Neutral Citation Number: (2004) EWHC 647 (Q.B.)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 March 2004

Before :

THE HONOURABLE MR JUSTICE EADY

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Between :

Case No: HQ03X01413	**Jimmy Nail**	**Claimant**
	- and -	
	(1) Geraint Jones	**Defendants**
	(2) Harper Collins Publications Ltd	
Case No: HQ03X00727	**Jimmy Nail**	**Claimant**
	-and-	
	(1) News Group Newspapers Ltd	**Defendants**
	(2) RebekahWade	
	(3) Jules Stenson	

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Jonathan Caplan QC and William Bennett (instructed by Schillings) for the Claimant
Adrienne Page QC (instructed by Farrer & Co) for the Defendants

Hearing date: 15 March 2004
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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.

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The Hon. Mr Justice Eady

Mr Justice Eady:

The nature of the claims

1. There are two actions before the Court. The first in time is a claim by Mr Jimmy Nail against Newsgroup Newspapers Ltd, the publishers of the *News of the World*, in respect of an article published on 19 May 2002 under the heading "Auf Wiedersehen Jimmy's Secret Bondage Orgies". Also joined in that action are the former editor Rebekah Wade and the journalist who wrote the story, a Mr Stenson. The second action was brought against Mr Geraint Jones, the author of a book called *Nailed: The Biography of Jimmy Nail*. This was published towards the end of 1998, although the claim form was not issued until 6 May 2003 or served until 11 August of that year. The publishers, Harper Collins Publishers Ltd, were also joined as defendants.

2. In each of the actions an offer of amends was made and accepted. Apologies have been published and all that remains, following negotiations, is for the Court to assess the appropriate compensation to be paid in accordance with s.3(5) of the Defamation Act 1996. It has been agreed between the parties that I should hear the matters together.

3. The background can be shortly summarised. Mr Nail is a well known actor and has appeared in a number of television series and films. He has also performed as a singer and musician, but is probably best known for his parts in the television series *Spender* and *Auf Wiedersehen Pet* (to which reference was made in the headline over the *News of the World* article).

4. When the book *Nailed* was published, more than five years ago, the Claimant had read it after it was drawn to his attention by Mrs Spall, the wife of a friend and fellow member of the cast of *Auf Wiedersehen Pet.* He told me in the course of his evidence that, although he found it offensive and full of inaccuracies, he consulted his present solicitors Schillings, shortly afterwards, and decided in the light of their advice not to sue over the contents – or indeed to make any complaint at all. The thinking apparently was that it might "die a death" and that to sue would simply be counter-productive, since the book could be given more publicity than would otherwise be the case. As with his other evidence, no challenge was made to it in cross-examination by Miss Page Q.C., who appeared for the Defendants in both actions. I therefore proceed on the basis that this was indeed the true explanation for at least the early period of the delay before proceedings were launched.

5. It emerged at the hearing that four separate daily newspapers had given coverage to the book shortly after publication. The *Daily Mail* published an extract on 7 November 1998. An article was published the following day in *The People*. Also, on 20 November of that year, *The Mirror* gave it some coverage among a number of other new publications. Then, on 6 January 1999, *The Sun* published a further extract headed "The Wild Nights".

6. The reason why the Defendants sought to introduce these publications into evidence, very shortly before the hearing, was not to seek to mitigate damages merely on the basis that similar allegations to those complained of had been published, by others, in the past. That would not be permissible in view of the well known decision of the House of Lords in *Associated Newspapers Ltd v Dingle* [1964] AC 371. As I understand the purpose, it was simply to put the record straight in view of Mr Nail's

claim in his witness statement (at para 15) that "… it received no publicity and was not serialised in any newspaper or publication".

7. Mr Nail told me that he only became aware of the contemporaneous articles to which I have referred when copies were disclosed in these proceedings shortly before the hearing. Miss Page expressed surprise at this, but again for fairly obvious reasons did not make any challenge to that evidence. I therefore accept that Mr Nail knew nothing about them at the time, and had not had them drawn to his attention by anyone subsequently.

8. What led to a change of tack was the publication of the *News of the World* story on 19 May 2002. This was to a very large extent based on the contents of the book (with what I regard as minor exceptions) and there was an invitation to readers, at the foot of the article, to telephone a number where they could obtain a copy of the book at a discounted price. It referred to "© Geraint Jones 2002", somewhat inaccurately, and in the body of the article the book was flagged up as "a bombshell new book", again clearly inaccurately. The reason why the *News of the World* had focused on the biography, and was seeking to lend it a spurious topicality, was that the first of a new series of *Auf Wiedersehen Pet* was to be transmitted that very evening.

9. The *News of the World* had obtained a licence from Harper Collins to use the material from the book and the staff were, it seems, relaxed about the legal implications of publication because no complaint had been made about the book itself. They published the allegations without any warning to Mr Nail or giving him an opportunity to comment or challenge them. This was, on the face of it, contrary to the guidance contained in the Press Complaints Commission Code of Practice, but I believe that the view was taken that if he had not complained about the book it was unlikely that he would have any objection to their regurgitation of the same stories.

The defamatory allegations

10. It is necessary now to say something about the *News of the World* allegations themselves. Miss Page did not overstate the literary quality of the article or make any claim to investigative prowess. She described it as "classic tabloid fodder for which readers buy such newspapers". The defamatory words related to events supposed to have happened many years ago. It is no part of the case of any of these Defendants to assert that they were true. That would be quite incompatible with the offer of amends procedure which they have adopted, and they have accepted, without any qualification, that the allegations are defamatory *and* untrue, as Mr Nail has maintained throughout.

11. Unfortunately, I do need to rehearse them to some extent in order to explain my decisions on the appropriate level of compensation. There is no doubt in my view that they have caused considerable distress and embarrassment to Mr Nail, and also to his partner, who provided an unchallenged witness statement for the proceedings, and who sat in court throughout the assessment hearing.

12. I will attempt to summarise the allegations under various categories based upon the meanings complained of on the Claimant's behalf.

13. First, there is the suggestion to which the headline refers; namely, that he "queued for an orgy with an outrageous sex-mad woman who demanded to be roped to a bedstead". Thus restrained, it seems, she entertained her gentlemen callers *seriatim*.

"Nobody appeared to bat an eyelid". Her identity remained in obscurity to the readers of the book. Perhaps the only original contribution of the *News of the World* was to track her down as a "popular" young woman formerly known in the locality as "Randy Mandy". There is then a certain amount of misty eyed reminiscence. One former beau fondly recalls how in those days "We all loved Mandy".

14. Whenever she was supposed to be conducting herself in this way, if she ever was, it would appear to have been some time in the early seventies. What matters, however, is that Mr Nail says he simply had nothing whatever to do with her.

15. There is another specific incident when it is alleged that "another nude lover" (a brunette) was seen by a housemate to be jammed up against the cold enamel of his kitchen cooker. Miss Page emphasised, however, that from the article this appears to have been entirely consensual. They were both "at it hammer and tongs" in the onlooker's presence. This is based on a less fastidious passage in the book which adds an element of improvisation to the same occasion. It was said that fat from the nearby chip pan was then spontaneously utilised as a makeshift lubricant. The story is recounted third hand as deriving from "one of the lads". I understood Miss Page to suggest that this allegation was barely defamatory at all and more akin to an infringement of privacy. She thought there was nothing particularly unusual about the conduct alleged – save perhaps for the *ambiance*. Indeed, in the book the episode is described as demonstrating the Claimant's "masterly composure and dexterity of thought".

16. There was also another episode described as "loud nookie in a broom closet". Miss Page submits that Mr Nail may be a little over-sensitive, since few people would think the worse of him. It is once more simply a question of location. In these matters, however, location can sometimes be critical.

17. There were also more general allegations of indecent exposure and indiscriminate sexual encounters with fans in pubs and clubs.

18. I am not sure that I would accept Miss Page's characterisation of such episodes as merely infringements of privacy rather than defamatory. She suggests, I think, that most reasonable readers would not think the worse of the Claimant. It would probably be dismissed as youthful high spirits. I believe nevertheless that a significant number of readers would find the allegations fairly unappetising – even by modern standards. The matter hardly needs to be debated, however, since it is an application for the assessment of damages following the acceptance of an unqualified offer of amends. I must take the allegations, therefore, to be false and defamatory. I have no particular difficulty in doing so.

19. Another more specific charge is that the Claimant "tried to seduce the wife of his rock star pal". This is said to have occurred at a time when he was with his current partner, with whom he has been in a permanent relationship for the last 24 years. It therefore involves disloyalty towards not only her but also his friend. That allegation is given a degree of apparent confirmation, so far as readers are concerned, by a photograph of the two people posing together. Again, of course, it is accepted as being quite untrue.

20. A different allegation is that Mr Nail once ate a can of dog meat when pressed for cash in Germany. An "old friend" called Stan is quoted as saying, "He was that

hungry. Still there's nothing wrong with the stuff. It doesn't kill dogs". That perhaps adds to an overall impression of general coarseness.

21. So far, the allegations might be thought, although no doubt distressing and offensive, not to impinge directly on Mr Nail's professional reputation. But the article also went on to allege that "Jimmy became more difficult to work with as his fame grew". He was portrayed as arrogant, rude and inconsiderate to "extras" in the background of a shot. "A man they'd so admired turned out to be a heartless, rude, b***d". That is clearly defamatory.

22. In a similar vein is the suggestion that, having bought a leather jacket he had worn in the first series of *Auf Wiedershen Pet*, he then charged a few hundred pounds extra for allowing it to be used in the next series. He is thus portrayed again as arrogant, small-minded and mean. Miss Page suggests that this again is not defamatory and conveys an impression simply of a man with an astute business eye.

23. Counsel for Mr Nail summed up the impact of the newspaper coverage as follows. "It maps out a life in which he has progressed from being a dog meat eating yob, who engaged in grubby and obscene sexual behaviour, to heartless prima donna". The overall impression is thus far from flattering.

24. The book contains some similar suggestions, as I have indicated, but there are other defamatory implications as well. These include the allegation that he shunned his father in the latter years of his life, despite the fact that he suffered from emphysema. There is also an implication that he exploited the untimely death of a long time colleague "in order to extract a tawdry financial advantage for himself".

25. Another strand of meaning in the book is that the Claimant, as the Thatcher era dawned, became a property developer "possibly with the help of financiers who would not be found advertising their services in Yellow Pages". The implication is clearly (as it is pleaded) that he "… financed his new business by illegal, probably criminal, means". (Another accusation is that he portrayed his origins as more impoverished than was truly the case.)

26. I must remember that defendants have the option of either defending a libel action, because they do not accept the claimant's meaning, or of making a "qualified" offer of amends confined to certain meanings, within the terms of s.2(2) of the 1996 Act. Here there was an unqualified offer made both in respect of the book and the newspaper article. This has the effect that the parties, the advocates and the court generally need to work on the basis that the words complained of bore the pleaded meanings. I would to some extent part company with Miss Page when she submitted that it remains the task of the court to form its own view on the precise meanings. I agree that any exaggerated or distorted meaning should be ignored but, if such circumstances arise, one would expect a defendant to have made the challenge clear – presumably by making only a qualified offer. It would seem unfair on a claimant who accepts an unqualified offer to find that the court dismisses his meanings as untenable when it comes to assessing the damages.

27. There is no doubt that some of the defamatory allegations do reflect on Mr Nail's professional reputation and, to an extent, on his employability. On the other hand, there is no hard evidence that his career has actually been affected by any of these publications, or that any individual has been discouraged from using his services. I

think Miss Page is to a large extent correct when she submits that the primary function of financial compensation here must be directed to distress, embarrassment and hurt feelings. Although I am not concerned with compensating the Claimant's partner, or his children, for their embarrassment, it is nevertheless appropriate to take into account the concerns that he felt on their behalf, and the acute embarrassment he must have experienced in having to tell his sons about the *News of the World* article. There was also his concern about what they would undergo by way of ribald comments at school.

28. I had no difficulty in accepting the Claimant's evidence about how much the publications have impacted on his own feelings and his family life. The effect has been more serious than would be implied by the somewhat dismissive word "embarrassment".

29. It is necessary to have in mind that where, as here, there are some allegations (in the book) which are not complained of it is inappropriate to take them into account for compensation. Thus any distress or other consequences of the passages *not* complained of must be discounted. This may be difficult to apply in practice, but the principle is clearly right.

30. So far as the book is concerned, it was read by far less people. Moreover, any figure I award must take account of the fact that the Claimant can only recover for the few copies sold in the 12 month period prior to the issue of proceedings. Any claim in respect of earlier sales would be statute-barred. Insofar as any of the copies sold in that period (I believe of the order of just over 100) were attributable to the puff given at the foot of the *News of the World* article, I should avoid double recovery.

31. On the other hand, the *News of the World* has sales of approximately four million and a readership of perhaps double that. The publication of those allegations is thus on an altogether different scale. It is undoubtedly the scale and tone of its coverage that has had the greatest impact.

32. Not surprisingly, perhaps, the derivative nature of the *News of the World* article has been prayed in aid by both sides. Mr Caplan Q.C. for the Claimant described it as "reckless" because the journalist simply lifted the allegations from the book and, taking a calculated risk, chose not to make any independent checks. Miss Page, on the other hand, said that Mr Nail has only himself to blame. As with any other claim in tort, a claimant has an obligation to mitigate his loss: see e.g. *Mawdsley v Guardian Newspapers Ltd* [2002] EWHC 1780 (Q.B.). If Mr Nail had sued, or even complained, about the book when it was published, the likelihood is that the *News of the World* article would never have appeared. I understand the point she makes but, strictly speaking, it is not a mitigation point so far as the *News of the World* article is concerned. That damage did not begin until 19 May 2002.

33. I must approach these allegations on the basis that they are false and defamatory and that they caused major and continuing distress to Mr Nail, which undermined his family relationships, not in the sense of damaging them permanently, but by way of intruding upon them and causing tensions which otherwise would not have been there. Although the *News of the World* allegations did not come quite as a bolt from the blue, since he had read the book several years before, I am prepared to accept that the huge publicity which the article attracted would have impinged upon his life far more

than the book. Reading it in 1998 would hardly have prepared him for the impact of the unannounced tabloid coverage some three and half years later.

What is the correct approach to compensation under the "offer of amends" regime?

34. The offer of amends procedure is gradually being developed in practice as media defendants begin to use it. I believe that this is only the second case to come before a judge for assessment of compensation, although the relevant provisions came into effect as long ago as 28 February 2000 (just over four years ago). The first assessment case was *Cleese v Clark* [2004] EMLR 37, which I heard in January 2003. Assessments under s.3(5) have to be tailored to the context. It is not possible to compare jury awards in the past which came about in quite different circumstances. There are now very few libel actions to reach trial with a jury, and such awards as are made normally follow a contest on liability. That puts a very different complexion on matters.

35. 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 an apology or correction. In any proceedings which have to take 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 wrongdoing. As to the claimant, the stress of litigation has from that moment at least been significantly reduced.

36. 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 is 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.

37. As I observed in *Cleese v Clark* at para [33], "I am not concerned with hypothesising as to what a particular group of 12 lay persons might have done, on the basis of what other groups of lay persons have done in the past". It is now appropriate, since the Court of Appeal's decision in *John v MGN* [1997] Q.B. 586, to have an eye to personal injury awards with a view to keeping a sense of proportion and remembering the value of money.

38. One of the reasons for the Neill Committee's recommendations of this new offer of amends procedure, back in July 1991, was to give media and other defendants a possible exit route when they faced the uncertainty and arbitrariness of jury awards in that era. Part of the background context was the number of very high awards which were being made at that time, including that of £1.5 million in *Aldington v Tolstoy*. This factor has to a large extent been mitigated since the European Court of Human Rights considered that case and found there to have been a breach of Article 10 of the

Convention: see *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442. It was in an attempt to remedy the difficulties over proportionality and unpredictability that the Court of Appeal suggested the changes of practice in *John v MGN Ltd*.

39. As I noted in *Cleese v Clark* at para [34]:

> "I must also have an eye to the levels of compensation awarded in personal injury claims. That is in accordance with the modern practice and was only recognised as acceptable following the Court of Appeal's decision in *John v MGN Ltd* [1997] Q.B. 586. It is important to realise that there have been relatively few jury awards over the intervening period. One needs naturally to put to one side some of the well known awards in earlier cases where juries were not invited to take such factors into account. There is, therefore, as we have been told more than once recently, a 'new landscape' and assessments have to be made without the baggage of that previous experience ".

40. Miss Page has indicated, in the course of her submissions, that parties in libel litigation are still feeling their way under the new offer of amends regime and, although it is being increasingly used "after a slow start", this process could well go into reverse if media defendants feel that they are still going to be subject to arbitrary and disproportionate awards; or, to put it another way, if they are not to be given due credit, in financial terms, for using the system and placing themselves in the hands of the court. It was not an *in terrorem* point, and it is entirely fair to make it, because of the public policy objectives underlying the adoption of the statutory scheme by Parliament. If they do not feel confident of getting a "healthy discount" for adopting what is, in effect, a conciliation process, then I suspect (although Miss Page did not put it in this way) that there may be 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.

41. In my judgment, Miss Page is right to press for a "healthy discount" for the reasons I have already indicated. Media defendants who act promptly when confronted with a claim are entitled to be rewarded for making the offer and, correspondingly, the claimant's ordeal will generally be significantly reduced with immediate effect.

42. Miss Page suggested (rather along the lines of sentencing policy) that one might expect a standard discount, which she put as high as two thirds – praying in aid for that purpose the reasoning of Morland J in *Mawdsley v Guardian Newspapers Ltd* (cited above).

43. I am not sure the analogy is entirely apt, since Morland J was there considering the summary judgment regime under ss.8-10 of the 1996 Act, where there are at least two special features which do not apply to the "offer of amends" regime under ss.2-4. Not only is there no ceiling of £10,000, but the availability of a declaration of falsity was also a factor he took into account in deciding whether those statutory remedies, taken all together, would provide "adequate" compensation, compared to an award by a jury of (say) £30,000. In this case, I am not concerned with the concept of merely "adequate" compensation, but rather with what is appropriate, necessary and

proportionate for compensating the Claimant in the circumstances in which he now finds himself.

44. In any event, it is dangerous to speak of a discount of any given proportion when the starting figure is itself bound to be somewhat arbitrary. The analogy with sentencing, to take account of a plea of guilty, breaks down because one generally has clear guideline cases, or statutory limitations, to identify what is the correct "tariff" sentence following a contested trial. In those circumstances, it makes sense to give a particular discount for an early plea. Here, in the nature of things, there is no comparable starting figure. Libel actions vary so much from one case to another. That is why I feel it is difficult to offer juries guidance as to the "correct" bracket for any given libel (although naturally I recognise that it is an approved practice to do so in appropriate cases). So much depends on the scale of publication, the gravity of the libel, and the personal reaction on the part of the individual claimant.

45. The conduct of the litigation can also be very important. Has there been a plea of justification? Or was there merely a debate about meaning? Was there an apology? Or, by contrast, was there aggressive cross-examination in public? So many factors come into play that I find it difficult to fix upon a "going rate".

46. I think it is more helpful to focus on what I would have been inclined to award for these libels following a trial (i.e. sitting as a judge alone) in which there had been no significant aggravation (such as a plea of justification) and no significant mitigation (such as an apology). This is not a wholly artificial scenario. It might arise in various ways; for example, if there were a trial confined to meaning or qualified privilege (neither of which, at least in theory, adds further injury to the claimant's reputation). I would tend to ask, having regard to the current conventional overall ceiling for damages of £200,000, what the particular libel is worth on that scale of gravity. I would then aim to make a significant reduction to take account not only of any actual apology but also of the very willingness of the defendant to use the offer of amends route. A defendant is in those circumstances effectively laying down his arms, and inviting meaningful negotiation over compensation and restoration of reputation.

Applying the approach to the present facts

47. There are unusual and special features of this case. In particular, so far as the book is concerned, there is the long delay and the fact that most of the 4,500 copies sold are effectively "out of bounds" for limitation reasons. There is also the fact that by not even complaining about it the Claimant, for reasons that may have seemed genuinely sound at the time, let the allegations gain to some extent in currency – up to the point where the *News of the World* defendants (albeit mistakenly) took him to be signifying a grudging acceptance of their essential accuracy. I do not criticise him or his lawyers. It is not always easy to know how to react. Nonetheless, I cannot ignore it altogether on the issue of compensation. I think it fair to say that he has to some extent contributed to his own misfortune. Whether it is properly to be described as a mitigation of damages point or not, it is in general terms appropriate to take into account all of a claimant's conduct as part of the background context.

48. The allegations in the book were serious and offensive, both so far as his personal reputation is concerned and in the context of his professional life. Nevertheless, I am compensating for a relatively few copies sold in the fourth or fifth year after publication. That is an unusual and indeed artificial exercise. What is more, I need to

take account of the recently published website apologies. It is possible that very few (if any) readers of the book will see them, but in practice there is very little else the publishers can do in this instance. In other cases there might be some purpose to be achieved by withdrawal of copies, the insertion of errata slips or giving undertakings as to the content of future editions. But none of that has any application here.

49. The newspaper article is, of course, very different. The impact of Sunday tabloid coverage can be very frightening and disorienting – especially where it intrudes between the subject and members of his immediate family. I am quite satisfied that is what happened here. Nevertheless, the range of damages sought by the Claimant's solicitors was very high. It was put at between £70,000 and £100,000. That aspiration seems to me to be seriously coloured by the "bad old days" before *John v MGN*. One has only to test it against the sort of personal injuries that would attract such an award to see that it would be disproportionate.

50. Miss Page chose to highlight the first category under "Moderate Brain Damage" in the Judicial Studies Board Guidelines:

> "Cases in which there is moderate to severe intellectual deficit, a personality change, an effect on sight, speech and senses with a significant risk of epilepsy and no prospect of employment".

I am sure that Mr Nail would be the first to recognise that there is here no real comparison – distressing though his experience undoubtedly was.

51. Miss Page might also have drawn comparison with injuries causing the loss of sight in one eye, with reduced vision in the remaining eye; or total deafness and loss of speech; or perhaps the bringing about of infertility in a female claimant, accompanied by severe depression and anxiety, pain and scarring.

52. All of these injuries would have lasting and profound effects on people's lives. The publication of a libel in a tabloid can be an intensely distressing experience, but the great advantage of the offer of amends system is that it does at least tend significantly to mitigate the impact and, to a greater or lesser extent, enable the relevant claimant (to adopt a modish phrase) to "draw a line" under the episode and to make a fresh start.

53. One must not be too tied to personal injury cases. It was, after all, for many years thought to provide no useful comparison at all: see e.g. the remarks of Lord Hailsham in *Cassell v Broome* [1972] AC 1027, 1071. Nonetheless, it is generally a worthwhile exercise to have regard to them in trying to arrive at a reasonable and proportionate assessment of financial compensation.

54. Of course it has to be seen alongside other factors, as Morland J made clear in the rather different context of *Mawdsley*. One must bear in mind the willingness to pay costs and the publication of an apology, both in the newspaper and repeated in open court by counsel. Much of that is in the past and the dust of battle has now effectively settled for many months.

Mr Caplan's points on aggravation

55. The first point raised under the label "aggravation" was the prominence of the article. There is no doubt it was prominently published, but it was inside the paper and with

no trailer or flag to draw attention to it on the front page. There is no reason to suppose that there was any advertising of the story with a view to increasing sales (by contrast with the circumstances in, for example, *Riches v News Group Newspapers Ltd* [1986] QB 256).

56. Reliance is also placed on the fact that no attempt was made to contact Mr Nail before publication, with a view to giving him an opportunity to comment upon or deny the allegations. This is clearly one factor which tends to aggravate the damages, because it undoubtedly led to the shock element of the article when Mr Nail first read it on the morning of publication. Nevertheless, the case is a little unusual, in the sense that the bulk of the allegations had been in the public domain, via the book, without any complaint. To some extent that blunts the point as an aggravating feature.

57. It is also said that the article "exploited" the transmission of a new series of *Auf Wiedersehen Pet*. This is a little unreal. It is to say hardly more than that newspapers publish things because they are topical. Admittedly, the topicality of the book was misrepresented as "bombshell" and "new" and I bear that in mind, but to say that the television series was "exploited" adds little.

58. There was a suggestion early on that the Defendants were going to justify some or all of the allegations. Once again, that is undoubtedly an aggravating factor, but it was in this instance short-lived.

59. I should add that it will normally *not* be regarded as an aggravating factor that a defendant takes time, provided the delay involved is no more than reasonable in the circumstances, in order to investigate the complaint and make a properly informed decision as to what steps to take. It may be said, in general terms, that the older the allegations are the greater the time needed to investigate.

60. Following the recommendation of the Neill Committee, Parliament provided a longer breathing space for deciding whether to make an offer of amends than that which had been permitted under the previous scheme set out in s.4 of the Defamation Act 1952. One of the reasons why that had hardly ever been used was that it proved, in practical terms, very difficult to comply with the strict time limits imposed.

61. Criticism is also made of the late delivery of evidence on the Defendants' behalf, and of what is described as a "transparent attempt to justify by the back door". I have already indicated that conduct which can truly be so characterised is indeed impermissible, contrary to the spirit of the new procedure, and thus liable to augment the compensation payable. The label is not, however, always apt. For example, here, part of the material introduced was simply to show the inaccuracy of Mr Nail's assertion that the book received no publicity at the time of its publication. It plainly did. It turns out that he knew nothing about it, and what he said in his witness statement was simply a mistake. The Defendants were entitled to point out that inaccuracy, but it takes matters no further. The mere fact that others had made the allegations cannot of itself mitigate the damages now to be awarded, as I have already made clear, in the light of *Associated Newspapers v Dingle* (cited above).

62. On the other hand, some of the evidence introduced was supposed to be directed to a different point. Leaving aside pure prejudice, which I assume was not the objective, I believe it was introduced in order to show that, in minor respects not going to the real sting of the words here complained of, the Claimant had acknowledged certain "wild"

elements in his past in public interviews, and could not therefore have been so completely taken by surprise as his evidence would imply.

63. This need not detain me long. As I have said, it did not go to the real sting anyway. But anything which defendants intend to rely upon in order to mitigate damages, which has a tendency to reflect directly or indirectly on the claimant, must be notified in good time so as to afford a fair opportunity of investigating it and, if it is admissible, answering it.

64. That would apply, for example, to material sought to be introduced by way of general bad reputation.

65. As I suggested in *Abu v MGN Ltd*, it is quite inappropriate when carrying out this procedure for either side to spring surprises on the other. Normally it would be right for both sides to know where they stand before they clinch the deal following an offer of amends.

66. Defendants must expect to deal with the claim "as notified". The claimants are generally entitled, so far as possible, to be informed of anything disparaging which the defendants propose to introduce. When an offer of amends is turned down, there is generally a complete defence available by virtue of s.4(2) of the Defamation Act 1996. It is not proper, therefore, under that very powerful incentive to lure a claimant into accepting what appears to be a genuine offer to put matters right, only for him to find that his reputation will be "rubbished" anyway.

67. Here no time was taken up by the parties breaking down the different components of the Defendants' late evidence or arguing about its admissibility. The parties were content for me to look at it and to exclude what I thought inappropriate. I should therefore make it clear that, apart from the corrective evidence about publicity attaching to the book when it came out, I propose to ignore the other press and broadcast coverage introduced. It is true that in *Abu v MGN Ltd* at paras [13]–[17] I made it clear that, given appropriate notice, evidence could be admissible on a s.3(5) hearing for traditional purposes such as "mitigation, aggravation and causation of loss". Quite how the material in this case was supposed to fit into any of those categories was by no means always clear, but I am quite satisfied that it was introduced far too late for it to be properly addressed or answered. I make no criticism of the Defendants in this context. There may be some good explanation for the delay. More generally, however, defendants need to be warned that where evidence of any significance is introduced late, and especially if it is prejudicial to the claimant, a judge hearing an assessment under s.3(5) may well treat it as an aggravating factor.

68. Criticism was levelled by Mr Caplan at the apology published in the newspaper, as long ago as 20 July last year (eight months before the assessment hearing took place). It was not the content to which objection was taken, but the hoary old problem of location. There were negotiations about where it should appear in the paper. The Defendants were, I am satisfied on the documents I have seen, quite flexible about it, but in the end it was published as part of the centre spread on the top left hand corner of the page.

69. As I mentioned in *Cleese v Clark*, there is no point in endlessly haggling or niggling about the size or location of an apology. The important thing is to achieve vindication

as quickly and effectively as possible. Here, it is said that it appeared alongside (or "hemmed in by") advertisements. I believe that the important elements of the apology are that it was published relatively quickly after the proceedings were issued, at the top of the page, and that it was reasonably eye-catching because of the photograph of Mr Nail and the reference to his name in the heading. The reality is that most readers are unlikely to analyse or dwell upon the contents of an apology. They will take it in, if at all, at a glance.

Miss Page's points on the chronology

70. It is said that Mr Nail was slow in pursuing his remedies, not only in respect of the book but also over the newspaper article. It is thus important to consider the matter in a slightly wider context. These were not the only libels published about Mr Nail in 2002. He was also pursuing remedies against *The Mirror* over an article published on 15 May, and also in respect of material broadcast on a radio programme, which was derived from *The Mirror* story. This all occurred a few days before the *News of the World* article was published. A week after the *News of the World*, there was an article in a local Newcastle newspaper called the *Sunday Sun*. The radio presenter merely repeated the *Mirror* story and made further allegations of "prima donna" behaviour. It is important to make it clear that remedies were sought by Mr Nail in respect of all these publications. Proceedings were served and settlements reached, which involved in each case apologies and payment of compensation. There was also a claim against the *Daily Mail* which was settled.

71. Miss Page queried how these matters could possibly explain the delay in pursuing the current actions. Mr Nail dealt with the matter in the witness box. He told me that he had too much litigation to cope with all at once, and there was a problem about putting his solicitors in funds on so many fronts. The picture I got was that he was holding fire, to some extent, on the present complaints partly for reasons of being overwhelmed, and partly because he wanted to stagger his financial commitments. That scenario was not challenged by Miss Page, and I accept the explanation. What is important, however, is that such delay as there was cannot be construed as indicating that Mr Nail did not take the *News of the World* allegations, or those in the book once he had complained about it, as being serious.

72. On assessment hearings such as this, the court will generally be interested to follow through the chronology in order to see to what extent it impacts upon the question of compensation. Here matters progressed relatively quickly. The claim form was issued in respect of the *News of the World* article on 5 March 2003, with the particulars of claim following two days later. This was, of course, some ten months after publication. The offer of amends was made on 29 May 2003 and it was accepted on 3 June. Offers were made by way of the Part 36 procedure for financial compensation, and negotiations also took place on the prominence of the apology. As I have said, the apology was actually published on 20 July. In the circumstances there is nothing unusual about this sequence of events which would have a bearing on the level of compensation one way or the other. So far as compensation is concerned, in accordance with my suggestion in *Cleese v Clark*, the parties have not revealed to me the amounts of money involved and I am not in a position, therefore, to comment on the reasonableness or otherwise of those financial offers.

73. The claim form was served in respect of the book on 11 August 2003, with the particulars of claim following on 5 September. The offer of amends was made on 24 October, and it was accepted after just short of a two month delay.

74. I need not pursue these matters in any further detail. All I need to say is that there is nothing in the conduct of the negotiations which justifies any element of aggravation either against the *News of the World* or the publishers of the book.

Conclusions

75. As to the book, I make my assessment at a modest but by no means nominal level. I put the figure at £7,500. I need hardly say, however, that the circumstances relating to its publication and the timing of the complaint are so unusual that they are unlikely to be replicated. Accordingly, the level of this particular award is hardly likely to provide a useful comparison in any other case.

76. My starting point valuation in respect of the newspaper article would be £45,000; that is to say without taking account of mitigating factors. I make a reduction of 50% for those purposes and arrive at £22,500.

77. Some of the allegations might be regarded as trivial or to be "laughed off", but that is part of the problem. There is an element of ridicule, which is why I would not, in arriving at my starting figure, simply dismiss the sexual allegations (which are, in any event, only part of the story) as what I think Miss Page described as "youthful high spirits" or something of the sort. There was undoubtedly a coarseness being attributed to the Claimant, which takes it well beyond that characterisation. Equally, of course, in a quite different context, the arrogance and bullying manner towards those he worked with is bound to make people (including perhaps potential employers) think the worse of him. It is admitted to be false and should attract substantial damages. Indeed, even after my discount, the figure is by modern standards still substantial.