is that, speaking of malicious falsehood, Lord Denning MR said at p 850:

> "The plaintiffs on this head of claim can only recover damages for their probable money loss, and not for their injured feelings."

216. But this has to be read in context. It was made clear (see Lord Denning MR at p 849 and Salmon LJ at p 854) that a decision had been made by the claimants that the claimant in his personal capacity should be treated as the claimant for the cause of action in libel, whereas the claimant's company should be treated as the claimant for the cause of action in malicious falsehood. A company, because a non-human, cannot recover damages for mental distress (see para 209 above). It was therefore clear that there could be no award of mental distress damages to the company for malicious falsehood, as opposed to Mr Fielding in his personal capacity, who was awarded mental distress damages for the libel.

(b) ***Joyce v Sengupta***

217. An article written by the first defendant in a national newspaper published by the second defendant alleged that the claimant, while working as a lady's-maid for a member of the royal family, had stolen her employer's confidential correspondence and handed it to another national newspaper; and that she had been ordered not to enter rooms where there might be confidential papers and had been, or was about to be, dismissed. The claimant brought an action for malicious falsehood, rather than libel, because she was able to obtain legal aid for the latter, but not the former, action.

218. The claimant alleged that the article contained false statements and was malicious, and she claimed damages, including damages pursuant to section 3 of the Defamation Act 1952. The judge granted the defendants' application to dismiss the

action as an abuse of the process of the court, holding that the claimant had improperly pleaded a case of defamation as one of malicious falsehood.

219. The appeal was allowed on the ground that both defamation and malicious falsehood were available to the claimant as causes of action and it was open to her to pursue either.

220. As regards damages for malicious falsehood, Sir Donald Nicholls V-C (with whom Butler-Sloss LJ agreed) addressed the question, which he said had never previously been decided, as to whether damages for injured feelings could be awarded for the tort of malicious falsehood whether at common law or under section 3(1). However, he made clear that what he said was obiter dicta, and that he was not deciding the point, not least as this was an interlocutory appeal and he did not have the full facts.

221. Having referred to Lord Denning MR's observation in *Fielding* (set out at para 215 above) and having observed that there appeared to have been no case in which mental distress damages had been awarded for malicious falsehood, Sir Donald Nicholls V-C, in a passage that merits citing almost in full, said the following at pp 347-349:

> "This state of the authorities suggests that damages for anxiety and distress are not recoverable for malicious falsehood. If that is the law it could lead to a manifestly unsatisfactory and unjust result in some cases. Take the example … of a person who maliciously spreads rumours that his competitor's business has closed down. Or the rumour might be that the business is in financial difficulty and that a receiver will soon be appointed. The owner of the business suffers severe financial loss. Further, because of the effect the rumours are having on his business he is worried beyond measure about his livelihood and his family's future. He suffers acute anxiety and distress. Can it be right that the law is unable to give him any recompense for this suffering against the person whose malice caused it? Although injury to feelings alone will not found a cause of action in malicious falsehood, ought not the law to take such injury into account when it is connected with financial damage inflicted by the falsehood?
>
> One turns to analogous torts for guidance. Inducement of breach of contract is another tort in which proof of damage is an essential ingredient. In *Pratt v British Medical Association* [1919] 1 KB 244, 281-282, McCardie J took humiliation and menace into account when assessing the damages. Likewise in

conspiracy: see the direction to the jury in *Quinn v Leathem* [1901] AC 495, 498. A close analogy is that of slander in a case where it is actionable only on proof of pecuniary damage. In *Lynch v Knight* (1861) 9 HL Cas 577, 598, Lord Wensleydale said:

'Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested.'

The point bristles with problems, not all of which were explored in argument. One possibility is that in an action for malicious falsehood damages are limited to financial loss. That would mark out a clear boundary, but it would suffer from the drawback of failing to do justice in the type of case I have mentioned. I instinctively recoil from the notion that in no circumstances can an injured plaintiff obtain recompense from a defendant for understandable distress caused by a false statement made maliciously. However, once it is accepted there are circumstances in which non-pecuniary loss, or some types of non-pecuniary loss, can be recovered in a malicious falsehood action, it becomes extremely difficult to define those circumstances or those types of loss in a coherent manner. It would be going too far to hold that all non-pecuniary loss suffered by a plaintiff is recoverable in a malicious falsehood action, because that would include injury to reputation at large. The history of malicious falsehood as a cause of action shows it was not designed to provide a remedy for such injury; the remedy for such loss is an action for defamation in which, incidentally, damages for injury to feelings may be included in a general award of damages. …

Nor would these difficulties be solved by rejecting damages for distress as a separate head of loss in a malicious falsehood action but permitting distress to be taken into account as an aggravating factor. On this footing the judge or jury could take injury to feelings into account when awarding a lump sum of damages 'in the round.' I do not see how, if only pecuniary loss is recoverable, the amount awarded can be increased to reflect the plaintiff's distress. That would be a contradiction in terms. It would be to award damages for

> distress in a disguised fashion. If distress can inflame the damages recoverable for pecuniary loss, the difference between awarding aggravated damages for that reason and awarding damages for distress as a separate head of loss is a difference in words only.
>
> My conclusion is that, on the limited argument addressed to us, it would be undesirable to decide this point."

222. There are four points of particular relevance to note about these obiter dicta.

223. First, the context was of a case in which it was likely that the claimant would be able to prove at trial that she had suffered substantial pecuniary loss.

224. Secondly, while Sir Donald Nicholls V-C focused on an example of mental distress caused by pecuniary loss, ie worry and anxiety caused by the pecuniary loss, he was giving this as an example of obvious injustice. He need not be interpreted as saying that only that type of mental distress could sound in damages for malicious falsehood.

225. Thirdly, it is an open question whether he was supporting or rejecting a requirement that some pecuniary loss must be proved before mental distress damages are available.

226. Fourthly, he made clear that damages for loss of reputation cannot be awarded for malicious falsehood.

227. Sir Michael Kerr also considered an award of damages for mental distress for malicious falsehood. He approached it through the lens of "aggravated damages" and thought that there was no reason why such damages could not be awarded for malicious falsehood whether at common law or under section 3. He said, at pp 350-351:

> "Many illustrations of cases in which aggravated general damages have been recovered for the commission of various kinds of torts can be found in the textbooks. They have been considered, for instance, in the context of the torts of assault, conversion, deceit, false imprisonment, malicious prosecution, trespass and others, and Sir Donald Nicholls V.-C. has already referred to conspiracy and inducing breaches of contract. There is therefore no reason whatever why such damages should not also be recoverable for the tort of malicious

> falsehood, either in addition to special pecuniary loss where this has been pleaded and proved, or as general damages where a plaintiff relies on section 3 of the Act of 1952."

228. In contrast, he seemed to think that an award of damages for mental distress as a separate head of damages could not be made for malicious falsehood. But, as Sir Donald Nicholls V-C observed in the last para from his judgment set out above, it makes little sense to recognise an award of mental distress through aggravated damages but not directly. This point is also forcibly made by *McGregor on Damages* at para 48-015:

> "Sir Michael Kerr… in his judgment in *Joyce v Sengupta*, devoted solely to the issue of damages for injury to feelings, … came to the curious conclusion that non-pecuniary loss of this variety could only be claimed as aggravated damages and not as a separate head of damage. Since, however, aggravated damages are relevant only to non-pecuniary loss they could only be claimed as a head of damage separate from the damages for the pecuniary loss which they cannot 'aggravate'. The damages here should simply be regarded as damages for injury to feelings."

229. We agree with Sir Donald Nicholls V-C and *McGregor on Damages* that, in principle, it cannot be correct to deny that mental distress damages are recoverable as a separate head of damages, while awarding "aggravated damages".

(c) *Khodaparast v Shad*

230. The defendant, who was the claimant's former lover, distributed documents throughout the Iranian community in London which appeared to be pages from pornographic magazines containing photographs of the claimant, an Iranian woman, advertising telephone sex services. The claimant, who taught at an Iranian religious school, had never been involved in telephone sex services or the sex industry. As a result she lost her job at the school and her prospects of employment in the Iranian community were detrimentally affected. She brought an action against the defendant for malicious falsehood relying on section 3 of the 1952 Act. She alleged that the defendant had created the images by superimposing photographs that he had taken of her onto pages of pornographic magazines and photocopying the result. The judge held that the defendant had been responsible for the publication or distribution of the pictures and ordered him to pay damages, including aggravated damages, of £20,000 for malicious falsehood to compensate her for the loss of her job and employment prospects and for injury to her feelings. The defendant appealed.

231. The Court of Appeal dismissed the appeal. On the damages, it was held that, once a claimant had established an entitlement to sue for malicious falsehood, whether on proof of special damage or by reason of section 3 of the 1952 Act, aggravated damages could be awarded for injury to feelings caused by the defendant's conduct. Here the amount awarded was not excessive – a comparison was made with a higher sum that could have been awarded for libel – and should be upheld. The leading judgment was given by Stuart-Smith LJ. Otton LJ agreed with that judgment but added his own words in relation to the damages. Potter LJ agreed with both judgments.

232. After referring extensively to *Joyce v Sengupta* Stuart-Smith LJ said the following at pp 630-631:

> "In my judgment, once the plaintiff is entitled to sue for malicious falsehood, whether on proof of special damage [or] by reason of section 3 of the Act of 1952, I can see no reason why, in an appropriate case, he or she should not recover aggravated damages for injury to feelings. As Sir Donald Nicholls V.-C. pointed out in *Joyce v. Sengupta* [1993] 1 W.L.R. 337, justice requires that it should be so."

233. Otton LJ made clear that damages for malicious falsehood could not include an award for loss of reputation but agreed that damages for distress and anxiety, through an award of aggravated damages, were here appropriately awarded and that the overall sum of £20,000 was not excessive. He said at pp 632-633:

> "Even though she could not be compensated for loss of her reputation, on the particular facts of this case she was clearly entitled, in my view, to recover damages for the aggravation caused by the defendant's insulting behaviour in accordance with Sir Donald Nicholls V-C and Sir Michael Kerr in *Joyce v Sengupta* …"

(4) Reasons for deciding that mental distress damages can be awarded to a claimant for malicious falsehood who is relying on section 3(1) even though the claimant has suffered no pecuniary loss

234. We set out below the principal reasons why, in our view, mental distress damages can be awarded for the tort of malicious falsehood to a claimant who is relying on section 3(1) even though the claimant has suffered no pecuniary loss.

(i) A starting point is that, in principle, if a tort has been committed against the claimant, the claimant should be entitled to compensation for all pecuniary and non-pecuniary loss caused by the tort subject to normal rules restricting or denying damages such as remoteness and mitigation.

(ii) That mental distress damages can be awarded for malicious falsehood, whether at common law or under section 3(1), is supported, as we have seen, by the obiter dicta in *Joyce v Sengupta* and by the reasoning and decision in *Khodaparast v Shad*. As we explain below, we consider that the best interpretation of those cases is that there is no restriction that the claimant must prove pecuniary loss before mental distress damages can be awarded.

(iii) That mental distress damages may be awarded is also supported by the case law in respect of closely connected torts. Mental distress damages (including "aggravated damages") have been awarded for the tort of deceit: *Archer v Brown* [1985] QB 401; *Saunders v Edwards* [1987] 1 WLR 1116. They have also been awarded for the tort of conspiracy (*Quinn v Leathem* [1901] AC 495, 498) and the tort of inducing breach of contract (*Pratt v British Medical Association* [1919] 1 KB 244, 281-282). But we accept that, because all those torts are actionable only on proof of damage, they may leave open whether pecuniary loss must be proved.

(iv) Although Sir Donald Nicholls VC in his obiter dicta in *Joyce v Sengupta* focused on a fact situation where, it would appear, the relevant mental distress was caused by pecuniary loss (ie the worry and anxiety consequent on the pecuniary loss), it is unnecessary to interpret his obiter dicta as confining recovery to that situation. Although the appellants have relied on this to draw a distinction that turns on whether the mental distress *was caused by the pecuniary loss*, we are unaware of that sort of distinction being drawn elsewhere in the law of damages. So in the cases referred to in the last sub-paragraph, where mental distress damages have been awarded, there was no attempt made to restrict the mental distress damages to mental distress caused by the pecuniary loss. Rather, in line with normal principle, the award of damages was for mental distress caused by the tort not just for that caused by the pecuniary loss. For example, in *Saunders v Edwards* the claimants were induced to buy a flat by the false representation that it had access to a roof terrace. They brought an action for the tort of deceit. In addition to damages for financial loss, the claimants were awarded damages for disappointment (and inconvenience) of £500. But there was no suggestion that the mental distress had to be caused by the financial loss suffered. On the contrary, the mental distress was the disappointment of not having access to the roof terrace. Moreover, it would be very difficult for a court to try to determine which part of the mental distress was caused by the financial loss as opposed to being caused by the tort. For example, let us assume in the instant case that the claimant had been able to prove a financial loss of £1000 and

also claimed mental distress damages. How is a party or the court going to be able to isolate which mental distress was caused only by the financial loss as opposed to the mental distress caused by the commission of the tort? By contrast, the approach we favour is clear and straightforwardly workable: the claimant is entitled to damages for mental distress caused by the tort subject to normal limiting principles, such as remoteness and mitigation.

(v) Therefore, even if it is thought that worry and anxiety caused by pecuniary loss present a particularly strong case for mental distress damages, there is no good reason, of principle or policy, why one should so confine the availability of mental distress damages.

(vi) The most difficult question is whether there is a restriction that mental distress damages are only recoverable for malicious falsehood where pecuniary loss has been proved. In *Khodaparast v Shad* it is clear that the claimant had suffered pecuniary loss eg loss of earnings. Similarly in *Joyce v Sengupta* the context was that the claimant would be likely to prove pecuniary loss at trial. Similarly in the cases dealing with closely related torts set out in sub-paragraph (iii) above, the torts are actionable only on proof of loss which, in their contexts, meant pecuniary loss. But it is hard to see any principled basis, or reason of policy, for such a restriction. It would be artificial and arbitrary for the availability of mental distress damages to turn on whether, for example, the claimant can prove that he or she has suffered a small pecuniary loss (say of £10). In a tort actionable only on proof of loss, the relevance of the pecuniary loss may go to establishing that a tort has been committed (ie to whether there is a cause of action). But once one has established that the tort is actionable per se, that role for pecuniary loss falls away.

(vii) Closely linked to that last point is that it would be inconsistent with our decision above that section 3(1) turns the tort of malicious falsehood, within the circumstances there laid down, into a tort actionable per se then to back-track by saying that mental distress damages should only be awarded on proof of special damage (ie pecuniary loss). Mental distress damages, often under the heading of "aggravated damages", plainly can be awarded for torts actionable per se such as trespass to person, land or goods (see, eg, *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB), [2019] QB 1251, at para 878; *Drane v Evangelou* [1978] 1 WLR 455; *Owen and Smith (trading as Nuagin Car Service) v Reo Motors (Britain) Ltd* (1934) 151 LT 274) just as they can be for torts actionable only on proof of damage. The principled position is that it is the cause of action that needs to be established and in torts actionable per se that does not require proof of damage.

(viii) When Sir Donald Nicholls V-C in *Joyce v Sengupta*, at p 348, said that "injury to feelings alone will not found a cause of action in malicious falsehood" he is best understood as meaning that a claimant could not succeed on a cause of action unless the claimant proved special damage or that section 3(1) was satisfied. He was not by that phrase disputing that, once the cause of action is established, injury to feelings might be compensated.

(ix) It is important to add that, in our view, the recognition that mental distress damages can be awarded for malicious falsehood will not open the floodgates to many new and trivial claims. The present case is highly exceptional because in almost all successful cases of malicious falsehood the claimant will have suffered pecuniary loss. Any damages added for mental distress are likely to be modest and a moderate sum so added is unlikely to make a significant difference to whether the claim is pursued or not. Put another way, the situations in which the defendant will be able to disprove pecuniary loss where section 3(1) is made out are likely to be extremely rare. It should also be noted that mental distress damages would not be made available for any lie about the claimant. Rather the lie has to be one that satisfies section 3(1). We would add that the decision in *Khodaparast v Shad* has not led to a flood of claims: on the contrary, we are aware of only one county court decision (*Smith v Stemler* [2001] CLY 2309) in which it has been applied. It should also be recalled that mental distress damages cannot be recovered by a company given that a company is not a human and therefore incapable of suffering mental distress (see para 216 above).

(x) There is one restriction on the recovery of non-pecuniary loss which, as we have made clear, is accepted in the judgments in both *Joyce v Sengupta* at p 348 and *Khodaparast v Shad* at pp 631-632. This is that, so as to avoid undermining the tort of defamation, whether libel or slander, there can be no recovery for loss of reputation as a non-pecuniary loss. This may be viewed as a valid reason of policy restricting the application of principle. Certainly the claimant in this case accepts that she cannot recover damages for loss of reputation as a non-pecuniary loss. A similar approach of refusing damages for loss of reputation as a non-pecuniary loss, so as not to undermine the tort of defamation, was adopted by the Court of Appeal in the tort of conspiracy case of *Lonrho plc v Fayed (No 5)* [1993] 1 WLR 1489.

(xi) Although an earlier passage in *McGregor on Damages* para 48-012 (partly set out in para 183 above), leaves open whether mental distress damages can only be awarded for malicious falsehood, if at all, where there has been pecuniary loss, later passages may be interpreted as tending to support the approach we are taking. In particular, para 48-014 reads as follows:

> "The Vice-Chancellor was concerned in *Joyce v Sengupta*, if non-pecuniary loss were once allowed, it would be difficult to set coherent limits to potential recovery, both to the circumstances for recovery of non-pecuniary loss and to the types of non-pecuniary loss recoverable. He need not have been so concerned; the courts are perfectly capable of, and accustomed to, deciding when and how far to give damages for the omnibus injury to feelings. The matter is one of principle and it is right that here policy should endorse recovery in general for injured feelings. What the Vice-Chancellor was particularly and rightly concerned to exclude, and indeed stated that it would be excluded as inappropriate in an injurious falsehood action, was the other and very different head of non-pecuniary loss, namely injury to reputation. This is in line with the Court of Appeal's decision very soon afterwards for its exclusion from the tort of conspiracy. In *Khodaparast v Shad*, it was said that the damages were in order because malicious falsehood was a species of defamation and the award was appropriate because persistence in the potentially defamatory allegations set out to blacken the claimant's character, but these damages are nevertheless to be regarded as given for the injury to feelings rather than for the injury to reputation. Indeed Otton LJ specifically accepted that 'damage to the plaintiff's reputation could not sound in malicious falsehood'."

(5) Conclusion on mental distress damages

235. In summary, it is our view that damages for proved mental distress/injured feelings can be and, unless ruled out on normal grounds such as remoteness, mitigation etc, should be awarded for malicious falsehood whether at common law or under section 3(1) (but, although we have heard no argument on this, not for loss of reputation as a non-pecuniary loss). In this case, this means that mental distress damages can be recovered by the claimant for, for example, upset and anxiety caused by the malicious falsehood that is actionable per se under section 3(1). As ordered by the Court of Appeal, the case should therefore be remitted to the trial judge for the assessment of such damages on the facts.

236. On this issue we therefore disagree with the judgment of the majority. Our reasons for doing so are set out above. The majority conclude that mental distress damages cannot be awarded because "financial damage is an essential element of the tort" (para 109). In our view that is inconsistent with the majority's acceptance (at paras 51-56) that once the requirements of section 3(1) are made out the tort is actionable per se. If so, that means that the tort of malicious falsehood can be established (and, indeed,

has been established in this case) without proof of pecuniary loss – ie it is not an essential element of the tort. It also follows that, contrary to what is said in the majority's judgment at the end of para 109, our approach is consistent with the premise, shared with the majority, that non-pecuniary loss caused by a tort is recoverable subject to normal rules restricting or denying damages such as remoteness and mitigation.

8. Overall conclusion

237. The proper interpretation of section 3(1) of the 1952 Act is that, in the circumstances specified, the tort of malicious falsehood is actionable per se. Section 3(1) imposes a forward-looking test that requires the objective likelihood of the words used causing pecuniary loss to be judged at the time of publication by reference to all causally relevant facts and matters which are, or should reasonably have been, known to the publisher. Mental distress damages can be awarded for the tort of malicious falsehood under section 3(1) even though the claimant has suffered no pecuniary loss.

238. For all the reasons set out above, we therefore agree with the decision of the Court of Appeal so that, in our view, the appeal should be dismissed.