Neutral Citation Number: [2006] EWCA Civ 540

Case No: A2/2005/1166

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(The Honourable Mr Justice Eady)
HQ04X03523

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/05/2006

Before :

LORD JUSTICE PILL
LORD JUSTICE KEENE
and
LORD JUSTICE MOSES

- -

Between :

David Turner	**Appellant**
- and -	
(1) News Group Newspapers Limited	**Respondent**
(2) Arisara Turner	

- -
- -

Mr Desmond Browne QC (instructed by **Messrs Campbell Hooper**) for the **Appellant**
Miss Adrienne Page QC (instructed by **Messrs Farrer & Co**) for the **Respondent**

Hearing dates: 23/24 February 2006

- -

Approved Judgment

Lord Justice Keene:

Introduction:

1. This case is concerned with a dispute about the amount of compensation payable in a libel case under section 3(5) of the Defamation Act 1996 ("the 1996 Act"), a provision which deals with the situation where an offer to make amends has been accepted but where the parties do not agree on the compensation payable. In such circumstances, section 3(5) provides that the amount of compensation

> "shall be determined by the court on the same principles as damages in defamation proceedings."

The issues in the present case include the scope and effect of the decision of this court in *Burstein v. Times Newspapers Ltd* [2001] 1 WLR 579 and in particular how far evidence of particular facts providing "directly relevant background context" is admissible in mitigation of damages in a case under section 3(5) of the 1996 Act. We are told that this is the first case to come before this court where the *Burstein* decision has had to be considered in an offer of amends case.

2. The appeal is brought by the claimant in the proceedings, Mr David Turner, against a decision of Eady J, who awarded compensation of £9,000 to the claimant. There were, nominally at least, two defendants to the claim, the second, Arisara Turner, being a former wife of the claimant. Her whereabouts, however, were and are unknown. The first defendant, News Group Newspapers Ltd, is the publisher of the News of the World newspaper.

3. The claim arose out of an article published in that newspaper on 15 February 2004. The article formed part of a larger two-page spread, entitled "How explosion in sex parties can be make-or-break affairs" and "SWINGERS AND LOSERS!" The specific article about which Mr Turner complained was headed "ARISARA 'It turned me on – but in the end it wrecked my marriage'." There then followed these words:

> "THE swinging scene was meant to spice up sultry Arisara Turner's marriage – but ended up wrecking it.
>
> The beautiful photographer (*pictured right)* was 25 when she was introduced to a circle of middle-class swappers by her businessman husband at a Coventry club.
>
> 'I was nervous and needed Dutch courage', recalled Arisara, who lives in west London.
>
> 'But inside I spotted a woman eyeing me up and we ended up in a clinch as my husband watched. He couldn't seem to get enough and it turned me on.
>
> Doctors
>
> 'But he kept pressuring me to have sex with the men too, and that I didn't like – even though they were quite well-to-do people, even policemen and doctors.

> 'After a while I got fed up with it and decided I didn't want to go any more. That caused furious rows at home and in the end we divorced'."

4. The photograph on the right was of the second defendant. As Eady J noted at paragraph 4 of his judgment, the claimant was not mentioned by name in the article and so would have been identifiable only by those readers who could recognise the photograph as being of one of his former wives. He and the second defendant had in fact married in February 1999 but separated two years later and divorced in November 2001. Co-habitation was then resumed for a further period, but they separated again in September 2003.

5. The particulars of claim relied upon eight natural and ordinary meanings of the words complained of, those meanings being that:

> "5.1 the Claimant is and/or was involved in a twilight world of swingers and wife-swapping and was depraved and immoral.
>
> 5.2 the Claimant is and/or was a member of a Coventry based sex, swinging and/or wife swapping club and/or circle.
>
> 5.3 the Claimant is and/or was accustomed to having sex with strangers and that the consequence of the Claimant's "craze" for sex with strangers was the breakdown of his marriage.
>
> 5.4 the Claimant introduced the Second Defendant to a circle of middle-class wife-swappers.
>
> 5.5 the Claimant obtained perverse enjoyment from watching the Second Defendant "in a clinch" with another woman.
>
> 5.6 the Claimant pressurised the Second Defendant to have sex with other men.
>
> 5.7 the Claimant is and/ or was a swinger and/or a wife-swapper and/or a loser.
>
> 5.8 the Claimant's marriage to the Second Defendant broke down and they divorced as a consequence of swinging and/or wife-swapping."

6. The proceedings were begun by a claim form dated 13 April 2004. Before taking this step, Mr Turner had written to the editor of the News of the World to complain on 17 February 2004, referring to the allegations in the article as defamatory and seeking the editor's comments and proposals. Having received no response, he sent a further copy of the same letter on 26 February 2004 and on the same day complained to the Press Complaints Commission. Eventually, after he had sent a further letter threatening to begin proceedings, and enclosing a draft "statement of claim", Mr Turner received a brief reply dated 26 March 2004. That came from the first defendant's legal manager, who indicated that he was making enquiries.

7. A more substantive response followed in a letter dated 5 April 2004 from the legal manager. This did not accept that the article was inaccurate and continued:

> "Your former wife maintains that she has told the truth. Several other people to whom we have spoken lend support to her account. We are also aware that, whilst you were married to her you arranged for her to be photographed (professionally) in "top shelf"/pornographic poses.
>
> In the circumstances, we do not think it would be appropriate offer you the "proposals" you seek."

8. The claimant was not satisfied with that response, as he made clear in a letter dated 6 April 2004. In that letter, he referred to there being "serious doubt" as to the reliability and integrity of his ex-wife and stated:

> "I have never disputed the fact that Mrs Turner was during our marriage a professional free lance photographic model and that I acted in common with others, as her agent in obtaining work of (inter alia) the type you refer to. This is widely known and I do not see that it has any relevance whatsoever to my complaint."

9. The claim form in the proceedings then followed on 13 April 2004. An unqualified offer to make amends under section 2 of the 1996 Act was made by solicitors on behalf of the first defendant by letter dated 18 June 2004. As required by that statutory provision, it offered to make and publish a suitable correction of the statement and an apology, and to pay compensation and costs "as may be agreed or determined to be payable". But it also gave notice that, if agreement on compensation could not be reached, further matters would be relied on. The judge rightly noted that the 18 June 2004 was the last opportunity to make an offer of amends, since such an offer could not be made once a defence had been served, and that date was when the defence was due to be served.

10. Amongst the "further matters relied on" was a *Burstein* plea of mitigation attached to the letter. It consisted of 28 paragraphs which in considerable detail described what were referred to as "lurid sexual practices" engaged in by the claimant. The bulk of these allegations were subsequently withdrawn, as I explain later, and in those circumstances the judge felt it unnecessary to set them out in his judgment. I share that view. He stated, however, that he would have to do his best to take that document into account.

11. The claimant accepted the offer to make amends by letter dated 9 July 2004. Negotiations then ensued as to the form of the apology and as to matters relevant to the amount of compensation. A correction and apology were published in the News of the World on 15 August 2004. In the course of correspondence the claimant made some limited admissions as to the matters alleged in the *Burstein* plea. This became of importance because in due course Mrs Turner was found to be missing. She had supplied a signed witness statement to the first defendant, but in her absence the first defendant decided that it could no longer persist in the full range of allegations set out in its *Burstein* plea. By a letter of 16 December 2004 it identified certain matters

upon which it still intended to rely when it came to the assessment of compensation, but by implication the first defendant limited itself to those identified matters. It again identified those matters in a document served on 22 February 2005 and described as "Outline of the First Defendant's Case".

12. These were effectively three in number. The first was the membership of the claimant and the second defendant of a Coventry-based private members' club called Caesars, which they were said to have attended on "fetish nights" on four or five occasions. The club was said to advertise itself as "the Midlands Leading Fetish, BDSM and Swingers Club" (BDSM standing for "Bondage and Discipline, Dominance and Submission, Sadism and Masochism").

13. The second matter was the role of the claimant as the second defendant's manager or agent in arranging for her to be professionally photographed in pornographic poses, described by the first defendant's counsel at trial as "open leg shots" and "girl on girl" poses. The claimant was alleged to have encouraged her in this activity, from which she made a modest income.

14. Thirdly, the first defendant relied on the fact that the claimant had publicised in the press in March 2001 his failed marriage and the fact that Mrs Turner had been a "page 3" model. This occurred in an interview published in The Sun under the headline "Page 3 Thai Girl Wed Me Just To Get Into Britain". In it he had called for her deportation. It was said that the claimant had provided a photograph of the second defendant topless and a photograph of her with him, both of which accompanied the feature. There was also reference to similar, if more restrained, coverage in The Mail on Sunday.

15. The judge found, and there is no challenge to his finding, that the claimant had been informed of the first defendant's intention to rely on these matters when it had served its original *Burstein* plea on 18 June 2004.

The Judgment Below:

16. Eady J approached the issue of compensation under section 3(5) on the basis that exactly the same principles were to be applied as govern an award of libel damages. That is accepted by both parties to this appeal and it appears to me to be inevitable, given the wording of that sub-section. As to what those principles are, the judge acknowledged that a defendant could not pray in aid in mitigation of damages specific aspects of the claimant's behaviour, as opposed to matters alleged by way of *general* bad reputation. That followed from what has been described as the rule in *Scott v. Sampson* [1882] 8 QBD 491. However, he also recognised that there was an exception to that rule as held by this court in the *Burstein* case, whereby evidence about the "directly relevant background context" was properly admissible, because

> "it is directly relevant to the damage which he [the claimant] claims has been caused by the defamatory publication": per May LJ., paragraph 42.

17. In seeking to apply these principles, Eady J identified the sting of the words complained of as lying in the words

> "But he kept pressuring me to have sex with the men too, and that I didn't like."

The judge commented at paragraph 24 of his judgment:

> "Although Mr Turner in the course of his evidence attempted to equate this allegation with his having participated in "rape", that was not how he put it in his particulars of claim or in his letter before action. For the reasons outlined in *Abu* therefore, that is not a meaning he is permitted to pursue at this stage. It is, in any event, an unrealistic meaning in view of the headline to the effect that Mrs Turner claimed to have been "turned on". The sting of the libel, which the first Defendant is not permitted to "justify by the back door", is that of pressuring the second Defendant into consenting reluctantly to have sex with the "well-to-do people"."

He then went on to consider whether the three matters relied on by the first defendant in mitigation of damages fell within the scope of the exception identified in *Burstein*. At paragraph 25, he stated:

> "As will emerge shortly, although the Claimant had no qualms about encouraging his wife to pose for explicit photographs displaying her genitalia and indulging in various sexual activities with women, he drew the line at "boy on girl" because *that* he regarded as pornography. It is against that background that the decision has to be made whether the three subjects I have described are "directly relevant background context" to the allegation of pressuring her to have sex with men or, in other words whether I should be assessing the compensation for that allegation in "blinkers" if I were to exclude them from consideration. Since the allegation in the newspaper concerned the circumstances in which the Claimant and his wife attended the Coventry club and the supposed pressure on her to indulge in sexual activities with other people, I am quite satisfied that the first two topics identified at [21] above, at least, are relevant background context. Moreover, since the Claimant complains of his distress at the infringement by the first Defendant of his privacy, I am equally satisfied that his self-invited exposure in the tabloid newspaper in 2001 is relevant to the extent with which he values that privacy and would, or would not, suffer hurt feelings by tabloid exposure on the subject of his marital relations. I am not persuaded that a defendant need always establish a direct causal link between the "background context" and the fact of publication: that would be likely to lead to over-elaborate analysis in some cases, and detract from the flexibility which the Court of Appeal in the *Burstein* case clearly intended."

18. The judge then dealt with the evidence on these three topics: on the visits to Caesar's Club in Coventry, it was admitted by the claimant that he had visited the club with the

second defendant on fetish nights on 4 or 5 occasions. He had been soberly dressed, but his then wife had worn an outfit aimed at a "St Trinian's schoolgirl" effect. He remembered bottoms being spanked but not other more extreme activities described by a witness called by the first defendant as taking place on a visit some years after the claimant's visits. There was no wife-swapping nor did he encourage his wife to have sex with other men. The judge noted that the claimant's visits involved a drive of some 92 miles from his home in Sheffield in order to attend these fetish nights and presumably a journey of similar length back. The first defendant's case on this topic was that someone who attended such a club would be correspondingly less likely to suffer embarrassment at the allegations of "swinging" than someone who had never done so.

19. The judge dealt at greater length with the topic of the explicit photographs of the second defendant. There were thousands of such photographs taken, as well as video material, of which he was provided with a selection. They included detailed shots of Mrs Turner's genitalia and of sexual activity between her and other women, including digital penetration and oral sex. Photographs of her appeared in magazines such as Men Only, Mayfair, For Men, International Park Lane and Asian Babes. There was evidence called by the first defendant from a professional photographer, who took many of the photographs, that the initial contact was made by the claimant and that it was he who gave instructions as to what sort of photographs were to be taken, such as "adult" and "top shelf". The claimant would usually say "the stronger the better". He too suggested photographs with other women in a "lesbian display", as he did a video film. There was evidence from another witness who ran a modelling agency that the second defendant "appeared to be completely under the control of her husband" who wanted much more explicit poses of her in more hard- core pornographic magazines.

20. The claimant's evidence on this was that, while he acted as her representative in arranging these photographic sessions, he did not have to pressurise her to do them. She enjoyed her work. Insofar as this evidence conflicted with that called by the first defendant, the judge seems to have preferred the latter. In part this evidence was relied on by the first defendant as showing that the claimant would be less likely to be upset by allegations of dominant and exploitive behaviour than the average husband.

21. As for the third matter, the press publicity instigated by the claimant about Mrs Turner and his marriage to her, the judge described the coverage in the Mail on Sunday, in which she was described as a glamour model who had posed in pornographic magazines and on "the X rated Adult Channel." The claimant was quoted as saying that he had been "totally ripped-off" by her when she had left him, taking luxury items worth £33,000. A few days later most of a page in The Sun newspaper was devoted to the same topic. The claimant, who was named, as he had been in The Mail on Sunday article, was described as a wealthy tycoon who "angrily claimed that his stunning bride Arisara only wed him to escape a life of poverty in Bangkok". He was quoted as feeling "used and hurt". She was termed a "page 3 Thai girl" whose photographs had appeared in Playboy and The Sun. The claimant was said to want her to be sent home, that is to say to Thailand, on the basis that she had only married him to get a visa for the United Kingdom. Friends of Mrs Turner, however, were quoted as saying that she was treated like a slave and was totally dominated.

22. The judge at paragraph 44 of his judgment added this:

> "Alongside the article appears a page length photograph of Mrs Turner, topless. There are two other photographs, one of Mr Turner with a caption describing him as "Used", and what purports to be "David's only picture of him and Arisara". He said in evidence that he was "mad at the time" and wanted revenge, but later they resumed cohabitation."

23. In the light of that evidence and the legal principles he had identified, Eady J addressed the quantum of compensation. He did so by a two-stage process: first, by arriving at a figure which would have been awarded after trial where the defendant had done nothing to aggravate the hurt to the claimant's feelings and nothing to mitigate, for example by means of the publication of an apology; then at the second stage, by deciding to what extent, if any, that first figure should be discounted to give effect to any mitigation.

24. In dealing with the first of those stages, the judge commented that the meanings of the words put forward by the claimant were not at the highest level of gravity, not suggesting criminality or dishonesty on his part. The impact of the article on his reputation appeared to be relatively minor. None of the witnesses called by him actually believed the defamatory sting of the allegations. Relatively few readers were able to identify him and they did not think that the allegations fitted him. Eady J regarded the most important element in the assessment in the present case as being the need to compensate for hurt feelings, distress and embarrassment. He took into account the impact of the article on the claimant's then fiancée but against "the relevant background context" of the three categories of evidence introduced by the first defendant. The judge saw the claimant as being far less sensitive to intrusive publication about his marital circumstances than the average claimant would be. Reflecting all these matters, he took a figure of £15,000 as being the starting point for compensation.

25. At the second stage, the judge had to consider what, if any, discount was then to be made because of the offer of amends and the surrounding circumstances. He took account of the fact that the first defendant had served originally a much more extensive and startling version of the *Burstein* plea, but he accepted that that plea had been put forward in good faith, relying on a witness statement made by Mrs Turner. He concluded that the first defendant had not acted improperly in putting forward that plea, but nonetheless he took account of the impact of it on the claimant's feelings, given that much of it could not be substantiated in the absence of Mrs Turner.

26. Eady J held that the apology published was adequate and accorded in substance with what the claimant was entitled to expect and what he wanted. But the judge regarded the first defendant as having behaved initially in a dismissive way towards the complainant, and he also took account of the facts that the News of the World for a time asserted that the words were true and that the apology was published later than it needed to be. For all these reasons he arrived at a discount of 40% which produced an award of £9,000. That covered not just the publication in the newspaper itself but also the publication, such as there may have been, on the first defendant's website.

The Issues:

27. The issues raised in this appeal range from broad ones of legal principle to those related specifically to the facts of this case. Into the former category come a number of matters concerning this court's decision in *Burstein*. I propose to deal with those first.

A. Matters of legal principle:

(i) Can *Burstein* be reconciled with *Speidel v. Plato Films Ltd* [1961] A.C. 1090?

28. In the course of his argument, Mr Browne Q.C., for the claimant has launched a frontal assault on the decision in *Burstein.* He contends that it was decided per incuriam, that it cannot be squared with the House of Lords' decision in *Speidel* and that it is unworkable in practice. To give these submissions proper consideration, it is necessary to provide a brief survey of this aspect of the law of defamation.

29. As I have indicated when summarising Eady J's judgment, there is a principle recognised in 1882 in *Scott v. Sampson* that, while general evidence of bad reputation possessed by the claimant is admissible in mitigation of damage in defamation cases, evidence of specific acts of misconduct on the part of the claimant cannot be given in evidence. The classic formulation of this principle was provided by Cave J in that case at pages 504 – 505.

> "As to … evidence of facts and circumstances tending to shew the disposition of the plaintiff, both principle and authority seem equally against its admission. At the most it tends to prove not that the plaintiff has not, but that he ought not to have, a good reputation, and to admit evidence of this kind is in effect as was said in *Jones v. Stevens* to throw upon the plaintiff the difficulty of shewing an uniform propriety of conduct during his whole life. It would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is to what extent the reputation which he actually possesses has been damaged by the defamatory matter complained of. Among all the cases which have been reviewed there is not one which can be cited in support of the admissibility of this evidence."

It will be seen that the justification for this exclusionary principle was in large part a practical one, reflecting the need to prevent trials becoming extended by the investigation of new allegations about the claimant's past life. It also seems that Cave J was concerned about the lack of relevance of such evidence to the issue in the case, since it would have "but a very remote bearing on the question in dispute".

30. In any event, there can be no doubt that the principle in *Scott v. Sampson* was approved by the House of Lords in *Speidel*. That decision was analysed in detail by May LJ in *Burstein* at paragraphs 29 to 35, and I do not seek to repeat here all the points which he there made. Some analysis, however, is required, given the reliance placed on it by the present claimant.

31. Viscount Simonds emphasised

> "the injustice and, indeed, the cruelty of an attack upon a plaintiff for offences real or imaginary which, if they ever were committed, may have been known to few and by them have been forgotten." (page 1125)

He, like Cave J, was also concerned about the inconvenience of having

> "one or more trials within the original trial." (ibid)

However, he recognised that in practice it might be difficult to define exactly the borderline between evidence of general bad reputation and that of specific conduct which had led to it.

32. That was one of the considerations which led Lord Radcliffe, in a powerful speech, to dissent on this part of the case. He concluded that:

> "… it would be wrong to hold that general evidence of reputation, which must mean reputation in that sector of a plaintiff's life that has relevance to the libel complained of, cannot include evidence citing particular incidents, if they are of sufficient notoriety to be likely to contribute to his current reputation. Such incidents are, after all, the basic material upon which the reputation rests, and I cannot see the advantage to anyone of excluding the better form of evidence in favour of the worse."

Lord Denning, another of the majority judges, relied upon a passage from *Starkie* on Slander and Libel as indicating the principle lying behind the exclusionary rule, namely that a plaintiff

> "… may be prepared with general evidence in support of character, though he cannot be supposed to be prepared with evidence to justify his conduct through life."

He emphasised that evidence of good or bad character had, in order to be admissible, to relate to that sector of a man's reputation which is relevant:

> "Thus, if the libel imputes theft, the relevant sector is his character for honesty, not his character as a motorist. And so forth."

But Lord Denning does not seem to have been prepared to draw a rigid distinction between the reputation which a plaintiff had and that which he ought to have had. Thus he gave at page 1138 the following illustration of how the legal principles should work in practice:

> "On the other hand, suppose a "notorious rogue" manages to conceal his dishonesty from the world at large. He should not be entitled to damages on the basis that he is a man of unblemished reputation. There must, one would think, be

> people who know him and can come and speak to his bad character."

And he went on to say that evidence of specific misconduct could in certain circumstances be admissible, as where a newspaper alleged that a man had been convicted six times for "dishonesty" but later finds that he has only been convicted twice. Those convictions could go before the jury. Lord Denning said this:

> "Although the newspaper cannot justify in whole it can justify in part. It can plead that, in so far as the words meant that he had been convicted twice, they were true and thus bring the two convictions before the jury. In *Clarkson v. Lawson* Sergeant Wilde put the very case: "If [the defendant] had charged the plaintiff with stealing three horses, he might have justified as to one," and Park J. said he could. "It was the common practice," said Sir James Scarlett in one of the cases cited to your Lordships, "if a defendant could not justify all, to justify a part of the libel, and produce witnesses to prove the part justified as a ground of mitigation and reduction of damages": see *Waithman v. Weaver*. This rule is based on sound sense. Seeing that the law does not permit a defendant, in mitigation of damages, to adduce evidence which tends to justification, it must permit him to adduce the selfsame evidence when pleaded in partial justification: see *Vessey v. Pike* by Lord Tenterden C.J. If it were not so, the plaintiff would recover damages for a character which he did not possess or deserve; and this the law will not permit."

One notes that final reference to preventing a plaintiff from recovering damages for a character which he did not *deserve*.

33. Lord Morris of Borth-y-Gest was again concerned about the risk of a roving inquiry into the plaintiff's character which would be hard to control, leading to trials within a trial. He too upheld the decision in *Scott v. Sampson*, as did Lord Guest, who regarded it as preventing the opening of a door to collateral issues:

> "The result might be that a trial in which the truth or falsity of one allegation was being investigated might degenerate into trials of the truth or falsity of a dozen other allegations, whether or not relevant to the subject-matter of the libel." (page 1148)

34. It can be seen that the majority of the House of Lords approved the principle spelt out in *Scott v. Sampson* and did so largely for practical reasons of trial management. That last aspect was one expressly noted by May LJ in the *Burstein* case. In his judgment, with which the other two members of the court expressly agreed, May LJ observed that in *Speidel*

> "a main concern was to prevent libel trials from becoming roving inquiries into the plaintiff's reputation, character or disposition." (paragraph 35)

Burstein was a case where the defendant newspaper pleaded certain facts about the claimant's past conduct, not by way of justification but in support of the pleaded defence of fair comment. At the outset of the trial, the judge struck out that defence, because the words complained of, namely that the plaintiff used to organise bands of hecklers to go about wrecking performances of modern atonal music, were statements of fact, not comment. There was thus no issue as to liability. The judge also struck out the facts pleaded in support of the defence of fair comment and ruled that they were not admissible in mitigation of damages. Evidence as to those facts never went before the jury which decided on the amount of damages.

35. The defendant had wanted to rely on such facts as that the claimant had co-founded a group of militant campaigners against modern atonal music known as "The Hecklers"; that he sought through them to vilify such music and its composers; that the Hecklers in a newspaper article called upon the public to join them in booing a performance of the opera "Gawain" at Covent Garden that evening; that the claimant did not disassociate himself from that article but rather supported it publicly; and that, at the end of the performance referred to, the claimant and The Hecklers booed and hissed.

36. The Court of Appeal held that the judge had been wrong to exclude all of these particulars, although some might properly have been excluded as irrelevant. In a detailed analysis of the authorities, May LJ held that *Scott v. Sampson* and *Speidel* did not extend to excluding

> "particular facts directly relevant to the context in which a defamatory publication came to be made." (paragraph 28)

He emphasised both the need for such facts to be directly relevant and the ability of the court nowadays to control the conduct of a trial, saying at paragraph 40:

> "It will, generally speaking, normally be both unfair and irrelevant if a claimant complaining of a specific defamatory publication is subjected to a roving inquiry into aspects of his or her life unconnected with the subject matter of the defamatory publication. It is also in accordance with the overriding objective that evidence should be properly confined, both in its subject matter and its duration to that which is directly relevant to the subject matter of the publication. Thus under the Civil Procedure Rules, the court now has ample power to deal justly with the problems which, in the main, gave rise to the first and third limbs of the decision in *Scott v. Sampson* 8 QBD 491."

Those were the matters which I have described as the principle in *Scott v. Sampson.* May LJ went on to say at paragraph 42:

> "… the evidence which *Scott v. Sampson* excludes is particular evidence of general reputation, character or disposition which is not directly connected with the subject matter of the defamatory publication. It does not exclude evidence of directly relevant background context."

Otherwise there would be a danger that the jury would be required to assess damages in blinkers (paragraph 47).

37. Aldous LJ agreed with May LJ, as did Sir Christopher Slade in a short concurring judgment. He agreed that there were matters amongst the defendant's pleaded particulars which were directly relevant background facts and which explained the context in which the defamatory publication came to be made. Consequently they were admissible. But Sir Christopher regarded the case as a special one, because the claimant had deliberately sought for himself a reputation as a militant opponent of modernist atonal music. If the jury were not to know of his activities in co-founding the Hecklers and procuring the booing of the opera Gawain, they would indeed be looking at the case in blinkers. Nothing, he said, in the decided cases precluded the consideration of such facts, particularly after the introduction of the Civil Procedure Rules 1998.

38. In the present appeal it is first argued by the claimant that *Burstein* was decided *per incuriam*. This argument is not advanced on the footing that this court in *Burstein* overlooked any important judicial decision: it will be evident already that May LJ scrutinised the decisions on this topic, especially *Scott v. Sampson* and *Speidel*, in great detail. It is, however, submitted that the court misunderstood the reason why Parliament did not change the law when considering the Defamation Bill in 1996 so as to permit the admission of evidence of particular acts of misconduct on the part of the claimant, as recommended in 1991 by a working group of the Supreme Court Procedure Committee, chaired by Neill LJ. This is a reference to a passage in the judgment of May LJ at paragraph 38, which reads as follows:

> "The Neill Committee's recommendations led to what became the Defamation Act 1996. Clause 13 of the Defamation Bill was drafted to implement the committee's recommendations with regard to *Scott v. Sampson* 8 QBD 491. The clause did not survive into the Act, we are told for want of parliamentary time. Various views were expressed in committee in support of and in opposition to the clause. In the circumstances, I do not think that any particular parliamentary intention can be discovered from the introduction of the clause and for its failure to survive into the Act. We are simply left with the law as it was."

39. Mr Browne contends that the reference there to "want of parliamentary time" is in error, and that the clause was dropped by the government because of criticisms of it during its passage through the House of Commons Standing Committee.

40. That may well be. We have been shown a passage from Hansard where the then Lord Chancellor, Lord Mackay, refers to the difficulty inherent in framing an alternative rule to that in *Scott v. Sampson*. But the passage appearing in May LJ's judgment at paragraph 38, quoted above, does not attach significant weight to why the clause did not become law, nor in my judgment should it have attached such weight. It was clear that Parliament had the opportunity to change the law on this topic in 1996, as it has had before, and that it chose not to take it. The court was well aware of that. There is no way in which any erroneous reference to a want of parliamentary time can render the decision in *Burstein per incuriam*.

41. It is then submitted that that decision cannot be reconciled with the House of Lords' decision in *Speidel*, or that at the very least it should be applied with caution. Mr Browne refers to the material which it was sought unsuccessfully to have admitted in *Speidel* in mitigation of damage, and quotes the editor of *Gatley on Libel* to the effect that the episodes being referred to could be argued to be part of the background context. It is argued that the *Burstein* decision represents a radical departure from the approach approved in *Speidel*.

42. In considering this argument, it needs to be borne in mind that the principle of *Scott v. Sampson* has never, before or since, been absolute. There have always been important exceptions or limitations to it, and to some extent these were reflected in Lord Denning's speech in *Speidel*. The essence of the principle remains, as May LJ stressed in *Burstein*, that generally a claimant cannot be subjected to a roving inquiry into aspects of his life unconnected with the subject-matter of the defamatory publication and specific evidence relating to such aspects cannot be called in mitigation of damage. That was the gist of the majority judgments in *Speidel*, insofar as they dealt with general principles.

43. But once one is dealing with matters which are directly relevant to the subject-matter of the libel, even though they do not establish the truth of the defamatory words, the position has long been different. Perhaps the most obvious is the admission of evidence put before the jury on a plea of justification or fair comment which ultimately fails. It has long been established that evidence of specific acts properly admitted on such a plea may nonetheless be taken into account by the jury when assessing damages even though the plea has failed. This goes back to the early nineteenth century (see *Chalmers v. Shackell* [1834] 6 C and P 475) and has been accepted in other common-law jurisdictions for many years, as can be seen in *Sutter v. Brown* [1926] App. Div. (SA) 172. But it is also well-recognised in modern English law. Perhaps the best known example is to be found in this court's decision in *Pamplin v. Express Newspapers Ltd* [1988] 1 WLR 116.

44. That was a case where the defendant pleaded, inter alia, a defence of justification and called evidence in support thereof. On damages, the trial judge directed the jury that they could take into account, in mitigation of damages, evidence of specific acts of misconduct put before them by the defendant as part of the unsuccessful defence of justification. That direction was upheld on appeal. Neill LJ summarised the principle laid down in *Scott v. Sampson*, but then added:

> "So much for evidence which is directed solely to establish the plaintiff's previous bad reputation. But a defendant is also entitled to rely in mitigation of damages on any other evidence which is properly before the court and jury. This other evidence can include evidence which has been primarily directed to, for example, a plea of justification or fair comment." (page 120 A-B)

The other two members of the court adopted a similar approach.

45. That case was followed in another Court of Appeal decision, *Jones v. Pollard* (unreported, 12 December 1996). There again the defendants had pleaded justification and called evidence to support that plea. At the close of evidence, the

bulk of the particulars of justification were struck out by the trial judge. It was nonetheless held by this court that the jury had been entitled to take into account, when assessing damages, the evidence put before them concerning the particulars of justification eventually struck out, so long as the evidence related to "the relevant sector of the plaintiff's life": per Hirst LJ, page 22 G and 23 G-H.

46. It is, of course, important to recognise that such evidence is restricted to that which can *properly* go before a jury in support of a plea of justification or fair comment. With that in mind, one is bound then to seek to discern the principle which lies behind these decisions that such evidence can be taken into account in mitigation of damages if the defence fails. Patently it cannot be based upon the assumption that the jury would in any event be unable in practice to ignore such evidence. It is a fundamental proposition of English law that juries, when directed to ignore evidence which they have heard, will faithfully do so, a proposition which operates as much in the criminal context as it does in the civil, and where any doubts as to its validity would have far-reaching consequences. One must therefore seek some other rationale. It seems to me that it must lie in the fact that such evidence, *properly* admitted on a plea of justification or fair comment, is likely to have some direct bearing on the subject-matter of the libel, even though it falls short of establishing such a defence. It may be that this court in *Burstein* was seeking to formulate a principle which provided the rationale for this well-established practice.

47. There are, of course, other well-known exceptions to the principle that evidence of specific acts of misconduct by the claimant cannot be put in on the issue of damages. In *Goody v. Odhams Press Ltd* [1967] 1 QB 333, this court held that the previous convictions of the claimant, within a relevant period of his life, were admissible in mitigation of damages. This was justified on the basis that previous convictions were a matter of public record, which is indisputable, and were cogent evidence that the claimant had a bad reputation, because "they are matters of public knowledge": per Lord Denning MR, at page 341A. That last proposition seems more debatable, and it is interesting to observe that Lord Denning went on to refer not only to "reputation" but also to "character":

> "Damages for libel are given for injury to character and reputation: and what better guide can there be to his character and reputation than his previous convictions?" (page 341D)

48. In the same way judicial strictures in previous civil litigation have also been held to be admissible in mitigation of damages, on the ground that they too show the claimant's general bad reputation and thus meet the requirements of *Scott v. Sampson:* see *Waters v. Sunday Pictorial* [1961] 1 WLR 967. This concept of what a person's general reputation consists of would not perhaps accord with most people's understanding.

49. The reference to "character" in the passage quoted above from Lord Denning in *Goody* is a valuable reminder that damages in defamation are not concerned solely with injury to reputation, but are intended to reflect other factors as well. One of those is the degree of injury to the claimant's feelings. This is a long-recognised aspect of such an award. It can be traced back to *Goslin v. Corry* [1844] 7 M and G 342 (at 346) and to *Lynch v. Knight* [1861] 9 HLC 577, at 598. The extent of such injury may well depend on the character of the individual claimant and his

vulnerability or invulnerability to such hurt. It is far from clear how the admission of evidence on this aspect of damages is to be reconciled with *Scott v. Sampson* or *Speidel*, since it does not appear to have been addressed in either of those decisions.

50. My analysis of these lines of authority leads me to conclude that the principle in *Scott v. Sampson* and its endorsement in *Speidel* were in large part based upon concern about the risks of "trials within a trial", a concern which as May LJ observed in *Burstein* the court is now better equipped to deal with than in the past because of its case management powers; that the principle has never been absolute; that one of the major exceptions to it, before and since that case, has been in respect of evidence of particular acts of misconduct by the claimant put before the jury in support of a plea of justification or fair comment which has then failed; and that insofar as a rational basis can be found for that major exception, it would seem to lie in the direct relevance such evidence is likely to have to the subject matter of the defamatory words. The problem which arose in *Burstein* was that such evidence never got before the jury, because the trial judge struck out the pleaded defence of fair comment before evidence had been called, unlike the situation in *Pamplin* and in *Jones v. Pollard.* This court was understandably not enamoured of a situation where the question of what evidence could be taken into account in mitigation of damages depended upon a matter of procedure. I share that view. It does not make sense for the jury to consider damages in an evidential vacuum in cases where a defence has been struck out before the calling of evidence, when directly relevant background evidence is regularly allowed to be taken into account on damages in cases where it relates to a defence subsequently struck out by the judge or rejected by the jury. Certainly one would wish to identify some underlying principle which would apply in cases where such evidence was not otherwise before the jury, and that, it appears to me, is what this court did in *Burstein*.

51. I therefore do not accept that *Burstein* cannot be reconciled with the House of Lord's decision in *Speidel*. It represents a development of the common law beyond the point which it had reached in 1961, but there is nothing surprising about that. Such developments are inherent in our system. In my judgment we in the present case are bound by the *Burstein* decision.

(ii) The scope of the *Burstein* decision

52. It is contended on behalf of the claimant that the decision in *Burstein* has proved difficult to apply in subsequent cases and that its meaning and scope are uncertain. Mr Browne refers to a number of first-instance decisions which, on the face of them, may not seem consistent with one another. He contrasts two decisions of Gray J, *Carpenter v. Associated Newspapers* (unreported, 16 January 2001) and *Ghannouchi v. Houni Ltd* [2003] EWHC 552 in order to illustrate the problems to which the *Burstein* decision is said to have given rise. In the latter the judge appears to have attached importance to the fact that the editor of the newspaper in which the article complained of was published did not claim to have had any of the facts sought to be relied on in a *Burstein* plea in mind when he published.

53. In reliance on that and on the judgment of Sir Christopher Slade in *Burstein*, Mr Browne submits that material is only admissible under *Burstein* if it is relevant either to how the defamatory publication came to be made or to how the claimant had himself caused a particular reputation of his to arise. It is, however, accepted that the

defendant does not have to show a causal connection between such matters and the publication of the libel.

54. That concession is clearly right. It was expressly stated in *Burstein* that there was no causal connection whatever between anything the claimant may have said or done and the publication of the defamatory words: see paragraph 24. The latter was in no sense provoked by the claimant's conduct. As for the limitations suggested on behalf of the claimant in the present case to the *Burstein* decision, I cannot see that any of the judgments in *Burstein* support the proposition that the defendant must have had the directly relevant facts in mind when publishing the words complained of. It is true that May LJ does refer to "particular facts directly relevant to the context in which a defamatory publication came to be made" (paragraph 28), but the emphasis there seems to be more on the context than on any mental process gone through by the defendant.

55. Again, it is right that Sir Christopher Slade attached importance in his judgment in *Burstein* to the fact that the claimant had sought for himself a particular kind of reputation. That, however, was not a necessary part of the principle expounded by May LJ, endorsed by Aldous LJ and "fully" agreed to by Sir Christopher Slade at paragraph 53.

56. I accept the point made in argument that it is somewhat repetitive to use the words "background" and "context" in the phrase "directly relevant background context", but that in itself does not produce obscurity. It is in any event inevitable that cases will occur where it is not easy to determine whether the test in *Burstein* is met or not. That does not mean that the test is an inappropriate one, any more than is that propounded in *Scott v. Sampson*: as Viscount Simonds recognised in *Speidel*, the line between evidence of general bad reputation and evidence of specific conduct giving rise to such a reputation is not easy to draw. What constitutes the directly relevant background will vary from case to case, but I would myself accept the need for the courts to proceed, as Mr Browne advocates, with some caution in applying *Burstein*, given that it represents a modification of the long-standing rule in *Scott v. Sampson*. As Eady J put it in *Polanski v. Conde Naste Publications Limited* (unreported, 21 October 2003), one should guard against extending too creatively the concept of "directly relevant background". The Court of Appeal in *Burstein* was concerned to avoid jurors having to assess damages while wearing blinkers. If evidence is to qualify under the principle spelt out in *Burstein*, it has to be evidence which is so clearly relevant to the subject-matter of the libel or to the claimant's reputation or sensitivity in that part of his life that there would be a real risk of the jury assessing damages on a false basis if they were kept in ignorance of the facts to which the evidence relates.

(iii) *Burstein* in offer of amends cases.

57. The third matter of legal principle is whether and, if so, how far *Burstein* should be applied in offer of amends cases. It is argued by the claimant that the procedure under sections 2 to 4 of the 1996 Act was intended to conciliate, not to intimidate a claimant, or as this court put it in *Milne v. Express Newspapers plc* [2004] EWCA Civ 664, (2004) E.M.L.R. 461 , paragraph 14, the main purpose is to encourage the sensible compromise of defamation proceedings. Yet there is a risk that powerful newspapers will use a *Burstein* plea to intimidate a claimant. Mr Browne points to the

original *Burstein* plea in the present case, with its shocking allegations, subsequently not pursued, and submits that that was what was happening here. Such a process, he submits, flies in the face of the intention lying behind the offer of amends procedure. At the very least, unproven allegations in a *Burstein* plea must aggravate the injury and increase the amount of compensation.

58. For the first defendant, Miss Page Q.C. accepts that last proposition and also accepts that if material was put forward improperly in such a plea, that too will lead to increased compensation. But she emphasises that a defendant has a statutory right to have compensation determined by the court when, for whatever reason, it cannot be agreed: see *Nail v. News Group Newspapers Ltd* [2004] EWCA Civ 1708; [2005] 1 All ER 1040, at paragraph 45. When the court comes to determine the amount of compensation, it is required by section 3(5) of the 1996 Act to apply the same principles as apply to an award of damages in defamation proceedings. Miss Page adopts a statement contained in paragraph 18 of Eady J's judgment in the present case:

> "Fairness requires that a defendant should not be called upon to pay compensation which is unmerited or to vindicate a claimant on a false basis."

59. I agree. There can be no doubt that a *Burstein* plea can be relied upon by a defendant in the offer of amends procedure, just as it can in defamation litigation. That follows from the terms of section 3(5), and Mr Browne accepts that the same approach has to be adopted in both situations. It follows that a defendant is entitled to fight his corner on an assessment of statutory compensation, just as he is over the question of damages in litigation. In appropriate circumstances, that may properly include reliance on a *Burstein* plea. Of course, if such a plea includes hurtful allegations which cannot ultimately be made out, that additional hurt will reflect in the award of damages or compensation. If the judge concludes that allegations were made improperly without there being at the time evidential support, that too will increase the amount of compensation. These are the risks taken by a defendant who seeks to mitigate by attacking the claimant's character. But the approach is no different from that applicable in defamation litigation.

60. Indeed, I see the force in Miss Page's submission that a *Burstein* plea may often be especially appropriate in offer of amends cases for two reasons. First, because no defence has been offered, there will have been no opportunity for evidence of specific acts of misconduct on the part of the claimant to have been put before the court in support of a plea of justification or fair comment or to show lack of malice. The defendant will have been deprived of that opportunity. Secondly, as this court indicated in *Nail*, paragraph 41, in offer of amends cases the claimant's reputation has been repaired to the full extent that is possible by means of a suitable correction and apology. Consequently, injury to feelings tends to play a more significant part in the assessment of statutory compensation than is normally the case in the determination of damages in litigation, particularly where the claimant is not well-known. In determining the extent of the injury to the claimant's feelings, evidence about his past conduct in that aspect of his life which is the subject-matter of the libel may be particularly relevant.

61. That then brings one to the issues specific to the facts of the present case.

B Issues specific to this case

(i) Were the three matters relied on by the first defendant in mitigation properly admitted in evidence?

62. This aspect of the case can be taken relatively briefly. It is accepted on behalf of the claimant that, if the approach spelt out in *Burstein* is valid and applicable in offer of amends cases, then it is proper to take into account the claimant's visits to Caesar's Club on "fetish nights". Mr Browne concedes that that would be relevant to any assessment of the extent of injury to the claimant's feelings as a result of the publication of the News of the World article. Furthermore, the fact that the claimant acted as his then wife's agent in getting her work in "top shelf/pornographic poses" was acknowledged by him to be "widely known". That being so, it is conceded that that fact is relevant to the claimant's reputation and was therefore admissible. That concession is rightly made: the evidence in question goes to his general reputation in respect of his sexual relationship with the second defendant, and is properly admissible irrespective of the decision in *Burstein*.

63. The third matter relied on by the first defendant was the publicising by the claimant in the press of the failure of his marriage to a "page 3 model". It is said on his behalf that this evidence does not fall within the ambit of the *Burstein* decision. None of the matters referred to in the articles in The Sun or The Mail on Sunday amount to directly relevant background to the false allegation that the claimant had pressurised Mrs Turner to have sex with other men.

64. I see the force of that argument, insofar as it goes. But it does not seek to deal with Eady J's reasoning for taking account of this piece of material, which I have set out in paragraph 17 of this judgment. As the judge said, the claimant complained of his distress at the infringement of his privacy. The degree of that distress had to be gauged against "his self-invited exposure" in the tabloid press, which was relevant to the extent to which he valued his privacy and would suffer hurt feelings by tabloid exposure on the subject of his marital relations. In my judgment, this third piece of material was, on the basis described by the judge, properly admissible.

(ii) Did the judge err as a matter of principle in his assessment of compensation?

65. I put the issue in that form, since the mere fact that this court might have arrived at a somewhat different figure of compensation does not entitle us to interfere. The award has to be manifestly wrong for this court to do so. The considerations to be reflected in an award under the statutory scheme are not in doubt. They begin with the provisions of section 3(5) of the 1996 Act, not merely the first sentence thereof, quoted at the outset of this judgment, but also the following words:

> "The court shall take account of any steps taken in fulfilment of the offer and (so far as not agreed between the parties) of the suitability of the correction, the sufficiency of the apology and whether the manner of their publication was reasonable in the circumstances, and may reduce or increase the amount of compensation accordingly."

The matters likely to be relevant were set out by this court in *Nail* at paragraphs 37 to 41, and it is unnecessary to repeat these comments here. I confine myself to the points raised on this appeal.

66. One general query raised on behalf of the claimant, though not pursued at length, is whether it is right in these compensation cases to use a two-stage process as the judge did here, that is to say, assessing first what the award would have been in the absence of a correction and apology, and then applying a discount to take account of those and other factors. I can see that there may be other ways in which the judge could arrive at an eventual figure, but the two stage approach is rational and reflects the two parts of section 3(5). There is nothing wrong with such an approach, which tends to ensure that the judge makes explicit the factors which he has taken into account.

67. A further general point made by Mr Browne is that the court must be alert to prevent awards against those who defame others from becoming so low that they cease to have any deterrent affect and merely become a cost item in the defendant's balance sheet. It is argued that the pendulum has swung away from excessive awards to such an extent that publishers may be tempted to take the risk of having to pay. It seems to me that that is a legitimate consideration to be borne in mind, which I do, but in itself it tells one nothing about the appropriateness of Eady J's award in this case or the figure of £15,000 which he took as his starting point.

68. It is convenient to consider first the arguments raised in relation to the starting point and then to deal with the issues as to the size of the discount. It is contended on behalf of the claimant that Eady J's starting point of £15,000 was far too low and the appropriate figure should have been in the range of £50,000 to £55,000. Mr Browne refers in this context to the award substituted by this court in *Houston v. Smith* (unreported, dated 16 December 2003), where the defamatory allegation had been one of sexual harassment by a doctor. In the present case it is argued that the judge underestimated the gravity of the libel, which was "tantamount to an allegation of being party to a rape". The meaning of having "pressurised" Mrs Turner to have sex with other men amount to more than urging her to do so and was akin, when read in context, to forcing her to do so against her will.

69. I do not accept that submission. Not only do the particulars of claim not allege anything akin to rape but the context of the words in the article makes it clear that Mrs Turner was consenting, albeit reluctantly, to have sex with other men. The article makes it clear that when she got fed up, she decided not to go anymore. The judge accurately summarised the sting of the libel in the passage from paragraph 24 of his judgment which I have quoted at paragraph 17 of this judgment. I am not persuaded that he underestimated the gravity of the libel.

70. Nor do I regard the claimant's position and reputation as comparable to that of the general practitioner in *Houston v. Smith.* In this respect his admitted role as agent for the second defendant in arranging for her to be photographed in pornographic poses for publication in magazines becomes important. That role was conceded to be "widely known", at least amongst those who knew the claimant. He was a man who, as the judge noted, was described by his counsel as relatively unknown, unlike some "celebrity" claimants who bring libel actions. He would not have been identifiable by most of the readers of the News of the World but only by those who recognised the photograph of his former wife. But those who were amongst his circle of

acquaintances would have been aware of his activities in connection with the pornographic photographs of the second defendant. His reputation was thus very different from that of the claimant in *Houston v. Smith*.

71. Complaint is made on his behalf that the judge seems to have accepted the evidence of the first defendant's witnesses about the extent to which the claimant sought more explicit photographs of Mrs Turner, without dealing with the claimant's denials of this. Indeed, the judge refers to the evidence called on behalf of the first defendant as being mostly not challenged in cross-examination. He does not say that he disbelieves the claimant's evidence on this.

72. There is not a great deal of force in these complaints. The judge was undoubtedly aware that there was, to some extent, a conflict of evidence: he refers at paragraph 33 of his judgment to a somewhat different picture emerging from the evidence of the professional photographer called by the first defendant from that described by the claimant. Insofar as there was such a conflict, Eady J clearly preferred the evidence of the first defendant's witnesses. He could have given his reasons for doing so more clearly, but that that was his finding cannot be in serious doubt.

73. What is also apparent is that those who read the News of the World article and realised that it referred to the claimant generally did not believe the allegations contained in it. That was the evidence of the witnesses called by the claimant, as the judge noted. Insofar as those who realised that it referred to the claimant were concerned, their reaction was, according to his own evidence, to smile or to giggle, rather than to shun him or avoid him socially. That too is relevant to any figure for compensation in respect of damage to his reputation.

74. The injury to his feelings also has to be reflected in the starting figure, and here all three of the matters covered by the ultimate *Burstein* plea are relevant. In the light of those, the judge found that

> "Mr Turner is far less sensitive to intrusive publications about his marital circumstances, or to being portrayed as a 'loser', than would be the average claimant." (paragraph 51)

Eady J had the benefit of hearing the claimant give evidence and was in a much better position than this court to assess the extent of the hurt suffered by the claimant from the publication.

75. It has not been shown that the judge overlooked any relevant factor in arriving at his figure of £15,000 as the starting point, nor in the unusual circumstances of this case does it seem to me that that figure in itself indicates any error of principle on his part. It was one at which he could properly arrive.

76. That leaves the issue of the appropriate discount to allow for the apology and correction, as well as for the events connected with them. The latter include the original *Burstein* allegations, put forward on 18 June 2004 and (with the three exceptions) not withdrawn until six months later on 16 December 2004. Those were undoubtedly serious and shocking allegations, and the fact that they were not ultimately established must reduce the size of the discount to reflect the hurt to the claimant's feelings. I am satisfied that Eady J sought to do that.

77. He found, however, that those original *Burstein* allegations had not been put forward improperly. That is challenged on this appeal. It is accepted by Mr Browne that the first defendant had a signed witness statement from Mrs Turner which supported those allegations, but he argues that, if the first defendant was not prepared to rely on her for the purpose of a defence of justification of the original article, it should not be seen as proper for the first defendant to rely on her signed witness statement in respect of the *Burstein* plea of June 2004.

78. One does not know why the first defendant did not choose to defend the claim on the basis of justification, though it is acknowledged that Mrs Turner's signed witness statement did not say anything about the original allegations in the published article. But I am not persuaded that the first defendant acted improperly in putting forward the original *Burstein* plea. Those allegations certainly were covered by the signed witness statement. The first defendant was entitled to rely on that. Moreover, a suggestion that the first defendant had acted in bad faith in this respect was not pursued before the judge. He was entitled to conclude that the June 2004 allegations were not improperly put forward and to refrain from reducing the discount still further for that reason.

79. It is argued on behalf of the claimant that the published apology and correction were not prominently displayed, but instead were tucked away and included no reference to the first defendant paying damages. Eady J accepted that they were not prominent, and he expressly took that into account (paragraph 59), but he noted that the publication accorded in substance with what was wanted by the claimant, who had described it as "a suitable correction and apology". As for damages, those had not been agreed, not had any figure for compensation under the 1996 Act. The judge took the view (paragraph 58) that a reference to compensation not having been agreed would not have improved the claimant's position, because it could have given the impression that the claimant was haggling or being greedy. I see the force of that and do not regard the omission of such a reference as being of significance.

80. There were aspects of the first defendant's conduct after the claimant's first letter of complaint which were relevant to the discount. His complaint was initially ignored, and then he was told that there was no reason to think that the published words were false. Only on 18 June 2004 did the first defendant concede liability, which was four months after the defamatory publication. The apology and correction were published six months after the defamatory publication in February 2004.

81. This court said in *Nail* that there is no conventional or standard discount when an offer to make amends has been accepted and an agreed apology published, since each case will be different. However, the court also said (paragraph 47) that most such cases will exhibit substantial mitigation. I agree. The publication of the apology and correction will normally have made good, so far as is possible, the damage to the claimant's reputation, and he will have been vindicated. His feelings will have been injured, and the assuaging of that hurt may be more limited, but a significant discount will usually be appropriate. This court in *Nail* was not prepared to interfere with a fifty per cent discount, despite the distress caused to the claimant in that case, but that was a case where the apology was not published late, as it was in the present case. Moreover, it was not a case where there had been aggravating features, such as the unsubstantiated allegations in the original *Burstein* plea in the present case.

82. Patently one would expect a smaller discount than fifty per cent in this case. Eady J arrived at a discount of forty per cent. He seems to me to have taken account of all the considerations relevant to the size of the discount. Does his figure of forty per cent indicate that he has nonetheless erred in principle in his assessment? I cannot see that it does. These are matters of fine judgment, where an appeal court must be cautious about second-guessing the figure arrived at by the judge who heard the witnesses and who is best placed to quantify the effect on the claimant's reputation and, especially, on his feelings. I am not persuaded that there is any basis on which this court would be entitled to interfere with the discount chosen by Eady J.

83. It follows that, in my judgment, the award of £9,000 to the claimant was one at which the judge was entitled to arrive. I would dismiss this appeal.

Lord Justice Moses:

84. I agree. The three categories of evidence relied upon by the News Group Newspapers Limited were relevant to the issue of the extent of the injury which the claimant asserted he had suffered. Firstly, the evidence that the claimant and his wife travelled one hundred and eighty four miles to and from Caesar's Club and that, on occasion, she was dressed in a manner calculated to meet the lubricious gaze of others attending a "fetish night" was relevant to prove the truth and extent of his alleged embarrassment caused by the offending article. Secondly, the evidence of his participation, as agent, in the pornographic exposure of his wife was relevant both to his reputation and to the extent of the hurt to his feelings. Thirdly, his disclosure of the break-down of his marriage to two newspapers, which included an attack on his former wife, were relevant to the extent of the infringement on his privacy of which he complained and the consequential distress he claimed he had suffered.

85. There seems to me to be little difficulty as to the admissibility of that evidence in the instant case. They afford but poor illustrations of the difficulty in drawing the line between that which offends the exclusionary principle enunciated in *Scott v. Sampson* and that which is admissible, in accordance with the decision in *Burstein*. The sensitivities of one who is accused of pressurising, not forcing, his wife to have sex with men are bound to be less refined, if he was prepared to encourage his wife in public displays of sexual exposure.

86. Similarly, in *Burstein*, it is difficult to conceive how a fair measure of compensation could be achieved for one composer who had chosen to attack the work of a fellow, albeit renowned, composer by booing, organising others to boo and boasting that he had done so without assessing the damages payable in the light of those facts. The problem lies in the identification and articulation of the principle by which such facts are to be admitted.

87. The purpose of the approach taken by the Court of Appeal in *Burstein* is clear; it was to ensure that the claimant was properly vindicated and fairly compensated. Exclusion of the facts identified by Sir Christopher Slade (at paragraphs 59 and 60) would not have achieved that result. The problem, as in so many branches of the law, lies in the expressions used to identify and describe the principle deployed to admit that evidence. May LJ referred to *relevant background context* (paragraph 41) or *background context directly relevant to damage* (paragraph 47). Ever forgetful of the need not to read judgments as if they were statutes, the words *directly relevant*

background context have been used as a label to be stuck on, by a defendant or ripped off, by a claimant. But the words themselves are no substitute for the reasoning of the court in *Burstein.*

88. The difficulty may lie, I suggest, in the fact that the label which it has been sought to apply, in subsequent cases, does not itself greatly assist in identification. Once detached, it does not, *pace* Keene LJ at paragraph 56, provide a test, since it assumes a meaning to the words of description it employs. To describe a fact as *directly relevant* has no meaning without identification of the issue to which it is alleged to be relevant. The word *context* may itself be misleading. It is accepted that, following *Burstein*, facts may be admitted, notwithstanding that they did not themselves cause or provoke the publication of the defamatory material; that must follow from the decision in *Burstein* itself. Further, there is no requirement that the facts should have been known to the publisher at the time of publication; there is no logic in such a requirement to achieve that which the principle seeks to achieve, a fair measure of damages. In those circumstances to ask whether the facts form part of the context in which the defamatory material was published does not seem to me to be of help to anyone save the lawyers who may gain much by endless debate as to what the label signifies. Nor does it assist to speak of the jury or judge being kept *in blinkers*, unless it is clear what is to be hidden from their eyes.

89. Keene LJ refers to *directly relevant background* and Sir Christopher Slade similarly refers to *directly relevant background facts;* the reference to *background* draws a distinction from those facts which relate directly to the defamatory words, which *ex hypothesi*, after an offer of amends, cannot be used in justification or to deploy the defence of fair comment. After an offer of amends, only those facts which are directly relevant to the existence and extent of the alleged damage may be admitted, unless a claimant seeks to rebut the presumption in Section 4(3) of the Defamation Act 1996. The key lies in identifying that which is directly relevant to the issue of damages. That lies, in my view, in recalling the reference by Cave J in *Scott v. Sampson* to *uniform propriety* (cited by Keene LJ at paragraph 29). A claimant's life may appropriately be considered in sectors (see Lord Denning in *Plato Films v. Speidel* [1961] AC 1090, 1140 and *Goody v. Odhams Press* [1967] 1 QB 333, 341A). A defendant may seek to reduce the damages by adducing evidence which is directly relevant to a claimant's conduct or reputation in the particular sector to which the defamatory material relates, for the purpose of mitigating damage.

90. Direct relevance to a particular sector of the claimant's life should be assessed by starting with a careful identification of the sector of the claimant's life to which the defamatory material relates; too broad an approach, such as *his private life* will defeat the function of the reference to *direct relevance*. Further restriction may be achieved by scrutiny of the purpose for which it is sought to adduce the facts in issue. It should be recalled that the purpose of the rule in *Scott v. Sampson* was by no means only a desire to keep a case within manageable proportion. The rule serves the important function of preventing a claimant from being terrorised into submission. It is worth recalling that, alongside its failed attempt to abrogate the rule in *Scott v. Sampson*, the Neill Committee advised that a defendant making an offer of amends should not be permitted to attack a claimant's character. Such an attack, once the rule had been abolished, should only be made before a jury (paragraph VII.28). But that advice went, along with the recommendation to abolish the rule.

91. It is, therefore, important to subject the proposal to adduce facts relating to the claimant's character to scrutiny to avoid the vice, which *Scott v. Sampson* seeks to avoid, re-appearing in cases where an offer of amends has been made. The compulsion to accept an offer of amends imposed by the difficulty in proof under Section 4(3) should not, I suggest, be used as a weapon by defendants to force acceptance of derisory offers.

92. However, in the instant appeal, in my view the judge's assessment of what this claimant deserved was, in my view, correct.

Lord Justice Pill

93. I agree that the appeal should be dismissed and there are only a few points I wish to make.

Burstein

94. Several expressions were used in *Burstein v Times Newspapers Ltd* [2001] 1WLR 579 to state the principle there established. I prefer that used by Sir Christopher Slade at paragraph 58, by way of comment on the judgment of May LJ. What are admissible are "directly relevant background facts". They are admissible "because they [are] directly relevant to the damage to the claimant's reputation suffered by him as a result of the publication". I agree with the guide as to what facts come within that category provided by Keene LJ at paragraph 56 of his judgment: that there would be a real risk of the jury assessing damages on a false basis if they were kept in ignorance of the facts to which the evidence relates.

The starting point

95. I agree with Keene LJ that, for the reasons he gives at paragraphs 69 to 75 of his judgment, the judge could properly arrive at a starting point of £15,000 for the assessment of damages. In particular, I do not accept that the allegation against the claimant in the publication was "tantamount to being party to rape". Moreover, the claimant's own admitted and proved conduct was such that his reputation could not, in relation to the allegations made, be compared with that of a husband who valued his privacy and that of his wife.

The discount

96. I am more concerned about the conduct of the first defendant when relying on the offer to make amends procedure provided by Sections 2 and 3 of the Defamation Act 1996. Section 3(5) provides that: "If the parties do not agree with the amount to be paid by way of compensation, it shall be determined by the court …" The courts should guard against the use of the procedure, in combination with the use of the principle in *Burstein*, as a cloak for making allegations intended to deter a claimant from proceeding to a proper assessment of damages.

97. In this case, letters to the first defendants went unanswered and the initial response, when made, was to assert that the words used were true. The offer to make amends was made at the last possible moment. It was accompanied by a *Burstein* statement so

startling in content that the judge felt unable to set it out, or summarise it, in his judgment.

98. The judge accepted, and was entitled to accept, that the matters in the statement were put forward in good faith. If they were to be put forward, they had to be put forward at that stage. Much of the material could not, in the event, be justified, however, and, that being so, putting it forward was a factor which should operate to diminish the discount to which the first defendant was entitled under the procedure. On the other hand, it must be recognised that the claimant's own conduct did leave him open to a legitimate use of the *Burstein* principle against him.

99. In this case, the judge's wish not to analyse how much of the *Burstein* statement properly fell within the principle in that case is understandable. In my judgment, however, there is often likely to be a requirement, if the discount is to be assessed fairly, to analyse how much of the *Burstein* statement falls legitimately within the principle in that case and how much of it is "seeking to introduce irrelevant or scandalous matter to take impermissible advantage of the court's process", a possibility, which the judge hoped would be very rare, considered at paragraph 55 of his judgment.

100. The court should in my view be slow to interfere with the discount determined by the judge who has heard the evidence and conducted the trial. Some of the same factors are at work as in the case of apportionments under the Law Reform (Contributory Negligence) Act 1945 ("the 1945 Act"). In that context appellate courts are very reluctant to interfere with the trial court's apportionment, though they may do so in the event of a substantial misjudgement in the factual basis of the apportionment.

101. In *National Coal Board v England* [1954] AC 403, the approach to apportionment under the 1945 Act was in issue. Lord Porter, at page 420, stated that "an appellate body does not interfere with the discretion exercised by the judge who tried the case". In the present context, that discretion is likely to be a wide one because of the number of factors which need to be taken into account and weighed. I would not interfere with the apportionment in this case.

102. For those reasons, and the reasons given by Keene LJ, I would dismiss this appeal.