Journal of Media Law

ISSN: 1757-7632 (Print) 1757-7640 (Online) Journal homepage: www.tandfonline.com/journals/rjml20

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To cite this article: Rebecca Moosavian & Peter Coe (05 Jun 2025): ‘The personal is political’: sexual misconduct allegations, defamation and gender politics, Journal of Media Law, DOI: 10.1080/17577632.2025.2509997

To link to this article: https://doi.org/10.1080/17577632.2025.2509997

Published online: 05 Jun 2025.

JOURNAL OF MEDIA LAW
https://doi.org/10.1080/17577632.2025.2509997

Routledge
Taylor & Francis Group

'The personal is political': sexual misconduct allegations, defamation and gender politics

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ABSTRACT

This article critically examines how English defamation law regulates cases involving allegations of sexual misconduct and/or violence which have become prevalent in the wake of the #MeToo movement. Part 1 provides an account of feminist methods that reveal the gendered nature of both legal doctrine and courtroom treatment of the parties in cases. Part 2 proceeds to analyse English defamation cases concerning allegations of sexual misconduct to demonstrate the presence of patriarchal gender dynamics. It argues that select features of defamation doctrine may be conceived or applied in a gendered way. It proceeds to consider the influence of gendered preconceptions on defamation courts, analysing instances of 'testimonial injustice' where the evidence of parties is afforded varying credibility. Finally, it considers how the wider legal costs culture and inequalities in access to justice can be exploited by #MeToo defamation claimants to women's disadvantage. We conclude that an awareness of complex wider context and politics is essential to ensure that cases and parties are dealt with justly.

ARTICLE HISTORY Received 14 May 2025; Accepted 15 May 2025

KEYWORDS Sexual misconduct and violence; feminist theory and gender; defamation; SLAPPs

Introduction

The endemic and ongoing problem of sexual misconduct and violence against women[1] has received growing attention and concern in recent years, as evidenced by multiple allegations against high-profile men such as Jeffrey

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[1]A note on terminology. This article will focus on a range of allegations concerning rape, sexual abuse, sexual harassment, sexual misconduct and violence against women. Though such conducts vary in severity, circumstances and harms, they all entail violence against women that is the broad concern of feminist critique. For consistency and clarity we will therefore use the umbrella terms 'sexual misconduct', 'abuse' and/or 'violence' throughout this article.

Epstein, Donald Trump, Mohamed Al Fayed, Tim Westwood and Russell Brand.[2] A key driver in bringing instances of violence to mainstream attention has been the global #MeToo movement in 2016, which prompted millions of women to post about their experiences of sexual abuse and misconduct online. Though men and boys may also be victims of sexual abuse,[3] the #MeToo discourse is inherently gendered, reflecting the fact that women and girls are the primary targets of such abuse.[4] This movement by its very nature entails survivors of abuse articulating their experiences via social media as a form of consciousness-raising, with the ultimate aim of changing culture and society.[5] Crucially, one key reason for the emergence of online fora as a means to share and highlight experiences of sexual violence has been the long-standing and widely acknowledged failure of formal criminal and civil law systems to adequately address such violence.[6] #MeToo's extra-legal processes are more open, collective and informal than law, and have proved more effective in challenging powerful perpetrators and instigating institutional change.[7] The informal, public nature of sexual misconduct allegations is, according to Jessica Clarke, a 'distinctive feature' of #MeToo which brings numerous benefits. For example, it connects survivors to one another, thus highlighting that their experiences are not isolated but rather

[2]See, e.g. David Hooper, *Buying Silence: How Oligarchs, Corporations and Plutocrats Use the Law to Gag their Critics* (Biteback Publishing 2025) chp. 3; Bernd Debusmann Jr, 'Jeffrey Epstein: Recruitment of Girls Detailed in Second Document Batch' (*BBC News* 5 January 2024) <https://www.bbc.co.uk/news/world-us-canada-67879225>; 'Sexual Misconduct Allegations Against Trump – A Timeline' (*The Guardian*,25 October 2024) <https://www.theguardian.com/us-news/2024/oct/25/trump-sexual-misconduct-allegations-timeline>; Graham Satchell and Jessica Rawnsley, 'More Than 400 People Come Forward Over Mohammed Al Fayed Sexual Abuse Allegations' (*BBC News*, 31 October 2024) <https://www.bbc.co.uk/news/articles/cy7dgrkp2vzo>; Chi Chi Izundu, 'Prosecutors to Consider Bringing Charges Against Tim Westwood' (*BBC News*, 7 November 2024) <https://www.bbc.co.uk/news/articles/c207rk0l4lro>; Alex Smith, 'Police Send Brand File to CPS to Consider Charges' (*BBC News*, 2 November 2024) <https://www.bbc.co.uk/news/articles/cpwrzd5259yo> all accessed 6 May 2025. Additionally, at the time of writing, the final judgment in the defamation trial *Noel Clarke v Guardian News and Media Ltd* [2025] EWHC 222 (KB) is awaited.

[3]See, e.g. *Aaronson v Stones* [2023] EWHC 2399; Rianna Croxford and Madeline Halpert, 'Ex-Abercrombie CEO Used Power, Wealth and Influence to Traffic Vulnerable Men, Prosecutors Say' (*BBC News*, 22 October 2024) <https://www.bbc.co.uk/news/articles/cgj4j05wy31o>; Aoife Walsh, 'Michael Jackson Lawsuits Alleging Sex Abuse Can Be Revived, US Appeals Court Says' (*BBC News*, 19 August 2023) <https://www.bbc.co.uk/news/world-us-canada-66553229> accessed 6 May 2025.

[4]The risks of being subjected to such abuse are exacerbated by intersectional factors such as race and class: Angela Davis, 'Struggle, Solidarity and Social Change' in Giti Chandra and Irma Erlingsdottir (eds), *The Routledge Handbook of the Politics of the #MeToo Movement* (Routledge 2020).

[5]Drawing, in particular, on the work of Michel Foucalt, Beatrice Chateauvert-Gagnon argues that #MeToo is best understood 'as a contemporary form of parrhesia, a practice originating from Ancient Greece that consists of speaking dangerous truth to power and taking risks in doing so out of a sense of duty to improve a situation for oneself and others.' See Beatrice Chateauvert-Gagnon, 'Speaking Truth to Power in a Digital Age: #MeToo as Parrhesia' (2024) 49(4) Signs: Journal of Women in Culture and Society 831, 832.

[6]Deborah Tuerkheimer, 'Beyond #MeToo' (2019) 94 New York University Law Review 1146, esp. 1151–1167; Catharine MacKinnnon, 'Global #MeToo' in Giti Chandra and Irma Erlingsdottir (eds) *The Routledge Handbook of the Politics of the #MeToo Movement* (Routledge 2020); Catharine A MacKinnon, '#MeToo Has Done What the Law Could Not' (*New York Times,* 4 February 2018) A19.

[7]Jessica A Clarke, 'The Rules of #MeToo' (2019) Article 3 University of Chicago Legal Forum 37, 42, 45.

systemic, and it can create a 'snowball effect', prompting multiple victims to come forward.[8]

But the proliferation of internet users sharing their #MeToo experiences of sexual misconduct and violence has prompted a marked increase in privacy and defamation actions brought by the (predominantly male) subjects of their allegations.[9] #MeToo allegations potentially violate the Article 8 European Convention on Human Rights (ECHR) privacy rights of individuals by revealing information about sexual conduct that invariably occurs in a private setting where the parties are likely to have a reasonable expectation of privacy.[10] Furthermore, such allegations may fall foul of defamation law which protects an individual from false statements that seriously harm their reputation.[11] But vital limitations in both doctrines should prevent them from protecting perpetrators of sexual misconduct. Misuse of private information (MPI) protections tend to narrowly focus on preventing the naming or identification of alleged perpetrators, and a claimant's Article 8 privacy right is balanced against the wider public interest in revealing disputed information.[12] And defamation contains a truth defence to reflect the rationale that an individual should not enjoy an undeserved reputation.[13] Yet despite such doctrinal limitations, privacy and defamation laws are being increasingly used to effectively silence women sharing their #MeToo experiences.[14]

The problematic effects of defamation law in this #MeToo context have been subject to growing academic concern and attention in countries such

[8]ibid 46; Tuerkheimer (n 6) 1174–1188.

[9]Concrete statistics about such actions and/or threats are not available due to their nature. But a range of leading lawyers and women's charities report a marked rise in the cases they are seeing: Jennifer Robinson and Keina Yoshida, *How Many More Women? The Silencing of Women By the Law and How to Stop It* (Endeavour 2022) 7–9; Nicole J Ligon, 'Protecting Women's Voices: Preventing Retaliatory Defamation Claims in the #MeToo Context' (2020) 94(4) St. Johns Law Review 961, 961; Sarah J Harsey and Jennifer J Freyd, 'Defamation and DARVO' (2022) 23(5) Journal of Trauma and Dissociation 481; Sarah J Harsey et al., 'Perpetrator Responses to Victim Confrontation: DARVO and Victim Self-blame' (2017) 26(6) Journal of Aggression, Maltreatment, and Trauma 644; Sarah J Harsey and Jennifer J Freyd, 'Deny, Attack, and Reverse Victim and Offender (DARVO): What is the Influence on Perceived Perpetrator and Victim Credibility?' (2020) 29(8) Journal of Aggression, Maltreatment, and Trauma 897.

[10]*Murray v Express Newspapers* [2008] EWCA Civ 446 [36]; *Mosley v News Group* [2008] EWHC 1777 [7], [98]–[100].

[11]Defamation Act 2013 s 1(1). The meaning of serious harm was finally settled by the Supreme Court in *Lachaux v Independent Print Media Ltd* [2019] UKSC 27 (discussed below).

[12]*WFZ v BBC* [2023] EWHC 1618 [79]–[88]; *Bloomberg v ZXC* [2022] UKSC 5. See further details below at notes 62 and 64. This article focuses on defamation law and therefore a detailed analysis of the effects of MPI in this context is beyond its scope. However, MPI is afforded critical examination elsewhere in this special edition. We share concerns that recent developments in MPI case law enable the doctrine to be used problematically to stifle legitimate sexual misconduct allegations and, as such, these developments warrant further thorough scrutiny and a degree of circumspection.

[13]See Part 2 for further discussion.

[14]It is possible that men may be targeted in this way, but such cases represent the exception rather than the norm. A rare and unusual example (because it involves a woman plaintiff) is the currently ongoing US defamation action brought by Fiona Harvey against Netflix for her depiction as Richard Gadd's violent stalker in the hit TV show 'Baby Reindeer': *Fiona Harvey v Netflix Inc* (2024) 2:24-cv-04744 (C.D. Cal.), U.S. Dist. LEXIS 193569.

as the United States,[15] Canada[16] and Australia.[17] Closer to home, English defamation law – long noted for its claimant-favoured features – has been subject to similar, cogent critique in general readership tracts by leading practitioners including Helena Kennedy KC,[18] Jennifer Robinson and Keina Yoshida,[19] and David Hooper.[20] This article builds upon this existing work by focussing on English #MeToo defamation case law which offers illuminating examples where gender dynamics have influenced reasoning and outcomes. However, the weaponisation of defamation law to suppress allegations of sexual misconduct and violence extends far more widely than these cases demonstrate. Reported examples of women informally sharing their experiences of misconduct or warnings about former partners or individuals they have encountered on dating websites are widespread.[21] Furthermore, practitioners offer anecdotal evidence that most defamation actions against women making such allegations occur informally, via pre-action legal threats that never reach litigation stage.[22] As such, the cases analysed here arguably represent the 'tip of the iceberg' and form a specific but neglected category of Strategic Lawsuits Against Public Participation (SLAPP)[23] cases that EU institutions and the UK government have been taking steps to address more generally.[24]

[15]See, e.g. Tuerkheimer (n 6); Ligon (n 9); Harsey and Freyd, 'Defamation and DARVO' (n 9); Harsey et al (n 9); Harsey and Freyd, 'DARVO' (n 9).

[16]Mandi Gray, *Suing for Silence, Sexual Violence and Defamation Law* (University of British Columbia Press 2024).

[17]Michelle Harradine, 'Defamation Law and Epistemic Harm in the #MeToo Era' (2022) 48(1) Australian Feminist Law Journal 31; Sarah Ailwood, 'Performance, Credibility and #MeToo Testimony in *Rush v Nationwide News Pty Ltd*' (2023) 79(2) Australian Feminist Law Journal 319; Camilla Nelson '"A Public Orgy of Misogyny": Gender, Power, Media, and Legal Spectacle in *Depp v Heard*' (2024) 25(2) Feminist Media Studies, 233.

[18]Helena Kennedy, *Eve Was Shamed, How British Justice is Failing Women* (Chatto and Windus 2018).

[19]Robinson and Yoshida (n 9).

[20]Hooper (n 2).

[21]For a sample of popular media coverage, see, e.g. Kate Solomon, 'Inside the Secret Network of Women Naming and Shaming their Bad Exes' (*Independent*, 12 October 2023) <https://www.independent.co.uk/life-style/are-we-dating-the-same-guy-b2428024.html>; Claire Graham, 'Facebook: Concern Over Group Naming Men to Be Avoided on Dating Apps' (*BBC News*, 8 December 2023) <https://www.bbc.co.uk/news/uk-northern-ireland-67655218>; Laura Glowacki, 'Facebook Groups Warning Women About Online Daters Could Be a Risky Business' (*CBC News Online*, 13 June 2023) <https://www.cbc.ca/news/canada/ottawa/dating-same-guy-facebook-group-legal-defamation-1.6873314>, all accessed 6 May 2025.

[22]Robinson and Yoshida (n 9) chapter 5. As Twomey J has explained of SLAPP cases more generally: 'slapps … are dependant [sic] for their effectiveness on [the] fact that High Court costs are only affordable to millionaires. In this way, the users of slapps are able to use the tail (of legal costs) to wag the dog (of justice) in order to stifle actions/comment with the threat of litigation.' *Connective Energy v Energia Group ROI Holdings DAC* [2024] IEHC 23 [34]. See also: Gray (n 16) 11–12; Hooper (n 2) 256–258.

[23]'SLAPPs' refers to the improper or coercive use of legal action or threats of legal action by powerful individuals or companies to harass and/or intimidate critics into silence. Such vexatious claims represent a weaponisation of the law to exploit power and wealth inequalities between parties, ultimately inhibiting scrutiny and debate on matters of public interest. For detailed analysis of SLAPPs, see Peter Coe, Rebecca Moosavian and Paul Wragg, 'Addressing Strategic Lawsuits Against Public Participation (SLAPPs): a Critical Interrogation of Legislative, and Judicial Responses' (2025) Journal of Media Law 1 https://doi.org/10.1080/17577632.2024.2443096, 1–2.

[24]Anti-SLAPP law and policy is gaining traction in the UK and across Europe. For detailed analysis, see ibid.

The original contribution and significance of this article is therefore threefold. First, it undertakes the first in-depth academic analysis of how gender dynamics have influenced the reasoning and outcomes in English defamation cases involving allegations of sexual misconduct and/or domestic violence. Second, it situates these English defamation cases in their wider historic and legal context to demonstrate that the gender dynamics influencing these cases are by no means new, but merely recurrences of those seen in other doctrines. Third, it applies established feminist methodologies to English defamation law for the first time to argue that it should be re-envisaged in order to minimise its risk of being exploited by perpetrators to prohibit women from articulating their experiences of sexual misconduct. In short, this article highlights English defamation law's significant but hitherto neglected role in the law's wider regulation of sexual misconduct and violence. Furthermore, it offers an important initial contribution to the process of reforming defamation doctrine and judicial culture to ensure it does not inadvertently sustain the enduring, pervasive problem of violence against women.

This article starts by providing an account of feminist methods that reveal the gendered nature of both legal doctrine and judicial treatment of the parties in cases. It demonstrates that #MeToo-era defamation cases are ripe for such feminist analysis because they occur in the overlap of two areas already widely noted for reflecting masculine norms: first, the law's historic and ongoing failure to adequately address violence against women generally (e.g. via doctrines such as crime and tort); second, defamation (and the privacy law to which it is closely related) that have been historically shaped by male interests and experiences. Against this background, Part 2 critically analyses contemporary English defamation cases concerning allegations of sexual and/or domestic violence to demonstrate that the deep-rooted patriarchal gender dynamics that pervade our justice system are also present in this particular context. It argues that three aspects of contemporary defamation doctrine are conceived or applied in a gendered way, to the disadvantage of women survivors. The reverse burden of proof inverts the perpetrator-victim narrative to the benefit of male claimants. The more exacting civil standard of proof for serious sexual allegations provides an additional hurdle for survivors. Furthermore, though the single meaning rule accounts for the context of an allegation, it fails to account for gender-based contextual factors. Part 2 proceeds to consider the influence of gendered preconceptions and cultural stereotypes on defamation courts, analysing instances of 'testimonial injustice' where the evidence of parties is afforded varying credibility along gendered lines. Finally, it considers how the wider legal costs culture and inequalities in access to justice can be exploited by #MeToo defamation claimants to women's disadvantage, an issue barely mentioned in case law.

In adopting this critique, our position is not that defamation laws are worthless or should be abolished. Instead, our claim is that despite progress in some areas, intractable gender (and other intersectional) inequalities persist, therefore a critical appraisal of the practical effects of defamation law in this context is necessary to better understand subtle (and not-so-subtle) ways in which it may continue to entrench such inequalities. Such an approach shuns the complacency of rose-tinted 'progress narratives' and is a pre-requisite to any meaningful reforms that might re-envisage defamation doctrine to minimise the risk of its misuse against survivors seeking to highlight their experiences and the wider issue of violence against women.[25]

Part 1: gender, defamation and privacy

This part provides an account of key feminist methods deployed throughout this article which reveal the inherently gendered nature of both legal doctrine and courtroom treatment of the parties in cases. It demonstrates that #MeToo-era defamation cases are ripe for feminist analysis because they occur in the overlap of two areas already widely noted for reflecting gendered/masculine norms. First, these cases involve allegations of violence against women, an issue that has long exposed law's shortcomings across a range of doctrines such as crime and tort. Second, from their very emergence, defamation and privacy laws have been inherently shaped by male interests in key respects.

Feminist methodology

Feminist legal scholarship is rich and diverse; a full account is therefore beyond the scope of this article. Nevertheless, our analysis implements two key approaches adopted across feminist literature, both of which have been utilised by the *Feminist Judgments Project* which critiques and creatively re-writes controversial or problematic judgments in prominent cases across a range of doctrines.[26]

First, this article considers the ways in which defamation rules, concepts and doctrine may be inherently gendered, constructing experiences in masculine terms. As Martha A. Fineman explains, historically 'Insofar as women's lives and experiences became the subjects of law, they were of necessity translated into law by men'.[27] She terms legally significant concepts

[25]E.g. Elizabeth Schneider makes the claim that 'Influenced by a sensitivity to gender, and informed by experience of woman abuse, privacy can be reconstructed and reformulated'. Elizabeth Schneider, 'The Violence of Privacy' (1991) 23 Connecticut Law Review 973, 994, 998.

[26]Rosemary Hunter, 'An Account of Feminist Judging' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice*) (Hart 2010) 35.

[27]Martha A Fineman, 'Feminist Theory and Law' (1995) 18(2) Harvard Journal of Law and Public Policy 349, 351.

(such as 'family' or 'private') as 'colonised categories' in that they have been 'defined, controlled and given legal content by men', thus reflecting male norms and understandings of the world. Ultimately, these categories influence or determine the outcomes in cases.[28] Nevertheless, laws are widely presumed to be gender neutral, merely reflecting universal abstract principles; feminist critique thus entails questioning this basic assumption of neutrality. As Fineman claims, 'struggle over the content and meaning of law is inherently political and … perspectives count'.[29] The 'gendered doctrine' method is deployed by Joanne Conaghan, who advocates drawing out 'the gender dimension so often lying undetected at the heart of a legal issue' and questioning gender-neutral accounts of certain cases.[30]

A second feminist method focuses on judicial and courtroom failure to take account of individual female parties' experiences and wider context when handling disputes. According to Rosemary Hunter, this failure is a result of judges drawing upon their background of social facts and 'common knowledge' when resolving disputes, and a feminist re-writing of judgments thus entails re-telling the facts of cases with greater awareness of the woman's position and choices in it, and greater reliance on contextual materials.[31] There is consensus regarding the legal system's persistent failure to account for women's experiences. In her influential 1992 book, *Eve Was Framed*,[32] Helena Kennedy KC drew upon her decades of courtroom experience to argue that the courts approached women litigants with unconscious antiquated views across a range of criminal and family law cases.[33] She claimed that lawyers, judges and juries dealing with domestic violence, rape, murder and divorce cases were influenced by popular myths and misconceptions about women's 'correct' responses to their circumstances, accusations that women had inflated their accounts and/or provoked the defendant's conduct.[34] She questioned why judicial imagination could identify with the experiences of victims of burglary and similar crimes, but frequently failed to do so in rape cases.[35] For Kennedy, the law's denial of women's experiences contributed to the maintenance of male power in society, and she concluded by calling for courtroom prejudices against women to be recognised and eliminated via systemic reform.[36]

[28] ibid.
[29] ibid 367. Also 352, 355.
[30] Joanne Conaghan, 'Law, Harm and Redress: A Feminist Perspective' (2002) 22(3) Legal Studies 319, 333.
[31] Hunter (n 26) 16, 21, 36.
[32] Kennedy (n 18).
[33] ibid 29.
[34] ibid 91, 93, 106, 115, 123. Such prejudices were exacerbated by race (chap 7).
[35] 'The fact that a male judge may never himself have such an experience [of rape] is not enough to explain the frequent insensitivity and apparent failure to identify with the victim. The leap of imagination required to appreciate the effect of the crime does not fail a judge when dealing with victims of terrorism or burglary or kidnapping.' ibid 121.
[36] ibid 15, 137, 263–264.

Conaghan also adopts this second method, advocating a woman-centred approach which 'takes women from the legal wings and places them, their needs and aspirations on the legal centre-stage'.[37] For example, her feminist re-analysis of the leading negligence case, *Waters v Metropolitan Police Commissioner*,[38] notes that nearly all the judges in this litigation relegated the alleged rape of the claimant by a fellow police officer to the periphery of the case. Instead, they focused on legal technicalities, providing a 'wholly one-sided … defendant-centred approach' – e.g. by emphasising the need to protect potential defendants from frivolous or vexatious sex discrimination claims – whilst remaining 'blind' to counter-factors such as access to justice. In this way, Conaghan's woman-centred approach critically 'challenges law's claims to neutrality and impartiality'.[39] Elsewhere, Fineman proposes the notion of 'a gendered life' that would enable law to take account of wider contextual matters it has tended to marginalise or exclude. According to the 'gendered life' approach, women share the potential to experience a range of situations where their gender is culturally relevant.[40] Women are shaped by a variety of 'material, psychological, physical, social and cultural' experiences which are distinct from men's experiences.[41] Fineman terms this a 'contemporary difference argument' which is grounded in empirical reality,[42] whilst avoiding negative domination models such as Catherine MacKinnon's.[43] Via this approach the gendered life 'attempts to open a space for women's perspective in law as distinct from men's', prompting the law to take women's experiences into account.[44]

The two feminist methodologies outlined here are particularly pertinent to #MeToo defamation cases because, as the next section shows, they involve the intersection of two areas where masculine norms have been influential, namely violence against women and defamation-privacy doctrine.

[37]Conaghan (n 30) 333.
[38]*Waters v Metropolitan Police Commissioner* [2000] 1 WLR 1607, HL. The case involved an action brought by a young policewoman who was raped by a fellow police officer and reported it to her superior officers. An ineffective and flawed police investigation was held, leading to no further action being taken against the man. Waters's complaint led her to face ongoing hostility, bullying and ostracism from her colleagues, ultimately leading to post-traumatic stress disorder. She brought civil actions against the MPC under employment discrimination law and the tort of negligence. The lower courts struck out Waters's claim on public policy grounds, but the House of Lords reversed this by taking 'a much more open and investigative stance' [331]. It held that public policy arguments were not fatal to her claim, and it was in the public interest that, if such matters had occurred, they were addressed. Conaghan writes 'I cannot help but wonder ***why*** it took so long and so much effort on Ms Waters' part for a judge to recognise and articulate this important and glaringly self-evident consideration.' Conaghan (n 30) 332.
[39]Conaghan (n 30) 335–337.
[40]Fineman (n 27) 359.
[41]ibid 359.
[42]ibid 360, 365.
[43]ibid 367.
[44]ibid 365–366.

Law's wider shortcomings regarding sexual violence

It is firmly established that gendered laws and adjudication have historically led to failures to provide protection or redress for women subjected to violence and sexual misconduct across a range of doctrines, including, family, employment, criminal and tort.

Criminal laws have historically struggled to effectively address crimes such as rape and domestic violence. UK rape laws have notoriously encapsulated these shortcomings, with explicitly gendered legal measures that, for example, a man was legally incapable of raping his wife,[45] a defendant should not be convicted on the uncorroborated evidence of a complainant,[46] and the defendant's belief regarding a woman's consent to sex need not be reasonably held.[47] Despite feminist-driven reforms to these types of laws across jurisdictions in recent decades, the problem of low reporting, charging and conviction rates for rape has endured.[48] Such reforms have struggled to address the ongoing gendered stereotypes and rape myths by which police and juries have continued to appraise the parties' testimonies.[49] In Hunter's terms, 'While these gender-based rules have been reformed, the epistemological assumption underlying them – that women lie about sex – remains deeply entrenched'.[50]

Feminist critiques of tort law have similarly sought to highlight its disparate treatment of women claimants and the harms they suffer, as well as the male-based assumptions that underpin its apparent gender-neutrality.[51] In her feminist re-analysis of *Waters*, discussed above, Conaghan shows that gender played an integral but unarticulated role in the masculine judicial

[45]This long-standing common law position was overturned in *R v R* (1992) 1 A.C. 599 (HL).

[46]The requirement that juries received judicial warnings that an accused charged with rape should not be convicted on the uncorroborated evidence of the complainant was removed by s 32(1) of the Criminal Justice and Public Order Act 1994.

[47]See *DPP v Morgan* [1975] 2 WLR 913. The Sexual Offences Act 2003 later introduced a requirement that the defendant's belief of consent be reasonable (s 1(1)–(2)). It also introduced a new statutory definition of consent (s 74).

[48]Vera Baird, Julian Molina and Sarah Poppleton, 'Rape Survivors and the Criminal Justice System', Victims Commissioner Report (October 2020). Accessible via <https://victimscommissioner.org.uk/document/rape-survivors-and-the-criminal-justice-system/> accessed 6 May 2025. See also Vanessa Munro, 'A Circle That Cannot be Squared? Survivor Confidence in an Adversarial Justice System' in Miranda Horvarth and Jennifer Brown (eds), *Rape: Challenging Contemporary Thinking – 10 Years On* (Routledge 2022) 204–208.

[49]Louise Ellison and Vanessa Munro, '"Reacting to Rape, Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49 British Journal of Criminology 202; Louise Ellison and Vanessa Munro, 'Telling Tales: Exploring Narratives of Life and Law Within the (Mock) Jury Room' (2014) 35(2) Legal Studies 201. See also Gerd Bohner, Friederike Eyssel and Philipp Sussenbach, 'Modern Myths About Sexual Aggression' in Miranda Horvarth and Jennifer Brown (eds), *Rape: Challenging Contemporary Thinking – 10 Years On* (Routledge 2022).

[50]Rosemary Hunter, 'Border Protection in Law's Empire, Feminist Explorations of Access to Justice' (2002) 11(2) Griffith Law Review 263, 267. See also Deborah Tuerkheimer, 'Incredible Women: Sexual Violence and the Credibility Discount' (2017) 166(1) University of Pennsylvania Law Review 1.

[51]Janice Richardson and Erika Rackley, 'Foreword and Introduction' in Janice Richardson and Erika Rackley (eds), *Feminist Perspectives on Tort Law* (Routledge 2012) ix–x, 1–2.

approach to doctrine, claiming 'one might be forgiven for thinking that the sex of the parties had no bearing on what allegedly occurred'.[52] Elsewhere in tort doctrine, Godden has focused on claims by women seeking a remedy for rape. She finds an increase in cases where claimants successfully obtained damages from their attackers. But such progress is undermined by the risks, stress and expense of litigating and defendants' use of rape myths (e.g. about consent and the claimant's sexual history) to discredit claimant credibility in the courtroom.[53]

In addition to these patent shortcomings across doctrine, two points further corroborate law's historic and ongoing failure to address violence against women across a range of contexts. First, pervasive physical and sexual violence against women – highlighted in earlier decades by feminists such as MacKinnon[54] – continues in the present day, as almost universally acknowledged by, for example, UK parliamentary select committees,[55] government ministers,[56] police chiefs[57] and UN bodies.[58] In contrast to this, false allegations of rape or misconduct are rare.[59] Second, the #MeToo movement emerged specifically in response to the legal system's ongoing, widespread failures to effectively address sexual violence and misconduct, e.g. via 'credibility discounts' imposed on complainants, and loopholes or limitations that enable misconduct to be dismissed by

[52]Conaghan (n 30) 334.

[53]Nikki Godden, 'Tort Claims for Rape: More Trials, Fewer Tribulations?' in Janice Richardson and Erika Rackley (eds), *Feminist Perspectives on Tort Law* (Routledge 2012).

[54]Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1994); Catharine MacKinnon, 'Reflections on Sex Equality Under Law' (1991) 100 Yale Law Journal 1280, 1293, 1297, 1299–1308.

[55]Between November 2023 and March 2024, the Women and Equalities Parliamentary Select Committee heard oral evidence for its inquiry, 'The Escalation of Violence Against Women and Girls. Accessible via: <https://committees.parliament.uk/work/7838/the-escalation-of-violence-against-women-and-girls/>

[56]The newly created post of Minister for Safeguarding and Violence Against Women and Girls is currently held by Jess Phillips M.P. The Labour government has pledged to halve violence against women and girls in the next decade: Hansard HC vol 754, col 286 (9 Oct 2024) (Anneliese Dodds M.P., Minister for Women and Equalities).

[57]In July 2024 a National Police Chiefs Council report found increases in a range of crimes involving violence against women and girls. See <https://news.npcc.police.uk/releases/call-to-action-as-violence-against-women-and-girls-epidemic-deepens-1> accessed 6 May 2025.

[58]See, e.g., UN Women's Global Database on Violence Against Women, accessible via <https://data.unwomen.org/global-database-on-violence-against-women>; the annual reports of the UN Special Rapporteur Against Women and Girls, accessible via <https://www.ohchr.org/en/special-procedures/sr-violence-against-women/annual-thematic-reports#hrc> both accessed 6 May 2025.

[59]The Crown Prosecution Service confirms that 'false allegations of rape are rare', citing its own 2013 report that, of 5,651 prosecutions for rape, there were only 35 prosecutions for making false allegations: 'Key facts about how the CPS prosecutes allegations of rape' 19 October 2020, at <https://www.cps.gov.uk/publication/key-facts-about-how-CPS-prosecutes-allegations-rape>. Elsewhere, research suggests that in the UK 4 per cent of cases of sexual violence reported to the police are found or suspected to be false. In Europe and the US research indicates rates of between 2–6 per cent: Lisa Lazard, 'Here's the truth about false accusations of sexual violence', *The Conversation*, 24 November 2017 at <https://theconversation.com/heres-the-truth-about-false-accusations-of-sexual-violence-88049>; See also Rape Crisis in Scotland, 'False allegations (2021)', 2–4 at <https://www.rapecrisisscotland.org.uk/resources/False-allegations-briefing-2021.pdf> all accessed 6 May 2025. Tuerkheimer, 'Incredible Women' (n 50) 16–20.

employers or the police.[60] These are two highly significant wider contextual points that should broadly inform adjudication in defamation cases.

Viewed against this backdrop, it is apparent that the sexual misconduct defamation cases critiqued in Part 2 are merely the most recent example of these long-standing gendered dynamics recurring in a different doctrinal context. In short: same issues, different doctrine.

The gendered nature of defamation and privacy

Public allegations of sexual violence or misconduct potentially engage both defamation and privacy laws. Privacy issues are relevant here because a fundamental feature of much abusive behaviour is that it tends to happen in private settings (or in public settings away from witnesses). Publicising intimate information about a sexual encounter with another party against their wishes potentially violates their Article 8 ECHR privacy right.[61] MPI protects information about sexual activities *per se*, including where they are alleged to involve rape, abuse or criminal activity on the claimant's part.[62] It thus enables claimants to obtain orders that restrict the speech of the individuals making such allegations against them, subject to limited qualifications.[63] Furthermore, MPI claimants can obtain court orders to prevent the media from naming them as subject to police arrest or investigation for sexual abuse or rape.[64] This section suggests that both privacy and defamation have a track record of being historically shaped by dominant male interests and experiences. As such, the law's shortcomings in addressing violence against women cannot be seen as a problem simply restricted to 'other' areas of law.

Gender and the public/private divide

The public/private divide is a fundamental aspect of the liberal tradition, and is epitomised by John Stuart Mill's division of conduct into binary spheres of

[60] Clarke (n 7) 42–45; Tuerkheimer, *Beyond #MeToo* (n 6) 1151–1167, 1179–1184; MacKinnon 'Global #MeToo' (n 6); MacKinnon, '#MeToo' (n 6) A19.

[61] E.g. see *PJS v News Group Newspaper Ltd* [2016] UKSC 26 [21], [24], [32] per Lord Mance, [86] per Lord Toulson (dissenting); *Mosley* (n 10) [124] per Eady J.

[62] *WFZ* (n 12) [81]–[82]; *BVC v EWF* [2019] EWHC 2506 [134], [136], [138], [140], [144]–[146].

[63] See, e.g. *JKL v VBN* [2019] EWHC 2227[13]–[16] (This concerned a previously granted MPI interim order that was modified to enable a woman defendant to confide about the claimant's alleged abuse and his identity to medical professionals and her close friends and family); *CWD v Nevitt* [2020] EWHC 1289 [65]–[84] (This case concerned an MPI and defamation action against defendant sisters who had accused the claimant of sexual assault and rape. The court refused the claimant's application to strengthen an existing interim anonymity order to include wider restrictions on reporting any information that might lead to his jigsaw identification); *FB1 v Facebook Ireland* [2021] NIQB 128 [6]–[10], [12]–[13] (In this case the claimant, who had previously been convicted of sexual assault, obtained a court order requiring *Facebook* to take down comments about the case. Here he failed to extend the order to include specific comments that had been posted by his victim and others in direct response to posts by his mother and sister).

[64] *WFZ* (n 12) [13], [79]–[88]; *Bloomberg* (n 12).

'inviolable' self-regarding 'private' action (which is none of the law's business) and other-regarding 'public' action (which may be).[65] This public/private dichotomy – and the historic laws it has influenced – have long been a target for feminist critique, but two aspects of the divide are pertinent for our purposes. First, the private domain has been typically ascribed as the domain of women and associated with characteristics of domesticity, intimacy and emotion, in contrast to the rational, masculine 'public domain' of political affairs and the marketplace.[66] Second, the 'private' is typically depicted as a realm that ought to lie beyond the reach of state or society's interference.

A full account of the myriad ways in which the gendered public/private divide has been questioned is beyond the scope of this article and has been covered by other scholars.[67] But #MeToo defamation cases raise a particular line of critique encapsulated by the maxim 'the personal is political'.[68] As Ruth Gavison's discussion of this slogan explains, categorising a matter as 'personal' excludes it from social or political debate in the public domain.[69] It marginalises such matters as *not* political and *not* for public concern. In Janice Richardson's terms, it has 'allowed political theorists to trivialise women's struggles against abuse of power by men [e.g. within the home]. Such abuse was characterised as concerning only 'private', personal issues, which lay in contrast with the grand affairs of state'.[70] This categorisation constructs 'private' issues as matters that lie solely within the responsibility of the affected individuals.[71] In doing so it isolates and silences conversations about them, rendering them less visible.[72] For example, Elizabeth Schneider, critiqued the 'violence of privacy' which has led the law to marginalise domestic violence as an individual problem rather than a social or systemic one.[73]

[65] John Stuart Mill, *On Liberty and Other Essays* (Oxford University Press 1998) 104.

[66] Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicolson 1985) 3; Margaret Thornton, 'The Public/Private Dichotomy: Gendered and Discriminatory' (1991) 18(4) Journal of Law and Society 448, 449–451.

[67] See e.g. ibid O'Donovan chapter 1; Thornton; MacKinnon, *Feminism Unmodified* (n 54) chapter 8; Ruth Gavison, 'Feminism and the Public/Private Distinction' (1992) 45(1) Stanford Law Review 1.

[68] The originator of this feminist maxim is unclear, but its first published example appears in Carol Hanisch, 'The Personal is the Political' (1969). Accessible <https://www.carolhanisch.org/CHwritings/PIP.html> accessed 6 May 2025. This essay questioned the personal 'versus' political divide, claiming 'personal problems are political problems' that call for a 'collective solution'. Though Hanisch notes here that she did not give the essay its famous title.

[69] Gavison (n 67) 19. See also Schneider (n 25) 979 ('Privacy reinforced the idea that the personal is separate from the political').

[70] Authors' addition. Janice Richardson, 'The Changing Meaning of Privacy, Identity and Contemporary Feminist Philosophy' (2011) 21(4) Minds and Machines 517, 518–519.

[71] Gavison (n 67) 19. See also Schneider (n 25) 979 ('Privacy reinforced the idea that the personal is separate from the political').

[72] ibid Gavison 20, 25, 28, 36. See also Richardson (n 70) 528–530 (critiques Nagel's classic 'neutral' liberal view of privacy and its gendered implications for women who wish to speak about their experiences of sexual harassment).

[73] Though, writing in 1991, she recognised relative progress, adding 'To some degree, a public dimension to the problem is now recognized.' Schneider (n 25) 982, 983.

Similarly, Margaret Thornton argues that privatising practices in the resolution of workplace sexual harassment disputes act to individualise the problem, occlude its systemic nature and limit wider public knowledge of it.[74] As Kennedy explains, this public/private divide has also disadvantaged women in the courtroom: 'The legal difficulties where offences take place in private are considerable. Usually there are no independent witnesses, deep and complicated emotional turmoil often surrounds the events, [and] motives for making allegations are often questioned'.[75] Collectively, these feminist insights emphasise the inherently political nature of sexual misconduct and the vital public interest in disseminating information about such behaviour.

For feminists of various stripes, the public/private divide perpetuates gender injustices and inequalities, and it is fundamentally flawed for two key related reasons. First, Mill's ideal is based on the liberal fiction that it protects a private sphere enjoyed by free and equal parties. In this sense it entirely disregards power and entrenched gender inequalities,[76] a shortcoming also evident in many #MeToo defamation cases, as Part 2 confirms. The public/private dichotomy's neglect of power inequalities is noted by many feminists, but MacKinnon articulates it in bold terms, claiming that understanding privacy as a 'refuge' of 'sanctified isolation, impunity and unaccountability' is far from universal, but rather highly dependent upon power. 'When the person with privacy is having his privacy, the person without power is tacitly imagined to be consenting. … Everyone is implicitly equal in there'.[77]

Second, the public/private divide is routinely deployed to justify non-intervention into the inviolable private domain by law and the state. This is illustrated by the example of domestic violence, which was historically immune from criminal laws, and which continues to be enabled by attitudes that view it as a 'private matter' between the parties and beyond legitimate legal involvement. Feminists argue that refusal to intervene in the private domain is an inherently political decision with concrete consequences.[78] As Katherine O'Donovan writes, 'Not legislating contains a value judgment just as legislating does. Law cannot be neutral; non-intervention is as potent an ideology as regulation'.[79] This non-intervention rationale – particularly when deployed selectively – acts to protect the

[74]Margaret Thornton, 'Privatising Sexual Harassment' (2023) 45(3) Sydney Law Review 371.
[75]Author's addition. Kennedy (n 18) 83
[76]O'Donovan (n 66) 2–11, 14–15.
[77]MacKinnon, 'Reflections' (n 54) 1311. See also MacKinnon, *Feminism Unmodified* (n 54) 99–101; Gavison (n 67) 30; Schneider (n 25) 978, 984–985.
[78]Martha Minow writes that one 'significant assumption' at work in domestic violence cases is 'that … failing to act is not an invasion.' Justices use words like 'private' 'as talismans to ward off the facts of the case.' But a failure to intervene is not simply inaction: 'Judicial action as well as inaction can be violent.' Martha Minow, 'Words and the Door to the Land of Change: Law Language and Family Violence' (1990) 43 Vanderbilt Law Review 1665, 1668, 1670–1672.
[79]O'Donovan (n 66) 184. See also 14, 19.

status quo, entrenching gender inequalities and leaving women vulnerable to violence.[80] Of course, contemporary #MeToo cases do not entail law's refusal to intervene, but rather its active restriction of defendants' public realm speech. Yet it does so *to* protect privacy and/or reputation (a facet of privacy).[81] As such, these cases represent a clear continuation of the gender-based struggles that have been of feminist concern for decades. Ultimately, for feminists, the 'personal is political' maxim calls for 'private', 'trivial', 'individual' women's issues to be re-envisaged and brought into the open from behind closed doors. But such calls should not be taken as demands to dispense with privacy or the public/private divide altogether. Gavison highlights the potentially 'totalitarian' implications of deeming everything political and thus subjecting all aspects of one's life to public scrutiny. As she explains, most feminists do not seek to eliminate privacy.[82] Instead, feminist critique of the public/private divide is valuable because it.

> highlights both the costs of coerced privatization, and the importance of public cultures in the personal lives of individuals. It provides a strong reminder that 'out of sight is out of mind', that low visibility and suppression distort public perceptions about what is important.[83]

Like Gavison, we agree that the problem with the public/private divide is how these terms have been understood and applied, and that they may be reconceived to progress feminist (and other) aims.[84] We now turn to historic privacy and defamation laws to demonstrate how these gendered understandings of the public/private binary influenced historic doctrine, before showing how they also recur in contemporary sexual misconduct cases

Privacy law and gender

Academic critique, particularly from the US, indicates that from their nineteenth century inception, privacy laws were shaped by dominant class, race

[80]'The private is a distinctive sphere of women's inequality to men. Because this has not been recognized, the doctrine of privacy has become the triumph of the state's abdication of women in the name of freedom and self-determination.' MacKinnon, 'Reflections' (n 54) 1311. See also MacKinnon, *Feminism Unmodified* (n 54) 96–97, 101.

[81]E.g., see *In re Guardian News and Media Ltd* [2010] UKSC 1; [2012] 2 AC 697, 717 per Lord Rodger of Earlsferry JSC; *Radio France v France* (2005) 40 EHRR 730; *Chauvy v France* (2005) 41 EHRR 29 629–630; *Pfeifer v Austria* (2009) 48 EHRR 8 183–184; *Karako v Hungary* (2011) 52 EHRR 36 1045–1046; *Axel Springer AG v Germany* (2012) 55 EHRR 6 206. See also Tanya Aplin and Jason Bosland, 'The Uncertain Landscape of Article 8 of the ECHR: The Protection of Reputation as a Fundamental Human Right' in Andrew Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press 2016) 265–290.

[82]Gavison (n 67) 20, 28–29, 40, 42–43.

[83]ibid 43.

[84]Gavison distinguishes between feminist analysis that challenges how public/private are respectively conceived (internal critique) and that which seeks to dispense with such distinctions altogether (external critique). Though she concedes that external criticisms offer valuable insights, she rejects them in favour of internal approaches. ibid 2, 43–44.

and gender-based interests.[85] The gendered reasoning in early privacy cases, such as *De May v Roberts*[86] and *Roberson v Rochester Folding Box Co*[87] has been noted.[88] The masculine nature of Samuel Warren and Louis Brandeis's seminal article[89] is also widely acknowledged. As Anita Allen and Erin Mack claim, 'The privacy tort was the brainchild of nineteenth century men of privilege, and it shows'.[90] They argue this earliest notion of privacy was understood in male terms (solitude, retreat from the public realm), did not account for women's privacy needs (regarding household labour or sexual autonomy) and echoed paternalist attitudes about feminine modesty and virtue.[91]

In a similar analysis that is pertinent to this area, Susan Gallagher focuses on wider events that influenced Warren and Brandeis, specifically the 'Beecher scandal' where a prominent preacher was revealed to have had an adulterous affair with a member of his congregation. She brings to light arguments in the wider discourse that advocated the ability of a man to preserve his public image, claiming:

> command over public knowledge of a man's domestic affairs became an integral part of prevailing conceptions of middle and upper-class masculinity. As a result, in regard to marital infidelity, domestic violence, and sexual misconduct, legal fictions that were designed to safeguard men's emotional well-being overtook the lived experiences of women and children when these cases could not be kept out of court.[92]

For Gallagher, Warren and Brandeis's privacy entailed a form of 'censorship', albeit one that 'became far less routine in the wake of the women's rights movement of the 1970s'.[93]

[85] See, e.g. Susan E Gallagher, 'Privacy and Conformity: Rethinking 'The Right Most Valued by Civilized Men' (2017) 33(1) Touro Law Review 159; Jonathan Hafetz, '"A Man's Home is His Castle?": Reflections on the Home, the Family and Privacy During the Late Nineteenth and Early Twentieth Centuries' (2002) 8(2) William and Mary Journal of Race, Gender and Social Justice 175; Caroline Danielson, 'The Gender of Privacy and the Embodied Self: Examining the Origins off the Right to Privacy in US Law' (1999) 25(2) Feminist Studies, 311; Jessica Lake, *The Face That Launched a Thousand Lawsuits, The American Women Who Forged a Right to Privacy* (Yal 2016).

[86] *De May v Roberts* (1881) 46 Mich. 160.

[87] 171 NY 538 (1902).

[88] E.g., in respect of *Roberson* see Amy Gajda, 'Roberson v Rochester Folding Box Co (1900)' in Paul Wragg and Peter Coe (eds), *Landmark Cases in Privacy Law* (Hart 2023) 19–38, 29–34; Rebecca Moosavian, 'Pavesich v New England Insurance Co (1905)' in Paul Wragg and Peter Coe (eds), *Landmark Cases in Privacy Law* (Hart 2023) 39–63, 55–56.

[89] Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) IV(5) Harvard Law Review 193.

[90] Anita Allen and Erin Mack, 'How Privacy got its Gender' (1990) 10 Northern Illinois University Law Review 441, 441, 442. See also Gallagher (n 85) 174 ('archaic assumptions about male supremacy that pervade the essay').

[91] ibid Allen and Mack 457–465.

[92] Gallagher (n 85) 171–172, 168–169. Gallagher continues: 'By maximising the importance of men's public image and minimizing the significance of bodily injury and actual fact, [Warren and Brandeis's] essay helped to forge the gentlemen's agreement that not only kept reports of sexual and domestic violence out of the press, but also served for decades to discourage victims of these crimes from speaking out.' At 173.

[93] ibid 173–174.

Defamation law and gender

As with privacy law, there is an established literature that demonstrates the highly gendered history of defamation law and, particularly, its role in reflecting and reinforcing stereotypes about women. This history reveals important parallels with modern #MeToo disputes and shows that gendered dynamics have a long-standing deep-rooted influence in this area. Historically, the overwhelming majority of defamation claimants seeking to vindicate their reputations have been high-status men.[94] Significantly, the earliest instances of women as defamation claimants involved cases where they were accused of adultery or sexual activity. This reflects the fact that women's (public) reputations were inherently linked to their (private) sexual 'virtue',[95] yet another manifestation of the public/private divide discussed above.

In English law, slander claims involving sexual misconduct allegations were historically deemed 'spiritual' matters that fell within the jurisdiction of the ecclesiastical courts rather than the common law. In the first half of the nineteenth century, most ecclesiastical court claimants were women who brought actions against (usually male) defendants for casting aspersions on their virtue. The ecclesiastical courts were accessible, inexpensive and enabled a claimant to receive an apology,[96] but the abolition of their jurisdiction in 1855 shut off this avenue of redress for women.[97] Common law defamation protections remained intact, but these reflected the masculine priorities of the legal profession and its clients. In particular, common law defamation protected the public-sphere business and professional reputations that were the concern of male claimants, but did not recognise sexual slurs.[98] If a slander fell within one of three recognised categories of allegation – criminal activity, infectious disease or professional incompetence – then damage was presumed to follow. If a slander did not concern one of these three matters, then the claimant also had to show that they had suffered direct economic

[94]For statistical confirmation of this point in the US context, see Diane L Borden, 'Patterns of Harm: An Analysis of Gender and Defamation' (1997) 2 Comm. L. and Policy 105, 120. Note that Borden's analysis is limited to two decade-long periods (1897–1906 and 1967–1976). See also Diane L Borden, 'Reputational Assault: A Critical and Historical Analysis of Gender and the Law of Defamation' (1998) 75(1) Journalism and Mass Communication Quarterly 98, 99.

[95]Borden states, 'women's reputations have been inextricably bound to their sexual identities, defined by the culture at large, replicated in the mass media, and eventually reinforced in the judicial system'. ibid, 'Reputational Assault', 98.

[96]Steven M Waddams, *Sexual Slander in Nineteenth Century England, Defamation in the Ecclesiastical Courts 1815–1855* (University of Toronto Press 2000) 123; Jessica Lake, 'Protecting "Injured Female Innocence" or Furthering "the Rights of Women"? Th Sexual Slander of Women in New York and Victoria (1808–1887)' (2022) 31(3) Women's History Review 451, 452; Jessica Lake, 'Whores Aboard and Laws Abroad: English Women and Sexual Slander in Early Colonial New South Wales' (2023) 35(3) Gender and History 916, 917. See also Laura Gowing, *Domestic Dangers, Women Words and Sex in Early Modern London* (Oxford University Press 1998) 33–34, 37–38, 60–61.

[97]ibid Waddams 185–189.

[98]Borden, 'Patterns of Harm' (n 94) 125–127; Borden, 'Reputational Assault' (n 94) 99, 101, 107, 108.

loss (so-called 'special damage') as a result.[99] The difficulty of meeting this requirement led many women's claims to fail, even though allegations of sexual 'misconduct' could ruin a woman's life prospects.[100]

Across the British Empire, many colonies adopted English laws, including defamation which had emerged to protect privileged men. This led to what Jessica Lake terms a 'global Slander of Women movement' sweeping across the British common law world.[101] Various American and Australian states introduced gendered reforms protecting women from sexual slanders from the first half of the nineteenth century.[102] As Lake notes, the reputational damage caused by allegations of women's sexual misconduct was framed differently across jurisdictions. For example, in New York, cases emphasised the paternalist need to protect women's sexual purity and the domestic realm, whilst in Victoria, Australia, working women claimants were concerned to uphold their respectability to prevent the commercial loss of trade or occupation that such allegations prompted.[103] In the UK, protection was eventually provided via the *Slander of Women Act 1891* (*SoWA*), which stated that slander by words which 'impute adultery or unchastity to a woman or girl' were actionable without proof of special damage, as damage was presumed.[104] The *SoWA* remained in force until its repeal by the Defamation Act 2013 (DA 2013).[105] Despite defamation law's attempts to widen its protections from narrower masculine priorities, the progress brought by slander of women reforms was nevertheless ambiguous. In the process of affording women new remedies, law also buttressed the patriarchal culture of the day. In particular, commentators argue that the law reinforced negative gendered norms, for example regarding 'appropriate' sexual conduct and the centrality of chastity to a woman's social status.[106] Interestingly, elements of this outlook persist in contemporary defamation

[99] *Lachaux* (n 11) [4]; Waddams (n 96) 17–18.

[100] ibid Waddams 147–151; Lake, 'Protecting "Injured Female Innocence"' (n 96) 452, 453, 456; Lake, 'Whores Aboard' (n 96) 918.

[101] ibid Lake, 'Whores Aboard' 916, 930.

[102] Andrew J King, 'Constructing Gender: Sexual Slander in Nineteenth Century America' (1995) 13 Law and History Review 63; Alison Krzanich, 'Virtue and Vindication: An Historical Analysis of Sexual Slander and a Woman's Good Name' (2011) 17 Auckland Law Review 33; Lake, 'Protecting "Injured Female Innocence"' (n 69) 458–459.

[103] ibid Lake 454, 470; Lake, 'Whores Aboard' (n 96) 919–920. Lake also draws out the recurring racialized understandings of women's purity across New York case law and wider discourse: 457, 460, 462.

[104] 54 and 55 Vict ch. 51, s1. See *Lachaux* (n 11) [4]; Richard Parkes KC and Godwin Busuttil et al (eds), *Gatley on Libel and Slander* (13th edn, Sweet and Maxwell 2022) 5–002.

[105] DA 2013, s 14(1).

[106] Gowing (n 96) 109–110, 124–125, 138; Waddams (n 96) 9; Lisa R Pruitt, 'Her Own Good Name: Two Centuries of Talk About Chastity' (2004) 63 Maryland Law Review 401, 405, 419–431; Andrew J King, 'Constructing Gender: Sexual Slander in Nineteenth Century America' (1995) 13 Law and History Review 63, 65–66, 68; Lake, "Protecting 'Injured Female Innocence"' (n 96) 470. See also, e.g. *Yousoupoff v Metro-Goldwyn Mayer Pictures Ltd* (1934) 50(1) Times LR 581, 584, 586, 587–588. Whilst ruling in the plaintiff's favour, the Court of Appeal judges' approaches in *Yousoupoff* nevertheless reflected the sexual mores of the day regarding the moral discredit of consenting sex, the stigma of rape on a woman's reputation and the importance of a woman's sexual purity.

law.[107] The slander of women history shows that defamation was explicitly and discreetly influenced by gender. But, as Part 2 demonstrates, defamation law's entanglement in gender and sexual politics cannot be dismissed as a mere matter of historic interest. Though the nature of contemporary #MeToo disputes has evolved away from preoccupation with women's chastity, defamation law remains subtly geared towards privileging male interests while failing to account for women's experiences or knowledge.

Part 2: gender politics in contemporary defamation

This Part critically analyses contemporary sexual misconduct English defamation cases through the lens of the feminist methods and history discussed above. Through analysis of select cases it demonstrates that the deep-rooted patriarchal gender dynamics that pervade the justice system are also evident in #MeToo defamation litigation.

It starts by focusing on doctrinal features that are conceived or applied in a gendered way and/or have gendered consequences. It proceeds to consider the influence of gendered preconceptions and cultural stereotypes on defamation courts, analysing instances of 'testimonial injustice' where judges have approached cases and litigants with assumptions that work against survivors. Furthermore, it argues that the wider costs culture and inequalities in access to justice can be exploited by #MeToo defamation claimants to women's disadvantage, and that these cumulative layers act to disadvantage women making sexual misconduct allegations.

Gendered doctrine and application

Despite English defamation law abandoning the explicitly gendered 'slander of women' doctrine in 2013, certain doctrinal features continue to have gendered characteristics and consequences. Although a comprehensive account of all facets of defamation law is beyond the scope of this article, three key features are notable in this context, and are analysed in turn below: the reverse burden of proof, the varying standard of proof and the single meaning rule.[108]

[107]See, e.g. *Driver v Radio New Zealand Limited* [2019] NZHC 3275 [112]. For a thoughtful analysis of whether defamation's capacity to cover false imputations about women's sexual activity reinforces society's wider sexual double-standards, see Tsachi Keren-Paz, *Egalitarian Digital Privacy, Image-Based Abuse and Beyond* (Bristol University Press 2023) 200–206.

[108]The public interest defence set out in DA 2013 s 4 may also be relied upon by defendants in sexual misconduct allegation cases, but a full examination of this is beyond the scope of this article and is the subject of further ongoing research by the authors. Relevant cases include: *Economou v De Freitas* [2016] EWHC 1853; [2018] EWCA Civ 2591; *Aaronson* (n 3); *Lachaux v Independent Print Ltd* [2021] EWHC 1797.

A reverse burden: the truth defence and its 'presumption of falsity'[109]

Once a claimant has proved that the elements of defamation exist,[110] including that actual or likely serious harm to reputation has been caused by the statement(s),[111] then a common defence deployed in sexual misconduct cases is truth. Section 2(1) of the DA 2013 provides a defence where the disputed allegations are 'substantially true'.[112] This provision imposes a reverse burden of proof; once the claimant has established the defendant's statement is *prima facie* defamatory, it is for the defendant to prove the truth of that statement on a balance of probabilities. If the defendant is unable to meet this burden, then the statement is presumed to be false. The justification for this reverse burden – also present in Australian, but not US defamation law – is the need to counter a power imbalance that favours the 'awesome power of the press', and other powerful institutions.[113]

Despite this justifiable rationale, the reverse burden, and the 'presumption of falsity' it creates, has long been the subject of controversy[114] for two related reasons pertinent to this discussion. First, it provides a legal mechanism for wealthy individuals and organisations to 'weaponise' the law to protect underserved reputations, thus creating a chilling effect on free speech.[115] In doing so,

[109]Harradine (n 17) 39.

[110]To establish a claim in defamation the claimant must show: (i) that the defendant published material in a comprehensible form that is communicated to someone other than them (see, e.g. *Pullman v Walter Hill and Co Ltd* [1891] 1 QB 524, 527, per Lord Esher MR, 529, per Lopes LJ; *White v J and F Stone (Lighting and Radio) Ltd* [1939] 2 KB 827, 834), and that the alleged defamatory material; (ii) refers to them; (iii) has a defamatory meaning; and (iii) has caused, or is likely to cause, serious harm to their reputation (see DA 2013 s 1(1)).

[111]DA 2013 s 1(1).

[112]DA 2013 s 2(4) abolished and replaced the broadly equivalent defence of justification.

[113]Sir David Eady has said that such institutions should not benefit from an assumption that 'their allegations, however serious, are true' and, therefore, the imposition of the reverse burden reflects the 'awesome power of the press' to damage individuals' reputations. See David Eady, 'Defamation: Some Recent Developments and Non-Developments' in Richard Susskind et al (ed), *Essays in Honour of Sir Brian Neil: The Quintessential Judge* (LexisNexis 2003) 155. According to Jacob Rowbottom, 'it is the power of the media to damage a name that invokes the "innocent until proven guilty" principle and it is reasonable to expect the media to take on the risk of any inaccuracies.' See Jacob Rowbottom, *Media Law* (2nd edn, Hart 2024) 54.

[114]Indeed, prior to the introduction of the DA 2013, libel reform campaigners, such as English PEN and the Index on Censorship, lobbied the government to require the claimant to prove the falsity of the statement, thereby effectively reversing the reverse burden. See English PEN and the Index on Censorship (Libel Reform Campaign), *Free Speech Is Not For Sale*, 2009 5, 8 <https://inforrm.org/wp-content/uploads/2010/03/libeldoc_lowres.pdf> accessed 6 May 2025.

[115]English PEN and the Index on Censorship (Libel Reform Campaign), *Free Speech Is Not For Sale*, 2009 5,8 <https://inforrm.org/wp-content/uploads/2010/03/libeldoc_lowres.pdf>; UN General Assembly, Promotion and protection of the right to freedom of opinion and expression, 30 July 2021, [22] <https://documents.un.org/doc/undoc/gen/n21/212/16/pdf/n2121216.pdf>, both accessed 6 May 2025; Peter Coe, *Media Freedom in the Age of Citizen Journalism* (Edward Elgar 2021) 252; Coe et al (n 23). See generally Geoffrey Robertson KC, *Lawfare: How the Russians, The Rich and The Government Try to Prevent Free Speech and How to Stop Them* (TLS Books 2023); Christopher Whelan, *Lawyers On Trial: Hired Guns Or Heroes* (2nd edn. Hart 2024)

the reverse burden facilitates SLAPPs. As Tony Weir has said: '[t]his absurd reversal of the normal burden of proof encourages claimants to sue even if they know that what the defendant said was perfectly correct'.[116] Second, the burden does not account for the fact that regular individuals – who do not have the same financial means as the claimant, let alone the 'awesome power of the press' – are also required to prove the truth of their statement.[117] Though the concerns about power imbalances between parties that initially influenced the reverse burden were sensible on their own limited terms, in a modern context this crude assumption about disparities in the respective power of parties may in some cases contradict its original stated purpose of countering the inequality of arms. As a result, the reverse burden fails to account for a greater diversity of parties, evolving litigation tactics, and more variable power imbalances, particularly regarding powerful claimants. As such, it needs further examination, particularly in the context of sexual misconduct allegations.

The 'presumption of falsity' is acutely felt by domestic and sexual violence survivors[118] because it exposes them to a common perpetrator strategy that Jennifer Freyd has termed DARVO (deny, attack and reverse victim and offender).[119] In the defamation context, this takes the form of the abuser bringing or threatening an abuse-specific SLAPP claim.[120] The presumption of falsity benefits the DARVO claimant by automatically imputing falsehood upon the defendant and their allegation(s). By bringing a defamation claim against their accuser, the claimant strategically utilises the law to shift the narrative in their own favour, by portraying themselves as the victim of false accusations, whilst simultaneously undermining the credibility of their accuser, who they make out to be the 'offender'.[121] In short, the reverse burden renders this DARVO technique particularly effective as it structures the dispute in terms that directly correspond with the DARVO template. As Freyd and Sarah Harsey have claimed, 'defamation lawsuits pursued by abusers weaponise and propagate DARVO'[122] When viewed alongside other aspects of defamation law analysed in this Part, this not

[116]Tony Weir, *Tort Law* (Oxford University Press 2002) 168.
[117]Coe, *Media Freedom* (n 115) 252.
[118]Harradine (n 17) 39; Keina Yoshida, 'Strategic Human Rights Litigation: A Feminist Reflection' (2023) 34(2) Yale Journal of Law and Feminism 105, 112–114; Robinson and Yoshida (n 9) chapters 6 and 7.
[119]Jennifer Freyd, 'Violations of Power, Adaptive Blindness and Betrayal Trauma Theory' (1997) 7(1) Feminist Psychology 22, 29–30.
[120]Gray (n 16); Robinson and Yoshida (n 9) 372–378; Harsey and Freyd, 'Defamation and DARVO' (n 9) 481–482, 484. Harsey et al, 'Perpetrator responses' (n 9) 645–647; Harsey and Freyd, 'DARVO' (n 9) 897–898; Irene Khan, (2021) A/76/258: 'Gender justice and freedom of expression – report of special Rapporteur on the promotion and protection of freedom of opinion and expression', United Nations, 8.
[121]ibid Gray 118–119; J Gilmore, *Tainted Witness: Why We Doubt What Women Say About Their Lives* (Columbia University Press 2017) 7–10.
[122]Harsey and Freyd, 'Defamation and DARVO' (n 9), 484.

only significantly disadvantages #MeToo defendants, but also, more generally, undermines women, their status and their credibility.

The standard of proof

The standard to which a claimant must prove their case in civil proceedings is 'on a balance of probabilities', meaning that they have made their case out to be 'more likely than not'.[123] In contrast, the criminal standard of proof is 'beyond reasonable doubt'.[124] This reflects the fact that the consequences of civil cases are less punitive than criminal cases, and the parties' rights are assumed to be 'symmetrical'.[125] Due to the reverse burden discussed above, the balance of probabilities standard applies to defamation defendants arguing the truth defence.

Yet, despite these settled principles, the *application* of the civil standard of proof is more nuanced. As Lord Nicholls explained in *Re H and R*,[126] 'the more serious the allegation … the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability'.[127] This does not mean that where a serious allegation – such as sexual misconduct – is in issue the standard of proof required is higher.[128] Rather, as confirmed by Lord Carswell *In Re D*,[129] the standard is flexible in its application.[130] This flexibility does not entail any adjustment to the formal benchmark that must be cleared for an allegation to be proved. Rather, it requires stronger, better-quality evidence for serious allegations to meet that balance of probabilities threshold.[131] This has important consequences in defamation cases concerning allegations of sexual misconduct or abuse which are clearly serious, especially where they impute criminality. For a defendant relying on the truth defence, the reverse burden is thus

[123]See e.g. *In Re B (Children)* [2008] UKHL 35, 13 per Lord Hoffmann: 'The time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.' See also *In Re H and R (Child Sexual Abuse: Standard of Proof)* [1996] A.C. 563, 586 per Lord Nicholls (discussed below) 'a court is satisfied an event occurred if the court considers, on the evidence, the occurrence of the event was more likely than not.'

[124]See, e.g. *Woolmington v DPP* [1935] AC 46, 481 per Viscount Sankey LC; *Miller v Minister of Pensions* [1947] 2 All ER 372, 373 per Lord Denning.

[125]Lord Legatt, *Keynote Address: Some Questions of Proof and Probability*, At a Glance Conference, Supreme Court, 11 October 2023, 2–3 at <speech-231011.pdf> accessed 6 May 2025.

[126]*In Re H and R* (n 123).

[127]ibid 586. Similarly, as cited in Lord Nicholls judgment (at 586), *In re Dellow's Will Trusts* [1964] 1 W.L.R. 451, Ungoed-Thomas J stated (at 455) 'The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.' Lord Nicholls judgment was recently referred to in *Kelly v O'Doherty* [2024] NIMaster 1 [30] per Master Bell. In respect of, the defence of justification, see Simon J's judgment in *Hunt v Times Newspapers Limited* [2013] EWHC 1868 (QB) which referred to Richard LJ's judgment in *R (N)* (at [76]).

[128]ibid.

[129][2008] 1 WLR 1499.

[130]ibid [27] per Lord Carswell approving Richard LJ's judgment in *R (N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468a [62].

[131]ibid. In a defamation context, Richard LJ's judgment (as approved by Lord Carswell) was referred to by Nicol J in *John Christopher Depp II v News Group Newspapers Limited, Dan Wootton* [2020] EWHC 2911 (QB) [42].

compounded by this requirement that the cogency of the evidence needed to defend the allegation to the civil standard is greater than in other cases.

This is illustrated by *Starr v Ward*[132] – an unsuccessful defamation claim brought by the 1970s TV comic Freddie Starr against a defendant who claimed in an interview that he had sexually assaulted her as a teenager. Here, Nicol J stated that although the imputation of a criminal offence does not change the standard of proof

> [i]t does mean that I must look rather harder at the evidence to see whether that standard is satisfied since "the more improbable an allegation the stronger must be the evidence that it did occur before, on the balance of probabilities, its occurrence will be established."[133]

Though the defendant in *Starr* was able to meet the *de facto* higher evidential requirements, this assumption that a more serious sexual allegation is automatically 'more improbable' is flawed for two reasons. It is at odds with the wealth of evidence – outlined in Part 1 – that such misconduct is common and pervasive. But most problematically, this *de facto* higher benchmark for survivors must be viewed in the light of the 'testimonial injustice' with which their evidence is often judicially treated (discussed below). As such, their evidence in these cases risks being routinely subjected to a 'double' discount.

The single meaning rule

Parties in a defamation case often disagree about the precise meaning of a disputed allegation, with claimants contendingit has a grave meaning and defendants arguing for a narrower or more trivial interpretation. This is illustrated in *Elphicke v Times Newspapers*[134] and *Economou v de Freitas*,[135] where the claimants assertedthe defendants' statements indicated they were guilty of rape, whilst the defendants counter-argued that they had conveyed less serious imputations that there were *reasonable grounds for suspecting* the claimant was guilty, and/or that further investigation was warranted.[136] The single meaning rule requires a court to ascertain *the* definitive fixed meaning of a disputed allegation, often in a separate preliminary hearing, and thus the outcome of a case may turn on the meaning that

[132][2015] EWHC 1987 (QB).

[133]ibid [96], citing *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772, per Brook LJ [35]. In *Starr* the defendant successfully relied upon the defence of justification, as she was able to establish, to the required standard and evidential threshold, the truth of her account ([95]–[111]).

[134]*Charles Elphicke M.P. v Times Newspapers* [2019] EWHC 3563 (QB) [18]–[21], [23]–[24] (preliminary hearing in claimant M.P.'s defamation action against *The Times* for its report that a woman had made as rape allegation against him. The court found the defendant's less serious 'lower level' *Chase* meanings applied).

[135]*Economou* (n 108), [61], [81], [89], [94], [115], [122], [128]–[130] (Warby J found that the defendant's less serious lower-level *Chase* meanings applied for disputed publications, but that 2 of the 7 were nevertheless defamatory).

[136]The distinction between these three categories of claim was established in *Chase* (n 133).

the court ascribes.[137] In fixing the single meaning of a defamatory statement the court considers a statement's 'natural and ordinary meaning' from the perspective of an ordinary reasonable reader.[138]

The potentially problematic nature and gendered application of the single meaning rule is illustrated in the *Stocker v Stocker* litigation – which began in the High Court,[139] made its way to the Court of Appeal,[140] and ended in the Supreme Court.[141] The claim was brought by Ronald Stocker against his former wife, Nicola Stocker, for comments she posted on his then girlfriend's Facebook wall in 2012. The defendant had shared information about an incident of domestic violence in which the claimant had assaulted her, claiming Mr Stocker 'tried to strangle me'. This domestic violence incident was clearly evidenced; in 2003 the claimant had been arrested after Mrs Stocker called the police. Police records of the incident confirmed that Mrs Stocker had red marks on her neck.[142] Mrs Stocker was subsequently granted a non-molestation order prohibiting Mr Stocker from harassing, intimidating, using or threatening violence, which Mr Stocker later breached.[143] Yet the claimant contended that Mrs Stocker's claim that he had 'tried to strangle her' was defamatory, as these words meant that he had tried to kill her. The defence counter-argued that in a domestic abuse context these words did not impute an intention to kill, but rather that Mr Stocker had violently gripped her neck, which restricted her breathing and put her in fear of being killed.[144] The ultimate outcome of the case turned on which of these two competing meanings the court adopted as the statement's single meaning.

[137]The rule is a well-established feature of English defamation law: *Lait v Evening Standard* [2011] EWCA Civ 859 at [31], [52] (Laws LJ); *Charleston v News Group Newspapers* [1995] 2 AC 65, at 71 (Lord Bridge). Despite this, it is laden with controversy and has long been criticised: *Slim v Daily Telegraph* [1968] 2 QB 157, 171 (Lord Denning MR); *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2010] EWCA Civ 609; [2011] QB 497 [33] (Sedley LJ), [43] (Rimer LJ); Andrew Scott, 'Ceci n'est pas une pipe: the autopoietic inanity of the single meaning rule' in Andrew Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press 2016) 40–57, 45; Richard Parkes KC and Godwin Busuttil (eds) *Gatley on Libel and Slander* (13th edn, Sweet and Maxwell) [3.016], 96–98.

[138]ibid *Slim* 172–173, per Lord Denning MR. In doing so, the court should apply the principles laid down by Sir Anthony Clarke MR in *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130, [14] (see notes 146–148 below and associated text).

[139][2016] EWHC 474 (QB), per Mitting J. Prior to this, strike out applications were heard by Warby J ([2015] EWHC 1634 (QB)), and Nicol J ([2016] EWHC 147 (QB).

[140][2018] EWCA Civ 170, per McFarlane LJ, Sharp LJ and Laws LJ. The leading unanimous judgment was delivered by Sharp LJ.

[141][2019] UKSC 17, per Lord Reed, Lord Kerr, Lady Black, Lord Briggs and Lord Kitchin. The leading unanimous judgment was delivered by Lord Kerr.

[142]*Stocker* HC (n 139) [38]–[43]; ibid [10], [61].

[143]The breach occurred on the 20 May 2011 because in contravention of the terms of order Mr Stocker spoke to Mrs Stocker about matters other than their son. In the High Court Mitting J, (ibid at [51]), explained that 'a man with whom the defendant [Mrs Stocker] had had an intimate relationship after the breakdown of her marriage, of which the claimant [Mr Stocker] strongly disapproved, was also there. I do not doubt that this angered him.'

[144]Moreover, Mr Stocker claimed that the post stating that he had made threats, and breached the non-molestation order, was defamatory, because it implied that he was dangerous and disreputable. In response, Mrs Stocker refuted this, albeit, in her defence, she averred that this statement was justified.

Unsatisfactorily, the claimant succeeded at both trial and the Court of Appeal. At trial, Mitting J agreed with the claimant that the 'natural and ordinary meaning' of Mrs Stocker's claim 'he tried to strangle me' as read by an ordinary reasonable reader would impute the more serious allegation of attempted murder.[145] Yet in reaching this conclusion, both Mitting J and the Court of Appeal disregarded established principles that the court should avoid 'over-elaborate' analysis of the words used,[146] particularly in online posts,[147] and 'not take a too literal approach to the task'.[148] Ignoring the interpretive leeway these principles afforded, they took an unduly restrictive, formal approach, wholly neglecting context and applying the single meaning rule in a way that separated meaning from the reality of the situation.[149]

To determine the meaning of Mrs Stocker's words Mitting J consulted the Oxford English Dictionary's definition of 'strangle', which he found to mean, legally, imputed an intention to kill on the part of Mr Stocker.[150] The context – the history of domestic violence and what Mrs Stocker actually intended by these words – was deemed irrelevant. Rather, the judge prioritised the literal and technical legal meaning he attributed to the words. Thus, Mitting J found that Mrs Stocker's posts bore the more serious meaning advocated by the claimant.[151] This finding meant that Mrs Stocker was required to prove the truth that Mr Stocker had attempted to kill her. Upon hearing the evidence, Mitting J made the following finding, which perfectly encapsulates the gendered nature and consequences of apparently 'neutral' adjudication:

> **I do not … believe that [the claimant] threatened to kill her or did anything with his hands with that intention.** I do not believe that he was capable even in temper of attempted murder. The most likely explanation about what happened is that he did in temper attempt to silence her forcibly by placing one hand on her mouth and the other on her upper neck under her chin to hold her head still. **His intention was to silence, not to kill.**[152]

[145] *Stocker* HC (n 139) [36]–[37].
[146] *Jeynes* (n 138) [14], per Sir Anthony Clarke MR; *Monroe v Hopkins* [2017] EWHC 433 (QB); [2017] 4 WLR 68 [35], per Warby J.
[147] ibid. (*Monroe*); *Stocker* SC (n 141) [43]–[46], per Lord Kerr; *Monir v Wood* [2018] EWHC (QB) 3525, [90], [92] per Nicklin J; *Smith v ADVFN plc* [2008] EHHC 1797 (QB) [13]–[16], per Eady J.
[148] *Koutsogiannis v The Random House Group Ltd* [2019] EWHC 48 (QB); [2020] 4 WLR 25 [12](iv), per Nicklin J. At [12] the judge sets out the main principles distilled from a long line of authorities.
[149] *Stocker* SC (n 141) [25]. Similarly, Andrew Scott has argued that in cases ' … where the meaning of the impugned publication is ambiguous or multifarious, the abstraction from reality involved in applying the single meaning rule will always result in a measure of injustice.' See Scott (n 137) 40–57, 45.
[150] *Stocker* HC (n 139) [36]–[37].
[151] ibid [37]: '[T]he reasonable inference to draw from [Mrs Stocker's posts] … was that the defendant was dangerous, at least to any woman with whom he lived or had lived, that he was a man who tried to kill on one occasion, had been arrested for an offence involving firearms on another, and had given the police reason to believe that he had broken a non-molestation order made against him.'
[152] ibid [43]. Authors' addition and emphasis added.

Thus, although Mrs Stocker could prove that Mr Stocker had assaulted her,[153] that he had breached a non-molestation order, and that he had been arrested on three occasions, she was unable, in Mitting J's assessment, to meet 'the sting' of the Facebook postings that the claimant was 'a dangerous man'. Rather, the judge found that the 'impression given by the postings to the ordinary reader was a significant and distorting overstatement of what had in fact occurred'.[154] Despite Mrs Stocker's evidence, in Mitting J's view the statements were not true, and were thus defamatory.[155]

The Court of Appeal endorsed Mitting J's decision and its rationale. It disagreed with Mrs Stocker's counsel, who argued that the judge's dictionary-based approach was overly literal and entirely disregarded the domestic violence context of the situation.[156] In doing so, the Court came to the contradictory conclusion that Mitting J had directed himself appropriately to the relevant *Jeynes* principles. Though dictionaries do not have a role in determining the ordinary meaning according to these principles, the Court found that 'no harm was done in this case' as Mitting J had 'merely used the dictionary definitions as a check, and no more'.[157] The lower courts' approaches in *Stocker* bear distinct parallels with the narrow, formalist reasoning in *Waters* critiqued by Conaghan; they were wholly claimant-centred and focused on technicalities at the expense of the clear gender-based dynamics at the heart of the case. It is pertinent to ask *why* judges got side-tracked by technicalities which set an unduly demanding bar regarding the precise terms in which a domestic abuse survivor spoke of her experiences, rather than scrutinising the motivation of her convicted abuser in suing her for statements that were based on clear evidence and broadly uncontested facts. As further analysis in Part 2 argues, gendered judicial treatment of the parties was relevant here.

Ultimately, it took the Supreme Court to correct Mitting J's approach to the single meaning of the disputed words. It held that the defendant's statements should not have been afforded such a literal and technical meaning divorced from the reality of the situation, especially because they were published on social media.[158] The Court's judgment stressed the importance of context to determining meaning, creatively re-envisaging the 'ordinary

[153]Mr Stocker himself admitted in the police interview that followed his arrest to at least common assault – which Mitting J acknowledged (ibid [54]), as did the Court of Appeal (*Stocker* CA (n 140), [25] per Sharp LJ). See also the Supreme Court judgment *Stocker* SC (n 141) [10], [61].
[154]*Stocker* HC (n 139) [54].
[155]Robinson and Yoshida (n 9) xiii.
[156]This argument was advanced by Mrs Stocker's counsel on appeal (it was not raised at trial). See *Stocker* CA (n 140). The Court of Appeal found that Mitting J had properly considered the context (see [15], [18]–[19], per Sharp LJ). The Supreme Court disagreed (see *Stocker* SC (n 141) [25]–[26], [38]–[46], [50], per Lord Kerr).
[157]*Stocker* SC (n 141) [17].
[158]ibid [15]–[16], [23]–[31], [37]–[48].

reader' for the internet age.[159] As Jacob Rowbottom acknowledges, this development is positive in protecting broader free speech on social media, as it 'ensures that speakers are not always held to the literal or most serious meaning of the words'.[160] But though the Supreme Court ultimately vindicated Mrs Stocker, its judgment is nevertheless limited, because the gendered violence issues in the case were entirely marginalised. Lord Kerr did briefly indicate that Mitting J's original judgment was unduly favourable towards the claimant, but went on to say that it was 'unnecessary to deal with that matter because of the conclusions that I have reached on other issues and, since it had not been argued that the judge's finding on this point was one which he should not have made, I say nothing more about it.'[161] The judgment thus failed to extend the Court's context-rich outlook to the domestic violence background and gender imbalances that were clearly at play in this dispute. As such, it represented a missed opportunity to highlight 'the importance of protecting the rights of survivors to speak about their abuse – online or anywhere else'.[162]

When it comes to determining the single meaning of sexual misconduct allegations, particularly those published online, contextualising such statements within the specific facts, parties *and also* the wider gender inequalities and pervasive culture of violence against women is of critical importance. Doing so would minimise the risk of decisions like *Stocker* and address Robinson and Yoshida's concern to ensure that the 'ordinary and reasonable reader' test does not effectively become 'a white privileged man' test.[163]

Gendered judicial treatment of parties

Inherently linked to the examples of gendered doctrine discussed in Part 2, English #MeToo defamation cases reveal that judicial approaches to the facts and parties may also be influenced by conscious or sub-conscious gender stereotypes and cultural assumptions.[164] This part discusses the issue of epistemic credibility that can create difficulties for women defendants in #MeToo defamation cases, before considering some select examples in English law and other common law countries.

[159]ibid [41], [43]. Lord Kerr referred to a 'new class of reader: the social media user', who understands that an online platform 'is a casual medium in the nature of conversation rather than carefully chosen expression'.
[160]Rowbottom (n 113) 46.
[161]*Stocker* SC (n 141) [12]. See also [9]–[11].
[162]Robinson and Yoshida (n 9) xvi, 341–382; Yoshida (n 118) 113.
[163]Ibid Robinson and Yoshida 261–262, 281. See also Kate A Manne, *Down Girl: The Logic of Misogyny* (Oxford University Press 2017) 187.
[164]Harradine (n 17) 32–33; Yoshida (n 118) 112. Yoshida refers to this as the 'hidden gender of media law.' See also Bianca Fileborn and Rachel Loney-Howes (eds), *#MeToo and the Politics of Social Change* (Palgrave Macmillan 2019); Rachel Loney-Howes, et al, 'Digitalfootprints of #MeToo' (2022) 22(6) *Feminist Media Studies* 1345; Ailwood (n 17) 319–346.

Commentators have noted that defamation law, particularly involving sexual misconduct allegations, is a 'discourse that prioritises the male reputation, career, and mental and emotional serenity'.[165] Clarke has also noted the background influence of gendered presuppositions 'that accused men have special entitlements to their careers, professional reputations, and future prospects because they are men, while women whose careers are derailed by harassment have not lost anything of value because they are women'.[166] Vitally, defamation law also entirely neglects the very high reputational risks that survivors take if they resolve to speak out about their experiences, as well as the reputational and emotional damage caused by deeming their allegations defamatory.

Epistemic credibility

The primary way in which gender dynamics pervade and influence the courtroom is via judicial (and wider society's) approaches to determining the credibility of parties' claims. As Part 1 established, allegations of sexual misconduct, or domestic violence are inherently difficult to prove because they tend to happen in private settings away from witnesses. Therefore, disputes often turn on one party's word against the other, increasing the difficulties for defendants in #MeToo defamation cases seeking to discharge the reverse burden to the higher *de facto* standard of proof.

The diverging weight routinely afforded to the respective parties' evidence in cases concerning disputed sexual violence or misconduct is widely noted. Leigh Gilmore argues that traditional legal processes 'taint' the testimony of victim-survivors.[167] Their testimonies are often seen as suspect, or unpersuasive, because of their gender, and because they possess 'less symbolic capital than men'.[168] By routinely upholding men's accounts, judges inadvertently protect the patriarchal order.[169] The influence of this gendered credibility gap across a range of courtroom contexts was noted by Kennedy in earlier decades,[170] and its presence has also been detected in historic sexual slander of women cases.[171]

[165]ibid Harradine 36. See also MacKinnon, '#MeToo' (n 6) A19.
[166]Clarke (n 7) 52.
[167]Leigh Gilmore, *Tainted Witness: Why We Doubt What Women Say About Their Lives* (Columbia University Press 2017) 31, 80.
[168]ibid 18–19.
[169]Of course, we acknowledge that in some cases it may be entirely appropriate to uphold a man's account. For clarity, our argument is not that complainants' allegations should always be upheld. Rather, doctrinal frameworks and judicial fact-finding processes in sexual misconduct disputes have an entrenched track-record of routinely and inherently privileging men's accounts, thus 'tilting the scales' against women complainants, and favouring general patriarchal ideals and interests.
[170]'As I practised throughout the 1970s and 1908s, it became increasingly clear that women in court still had less credibility than men. … Wherever they stand in the courtroom, women are not deemed to have the same authority or credibility as their male counterparts.' Kennedy (n 18) 21–22.
[171]Gowing (n 96) 50–52, 129–130. For a slightly more qualified view, see Waddams (n 96) 90–91, 102.

Australian feminist analyses of #MeToo defamation cases highlight reasons for this credibility gap. Michelle Harradine claims that a credibility disparity features prominently in #MeToo defamation cases 'whereby the dominant social member – the man – receives more credibility than he arguably deserves (a credibility excess), whilst the subordinate social member – the woman – receives less credibility than she would otherwise have (a credibility deficit)'.[172] Furthermore, she argues that women's testimony in such cases is held to 'masculine standards of credibility including rationality, autonomy and objectivity',[173] with focus on matters such as whether the complainant made a prompt formal report to the authorities.[174] Similarly, Ailwood's cogent critique[175] draws out the credibility gap present in the high-profile Australian case of *Rush v Nationwide News*.[176] Here, actor Geoffrey Rush succeeded in his defamation claim against a newspaper that published allegations of his sexual harassment of a young actress, Eryn Jean Norvill, during the run of a theatre production of *King Lear*. Among other criticisms (discussed below), Ailwood focuses on the trial judge, Justice Wigney's emphasis on witness consistency and plausibility. She claims that these two credibility standards '[conceal] the justice system's inherently masculine norms and denial of women's experience under a cloak of ostensible rationality, impartiality, objectivity and logic'.[177] For these critics, defamation law extends and entrenches existing gendered credibility disparities.

Though commentators use a range of terms to reflect the gendered credibility gap, Miranda Fricker's excellent work on 'epistemological injustice' has been influential in this context.[178] She philosophically examines the reasons some speakers are viewed as inherently less credible than others, and the effects of such disparate treatment. Fricker's epistemological injustice takes two overlapping, mutually-reinforcing forms. First, testimonial injustice occurs where a speaker is regarded as less trustworthy or believable due to prejudicial stereotypes which have a distorting influence on the hearer's credibility assessment.[179] This is harmful because it denies an essential aspect of the speaker's humanity, namely their capacity as a giver of knowledge.[180] More generally, it exacerbates oppression and disadvantages subordinated groups.[181] Second, hermeneutical injustice occurs where 'a gap in collective interpretive resources puts

[172]Harradine (n 17) 34. See also Manne (n 163) chapter 6.
[173]ibid (Harradine) 44, 48.
[174]ibid 49.
[175]Ailwood (n 17).
[176]*Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496; *Nationwide News Pty Limited v Rush* (2020) 380 ALR 432.
[177]Ailwood (n 17) 335.
[178]Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press 2010).
[179]ibid chapters 1–2.
[180]ibid 44.
[181]ibid 43–59.

someone at an unfair disadvantage when it comes to making sense of their social experiences'.[182] This form of injustice occurs where a majority culture shaped by more powerful members does not recognise or label a problem suffered by a subordinate group, e.g. earlier social attitudes that viewed workplace sexual harassment as harmless 'fun'.[183] It causes speakers from certain groups to struggle to intelligibly articulate their experiences within the limits of prevailing discourses, leading to 'hermeneutical marginalisation' where their speech is misunderstood or distorted.[184] Fricker notes the wider impacts of both forms of epistemic injustice upon the public domain: they act to silence subordinate speakers by pre-emptively deterring them from sharing their experiences; furthermore, they wrongfully exclude such speakers from the co-operative process of information pooling, with isolating and objectifying consequences.[185]

Harradine references Fricker in her critique of Australian #MeToo defamation law, claiming it entails a form of testimonial injustice that is inherently linked to power and causes 'epistemic harm' by 'reinforc[ing] dangerous and long-standing fallacies about the ability of women to be credible givers of knowledge'.[186] Deborah Tuerkheimer also draws on Fricker's work to explain the deeply engrained scepticism towards rape accusers across the criminal justice system despite reforms to legal rules. She argues that the 'credibility discount' systematically applied to their accounts is '*the* dominant feature of our legal response to rape'.[187] Thus, for Tuerkheimer, the chief function of informal #MeToo processes is to correct the 'epistemic injustice' of formal legal mechanisms where 'a person is wronged in her capacity as a knower'.[188] In a similar vein, Robinson and Yoshida use 'himpathy',[189] a term coined by Kate Manne that refers to the sympathy directed towards alleged male perpetrators of sexual misconduct, and the anger that is subsequently aimed at their accusing female victims.[190] Two related points emerge from these analyses of witness credibility gauging

[182]ibid 1 and chapters 7. Deborah Tuerkheimer offers rape myths as an example of hermeneutic injustice: Tuerkheimer, 'Incredible Women' (n 50) 47.
[183]Fricker (n 178) 147–151.
[184]ibid 148, 152–153, 159–160, 162.
[185]ibid 43, 130–133, 162–163. Eyja Brynjarsdottir characterises the #MeToo movement as a form of 'epistemic resistance' and a fight for epistemic justice: Eyja Brynjarsdottir, 'Silencing Resistance to the Patriarchy' in Giti Chandra and Irma Erlingsdottir (eds), *The Routledge Handbook of the Politics of the #MeToo Movement* (Routledge 2020).
[186]Harradine (n 17) 31–55, 33–34. See also Richardson (n 70) 526–530 (adopts Fricker's work to critique Nagel's 'neutral' liberal account of privacy).
[187]Emphasis added. Tuerkheimer, 'Incredible Women' (n 50) 3, 41–50. Tuerkheimer provides an extensive evidence base for her claims and though her focus is restricted to the US context, the issues she reveals are clearly relevant to other jurisdictions, including the UK.
[188]Tuerkheimer, *Beyond #MeToo* (n 6) 1179–1181.
[189]Robinson and Yoshida (n 9) xvi.
[190]Manne (n 163) 196–205.

processes: first, the process of attributing weight is inherently shaped by wider power dynamics and notions of status; second, this innately gendered practice further weighs the scales against survivor defendants in defamation cases.

There are examples of testimonial injustice in English defamation case law. The clearest example is the *Stocker* litigation, discussed above. Behind the technical veneer of the single meaning rule, Mitting J's judgment, and the Court of Appeal's subsequent endorsement, reveals evidence of 'epistemological injustice' or 'himpathy'. Mitting's J finding that 'I do not believe that [Mr Stocker] was capable even in temper of attempted murder' and that 'his intention was to silence, not to kill' encapsulates this 'himpathetic' mindset.[191] Indeed, in the Supreme Court, Lord Kerr asked how Mitting J could have reached a conclusion that was 'more benevolent to Mr Stocker than any version of the facts which he could reasonably have advanced. It seeks to explain the red marks on a basis which Mr Stocker has never argued for'.[192] Mitting J's judgment, and the Court of Appeal's affirmation, also received excoriating criticism beyond the courtroom. Harriet Wistrich, the Director of the NGO the Centre for Women's Justice, said the 'judgment reveals a shocking ignorance amongst members of the judiciary of the realities of domestic violence'.[193] Elsewhere, Robinson and Yoshida claim that *Stocker* demonstrates a High Court judge 'implicitly rejecting' clear evidence and applying his own 'male-centric' and baseless theory to exonerate Mr Stocker.[194] They also point out the judgment's startling 'irony and perverse logic': Mitting J found that Mr Stocker had *merely* intended to silence (rather than kill) Mrs Stocker. Yet, in determining she had defamed him by attempting to warn his new partner about his propensity for violence, she not only faced huge legal costs but was prevented from speaking about her abuse. Thus, the judge effectively silenced her.[195]

The case of *Economou v de Freitas*[196] provides a further salient example. The defendant was the father of Eleanor de Freitas, the ex-partner of the claimant. Ms de Freitas had reported the claimant to the police for rape, but no further action was taken. The claimant subsequently brought a private prosecution against her for perverting the course of justice by fabricating the allegation. Ms de Freitas, who was diagnosed as bipolar, committed suicide shortly before her trial. During a Coroner's Inquest into her death the defendant gave interviews across different media outlets as he wanted the Inquest to

[191]For an alternative view of the act of strangling (or rather, *attempting to strangle*) a woman, see ibid 1–4, 16–18.
[192]*Stocker* SC (n 141) [12].
[193]Centre for Women's Justice, 'Protest over libel case that has chilling implications for women who speak out over domestic violence', 23 January 2019 <https://www.centreforwomensjustice.org.uk/news/2019/1/23/protest-over-libel-case-that-has-chilling-implications-for-women-who-speak-out-over-domestic-violence> accessed 6 May 2025.
[194]Robinson and Yoshida (n 9) xvi, 261–262.
[195]ibid xiv–xv.
[196]*Economou* HC (n 108); [2018] EWCA Civ 2591.

investigate the decision of the Crown Prosecution Service to take over the private prosecution instigated by the claimant. Although the defendant did not name Economou, Warby J found that two of the seven publications were defamatory because they implied there was evidence he was guilty of rape.[197] However, in a decision later upheld by the Court of Appeal, the judge also found that the defendant's statements fell within the public interest defence.

In *Economou* the courts reached a just outcome by taking a pragmatic, flexible approach to determine that the defendant's comments met the public interest defence requirements.[198] First, Warby J found that the defendant's statements concerned 'a matter of public interest',[199] highlighting the need to ensure that women feel able to report abuse without fear of prosecution for making false claims.[200] Second, he found that the defendant 'reasonably believed' it was in the public interest to publish his statements.[201] Warby J claimed that the defendant's role should be taken into account. Although close attention should be paid to the pre-DA 2013 *Reynolds* criteria for responsible journalism,[202] it was not appropriate to hold Mr de Freitas to the same standards required of a journalist, and a lower standard could be applied as his role was closer to that of a source, or contributor.[203] The judgment allowed the courts to accommodate different types of publisher, meaning that individuals who speak out about abuse in different forms may avail themselves of the s4 defence if they meet its requirements,[204] even if their standard of care might fall short of that expected of a trained

[197]ibid *Economou* HC [130].

[198]DA 2013 s 4. This replaced the pre-DA 2013 'Reynolds defence' set out in *Reynolds v Times Newspapers Limited* [2001] 2 AC 127.

[199]DA 2013 s 4(1)(a). This entails an 'objective evaluation' of the subject matter of the statement, and courts apply a broad definition of public interest: *Serafin v Malkiewicz and others* [2020] UKSC 23 [74], per Lord Wilson.

[200]*Economou* HC (n 108) [144]. The Court of Appeal emphatically agreed:

> There was, more generally, a strong public interest in ensuring that victims of rape came forward and an obvious risk that they may be deterred from doing so by the risk of prosecution for perverting the course of justice. As the judge noted, it does not follow from the fact that an accused person is not prosecuted or charged, that an allegation made against them is false, still less that it is made with knowledge that it is false. (*Economou* CA (n 196) [91], per Sharp LJ)

[201]DA 2013 s 4(1)(b). This limb imposes two requirements: (1) the defendant must show they believed that publishing the statement was in the public interest, by demonstrating they 'addressed [their] mind to the issue' (*Turley v Unite the Union* [2019] EWHC 3547 (QB) [138](vii), per Nicklin J). The defendant must have honestly held the belief to be true (*Banks v Cadwalladr* [2022] EWHC 1417 (QB); [2022] 1 WLR 5236 [109], per Steyn J; *Hay v Cresswell* [2023] EWHC 882 (KB) [200], per Williams J). (2) in assessing whether that belief was objectively reasonable, the court 'must have regard to all the circumstances of the case' and make 'appropriate' 'allowance for editorial judgment': *Serafin* (n 199) [74], per Lord Wilson.

[202]*Economou* CA (n 196) [76], per Sharp LJ.

[203]*Economou* HC (n 108) [242], [246] (the Court of Appeal agreed: *Economou* CA (n 196) [110], per Sharp LJ). Warby J also concluded that even where a defendant is the author of the article, if it is published in a newspaper, then it is incumbent on that publication to 'to undertake appropriate checks and provide appropriate balance.': [258].

[204]Sharp LJ was clear that the 'defence is not confined to the media' and is, therefore, of general application (*Economou* CA (n 196) [110]).

and experienced journalist.[205] But it is arguable that the courts were able and willing to make this finding because they had a particularly sympathetic, rational defendant who had 'played by all the rules' and approximately fitted the formal 'public interest' criteria. The court knew how to accommodate this middle-class, grieving father who had acted with unimpeachable motives, upon the advice of lawyers and charity workers, and very carefully presented his claims through trusted, respected news organisations.[206] As the Court of Appeal acknowledged, this was an unusual case.[207] The courts' favourable finding was perhaps also aided by other facts, with Warby J commenting that the claimant had conducted his case in 'an offensive and bullying manner' with mixed motives that included 'anger' and 'elements of vengefulness'.[208] But it is pertinent to ask whether the defendant's more vulnerable daughter – or other survivors in her situation – would have been in a position to meet these precise and exacting standards, particularly against a claimant who was more adept at hiding their aggression?

Epistemic credibility across jurisdictions

The problem of epistemic injustice or 'himpathy' is not restricted to English cases. The credibility inequality it creates – both in and beyond the courtroom – is aptly illustrated by two high-profile defamation cases: the conflicting outcomes in the Johnny Depp litigation in England and America, and the *Rush* litigation in Australia.

As is well-known, Depp brought a defamation action against *The Sun* newspaper, and its journalist, Dan Wootton, for an article alleging that he had assaulted the actress Amber Heard during their marriage.[209] This was an opinion piece, published without any input or comment from Heard. Though she was not a party to the litigation, Heard was called to give evidence by the defendants in support of their truth defence. Prior to Depp bringing the defamation claim, Heard had not publicly spoken about the violence in their marriage: she had only given a Californian judge enough information to obtain a restraining order against Depp, in 2016.[210] Indeed, as part

[205]Coe (*Media Freedom*) (n 115) 257–258.
[206]*Economou* HC (n 108) [35], [38]–[39] (defendant obtained legal representation); [195]–[197], [199]–[207], [203] (defendant consulted with specialist charities); [219] (defendant's motives were not 'improper' or 'illogical'); [223] (defendant worked with trusted media); [256], [257] (defendant made careful, qualified statements); [60], [79], [88], [208] (defendant was a grieving father).
[207]*Economou* CA (n 196) [112].
[208]*Economou* HC (n 108) [252], [260]. ('Mr Economou has made the error of seeing this case from his own perspective as a victim, paying too much attention to the impact on him and his feelings, and giving insufficient consideration to the other perspectives, indeed the other rights and interests, that demand and deserve consideration.') See further [45], [134], [169], [176]–[179], [205]–[206], [226]–[229], [232], [234].
[209]*Depp v NGN* (n 131).
[210]ibid [88].

of their divorce settlement she signed a non-disclosure agreement preventing her from discussing the order, or its substance. Robinson, who advised Heard, has explained her invidious position: she faced the risk of being deemed a liar if she chose not to give evidence as *The Sun* might opt to settle to avoid the commercial risk of trial; and if Depp's claim succeeded she would be deemed a liar and the domestic violence allegation could not be repeated.[211] Heard chose to give evidence. Significantly, the defendants argued that, by putting the defendant to truth (via Heard as its witness), Depp had deployed DARVO tactics.[212] Nicol J agreed and, with meticulous attention to the evidence, found that *The Sun*'s allegations were substantially true. In coming to this conclusion, he held that twelve of the fourteen disputed incidents of violence, including one incident of sexual violence, met the standard of proof.[213] Despite the positive outcome of Heard's testimony being vindicated in open court, *The Sun*'s deployment of the truth defence put her account, very publicly, on trial. Significantly, beyond the courtroom Heard was subjected to an avalanche of vitriolic abuse from Depp supporters, both on the steps of the court and online.[214] Heard articulated the personal impact of this abuse in her post-trial public statement, outside the Royal Courts of Justice.[215]

The litigation later shifted to the United States, where Depp sued Heard directly for a 2018 opinion piece in *The Washington Post* in which she had stated 'Two years ago, I became a public figure representing domestic abuse'.[216] Depp sought $50 million, claiming that the article was defamatory of him, and had been published with actual malice.[217] He chose to sue in

[211]Robinson and Yoshida (n 9) 309.

[212]*Depp v NGN and Wootton* 27 July 2020 Proceedings Day 15, 2375, 2378, 2380 <https://inforrm.org/wp-content/uploads/2020/07/Day-15.pdf> accessed 6 May 2025. The same argument has been advanced in respect of the US litigation, discussed below. For example, see Nelson (n 17) 4–5; Harsey and Freyd, 'Defamation and DARVO' (n 9) 481–482, 484.

[213]*Depp v NGN* (n 131), [206]–[573]. The Court of Appeal subsequently dismissed Depp's application for permission to appeal: [2021] EWCA Civ 423.

[214]Robinson and Yoshida (n 9) chapter 7.

[215]'I did not file this lawsuit and, despite its significance, I would prefer not to have been in court. It has been incredibly painful to relive the break-up of my relationship, have my motives and my truth questioned, and the most traumatic details of my life with Johnny shared in court and broadcast around the world.' Conrad Duncan, 'Johnny Depp libel trial: Amber Heard says reliving break-up was "incredibly painful"' (*The Independent*, 29 July 2020), <https://www.independent.co.uk/news/uk/crime/johnny-depp-trial-amber-heard-speech-domestic-abuse-divorce-libel-sun-a9642671.html> accessed 6 May 2025.

[216]Amber Heard, 'I spoke up against sexual violence — and faced our culture's wrath. That has to change' (*The Washington Post*, 18 December 2018), <https://www.washingtonpost.com/opinions/ive-seen-how-institutions-protect-men-accused-of-abuse-heres-what-we-can-do/2018/12/18/71fd876a-02ed-11e9-b5df-5d3874f1ac36_story.html> accessed 6 May 2025. This was written in her capacity as Women's Rights Ambassador for the American Civil Liberties Union and was originally drafted for her by the ACLU team.

[217]*New York Times v Sullivan* 346 US 254; 84 S Ct 710 (1964) introduced the requirement for public officials to prove falsity and 'actual malice' of the defamatory statement. This was subsequently extended to apply to public figures, including celebrities: *Curtis Publishing Co v Butts* US 155; 87 S Ct 1975 (1967), 1991 per Harlan J; *Gertz v Robert Welch Inc* 418 U.S. 323; 94 S Ct 2997 (1974), 3005, 3008, per Powell J; *Milkovich v Lorain Journal Co* 497 US 1 (1990).

Virginia, rather than the parties' home state of California because, as his lawyers admitted in court, unlike California, there were no anti-SLAPP laws in Virginia that would have given rise to a strike out application from Heard.[218] Heard's lawyers argued that the case should be discontinued on the basis that Nicol J, in the UK, had already held her allegations to be substantially true, but Judge Azcarate refused.[219] At Depp's request, and despite Heard's opposition, the six-week trial in the Fairfax County Court was broadcast live online.[220] Heard was again required to publicly relive and justify her allegations of violence through forensic cross-examination, but this time in front of the watching-world. Indeed, the trial developed into a spectacle, prompting a proliferation of real-time online commentary and user-generated content that mocked, abused, publicly pilloried and questioned Heard's testimony.[221] Irrespective of the credibility Heard was afforded in the English trial, the online circus surrounding the US trial amply demonstrated that a large, entrenched gendered credibility gap is very much alive and well in wider society. It is perhaps therefore unsurprising that the un-sequestered jury found in Depp's favour, awarding him damages totalling $15 million.[222]

Rush v Nationwide News Pty Ltd[223] offers a further salient instance of this testimonial injustice. Ailwood shows that here, Justice Wigney repeatedly and explicitly privileged the claimant's status and professional reputation as a world-leading 'actor-genius' in contrast to his sceptical treatment and discrediting of Norvill's professionalism.[224] He ultimately preferred Rush's testimony, finding Norvill's evidence to be 'exaggerated and unreliable'.[225]

[218]To date, over 30 US states have adopted anti-SLAPP laws, including California, Arkansas, Arizona, Delaware and, in July 2024, Pennsylvania. See Whelan (n 115), 114; Nicole J Ligon, 'Solving SLAPP Slop' (2023) 57(2) University of Richmond Law Review 459, 467.

[219]*John C Depp II v Heard* (2021) 108 Va. Cir. 382.

[220]According to Camilla Nelson, the trial was 'the first largescale celebrity trial of the streaming age.' On the day of the verdict, the audience peaked at 3.5 million concurrent viewers: See Nelson (n 17).

[221]Camilla Nelson refers to this as the commodification of misogyny. See Nelson, (n 17, 13–14.

[222]*John C. Depp, II v. Amber Laura Heard* No. CL-2019-2911 (Va. Cir. Ct. Jul. 25, 2019). Depp was awarded $10 million in compensatory damages and $5 million punitive damages. The damages award was subsequently reduced to $10.35 million. Heard, who counter-claimed for $100 million, was awarded $2 million in compensatory damages, but was not awarded punitive damages. For detailed commentary on the trial, and the jury's decision, see Robinson and Yoshida (n 9) 326–340.

[223]*Rush v Nationwide* (n 176); *Nationwide v Rush* (n 176). Other high-profile defamation cases involving allegations of sexual misconduct have come before the Australian courts, e.g. *Dent v Burke* [2019] ACTSC 166, [2020] ACTCA 22 (the plaintiff complainant brought an action against her abuser for claiming in a television interview that the allegations against him were lies. Her action failed because, due to the defendant's 'less than compelling' performance and the interviewer's scepticism towards his claims, the ordinary reasonable viewer would not have been left with the impression the plaintiff was a liar); *Lehrmann v Network Ten Pty Limited* [2024] FCA 369 (the plaintiff had been previously charged with rape, but his criminal trial was inconclusive. He later brought an unsuccessful defamation action against the complainant and television company for broadcasting her allegations about the rape. Concluding a complex, lengthy judgment, Lee J stated: 'Having escaped the lion's den, Mr Lehrmann made the mistake of going back for his hat.' [1091]).

[224]Ailwood (n 17) 331–335. See e.g. *Rush v Nationwide* (n 176) [2], [243]–[244], [312], [578], [581], [612], [693].

[225]ibid *Rush v Nationwide* [509].

But, significantly, the judgment did not account for the hierarchical power inequalities in the entertainment industry between 'stars' and 'other' actors.[226] According to Ailwood, the judge's approach adopted numerous sexual harassment myths[227] and applied a masculine, courtroom hindsight to Norvill's conduct that neglected the lived experiences of women in this situation and the ways power inequalities might have influenced her responses.[228] In short, Justice Wigney did not recognise the constraints and precarity of Norvill's position and failed to appraise her conduct in that context.[229]

Though deeply concerning, the domestic and international examples of testimonial injustice discussed here are not reflective of approaches in all cases, and we acknowledge and commend examples of better judicial practice.[230] Nevertheless, these cases are telling examples that illuminate our understanding of how defamation operates in sexual misconduct allegation cases. They act as salient reminders that such 'himpathetic' outlooks endure in at least some courtrooms, with concrete consequences for survivors. These cases also provide cues as to wider informal testimonial injustices operating across the system but outside of the text of final judgments, for example, in lawyers' offices. Finally, viewed cumulatively alongside the doctrinal limitations and costs barriers (discussed below), this testimonial injustice (including the risk that it *might* be applied) forms yet another layer that acts to systematically disadvantage women defendants in such cases.

Costs culture and wider issues

Finally, the UK's legal costs culture deepens the inequality of arms between parties, and this feature of the English legal system contributes to further disadvantaging women defendants in sexual misconduct defamation cases. Because of the highly expensive defamation costs culture in the UK,

[226]Though Norvill explicitly referred to it in her evidence, stating: 'I was at the bottom of the rung in terms of the hierarchy and Geoffrey was definitely at the top. That was in play. I have to be honest and say that his power was intimidating and his person.' Transcript of Proceedings, Federal Court of Australia, NSW Registry, Wigney J, No. NSD 2179 of 2017 *Geoffrey Roy Rush and Nationwide News Pty Ltd and Anor*, 30 October 2018, 520.

[227]These included (1) women fabricate or exaggerate sexual harassment; (2) women have ulterior motives for alleging sexual harassment; (3) that sexual harassment is natural heterosexual behaviour; (4) it is the victim's responsibility to stop the sexual harassment; (5) that is it is driven by sexual desire of the perpetrator for the victim rather than an expression of gendered power. Ailwood (n 17) 336–337.

[228]ibid (Ailwood) 337, 339–340.

[229]In a later interview with *The Guardian*, Norvill referred to the trial as 'the most isolated period of my life' and claimed that her 'trust was broken in lots of different ways' which required her to 'completely reshape my worldview.' See Elissa Blake, 'My experience was not #MeToo, it was #HerToo': Eryn Jean Norvill on her life-changing return to the stage' (*The Guardian*, 6 May 2022), <https://www.theguardian.com/stage/2022/may/07/my-experience-was-not-metoo-it-was-hertoo-eryn-jean-norvill-on-her-life-changing-return-to-the-stage> accessed 6 May 2025.

[230]E.g. Nicol J in *Depp v NGN* (n 131) as discussed above, and Williams J in *Hay v Cresswell* [2023] EWHC 882 (KB) discussed below.

defending claims often puts defendants under huge financial pressure,[231] which may encourage them to settle *on the claimant's terms*, rather than go to trial. Alternatively, it might result in vulnerable parties attempting to represent themselves without the appropriate support.[232] Furthermore, DARVO tactics and the trial process have traumatic impacts upon survivors, irrespective of case outcomes. Aspects of the litigation process, such as disclosure or cross-examination at trial, are likely to be intimidating and harmful to survivor-defendants. Disclosure processes that provide the claimant with access to intimate information can be intrusive.[233] The trial is re-traumatising for survivors, as it forces them to publicly relive, and to justify, their allegations of abuse.[234] The prospect of such exposure can be used by claimants to leverage defendants to capitulate, and/or as an extension of the original abuse.[235] Inevitably this will mean, because of the terms of the settlement, that they will not be able to share their experiences: they are effectively silenced. Even where women opt to defend their case, their lawyers are likely to advise them to not repeat the allegations until the matter is resolved at trial; this silences them during the litigation period.[236] Thus, UK defamation costs culture facilitates the weaponisation of defamation law not only to temporarily or permanently silence individual defendants, but to also deter the wider collective movement to address violence against women. The Court of Appeal warned against such chilling effects in *Westcott v Westcott*, a defamation case brought by a claimant against his daughter-in-law in response to her police report alleging he had assaulted her. In holding that the defendant's complaint was protected by absolute privilege, Stanley Brunton LJ stated:

> the public interest in victims or witnesses of crime coming forward to the police is more pressing and more important than the protection of the reputation of the person accused of the crime. It would be very undesirable, for example, if victims of rape, particularly where the alleged perpetrator is a man with substantial resources, were to be deterred by the risk of defamation proceedings from complaining to the Police.[237]

[231]E.g. Mrs Stocker has said that she was fortunate to have lawyers acting on her behalf on a 'no win no fee' basis, but regardless of this the litigation placed her under considerable financial pressure. If she had not been successful in the Supreme Court, she would have still been liable to pay her husband's legal costs, which amounted to approximately £300,000: ibid. 292. See also Coe et al (n 23).

[232]For example *Esther Ruth Baker v John Hemming* [2019] EWHC 2950. Here the claimant had made earlier historic sexual abuse allegations against M.P. John Hemming. She brought a defamation action against him for statements he made indicating she was a liar who had made false claims. Baker, who claimed to have mental health issues, acted as a litigant in person and repeatedly failed to comply with court requirements. Her application was dismissed.

[233]Gray (n 16) 28–29.

[234]Jane Gilmore, *Fixed It: Violence and the Representation of Women in the Media* (Viking 2019) 182.

[235]Gray (n 16) 40, 118.

[236]ibid 11–12, 66, 116; Robinson and Yoshida (n 9) 249.

[237]*Westcott v Westcott* [2008] EWCA Civ 818 [42] (concurring with Ward LJ).

Despite the safeguard *Westcott* affords, defamation law continues to foster problematic deterrent effects in this context because this immunity is limited to formal police complaints, and therefore a well-resourced complainant can still draw out litigation where misconduct allegations are made informally online or via media reporting. For example, former M.P. Charles Elphicke's defamation claim against *The Times* (mentioned above) was only withdrawn after he was convicted of three counts of sexual assault against women.[238]

This issue is also aptly illustrated by *Hay v Cresswell*.[239] Nina Creswell made online allegations that the claimant had seriously sexually assaulted her,[240] and successfully defended them on both truth and public interest grounds.[241] It is not only the outcome of *Hay* that marks it as an exemplar of effective, gender-sensitive defamation adjudication. Williams J also adopted a progressive approach to the disputed facts and evidence. For example, the judge criticised police failures to take Hay's initial report seriously,[242] and approached the case in a context-sensitive manner, showing understanding of Hay's situation and acknowledging that there is not one 'correct' response to sexual assault.[243] She found that the overall credibility of Hay's essential claims was not significantly undermined by minor inconsistencies in her evidence or the delay in publicising the allegations.[244] But these positive aspects of the judgment gloss over the fragility of the outcome. Because of the costs involved in defending the claim, Cresswell was initially forced to represent herself.[245] Commentators confirm that this is a wider problem; women's weaker economic position and resulting inability to afford legal advice is commonly exploited by perpetrator-claimants.[246] Fortunately, Creswell later obtained funding from *Good Law Project* to pay for legal representation.[247] Yet without this professional legal support, she would have struggled to technically establish the truth

[238]*Elphicke* (n 134). Though the costs disputes in this case have continued: *Charles Elphicke v Times Media Limited* [2024] EWHC 2595.
[239][2023] EWHC 882 (KB).
[240]The defendant used an online blog (*Telegra.ph*) to write about her experience of a sexual assault by the claimant which she subsequently circulated on social media: ibid [59]–[68].
[241]The ruling on the DA 2013 s2 truth defence disposed of the claim, but the judge went on to consider the DA 2013 s4 public interest defence, finding that the publications were a matter of public interest, that the defendant believed this to be the case, and in the circumstances the defendant held a reasonable belief: ibid. [201]–[214].
[242]ibid. [114]. Williams J was highly critical of this decision, and the police's 'superficial' and 'cursory' approach to dealing with her complaint: [178] (i)–(vii).
[243]ibid [162], [181].
[244]ibid [162]–[163], [194]–[196].
[245]ibid [73].
[246]Robinson and Yoshida (n 9) 181–182, 247–248, 295, 387; Gray (n 16) 23–26.
[247]<https://goodlawproject.org/about/> and <https://goodlawproject.org/update/win-nina-cresswell/> both accessed 6 May 2025. For a similar case highlighting these challenges, see note 63 above (*CWD v Nevitt* [2020] EWHC 1289 (QB)) and the work of *The Gemini Project*: <https://thegeminiproject.org/> accessed 6 May 2025.

defence with its reverse burden. Consequently, she would have been silenced *and* also liable to pay her perpetrator damages and reimburse his legal costs.

Furthermore, although Cresswell's lawyers were able to discharge the burden, and establish the truth of her account, this hides the precarity of her victory. The success of her defence was partly based on a contemporaneous Facebook message trail that corroborated her account.[248] If these messages had been sent via the mobile SMS services of the day, it is unlikely they would have been preserved. Moreover, Hay made the error of, *inter alia*, changing his account of the events, from an initial denial of any post-nightclub contact between him and Cresswell, to conceding that they left the nightclub together , walking a short distance with her, before trying to kiss her.[249] In the absence of these favourable factors – and a charity-funded professional legal team able to effectively exploit them – it is highly unlikely that Cresswell would have established her truth defence, despite the veracity of her allegations. Such matters should not be left to chance. Yet shortcomings in access to legal representation and the distorting effects of costs culture on parties' litigation risk assessments in defamation cases is largely neglected by English case law.

Conclusion

Sexual misconduct allegations have proliferated since #MeToo, and therefore so too have defamation suits and threats by alleged perpetrators. As the #MeToo defamation cases analysed here show, allegations can be expressed in diverse ways. Perpetrators may be named, anonymised or their identities alluded to. Statements may make categorical factual assertions regarding a perpetrator's conduct, or may entail more qualified or oblique claims. Allegations may be made by the survivor directly, or via news intermediaries; they may be expressed emotively or informally online. But defamation's forensic preoccupation with intricate and arcane technicalities regarding the precise construction of allegations sometimes risks prioritising form over substance and unduly favouring perpetrators in this context. Moreover, it allows judges to focus on narrow features of the case whilst ignoring the wider social context of their decision.

The doctrinal features analysed in this article should be modified to be more gender-sensitive in sexual misconduct allegation cases. The reverse burden of proof, originally intended to redress power imbalances between claimants and powerful media defendants, should be reconsidered to enable it to responsively account for more diverse parties (including powerful claimants) and DARVO litigation tactics. The *de facto* higher evidential

[248]*Hay* (n 239) [117], [120]–[123], [174], [181].
[249]ibid [70], [78], [88](iii)–(iv). See also [188]–[193].

requirements to meet the civil balance of probabilities standard on the basis that serious sexual misconduct is less likely to have occurred should be jettisoned. The contextual approaches to determining the single meaning of a disputed statement should be developed to account for gendered violence factors in relevant cases so as to ensure a survivor's intended meaning is not unfairly marginalised when the single meaning of their statement is fixed.

Defamation's entanglement with gender and sexual politics is not a mere matter of historic interest; rather, the cases analysed here show that patriarchal gender imbalances remain present in 'neutral' defamation doctrine and judicial assessments of survivor credibility. Nor can the law's failures to address violence against women be dismissed as a problem restricted to 'other' areas such as criminal or family law; rather, these sexual allegation cases represent instances of 'same issues, different doctrine'. Viewed through an alternative feminist lens, these cases represent an attempt by male perpetrators to extend the exacting, procedural formalities of law that have historically protected their interests very effectively, out into the informal online public domain. Yet ironically, survivors have come together in this domain specifically to avoid this very same gendered legal system that has persistently failed them. At the very least, defamation doctrine and judges should be alert to this alternative narrative and be very wary of enabling age-old gender dynamics to re-manifest in this newer doctrinal context.

The examples critiqued here illustrate various skewed gender dynamics. Optimists may claim that these cases are isolated examples, but reported cases are becoming more common, and they are an important indicator of wider practice at pre-action and pre-trial unreported stages. Optimists may further respond that the defendants in some of these cases – Hay, Stocker, and Ward – ultimately prevailed, and that the reasoning in cases such as *Stocker* and *Rush* are not representative. But such responses gloss over more fundamental points. Even where defendants succeeded, they were forced to go through the stress, expense and trauma of defending themselves from their attackers. Their victories were by no means certain or predictable. Furthermore, the cumulative effect of gendered doctrine, gendered credibility discounts and inequalities in access to justice contribute to survivor reluctance to defend suits (in the same way it deters them from formally reporting instances to employers or police). This combination can embolden perpetrators to try their luck with legal threats to silence, a tactic that proved highly effective for Mohamed Al Fayed and Jimmy Saville, enabling them to conceal and continue their crimes until their deaths.

The cultural shift needed to address violence against women cannot occur without publicly shared experiences that defamation and privacy laws potentially suppress. Again, we do not claim that reputations should be unprotected, or that defamation should be dispensed with. But defamation law's capacity to be deployed in a way that exacerbates sexual abuse and violence

suffered by individual women (and that harms women more broadly) must be closed down so far as is possible. Lawyers and policymakers therefore have a duty to consider how defamation law (and the wider system) might be further reformed to at least minimise these problematic effects.

Acknowledgements

We are indebted to Professor Nicole Moreham (Victoria University of Wellington), Professor David Rolph (University of Sydney), Professor Máiréad Enright (University of Birmingham), Dr Zoe Tongue (University of Leeds) and the Journal of Media Law's anonymous reviewer for their invaluable comments on a previous draft of this article.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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