

Bare comment defamatory at common law— Jeremy Corbyn’s appeal against preliminary issue findings dismissed (*Corbyn v Millett*)

This analysis was first published on Lexis®PSL on 27 April 2021 and can be found [here](#) (subscription required).

TMT analysis: The Court of Appeal has dismissed Jeremy Corbyn’s appeal of part of the judgment of Mr Justice Saini which dealt with preliminary issues in the libel proceedings defended by Mr Corbyn. Among other things, the court held that Saini J had not erred in finding that the words complained of were factual allegations and that his approach to ‘bare comment’ had been correct. Written by Mathilde Groppo, associate at Carter-Ruck.

Corbyn v Millett [\[2021\] EWCA Civ 567](#) (20 April 2021)

What are the practical implications of this case?

The decision is noteworthy primarily because it clarifies the concept of, and approach to ‘bare comment’ in the determination of meaning in libel cases.

The judgment applies well-established legal principles regarding the approach to be taken in determining whether a statement is one of fact or opinion. It reiterates the ‘key principle of law’ in this regard, being ‘that the answer to that question must always be the one that would be given by the ordinary reasonable reader or—as in this case, viewer’, by ‘avoid[ing] over-elaborate analysis and [giving] weight to its own impression’.

In dismissing Mr Corbyn’s appeal in relation to the finding that the statement was one of fact rather than opinion, the court makes it clear that the concept of ‘bare comment’ ‘is an aspect of the first condition’ needing to be met for the defence of honest opinion to be available. That condition is set out in [section 3\(2\)](#) of the Defamation Act 2013 ([DA 2013](#))—the statement must be one of opinion, not one of fact.

The court rejected the argument that *Joseph v Spiller* [\[2010\] UKSC 53](#) has in any way changed the above approach. It clarified that *Spiller* related to a separate condition which must be met for the defence of honest opinion to be available—namely, that the words complained of must identify the basis of the opinion (a condition now reflected in [DA 2013, s 3\(3\)](#)).

What was the background?

This is the Court of Appeal’s decision given on Jeremy Corbyn’s appeal of part of the judgment which followed the trial of preliminary issues in the libel proceedings brought against him by Richard Millett. The proceedings relate to statements made by Mr Corbyn on the Andrew Marr show on 23 September 2018. The words complained of were spoken by Mr Corbyn in response to Andrew Marr’s questions to him relating to a speech he made in 2013, in which he referred to ‘Zionists’ who ‘don’t understand English irony’.

Mr Corbyn had applied for a trial of various preliminary issues (including serious harm, for which permission was refused). The first instance judgment related to three issues:

‘(a) the natural and ordinary meaning of the statement complained of, including whether it refer[red] to the defendant, and any reference innuendo; (b) whether that meaning convey[ed] a statement of fact or opinion, or else in part a statement of fact and in part of opinion; and (c) whether the meaning convey[ed] a defamatory tendency at common law.’

The appeal concerned the judge's findings on points (b) and (c). In relation to (b), Mr Corbyn's argument was that some aspects of the judge's reasoning were flawed, and that he had been wrong in law and in fact to treat this case as one of 'bare comment' and to hold that the words complained of were allegations of fact. In relation to (c), Mr Corbyn again argued that the judge's reasoning had been flawed, and he identified five such flaws, summarised at para [28] of the Court of Appeal's judgment.

What did the court decide?

The Court of Appeal dismissed Mr Corbyn's arguments in relation to both aspects of his appeal.

Issue 1: fact or opinion

Mr Corbyn sought to argue that the judge's use of the term 'bare comment' showed that he must have concluded that the words complained of were a statement of opinion, but one that he must, as a matter of law, treat as a statement of fact; and that he had thereby conflated the first two conditions of the statutory defence.

The court disagreed with that analysis, considering that the judge's findings that the words complained of were 'bare comment' (in the sense set out at para [16(iv)] in *Koutsogiannis*, ie an allegation which does not indicate its basis) had in fact been an 'alternative ground of decision' (additional to his primary finding that the allegations were factual).

On the facts of the case, the court considered that the judge had not found that the allegations were factual because they were 'bare comment'. The court's analysis was that the judge found that the allegations were factual, and that he had separately noted that they were 'bare comment' which, in the circumstances of the case, the judge held to be a statement of fact.

The court also noted that, absent legal error, it would only interfere with the judge's factual finding that the allegations were allegations of fact if that finding was wrong, which it found was not the case. The Court of Appeal's judgment in fact went further and noted that, having watched the interview, it agreed with the judge's findings.

Issue 2: defamatory at common law?

Mr Corbyn sought to argue that the judge's decision on the issue contained five flaws, set out at para[28] of the Court of Appeal's decision.

The Court of Appeal dismissed all of Mr Corbyn's criticisms of the judge except for one. The court agreed that Saini J had erred in adopting a 'multi-factorial' approach, which had led to him conflating the issue as to whether the allegations crossed the common law threshold of seriousness (that the statement '[substantially] affects in an adverse manner the attitude of other people towards [the claimant] or has a tendency so to do' as per *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414), and the statutory requirement of serious harm in [DA 2013, s 1\(1\)](#). The court agreed with Mr Corbyn that circumstantial matters, which may be relevant to the assessment of serious harm, are generally left out of account when considering whether words are defamatory at common law. Despite this, it considered that the judge had been right to hold that the words complained of were defamatory of the claimant at common law.

Case details

- Court: Court of Appeal, Civil Division
- Judge: Sir Geoffrey Vos, Master of the Rolls; Dame Victoria Sharp, President of the Queen's Bench Division; Lord Justice Warby
- Date of judgment: 20 April 2021

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