Damages in Libel

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LAWYERS notice that laymen are interested in libel. People are also interested in money. So it is not surprising that there should be particular interest in the question of damages in an action for libel. How much is an injured reputation worth in hard cash?

This is what lawyers call a jury question — i.e., one to be answered by twelve ordinary citizens in the jury box under direction from the judge. It is possible, but unusual, for a libel case to be tried by a judge sitting alone. Most judges dislike this and prefer to share their responsibilities with a jury. Indeed this is a field in which lawyers are apt to feel hurt that their efforts are misunderstood by laymen. The law says that the constitutional tribunal for deciding the amount of damages to be paid by a person who says false things about his neighbour is a jury representing the public, who can by their award show what they think of the defendant's conduct. Almost the only rule is, or was, that the award must be reasonable. When the layman asks 'what is reasonable?' the lawyer replies, 'That is for you to say. It is fact, not law'. All matters relating to the mode of publication, the circumstances of the parties, and the conduct of the defence, can be considered. There is old authority for saying that a jury is entitled to consider not only what the plaintiff ought to receive but what the defendant ought to pay. Further, although the plaintiff's hurt feelings, as distinct from his loss of reputation, are not the primary object of compensation, damages may still be given for them once it has been shown that some reputation has been lost. As Tennyson put it in 'Locksley Hall':

But the jingling of the guinea helps the hurt that Honour feels.

Generally, however, the plaintiff wants more than guineas — he wants guineas which are paid by the defendant. Most plaintiffs would feel vaguely aggrieved if some benevolent friend of the

defendant rather than the defendant himself paid the sum awarded. The House of Lords has recognized this human weakness. It has said that the damages awarded to a plaintiff by a judge sitting alone should not be reduced by reason of the fact that the judge unlike a jury has been able in his judgment to say pleasant things about the plaintiff or hard things about the defendant. Compliments even from the bench are no substitute for cash.

The latitude which the law allows to juries in their assessment is remarkable. The vagueness which surrounds the whole subject is well shown by a case in which the Court of Appeal ordered a new trial on the ground that the award of £1,000 was excessive. It was claimed that the jury has been annoyed by the attitude of the defendants and in particular by the way in which their counsel, F. E. Smith, K.C., had conducted their case. Lord Justice Hamilton said:

> Still, in my opinion by no formula or manipulation can £1,000 be got at. For any damage really done, £100 was quite enough; double it for the sympathy; double it again for the jury's sense of the defendants' conduct, and again for their sense of Mr. F. E. Smith's. The product is only £800.[1]

One incidental result of this liberty enjoyed by juries is that the Court of Appeal is or was very reluctant to order a new trial on damages, for what is it to do if the second jury awards a sum similar to that given by the first? Even when the Court thinks that the award is manifestly excessive, it cannot substitute its own figure for the jury's, as it can in actions for personal injuries. It must order a new trial.

Recent cases have stressed the need for two virtues — moderation, and uniformity. Moderation has been emphasized in a number of cases involving newspaper defendants — in particular, *Lewis* v. *Daily Telegraph*[2] in which the House of Lords set aside awards totalling £217,000. There is a curious paradox here. In the eighteenth century it was juries who were anxious to maintain the freedom of the Press and judges who were anxious to restrict it. In the twentieth century it is the jury which seems determined to make the Press pay heavily for libel, and judges who are anxious to keep awards within limits.

[1] [1913] 3 K.B. 764.
[2] [1964] A.C. 234.

Uniformity has two aspects. First, the Court of Appeal has tried to ensure that awards in libel cases are roughly comparable to those in personal injury cases. The law has not, it has been asserted, got a different scale of values for reputations and for limbs. So that if for loss of a limb £10,000 was awarded, which would be roughly the current scale, it would need a serious attack on the plaintiff's reputation before a similar award was permissible in a libel case. This sounds attractive. Everybody likes to feel that like cases are being treated alike. But this attempt at uniformity makes the assumption that the legal scale of values for personal injuries is itself correct. Many people would question this and argue that the scale is too low.

Secondly, the courts now stress the fact that damages are intended only to compensate the plaintiff for that which he has lost. So in the field of personal injuries this has produced a series of cases holding that the plaintiff is not entitled to collateral benefits or windfalls: they must be deducted from any damages awarded. So it is logical for the law to exclude the largest windfall of all — punitive or exemplary damages, for they are frankly given not to compensate the plaintiff but in order to punish the defendant and to deter him and others of like mind from committing similar conduct in the future.

This is a topic on which judicial opinions have varied in an interesting way. In *Loudon* v. *Ryder*[1] Lord Devlin, then Devlin J., of the Queen's Bench Division, told a jury in an action for assault and trespass that they were entitled to award a sum which would not only compensate the plaintiff, a young lady, for an unpleasant experience, but also punish the defendant for his disgraceful and outrageous invasion of the plaintiff's privacy. The jury accepted the invitation and returned a verdict for £5,500, of which £3,000 was specifically stated to be punitive damages. The Court of Appeal, after some hesitation, refused to interfere. There was certainly some authority to support such awards in cases of trespass and assault. In such a case in 1814 Gibbs C.J., asked, 'I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages'?[2] Perhaps that has a rather

[1] [1953] 2 Q.B. 202.
[2] *Merest* v. *Harvey* (1814) 5 Taunt. 442.

old-fashioned sound today. In *Loudon* v. *Ryder* a bystander told the defendant that 'he had no business to be doing things like that in England', and this remark was quoted approvingly by Denning L.J., in the Court of Appeal. But it is a curious fact that although the textbooks all assume that punitive damages may be awarded in libel there is no clear reported decision, as distinct from emphatic dicta,[1] to this effect. Perhaps the nearest decision is *Youssoupoff* v. *M.G.M. Ltd*,[2] in which the Court of Appeal upheld an award of £25,000 against the defendant company for a cruel and widely circulated libel. The Court said that the jury were entitled to take into account the fact that the defendants had expressly refused to withdraw the film pending trial on the ground that if they did so they might lose profits amounting to £40,000. Such an award reminds one of a rather rhetorical passage in an American decision:

> If the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict that these great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences called corporations; and that is, the pocket of the money power that is concealed behind them; and if that is reached they will wince.[3]

But in 1964 in the famous trade union case of *Rookes* v. *Barnard*[4] Lord Devlin took a different view and the other four Law Lords agreed with him. Lord Devlin thought it was wrong for the defendant to be obliged to pay a sum equivalent to, or perhaps much greater than, a fine in a criminal case without any of the protection afforded by the special procedure of the criminal courts. It was also wrong that such a sum should go as a windfall to the plaintiff. It was beyond the power of the Law Lords to abolish punitive damages entirely, but they said that in future they should be limited to two classes of case at common law — when there was unconstitutional action by servants of the government, or when the action of the defendant was calculated to make a profit for himself which would exceed any damages a court might order him to pay to the plaintiff.

[1] *Ley* v. *Hamilton* (1935) 153 L.T. 384, 386.
[2] [1934] 50 T.L.R. 581.
[3] *Goddard* v. *Grand Trunk Ry. of Canada* 7 Me. 202 (1867).
[4] [1964] A.C. 1129.

It will be seen that this distinguishes between two cases — the first emphasizes mainly the defendant's position, the second more the nature or quality of his conduct. This is not the occasion to discuss the value of this distinction, or even to wonder whether the whole attempt to delimit the scope of punitive damages is not mistaken. But it is clear that the Lords have at least conceded that there may still be cases in which the defendant may have to be hit really hard in his bank balance in order to show him that he should not do things like that in England. I wish merely to discuss the narrower question, when are such damages permissible in libel?

It is, I suppose, possible that a disgraceful libel might be published by a servant of the government so as to fall within the first category, but such cases are so rare that they may be ignored. But what is the position of a newspaper whose circulation increases after it has published a libel on some well-known person? Is it to be at risk for punitive damages, as one, rather literal, interpretation, might suggest. The question has been discussed in three cases since 1963 — *McCarey* v. *Associated Press*,[1] *Broadway Approvals Ltd* v. *Odhams Press Ltd*[2] and *Manson* v. *Associated Newspapers Ltd*[3] — the first two in the Court of Appeal, and the third at first instance before Widgery J. These cases make two points plain. First, the mere fact that circulation increases after a libel will not imperil a newspaper's position. Punitive damages should be awarded only if there is real evidence of a wicked and callous attempt to increase circulation at the cost of the plaintiff's reputation. In *Manson* the judge said that 'a cold and cynical calculation of profit and loss was required'. This seems to go further than Lord Devlin himself, and to impose a very heavy burden of proof on a plaintiff. Indeed, the evidence which is available about the workings of Fleet Street suggests that careful calculations are not much favoured: rough and ready approximations are rather the order of the day.

Secondly, a distinction must be drawn between aggravated compensatory damages on the one hand and punitive damages on the other. Compensatory damages may be inflamed or aggravated

[1] [1965] 2 Q.B. 86.
[2] [1965] 1 W.L.R. 805.
[3] [1965] 1 W.L.R. 1038.

by the wounding and insulting circumstances surrounding the publication of the libel. But the jury is not now entitled, save in the two exceptional cases, to add an additional slice of money on top of the compensatory amount in order to punish the defendant. As it was put in one sentence by Davies L.J., in *Broadway Approvals*,[1] there is a difference between conduct which shocks or wounds the plaintiff and conduct which shocks the jury.

Now if the power to award aggravated compensatory damages is combined with the old principle that a jury's award is within very wide limits unquestionable it may be thought that there is not really much room left for punitive damages anyway. That is what Lord Devlin himself thought in 1964. But this assumption has been seriously weakened by these more recent cases which also display a determination to equate awards for libel with those for personal injuries. Now if the maximum award for libel in future is to be in the £20–30 thousand bracket, which is roughly the maximum for serious personal injuries, then it must be asked whether this sum is sufficient to deter an arrogant and powerful defendant. May there not be newspapers which are making money so fast, or even losing it so quickly, that no ordinary commercial calculations are relevant to their decision to publish a gross libel on some public figure?

The whole matter has been discussed in an interesting recent case in the High Court of Australia, *Uren* v. *John Fairfax & Sons Pty Ltd.*[2] The plaintiff was a Federal M.P. in Australia. He sued two newspapers, the *Sun-Herald* and the *Sunday Telegraph*, for libel. In each newspaper the alleged libel was given great prominence. It was an allegation that the plaintiff had some link with a well-known Russian spy, and had been duped by that spy to ask parliamentary questions about defence establishments. The allegation was not merely quite untrue but had been published recklessly and arrogantly. The defendants did not contest liability but fought the case purely on damages. The trial judge told the jury that they were entitled to award punitive damages. The jury returned with a verdict for £13,000, no distinction being made in that total sum between compensatory and punitive damages.

[1] [1965] 1 W.L.R. 805, 822.
[2] (1966) 40 A.L.J.R. 124.

In a second action, Uren sued two more newspapers for four more distinct libels. The appeal in the second action was heard at the same time as the appeal in the first action. Two of the four libels in the second action simply repeated the allegation made by the *Sun-Herald* in the first action that the plaintiff had links with a spy. On these counts the jury awarded the plaintiff £15,000. The other two libels were quite different. One alleged that the plaintiff was one of a 'divided, warring, rag-tag and bob-tail outfit' which 'would have difficulty in running a raffle for a duck in a hotel on a Saturday afternoon, let alone running a country'. The jury's award of £5,000 for this was set aside on appeal as absurdly excessive. The fourth libel commented on the plaintiff's parliamentary record and suggested that in some way he was pro-communist. The jury's award of £10,000 for this was also set aside as extravagant.

The real question in both appeals was the award of punitive damages for the two libels alleging contacts with a spy, for which the plaintiff had received £13,000 and £15,000 respectively. The High Court of Australia unanimously refused to follow Lord Devlin's opinion in *Rookes* v. *Barnard*. It held that in Australia punitive damages might properly be awarded when there had been an insolent vindictive, outrageous or high-handed disregard of the plaintiff's rights. ('Contumelious' was the particular adjective favoured by the Court.) On the other hand, the Court held, though with two dissentients, that in neither action were the circumstances such as to entitle the jury to award punitive as distinct from compensatory damages. The Court's disagreement with Lord Devlin was at bottom based on the simple ground that it was hard to see why the law should treat more favourably libels published with the utmost spite, arrogance and ill will than those published after a cold-blooded calculation of the likely profit to be gained from them. Many people will find this persuasive. There are well-known examples of men in public positions being harried or hounded by a newspaper in a way which strongly suggests spite or malice on the part of the owner or editor of the paper. It is true that the Press Council (of which, by a coincidence, Lord Devlin became chairman when he retired from the bench) will discourage conduct of this kind. But an arrogant newspaper might disregard the Press Council. Now until recently

it would have been unthinkable for the High Court of Australia not to have followed a decision of the House of Lords. But the Court has achieved a remarkable reputation throughout the world for the depth of learning and analytical skill displayed in its judgments, in particular in those of Sir Owen Dixon the recently retired Chief Justice. In some indefinable way, an Australian judgment gives the reader the feeling that the last word on the subject has been said for a generation.

In March 1967 the Court of Appeal delivered a judgment[1] that illustrates vividly the difference between the English and the Australian approach. The Plaintiff, Mr Harold Fielding, was a well-known impressario. Mr Fielding and the Company which he controlled produced a very successful musical, 'Charlie Girl'. The box office receipts were an all-time record for the theatre. The Defendants who knew these facts nevertheless published in their theatrical weekly *Variety*, that has a world-wide circulation, a statement that 'Charlie Girl' was a 'disastrous flop'. When Mr Fielding protested the Editor roared with laughter and said 'It's nothing, Fielding'. The paper never apologized. When Mr Fielding and his Company sued, the paper did not even take the trouble to defend the action on the issue of liability. With judicial restraint Lord Denning said the paper 'had behaved very badly indeed'. What damages should a defendant like this be made to pay?

This question had to be answered in the Fielding case, not by a jury of laymen but by a Queen's Bench Master, of very great experience and ability. (A Master might be described as a subordinate Judge.) He awarded Mr Fielding £5,000 and his Company £10,000. The Court of Appeal after referring to the difference between *Rookes* v. *Barnard* and *Uren* v. *Fairfax* decided it must reduce the awards to a total of £1,600, a cut of nearly 90 per cent.

More recently the Court of Appeal has reviewed the whole topic of exemplary damages in *Broome* v. *Cassell and Co. Ltd. and Irving*.[2] The second defendant, David Irving, described by Phillimore, L.J., as 'a grasping, conceited and foolish young man', wrote,

[1] [1967] 2 Q.B. 841.
[2] [1971] 2 Q.B. 354.

and the first defendants published, a book entitled *The Destruction of Convoy P.Q. 17*. The book contained the gravest libels on the plaintiff, a retired naval offer, accusing him of cowardice and disobedience to orders when he had been in command of the convoy. The defendants did not go into the witness box, and did not attempt to justify the really serious parts of the libel. After the first defendants had been served with a writ for libel in respect of the distribution of 60 proof copies they released the hard-back edition to the public. Lord Justice Salmon said: 'It seems obvious to me that they took the risk with their eyes open, judging that they would make more money out of the book than the money which any libel action would be likely to cost them.'

The Court of Appeal held that under the rules laid down by Lord Devlin the jury were entitled to award the plaintiff £40,000 damages, made up of £15,000 compensatory, and £25,000 exemplary, damages. But the Court also said that the rules in *Rookes* v. *Barnard* gave rise to so many difficulties that the decision itself should not be followed. The question whether the Court of Appeal can, or should, make such a pronouncement about a decision of the House of Lords is now itself under appeal to the House.

Moon-night

Translation from *Tu Fu* (Ch'ang-an, Fall, 756)

Moon of tonight upon Fu Chou
In the women's quarters she watches alone,
Far away, I pity the small boy, and the girls
Who do not know or remember the Capital —
In a sweet mist her hair-clouds moisten
In the pure glitter her jade arms are chill
When shall we leaning by the curtained void
Shine on each other, our tear-streaks dry?

DAVID LATTIMORE