"JURY AWARDS OF DAMAGES IN DEFAMATION ACTIONS ARE SOMETHING OF A LOTTERY"

Costs cover
for 'no
win, no fee'
libel cases

LIBEL claimants who sue under "no win, no fee" deals can now have insurance to cover legal costs if they lose. Two insurance schemes were

1999

Libel
for su

A LEADING Westcountry consultant surgeon was in jubilant mood yesterday

TV code on adverts set to be eas

ITN

Mr Rahar

A critical evaluation of the role of the jury in defamation trials: It is time to move towards trial by judge alone, and remove the unnecessary unpredictability of jury trial in defamation cases. This dissertation attempts to devise an improved scheme of assessing damages in defamation.

Abstract

The main aim of defamation is to offer protection of reputations. A claimant who wins his brought action for defamation is entitled to an award of damages. Subject to guidance and directions of the judge, the jury is charged with determining all matters relating to the assessment of damages. The aim of this paper is to assess the propriety of the jury's role in assessing, and quantifying, compensatory and exemplary damages. The Jury's assessment of these damages bears no logical or rational explanation. It is well recognized that awards made by the jury in defamation trials are excessive. The unpredictability involved with jury awards has lowered the effect of many libel award payouts, tantamount to that of a lottery. The extortionate levels of damages awarded have cast a "chilling effect" on both political and public debate. Judicial and statutory developments have however shown a discernible transition in this area. However, despite these judicial and statutory developments, the unpredictability still remains and reform of the law has still been deemed to be necessary. Consequently the only practicable solution would appear to be for the legislature to usurp the jury's role of assessing and quantifying damages in libel actions.

Table of Cases

1. ***Aitken** v. **Preston And Others*** [1997] E.M.L.R 415
2. ***Attorney General** v. **Guardian Newspapers Ltd (No. 2)*** [1990] 1 AC 109
3. ***Beta Construction Ltd** v. **Channel Four Television Co Ltd*** [1990] 1 W.L.R. 1042
4. ***Blackshaw** v. **Lord*** [1984] Q.B. 1
5. ***Broome** v. **Cassell & Co Ltd (No.1)*** [1972] A.C. 1027 at 1071
6. ***Campell** v. **News Group Newspapers Ltd and another*** [2002] EWCA Civ 1143
7. ***Davis & Sons** v. **Shepstone*** (1886) L.R. 11 App. Cas. 187
8. ***Derbyshire County Council** v. **Times Newspapers Ltd*** [1993] A.C. 534
9. ***Downtex Plc** v. **Flatley (Damages)*** [2004] EWHC 333
10. ***Gee** v. **BBC*** Times, November 26, 1984
11. ***Goldsmith** v. **Pressdram*** [1988] 1 WLR 64
12. ***Gorman** v. **Mudd*** (unreported) 15 October 1992; CA (Civil Division) Transcript No 1076 of 1992
13. ***Green** v. **Times Newspapers Ltd*** 2001 WL 98032
14. ***Grobbelaar** v. **News Group Newspapers Ltd*** [2003] E.M.L.R. 1
15. ***Houston v. Smith*** (unreported) 16 December 1993; Court of Appeal (Civil Division) Transcript No 1544
16. ***Jimmy Nail** v. **News of the World*** [1997] E.M.L.R. 233
17. ***John** v. **MGN Ltd*** [1997] QB 586
18. ***Jones** v. **Pollard and others*** [1997] EMLR 233
19. ***Kiam** v. **MGN Ltd*** [2003] Q.B. 281
20. ***Kiam** v. **Neil*** [1996] EMLR 493
21. ***Lewis** v. **Daily Telegraph Ltd.*** [1963] 1 Q.B. 340
22. ***Maxwell** v. **Pressdram Ltd*** [1987] 1 W.L.R. 298
23. ***McCarey** v. **Associated Newspapers Ltd.*** (No. 2) [1965] 2 Q.B. 86
24. ***Monson** v. **Tussauds*** [1894] 1 Q.B. 671
25. ***Pamplin** v. **Express Newspapers Ltd*** [1988] 1 WLR 116
26. ***Praed** v. **Graham*** (1889) 24 Q.B.D. 53, 55
27. ***R**. v. **Cawthorne*** [1996] 2 Cr App R (S) 445
28. ***Rantzen** v. **Mirror Group Newspapers*** [1994] Q.B. 670
29. ***Riches** v. **News Group Newspapers Ltd*** [1986] QB 256
30. ***Roache** v. **News Group*** [1998] EMLR 161
31. ***Rookes** v. **Barnard*** [1964] AC 1129
32. ***Rothermere** v. **Times Newspapers Ltd*** [1973] 1 All ER 1013
33. ***Schellenberg** v. **BBC*** [2000] EMLR 296
34. ***Sim** v. **Stretch*** [1936] 2 All ER 1237
35. ***Smith** v. **Houston***, Unreported, December 14, 1993, CA
36. ***Suttcliffe** v. **Pressdram*** [1991] 1 Q.B. 153
37. ***Taylor** v. **Anderton*** [1995] 1 WLR 447
38. ***Walker Wingsails Systems** v. **Yachting World*** (unreported)
39. ***Ward** v. **James*** [1966] 1 Q.B. 273

Table of Foreign Cases

1. ***Carson** v. **John Fairfax & Sons Ltd*** (1993) 178 CLR 44
2. ***Uren** v. **John Fairfax & Sons Pty Ltd*** (1996) 117 CLR 118

Table of ECHR Cases

1. ***Tolstoy Miloslavsky** v. **United Kingdom*** [1995] 20 E.H.R.R. 442
2. ***Sunday Times** v. **United Kingdom*** [1979] 2 E.H.R.R. 245

Table of Statutes

Table of Foreign Statutes

Conventions

Contents

1

Introduction

1.1 Defamation: Libel and Slander

The main aim of defamation is to offer the protection of reputations.[1] There is no statutory definition of defamation, but in common law a defamatory statement is one which injures the claimants reputation by exposing him to hatred, ridicule or contempt, or which tends to lower him in the esteem of right-thinking members of society.[2] The two forms of defamation are libel and slander. The distinction (which is not important for the purposes of this study) hangs on permanence of the statement. The spoken word is generally slander and libel is defamation in permanent form i.e. writing, pictures or even a waxwork figure.[3] The tort of defamation is something of an oddity among torts. It is usually tried in the High Court with a jury. It is the role of the jury to determine matters of fact and level of damages. "*The assessment of damages is peculiarly the province of the jury in an action for libel*."[4]

1.2 General Damages

The term damages describes the payment of money by the defendant to claimant to remedy a wrong committed. The difficulty here however is that a claimants reputation has no cash value, so the court has to form its own estimation of the harm caused to it. The actual pecuniary loss suffered by a claimant is called "*special damage*";[5] all other damages are "*general damages*". A claimant, who wins his brought action for defamation, is entitled to an award of general damages.[6] General damages can be broken down into subcategories.

A jury can award *contemptuous damages*. This is an award of "*the smallest coin in the realm*" (presumably a penny) when the jury are of the view the action brought was "*utterly trivial*" and should not have been brought.[7] An award for *nominal damages* of a few pounds can be awarded. Such damages are awarded when the jury has concluded that although a wrong has been

[1] Jones, Michael, A., *Textbook on Torts*, Seventh Edition, (Oxford: OUP, 2000), ch 13, p495
[2] ***Sim** v. **Stretch*** [1936] 2 All ER 1237, at p.1240, per Lord Atkin
[3] ***Monson** v. **Tussauds*** [1894] 1 Q.B. 671
[4] *Per curiam* in ***Davis & Sons** v. **Shepstone*** (1886) L.R. 11 App. Cas. 187
[5] Special damages can be recovered if the claimant can prove the not actionable slander caused him actual loss.
[6] Price and Duodu, *Defamation Law, Procedure & Practice*, (3rd Edn.), (London: Sweet & Maxwell, 2004), at 20-02, p. 206
[7] Carter, Ruck, Walker and Starte, *Carter-Ruck on Libel and Slander*, (4th edn.), (London: Butterworths, 1992), p.167

committed, no real harm has come about as a consequence. Moreover, *compensatory damages* can be awarded and are intended to vindicate the claimant's reputation,[8] and to compensate him for the injury to his character,[9] that has been caused by the defamation.

A further subcategory, which allows the jury to increase compensatory damages to some extent, is referred to as *aggravated damages*. This is intended to compensate the claimant for the injury to his feelings and sense of affront and indignation caused by the publication of the defamation. This may be aggravated by the high handed or oppressive conduct of the defendant. However, it is important to bear in mind that these damages are supposed to be measured according to the hurt caused to the plaintiff and are in no sense to be treated as a means of punishing the defendant. The jury is required to award a single sum, taking into account both forms of compensation.

Lastly *exemplary damages* are from time to time awarded in addition to compensatory and aggravated damages. Defamation is one of the few compensatory jurisdictions, which introduces an entirely penal element. The purpose of exemplary damages is to punish the defendant and to teach him that '*tort does not pay*'. [10] Exemplary damages in defamation are likely to be awarded "*where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out for his wrong doing* [defamatory statement] *will probably exceed the damages at risk*".[11]

1.3 Factors in the jury assessment of compensatory damages

Compensatory damages should be "*proportionate to the damage which the plaintiff has suffered*" and no greater than what is "*necessary to…provide adequate compensation and to re-establish his reputation*".[12] However, compensation in defamation is a far more complex issue than in other tortuous actions, (such as for injury to person for negligence), because of the subjective element involved. There can never be any "*precise correlation*" between a damaged reputation and a sum of money. [13]

---

[8] Per Windeyer J in ***Uren v. John Fairfax & Sons Pty Ltd***(1996) 117 CLR 118 at 150, approved by Lord Hailsham LC in ***Broome v. Cassell & Co Ltd (No.1)*** [1972] A.C. 1027 at 1071
[9] Per Lord Hailsham L.C., *Ibid.*
[10] ***Rookes v. Barnard*** [1964] AC 1129, 1227, *per* Lord Devlin, quoted with approval by Lord Diplock in ***Broome v. Cassell*** [1972] AC 1027, 1130D.
[11] Lord Hailsham of Marylebone L.C. in ***Broome v. Cassell*** [1972] A.C. 1027 at 1078 explaining Lord Devlin's formulation in ***Rookes v. Barnard*** [1964] AC 1129 at 1227
[12] ***Rantzen v. Mirror Group Newspapers*** [1994] Q.B. 670 at 696A.
[13] Price and Duodu, *Defamation Law, Procedure & Practice*, (3rd Edn.), (London: Sweet & Maxwell, 2004), at 20-02, p. 206

> "*Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not only can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date,* [the claimant] *must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge.*"[14]

Furthermore, as Windeyer J pointed out in the Australian case of ***Uren** v. **John Fairfax & Sons Pty Ltd***:

> "*…compensation by damages operates in two ways - as a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money*".[15]

This is doubtful reasoning because an excessive sum awarded, as compensatory damages to a claimant cannot be justified as merely comfort money for the wrongs suffered. Furthermore this will raise concern when one considers the notably lower level of damages awarded in other tortuous actions (i.e. personal injury claims).

It must be borne in mind that the concept of vindication is one that is unique to defamation actions. The theory is that an award of damages can reverse part of the harm done by a defamatory statement. A claimant can point to the sum awarded as a demonstration to the world at large that the allegations were unfounded – or as is commonly said, "*the damages nail the lie*", "*they said I was a crook and the jury gave me £100,000, which proves it was false*."[16] The more serious the allegations and the wider the publication, demands a greater sum, necessary to vindicate the claimant. In the case of ***Tolstoy Miloslavsky** v. **United Kingdom***[17], it was argued the record sum of £1.5 million in compensatory damages awarded to Lord Aldington, was to vindicate his reputation. Arguably, in reality the objective of totally vindicating a reputation is hardly ever achieved.

[14] ***Broome** v. **Cassell & Co Ltd (No.1)*** [1972] A.C. 1027 at 1071 per Lord Hailsham LC
[15] (1966) 117 CLR 118 at p. 150
[16] Price and Duodu, *Defamation Law, Procedure & Practice*, (3rd Edn.), (London: Sweet & Maxwell, 2004), at 20-03, p. 207
[17] (1995) 20 E.H.R.R. 442

1.4 The quantum of damages

How much money is necessary to demonstrate the falsity of an allegation, for example in a newspaper? Although principles regarding the judges' direction to juries have been set out, the former stance was firmly against drawing any comparisons between any personal injury awards and damages awarded in libel actions. The well-established rules against giving juries any guidance on the appropriate level of damages were expressed in the case of ***Broome** v. **Cassell & Co Ltd***, where it was asserted "[w]*hat is awarded is thus a figure which cannot be arrived at by any purely objective computation*".[18] However following concerns over excessive jury awards, the last twenty years has seen a steady progression aimed at containing the capacity of juries to be over generous with the defendants' money.

1.5 The central theme and scope of this paper

The aim of this paper is to assess the propriety of the jury's role in assessing, and quantifying, compensatory and exemplary damages. It is essential that reasoned, consistent and proportionate damages be awarded. However, it shall be argued that this is impossible to achieve if, as at present, the jury is to continue to have the task of deciding the quantum of damages. It shall be proposed that the judge alone ought to be responsible for determining the quantum of both exemplary and compensatory damages. Although recent judicial and legislative developments have done much to clarify the **irregularity of inflated awards of damages made by juries,** statutory reform is widely agreed to be essential. As Lord Justice Stephenson stated in ***Riches** v. **News Group Newspapers Ltd***, the present state of the law "…*creates a state of affairs which cries aloud…for Parliamentary intervention*".[19]

It is well recognized that awards made by the jury in defamation trials are excessive.[20] There is no profound justification why reputations should be valued at sums higher than judicial awards for personal injuries or assessments made by the *Criminal Injuries Compensation Board*. As one commentator has accurately remarked "*sticks and stones may break my bones, but names can make me rich*".[21] Certainly in the last twenty years, awards of damages made by the jury have been wildly disproportionate to the conceivably damage suffered by claimants.

---

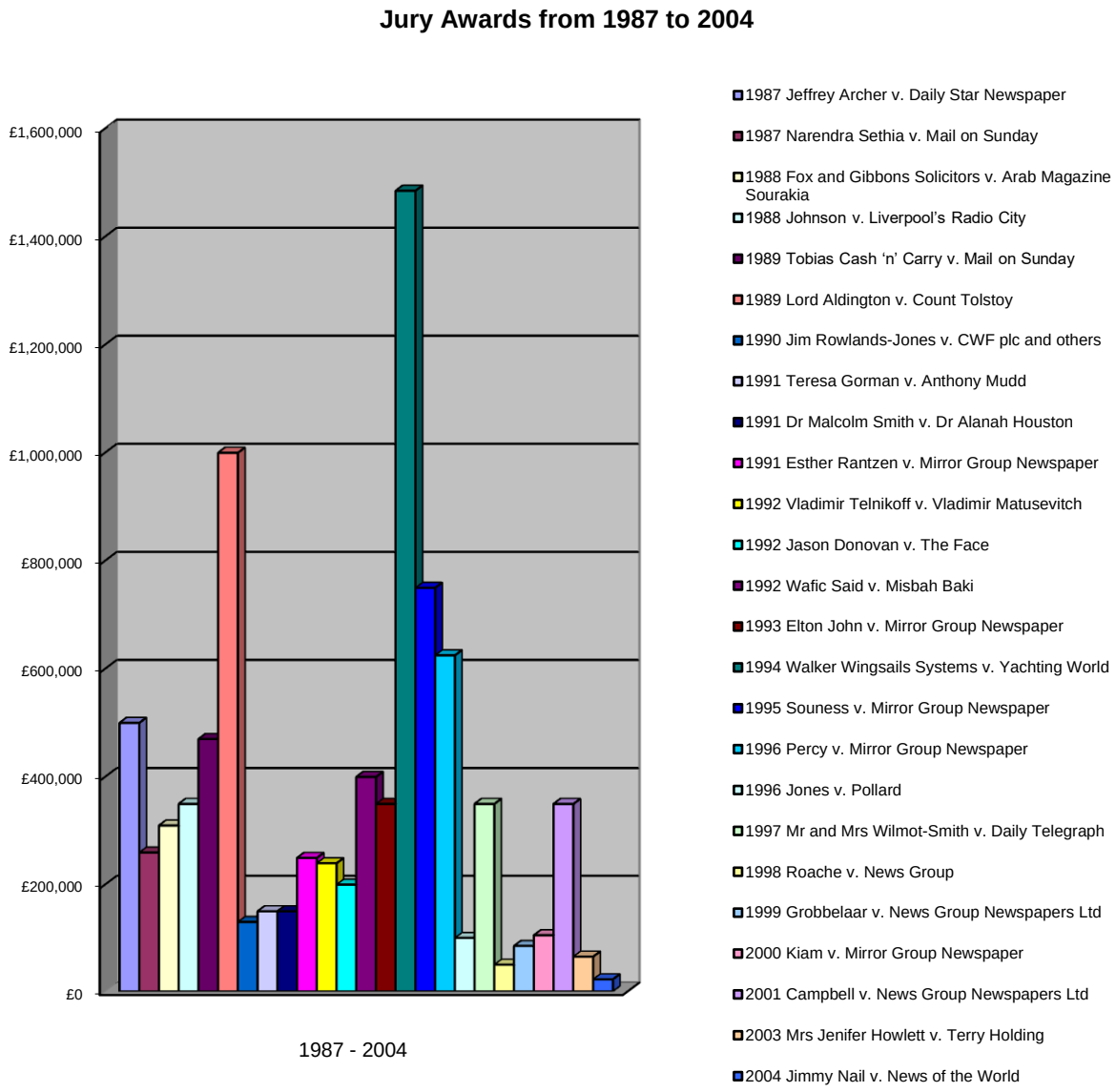
[18] [1972] A.C. 1027 at 1071 per Lord Hailsham LC
[19] [1986] QB 256 at 269
[20] *The English Law Web Site of Asif Tufal,* Defamation Notes on www. lawteacher.net at http://www.lawteacher.net/Tort/Defamation/Defamation%20Lecture.htm
[21] Platt, Steve, 'Would you sue your paper boy?', *New Statesman & Society*, 12 March 1993 at http://www.steveplatt.net/archive/newstatesman/johnmajor/majorpaperboy.htm

Table 1: This table shows an assorted sample of jury awards from 1987 to 2004. However, these figures were the initial awards made by juries, which were subsequently settled for, or reduced on appeal to lower sums. The figures in Table 1 are used and shown here to illustrate the initial excessiveness of the jury awards.

Year	**Cases** *(Claimant) awarded damaged against (Defendant)*	**Damages Awarded**
1987	Jeffrey Archer v. *Daily Star Newspaper*[22]	£500,000
1987	Narendra Sethia v. *Mail on Sunday* [23]	£260,000
1988	Fox and Gibbons Solicitors v. Arab Magazine *Sourakia*[24]	£310,000
1988	Johnson v. *Liverpool's Radio City*[25]	£350,000
1989	Tobias Cash 'n' Carry v. *Mail on Sunday*[26]	£470,000
1989	Lord Aldington v. Count Tolstoy[27]	£1,000,000
1990	Jim Rowlands-Jones v. City and Westminster Financial Plc and others[28]	£130,000
1991	Teresa Gorman v. Anthony Mudd[29]	£150,000
1991	Dr Malcolm Smith v. Dr Alanah Houston[30]	£150,000
1991	Esther Rantzen v. *Mirror Group Newspaper*[31]	£250,000
1992	Vladimir Telnikoff v. Vladimir Matusevitch[32]	£240,000
1992	Jason Donovan v. *The Face*[33]	£200,000
1992	Wafic Said v. Misbah Baki[34]	£400,000
1993	Elton John v. *Mirror Group Newspaper*[35]	£350,000
1994	Walker Wingsails Systems v. Yachting World[36]	£1,485,000
1995	Souness v. *Mirror Group Newspaper*[37]	£750,000
1996	Percy v. *Mirror Group Newspaper*[38]	£625,000
1996	Jones v. Pollard[39]	£100,000
1997	Mr and Mrs Wilmot-Smith v. *Daily Telegraph*[40]	£350,000
1998	Roache v. *News Group*[41]	£50,000
1999	Grobbelaar v. *News Group Newspapers Ltd*[42]	£85,000
2000	Kiam v. *Mirror Group Newspaper* [43]	£105,000
2001	Campbell v. *News Group Newspapers Ltd*[44]	£350,000
2003	Mrs Jenifer Howlett v. Terry Holding[45]	£65,000
2004	Jimmy Nail v. *News of the World*[46]	£22,500

[22] Rawnsley, Andrew, 'Archer wins record £500,000 damages', Saturday July 25, 1987**,** Guardian Unlimited, at http://www.guardian.co.uk/archer/article/0,2763,522734,00.html
[23] Hooper, David, Reputations Under Fire, Winners and Losers in the Libel Business, (London: Little Brown Company, 2000), at p.300
[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.*
[27] ***Tolstoy Miloslavsky** v. **United Kingdom*** (1995) 20 EHRR 442
[28] Price and Duodu, *Defamation Law, Procedure & Practice*, (3rd Edn.), (London: Sweet & Maxwell, 2004), at Appendix 3, p. 579
[29] ***Gorman** v. **Mudd*** (unreported) 15 October 1992; Court of Appeal (Civil Division) Transcript No 1076 of 1992
[30] ***Houston** v. **Smith*** (unreported) 16 December 1993; Court of Appeal (Civil Division) Transcript No 1544 of 1993
[31] ***Rantzen** v. **Mirror Group Newspapers*** (1986) Ltd [1994] QB 670
[32] Hooper, *opt. cit.*, at p.300
[33] Price and Duodu, *Opt cit.*, at Appendix 3, p. 579
[34] Hooper, *opt. cit.*, at p.300
[35] ***John** v. **MGN Ltd*** [1997] QB 586
[36] ***Walker Wingsails Systems** v. **Yachting World*** (unreported).
[37] Hooper, *opt. cit.*, at p.300
[38] *Ibid.*
[39] [1997] E.M.L.R. 233
[40] Hooper, *opt. cit.*, at p.300
[41] ***Roache** v. **News Group*** [1998] EMLR 161
[42] ***Grobbelaar** v. **News Group Newspapers Ltd*** [2003] E.M.L.R. 1

Figure 1: This is a graphical representation of the data contained in Table 1.



[43] ***Kiam** v. **MGN Ltd*** [2003] Q.B. 281
[44] [2002] E.M.L.R. 43
[45] Carter-Ruck Lawyers, 'Jury Awards Former Mayor £65,000 for Aeroplane Banner Libels' Cater-Ruck Article, December 2003/January 2004 Newsletter, at Carter-Ruck website http://www.carter-ruck.com/articles/2003-2004-Howlett.html
[46] [2004] E.M.L.R. 20

This disproportionate effect has given rise to serious and justified criticisms of the procedures that have lead to such awards. In ***Goldsmith** v. **Pressdram Ltd***[47] it was suggested that the emphasis should be against trial by jury in defamation cases.

> *''…There is now a considerable body of opinion among the senior judiciary that such matters should be taken away from juries… Juries are not now looked at with the same favour as a decade ago.''*[48]

Consequently a marked transition in the attitude of the judiciary has taken place. Judges have been more inclined to intervene in order to redress the damage caused to the defendant by excessive jury awards. The underlining justification for incorporating the jury in trials of defamation actions was to safeguard the freedom of speech of the press. Ironically, today it is the media who are most critical of the jury and their role in defamation actions.[49] The extortionate levels of damages awarded have cast a "*chilling effect*" on both political and public debate.[50]

1.6 Research Methodology

Most of the law regarding jury awarded damages in the context of defamation is in the form of primary source material, such as legislation and the common law. This study has drawn on specific provisions and principles from United Kingdom legislation and common law in determining its application. For example this research has used these to provide an insight into the jury's role in assessing damages, while discussing the judicial attempts to reduce the jury's role. Secondary source material such as articles and books written by commentators have served this study for it to promulgate how the area is perceived, and to extract differing views and opinions of the operations of the relevant law.[51] First and foremost all the primary and secondary source materials have been employed to help provide an understanding of the current state of the statute book and developments in the common law.

---

[47] ***Goldsmith** v. **Pressdram*** [1988] 1 WLR 64
[48] ***Goldsmith** v. **Pressdram*** [1988] 1 WLR 64. Per Lawton LJ
[49] Clarke-Williams, Jeremy and Skinner, Lorna, *A Practical Guide to Libel and Slander*, (London: Butterworths LexisNexis, 2003), p.9
[50] The "chilling effect" describes the fear that deters a publisher from publishing what may be the truth. Observed in ***Derbyshire County Council** v. **Times Newspapers Ltd*** [1993] AC 534at 548 DE, per Lord Keith of Kinked
[51] See Bibliography.

Furthermore, the Law Commission has produced several key reports (although not directly specific to the topic of damages in defamation).[52] Furthermore the *Faulks Committee*[53] and the *Working Group of the Supreme Court Procedure Committee* chaired by Neil L.J. have also produced reports on the practices and procedures in defamation.[54] This study has adopted a critical method of examining the different proposals that the above-mentioned reports have advanced. Through this critical evaluation this study has produced an original hybrid solution to assessing damages in defamation actions.

1.7 Structure of this paper

Chapter one of this dissertation has offered an introduction, which defines the areas of this study. A section in this chapter has been devoted to offering the reader an analysis of the different categories of general damages and how they apply to defamation jury awards. It further informs the reader of the theme and scope of the paper, which sets the discussion in context. Moreover this chapter has described the structure this dissertation will take and the issues to be visited.

Chapter two of this dissertation discusses the jury's role in assessing damages. It describes the Statutory right to jury assessment of compensatory and exemplary damages. In particular the right to a jury trial in civil proceedings as conferred by section 69 of the *Supreme Court Act 1981* and the circumstances in which the court may, in its discretion order the trial to be brought with or without a jury. Moreover, it examines the effect of section 8 of the *Defamation Act 1996* on the role of the jury and the power this gives the court to dispose of a defamation case summarily. Chapter two further goes on to present the problem, i.e. the unpredictability involved with jury awards that renders them something of a lottery. It argues and illustrates the cause of this unpredictability as being formerly established through procedural rules, these being: damages assessed "*at large*", the jury's subjectivity and discretion, judges and counsel previously being barred from recommending appropriate sums and the constraint on the Court of Appeal, from substituting excessive jury assessment for that of their own awards.

[52] Law commission, *How Much Is Enough?* (Law Com No 225, 1994); Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1995) Consultation Paper No 140; Law Commission Report, 'Aggravated, Exemplary and Restitutionary Damages', (Law Com No. 247, 1997); Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (Law Com No 257, 1999)
[53] Great Britain Committee on Defamation, *Report of the Committee on Defamation*, (London: HMSO, 1975), (Cmnd.; 5909), Chapter 17, [hereinafter Faulks Committee Report]
[54] Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* (July 1991)

This dissertation in chapter three visits the judiciary's attempts to harness the jury's role. The first part of the chapter examines the developments brought by the case of ***John** v. **MGN Ltd***.[55] This study has examined the state of the law from position prior to the case of ***John***, the impact this case brought and the developments subsequent to it. In particular this study critically examines the ability of parties to a defamation action to make submissions as to appropriate awards and the power the Court of Appeal now has to substitute jury awards of damages through section 8 of the *Courts and Legal Services Act 1990*. Section 8 has raised some ambiguity as to its construction for the courts and it will be argued "*damages in defamation cases will not as a result* [of s.8] *become any easier (bearing in mind all the subjective elements involved in assessing damages), although we can expected awards to be significantly lower*." This contention is supported through *Judicial Statistics* from 1998 to 2003.

Chapter four examines the effect of the Article 10 of the *Human Rights Act 1998*[56] and the court's modification of it previous approach in assessing jury awards. This paper will consider the case of ***Tolstoy Miloslavsky** v. **UK***[57] in which the jury awarded the record sum of £1.5 million damages, which combined with the deficit of adequate judicial safeguards violated freedom of expression under Article 10. Furthermore the case of ***Rantzen** v. **Mirror Group Newspapers Ltd***[58] will be considered in which Article 10 of the ECHR was applied. The Court of Appeal in this case determined that the jury should be given clear and precise guidance for the purposes of calculating damages. It will be argued the introduction of Article 10 has brought down the threshold for intervention for the courts. They appear more willing now (through Article 10) to allow restructuring to tackle the inadequacies of jury awards in defamation actions.

Chapter five will present some of the arguments and proposals for reforming of the jury's role in defamation actions, which were advanced in the various reports.[59] This study will adopt a critical method of examining the different proposals that have been advanced to provide a workable solution and address the problems and that have been highlighted in earlier chapters. The study

[55] [1997] QB 586
[56] Which incorporates the *European Convention for Human Rights 1950* (referred to as ECHR hereon) into domestic law.
[57] ***Tolstoy Miloslavsky** v. **United Kingdom*** (1995) 20 E.H.R.R. 442
[58] [1994] QB 670
[59] Great Britain Committee on Defamation, 'Report of the Committee on Defamation', (London: HMSO, 1975), (Cmnd.; 5909); Ireland The Law Reform Commission, *Report on the Civil Law of Defamation* (December 1991) at http://www.lawreform.ie/publications/data/volume10/lrc_67.html; Ireland, The Law Reform Commission *Consultation Paper on the Civil Law of Defamation* (Dublin, March 1991); Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1995) Consultation Paper No 140; Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (Law Com No 257, 1999); Law Commission Report, 'Aggravated, Exemplary and Restitutionary Damages', No. 247 (1997)

will evaluate the reform proposals, consultations and findings from these reports to offer a new and improved scheme of assessing damages in defamation.

This study in concluding its own reformulation will argue the most appropriate solution is that the judge alone ought to be responsible for assessing the quantum of damages for defamation, thus usurping the role of the jury in this area. This would mean the judge would decide the award of damages to be made and question of liability be left to the jury. The practical difficulties of separating the functions of the judge and jury have also been addressed, and it is maintained that these are workable. It is further proposed a tariff system ought to be set up through the judgements of the appellate court, in order to restrain the discretion of the judges. The reforms in New South Wales have been considered.[60] Sections 7A and 46A of the *Defamation Act 1984* (NSW) as inserted by the *Defamation (Amendment) Act 1994* (NSW) are examined and it is argued this presents a paradigm the United Kingdom can adopt. Chapter six will go on to conclude this study and offer a summary of the solutions and findings of this research.

2

The Jury's Role in Assessing Damages

2.1 Statutory right to jury assessment of compensatory and exemplary damages

The present right to a jury trial in civil proceedings is conferred by section 69 of the *Supreme Court Act 1981* which was first established by section 6(1) of the *Administration of Justice (Miscellaneous) Provisions Act 1933*. The jury is "*the constitutional tribunal*" charged with determining all factual matters related to liability.[61] Subject to guidance and directions of the judge, the jury is also charged with determining all matters relating to the assessment of damages. The jury trial is a distinctive feature of libel actions in England. This feature is something of an anomaly in civil proceedings in English Law. It dates back to the *Fox's Libel Act 1792*, when proceedings were criminal.[62] It is generally assumed that juries award higher damages than expected from a judge in defamation actions, thus claimants generally opt for jury trials whenever possible. This right to a trial by jury may have to be forfeited if the court or judge is of the

[60] New South Wales, Law Reform Commission, *Defamation* (LRC 11, NSW Government Printer 1971); New South Wales, Law Reform Commission, *Defamation* (DP 32, 1993); New South Wales, Parliament of New South Wales, Legislative Assembly, *Report of the Legislation Committee on the Defamation Bill, 1992* (October 1992)

[61] Gatley, *Gatley on Libel and Slander*, (9th edn.) (London: Sweet & Maxwell, 1997), p. 889 - 890

[62] Martin Nourse, 'The English Law of Defamation – Is Trial by Jury Still the Best?', in Markesinis B., S., (ed.), *The Clifford Chance Lectures*, Vol. I, *Bridging the Channel*, (Oxford: OUP, 1996), Chapter 4

opinion that the trial requires any prolonged examination of complex documents, which cannot conveniently be made with a jury.[63] Otherwise the court may in its discretion order the trial to be brought with or without a jury.

2.2 Judicial discretion to order a trial without a jury

The judicial discretion of whether to permit a jury trial is contingent on what has been termed the "*the efficient administration of justice*".[64] The court has to balance granting trial by jury where requested and with a realistic view about the material a jury can consider. In ***Rothermere** v. **Times Newspapers Ltd***,[65] the claimant's documents alone consisted of some 2033 items, many of which were exhaustive files with countless pages. Even so the Court of Appeal held that the defendant's application for trial by jury should be granted, because concerns of national importance relating to the conduct of major newspaper publishers was at stake. The decision in ***Goldsmith** v. **Pressdram Ltd***[66] has further highlighted that where a trial requires prolonged examination of documents, s.69 of the Supreme Court Act 1981 will create a presumption in favour of a trial by judge alone.[67] Only in rare cases of public importance will a judge exercise his discretion[68] to order trial by jury where lengthy consideration of documents would be involved. This was confirmed in the Court of Appeal case of ***Aitken** v. **Preston***,[69] where Lord Bingham C.J. echoed his observation in ***Taylor** v. **Anderton***[70] that the court would ordinarily require very persuasive reasons to order a jury trial when it had already been decided that such trial would be seriously *inconvenient*.

When deciding whether or not a trial by jury could be carried out "*conveniently*", Lord Bingham C.J. in ***Aitken** v. **Preston*** said that this meant "*without substantial difficulty in comparison with carrying out a trial by judge alone*".[71] The Court of Appeal identified several factors, which would have to be considered, for example: (a) the additional length of a jury trial as compared with a trial by judge alone; (b) the additional cost of a jury trial taking into account not only the length of the trial, but also the cost of, for example, additional copies of documents; (c) any practical difficulties which a trial by a jury would entail, such as the handling of particularly

[63] s.69(1) Supreme Court Act 1981
[64] Smith, Bailey & Gunn, Smith, Bailey & Gunn on the Modern Legal System, (4th edn.), (London: Sweet & Maxwell, 2002), p.1036
[65] [1973] 1 All ER 1013
[66] [1987] 3 All ER 485
[67] ***Gregson** v. **Channel Four Television Corp*** [2002] EWCA Civ 941
[68] By virtue of s. 69(3) Supreme Court Act 1981
[69] [1997] E.M.L.R 415
[70] [1995] 1 WLR 447
[71] [1997] E.M.L.R at page 421

bulky or inconvenient files, the need to examine documents alongside each other, and the degree of minute scrutiny of individual documents which will be required; (d) any special difficulties or complexities in the documents themselves.[72] This new principle was applied in ***Gee v. BBC***,[73] where the judge granted an application that the jury be discharged and the judge alone should continue the trial, after it had become evident that the documentary evidence was rapidly increasing. Hence, had the ***Rothermere*** been decided today it would probably have been decided differently through the application of this developed principle.

2.3 The Effect of section 8 of the Defamation Act 1996 on the role of the jury;

By virtue of s.8 of the *Defamation Act 1996*, judges can decide in some circumstances to dispose of a defamation case summarily, (this is without a jury trial). For instance, a judge may dismiss the claimant's case if it is hopeless, or give him summary relief if the defence has no '*realistic prospect of success*'.[74] Such relief would provide the claimant with adequate compensation.[75] But, the judge can only award up to £10,000 under this procedure.[76] It can be argued that this ceiling is too low to encourage frequent use of this procedure. Therefore it is likely that the s.8 provision will only be reserved for less serious cases.[77] Nevertheless the provision has certainly weakened the constitutional role of the jury by giving precedence to judicial and administrative efficiency.

2.4 The Lottery Effect of Jury Awards of Damages

The Jury's assessment of damages bears no logical or rational explanation. The unpredictability involved with jury awards has lowered the effect of many libel award payouts, tantamount to that of a lottery. The cause of this uncertainty that pervades the assessment of damages can be traced to a number of established procedural rules. Firstly, damages are assessed "*at large*" in the sense that they cannot be calculated with reference to any mechanical, arithmetical or objective formulae.[78] McHugh J dissenting in the Australian case of ***Carson v. John Fairfax & Sons Ltd*** said:

---

[72] [1997] E.M.L.R at page 421
[73] Times, November 26, 1984
[74] s.8(2) *Defamation Act 1996*
[75] s.8(3) *Defamation Act 1996*
[76] s.9(1)(c) *Defamation Act 1996*
[77] ***Downtex Plc v. Flatley (Damages)*** [2004] EWHC 333; ***Green v. Times Newspapers Ltd*** 2001 WL 98032; ***Beta Construction Ltd v. Channel Four Television Co Ltd*** [1990] 1 W.L.R. 1042
[78] ***Broome v. Cassell & Co Ltd (No.1)*** [1972] A.C. 1027 at 1071 per Lord Hailsham LC

> "*The rough & ready process by which juries assess damages in a defamation action is not one which appeals to the many sophisticated minds of the spreadsheet generation*."[79]

The uncertainty caused by the jury's subjectivity and discretion is further reinforced by the fact that juries are not required to give a reasoned explanation (like judges) as to why they have chosen to award a certain quantum of damages. Secondly, judges and counsel were barred from recommending any appropriate sums to give the jury some idea of the parameters within which they ought to base their awards. So the jury's discretion was unlimited and the only guide, which juries had, was their own recollections of awards in other actions.[80] The matters to which the trial judge could refer, in the summing up were strictly limited, and it was improper to refer to previous awards of the Court of Appeal on appeal from excessive jury awards. Third, no reference could be made to personal injury awards in order to calculate some sense of proportion between the damaged reputation and physical injuries. Finally, the other main cause for uncertainty prior to 1990 was the constraint on the power of the Court of Appeal, which disabled it from substituting excessive jury assessment of damages with sums they considered more appropriate. The courts' were formerly restricted to quashing an award and ordering a retrial. Lord Reid in ***Broome** v. **Cassell (No. 1)*** [81]stated:

> "[a]*ll that a reviewing court can do is to quash the jury's decision if it thinks the punishment awarded is more than any twelve reasonable men could award. The court cannot substitute its own award. The punishment must then be decided by another jury and if they too award heavy punishment the court is virtually powerless*."

Thus the court could only interfere with awards on the basis that no reasonable jury, properly directed, would have reached that conclusion. In ***Blackshaw** v. **Lord***,[82] Fox L.J. said that the Court of Appeal "*is not entitled to seize the matter from the jury and set aside the award merely because our opinion as to the proper amount of damages differs from that of the jury*".[83] In ***Suttcliffe** v. **Pressdram***[84], Lord Donaldson MR, whilst agreeing that a challenge to a jury's

[79] (1993) 178 CLR 44 at pp. 72-73
[80] Carter, Ruck, Walker and Starte, *Carter-Ruck on Libel and Slander*, (4th edn.), (London: Butterworths, 1992), p.169
[81] [1972] AC 1027, at 1087E-F
[82] [1984] Q.B. 1
[83] *Ibid.* at pp. 42-43
[84] [1991] 1 Q.B. 153 at p. 176

assessment of damages could only very rarely succeed, disagreed with Lord Stephenson's view expressed in ***Blackshaw** v. **Lord*** that the power to set aside the assessment is "*apparently obsolescent*".[85]

Judicial and statutory developments have however shown a discernible transition in this area. The abovementioned problems have been somewhat alleviated by the decision in the case of ***John** v. **MGN Ltd***.[86] This case extended the power of the judges, enabling them to give far more detailed guidance in their direction to juries by referring to "comparable" compensatory awards (for pain, suffering and loss of amenity) in personal injury cases, when assessing compensation for defamation.[87] Judges were also empowered, in combination with the respective counsels, to suggest workable sums of damages that in their opinion would be reasonable.[88] However, the juries are still given discretion (albeit to a more limited extent), to disregard guidance or figures suggested by counsel or judges. The Court of Appeal has also been given the power to either order a new trial on the grounds that damages awarded by a jury are excessive or inadequate or, to substitute its own award of damages for that of the jury when the sum awarded by the latter was excessive, without having to order a retrial.[89]

[85] [1984] Q.B. 1 at pp. 42-43
[86] [1997] Q.B. 586
[87] This was one of the Law Commission's recommendations in *Damages for Personal Injury: Non-Pecuniary Loss* (1995) Consultation Paper No 140.
[88] Law Commission Report, 'Aggravated, Exemplary and Restitutionary Damages', No. 247 (1997), at para. 1.175
[89] By virtue of s.8 of the *Courts And Legal Services Act 1990* and Rules of the Supreme Court, Order 59, rule 11(4). As applied in ***Grobbelaar** v. **News Group Newspapers Ltd*** [2002] 1 WLR 3024, HL; ***Campell** v. **News Group Newspapers Ltd and another*** [2002] EWCA Civ 1143; Smith v. Houston, Unreported, December 14, 1993, CA; ***John** v. **MGN Ltd*** [1997] QB 586; ***Kiam** v. **Neil*** [1996] EMLR 493; ***Jones** v. **Pollard and others*** [1997] EMLR 233; ***Rantzen** v. **MGN Ltd*** [1994] QB 670.

3

Judicial Attempts to Harness the Jury's Role

3.1 The law preceding John v. MGN Ltd – (The Reference to personal injuries awards in guiding juries)

Before the Court of Appeal judgment in ***Suttcliffe** v. **Pressdram***,[90] judges were confined to vague directions, telling jurors to be fair and not excessive.[91] However in ***Sutcliffe***, it was held that in summing up, the trial judge should to give the jury some guidance as to the financial implications of the sum by pointing out the investment income from, or the purchasing power of the large sums. This would allow the jury to appreciate the real value of such sums and weigh them against any sums they had in mind, to estimate if the compensation was just.[92] The reasons for the court rejecting any analogy with personal injuries cases were twofold. The first was that the measure of damages, is or may be different in the two cases, due to the fact that defamation damages have to reflect the aggravation caused to the claimant and any mitigation by vindicating the claimant's good name.[93] The second was that Parliament has provided different modes of trial for the two categories of case.

The Court of Appeal in the subsequent case of ***Rantzen** v. **Mirror Group Newspapers***[94] also concluded that "[t]*here is no satisfactory way in which conventional awards for damages for personal injuries can be used to provide guidance for an award for an action for defamation*" given the difference in the type of loss sustained in defamation cases. Although, the jury should be invited to consider the purchasing power of any award and whether the award would be proportionate to the damage. The major change in the law was brought about by the departure from this precedent in the case of ***John** v. **MGN Ltd***.[95]

[90] [1991] 1 Q.B. 153
[91] Carter, Ruck, Walker and Starte, *Carter-Ruck on Libel and Slander*, (4th edn.), (London: Butterworths, 1992), p.169
[92] [1991] 1 Q.B. 153, at 178-179, 185-186
[93] *Ibid.* at 175
[94] [1994] Q.B. 670 at p.695 per Neil L.J.
[95] [1997] Q.B. 586

3.2 The impact of John v. MGN Ltd

In this case the Court of Appeal held that comparative reference could be made, both to conventional compensation scales in personal injuries cases,[96] in addition to previous libel awards made or approved by the appellate court. This case brought about a major breakthrough in libel law since the *Defamation Act 1952*, and thus deserves further examination. This case concerned Elton John (the famous artist), who brought proceedings against *The Sunday Mirror* newspaper. The latter had published an article, which accused Elton John of being engaged in a bizarre diet of chewing but not swallowing food. The article showed a picture of the claimant stating he was hooked on a bizarre "*diet of death*", which was a form of the eating disorder, bulimia nervosa.[97] The newspaper made no endeavour to justify the story, calling no evidence at trial. The documents disclosed by the newspaper showed that the story derived from an experienced freelance journalist in Los Angeles. The newspaper had made an offer of an apology early in the proceedings. However, the jury awarded a total of £350,000 damages, comprising of £75,000 compensatory damages and £275,000 exemplary damages. The newspaper appealed.

The lack of guidance or direction given to the juries, and the excessive awards which had preceded the ***John*** case, made the court seriously reconsider the unsatisfactory principles employed to assess damages. Sir Thomas Bingham M.R. recognised that:

> "*Respect for the constitutional role of the jury in such actions, and judicial reluctance to intrude into the area of decision making reserved to the jury, have traditionally led judges presiding over defamation trials with juries to confine their jury directions to a statement of general principles, eschewing any specific guidance on the appropriate level of general damages in the particular case.*"[98]

In assessing the most appropriate level of damages it was acknowledged that the key factors to be taken into account were, firstly the gravity of the libel and to what extent it touched on the "*personal integrity, professional reputation, honour, courage, loyalty and the core attributes*" of the claimant's personality.[99] The extent of the publication was the other important consideration. While these principles helped the court to categorise a defamation by comparison to other libels,

---

[96] This was one of the recommendations in Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1995) Consultation Paper No 140, para 4.103.
[97] 1997] Q.B. 586 at 597-598
[98] [1997] Q.B. 586 at p. 608
[99] *Ibid.* at 607

it failed to provide no guidance as to what figure should be reached, which is what any litigant or lawyer wants to know. Evidently it was felt that the time had come to depart from the traditional approach.

Sir Thomas Bingham M.R. referred back to the ***Sutcliffe*** case, where it was argued that an analogy between personal injury and libel damages was inappropriate because of the Parliamentary designation of the two different modes of trial.[100] Three powerful observations were made to contest this rationale. First, it was unclear whether Parliament had given any thought to the assessment of damages by juries when enacting s.69 of the *Supreme Court Act 1981*. Second, the grossly excessive awards by juries were not in 1981 a major source of concern, which they had since become. Third, it was said that the suggestion was not that juries should not assess damages in defamation actions, only that they should receive guidance when doing so. Sir Thomas Bingham said that the excessive awards of damages made in recent years were not the fault of the juries, who "*were in the position of sheep loosed on an unfenced common, with no shepherd*".[101] He said that judges "*confined themselves to broad directions of general principle*", coupled with instructions to the jury to be reasonable.[102] However no guidance was given as to what may be reasonable or unreasonable, so it was "*not altogether surprising that juries lacked an instinctive sense of where to pitch their awards*."[103]

The Court of Appeal said that in their view, it was "*offensive to public opinion, and rightly so, that a defamation plaintiff should recover damages for injury to reputation greater, perhaps by a significant factor than if that same plaintiff had been rendered a senseless cripple or insensate vegetable*". [104] To this end, counsel and judge were empowered to address the jury on the quantum of damages. It was felt that figures suggested by responsible counsel would be likely to reflect the upper and lower bounds of a realistic bracket. Sir Thomas Bingham M.R. recognised the practical advantages, which would result from the judges' ability to refer the jury to awards for personal injuries. Firstly a more coherent framework of damages would emerge. Specific features of unique cases would be recognised, while ensuring that broadly comparable cases led to broadly comparable awards. The overall benefit would be more transparency, consistency, and

[100] *Ibid.* at 613
[101] *Ibid.* at 608
[102] *Ibid.*
[103] *Ibid.*
[104] [1997] Q.B. 586 at p. 614

proportionate sums. This was the pattern, which had emerged with personal injuries cases that had become the exclusive domain of judges, since jury awards of damages had been ousted.[105]

3.3 The law subsequent to John v. M.G.N.

The question, which immediately arose after the case of ***John***, was whether the case meant that the jury now had a fence and shepherd, marking the end of the libel damages lottery? The decision certainly paved the way for more predictable awards of damages, by establishing that in future, personal injury awards could be used as a check on the reasonableness of damages awarded for the damage to reputation. The Court of Appeal said "[t]*he time has in our view come when judges, and counsel, should be free to draw the attention of juries to these comparisons*".[106] The uppermost limit for the worst type of defamation is generally accepted to be no greater than the maximum award in personal injury; this is currently set at £200,000 for quadriplegia. In the case of ***Jones v. Pollard***[107], Hirst L.J. with whom the other members of the Court of Appeal agreed, said:

> *"I cannot accept that the main purpose of* ***John*** *was to establish a ceiling, if by that is meant that in the most serious cases awards of general damages at the very top of the JSB range would normally be appropriate. Such cases comprise quadriplegia, very severe brain damage…and total blindness and deafness.*"

He went on to say:

> *"For my part, save in the most exceptional case, I find it difficult to imagine any defamation action where even the most severe damage to reputation, accompanied by maximum aggravation, would be comparable with such appalling injuries. The purpose of the personal injuries comparison sanctioned in* ***John*** *is in my judgement to assist juries and the Court of Appeal to maintain a sense of proportion…".*[108]

[105] [1997] Q.B. 586 at p. 608
[106] [1997] Q.B. 586 at 614
[107] [1997] E.M.L.R. 233
[108] [1997] E.M.L.R. 233 at p. 257

The Court of Appeal had however stressed that reference to personal injury awards does not mean that there must be a direct correlation between the tariffs referred to, and damages for defamation.[109] In defamation actions there is a vindicatory element and compensation for post tortuous conduct, which is absent in personal injury cases. [110] In theory therefore a jury can disregard awards for personal injuries. A proposed bracket of damages would not bind the jury but it would be assumed that future departures from it were likely to be for good reasons rather than merely reflecting the lack of guidance. The stakes therefore still remain high for both parties in calculating the chance of success at trial, and the lottery element has not been completely eradicated, although some development has been made.

3.4 Submissions by the parties as to appropriate awards

Following the case of ***John*** a defendant can now make an open offer of settlement (precise figure for damages) to a claimant. The offer can be made at any stage of the litigation and may be referred to the court in determining damages. The same principle applies to advocates who can suggest appropriate figures to the jury. Counsels in their submissions, and also the trial judge in his directions to the jury, are permitted to suggest appropriate figures (or brackets) to the jury.

> "*The plaintiff will not wish the jury to think that his main object is to make money rather than to clear his name. The defendant will not wish to add insult to injury by underrating the seriousness of the libel. So…the figures suggested by responsible counsel are likely to reflect the upper and lower bounds of a realistic bracket*".[111]

In ***Ward v. James***[112] the Court of Appeal was of the belief no figures should be mentioned. The justification they provided was "[i]*f the judge can mention figures to the jury, then counsel must be able to mention figures to them. … Each counsel would, in duty bound, pitch the figure as high or as low as he dared. … The proceedings would be in danger of developing into an auction.*" Sir Bingham M. R. in ***John*** said the former arguments for restricting reference to figures were

[109] [1997] Q.B. 586 at p. 614
[110] This was recognised by Windeyer J. in ***Uren v. John Fairfax & Sons Pty. Ltd***. (1966) 117 C.L.R. 118, 150 and by Lord Hailsham of St. Marylebone L.C. in ***Broome v. Cassell & Co Ltd (No.1)*** [1972] A.C. 1027 at 1071
[111] ***John v. M.G.N. Ltd.*** [1997] Q.B. 586 at 616
[112] [1966] 1 Q.B. 273

unconvincing. The Master of the Rolls conflictingly contended that the process of mentioning figures would in the Court's view induce a "*mood of realism on both sides*".[113]

The main problem, with the ability of both parties to suggest awards, is the undesired but foreseeable influence they can have on the jury's finding on liability. The more defending counsel discusses damages, the more likely it is that a jury will feel obliged to make an award. However, the reluctance to suggest an appropriate figure might be taken against the defendant on appeal if the defendant claims that the jury's award was excessive. Moreover, where the defendant fails to put forward a figure there may be little incentive on the part of the claimant to do so. Also, if the jury find for the claimant, but award less than the sum suggested by his counsel, the effect may be to detract from his vindication. These considerations show that the suggesting of awards may be reduced to a mechanism of tactical manoeuvring employed by counsel, to manipulate the opinion of the jury. So it is submitted that the lottery effect of libel damages is not necessarily minimised by enabling both parties to suggest an appropriate quantum of damages, because this measure would probably, only serve to confuse rather than clarify guidance given to juries.

3.5 The power of the Court of Appeal to substitute jury awards of damages

Prior to 1990 the appellate court's powers was limited to ordering a retrial when excessive jury awards were made.[114] In response to concerns expressed about disproportionate damages, the law was changed by section 8 of the *Courts and Legal Services Act 1990*. Section 8(2) of this provision states that the Court of Appeal, may in the classes of case specified in the rules, have the power to substitute the sum awarded by the jury for such sum as appears to the court to be more appropriate instead of ordering a retrial. Section 8(1) provides that "*case*" means any case where the Court of Appeal has the power to order a new trial on the ground that damages awarded by a jury are "*excessive or inadequate*".[115] This section, however, raised some ambiguity as to its construction.

[113] [1997] Q.B. 586 at 615

[114] Notwithstanding the Faulks Committee's recommendation as far back as 1974, that the Court of Appeal should have the power to substitute its own figure for that of the jury. Committee on Defamation, 'Report of the Committee on Defamation', (London: HMSO, 1975), (Cmnd.; 5909), para. 514

[115] When subsections (1) and (2) of section 8 were brought into force Order 59, rule 11(4) was amended to give effect to them.

The statutory provision failed to elaborate on the meaning of an "*excessive*" jury award. This issue arose in the case of ***Rantzen v. Mirror Group Newspapers Ltd.***[116] where a jury awarded £250,000 damages for libel to Esther Rantzen in respect of an article in *The People* which she successfully argued indicated that she had shielded a child abuser and behaved in a way that was hypocritical in view of her position as founder and chairman of the *Childline* services. The Court of Appeal was left to decide whether the award was "*excessive*" for the purposes of s.8 the 1990 Act. In the past the Court of Appeal's test for determining whether an award was excessive or not was couched with their power to order a retrial. The barrier against the grant of a new trial had been set very high and was only exercised in a small minority of cases where the damages had been regarded as so excessive as to be '*divorced from reality*',[117] wholly unreasonable[118] or "*out of all proportion to the facts*".[119]

To assist in the construction of what was "*excessive*", for the purposes of s.8 the 1990 Act the Court followed the course of referring to *Hansard*. It was discovered that in the course of *Hansard* debate the Lord Chancellor had announced that s.8 contemplated no major changes in the law, and the grounds for interference with awards were "*not to be touched*".[120] It appeared that those who drafted the Act intended the test of the utter irrationality of the jury's award, (earlier formulations erected) to remain as a precondition to interference by the Appeal Court. However, despite the reluctance of the past appellate courts to interfere with an award of the jury, the strongly euro-minded Court of Appeal in ***Rantzen*** did not find the Lord Chancellor's statement to be an undefeatable obstacle to reaching an alternative construction of the term "*excessive*". The Court found recourse in Article 10 of the ECHR, to enable them to make a substitute award, and to circumvent the Lord Chancellor's statement thus lowering the barrier against intervention.

Miss Rantzen, who "*had not suffered any financial loss or social damage*"[121] and remained "*a distinguished and highly respected figure*"[122] with an extremely successful career and appeared to have gone through a terrible though transient ordeal. It was thought that the courts' exercise of its powers in pursuant of s.8 would ensure that they would leave a series of precedents of "*proper*" awards, for guiding juries.[123] Disappointingly, however, the Court of Appeal merely devoted a

[116] [1994] Q.B. 670
[117] ***McCarey v. Associated Newspapers Ltd.*** (No. 2) [1965] 2 Q.B. 86, 111, *per* Willmer L.J.
[118] ***Praed v. Graham*** (1889) 24 Q.B.D. 53, 55, *per* Lord Esher M.R.
[119] ***Lewis v. Daily Telegraph Ltd.*** [1963] 1 Q.B. 340, 380, *per* Holroyd Pearce L.J.
[120] Hansard, (H.L. Debates) February 20, 1990 at cols. 170-171
[121] [1994] Q.B. 670 at p. 688
[122] [1994] Q.B. 670 at p.696
[123] [1994] Q.B. 670 at 696-7

brief paragraph explaining why it considered £110,000 to be a more appropriate figure than £250,000. The Court omitted from providing any detailed explanation, which could be used for direction in other cases, as to why Miss Rantzen deserved £110,000 rather than say £50,000. This was a surprising omission considering Neill L.J. had accepted that one of the requirements of Article 10 was that the penalties that a libel publisher faced should be "*prescribed by law*",[124] which was not necessarily provided by a jury having a free hand on damages and thereby a unnecessary restriction on freedom of expression in a democratic society.

The Court of Appeal also asserted its powers under s.8 in ***John** v. **MGN***, but the level of compensatory damages as substituted, was still higher than personal injury awards for losses of limbs or faculties. The ***John*** libel was worth £25,000 in compensatory damages, and the appropriateness of that sum is questionable, particularly in light of the fact that the libel it did not touch the artist's personal integrity or professional reputation. A very serious libel, for example accusing someone of a criminal offence may still command a six-figure sum, equivalent to the maximum conventional award for pain and suffering and loss of amenity in personal injury. This seems highly unreasonable when one considers the arguably repairable nature of something like a reputation, which could be restored by the jury's verdict, quite unlike the damage suffered in personal injury by a victim with brain damage.

However, undoubtedly the effectiveness of s.8 to reduce absurdly high sum awarded by the juries has been seen in two recent cases. In ***Campbell** v. **News Group Newspapers Ltd***[125] where Campbell had been accused by an article in the *News of the World* of being an active paedophile. The jury awarded Campbell £350,000 and the *News of the World* appealed against quantum only. The Court of Appeal accepted the *News of the World's* "*significant partial justification*" of the Campbell's perverted interest in boys, but acknowledging that the paper failed to justify any actual abuse. The Court of Appeal substituted the jury's award of £350,000 with an award of £100,000. However, this was reduced still further to £30,000 on account of Campbell's gross misconduct in the case.

[124] This means, "*the law must be adequately accessible*" and "*formulated with sufficient precision*…". ***Sunday Times** v. **UK*** (1979) 2 E.H.R.R. 245, 271, para. 49
[125] [2002] E.M.L.R. 43

Furthermore in the case of ***Grobbelaar v. News Group Newspapers Ltd*** [126] a former Liverpool goalkeeper was accused of taking bribes in order to fix football matches and throw games. The libel was supported by evidence of covert video recordings, of the claimant admitting to previously fixing games and accepting cash payments. The trial jury found that the claimant had been libelled and awarded him damages in the sum of £85,000. On appeal to the House of Lords, the verdict of the jury was condemned and the damages were reduced from £85,000 to £1 nominal damages by virtue of s.8. Although in this case an actionable libel had occurred, the court deemed that Grobbelaar should not receive substantial damages as he had acted in "*flagrant breach of his legal and moral obligations*" by entering into the corrupt agreement accepting money to fix games.[127]

Returning to the dicta in ***Rantzen***, the Court of Appeal held its judgments in appeals based on s.8 should form a sustainable coherent corpus of authority for the assessment of damages, which may be referred to juries in assisting their deliberations. At present this remain questionable, as such a framework is not going to be established quickly. What was derived from ***Rantzen*** and certainly the abovementioned s.8 cases is that the jury's task of estimating "*proper*" damages in defamation cases will not as a result become any easier (bearing in mind all the subjective elements involved in assessing damages), although we can expected awards to be significantly lower.

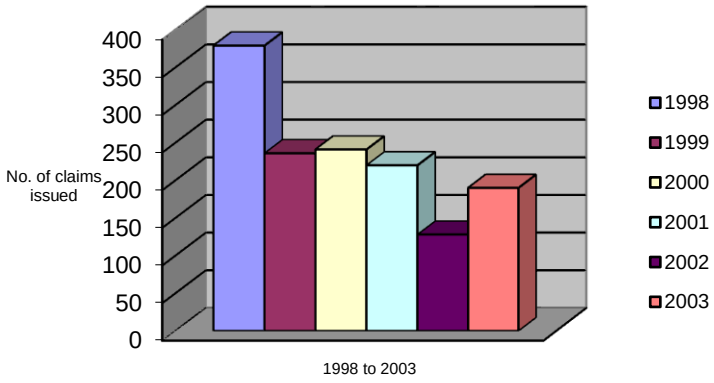
The jury's control over awards of damages in defamation has been somewhat effectively decreased through judicial attempts to harness the jury's role. As the jury's control diminishes, it is probable that the jury trial will become less attractive to claimants. There has been a marked reduction in the defamation (libel, slander) cases issued in the Royal Courts of Justice between 1998 and 2003.[128] While *Judicial Statistics* shows a steady decrease in the number of defamation actions issued from 1998 up to 2003, there were still nevertheless 190 claims issued last year.

[126] [2003] E.M.L.R. 1
[127] [2003] E.M.L.R. 1 at 16, per Lord Bingham of Cornhill
[128] The introduction of the pre-action protocol in defamation proceedings as introduced by the Lord Woolf's new *Civil Procedure Rules 1998* may also have had a contributing effect to this.

Table 2: This table shows the number of defamation cases that were issued in Royal courts of Justice between 1998 and 2003.

Year	No of Claims issued
1998 [129]	379
1999 [130]	236
2000 [131]	241
2001 [132]	220
2002 [133]	128
2003 [134]	190

Graph 2: This graph illustrates the number of defamation cases that were issued in Royal courts of Justice between 1998 and 2003.



[129] *Judicial Statistics 1998*, table 3.2, Department of Constitutional Affairs website at http://www.dca.gov.uk/courtfr/jstats/3_2.pdf
[130] *Judicial Statistics 1999*, table 3.2, Department of Constitutional Affairs website at http://www.dca.gov.uk/jsar99/chapter3.pdf
[131] *Judicial Statistics 2000*, table 3.2, Department of Constitutional Affairs website at http://www.dca.gov.uk/judicial/jsar00/chapt3.pdf
[132] *Judicial Statistics 2001*, table 3.2, Department of Constitutional Affairs website at http://www.dca.gov.uk/judicial/jsar01/judicial_stats3.pdf
[133] *Judicial Statistics 2002*, table 3.2, Department of Constitutional Affairs website at http://www.dca.gov.uk/judicial/jsar02/judicial_stats3.pdf
[134] *Judicial Statistics 2003*, table 3.2, Department of Constitutional Affairs website at http://www.dca.gov.uk/judicial/jsar03/js03_chapter_3.pdf

4

Defamation Awards and the Human Rights Act 1998

4.1 Article 10 and the assessment of damages for libel

The purpose of this chapter is to consider the relationship between the ECHR[135] as incorporated into English law by the *Human Rights Act 1998* and it consequences on jury awards in defamation actions. The primary focus from this study's perspective is on Article 10 the freedom. Article 10 of the *Human Rights Act 1998* has been of significant application in lowering excessive jury awards. The provision puts excessive jury awards into perspective by implementing the principle of proportionality. Article 10(1) of the Act states that:

> "*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without public authority and regardless of frontiers.*"

Article 10(2) further states that:

> "*The exercise of these freedoms may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society…for the protection of the reputation or rights of others…*"

4.2 The Convention and the common law

Prior to the incorporation of the ECHR into English law through the *Human Rights Act 1998* the Court of Appeal in ***Rantzen v. Mirror Group Newspapers Ltd***,[136] recognised that:

> "[W]*here freedom of expression is at stake…recent authorities lend support to the proposition that article 10 has a wider role*[137] *and can properly be regarded as an articulation of some of the principles underlying the common law.*"[138]

---

[135] *The European Convention on Human Rights and Fundamental Freedoms 1950*
[136] [1994] QB 670
[137] It was accepted that the ECHR could be used for the purpose of resolving ambiguity in English primary or subordinate legislation. Where there was an ambiguity the courts presumed that Parliament intended to legislate in conformity with the ECHR and not in confliction with it.
[138] [1994] QB 670, at 691 C-D, *per* Neill L.J., referring to *inter alia*; ***A-G v. Guardian Newspapers Ltd (No.2)*** [1990] 1 AC 109, at 283 *per* Lord Goff

Neill L.J. proceeded to cite some of the remarks of Lord Goff in ***Attorney General v. Guardian Newspapers Ltd (No. 2)***[139] and Lord Keith in ***Derbyshire County Council v. Times Newspapers Ltd***.[140] In the former, Lord Goff said he conceived it to be his duty to interpret the law in the light of the Convention "*when I am free to do so*".[141] He said, "*I can see no inconsistency between English law… and Article 10. This is scarcely surprising since we may pride ourselves on the fact that freedom of speech has existed in this country as long as, if not longer than, it has existed in any other country in the world*."[142]

4.3 Modification of previous approach in assessing jury awards through Art.10

Alarm has been raised among the judiciary by the "*almost limitless discretion*" [143] of the jury in assessing excessively sized awards. This in effect has created doubts as to the consistency of these awards with the right to freedom of expression. In an attempt to remedy this, the appellate court has had to modify the previous approach in assessing jury awards. The case of ***Tolstoy Miloslavsky v. UK***[144] could have potentially seized the argument for implementing some major reforms of libel law. This case concerned a series of battles over Count Tolstoy's libel of Lord Adlington, which was published and distributed in a pamphlet written by the Count, accusing the latter of committing atrocities at war.[145] In November 1989 the jury awarded Lord Adlington the record sum of £1.5 million. The defendant's inability to produce the sum of £1.5 million could perhaps be explained by the jury's intention to make a ringing declaration of the claimant's innocence whilst punishing the guilty defendant with certain bankruptcy.

The outcome of this decision was extremely alarming, when one considers the possible repercussions, had the defendant been a newspaper. If the defendant had been a newspaper, would the damages have been set at £5 million or even £10 million? If this is an inference, which can be drawn, then the "*chilling effect*" which such unrestricted liability could have produced on the media is disturbing. Fortunately, the case was referred to the European Court of Human Rights (ECtHR), which brought the issue into perspective with the principle of proportionality.

---

[139] [1990] 1 AC 109
[140] [1993] A.C. 534
[141] [1990] 1 A.C. 109 at p. 283
[142] *Ibid.*
[143] ***Rantzen v. MGN Ltd*** [1994] QB 670 at 692G per Neill L.J.
[144] ***Tolstoy Miloslavsky v. United Kingdom*** (A/323) (1995) 20 E.H.R.R. 442
[145] The pamphlet alleged that Lord Adlington, who had been a British Army officer at the end of the Second World War, had been responsible for handing over thousands of prisoners of war to the Soviet authorities, without any authorisation, and knowing the cruel fate they would encounter.

Count Tolstoy alleged a violation of his right to freedom of expression under Article 10. The jury had been directed not to punish the applicant but only to compensate. However, the sum awarded was three times in excess to any previous record libel award.[146] It was noted that substantive domestic law had failed to provide any adequate principle that required the "*award to be proportionate*" to the aim of vindicating the damage to the claimant's reputation.[147] The Court of Appeal could not have set aside an award simply because it was excessive, but only if it was so unreasonable that it must have been arrived at capriciously, unconscionably or irrationally.[148] Finally, the court concluded that the award of £1.5 million in compensatory damages, in combination with the deficit of adequate judicial safeguards at trial and on appeal against disproportionately high awards, amounted to a violation of the defendant's rights to freedom of expression under Article 10.[149]

In the ***Rantzen*** case, the Court of Appeal turned to Article 10, to determine the meaning of an "*excessive*" award.[150] The requirement in Article 10(2) prescribes that freedom of expression can only be limited by restrictions or penalties if they "*are prescribed by law and are necessary in a democratic society*" for various defined reasons, one being for "*the protection of the reputation or rights of others*". The court declared that the grant of an almost limitless discretion on a jury in assessing damages was not "*necessary*" in the sense that it was not justified by pressing social need. The common law, "*if properly understood*" required the courts to subject large awards to a more searching scrutiny than had been customary in the past. [151] It was concluded that the test for intervention ought to have been lower; "*could a reasonable jury have thought that this award was necessary to compensate the plaintiff and to re-establish his reputation*?" [152] In the ***Rantzen*** case it was decided that a reasonable jury could not have thought this.

[146] See Chapter 1, figure 1.
[147] (1995) 20 E.H.R.R. 442 at 468
[148] *Ibid.* at 472
[149] *Ibid.* at 473
[150] Previously the term "*excessive*" had been couched in the test to grant a new trial, which had been set very high. See Chapter 3.5
[151] [1994] Q.B. 670 at p. 692
[152] *Ibid.*

The lack of guidance given to juries by trial judges on the assessment of damages, further caused unease in ***Rantzen***. It was observed that Article 10(2) of the Convention required that any restrictions on the exercise of the right to freedom of expression should be "*prescribed by law*". The ECtHR has held that: '*A norm cannot be regarded as a 'law' until it is formulated with sufficient precision to enable the citizen to regulate his conduct*'.[153] The unguided discretion of the juries to assess damages in defamation actions contravened this requirement. Thus the Court of Appeal in ***Rantzen*** clearly deemed that the jury should be given clear and precise guidance for the purposes of calculating damages. Only then would any restriction on the freedom of expression be within the "*prescribed by law*" test laid down in Article 10(2). It was therefore held that trial judges could refer juries to previous awards made by the Court of Appeal in the exercise of its powers under s.8 of the *Courts and Legal Services Act 1990*.[154] Reference is, however, not to be made to damages awarded by juries preceding ***Rantzen***, as they are not given the same judicial weight, as they were calculated with only minimal guidance.

Through the power of "substitution" of jury awards,[155] along with the court's reliance on Article 10 of the *Human Rights Act 1998* (in ***Rantzen***) to the exercise that power, we have seen a major judicial restructuring to tackling the inadequacies of judicial safeguards at trial and on appeal against disproportionate damages. Fortunately, the introduction of Article 10 of the *Human Rights Act 1998* has brought down the threshold for intervention. The ***Tolstoy*** and ***Rantzen*** cases have given potential defendants recourse to the principles of proportionality and reasonableness as a check on damages awarded by either juries or judges. It is tempting to assume that the Court of Appeal decision in ***John*** reflects the views of the ECtHR but the Court of Appeal in that case did go out of their way to say their views were not based on Article 10, but on the English common law, which it believed achieved the same result.

[153] ***The Sunday Times*** *v.* ***The United Kingdom*** (1979-80) 2 EHRR 245, 71, para 49
[154] [1994] Q.B. 670 at p.694B-C
[155] Introduced by s.8 of the *Courts and Legal Services Act 1990*

5

Proposals for reform of the jury's role in defamation actions

5.1 Universal judicial assessment of damages in defamation actions

The preceding outline of developments in the law, has been aimed at demonstrating that the although the lottery effect of many libel decisions has been reduced, it still has not been completely eliminated, owing to the continuation of the jury's role in assessing the quantum of damages. As far back as in 1975, the Faulks Committee[156] recommended that a judge in all defamation actions should assess damages, because the jury lacked the necessary knowledge and experience. Where a jury is hearing a defamation case, the jury's function in the assessment of quantum should be limited to stipulating whether damages should be substantial, moderate, nominal or contemptuous.[157]

5.2 Is the Faulks Committee solution an unworkable one?

Doubts have been raised as to whether these categories are satisfactory or not. Having recommended that the function of assessing damages be transferred from the judge to the jury, the Irish Law Commission[158] considered that the distinction between the categories of damages recommended by the Faulks Committee was not an easy one to draw. It detected a punitive element in many cases where, strictly speaking exemplary damages should not have been awarded. It also foresaw complications arising where appeals were taken from both the jury's categorisation and the judge's assessment.[159] It is therefore recommended that the jury should have the power merely to indicate in their verdict a finding that the case is appropriate for nominal damages only.[160]

It is submitted that it is doubtful whether these categories can make sense unless the jury can put a numerical value on what it understands by, for example, a "nominal" or "moderate" award. This would then of course defeat the whole point of splitting the function of judge and jury. Therefore it would appear that the Faulks Committee's proposal that the jury should indicate the appropriate category of damages creates as many complications as it eliminates. However, it is submitted

[156] Great Britain Committee on Defamation, *Report of the Committee on Defamation*, (London: HMSO, 1975), (Cmnd.; 5909), Chapter 17, [hereinafter Faulks Committee Report]
[157] *Ibid.* para. 513, p.143
[158] Irish Law Commission, *Report on the Civil Law of Defamation* (December 1991)
[159] *Ibid.* para 10.4
[160] *Ibid.* paras 10.4; 10.6(2)

that the role of assessing the quantum of damages should still be transferred to the judge alone, without any reference from the jury as to what type of award ought to be made.

5.3 Functional "split" between judge and jury

The Law Commission in 1995 consulted[161] on whether it would be workable to split the determination of liability and damages between jury and judge in defamation cases. The response they received from consultees' was that, such a split of function between judge and jury was workable.[162] The justification for this functional split was highlighted with a persuasive analogy with criminal trials in which juries decide on guilt and the judge decides the appropriate sentence.[163] Also cited was the s.7A of the *Defamation Act 1974* (NSW) (which was inserted by the *Defamation (Amendment) Act 1994*) (NSW), which came into force in 1995. This provision provides that the trial judge and not the jury should determine the amount of the damages. Under s.7A of the *Defamation Act 1974* (NSW) the judge determines the question of whether "*the matter complained of is capable of carrying the imputation pleaded*" and whether it carries a "*defamatory meaning*". [164] If the judge has made these findings then it is the function of the jury to decide whether the matter complained of does in fact carries the pleaded imputation and, whether the imputation is defamatory. All maters relating to defences and damages are then left to the judge. In assessing such damages the judge is required to take into account the general range of damages for non-pecuniary loss in personal injury awards in New South Wales. [165]

5.4 Is the Functional "split" solution an unworkable one?

In ***Aitken** v. **Preston And Others***, some of the undesirable effects of the judge and jury functional "*split*" were identified. These involved the need of "*recalling certain witnesses*", and the leading of "*considerable evidence concerning damages*".[166] Lord Bingham said that, in the event that "*the jury trial, liability and quantum should be separated…*[T]*his will add immeasurably to the length*

---

[161] Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1995) Consultation Paper No 140, paras 4.86-4.104.
[162] Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (Law Com No 257, 1999), at para. 4.20
[163] Law Commission Report, '*Aggravated, Exemplary and Restitutionary Damages*', (law Com No. 247, 1997), para 5.89.
[164] *Defamation* (1995) Report 75 of the New South Wales Law Reform Commission, para 3.4 at http://www.austlii.edu.au/au/other/nswlrc/rpt75/
[165] ss. 7A and 46A of the *Defamation Act 1984* (NSW) as inserted by the *Defamation (Amendment) Act 1994* (NSW)
[166] [1997] E.M.L.R 415 at p. 427

and cost of the trial".[167] He took the view understood by the Master of the Rolls in ***Taylor*** *v.* ***Anderton***,[168] who said:

> "*The case as it stands will be very lengthy, very expensive, very burdensome and very difficult to control if tried by judge alone. If tried by a judge and a jury it will be even lengthier, even more expensive, even more burdensome and even more difficult to control*" [169]

Another adverse consequence of the separation of the role of the judge and jury is the possible overlap in questions of liability and damages. For example if there are certain facts relating to liability, which a jury must decide, which are also relevant to the issues of damages a judge must decide, but which are not apparent from a jury's verdict on the question of liability. This argument was raised by leading libel silks during the Law Commission's consultation process in relation to proposals for a functional "*split*".[170] They said "[i]*t is not possible to divorce the issue of liability from that of quantum…"*.[171] The problem would arise where a defendant pleads justification. Even if the plea is unsuccessful and has to pay damages for the libel, the facts may nevertheless serve to reduce the damages awarded on the grounds there was some truth in part of the libel. Since the judge cannot know what the jury decided, he does not have the factual basis before him on the basis of which he can decide whether damages are available, and if so what the appropriate sum should be.[172] "*This is an exercise which would have to be carried out on the basis of no more than surmise about which of the libels had been found proved*"[173].

The above problem could be tackled through a proposed system whereby the a judge could be entitled to question the jury to elicit their finding of fact in relation to the libel. The Law Commission subsequently dismissed this solution.[174] One recurring observation made in response to this proposal, was that such an exercise would be akin to setting the jury an "*exam paper*" which was only answerable through an essay, which could take days for the jury to draft. Moreover, judges' questions may not necessarily correspond to the way in which juries arrived at their verdicts. Moreover the task of answering the judges' questions only attribute delays and

[167] [1997] E.M.L.R 415 at p. 423-424
[168] [1995] 1 WLR 447
[169] [1997] E.M.L.R 415 at p. 423
[170] Law Commission, (1995) Consultation Paper No 140, at paras 4.98-4.100 and Law Commission Report, (law Com No. 247, 1997), footnote 668.
[171] Law Commission, (1995) Consultation Paper No 140, para 4.98
[172] ***Pamplin*** *v.* ***Express Newspapers Ltd*** [1988] 1 WLR 116
[173] ***Aitken*** *v.* ***Preston And Others*** [1997] E.M.L.R 415 at 427
[174] The suggestion was discussed, and dismissed in Law Commission, (1995) Consultation Paper No 140

inconsistencies between jurors' views, undermining their unanimous decision.[175] This proposal stands at odds with the fact the jury is entitled to give a *general* verdict.

A possible solution to this is found in the realms of criminal law where the problem of ascertaining the factual basis for sentencing has successfully been overcome. In the criminal law context, where the jury's verdict is consistent with two or more factual basis, the judge can exercise his discretion as to whether or not he wishes the jury to indicate the factual basis on which they proceeded.[176] In some circumstances the doubt will not be resolvable[177] and in such cases *Archbold* states the judge must proceed by sentencing an offender on a factual basis that is consistent with the jury's verdict. If there is more than one view of the facts, which are consistent with the jury's verdict, the judge is left to "*form his own view in the light of the evidence*". [178] The civil courts, faced with a similar dilemma, could follow this approach.

5.5 The assessment of damages by judges

The Law Commission recommended "*the availability and assessment of punitive (exemplary) damages should always be decided by the trial judge and never by jury*".[179] It was submitted however, that the jury's role in determining factual doubts relating to liability, should remain. However, once it is decided whether or not the claimant is liable for defamation, the responsibility for deciding the quantum of both compensatory and exemplary damages should fall on the judge. The Commission said,

> "[w]*e would envisage that the judge would direct the jury that, whilst liability and the amount of compensation (or restitution) are matters for them, the questions as to whether, exceptionally, punitive damages should be awarded, and their quantum, are matters for the judge alone to decide*." [180]

It is submitted that surely this artificial separation of the functions of the judge and jury, between compensatory and exemplary damages, entails just as many complications, difficulties and inconveniences as the Faulks Committee's proposals. Consequently the only practicable solution would appear to be for the legislature to usurp the jury's role of assessing and quantifying damages for libel. This however raises important constitutional issues. It could be argued that

[175] Law Commission, (1995) Consultation Paper No 140, para. 4.98
[176] ***R** v. **Cawthorne*** [1996] 2 Cr App R (S) 445, 450- 451
[177] This will happen if the jury is not asked to indicate the basis for its verdict, or refuses to do so.
[178] *Archbold, Criminal Pleading, Evidence & Practice* 1997, para 5-9
[179] Law Commission Report, (1997) No. 247, para 5.81
[180] *Ibid.*

Article 6 of the *Human Rights Act 1998* should necessitate the retention of trial by jury in defamation cases.

In ***Schellenberg** v. **BBC***,[181] Eady J stated "*I have seen nothing to suggest that…judges are to be less interventionist, in litigation of the kind where there is a right to trial by jury. That important right is sometimes described as a "constitutional right", although the meaning of that emotive phrase is a little hazy*". [182] The Law commission has highlighted that in their opinion ECHR case law does not suggest that the right to a fair trial enshrined in Art 6(1) of the *Human Rights Act 1998* guarantees a right to trial by jury.[183] Furthermore, in the case of ***Kiam** v. **Neil (No. 2)***,[184] Lord Justice Beldam forcefully asserted, "*It is…necessary to bear in mind that Parliament has repeatedly declined to attenuate the right of a plaintiff who claims trial by jury in a libel action*."[185] Furthermore, his Lordship's said

> "*it seems to me that if the failure of the jury to keep its award within the bounds indicated by a judge gives rise merely to the possibility that their judgement is to be preferred to that of the judge, the court may appear to preserve only the semblance of a right which Parliament has repeatedly affirmed*."[186]

In contrast however, the approach of the Court of Appeal was very different in the later case of ***Aitken** v. **Preston And Others***.[187] The issue in this case was when could the court exercise its discretion to order a trial without a jury. It was held that the emphasis was now against jury trials, and this was to be taken into account by the court when exercising its discretion. This part of the decision was based on the case of ***Goldsmith** v. **Pressdram***.[188] The conclusion was drawn from s.69(3), of the *Supreme Court Act 1981*, which was to replace s.6(1) of the *Administration of Justice (Miscellaneous Provisions) Act 1933*. It was further held in ***Aitken*** that "*the interests of justice would be best served by a painstaking, dispassionate, impartial, orderly approach to deciding where the truth lies*".[189] Thus in the light of the outcome of the case, the inference can safely be drawn that these features are absent from a trial by jury.

---

[181] [2000] EMLR 296
[182] [2000] EMLR 296 at 318
[183] Law Commission, *Defamation and the Internet - A Preliminary Investigation*, Scoping Study No 2 (December 2002), para 37, at p.10
[184] [1996] EMLR 493
[185] [1996] EMLR 493 at p. 507
[186] *Ibid.*
[187] [1997] EMLR 435
[188] [1988] 1 W.L.R. 64 at page 68 *per* Lawton L.J. with whom Slade L.J. expressly agreed.
[189] [1997] E.M.L.R. 415 at p. 427

It is submitted that the jury's role in determining factual issues relating to liability, ought to be maintained. However, once it is decided whether or not the claimant is liable for defamation, the judge will have to be responsible for deciding the quantum of both compensatory and exemplary damages. In its report, the Law Commission stated, in the context of exemplary damages,

> "*we consider that this reallocation of responsibility is justified in principle, and essential if 'consistent', 'moderate' and 'proportionate' awards are to be a reality. Cases have demonstrated a disturbing arbitrariness and excess in the sums awarded as damages to plaintiffs by juries*."[190]

While the assessment of damages by a judge alone is likely to enhance consistency and predictability of those awards, it must be remembered that judges can also get their sums wrong while assessing damages. One example of this was seen in the ***Grobbelaar*** libel action where the court reduced the damages from £85,000 to £1. If the jury is really to be regarded as "*sheep loosed on an unfenced common, with no shepherd*",[191] the award of damages for the sum of £85,000 was quite astonishing given that in this case, the "*sheep*" had a shepherd, namely Mr Justice Gray, who suggested a the bracket of damages of up to £150,000.[192] The direction provided by the judge in this case does little to provide confidence to the idea that judges will be better assigned to calculate damages. Therefore should one prefer the views of judges, to the common sense of juries? As one commentator has remarked, "[d]*o we want trial by Woolf instead of sheep*?"[193]

The Neill Committee's *Report on Practice and Procedure in Defamation*[194] was particularly concerned with the arbitrariness of the sanction of exemplary damages, in the hands of juries, they stated:

> "*…the decision whether to award damages and, if so, what the size of the award should be is left to a lay jury with no guidance on quantum and inevitably no possibility of a decision in accordance with any kind of tariff. This at a time when, in sentencing policy generally, consistency and*

[190] Law Comm. No. 247 (1997), para. 5.82
[191] ***John** v. **MGN Ltd*** [1997] Q.B. 586 at p. 608
[192] [2003] E.M.L.R. 1 at 6
[193] Tait, Nigel, 'Libel Law: the declining role of Juries', Cater-Ruck Article, at Carter-Ruck website http://www.carter-ruck.com/articles/200311-lost_sheep.html
[194] Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* (July 1991)

predictability are goals constantly striven for both by means of statutory intervention and by way of judicial sentencing conferences and seminars."[195]

It could be argued that the recent common law developments dealing with jury damages awards militate against usurping the jury's role in determining the quantum of damages. The recent line of cases, which firstly, permit more detailed guidance for juries on how to assess damages, and second extend the appellate court's control of jury-assessed damages, have already been discussed in detail. Consequently, it is argued that these improvements in the law largely diminish the danger of awards being arbitrary and excessive, which provide the primary justification for judges rather than juries assessing the quantum of damages.

So far, however, cases subsequent to ***John v. MGN Ltd***[196] have served to deny this proposition. Even where a judge has distinctively followed the recommendations of the Court of Appeal in ***John***, it has not prevented initial inflated damages being awarded for libel.[197] Examples include ***Jones v. Pollard***[198]where the jury awarded damages of £100,000, ***Grobbelaar v. News Group Newspapers Ltd***[199]where the jury awarded the claimant £85,000 and ***Campbell v. News Group Newspapers Ltd***[200] in which the jury found for the claimant and awarded him £350,000. Scott Bayfield argues that the jury awards "*remain as unpredictable as ever, despite legislative and judicial attempts to bring them into line with personal injuries awards".*[201] However in the case of ***Kiam v. Neil (No.2)***, counsel for the plaintiff argued that "*It was of critical importance that the Court of Appeal should not be the automatic arbiter of awards in defamation cases since the jury is the proper tribunal for the assessment of awards unless the award is obviously flawed*." [202]

Unfortunately the problem underlying this latter argument is the fact that it is extremely difficult to decide whether the award of the jury is "*obviously flawed*", due to the fundamental principle that a jury gives no reasons for its decision. This has two adverse implications. Firstly, *ex post facto* appellate controls of jury awards are inhibited, despite the lowering of the test for intervention following ***Rantzen v. MGN Ltd***.[203] Secondly unreasoned awards are much less likely

[195] *Ibid.* ch IV, para 8.
[196] [1997] QB 586
[197] See figure 1
[198] [1997] E.M.L.R. 233
[199] ***Grobbelaar v. News Group Newspapers Ltd*** [2003] E.M.L.R. 1
[200] [2002] E.M.L.R. 43
[201] J Scott Bayfield, *The Lawyer*, 29 April 1997, p 18 cited in Law Comm. No. 247 (1997), at footnote 666
[202] [1996] EMLR 493 at p. 506
[203] [1994] QB 670

to be consistent, moderate and proportionate.[204] These three qualities are essential to the legitimacy of any legal remedy of damages in defamation. Consequently, the absence of one or more of these qualities, which would make an award "flawed", cannot ever be obvious in the sense suggested in ***Kiam** v. **Neil (No. 2)***,[205] if no reasons have been given as to why a certain quantum of damages was considered appropriate. "*A general verdict of a jury could well leave room for doubt and continuing debate whether, on important and hotly contested issues, the plaintiff or the defendant have been vindicated*."[206]

Therefore, the most convincing argument would appear to be in favour of the *judicial* determination of damages. Judges, unlike juries, are expected to give reasons for their decisions. This in turn could set a framework of precedents which would create more certainty for the both the press and potential claimants. Reasoned decisions are also imperative to the goal of achieving a coherent framework of awards. As the Law Commission pointed out "*Previous decisions can only be truly useful to future courts and to future litigants, because of the diversity of circumstances relevant to awards of damages, if they are reasoned decisions*".[207]

5.6 Introduction of a judicial system of "tariffs"

It is submitted that once a system of tariffs for compensatory and exemplary damages, (analogous to that for damages for personal injuries) has emerged in defamation cases, it is likely to make the assessment of an award of damages, as predictable as the assessment of personal injuries damages. A more coherent and consistent pattern of awards is likely to develop in the hands of judges, through the proliferation of such a system of tariffs.

An objection to the creation of a tariff system is that such a system can produce an undue rigidity and inflexibility in the assessment of damages.[208] Nevertheless, the argument that such a system will lead to undue rigidity is overridden by the need for consistency in this area. The Law Commission has suggested this tariff system should not be one of fixed awards; rather it should be a set of benchmark figures with a range of aggravating and mitigating factors. This study endorses this view, as it will surely preserve flexibility and sensitivity on a case-by-case basis.[209]

---

[204] Law Commission Report, (1997) No. 247, para 5.85
[205] [1996] EMLR 493
[206] ***Aitken** v. **Preston And Others*** [1997] E.M.L.R 415 at p. 427 *per* Lord Bingham C.J.
[207] Law Comm. No. 247, (1997), para 5.86
[208] Law Comm. No. 247, (1997), para 5.93
[209] *Ibid.*

5.7 Combating the "chilling effect"

Damages, which exceed "compensation" and include a punitive element to punish the defendant, will inevitably bestow a windfall on the claimant who will be unjustly enriched from being the victim. It is argued that exemplary damages are unjustifiable because of their potential to restrain the media from engaging in controversial debate, which is in the public interest, for fear of heavy penalties by way of exemplary damages. In combating this "*chilling effect*" it has to be asked whether it is worth preserving the award of exemplary damages in defamation actions. Although strong arguments can be levied in favour of maintaining exemplary damages as a remedy,[210] it shall be argued that there are stronger arguments in favour of press freedom, which is jeopardised by the continuation of such a punitive remedy for defamation.

The Faulks Committee report strongly recommended that awards of punitive or exemplary damages in defamation proceedings should be abolished,[211] as did the 1991 report of the Working Group of the Supreme Court Procedure Committee chaired by Neil L.J. who said "[a]*t least in criminal proceedings plaintiffs would be ... subject to far less arbitrary sanctions*". [212] It is submitted that this recommendation still carries considerable weight in the light of the arguments just presented.

It is submitted the criminal law is the only constitutional body appropriate for imposing penalties for defamation by way of a "fine". In ***Broome** v. **Cassell & Co Ltd (No.1)*** Lord Hailsham did call on judges to be warned that where exemplary damages are considered appropriate,

> "*…juries should not be encouraged to lose sight of the fact that in making such an award they are putting money into a claimant's pocket, and not contributing to the rates or to the revenues of central government*."[213]

However in the light of the excessive awards made in previous years, this warning obviously has not been heeded. Allowing a judge and jury to punish the defendant in a defamation action produces the effect of blurring the distinction between criminal and civil law. This deprives the defendant of the protection accorded to him by the criminal law. Thus the punishment is dealt

[210] For example it's effect of deterrence and the marking out of conduct for disapproval. Or it's use where compensation does not adequately remedy the infringement of certain important interests.
[211] Faulks Committee Report, *opt cit.* para. 360
[212] Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* (July 1991) Chapter IV, para 11
[213] [1972] AC 1027, at p. 1082

with on a lower civil law burden of proof.[214] The defendant is denied the right to call witnesses if a submission of "no evidence" fails. There is no presentation of the case both on guilt and punishment on a dispassionate basis by the prosecution. These are just a few of the safeguards which the criminal trial affords, and which make the award of penal damages entirely unjustifiable in a civil court where this protection is absent. In the words of the House of Lords in ***Broome** v. **Cassell & Co Ltd (No.1)***,

> "[t]*o allow punitive damages is to encourage plaintiffs to go on gold-digging expeditions and in jury awards involves great danger of inconsistent standards in comparison with the damages awarded for grave personal injuries*."[215]

It is submitted that exemplary damages ought to be abolished in the field of defamation actions, because they are an "*anomalous*" civil remedy, inconsistent with the aims, principles and policies of libel law.[216]

> "*In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award in compensation (which may of course be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum*."[217]

Exemplary damages are not, even in an attenuated sense concerned with compensating the claimant. Until ***Rookes** v. **Barnard***[218] they were not clearly differentiated from aggravated damages but that case restricted them to three situations: (1) where statute expressly authorises such an award. (2) Where the wrong involves oppressive, arbitrary or unconstitutional action by servants of the government. (3) Where the defendant's tortuous act has been done with "*guilty*

[214] This is on the "*balance of probabilities*" rather than "*beyond reasonable doubt*" as in criminal cases.
[215] [1972] AC 1027 at p. 1038
[216] ***Broome** v. **Cassell*** [1972] A.C. 1027 at 1086
[217] *per* Lord Devlin in ***Rookes** v. **Barnard*** [1964] A.C. 1129 at p. 1228 quoted with approval by Lord Hailsham in ***Broome** v. **Cassell*** [1972] A.C. 1027 at 1059
[218] [1964] A.C. 1129

knowledge, for the motive that the chances of economic advantage outweigh the chances of economic, or perhaps physical penalty"[219]

The case of ***Broome** v. **Cassell & Co Ltd (No.1)**[220]* affirmed the availability of such damages for these torts in 1972 and gave the abovementioned third category a thorough consideration in its application to libel. This case stressed that the fact that the libel is published in the course of carrying on a business is not of itself sufficient. The categories identified were intended as imposing further restrictive conditions upon the award of exemplary damages.

It is submitted that the jury is an entirely inappropriate forum for determining whether or not an award of exemplary damages ought to be made. The subjective element involved in the award of exemplary damages, especially in determining the quantum, is particularly dissatisfactory because the jury can easily be confused and misled by skilled counsel. As Identified by Lord Hailsham:

> "*The difficulty consists not in working the system of aggravated and purely compensatory damages, where they apply, as they do in almost every case of contumelious conduct under Lord Devlin's opinion, but in working the system of punitive damages alongside the system of aggravated and compensatory damage...The difficulty resides in the fact that the thinking underlying the two systems is as incompatible as oil and vinegar, the one based on what the plaintiff ought to receive and the other based on what 12 reasonable, but otherwise uninstructed men and women think the defendant ought to pay*." [221]

What seems to emerging as a result of the confusion is the infliction of a double penalty for the same offence. The jury seem to be awarding a solatium and then adding to that another additional sum by way of penalty. Essentially, the only way to avoid this is if the judge ensures that in his direction to the jury they are made aware of the dangers of awarding an excessive sum. "*A judge should first rule whether evidence exists which entitles a jury to find facts bringing the a case within the relevant categories, and if it does not, the question of exemplary damages should be*

---

[219] *per* Lord Hailsham of Marylebone L.C. in ***Broome** v. **Cassell*** [1972] A.C. 1027 at 1078-9 explaining Lord Devlin's formulation in ***Rookes** v. **Barnard*** [1964] A.C. 1129 "*where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out for his wrong doing will probably exceed the damages at risk*".
[220] [1972] A.C. 1027
[221] [1972] A.C. 1027 at 1077

withdrawn from the jury".[222] Essentially it remains challenging for the juries to absorb the detailed guidance they receive on damages, which is only relevant if the claimant has established his case. This suggests that consideration needs to be given as to whether it would be better to separate the questions of liability and damages, so that directions on the latter are only made to the jury once liability has been established.

The questions, which have to be put to the jury, are also objectionable because they could lead to considerable confusion in this context. Such examples are questions as to the defendant's purpose and state of mind in relation to the statement. For the necessary state of mind, recklessness in relation to the libel is adequate, and its meaning is analogous to that in deceit. Therefore the statement must be made without belief in its truth. "*The publisher must have suspected that the words were untrue and have deliberately refrained from taking obvious steps which, if taken would have turned suspicion into certainty*."[223] Mere negligence is insufficient.[224] Consequently the jury must not be directed with the formula that the defendant must have acted "*not caring whether the publication be true or false*" because there is the risk that they may confuse "*not caring*" with "*carelessness*".[225]

The defendant's purpose in making the statement must be specified as the hope or expectation of material gain. The core of this category of exemplary damages is that the tort is committed with for the purpose of obtaining pecuniary advantage. In ***Broome** v. **Cassell*** Lord Hailsham said:

> "*it is not necessary that the defendant calculates that the Claimant's damages if he sues to judgement will be smaller than the defendant's profit…The defendant may calculate that the plaintiff will not sue at all because he does not have the money …or because he may be physically or otherwise intimidated*."[226]

The jurisdiction to award exemplary damages, has been subjected to authoritative analysis in the case of ***John** v. **MGN Ltd.*** The jury awarded £75,000 in compensatory damages and £275,000 exemplary damages, which the Court of Appeal reduced to £25,000 and £50,000 respectively. Reviewing the authorities the Court of Appeal held that to avoid the risk of the jury punishing a

[222] ***Broome** v. **Cassell*** [1972] A.C. 1027 at 1081
[223] ***John** v. **MGN Ltd*** [1997] Q.B. 586 at 618
[224] ***Maxwell** v. **Pressdram Ltd*** [1987] 1 W.L.R. 298
[225] [1997] Q.B. 586 at 618
[226] [1972] A.C. 1027 at 1079

defendant who only published carelessly (where "reckless" publication was alleged), the jury should be directed clearly that they have to be satisfied that the publisher had no genuine belief in what was published, but suspected that the words were untrue and deliberately refrained from taking obvious steps, which if taken would have turned suspicion into certainty.[227]

The Sunday Mirror was in effect damned twice for having tried to check the story and having failed. The fact that they felt checks were desirable was taken as evidence of their lack of belief in the story's truth, i.e. the papers failure to pursue the story to the end coupled with the criticism that they had no confirmation. Furthermore, the evidence of calculation required in exemplary damages, namely that the finical return for publishing would outweigh any liability in tort, can be found simply by virtue of a prominent headline on the front page. What is clear in abundance from the judgement is that failure by the defendant newspaper to give evidence of its conduct in publishing a story can be a dangerous step to take. The level of chance involved in the award of exemplary damages seems to entail the same unpredictability and uncertainty which is involved in compensatory damages, yet is far less justifiable because it inflicts an unjustified punishment on the defendant, whilst at the same time gratuitously over compensating the claimant. After all, why should one person be unjustly enriched because of another person's misperceived wrongdoing?

[227] [1997] Q.B. 586 at 618

6

Conclusion

6.1 Is now the right time to alter law?

In 1997 the Law Commission stated "…*we accept that before being altered further defamation law should be allowed to settle, particularly given that there has been so much change in recent years*". The Law Commission had one eye on the s 8 of the *Courts and Legal Services Act 1990* and the judicial development made in ***John v. M.G.N. Ltd***[228] They added, "*further change is anticipated in the near future*". The Law Commission envisaged a significant change would be brought about to defamation law through the incorporation of the ECHR through the *Human Rights Act 1998*.[229] This paper has revisited this area (of defamation law) to determine how these changes have settled and to ask whether the law is in an adequate position, if not, is now the right time to alter law?

6.2 What is proposed?

In light of these changes the aim of this paper was to show that the jury is no longer an appropriate tribunal for the assessment of the quantum of damages in a libel action. In contemporary cases, such awards have reached record; six figure sums, as in ***Tolstoy Miloslavsky v. UK***.[230] The jury was originally established as the constitutional tribunal for awarding damages in defamation actions in order to safeguard the freedom of the press. Ironically, jury awards have served to derogate from the freedom of expression of the media. The principles of proportionality, moderation and consistency have been "*unhappy bedfellows*" with defamation damages awarded in previous years.

Judges have, through their deference to the constitutional role of the jury and their extreme reluctance to disturb its role, shown doubts of their own ability to award sums in damages any more reasonable than those awarded by the jury. It has been said:

> "*I know of no principle of reason which would entitle judges, whether of appeal or at first instance, to consider that their own sense of the proprieties is more reasonable than that of a jury, or which would entitle them to arrogate*

[228] [1997] QB 586
[229] Law Comm. No. 247 (1997), at para. 4.22
[230] (1995) 20 E.H.R.R. 442

> *to themselves a constitutional status in this matter which Parliament has deliberately withheld from them, for aught we know, on the very ground that juries can be expected to be more generous on such matters than judges*."[231]

However,

> "*A jury is more likely than a judge to be influenced by irrelevancies and to give disproportionate weight to emotional factors in reaching their verdict, while the judge is better able to assess the evidence with the benefit of his training at the bar, and his experience of legal technicalities*." [232]

A claimant with a weak case is generally advised that his prospects of success are greater with a jury than with a judge alone. Because the results of jury trials are regarded as especially unpredictable, lawyers cannot so well assess their outcome and tend to recommend negotiations to settle them. This encourages gold-digging and blackmailing actions.

This is precisely the problem, which was addressed in the ***John*** case where Sir Thomas Bingham said "*...risky though the process undoubtedly is, as a road to untaxed riches.*"[233] The overall impression of defamation actions is that of the wealthy gambling for money, using the juries as pawns when setting their stakes. This is reinforced by the fact that defamation actions tend to be exclusively the domain of the rich since legal aid is not available to claimants in this area.

Originally, the assessment of damages was intended to compensate the claimant for injury to his reputation. Aggravated damages were supposed to further compensate the claimant for injury to his feelings and sense of affront and indignation, whilst exemplary damages were conversely, to punish the defendant and to teach him that '*tort does not pay*'. Instead, it has been widely recognised now that juries can often be obtuse and prejudiced in favour of claimants whose skilful counsels manipulate their emotions. This has lead to the elimination of trial by jury in almost all other civil cases.

The legislature is the only legitimate body, which has the power to usurp the constitutional role of the jury in assessing the quantum of damages for defamation. This paper has followed the statutory and judicial attempts, which have been made to harness the jury's role in this area.

[231] ***Broome** v. **Cassell & Co Ltd (No.1)*** [1972] A.C. 1027 *per* Lord Hailsham
[232] Great Britain Committee on Defamation, *Report of the Committee on Defamation*, (London: HMSO, 1975), (Cmnd.; 5909), Chapter 17
[233] [1997] Q.B. 586 at 611

First, under s.8 of the *Courts and Legal Services Act 1990*, the Court of Appeal has been given the power to substitute its own award of damages, for that awarded by a jury without ordering a retrial. The *Defamation Act 1996*, has also given the courts the power to give claimants limited relief, under a summary procedure, without a jury trial. Judicial attempts to constrain the almost limitless discretion of the jury were made in cases such as ***Rantzen** v. **Mirror Group Newspapers Ltd*** and ***John** v. **Mirror Group Newspapers Ltd***. In the latter case, the Court of Appeal held that comparative reference could be made to conventional compensation scales in personal injury cases, as well as to previous libel awards, made or approved by the appellate court. Personal injury awards were to be used as a check on the reasonableness of defamation damages, and to induce a sense of proportionality. The claimant and the defendant were also invited to suggest sums of awards which in their views were appropriate, to induce a sense of realism.

In the ***Rantzen*** case, Article 10 of the Human Convention of Human Rights was applied. This required that the jury be given more concrete guidance when assessing damages. Only then would the restriction on the freedom of expression, created by the jury assessment of damages, be "*prescribed by law*". The threshold for judicial intervention to correct excessive awards was also brought down; the question was "*could a reasonable jury have thought that this award was necessary to compensate the plaintiff and to re-establish his reputation?*" In the ***Rantzen*** case this was answered in the negative.

Despite these judicial and statutory developments, reform of the law has still been deemed to be necessary. It has been argued that the judge alone ought to be responsible for assessing the quantum of damages for defamation, thus usurping the role of the jury in this area. The recommendation of the Faulks Committee, that the jury suggest what category of award the claimant ought to be awarded, has been rejected as unworkable. The practical difficulties of separating the functions of the judge and jury have also been addressed, and it is maintained that these are workable. This assertion has been founded on the experience of the criminal law, where issues similar to those in the civil law arose.

It has been proposed that a judge alone should assess libel damages, and a tariff system ought to be set up through the judgements of the appellate court, in order to restrain the discretion of the judges. Furthermore, in combating the "*chilling effect*" it has been shown that the award of exemplary damages in defamation actions entails unpredictability and uncertainty, which is also involved in compensatory damages, yet is far less justifiable because it inflicts an unjustified punishment on the defendant. This paper would endorse the Faulks Committee and the Working

Group of the Supreme Court Procedure Committee's view that awards exemplary damages in defamation proceedings should be abolished. Hopefully, this would avoid any repercussions, which have been caused by the free hand, which was given to juries, when awarding damages. The reform of the law of New South Wales further militates in favour of the arguments, which have been propounded in this study. Since 1995, legislation in New South Wales laid down that the trial judge was to determine whether any defence was established and the amount of damages, not the jury. In assessing such damages the judge is required to take into account the general range of damages for non-pecuniary loss in personal injury awards in New South Wales.[234] The legislative reforms in New South Wales, show how reform in England is long overdue, and support the argument in favour of usurping the role of the jury in awarding damages.

[234] ss. 7A and 46A of the *Defamation Act 1974* (NSW) as inserted by the *Defamation (Amendment) Act 1994* (NSW)

Bibliography

Carter, Ruck, Walker and Starte, *Carter-Ruck on Libel and Slander*, (4th edn.), (London: Butterworths, 1992)

Carter-Ruck Lawyers, 'Jury Awards Former Mayor £65,000 for Aeroplane Banner Libels' *Cater-Ruck Article*, December 2003/January 2004 Newsletter, at Carter-Ruck website http://www.carter-ruck.com/articles/2003-2004-Howlett.html

Clarke-Williams, Jeremy and Skinner, Lorna, *A Practical Guide to Libel and Slander*, (London: Butterworths LexisNexis, 2003)

Great Britain Committee on Defamation, 'Report of the Committee on Defamation', (London: HMSO, 1975), (Cmnd.; 5909)

Harbottle and Lewis, 'Libel Damages: The Road to Untaxed Riches', [2002] In-House Lawyer, November, (www.harbottle.com) at http://www.harbottle.com/i_articledetails.asp?type=article&P_ID=441&ID=43&SuperID=11&from=legal

Hooper, David, *Reputations Under Fire, Winners and Losers in the Libel Business*, (London: Little Brown Company, 2000)

Ireland, The Law Reform Commission, *Report on the Civil Law of Defamation*, (LRC 38-1991) at http://www.lawreform.ie/publications/data/volume10/lrc_67.html

Ireland, The Law Reform Commission *Consultation Paper on the Civil Law of Defamation* (Dublin, March 1991)

Jones, Michael, A., *Textbook on Torts*, Seventh Edition, (Oxford: OUP, 2000)

Judicial Statistics 1998, Department of Constitutional Affairs website at http://www.dca.gov.uk/courtfr/jstats/32.pdf

Judicial Statistics 1999, Department of Constitutional Affairs website at http://www.dca.gov.uk/jsar99/chapter3.pdf

Judicial Statistics 2000, Department of Constitutional Affairs website at http://www.dca.gov.uk/judicial/jsar00/chapt3.pdf

Judicial Statistics 2001, Department of Constitutional Affairs website at http://www.dca.gov.uk/judicial/jsar01/judicial_stats3.pdf

Judicial Statistics 2002, Department of Constitutional Affairs website at http://www.dca.gov.uk/judicial/jsar02/judicial_stats3.pdf

Judicial Statistics 2003, Department of Constitutional Affairs website at http://www.dca.gov.uk/judicial/jsar03/js03_chapter_3.pdf

Law Commission Report, 'Aggravated, Exemplary and Restitutionary Damages', (Law Com No. 247, 1997)

Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (Law Com No 257, 1999)

Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1995) Consultation Paper No 140

Law Commission, *Defamation and the Internet - A Preliminary Investigation*, Scoping Study No 2 (December 2002)

Law commission, *How Much Is Enough?* (Law Com No 225, 1994)

Lewis, Philip, *Gatley on Libel and Slander*, (8th edn.) (London: Sweet & Maxwell, 1981)

Martin Nourse, 'The English Law of Defamation – Is Trial by Jury Still the Best?', in Markesinis, B., S., (ed.), *The Clifford Chance Lectures*, Vol. I, *Bridging the Channel*, (Oxford: OUP, 1996)

Milmo and Rogers, *Gatley on Libel and Slander*, (9th edn.) (London: Sweet & Maxwell, 1997)

Mullender, Richard, 'Defamation, the Jury and the Pursuit of Justice', [2001] 60 *Cambridge Law Journal* 460

New South Wales, *Defamation* (1995) Report 75 of the New South Wales Law Reform Commission, http://www.austlii.edu.au/au/other/nswlrc/rpt75/

New South Wales, Law Reform Commission, *Defamation* (LRC 11, NSW Government Printer 1971)

New South Wales, Law Reform Commission, *Defamation* (DP 32, 1993)

New South Wales, Parliament of New South Wales, Legislative Assembly, *Report of the Legislation Committee on the Defamation Bill, 1992* (October 1992)

Platt, Steve, 'Would you sue your paper boy?', *New Statesman & Society*, 12 March 1993 at http://www.steveplatt.net/archive/newstatesman/johnmajor/majorpaperboy.htm

Price and Duodu, *Defamation Law, Procedure & Practice*, (3rd Edn.), (London: Sweet & Maxwell, 2004)

Price, *Defamation Law, Procedure & Practice*, (London: Sweet & Maxwell, 1997)

Rawnsley, Andrew, 'Archer wins record £500,000 damages', Saturday July 25, 1987**,** Guardian Unlimited, at http://www.guardian.co.uk/archer/article/0,2763,522734,00.html

Scott-Bayfeild, Julie, A., *Defamation: Law and Practice*, (London: FT Law & Tax, 1996)

Slapper & Kelly, *English Law*, (London: Cavendish, 2000)

Smith, Bailey & Gunn, Smith, Bailey & Gunn on the Modern Legal System, (4th edn.), (London: Sweet & Maxwell, 2002)

Tait, 'Libel Law: the declining role of Juries', Peter Carter-Ruck and Partners, (http://www.carter-ruck.com) at http://www.carter-ruck.com/articles/200311-lost_sheep.html

The English Law Web Site of Asif Tufal, Defamation Notes on www. lawteacher.net at http://www.lawteacher.net/Tort/Defamation/Defamation%20Lecture.htm

Thomas, '*Damages: Should it be up to the Jury to Decide?*' [2000] L.Ex. Apr, 30

Zander, *Cases and Materials on English Legal System*, (9th edn.), (London: LexisNexis, 2003)

Appendix

Table 1: This table shows an assorted sample of jury awards from 1987 to 2004. However, these figures were the initial awards made by juries, which were subsequently settled for, or reduced on appeal to lower sums. The figures in Table 1 are used and shown here to illustrate the initial excessiveness of the jury awards.

Year	**Cases** *(Claimant) awarded damaged against (Defendant)*	**Damages Awarded**
1987	Jeffrey Archer v. *Daily Star Newspaper*	£500,000
1987	Narendra Sethia v. *Mail on Sunday*	£260,000
1988	Fox and Gibbons Solicitors v. Arab Magazine *Sourakia*	£310,000
1988	Johnson v. *Liverpool's Radio City*	£350,000
1989	Tobias Cash 'n' Carry v. *Mail on Sunday*	£470,000
1989	Lord Aldington v. Count Tolstoy	£1,000,000
1990	Jim Rowlands-Jones v. City and Westminster Financial Plc and others	£130,000
1991	Teresa Gorman v. Anthony Mudd	£150,000
1991	Dr Malcolm Smith v. Dr Alanah Houston	£150,000
1991	Esther Rantzen v. *Mirror Group Newspaper*	£250,000
1992	Vladimir Telnikoff v. Vladimir Matusevitch	£240,000
1992	Jason Donovan v. *The Face*	£200,000
1992	Wafic Said v. Misbah Baki	£400,000
1993	Elton John v. *Mirror Group Newspaper*	£350,000
1994	Walker Wingsails Systems v. Yachting World	£1,485,000
1995	Souness v. *Mirror Group Newspaper*	£750,000
1996	Percy v. *Mirror Group Newspaper*	£625,000
1996	Jones v. Pollard	£100,000
1997	Mr and Mrs Wilmot-Smith v. *Daily Telegraph*	£350,000
1998	Roache v. *News Group*	£50,000
1999	Grobbelaar v. *News Group Newspapers Ltd*	£85,000
2000	Kiam v. *Mirror Group Newspaper*	£105,000
2001	Campbell v. *News Group Newspapers Ltd*	£350,000
2003	Mrs Jenifer Howlett v. Terry Holding	£65,000
2004	Jimmy Nail v. *News of the World*	£22,500

Figure 1: This is a graphical representation of the data contained in Table 1.

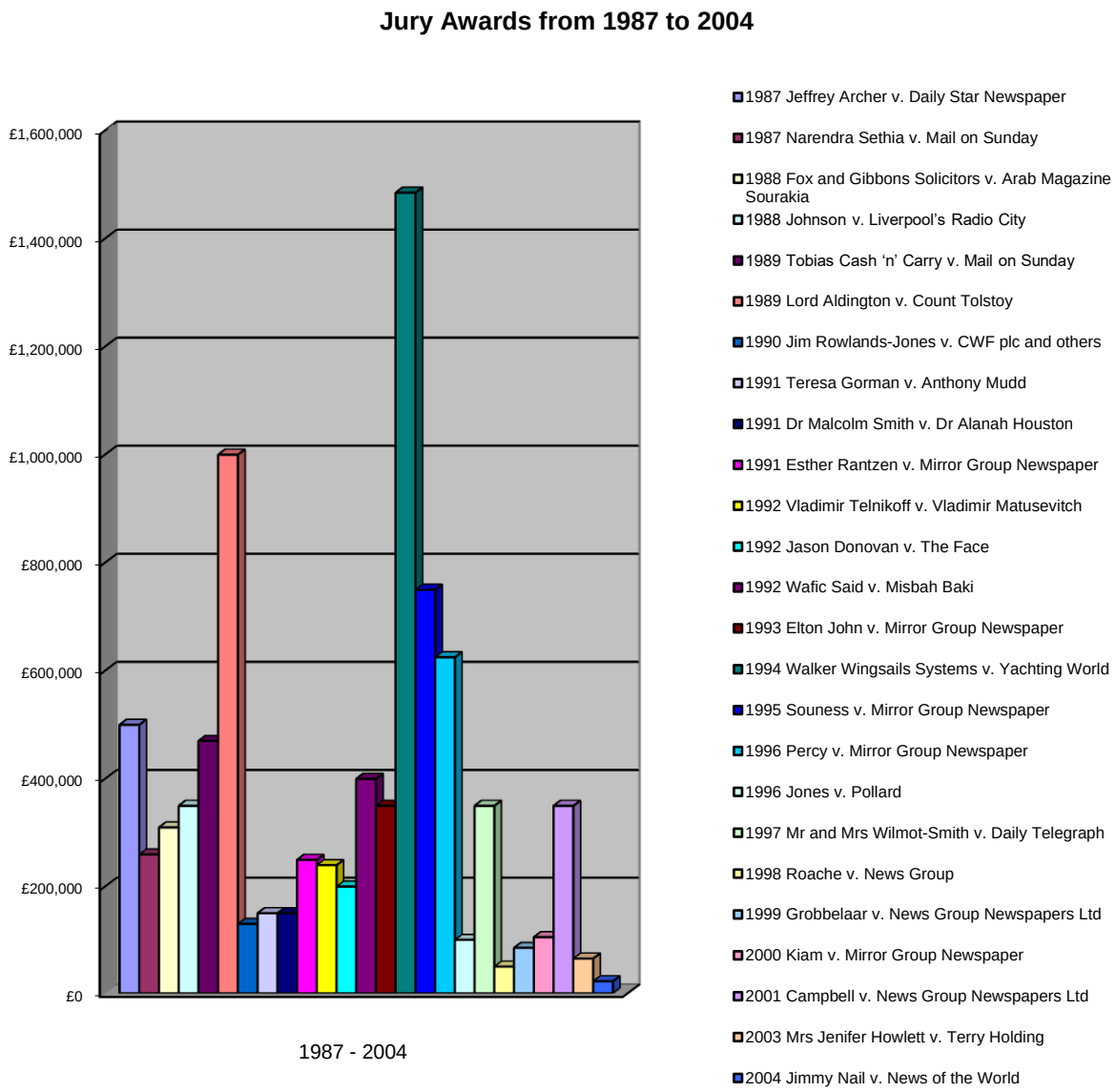


Table 2: This table shows the number of defamation cases that were issued in Royal courts of Justice between 1998 and 2003.

Year	No of Claims issued
1998	379
1999	236
2000	241
2001	220
2002	128
2003	190

Graph 2: This graph illustrates the number of defamation cases that were issued in Royal courts of Justice between 1998 and 2003.