Case No: A2/2006/1100

Neutral Citation Number: [2007] EWCA Civ 744
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(MR JUSTICE GRAY)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 18th April 2007

Before:

LORD JUSTICE CHADWICK
LORD JUSTICE LAWS
and
MR JUSTICE EVANS-LOMBE

- -

Between:

PURNELL

Appellant

- and -

BUSINESS MAGAZINE LTD

Respondent

- -

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

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Mr D Price appeared on behalf of the **Appellant**.
Mr W Bennett (instructed by Steeles) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Laws:

1. This is a defendant's appeal against an award of damages of £75,000 in a libel case. It is brought with permission granted by Sedley LJ on 9 August 2006 on one ground only. He declined to grant permission on other grounds and a renewed application in respect of those, save for one which was abandoned, was dismissed by May LJ on 15 November 2006. Thus the only live ground is that for which Sedley LJ granted permission. It consists of what to my mind is in some ways a curious point, arising out of the fact that the jury which made the damages award on 4 May 2006 was dealing with quantum only. Eady J had on 14 March 2006 struck out a defence of justification and entered judgment for the claimant -- respondent to this appeal -- for damages to be assessed.

2. The material facts can be stated very shortly. The respondent was the team principal of the Jaguar Racing Formula One Team until January 2005 when he was placed on what is sometimes called "gardening leave". The first appellant is the publisher of a monthly magazine called BusinessF1, whose subject matter is the motor racing world. The second appellant is the magazine's editor.

3. The article complained of in the proceedings occupied part of page 13 in the April 2005 issue of BusinessF1. It was written by the second appellant. It was headed "Purnell Bribed Top Journalist to Puff Achievements". The text of the article contained a number of statements which arguably negated the impression contained in the headline. However, the second appellant, who acted in person throughout in the proceedings, admitted in his defence that the article bore the meanings attributed to it in the respondent's pleading to the effect that the respondent had acted dishonestly and corruptly bribed a journalist with his employer's money. The appellants accept, unsurprisingly, that the allegation was indeed a serious one.

4. The basis on which Eady J struck out the pleaded defence of justification on 14 March 2006 was that, on the evidence, no reasonable jury could conclude that there had been any bribery by the respondent. There was no other defence and the words were plainly defamatory. Accordingly, Eady J entered judgment for the respondent, as I have said, and granted what has been referred to as a standard injunction against repetition. The respondent might have asked Eady J to dispose of the whole case on a summary basis, pursuant to section 8 of the Defamation Act 1996, but in that case damages would have been limited to £10,000.

5. As was his right, the respondent chose to seek a greater award from a jury. Accordingly, the case proceeded to a trial on damages before Gray J and a jury on 3 and 4 May 2006. It was submitted by counsel for the respondents that there were three elements to the claim: injury to feelings, injury to reputation and vindication. There was no claim for pecuniary loss or for exemplary damages.

6. The only live ground of appeal concerns the third of these elements, vindication. This is how it is articulated in the skeleton argument for the appellants prepared by their advocate, Mr Price:

> "It was wrong in principle for the Judge [Gray J] to allow the jury to include any element of vindication in its award,

> as the judgment of Eady J fully vindicated [the claimant] to any extent possible by the legal process."

7. Summing up to the jury on the second day of the damages trial, Gray J told them, (or rather reminded them -- it had been much referred to) that a judge had earlier struck out the defamation defence; no other defence was relied on, their task was only to decide what sum to award by way of damages. He proceeded to identify the factors which the jury should consider in arriving at a figure to compensate the respondent. On the vindication element the learned judge said this:

> "Another thing on which Mr Bennett laid considerable stress in his closing speech to you is the wish of Mr Purnell to achieve, by your award, vindication as it is called. What that means is that what Mr Purnell wants you to do is to award a sum of sufficient size to send a signal to people that there was no truth at all in the allegation that he bribed a journalist. Well, it is perfectly right. You are entitled to take account of that understandable wish on the part of Mr Purnell but be a little cautious, if I may suggest it, members of the jury, for this reason. There was not, in the hearing you have participated in over the last two days, a plea of justification put forward.
>
> "So it is not a case like many libel actions where there is maybe a newspaper justifying, or seeking to justify, some serious slur on a man perhaps in the public eye. The case will be reported day after day, the press box would be full of journalists and the allegation, the slur, would be published repeatedly and very, very widely. In that kind of case the need for vindication is obvious because a lot of people would have come to hear about the slur and it would be right and proper for the jury in those circumstances to treat the need for the claimants to achieve vindication through the jury's award as a major consideration.
>
> "Now, you may think this case is rather different from that, although Mr Rubython has made a number of comments suggesting that there might have been some truth in what was published in the article after all, the fact is there has not been a plea of justification on the record, the subject of evidence before you, nor (for all I know) has there been reporting of the sort of questions that Mr Rubython was asking in the course of his cross-examination yesterday.
>
> "Yes, bear in mind the legitimate wish for vindication but perhaps give it rather less significance in the context of this case than you might have in some other cases where there was a plea of justification being advanced on the subject of evidence. But in the case of vindication, as in

> the case of all the other factors that come into the mix when deciding the amount of the award, it is for you to decide what weight each of those factors should bear."

8. As regards the overall quantum of damage, Gray J in his summing up suggested a bracket of between £25,000 and £60,000, making it clear, however, that that was only an indication and the jury was free to go below or above it. It is well established that general damages in defamation cases serve the three functions submitted by counsel before Gray J: to console the claimant for the injury to his feelings occasioned by publication of the defamatory statement; to repair the harm to his reputation; and as a vindication of his reputation. The learning that is often cited as explaining the element of vindication in defamation damages is this following passage from the speech of Lord Hailsham, Lord Chancellor in Broome v Cassell [1972] AC 1027 at 1071c-e:

> "In actions of defamation and in other actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily an even more highly subjective element. 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 merely 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, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge. As Windeyer J. well said in Uren v John Fairfax & Sons Pty. Ltd., 117 CLR 115, 150:
>
> "'It seems to me that, properly speaking, a man defamed does not get compensation *for* his damaged reputation. He gets damages *because* he was injured in his reputation, that is simply because he was publicly defamed. For this reason, 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."

9. In Rantzen v Mirror Group Newspapers (1986) Ltd [1994] QB 670, Neill LJ giving the judgment of the court said this:

> "Despite Mr Gray's submissions to the contrary it seems to us that the damages for defamation are intended at least in part as a vindication of the plaintiff to the public. This element of the damages 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 [1972] A.C. 1027, 1071."

Then a little later Neill LJ said this:

> "… the jury should be invited to consider the purchasing power of any award which they may make. In addition they should be asked to ensure that any award they make is proportionate to the damage which the plaintiff has suffered and is a sum which it is necessary to award him to provide adequate compensation and to re-establish his reputation."

The re-establishment of the claimant's reputation there referred to is the same thing as its vindication.

10. The appellants, through Mr Price, are at pains to emphasise the undoubted proposition that an award of damages for defamation is a restriction upon freedom of expression within the meaning of article 10 of the European Convention on Human Rights. The significance of this is that if a violation of the Convention is to be avoided the damages awarded must be no more than "necessary". So much was recognised in Rantzen (see 692 d-h) and also in John v MGN [1997] QB 586.

11. Building on this foundation of article 10, Mr Price submits that Eady J's judgment:

> "… provided all the vindication that was available to [the claimant] through the court process." [see his skeleton argument, paragraph 128]

That is the proposition upon which he has laid much emphasis in his submissions before us today. He refers to a dictum of Gray J himself in Rackham v Sandy [2005] EWHC 482 in which the learned judge sat without a jury to determine both liability and quantum in a defamation case. At the end of his judgment Gray J said:

> "No time was spent during the trial dealing with the issue of damages. To the extent that Mr Rackham seeks and is entitled to vindicate his reputation, that will be largely achieved by a reasoned judgment."

12. The judge proceeded to make an award of £2,000. This is to be compared with what was said by Slade J in Hook v Cunard Steamship [1953] 1 WLR 682 at 686:

> "It was fortunate for the defendants that he, [that is the judge] not sitting with a jury, was able to make it clear that there was no vestige of ground, nor had any vestige of ground been suggested by the defendants, for casting the slightest aspersion upon the plaintiff's character. He was, therefore, able to vindicate the plaintiff in that court, and it was not necessary for him to vindicate him by visiting a heavy sum of damages upon the defendants for their conduct in the matter, as a jury might well have done, being the only way in which they could have made it clear that there was no stain of any kind upon his character. His Lordship then assessed the damages at £250."

13. We have also been shown two cases arising from the practice in the Second World War for defamation cases to be heard without juries. In Rook v Fairrie [1941] 1 KB 507 Sir Wilfrid Greene MR said this:

> "… the learned judge goes on to point out the difference that exists in the case of a libel action heard by a jury and a libel action heard by a judge alone. He points out truly that in a case where there is only a jury, the only way in which the jury can indicate its view of the grossness of the libel, the conduct of the defendant and the character of the plaintiff, is in the figure which the jury thinks right to award. In a case where a judge is sitting alone, on the other hand, Atkinson J points out that those matters can be expressly dealt with in the judgment of the trial judge, and that accordingly the question of awarding a sum of damages which, by its mere magnitude, will show the views of the Court is one which bears a very different aspect where the case is heard by a judge alone. He points out that a jury may take this attitude, that it may say: "We are not allowed to say what we think about this case, and so we will give a very big sum, which will indicate "what we think." It is said that that is a misdirection by the learned judge, that the consideration to which he is there pointing is one which he ought not to allow to affect his mind at all, and that his duty is to put himself in the position of a jury without regard to the fact that in his reasons for his judgment he is able to express in words what a jury can only express in figures. In my opinion, there is no misdirection here. When once it is appreciated what the nature of damages in a libel action is and the rather complex objects which an award of damages in such an action are supposed to secure, the result, it appears to me, inevitably follows that where a judge is sitting alone the situation is in important respects different from that where he is sitting with a jury, because although the same elements are always present, the method in which they ought in any individual case to be treated may well be different. Accordingly I can find no misdirection there."

14. In Bull and Vasquez [1947] 1 All ER 334, Sir Wilfrid Greene MR referred to Rook v Fairrie and said:

> "336. In that case the question arose whether it was open to a judge sitting alone in assessing damages to have regard to the fact that, unlike a jury, he was able in his spoken judgment to express his opinion of the seriousness of the libel. This court held that the judge there has not misdirected himself in holding that he was entitled to take that circumstance into account. All I wish to say is that that judgment cannot be read as suggesting that where a

> judge expresses in his spoken judgment his opinion of the libel and the conduct of the person uttering it, he is thereby in some way disentitled from awarding heavy damages. The position, as I understand it, is that the whole matter is at large and the judge is entitled, though not bound, to take into account what he has been able to say in his spoken judgment. In one case he may think that that is sufficient and the damages may be on the low side in consequence. In another case, he may think that that is not sufficient and he may award heavy damages as well as expressing his opinion in his judgment. The case certainly cannot be taken as suggesting for a moment that once a libel action is heard by a judge alone it is not competent to him to award the damages which he would have awarded if he had not been in a position to express his opinion in words."

I shall have a little more to say about these last two cases.

15. Mr Price goes so far as to submit that in any case where defamatory allegations have been rejected as untrue or unproved in and by a judge's reasoned judgment, the claimant's entitlement to vindication is complete and there is no place for an award of damages in part or whole to provide for that same element. Mr Price, I have to say, does not appear to have a very high opinion of Lord Hailsham's reasoning in Cassell & Co Ltd v Broome & Anr. In paragraph 28 of his skeleton argument he makes this submission:

> "But for the most part, it is a complete fiction that the amount of the damages is a reliable guide to Lord Hailsham's notional bystander as to the level of untruth. It is a far less reliable guide than a written judgment which states in terms what was true or untrue and why. Why would [a claimant] be any less vindicated by an award of £25,000 than an award of £75,000? The whole theory proceeds on the false premise that the general public have an accurate perception of appropriate levels of damages for the varying levels of gravity (factoring in any element of truth) and so can discern the level of untruth from the jury's award."

16. Mr Price submitted in terms in answer to a question from my Lord, Evans-Lombe J, that in a case where a judge alone deals with liability and quantum in a libel dispute there should never be an award to reflect vindication. Mr Price's primary submission on the facts of this case is that Gray J misdirected the jury in what he said about vindication. He should have directed them to disregard vindication in assessing damages and that they should not include in the damages they assessed any element whatever to reflect the respondent's desire to be vindicated. Mr Price also advanced a fall-back position, namely that the judge should have but did not direct the jury to consider whether, given the earlier judgment of Eady J, it was necessary to include in the damages any element for vindication.

17. Mr Bennett, counsel for the claimant, first submits that there is high authority to the effect that damages in defamation ought not to be reduced only on account of the fact that a narrative judgment has been given holding the libel to be false. This is the case of Associated Newspapers v Dingle [1964] AC 371 in their Lordship's House. Lord Morton of Henryton indicated (p.401) that leading counsel on both sides had invited their Lordships to express their views about what had been said by Atkinson J in Rook v Fairrie, part of which was quoted by Sir Wilfrid Greene MR in the passage I have set out from that case. The whole passage from Atkinson J, cited by Lord Morton in Dingle, is as follows:

> "The report then quotes the following words:
>
> 'A jury can only indicate its view by the size of the sum that it gives as damages, and I think it very likely that a jury would have said: 'We are not allowed to say what we think about this case, and so we will give a very big sum, which will indicate what we think.' But I am a judge and I have been able to indicate what I think of the case, and in my view it is unnecessary to give a larger sum than that to drive home my conviction, and indeed everybody's conviction, that there never was the slightest foundation for any one of these libels, there never was the slightest justification for one word to be said against Mr Rook in any shape or form, and that Mr Fairrie knew it from first to last and Messers Galban, Lobo & Co knew it from first to last, and that their attitude, I have no doubt, was influenced, though to what extent one cannot measure, by the seed of distrust put into their minds by the defendant 9 months before the war began, in May of last year. I think that sum is sufficient to indicate my view. I can well think that a jury would have given a bigger sum, but sometimes juries give sums which are too big. At any rate that is the conclusion to which I have come. I give judgment accordingly for £550."

18. Lord Morton proceeds also to cite the Master of the Rolls' judgment in Rook and then a passage from a judgment of Lord Goddard, Lord Chief Justice in Knupffer v London Express Newspapers where the Chief Justice had said this:

> "For myself, I find it difficult to subscribe to the view that a judge may give less than he thinks a reasonably minded jury would give because he can express his opinion on the conduct of the parties in words while a jury can only do so by the amount that they award. If as a war-time measure a litigant must dispense with a jury he ought not, in my opinion, so far as is humanly possible, to be at any disadvantage for that reason, but as there are limits to the power of a jury as regards damages, so there are to those of a judge."

Lord Morton observed at page 402:

> "It follows from these observations that Goddard LJ did not regard with any favour the reasoning of Atkinson J in Rook v Fairrie."

Lord Morton then proceeded to cite Bull and Vazquez and his speech continues as follows:

> "There is no indication that Pearson J or the Court of Appeal in the present case reduced the damages because they had expressed a favourable opinion of Mr Dingle, and any observations which your Lordships may make on the subject will be obiter dicta. Nevertheless, I hope that your Lordships will see fit to express your views, in response to the invitation of counsel. The question is one of general importance, and it is obviously desirable that the course adopted in Rook v Fairrie should either be followed by all judges or by none.
>
> "My Lords, I cannot agree with the introduction of this element into the assessment of damages. The principles to be applied by a judge in assessing damages are the same as the principles to be applied by a jury. It cannot, I think, be right for a judge to say to a plaintiff, in effect: 'A jury might well award you £x damages in this case, and they would not be wrong in so doing. I shall, however take into account the fact that I have expressed a favourable opinion of you in my judgment. I shall award you a lesser sum than £x because that tribute will have a good effect upon your general reputation.' Such a method of assessing damages would do less than justice to the plaintiff, in my view, and it is based upon suppositions which may be unfounded. A judge cannot tell how widely his judgment will be reported and read, not can he tell how far the plaintiff's general reputation will be improved by his complimentary remarks. A simple verdict of a jury in favour of the plaintiff will no doubt have a good effect on his reputation, and it is surely impossible to set a monetary value upon the difference, if any, between the effect of a jury's finding and the effect of a judge's finding plus a compliment from him."

Lord Cohen, page 407, agreed without any additional reasoning. Lord Denning said this, page 408:

> "In Rook v Fairrie it was said that a judge was entitled to reduce the damages because he could, by the words he used, vindicate the good reputation of the plaintiff, whereas the jury could do no such thing. I do not think the judge has any right to reduce the damages on this account. In an action for libel the plaintiff has a constitutional right to trial by jury. If he chooses trial by judge alone instead

> of trial by jury, he should not suffer on that account. Just see what difficulties will arise about payment into court! How can the defendant assess the amount of his payment in, or the plaintiff decide whether it is enough or not, if the correct figure depends on what the judge may, or may not, elect to say in his judgment? And how can the judge himself know what effect his vindication will have? He cannot ensure that the newspapers give it adequate publicity. If Rook v Fairrie were good law, it would discourage a plaintiff from bringing before a judge alone an action which was more suitable for trial by him than by a jury. I cannot therefore subscribe to it. But I do not think it matters in this case because there is nothing to show that the judge did reduce the damages on that account."

Lord Morris of Borth-y-Gest also agreed (418-419) as had Lord Radcliffe, giving the first speech (400-401).

19. Mr Bennett, for the respondent, also has some factual points and I should explain those before confronting the legal issue joined between the parties. Mr Bennett refers first to the April 2006 edition of the appellant's magazine, BusinessF1, which it is said misrepresented and undermined Eady J's judgment, and in particular in a passage attributed to the second appellant:

> "It was a harsh decision, considering the evidence presented, but the actual intention of payment is extraordinarily hard to prove. This judgment effectively means that no magazine or newspaper can accuse someone of bribing someone or of someone taking a bribe unless both parties actually admit it. The passing over of money, as we have proved, is irrelevant."

20. This was put in terms to the respondent at the trial before Gray J by his own counsel and this exchange ensued (Day 1, transcript internal pagination 36B):

> "Q: Mr Purnell, what is your assessment of that column in the article?
>
> "A: This is the part that really causes real offence. It reads as though, "Purnell's on trial. He's got off on a technicality, you know? Lucky bloke, but we know he's guilty, really" and to say that the passing over of money is irrelevant -- well, that's the nub of a bribe. I can't believe that the law allows -- would agree with this, that:
>
> "'No magazine or newspaper can accuse somebody of bribing someone, or somebody of taking a bribe unless both parties actually admit it.'
>
> "I think that's --

> "Q: Do you think that is a fair summary of what Eady J said in his judgment?
>
> "A: I think it's a misrepresentation, an utter misrepresentation of his judgment."

21. Mr Bennett says the piece in the magazine was published for the very same readership as had been the original defamatory article. Mr Price says that the second article is irrelevant to vindication because of his submission that "vindication does not depend on the vindicatory decision being reported by the news media and/or the defendant not seeking to disparage it". Mr Bennett submits also that it was the respondent's case at trial before Gray J and the jury that the appellants had gone out of their way to "rubbish" Eady J's judgment. This second article, to which I have referred, had been pleaded as aggravating the damages. The respondent said the second article was designed to imply that Eady J had allowed him to, as the respondent himself put it, "get off on a technicality". It was never suggested by the appellants to Gray J and the jury that the respondent's reputation had been vindicated by Eady J. On the contrary, the suggestion being made was that the original allegation was true. I should cite these short passages from the transcript, Day 1, internal page 51A. Mr Rubython, the second appellant, says this:

> "Mr Bishop was paid in two stages [Mr Bishop was the person supposed to have been bribed]. It appears to be the same work. In the first stage when you were not Chief Executive and the costs were a lot higher, he was paid approximately 3,800 and for the second stage of the contract he was paid just over 6,000, which is about double. That does not fit with the cost-cutting ethos that you had installed in the company. I would just ask you why was he paid double?"

Before the respondent could answer the judge says:

> "Mr Rubython, I am not even going to allow, if I may say so, Mr Purnell to answer that because I think you are trying to suggest, notwithstanding Eady J's ruling, that there is some truth in the suggestion that there was a bribe paid to Mr Bishop. You cannot do that."

22. Then, also Day 1, internal page 69, Mr Rubython still asking the questions:

> "Q. Do you not think that the fact that there was a payment made to Mr Bishop of approximately £10,000 and you have admitted it is plainly obvious that the articles that were written by Mr Bishop were very generous to you and very, very good press, you must surely see that there was some basis for this article?
>
> "MR JUSTICE GRAY: That is a question that I think, Mr Rubython, you know very well you cannot ask. Your

> defence of justification has been struck out. That means it cannot be resurrected even by hinting at the truth of the allegation of bribery."

Then, in the second appellant's opening address to the jury, Day 1, internal page 92F:

> "Ladies and Gentlemen of the jury, a solicitor friend once told me, 'You must never write that two people have a sexual relationship if both of them are likely to deny it'. The reason is simple, because behind the closed doors of a bedroom they are the only two people who can know if they have. If an allegation later becomes the subject of a libel action, his inference was that a journalist, i.e. myself would lose. I have learnt that to my cost in this case, in a similar situation. When a payment you might suspect as a bribe passes between two people, unless one of them, the briber or the bribed admits it is an inducement to do something, other than what the payment is purported to be, it cannot be described as a bribe because it can never be proved to be so. Bribery is a most difficult misdemeanour to prove; so is the position myself and my magazine find ourselves in today."

Then one sentence from the next page, 94A:

> "You will gather from my tone that, although I accept his judgment, [that is Eady J] I do not think for one minute it is correct."

Then Gray J made this comment to the second appellant, Mr Rubython, at the end of his opening and before he began his evidence. Day 1, 96A:

> "I think I should also state, before you start your evidence, that I will not permit you to do what you have just done in your opening speech, which is to, in effect, invite the jury to accept that the allegation of bribery was true. That is not something you are entitled to do."

23. In contrast to Mr Rubython, counsel for the respondent before Gray J dealt with the possibility of vindication by Eady J at some length in his closing speech. He postulated an instance in which the respondent showed an interlocutor a copy of Eady J's judgment in order to demonstrate that he was vindicated. Then he made these submissions (Day 2, appeal bundle numbering 172, internal transcript page 35):

> "Now, members of the jury, in an ideal world that person would take the judgement, read it carefully and closely and come to the conclusion that Mr Purnell's reputation was, in fact, vindicated by Mr Justice Eady. But we have to accept that in the real world people are not particularly inclined to

read legal judgments. Mr Purnell is realistically not in a position to start sending around legal judgments to all the people he knows. Legal judgments are written by lawyers for lawyers in legal language. If that judgment was sent to that person on Fleet Street it would probably be put on a pile where it gathered dust.

"But then the person on Fleet Street says that not only that, 'You send me this judgment if you like but I have seen what Mr Rubython said about that in his magazine. But word has got around there was that trial, was there not, in open court last week where anyone can report on what is going on and watch what is going on. In fact Mr Rubython is still saying that allegation is true'.

"The person on Fleet Street may never have met Mr Rubython, all he has seen is his magazine. He might well say to Mr Purnell, 'Come on this is F1, £25 a copy, a credible magazine like that. Mr Rubython, the editor of that magazine, the magazine that is trusted, BusinessF1, come on. If Mr Rubython still says, even now, under oath in a High Court trial that allegation is true then there must be something in it'.

"What can Mr Purnell do faced with this situation? He cannot point to an apology because the court cannot order Mr Rubython to make one and Mr Rubython has made it quite clear he will not apologise. He cannot point to a new judgment by Mr Justice Gray because in this type of case Mr Justice Gray is not here to give the judgment. It is effectively you, members of the jury, who give your judgment by reason of the award of damages you make.

"Therefore really the remedy in this case, the remedy that Mr Purnell seeks, is in your hands, because the man or woman on the street respects the decisions of juries, particularly the decisions of a High Court jury such as the one you are sitting on. They do so because the man or woman on the street say, 'Oh yes, a jury. That is 12 men or woman just like me'. It is not lawyers, it is ordinary people trying to do justice. Juries do not let people off on technicalities, juries apply common sense. When a jury makes a decision not even someone like Mr Rubython, at least with any credibility, can say that they had it wrong or they applied some sort of legal technicality.

"So what can you do? If I go back briefly to that situation where you have someone on Fleet Street that Mr Purnell has just stopped. What Mr Purnell needs to do is say, 'All right, you have said all that, there is one thing I can tell

> you, we went to trial last week in front of a jury, a High Court jury, and they awarded £X'. That is the amount quite shortly you will be asked to award Mr Purnell.
>
> "I am not going to try and tell you how much to award. What I will say is it needs to be such an amount that Mr Purnell can say to the hypothetical person on Fleet Street, 'Look the jury gave me this amount' and it needs to be an amount which makes that person say, 'Well if the jury gave you that after a trial where they heard all the evidence, then clearly there is nothing in this allegation. It is quite clear when you look at how much has been awarded that was a serious allegation and he jury decided it was a load of rubbish'."

24. Those, then, are the relevant factual materials. I turn to the law and in particular the effect of Dingle in their Lordships' House. There are in theory, no doubt, three possible positions to be considered where damages for defamation have to be assessed in a case where there is also a previous judgment dismissing a justification defence with reasons. First, the earlier judgment should always be taken into account by the tribunal assessing damages as extinguishing the need for any element of vindication to be reflected in the damages. Secondly, the earlier judgment should never be so taken into account. Thirdly, the earlier judgment may be taken into account by the damages tribunal depending on the latter's view of its impact on the vindication issue. Mr Price adopts position one; Mr Bennett says that Dingle vouchsafes position two.

25. At the outset of this judgment I described the point in the case as a curious one. In part, at least, that is because of the standing, or rather the history, of the Dingle case since it was decided. Lord Morton's observations were, as he himself stated, *obiter dicta*, but their other Lordships agreed with him without any qualification and in the ordinary way I would adopt an approach like that of Cairns J in WB Anderson & Sons Ltd and Ors v Rhodes and Ors [1967] 2 All ER 850 when he said:

> "When five members of the House of Lords have all said after close examination of the authorities that a certain type of tort exists, I think that the judge at first instance should proceed on the basis that it does exist without pausing to embark on an investigation whether what was said was necessary to the ultimate decision."

26. However, it is interesting that Lord Morton's observations are not referred to in *Gatley*, the leading libel textbook, and according to Mr Price's researches, have not been cited in any case in the 45 years following Dingle. There are some references in *McGregor on Damages*, 17th edition, at 11,042, 37,015 and 45,031.

27. At all events, it seems to me, we are obliged to have regard to the strictures and principles enunciated in the European Court of Human Rights and in particular to the principle that an interference with the right of free expression can only be justified under Article 10.2 if it is proportionate to a legitimate aim -- that is to say it goes no further than is necessary in a democratic society, in the words of the

sub-article. It seems to me inescapable that the existence of a prior reasoned judgment rejecting a justification defence and so holding that the claimant has indeed been libelled is at least capable of providing some vindication of a claimant's reputation. If that is right, then the court assessing damages must surely see whether it does in fact provide such vindication, for otherwise the court would fail to make a complete or comprehensive judgment on this issue of necessity and would be at risk of failing in its duty to uphold and apply the Convention rights. More broadly, it is in my view important that an assessment of damages be arrived at in light of all the relevant circumstances, and again the prior reasoned judgment is surely capable of amounting to a relevant circumstance. In Rook v Fairrie the Master of the Rolls cited this passage from the speech of Lord Herschell in Bray v Ford [1896] AC 44, 52:

> "But in the case of an action for libel, not only have the parties a right to trial by jury, but the assessment of damages is peculiarly within the province of that tribunal. The damages cannot be measured by any standard known to the law; they must be determined by a consideration of all the circumstances of the case, viewed in the light of the law applicable to them. The latitude is very wide. It would often be impossible to say that the verdict was a wrong one, whether the damages were assessed at £500 or £1,000."

Nowadays, of course, libel damages may be and often are assessed by judges and the latitude inherent in the assessment is, I apprehend, not as wide as in Lord Herschell's day. But the injunction to have regard to all the circumstances of the case surely remains.

28. I would accept Mr Bennett's submission that their Lordships in Dingle were, with great respect, concerned to avoid the development of two tiers of libel damages -- one arising where damages are tried by judge alone, the other where the issue is tried by a jury. That is, no doubt, a consideration of great importance. I also have regard to Mr Bennett's further submissions developed this afternoon, building in large measure on what Lord Denning said in the Dingle case, namely that great uncertainty might be produced by two such tiers upon such matters as the accurate giving of advice to libel defendants upon what are now Part 36 payments and also the general desirability, if it be such, of encouraging trials by judge alone.

29. However, with great deference, on the approach I would favour I do not consider that these difficulties would be anything like as stark as Mr Bennett has submitted. In all the circumstances it seems to me that a prior narrative judgment rejecting a defence of justification and so holding the libel to be established is capable of providing some vindication of a claimant's reputation. I would therefore hold that the third position I identified earlier is the correct one. The effect of such an earlier judgment no doubt depends on all the circumstances and, generally speaking, the effect in relation to vindication will I think most likely be marginal. Where there has been a fiercely contested trial on the facts, perhaps attended with much publicity, and the defendant's witnesses have been roundly disbelieved and there is a positive and unequivocal finding in the claimant's favour on the merits, those circumstances will be relevant as amounting to some vindication.

30. But there are also cases where the judgment will provide no or no significant or reckonable vindication. They will perhaps arise where the justification has been struck out for some technical reason in circumstances where, in truth, no consideration whatever has been given to the merits. Those circumstances will have to be regarded. Cases in between may include strike-outs, they may include trials. There will be cases where, for one reason or another, the vindication is real but very faint.

31. I do not accept Mr Price's submission that the "degree of attendant publicity", as he put it, how it plays out in the media, is irrelevant to an assessment of a judgment's effect in terms of vindication. But I emphasise my view that overall the effect of prior judgments is likely to be marginal in relation to that issue. Generally speaking, Mr Price's position, that the existence of a prior narrative judgment always negates any right or requirement to have vindication reflected in the damages, in my judgment represents a straitjacket; which like all straitjackets constrains reality. It allows no scope for the consideration of particular circumstances. Underlying this argument advanced by Mr Price is, I think, the proposition that the earlier narrative judgment provides the whole measure of the vindication to which a claimant is entitled. Thus, if it is marginal in the claimant's favour the required vindication is less than if it is emphatic. But that fails to acknowledge that in any case where a justification defence is rejected the claimant is entitled, without qualification, to be treated on the footing that the libel is false. No doubt the jury can take into account any qualification of the claimant's merits which appears in the prior judgment. But that does not show that all always and in principle the earlier judgment exhausts the need for vindication. Nor does it show that there is any necessary symmetry between the degree of vindication required and the contents of the earlier narrative judgment.

32. What then, of the present case? I return very briefly to Mr Bennett's factual points. First, it is important to recognise that Eady J did not preside over a trial of the merits in the ordinary sense. There was plainly no cross-examination; no witnesses were called; the judge examined the pleadings and witness statements, and held, as I have said, that the evidence so presented could not support the case of justification. Now vindication of a person's reputation is, so to speak, a red-blooded affair. It may not be achieved, certainly not fully achieved, by the surgical application of judicial reasoning to the contents of legal documents. But that is not, by any means, the whole of what is to be said.

33. It might have been one thing if these appellants before Gray J had accepted without equivocation the decision of Eady J, accepted fair and square that they had defamed the respondent and urged that in the circumstances Eady J's judgment constituted sufficient vindication. That might have got some wind behind it, at least if the follow up article in Business F1 had not been written; but that is very far from what happened, as I have sought to demonstrate. In my judgment the appellants did their very best to escape the grip of Eady J's decision. They attempted to suggest to the jury that the libel was after all true. They were rightly checked by the judge. They now seek to change their tack entirely to embrace Eady J's judgment and use it as the cornerstone of an argument to suggest that the jury awarded too much against them. I regard that as an exercise which lacks integrity and legal merit in equal measure. I have heard nothing that

calls into question the jury's award. In particular I see no reason to criticise the judge's direction to the jury as regards vindication.

34. In my view, while Eady J's judgment went some distance to vindicate the respondent's reputation, in all the circumstances that aspect of the claim could only be fully satisfied if it were effected in the jury's award of damages. That being so, I do not think the judge can be said to be at fault in not directing the jury in terms to consider whether Eady J's judgment was sufficient to constitute all the vindication to which the respondent was entitled, and for that reason I would reject that submission. Nor is there anything in the submission that the direction to the jury recommended in the Ransom case was not completely fulfilled by the judge. It was plainly implicit in what the judge was saying about vindication that the jury were to make no more than a proportionate award.

35. For all these reasons I would dismiss this appeal.

Mr Justice Evans-Lombe:

36. I agree.

Lord Justice Chadwick:

37. I also agree. It is, I think, important to keep in mind the observation of this Court, in its judgment in Rantzen v Mirror Group Newspapers (1986) Ltd [1994] QB 670 696 A-B, that the object of an award in a defamation action is to compensate the successful claimant for the damage which he has suffered and is a sum which is necessary to provide adequate compensation and to re-establish his reputation.

38. Adequate compensation will, of course, include compensation for loss of reputation and compensation for hurt feelings. But, as the observation in Rantzen to which I have just referred makes clear, compensation measured only by the yardstick of loss of reputation and hurt feelings may not be sufficient to re-establish the claimant's reputation. Some additional element may be necessary. That element may be regarded as necessary by way of vindication, as Lord Hailsham of St Marylebone LC explained in the passage in his speech in Cassell & Co Ltd v Broome & Anr [1972] AC 102 to which Lord Justice Laws has referred.

39. Notwithstanding the observations of the House of Lords in Dingle v Associated Newspapers [1964] AC 371 -- where the point did not arise for decision -- I find it difficult to accept that, in principle, the exercise which has to be carried out in giving effect to the guidance in Rantzen, whether by judge or jury, in order to arrive at the proper amount to award to a successful claimant in a defamation case must be conducted on the basis that the decision maker is required to ignore the extent, if any, to which a reasoned judgment may itself re-establish the reputation of the claimant. There is, of course, a distinction between a trial before a judge -- which results in a reasoned judgment -- and a trial before a jury -- which does not. But it does not seem to me that the inability to take a reasoned judgment into account in those cases where there is no such judgment should lead the court to refuse to take account of the extent to which a reasoned judgment may re-establish

the claimant's reputation in a case where there is one. But, in the particular case, the rehabilitation effect of the judgment may be of relatively little value.

Order: Appeal dismissed.