Neutral Citation Number: [2005] EWHC 892 (QB)

Case No: HQ04X03523

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/05/2005

Before:

THE HON. MR JUSTICE EADY

- -

Between :

David Turner	**Claimant**
- and -	
(1) News Group Newspapers Ltd	**Defendants**
(2) Arisara Turner	

- -
- -

Jonathan Crystal (through the Bar Public Access Scheme) for the Claimant
Adrienne Page QC (instructed by Farrer & Co) for the first Defendant

Hearing dates: 25th and 26th April 2005

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

THE HON. MR JUSTICE EADY

Mr Justice Eady:

1. The purpose of this application is for the court to determine the appropriate amount of compensation to be paid by News Group Newspapers Ltd to Mr David Turner under section 3(5) of the Defamation Act 1996. There is a second Defendant, Arisara Turner, who is one of the Claimant's former wives. Judgment was obtained against her, through his former solicitors, on 29th June 2004. The Defendants are sued in respect of the same publication, as joint tortfeasors, and it would thus not be appropriate for there to be two awards of compensation. The ordinary principles of law would apply in this respect, even though any sum fixed in these proceedings would technically be characterised as "compensation" rather than libel damages. There could be no question, however, of the Claimant recovering twice over.

2. Mr Turner complained of an article published in *The News of the World* on 15th February 2004 as part of more general coverage, spread over two pages, under the headings "How explosion in sex parties can be make-or-break affairs" and "SWINGERS & LOSERS!" The article purports to set out the stories of a number of people who have had experience of "swinging" – a term which is defined in the first of the articles as being "hooked on sex with strangers". The article covers "wife-swapping" as well. These activities are said to be "booming thanks to the internet explosion that has set thousands hunting for thrills at new sex clubs".

3. There is also a complaint about the article appearing on the first Defendant's website.

4. The article which particularly concerns Mr Turner is headed "ARISARA – 'IT TURNED ME ON – BUT IN THE END IT WRECKED MY MARRIAGE' ". There is a photograph alongside the articles of Arisara Turner, the second Defendant, who would no doubt be recognisable by some readers as one of Mr Turner's former wives. They were married in February 1999. They separated first in 2001 and then, as I understand the position, resumed co-habitation shortly afterwards for another two years or so. People could only identify Mr Turner as the subject of the article if they were in a position to recognise the photograph, since he was not mentioned by name.

5. The article contains the words complained of:

> "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’. ”

6. The general message of the two page spread overall appears to be that “swinging” and wife-swapping are risky activities which can lead to jealousy and ultimately the break up of relationships.

7. Mr Turner relies upon eight sub-paragraphs of natural and ordinary meanings which he attributes to those words:

> “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”.

8. Miss Page QC for the first Defendant points out that this is the first case to come before the court by way of the offer of amends jurisdiction under the 1996 Act in which the Claimant has not been readily identifiable to most readers, and thus can only establish a cause of action by pleading and proving a reference innuendo. What is more, it is also the first case in which the court has been invited to apply the principle in *Burstein v Times Newspapers Ltd* [2001] 1 WLR 57, CA, in the course of fixing an award of compensation. There is no doubt that it does apply in such cases, since the court has to apply exactly the same principles as govern an award of libel

damages at a conventional trial or assessment. As I noted in *Abu v MGN Ltd* [2003] 1 WLR 2201 at [18]:

> "I do not need here to explore the implications of that decision in any detail. Suffice it to say that, in so far as it may in any way have changed or developed the law in relation to what is relevant to the assessment of libel damages, it will be equally effective in any assessment of compensation under section 3(5). Parliament rejected the Neill Committee's recommendation for the abrogation of the so-called rule in *Scott v Sampson* (1882) 8 QBD 491, just as earlier it had rejected similar recommendations by the Porter Committee (Report of the Committee on the Law of Defamation (Cmd 7536)) in 1948 and the Faulks Committee (Report of the Committee on Defamation (Cmnd 5909)) in 1975. Thus it would appear still to be the law, subject always to the matters addressed in *Burstein's* case, that a defendant cannot pray in aid purely for the mitigation of damages specific aspects of the Claimant's behaviour (as opposed to matters alleged by way of *general* bad reputation)".

9. In *Burstein* at [40] May LJ warned that:

> "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 would follow that such an inquiry would also be inappropriate on an assessment under section 3(5). On the other hand, as I observed in *Abu* at [19]:

> "It has to be recognised, however, that 'directly relevant background context', properly confined, would be admissible in accordance with the Court of Appeal's reasoning. Of course, it may not always be easy to draw the line but the principle will have to be applied".

10. The tension to which I there referred arises in this case. Although there was at an earlier stage in the proceedings an intention to rely upon "general bad reputation" on Mr Turner's part, and notice was so given, this was subsequently withdrawn. The current position is that Miss Page wishes to rely upon certain admitted or unchallenged facts about Mr Turner and his conduct in relation to his former wife by way of "directly relevant background context". Mr Crystal, on his behalf, has made it clear that he does not accept that those matters can properly be characterised as "context" primarily, as I understand it, for the reason that they were not in any sense causative of the publication of the defamatory words in the article. He submits that, from the *Burstein* decision as a whole, it is clear that this is a necessary precondition for the admission of background context. I shall have to consider these arguments shortly but, first, it is necessary to say a little more about the history of the proceedings.

11. Mr Turner launched his complaint two days after publication in a letter to the editor, which he introduced with these words:

> "Although I am not a reader of your newspaper I was given a copy of the article by my cleaning lady on Monday morning, 16 February 2004 and was thereby forewarned of the inevitable reaction of some of my staff thereby avoiding the severe embarrassment and total humiliation which I would otherwise have suffered.
>
> Within that article you feature a photograph of my ex-wife Arisara Turner and a story line, which makes a number of unsavoury and sordid allegations about our marriage and married life, which are factually untrue and which I find wholly abhorrent and deeply upsetting.
>
> … I am frankly appalled that you should have carried a story about my private life without first approaching me, particularly when the allegations made are of such a personal and offensive nature …"

12. There was an unfortunate hiatus during which his complaint appears to have been ignored or, as Mr Crystal put it, treated with contempt. It was necessary for another copy of the same letter to be sent. Still there was no response and Mr Turner next had resort to the Press Complaints Commission. Eventually, after a further chasing letter on 25th March 2004, there was a response from Mr Crone, the legal manager, dated 26th March, in which he apologised and acknowledged receipt of the earlier correspondence. Following inquiries, he wrote further to Mr Turner of 5th April, stating:

> "Your former wife maintains that she has told the truth. Several other people to whom we have spoken lend support to her account".

Mr Crystal rhetorically inquired who these "other people" were. He invited the inference that there were no such people, and that this was simply a further example of a powerful newspaper group giving a relatively unknown complainant the brush off. At all events, the claim form was issued on 13th April 2004 and solicitors gave notice of acting on Mr Turner's behalf on 23rd April.

13. On 18th June 2004 an unqualified offer of amends was made by Farrer & Co on behalf of the first Defendant. It would naturally follow that it was no longer being maintained that the allegations complained of were true. In the course of that letter, however, notice was given of "further matters relied upon". The significance of the date of the offer is simply that it was when the defence fell due for service. That was therefore the last opportunity permitted under the statute to take advantage of this regime.

14. The most significant aspect of the "further matters relied upon" was a plea of mitigation based on *Burstein* which accompanied the letter and which ran to some 28 paragraphs settled by counsel. There is no doubt that it would have been a startling

document for Mr Turner to receive. He relies upon it as aggravating the hurt to his feelings but, with appropriate sensitivity, neither counsel mentioned its contents in open court during the assessment hearing, since it has subsequently been withdrawn save in certain limited respects, which have been more narrowly defined. For these reasons, it would not be right for me to refer to the contents of the document either. It has remained confidential. I shall have to do my best to take it into account, and to make clear how I have done so, without going into its detailed contents.

15. The significance of these matters was addressed by counsel from opposite ends of the spectrum. Miss Page submitted that, once an unqualified offer of amends has been made and the claimant therefore knows that he is to receive an apology and compensation, it should not be held against a defendant if steps are taken for the purpose of arriving at fair compensation by way of introducing "relevant background context", even though it might reflect adversely on the claimant. In support of this argument she prayed in aid certain passages of the judgment of May LJ in *Nail v News Group Newspapers Ltd* [2004] EWCA Civ 1708, [2005] 1 All ER 1040 at [45]:

> "I should perhaps also add that a defendant who takes a judicial determination of compensation to the conclusion of a contested hearing does not by that fact alone aggravate the damage. [Counsel] did not submit that this should be seen as aggravation. The defendant is simply exercising the statutory right to have compensation determined by the court when, for whatever reason, it cannot be agreed. This is in contrast with some defendants who unsuccessfully contest full libel proceedings with, for instance, a plea of justification".

16. Mr Crystal, by contrast, submitted that here there are indeed certain features which should be taken into account by way of aggravation. He referred to words of mine in the *Nail* case at first instance: [2004] EWHC 647, [2004] EMLR 20 at [35]-[40]. He had these passages particularly in mind:

> "The offer of amends regime provides, as it was supposed to, a process of conciliation. It is fundamentally important that when an offer has been made, and accepted, any claimant knows from that point on that he has effectively 'won'. He is to receive compensation and apology or correction. In any proceedings which have to taken place to resolve outstanding issues, there is *unlikely to be any attack upon his character*. The very adoption of the procedure has therefore a major deflationary effect upon the appropriate level of compensation. This is for two reasons. From the defendant's perspective *he is behaving reasonably.* He puts his hands up, and accepts that he has to make amends for his wrong doing. As to the claimant, the stress of litigation has from that moment at least been significantly reduced.
>
> Whereas juries used to compensate for the impact of the libel 'down to the moment of the verdict', once an offer of amends has been accepted the impact of the libel upon the claimant's feelings will have greatly diminished and, as soon as the

> apology has been published, it is also hoped that reputation will be to a large extent restored. It is naturally true that if a defendant or his lawyers thereafter *should behave irresponsibly, or try to drag in material to 'justify by the back door',* that will be an aggravating factor. On the whole, however, once a defendant has decided to go down this route, it would make sense to *adopt a conciliatory approach and work towards genuine compromise* over matters such as the terms of an apology or the level of compensation. …
>
> If [media defendants] do not feel confident of getting a 'healthy discount' for adopting what is, in effect, a conciliation process, then I suspect (although [counsel] did not put it in this way) that there may a return to the tactic (sometimes encountered on the part of media defendants in the old days) of *using their considerable resources to complicate and prolong litigation with a view to discouraging less wealthy litigants*".

(*emphasis added*)

17. Mr Crystal submits that the first Defendant's conduct in this case does not fit comfortably within that template. It is his case that the first Defendant should not receive any "discount", let alone a healthy one. Indeed, its conduct should be taken to aggravate the injury to his client's feelings and thus increase the damages, since:

    i) there has, in effect, been an "attack upon his character";

    ii) the first Defendant has not been "behaving reasonably";

    iii) the first Defendant and/or its lawyers have behaved "irresponsibly" and dragged in material to "justify by the back door";

    iv) the first Defendant has not been trying genuinely to implement a conciliation process with Mr Turner but, instead, has been attempting to "see him off";

    v) the first Defendant has employed the tactic of using its "considerable resources to complicate and prolong litigation with a view to discouraging less wealthy litigants".

18. It is necessary in these cases always to have in mind that there are two sides to the coin and to take them both into account. A particular step taken by a defendant in preparation for a section 3(5) hearing may sometimes give a claimant cause for concern or increase the hurt to his feelings, but it does not *necessarily* follow that the defendant is behaving unreasonably or resorting to impermissible tactics. Material which is relevant to mitigate the amount of damages or compensation may very well reflect on the claimant's character. Provided it falls within the ambit of what the law permits, and it has been notified at least in general terms to the claimant before he takes his decision to accept the offer of amends, its introduction should not automatically be held against the defendant. 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.

19. The important question, therefore, is whether or not the material which has been the subject of Mr Crystal's strictures is admissible on the quantification issue. The effect of the Court of Appeal's decision in *Burstein* was to ease the strict confines of the rule in *Scott v Sampson* and to render admissible, in some circumstances, evidence of specific facts (hitherto only considered legitimate for the purposes of a plea of justification). As Miss Page recognised in the course of argument, this is a difficult area, and especially so in the light of the decision of the legislature in 1996 to reject the Neill Committee recommendation which had found its way into a draft clause 13 of the Defamation Bill. This was referred to in *Burstein* at [54] by Sir Christopher Slade, who set out its terms:

(1) In defamation proceedings the plaintiff is not entitled to damages for injury to his reputation beyond what he would be entitled to if all facts affecting or liable to affect his reputation (at the time that damages fall to be assessed), in relation to the sector of his life to which the defamatory statement relates, were generally known.

(2) The defendant may, accordingly, in mitigation of damages, lead evidence not only as to the plaintiff's general reputation at that time but also as to specific facts which if they were then generally known would affect the plaintiff's reputation in relation to the relevant sector of his life.

Notwithstanding the rejection of this clause, the Court of Appeal felt able in *Burstein* to introduce more flexibility by resort to considerations of "case management and justice": see e.g. [41] and [58]. As May LJ expounded the principle at [42]:

> "For practical purposes, every publication has a contextual background, even if the publication is substantially untrue. In addition, 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. To the extent that evidence of this kind can also be characterised as evidence of the claimant's reputation, it is admissible because it is directly relevant to the damage which he claims has been caused by the defamatory publication".

It therefore becomes critical to focus upon what, in any given case, can be characterised as "directly relevant background context". Having regard to the fact that the draft clause 13 was not enacted in 1996, it is reasonable to assume that this concept must be narrower than the proposed statutory wording (i.e. "all facts affecting or liable to affect his reputation … in relation to the sector of his life to which the defamatory statement relates").

20. I must now therefore turn to the three categories of material which were admitted in evidence, and as to which Miss Page submits (a) that they would go significantly to reduce the amount of the compensation to which the Claimant is entitled, and (b) that her client's reliance upon them (even though it may incidentally cause embarrassment or hurt to he Claimant) should not be held against it. Mr Crystal argues the reverse, since he says that the matters were only introduced "to rough him up".

21. The three topics were notified to the Claimant in a document served on 22nd February 2005 as follows:

    i) The involvement of the Claimant and second Defendant in fetish functions at a club in Coventry called Ceasars, which advertises itself as "the Midlands leading fetish, BDSM and swingers club". Miss Page tells me that BDSM stands for "Bondage in Discipline, Dominance and Submission, Sadism and Masochism".

    ii) The very active career of the second Defendant as a model posing for what Miss Page described as "open leg shots" and "girl on girl" poses. The Claimant encouraged her in this career, from which she made a modest albeit tax free income, and acted as her agent.

    iii) After the Claimant and the second Defendant initially split up, in 2001, she was "slagged off" by the Claimant in *The Sun* newspaper under the title "Page 3 Thai girl wed me just to get into Britain" and he called for her deportation.

22. I shall need to address these topics in turn but, before I do so, I should also consider when it was that the first Defendant *first* notified the Claimant of its intention to pray those factors in aid on quantum. I indicated in *Abu v MGN* [2003] 1 WLR 2201 at [9]-[10] that neither party should be able to take the other by surprise, by the introduction of new material, after an offer of amends has been accepted:

> "9 It would only accord with most people's sense of justice if the offer of amends is construed as relating to the complaint *as notified*. Such an approach would also accord with the modern 'cards on the table' approach to litigation generally and, more specifically, with the thinking behind the Defamation Pre-Action Protocol.
>
> 10 By the same token, if an offer of amends has been made, whether on a qualified or unqualified basis within the meaning of section 2(2), the complainant would not doubt like to know, before accepting it, if his reputation is going to be further undermined during the court process. …"

23. Miss Page emphasised that all the three factors identified above were indeed notified to the Claimant prior to the acceptance of the offer of amends, in that they were included at paragraphs 16, 24 and 26 of the original *Burstein* plea (the contents of which generally have been regard as *verboten* for the purposes of the hearing before me). I am thus quite satisfied that the Claimant was so informed and that he would have been able to anticipate that the first Defendant intended to raise such material as background context to the publication, as the notice of 22nd February reaffirmed. One test formulated by May LJ in *Burstein* at [41] was whether the decision of the judge at first instance, to keep the relevant material away from the jury, was "to put them in blinkers".

24. It is accepted, of course, as it has to be on an application of this kind, that the sting of the words complained of was false and defamatory. Although there are a number of variations pleaded, which I have set out above, it seems to me to be clear that the nub

of Mr Turner's complaint is to be found in the words "But he kept pressuring me to have sex with the men too, and that I didn't like …". 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 it 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".

25. 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 pressurising 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 newspapers 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.

26. I must now turn to the evidence that was before me on those three issues. On some five occasions Mr and Mrs Turner attended Caesar's Club in Coventry which, I understand, is situated some 92 miles from Sheffield. They went to the Friday fetish nights for which there was apparently a dress code. The Claimant, eschewing leather or anything more exotic, wore a sober black shirt and trousers. His wife wore a white top and short skirt. He agreed with Miss Page that this was aimed at a "St. Trinian's schoolgirl" effect.

27. There was evidence before the court from a Miss Irena Barker who attended one of the advertised fetish nights on 8th October 2004, at the request of the *The News of the World,* and gave an account of the goings on. It seems that most men wore black leather trousers, although two opted for latex dresses and high heels. Various demonstrations were laid on; for example, four middle-aged men were poking at female "demonstrators" with bottle brushes and oven mitts. Another popular activity seemed to involve women having their genitals clamped with various metal clips. Bottoms were on offer for tickling, stroking or spanking with "small feather dusters, whips, sticks and other small beating implements". Some people also entered

suffocation sacks from which the air was pumped out. Miss Barker left at about 1.30 am.

28. These events were, of course, some years after Mr and Mrs Turner used to attend. He thought the club must have changed hands as it appeared to be offering more sophisticated attractions than in his day. When he attended, it was "on its last legs". He did remember bottoms being spanked, but nothing as dramatic as Miss Barker's experiences. He took no particular notice of the bottoms, however, and treated it really as a "fancy dress" party. His wife, he said, was fascinated by the fetish scene and would make drawings of what people were wearing. It was "just something to do on a Friday night". They apparently "made a night of it", having a curry before they set out and enjoying breakfast on the M1 on the way back. There was no wife swapping; nor did Mr Turner encourage his wife to have sex with other men.

29. The subject seems to have come into this case originally via the draft pleading the Claimant sent to Farrer & Co, solicitors for the first Defendant, on 25th March of last year. Miss Page submits that he must therefore himself have, correctly, identified his membership of and attendance at the Caesar's Club for fetish nights as being relevant background context. She submits that he would be correspondingly less likely to suffer embarrassment at the allegations of "swinging" than someone who had never attended such a club. That is as far as it goes.

30. The next subject is that of the explicit photographs. As I have said, Mr Turner acted as his wife's representative in arranging for photographic sessions. Quite why she was doing it was unclear. His evidence seemed to be ambivalent, as to whether she was doing it because she enjoyed it or purely to make money. But there is evidence on that subject from two other witnesses, to which I shall refer shortly. It seems that Mrs Turner was something of a "trooper" in this enterprise. She appeared on an X-rated Adult Channel, and in magazines such as *Men Only, Men's World, Mayfair, For Men, International Park Lane,* and *Asian Babes*. Thousands of photographs were taken and some video material, of which I was provided with a selection in evidence.

31. Mrs Turner was happy, time and again, to go on displaying her perineum from every possible angle. She pulled her labia about to give the viewer opportunities for quasi-gynaecological inspection. In many shots she had a ring inserted at the upper end of her labia. This was no doubt to sparkle things up a bit and also perhaps to give her better purchase. She is shown, for example, in some photographs using it like a ring-pull. There were also photographs of other women, with whom she was rolling about naked. They were kissing each other at one end or the other. My attention was drawn to certain specific pictures from what was described as "an assorted selection", in one of which Mrs Turner was using her tongue on the clitoris of an unidentified third party (said by Miss Page to be "a total stranger").

32. According to the Claimant, Mrs Turner enjoyed her work: there was no question of his "pressuring" her to do it. She was keen to have a measure of independence by making some spending money for herself (free of tax).

33. A somewhat different picture emerged from the evidence of one of her regular photographers who gave evidence before the court. He was Mr Jeff Kaine, a very experienced (and specialist) professional photographer with his own studio. He was the person who took the "assorted selection" to which I have referred. Originally, in

1999, Mr Kaine was rung up by the Claimant who made an appointment to bring his wife over, because she was "keen to break into modelling". He said he wanted shots of her "in compromising positions, preferably with other women".

34. He only came to London for the introductory shoot, but thereafter kept in touch with Mr Kaine by telephone. As Mr Kaine said in paragraph 5 of his witness statement:

> "I agreed to the above arrangement with David Turner and Arisara came to my studio about a dozen or so times during the course of about a year. To the best of my recollection, apart from the first shoot when I met him and Arisara, David Turner never came down from Sheffield with Arisara to my studio for the other shoots but he was always on the telephone giving me instructions as to the sort of photographs he wanted me to take of Arisara. On every occasion, the photographs were to be of Arisara semi or wholly undressed and of a '*top shelf*' and adult nature. On one occasion I remember how David Turner telephoned me and said that his wife wanted to be photographed with another woman in a '*lesbian display*'. I specifically remember how he described Arisara as '*gagging for it*'. I never really took '*instructions*' from Arisara herself (although I was careful to ensure that she never was doing anything that she did not want to). It was always David Turner who told me what sort of photographs (in general terms – '*sexy*' / '*adult*' / '*top shelf*') were to be taken. He would usually say to me that the photographs were to be '*the stronger the better*'. He also said that if Arisara looked nervous or unwilling to perform then I was to '*dominate*' her and force her to pose in an explicit way. I never would do such a thing as it is entirely unprofessional and against my nature. I remember how Arisara told me in fact that she did not mind the photo sessions because she was just doing it to please her husband".

35. Mr Kaine added that the Claimant would always expect 20 to 30 photographs from every shoot to be sent to him – presumably for his personal records. Mrs Turner signed a separate release form each and every time Mr Kaine sold photographs to a particular magazine. This was unusual, but it was an arrangement stipulated by Mr Turner so that he could keep track of where she was appearing.

36. As time went on, Mr Kaine said that there were problems caused by Mr Turner's constantly telephoning publishers to complain over their choice of shots in the magazine. One publisher apparently so tired of Mr Turner ringing him up that he sent a batch of photographs back to Mr Kaine, saying that he never wanted to deal with him again if Mr and Mrs Turner were involved.

37. Mr Kaine also made video film of Mrs Turner and another woman, originally with the intention of using it for his own web site as a "pay to view" item. I have seen a selection of stills from that video. It was called "Wan and Rachelle" ("Wan" being one of Mrs Turner's professional *noms de guerre*). It shows the usual activities and, in particular, digital penetration and oral sex. Mr Kaine said it was "arranged under the express instructions of David Turner". Although Mr Turner said that Mr Kaine was

"mistaken" in that respect, most of his evidence was not challenged in cross-examination.

38. Another witness was Phil Green, a legal executive from Lincolnshire who has a modelling agency called Supermodel Ltd. He too was contacted by Mr Turner because his wife was keen to work as a "glamour model". Mr Green agreed to act as her agent and took a percentage (except in cases where Mr Turner had arranged matters direct, as he did with Jeff Kaine). Mr Green only dealt with a certain level of material, which he characterised as " 'Loaded' and 'FHM' and nothing stronger". But Mr Turner pressed him to arrange for "much more explicit poses for publication in more hard-core pornographic or 'top shelf' magazines".

39. As with Mr Kaine, the financial arrangements stipulated by Mr Turner were unusual. Both witnesses explained that the industry-wide practice was for the model concerned to be paid a fixed fee for each session, but Mr Turner wanted the revenues to be shared whenever her photograph was syndicated to a magazine. Relations broke down because Mr Turner insisted on negotiating his own deals with photographers and "he had a liking for Arisara to be photographed for the more explicit and erotic magazines". She only remained on Mr Green's books for about fifteen months. He seems to have got on reasonably well with Mrs Turner and told me:

> "Some time after I had finished working as Arisara's agent, I cannot now remember exactly when, Arisara telephoned me out of the blue to say that she had left her husband, David Turner and was travelling over to the agency. I remembered Arisara and, in particular, how when I had first met her I had found her to be extremely shy and someone who appeared to be completely under the control of her husband. I particularly remember how she was a lot younger than her husband and I was slightly surprised by her telling me that she had now left him. She said to me that I was effectively one of the very few people that she knew other than her husband and she asked if I could help. I felt some responsibility towards Arisara having previously acted as her agent and she came to stay at my house for a few days after she had left her husband."

Again, this evidence was not challenged in any material respect.

40. Miss Page relies on this category of evidence as relevant to the quantum of compensation – partly because a claimant's conduct is legitimately to be taken into account: see e.g. *Kelly v Sherlock* (1866) LR 1 QB 686. It is partly also because (she submits) Mr Turner is less likely to have been upset by allegations of dominant and exploitative behaviour than the average husband. As Miss Page put it, the assessment of compensation requires account to be taken of the "open and liberal manner" in which they conducted themselves and of their "modern" approach to such matters.

41. The third aspect of Mr Turner's behaviour she wished to highlight concerned the press publicity at his instigation following shortly after the breakdown of the marriage.

42. An article appeared in the *Mail on Sunday* for 18th March 2001 by Alison Gordon, "Social Affairs Editor". It consisted largely of quotations from Mr Turner and, to a lesser extent, from Mrs Turner. It was headed "Businessman's wife runs off after row over her modelling career" and "My Page 3 Thai bride fleeced me of £33,000". There is a photograph of Mrs Turner posing on a bed, although on this occasion wearing her knickers, and underneath the caption states "Arisara won many admirers as a glamour model but husband David Turner, right, disapproved". A much smaller photograph of Mr Turner appears in the bottom right hand corner. The text is as follows:

> "HE said he only wanted love – but a wealthy businessman who married a Thai girl was counting the cost last night.
>
> David Turner was enchanted with his beautiful young bride and she in turn appeared to be very happy with her new life in Britain.
>
> But eight months after being granted a visa to stay here as long as she liked, Arisara – who found fame as a glamour model – has vanished, taking luxury items worth £33,000 with her.
>
> The break-up came after 50 year-old Mr Turner pleaded with Arisara, 26, to give up the career which had seen her pose naked for The Sun's Page 3, in pornographic magazines and on the X-rated Adult Channel.
>
> She refused and has now left their penthouse home in Sheffield.
>
> Mt Turner, 50, said yesterday: 'I've been totally ripped off. I have been very hurt and shocked. I had grown to love her and I wanted to have a child with her and for us to spend the rest of our lives together.
>
> There had been friction because I wanted her to pack in her career but she wanted her independence'.
>
> Mr Turner, who has three children by three previous marriages, had deliberately sought out a Thai bride.
>
> He said: 'I thought a Thai woman would be more loving and caring and faithful than a Western woman.'
>
> Among the possessions allegedly stolen by Arisara were a gold Corum watch valued at £18,000, a gold Rolex worth £9,300, and a £1,000 laptop computer. Police are investigating.
>
> The couple first met in England in 1998 after Mr Turner responded to an advertisement in The Sunday Times by Kent-based Siam Introductions. Arisara was here on a six-month visa, planning to marry an army officer, but their relationship collapsed. Within days she agreed to move in with Mr Turner

> and they married in a Sheffield register office in February 1999, just days after Mr Turner's third divorce came through.
>
> Seven months later they contacted a photographer to take some glamour pictures 'as a bit of fun'. It was the start of a flourishing modelling career and Arisara posed as Susie of Sheffield on Page 3 and went on to appear in magazines and erotic books.
>
> After she fled three weeks ago, Mr Turner tracked her down at Heathrow as she prepared to fly back to Bangkok. But they argued and she disappeared. Since then Mr Turner has become increasingly suspicious that she may already have been married.
>
> Last night The Mail On Sunday found Arisara at the home of a friend. She admitted taking the computer and running up a large bill for cosmetics on Mr Turner's store card, but denied taking watches and cash.
>
> She said: 'He abused me. He tried to treat me like a slave, I had to cook exactly what he wanted to eat and if I did anything wrong he punished me.'
>
> Mr Turner denies the allegations."

It is obvious that the version presented to the public on that occasion is hardly consistent with the unchallenged evidence of Mr Kaine and Mr Green, but Miss Page's primary point on the quantification of compensation was that Mr Turner seemed content on that occasion to portray himself as a "loser" (one of his own meanings).

43. A few days later, on 21st March, most of a page in *The Sun* was devoted to the same topic under the heading "PAGE 3 THAI GIRL WED ME JUST TO GET INTO BRITAIN: Boss's fury at runaway bride". On this occasion he called for her deportation:

> "A WEALTHY tycoon told yesterday how a Page Three model from Thailand married him – then ran off after getting a visa to stay in Britain.
>
> Company director David Turner angrily claimed that his stunning bride Arisara only wed him to escape a life of poverty in Bangkok.
>
> Mr Turner, 50, has complained to immigration authorities that the 26-year-old exotic beauty "used" him so she could live permanently in this country.

> *He said that she cleared their penthouse flat of all her belongings and vanished – then racked up a £1,000 bill for cosmetics.*
>
> Mr Turner, who had been married three times before, fell for Arisara after meeting her through an introduction agency.
>
> They tied the knot on the day his third divorce came through in 1999 and she took up modelling.
>
> *Soon she appeared in Playboy and The Sun, under the English name Susie.*
>
> But the marriage crumbled after Arisara was granted an indefinite visa to stay in Britain.
>
> Mr Turner said she packed all her things while he was out and fled their flat in Sheffield without any explanation.
>
> Later the same day, he said she ran up the £1,000 bill on his account at a department store.
>
> Mr Turner who wants Arisara sent home said: 'I now realise this was probably a marriage of convenience – I feel used and hurt. She was everything I ever dreamed of in a woman.
>
> I thought she loved me as much as I loved her, but now I can see it was all one-way traffic.
>
> After she got the visa to stay in Britain she seemed to change.
>
> I wanted her to give up modelling so we could have a child, but she wasn't keen. The Immigration Service should report her'.
>
> *But pals of Arisara – now living in a hostel – hit back, claiming she was treated like a slave*
>
> Her agent Phil Green said: 'Whatever David says it wasn't a marriage of convenience.
>
> She is a timid girl and was totally dominated. She never set out to deceive anyone'.
>
> The Immigration Service said 'We are looking into the matter'".

44. 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.

45. I must now address the assessment of compensation having regard to all these circumstances relating to the specific case, as well as to the general principles to be applied in "offer of amends" cases, as they have been expounded in the recent cases and, in particular, in *Abu v MGN Ltd* and *Nail v News Group Newspapers Ltd* (cited above). The first stage is to identify the figure I should award at the conclusion of a hypothetical trial in which the defendant had done nothing to aggravate the hurt to the claimant's feelings (e.g. by pleading justification or by insulting cross-examination) and nothing to mitigate (e.g. by the publication of an apology). At the second stage, I must consider to what extent, if at all, that figure should be discounted to give effect to any mitigating factors of which this Defendant is entitled to take advantage.

46. Most relevant is the offer of amends itself, made on 18th June 2004, and the apology published in the newspaper on 15th August. Naturally, in the course of carrying out the exercise, I must also weigh in the scales any conduct which, despite the offer of amends, has had the effect of aggravating matters. This could be relevant to reducing the size of the "discount" or, in an extreme case, I suppose it might even, at least theoretically, make it appropriate to allow no discount at all.

47. It is clear from the Court of Appeal judgment in *Nail* at [47] that there are no hard and fast rules as to the size of the reduction. It will be left to the judge to make the assessment on the particular facts. Cases vary so much.

48. The matters I have been considering so far, in the light of the evidence introduced by Miss Page, do not go to mitigation in the strict sense, so as to be taken into account at stage two. They are simply part of the background context against which I have to make a judgment as to the starting figure at stage one.

49. I must proceed, in a case where the offer of amends is "unqualified", on the basis of the meaning or meanings the Claimant has put forward prior to the offer being made. I have set out Mr Turner's meanings at [7] above. It is immediately apparent that they are not at the highest level of gravity. The allegations may have been embarrassing and intrusive, but there is no pleaded meaning which suggests criminality or dishonesty on his part. It is relevant also to have in mind the factors sometimes encountered in defamatory publications which were identified by the Court of Appeal in *John v MGN Ltd* [1997] QB 586, 607:

> "In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be".

It is fair to say in the instant case that these factors do not appear to be significantly engaged.

50. The impact of the *News of the World* article on Mr Turner's reputation appeared to be relatively minor. According to his evidence, it led those people he knew and who recognised the photographs of Mrs Turner to smile or giggle rather than to revile him or to shun or avoid him socially. For example, he said that his secretary "had a great big smile on her face and was obviously amused by this whole sorry state of affairs". Moreover, it is quite apparent from the evidence introduced that none of the witnesses

actually believed the defamatory sting of the allegations. Naturally, the relatively few readers who were able to identify him were people known to him socially or from the working environment. They did not apparently think it fitted the Mr Turner they knew. Correspondingly, therefore, the need for vindication of his reputation is of less significance.

51. I am well aware, of course, that injury to reputation and the need for vindication are not the only considerations. I must also compensate for hurt feelings, distress and embarrassment. As in the *Nail* case, that is the most important element in the equation here. Mr Turner gave evidence about the impact of the article upon him. In particular, he told me of his anxiety about breaking the news of the publication to his then fiancée (also, as it happens, from Thailand). I need to take that into account, albeit against "the relevant background context" of the three categories of evidence Miss Page has introduced. It is quite apparent, for example, from the articles in *The Sun* and *The Mail on Sunday* in 2001 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.

52. Nowadays, since the decision in *John v MGN Limited*, it is recognised that the court can have regard to the level of general damages in the quite different context of personal injury cases. That is not because there is a direct comparison to be made, but rather so as to make sure that libel awards are not disproportionately large when set alongside such figures: see e.g. the judgment of May LJ in *Nail v News Group Newspapers Ltd* at [37]. It is simply one aspect of keeping in mind the value of money and the need to have a sense of proportion. There is no point in referring for present purposes to levels of awards for particular categories of injury, but it is reasonable to suppose that comparisons of this kind have played a part in the general moderation of libel damages over the years since the *John* case was determined. It is in accordance with that current scale of values that I must measure the appropriate level of compensation.

53. Bearing all these considerations in mind, at the first stage of the assessment exercise, I have decided that the right starting point is £15,000. I now turn to consider the question of "discount". In *Nail,* as it happens concerning the same Defendant, I selected a 50% reduction in the light of the offer of amends and the circumstances in which it came to be made. That will not always be appropriate, of course, but I thought it right on those particular facts, and especially because there had been no significant derogation from the appropriate spirit of conciliation through aggravating conduct.

54. As I have already made clear, Mr Crystal contends on Mr Turner's behalf that this is a very different case. He relies particularly on what I described as the "startling" first version of the *Burstein* plea. It is important to recall, however, that this was not conjured out of thin air, as Mr Turner apparently suspected, as a dishonest attempt to "rough him up". During the hearing it was made clear that it had been based on a statement from Mrs Turner. Mr Crystal complained that he had never been shown it, and he was thus not in a position at that stage to accept that it had been put forward in good faith. He was therefore given a copy to consider. I should make it clear that I was not given a copy and this has not, therefore, affected my mind in making the assessment. I have also ignored, as I was asked to do, the content of the original *Burstein* plea itself. Once a copy of the statement was supplied to the Claimant's

advisers, no more was heard of it. I should therefore proceed on the basis that the *Burstein* plea was put forward in the first place in good faith. (I am told that Mrs Turner had subsequently moved from her address and the first Defendant's advisers were unable to make contact.)

55. As I have suggested earlier, given that the *Burstein* principle applies in s. 3(5) assessment cases, it is almost inevitable that sometimes the steps which a defendant takes, albeit quite legitimately for the purposes of achieving a fair overall assessment, will add hurt to a claimant's feelings. That does not mean that the level of compensation goes up automatically. That would be to discourage defendants from seeking to deploy arguments based on *Burstein* or the more traditional mitigating factors. It would hamper settlements and undermine the utility of the "offer of amends" procedure. The primary question seems to me, in any given case, whether a claimant has behaved reasonably in raising any particular matters, rather than seeking to introduce irrelevant or scandalous matter to take impermissible advantage of the court's process. In the latter case, which in practice one imagines will be very rare, it would of course be right to reflect such aggravating conduct in quantifying the compensation. The test needs to be an objective one and cannot be solely determined by reference to the individual claimant's reaction.

56. I have seen nothing in this case to persuade me that the first Defendant has acted improperly in the introduction of materials following its offer of amends, and I do not think it would be right to penalise them in that respect. Having said that, although the original *Burstein* plea was advanced in good faith, the first Defendant found itself unable to substantiate a significant part of the allegations in the absence of Mrs Turner. Its impact on the Claimant's feelings must, therefore, be taken into account as one factor tending to detract from the deflationary effect of making the offer of amends.

57. There is criticism of the apology published on 15th August 2004. It had been the subject of negotiation and largely corresponded to what the Claimant wanted. Inevitably, of course, its publication drew his name to the attention of far more readers than the original article. It was published under the heading "DAVID TURNER APOLOGY" on page 36 in these terms:

> "ON 15 February we published an article, Swingers And Losers, which wrongly stated that Arisara Turner was pressured by her then husband, David Turner, to take part in the swinging and wife-swapping scene, including pressuring her to have sex with other men.
>
> We now accept that neither Mr Turner nor his then wife, Arisara Turner, were involved in swinging or wife-swapping and neither did Mr Turner pressurise his former wife to have sex with other men.
>
> We apologise to Mr Turner for the error."

58. No one could pretend that the apology was prominent, but it did at least accord in substance with what Mr Turner was entitled to expect and what he wanted. Indeed, the Claimant himself (in his allocation questionnaire) described it as "a suitable

correction and apology". The principal criticism now is that it did not include words to the effect that the first Defendant had agreed to pay damages. A sum of compensation would be payable in accordance with the statutory procedure, but very few readers would be aware of that. The first Defendant took the approach that, since damages had not yet been *agreed*, it would not be appropriate to suggest the contrary. The only alternative would be to say something along the lines, "We will pay Mr Turner appropriate compensation in due course. If it cannot be agreed, the matter will be referred to a judge to resolve the dispute under s. 3(5) of the Defamation Act 1996". I cannot see that this would have improved the Claimant's position, and indeed it might have given the impression to some readers that he was haggling or being greedy. In these circumstances, I do not believe the omission should count against this Defendant.

59. In this context of the first Defendant's treatment of his complaint, it seems to me that Mr Turner's best point is that he was ignored for some weeks and then told that *The News of the World* had no reason to think that the allegations were false. That is a different situation from that in which a defendant needs time to make inquiries to establish the merits of the claim, one way or another, which certainly should not work to his disadvantage: See e.g. *Nail* [2004] EWHC 647 (QB), [2004] EMLR 20 at [59]. The rather dismissive way in which the complaint was initially treated, and the assertion that the words were true, which appeared to be maintained from 8th April to 18th June 2004, are factors which in my judgment have some impact upon the "discount". It was also the case in *Nail* that justification was canvassed early on, but that was an aggravating factor which was said in the circumstances to be "short lived". Inevitably, of course, the initial delay here meant that the apology was published later than it needed to be (i.e. six months after publication). As I have already recognised, it was also rather tucked away and was likely to have been missed by many of the relevant readers. I have also mentioned the failure to make good the *Burstein* plea in its original form. For those reasons I consider that less credit (or "discount") should be given to the first Defendant than in the *Nail* case. Once the offer was made, however, there does not seem to be anything to justify a significant "penalty".

60. In all the circumstances, I think that the right discount should be 40% in this case. I therefore assess the overall award of compensation at £9,000. That is intended to embrace not only the newspaper publication but also any "hits" there may have been on the relevant part of the website.