

Problems with Defamation Damages?

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INTRODUCTION

What is a damaged reputation worth? How is a response arrived at in law? These are not new questions, but remain central concerns for defamation law and reform.¹ It seems the law finally is re-evaluating defamation damages. This paper examines the area with two aims. Its primary focus is the doctrine used to assess the quantum of compensatory damages, both at trial and on appellate review. This is set within wider questions about defamation law in its operation and evolution, with note made of some exploratory legal writing about reputation.² Part one of the paper outlines the traditional doctrine concerning civil defamation damages. Part two investigates and considers possible tensions within damages' role. In part three, contemporary case law is analysed. Various pending or recent reforms are considered, and questions about residuary issues in damages are raised in the paper's final parts. The main references are to Australia, notably New South Wales, and to England, but some consideration also is given to Canada.³

The conclusions are, first, that further considering the social basis of reputation may illuminate some of the underlying complexity in defamation damages' role. Secondly, and perhaps less theoretically, trends in Australia and England suggest some desire for comparisons between personal injury and defamation awards. Several Australian courts have suggested this could be inappropriate at trial. That may in turn make appellate use of personal injury awards difficult. Noting the *type* of comparison suggested under the current English approach may offer some assistance in Australia.

Three aspects often raised about damages for civil defamation are the very high worth they give to reputation, at times, their unpredictability, and their inconsistency in comparison with other compensatory damages awards. A few examples illustrate these concerns. In early 1996, Australian juries awarded individual plaintiffs sums of \$600 000 and \$475 000 for defamatory

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¹ Notably, *Defamation Act* 1996 (Eng), and changes introduced by *Defamation (Amendment) Act* 1994 (NSW) which affected quantum of damages and roles of judge and jury in assessing damages and defences. For further possible changes under the Defamation Bill 1996 (NSW), see Part 4, *infra*.

² Other aspects of damages are not considered directly: eg claims for Australian interstate publication, aggregation for closely related publications, joint tortfeasors, interest, and mitigation.

³ The leading Canadian text notes there is no distinct Canadian defamation law; it exists within a broad Commonwealth approach: Brown, *The Law of Defamation in Canada* (2nd ed, 1994) 7. See also *fn* 37.

publications with very limited circulation.⁴ In both these cases, the audience was seen as comprising key figures in plaintiffs' work fields. The awards were not for proved losses; rather, they followed from the presumption of damages in defamation cases, being left to jury assessment.⁵

Slightly earlier in England, a critical review of a yacht design resulted in a jury award of £1 485 000,⁶ reduced by consent on appeal to £160 000.⁷ A former footballer, Graeme Souness, was awarded £750 000 against the Daily Mirror for an article which alleged he badly treated his former wife,⁸ but he agreed to accept £100 000.⁹ In early 1996, *Percy v Mirror Group Newspapers*¹⁰ resulted in a trial award of £625 000 to a doctor who allegedly failed to attend hospital for a seriously injured patient, the patient being transferred and later dying.¹¹ An appeal was lodged on quantum and liability, but the case settled for £125 000.

High awards are not exclusively recent: *Youssouf v MGM*¹² illustrates their long English lineage. Forty thousand pounds was awarded in the early 1930s for an allegation that the plaintiff was raped. This would be equivalent to approximately £1 000 000 today.¹³ The decisions go back even further. American academic, Robert Post, has reported the seventeenth century decision of *Lord Townsend v Hughes*¹⁴ in which an English Lord was awarded the fortune of £4 000 in 1677 against a defendant who had said he was 'an unworthy man, and acts against law and reason'.¹⁵

If such awards have long been made, they have also often been thought problematic. They allow the impression that civil defamation is used to control and punish media company defendants. Against individual defendants the awards can appear absurdly high. That such awards may not survive appeal does not answer problems facing all parties in litigating claims. Litigation costs and uncertainty about quantum put parties in invidious positions; for example, the Mirror Group reportedly had costs of £500 000 after the *Percy* trial.¹⁶ This situation is compounded by the lack of legal aid for

⁴ *Nugawela v Crampton* (unreported, Supreme Court of NSW, Levine J, 25 March 1996) and *Perkins v NSW Aboriginal Land Council* (unreported, District Court NSW, March 1996) per Badgery-Parker J. *Nugawela* was upheld in the Court of Appeal as *Crampton v Nugawela* (1996) 41 NSWLR 176.

⁵ In general, the tribunal of fact assesses damages. This has changed in NSW, see Part 3.1 infra. The use of defamation juries in Australian jurisdictions is noted in Tobin and Sexton, *Australian Defamation Law and Practice* (1995) [26,505].

⁶ *Walker v Sheehan* (unreported, High Court (Eng), Sir Michael Davies J, 8 July 1994).

⁷ Scott-Bayfield, 'Defamation Update' (1996) 140 (12) *Solicitors Journal* 305. She refers to it as *Walker Wingsail Ltd v Yachting World*.

⁸ *Souness v Daily Mirror* (unreported, High Court (Eng), June 1995); noted in *John v MGN Ltd* [1996] 2 All ER 35, 50.

⁹ Scott-Bayfield, op cit (fn 7) 305.

¹⁰ *Percy v MGN Ltd* (unreported, High Court (Eng), February 1996).

¹¹ Price, *Defamation: Law, Procedure and Practice* (1997) 426.

¹² (1934) 50 TLR 581.

¹³ In *Sutcliffe v Pressdram* [1991] 1 QB 153, 185 Nourse LJ noted counsel's calculation that the *Youssouf* award equalled £900 000 in 1989.

¹⁴ *Lord Townsend v Hughes* (1677) 86 ER 994.

¹⁵ Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 *California Law Review* 691, 705.

¹⁶ 'Fourth biggest UK verdict' (1996) 38 *Gazette of Law and Journalism* 14.

defamation actions in Australia and England. Appealing such verdicts is a very indirect way to achieve appropriate results.

The actual frequency of such awards and the extent of consequential problems does need research.¹⁷ This paper, however, focuses on the awards themselves and the perceptions they create. Where is this so-called 'legal lottery'¹⁸ going? Will changes in assessing damages, which are being made or being considered, be significant?

1 Damages in civil defamation

Courts traditionally see a defamation award as comprising elements of ordinary, aggravated, and in some jurisdictions exemplary damages. These are also known as punitive or vindictive damages, while the ordinary and aggravated elements of awards are compensatory.

1.1 Ordinary compensatory damages

This paper focuses on compensatory damages for defamation. Their stated role is dual: to console a defamed plaintiff and to vindicate the plaintiff's reputation.¹⁹ Consolation itself can be divided into two elements: consolation for personal distress and reparation for harm to reputation.²⁰ The element of consolation for personal distress is only available to individuals. The emotional hurt of being defamed is compensated under this head as well as any general, although unproven, damage to reputation. Allowing such general damage to be incorporated within the concept of 'consolation' seems conceptually awkward, at the least. But here it may be worth noting more that some elements of consolation relate purely to the plaintiff's reactions and feelings, while some relate to issues of public perception. Any differences in those aims may be exacerbated by damages also seeking to vindicate the plaintiff's reputation. Vindication clearly involves public perceptions. Most simply, damages trying to serve all these aims create difficulties. Compensatory damages also can include amounts of special damage caused by the tort; that is, actual proven loss.²¹ The more common situation, however, is for general damages to include any amount thought necessary for general loss to commercial reputation.

As to quantum of damages, two points can be noted. Ignoring situations of slander not actionable without proof of special loss, the law presumes harm flows from actionable defamation.²² Damage is presumed, is not limited by legislation, and is traditionally assessed by jury. Damages are 'at large', which

¹⁷ Empirical media law research has been relatively neglected outside the US. For one recent UK example see Barendt, Lustgarten, Norrie and Stephenson, *Libel and the Media: The Chilling Effect* (1997). A US overview of reform proposals, many drawing on empirical work, is *Reforming Libel Law* (Soloaki and Bezanson, eds, 1992).

¹⁸ A common appellation; eg Conroy, 'The Libel Lottery', *The Age* (Melbourne) 30 July 1996.

¹⁹ *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 150 per Windeyer J.

²⁰ *Carson v John Fairfax and Sons Ltd* (1993) 178 CLR 44, 60 per Mason CJ, Deane, Dawson and Gaudron JJ.

²¹ *Ratcliffe v Evans* [1892] 2 QB 524, 528 per Bowen LJ.

²² *Ibid.*

may be a misleading term, and perhaps even leads juries to making high awards.²³ Damages 'at large', however, are just those not limited to pecuniary loss and not capable of precise mathematical calculation.²⁴ This is why they were seen, historically, as particularly suited to jury assessment.

Vindication is essential to the defamation remedy. It has led to the law requiring damages' quantum to be such as 'to convince a bystander of the baselessness of the charge'.²⁵ This is one difference from the ordinary tort law situation: compensatory defamation damages follow from the very publication of a defamatory statement:²⁶

It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways — as a vindication of the plaintiff to the public and as consolation to him for a wrong done.

The law's method of vindication, monetary award, contributes to the lack of consistency now seen with other types of compensatory damages, such as serious personal injury. Curious effects could be suggested: plaintiffs of a high social status can be seen to need higher awards. A low award would insult their standing and fail to vindicate their status.²⁷ As Alec Samuels asked in 1963, can such a situation be correct?²⁸ It is certainly true that the variety of factors to be considered also contributes to a lack of predictability. These include the defendant's conduct, the area of publication and the seriousness of defamatory imputation.²⁹

Large awards do not necessarily achieve vindication: the public perception does not match defamation's doctrine. This perhaps could be thought to suggest even higher awards! The law, however, logically could as well believe vindication would be achieved by reliance simply upon the verdict rather than quantum of award.

1.2 Aggravated compensatory damages

Ordinary compensatory damages can be increased by aggravated damages.³⁰ Still compensatory, the award is increased to match the greater harm caused. A defendant's actions within the act of publication or at any time up to verdict are relevant to their assessment. A pre-condition to their award, however, is a

²³ Tobin and Sexton, *op cit* (fn 5) *supra*, [20,015].

²⁴ *Rookes v Barnard* [1964] AC 1027, 1221 per Lord Devlin.

²⁵ *Broome v Cassell and Co* [1972] AC 1027, 1071 Lord Hailsham LC.

²⁶ *Uren v John Fairfax and Sons Pty Ltd* (1966) 117 CLR 118, 150 per Windeyer J.

²⁷ For example Fleming, 'Defamation: Political Speech' (1993) 109 *Law Quarterly Review* 12, 14–15.

²⁸ Samuels, 'Problems of Assessing Damages for Defamation' (1963) 79 *Law Quarterly Review* 63, 69–70.

²⁹ Walker, *Law of Journalism in Australia* (1989) 210–11 notes the factors considered in assessing ordinary compensatory damages as one significant aspect of the difficulty in predicting their quantum.

³⁰ The jury should not normally be asked for a separate figure in relation to aggravated damages: see discussion in *Clift v Timms* (unreported, Queensland Court of Appeal, Pincus, Davies JJA, MacKenzie J, 25 March 1997) 4–5.

lack of bona fides by the defendant, or that the action be otherwise unjustifiable or improper.³¹ When determining the greater harm suffered by the plaintiff, aspects such as malice in publication, the extent and mode of publication, failing to apologise after publication, or the defendant's conduct of the litigation can all be considered.³²

1.3 Exemplary damages

The third category, exemplary damages, has been subject to long debate. There is a question as to the propriety of a civil court dispensing sanctions of punishment and deterrence. But, there is also a perceived need to punish and deter defendants of great resources from continuing to publish defamatory statements. In *Hill v Church of Scientology of Toronto*,³³ the Canadian Supreme Court emphasised the rational purpose played by an exemplary award of Can\$800 000. It was needed to dissuade the defendant from continuing to publish defamatory statements. New South Wales has abolished exemplary damages.³⁴

The main relevance of exemplary damages here is an apparent tendency for elements of punishment to enter into general awards. Desire to punish large and powerful defendants may lead to a punitive element being incorporated in general damages where, doctrinally, there should be none.

2 Diverse aims and tensions in defamation damages?

Many aspects of defamation damages can be seen to exhibit tensions. These include the degree of consistency between different defamation awards, vindicating the plaintiff by monetary award without overcompensating, and the comparability of damages with non-defamation awards. In these, the appropriate scope of defamation in relation to different plaintiffs, defendants and types of expression is fought over doctrinally. The significance varies between jurisdictions of expression being political or public as opposed to private, or parties being individual as opposed to corporate entities — that is to say, media companies. In Australia, media discussion of political and governmental matters can be protected under an extended common law qualified privilege.³⁵ English and Australian law has limited the ability of elected governmental bodies to sue in defamation.³⁶ This has been extended

³¹ *Triggell v Pheeny* (1951) 82 CLR 497; *Andrews v John Fairfax and Sons Ltd* [1980] 2 NSWLR 225.

³² See generally, Walker, op cit (fn 29), 211–13; and as to the role of the defence of justification and damages, *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211.

³³ (1995) 126 DLR (4th) 129, 186 (*Hill*).

³⁴ s 46(3), *Defamation Act* 1974 (NSW).

³⁵ *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96. Together with *Levy v Victoria* (1997) 146 ALR 248, it explained the significance for defamation law of the constitutionally implied protection of discussion of political and governmental matters, from *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 and *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 and earlier decisions. *Lange* is discussed in (1997) 44 *Gazette of Law and Journalism* 2 ff.

³⁶ *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534; *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680.

at first instance to bar political parties suing in England.³⁷ The United States has First Amendment protection for speech about public and other figures.³⁸

The appropriate role for judge and jury in assessing awards is another point of contention. This area may slip into a simplistic jury irrationality argument: following the *Sutcliffe* decision,³⁹ one commentator asserted: 'It is hard to understand how a jury which is unaware that £600 000 is a lot of money is ever going to grasp any concept connected with numeracy.'⁴⁰ The point in this paper is not so much who assesses damages, but by what standards and with what guidance they do so. Questions of guidance, of course, do have relevance for instances of jury assessment. Juries are also perceived to treat defendants differently — particularly corporate as opposed to individual defendants — and this may confuse the role of damages. Some empirical research supports the existence of this differential treatment by juries,⁴¹ and media commentators often refer to a jury desire to punish media defendants. In any case, the degree to which individual and corporate litigants can usefully be compared is ripe for investigation.⁴²

A different question about damages is focused on here: that most enduring question of comparing compensatory damages with the general damages components of personal injury awards. Defamation damages generally have been much higher than those for debilitating physical injury. Doctrinally, two approaches have been common in the face of this difference. The first is that regard should be had to personal injury cases, as Diplock LJ stated strongly in *McCarey v Associated Newspapers Ltd (No 2)*:⁴³

I am convinced that it is not just (and I do not think that it is the law . . .) that in equating incommensurables when . . . reputation has been injured the scale of value to be applied bears no relation whatever to the scale of values to be applied when equating those other incommensurables, money and physical injuries. I do not believe that the law today is more jealous of . . . reputation than of . . . life or limb.

The contrary view was put by Lord Hailsham LC in *Broome v Cassell*.⁴⁴ It emphasises the distinct nature of harm to reputation. And further, an award for defamation is needed for vindication 'in case the libel, driven underground, emerges from its lurking place at some future date, [the plaintiff] must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge.' As that quotation might suggest,

³⁷ *Goldsmith v Bhojral* [1997] 4 All ER 268.

³⁸ A recent overview from an Australian perspective is Chesterman, 'The Money or the Truth: Defamation Reform in Australia and the USA' (1995) 18 UNSWLJ 300.

³⁹ *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153.

⁴⁰ Mears, 'The Libel Law: Life after Sutcliffe and Aldington' [9 Feb 1990] *New Law Journal* 176, 179.

⁴¹ For example, MacCoun, 'Differential Treatment of Corporate Defendants by Juries: an examination of the "deep-pockets" hypothesis' (1996) 30 *Law and Society Review* 121.

⁴² As Barendt has noted in England: 'Government, Libel and Freedom of Speech' [1992] *Public Law* 360, 361. See also MacCoun, *op cit* (fn 41) 123.

⁴³ [1965] 2 QB 86, 109.

⁴⁴ [1972] AC 1027, 1071.

rhetorical and emotive language sometimes accompanies this approach: 'A defamatory statement can seep into the crevasses of the subconscious and lurk there ever ready to spring forth and spread its cancerous evil.'⁴⁵

Defamation typically is said to involve the law balancing interests in reputation and freedom of expression. Free speech is generally understood here in a negative Diceyan sense and considered in shaping available defences.⁴⁶ Reputation is comparatively little analysed in defamation law. The usual legal explanation is that it represents the opinions others hold of a person,⁴⁷ and is distinguished from character.⁴⁸ Often, not much more is said. With defamation law's presumptions, such as harm following defamatory publication, little more needs to be said in the cases. But reputation is an ambiguous concept:⁴⁹

Reputation is a flawed value. It is only a snapshot of the plaintiff's character, quite often doctored to portray something that has little or no basis in reality. A person may have a right to project an image of himself that does not exist; he does not have a right to prevent others from exposing what is merely an illusion.

Several commentators have further investigated reputation. Early this century, Roscoe Pound sought a sociological framework for how law treats personal interests.⁵⁰ He emphasised reputation's social aspects and it being both personal and economic in quality. If property, it was of an unusual kind. Most recently, Thomas Gibbons has strongly questioned the sense in any legal remedy aimed at directly protecting reputation.⁵¹ His suggestion to reassess the basis of liability may have value. But here the issues are considered more within the articulated parameters of case law discourse. In between these writers, Robert Post has also considered the type of legal interest that reputation is.⁵² His work is a more complex version of Pound's approach, and may be a necessary prelude to Gibbon's arguments. For present purposes, Post's analysis will be the one considered further.⁵³ The work draws on traditional common law defamation, has relevance to defamation damages generally and application beyond the United States.

Post suggests there are at least three social interests in individual reputation, those of property, honour, and dignity. Each partially explains

⁴⁵ *Hill* (1995) 126 DLR (4th) 129, 176 per Cory J.

⁴⁶ For example, *Australian Capital Television Pty Ltd v Commonwealth of Australia (No 2)* (1992) 177 CLR 106.

⁴⁷ Lewis, *Gatley on Libel and Slander* (8th ed, 1981) 222.

⁴⁸ As explained in *Plato Films Ltd v Speidel* [1961] AC 1090, 1138 (HL) per Lord Denning. A most comprehensive listing of defamation law's conception of reputation is in Brown, *op cit* (fn 3) 52.

⁴⁹ Brown *op cit* (fn 3) 8.

⁵⁰ Pound, 'Interests in Personality' (1915) 28 *Harv L R* 343 and 445.

⁵¹ Gibbons, 'Defamation Reconsidered' (1996) 16 *Oxford Journal of Legal Studies* 587, esp 589-600.

⁵² Post, *op cit* (fn 15).

⁵³ Others that could be noted include Cane, *The Anatomy of Tort Law* (1997) who analyses reputational interests as broadly analogous to property; and Lidsky, 'Defamation, Reputation, and the Myth of Community' (1996) 71 *Washington Law Review* 1 who considers Post's work and pluralistic societies.

reputation's legal significance, although dignity may do this most satisfactorily for defamation law.⁵⁴ Reputation as a property interest could be part of an entity's market capital.⁵⁵ Damages, although important for this, would not need to be presumed, and defamation would seem less suitable than other remedies such as injurious falsehood.⁵⁶ The interest in a professional reputation would be an example of this element. Reputation as honour could refer to ideas of fixed social roles, each accorded its particular status. This has obvious historical relevance, particularly in relation to seditious libel. It may also illuminate current defamation practice with its common emphasis on good reputation being beyond monetary value.⁵⁷ An important result of this approach is that damages, necessarily, would have non-compensatory ends related to social mores connected to honour and status. Reputation as dignity is, comparatively, individualistic.⁵⁸ But under it, defamation law would need to reconcile private dignity with public reputation. Post suggests this can be done if identity is seen as individually constituted *and* socially reinforced in an ongoing process.⁵⁹ This element particularly relates to the control or punishment visible in defamation awards: damages may not only be to compensate and vindicate, but to deter breaches of social mores that assist in forming individual identities. This would be a reason at the base of large awards, beyond their assessor having some sense of retribution. Reputation as dignity, then, 'creates two analytically and operationally distinct functions for defamation law: the rehabilitation of individual identity and the maintenance of communal identity'.⁶⁰ Aiming to achieve both functions may be one of the strongest tensions for damages in defamation. The supposed quarantining of exemplary damages under a separate head, and their disallowance in some jurisdictions, may be doctrinal folly. The very thing defamation is seeking to address, reputation, may require boundaries to be set and enforced by deterrent awards.

3 Case law on defamation damages

Australia's doctrine on assessing defamation damages is changing. Courts *may* limit the quantum of awards, even if by a perhaps arbitrary reliance on the generally lesser personal injury verdicts. The case law, however, reveals concerns about trial practicalities of comparisons with personal injury awards. It is contrasted with English decisions that also appear to have reduced defamation awards, and with a significant Canadian case in which the opportunity was rejected either to enlarge the area of privileged

⁵⁴ For example, *Barendt*, op cit (fn 42) 361.

⁵⁵ *Post*, op cit (fn 15), 693–9.

⁵⁶ *Id* 699.

⁵⁷ *Id* 705.

⁵⁸ *Id* 707.

⁵⁹ *Id* 711, drawing on symbolic interactionist sociology, the utility of which is not commented on here.

⁶⁰ *Id* 715.

expression via *New York Times v Sullivan*,⁶¹ or to limit jury assessment of damages, whether by comparison to personal injury cases or otherwise.

3.1 Australian decisions

In *Coyne v Citizen Finance*,⁶² the defendant was found at trial to have defamed Peter Coyne, imputing he had misrepresented involvement with Citizen Finance in a joint venture land development and fraudulently incurred debts on its behalf. Coyne was awarded \$150 000 in compensatory damages. These did not include any amount for actual pecuniary loss, beyond damage to general business reputation. The award was unusual in Western Australian defamation actions in being determined by a jury rather than judge, and it was very large by the standards of that State. The jury had been referred by counsel to general damages awards in personal injury actions, but the trial judge stated such figures would not assist as they were given separately to the context of those cases. An appeal on quantum was allowed by majority in the Supreme Court of Western Australia.⁶³ The damages were held beyond what any jury could have reasonably awarded. A High Court majority reinstated the jury verdict.⁶⁴

Two issues about appellate review of jury defamation verdicts were relevant, namely the test to set aside verdicts and the propriety of comparisons to general damages in personal injury awards. The High Court majority, Toohey, Dawson and McHugh JJ, said there was no precise formula for an appellate court to apply in reviewing a jury defamation verdict. Any of the following would be suitable: determining whether the verdict was unreasonable and out of all proportion with the harm, whether the jury could not have arrived at the figure reasonably, or could not have done so without taking into account a factor it should not have done. Their Honours, however, stressed the jury's special role in defamation, that 'the law makes the jury and not the judiciary the constitutional tribunal'.⁶⁵ In reviewing an award, the court should assume the jury viewed the evidence most consistently with its verdict, and then ask whether that verdict is sustainable. A heavy burden faces a party seeking to overturn a jury defamation verdict.

In contrast, Mason CJ and Deane J, dissenting in a joint judgment, agreed with the appellate court that the jury's verdict was excessive. They emphasised the rule for setting aside a verdict is like any other case, noting there is no reason to give juries a special competence in Australian defamation actions as judges commonly determine defamation damages. The question is simply whether the amount is outside the range of what can be considered appropriate.⁶⁶

As to drawing comparisons in assessing damages, Mason CJ and Deane J held an appellate court could compare the jury verdict with damages awarded

⁶¹ 376 US 254 (1964).

⁶² Later High Court proceedings are reported at (1991) 172 CLR 211.

⁶³ *Citizen Finance Ltd v Coyne* [1990] WAR 333.

⁶⁴ (1991) 172 CLR 211.

⁶⁵ Id 238 citing *Broome v Cassell & Co* [1972] AC 1027, 1065 per Lord Halisham.

⁶⁶ Id 214-15.

for personal injuries.⁶⁷ They noted the earlier statement of Diplock LJ in *McCarey*, quoted above, and its recent rejection (at that time) in England. Their Honours did not follow that English decision, *Sutcliffe v Pressdram*.⁶⁸ They pointed out the classes of case had been assessed differently in the two countries: defamation by juries and personal injury by judges in all instances in England, unlike Australia. Differences between the classes of case could be exaggerated and, in any event, appellate courts could allow for them.⁶⁹ They concluded with the clear statement:⁷⁰

It seems to us that it would be quite wrong for an appellate court, entrusted with hearing appeals in both defamation and personal injury cases, to be indifferent to the need to ensure that there was a rational relationship between the scale of values applied in the two classes of case.

Toohy J, with whom Dawson and McHugh JJ agreed, did not favour this approach of comparisons. His Honour noted a trial judge could guide the jury about money's purchasing power or investment potential. Toohy J also suggested a judge could indicate a range of possible awards, while being clear it was the jury's decision. That range, however, would relate to other defamation actions rather than personal injury cases. This followed from the common judicial approach that there is a wide bracket of amounts that people would consider appropriate to compensate and vindicate a defamation plaintiff, and that an appellate court should review whether the jury had remained within that bracket.⁷¹

These issues were revisited by the High Court in *Carson v John Fairfax and Sons Ltd*.⁷² Nicholas Carson, a prominent commercial solicitor, was awarded \$600 000 in compensatory damages, at that time the highest Australian award for defamation. Publications in the *Sydney Morning Herald* were found to carry imputations of improper threats to sue and conspiring to evade service of criminal proceedings. The New South Wales Court of Appeal majority, Kirby P and Priestley JA, set aside the verdicts as excessive and ordered new trials upon damages. Kirby P stated the awards 'smack of the punitive',⁷³ which is impermissible in that state.⁷⁴ Carson unsuccessfully appealed to the High Court.

The High Court majority, Mason CJ, Deane, Dawson and Gaudron JJ in a joint judgment, largely adopted the Mason CJ and Deane J minority in *Coyne*. As to the proper gravity to be given to a jury defamation verdict, their Honours noted statements that an appellate court should be extremely reluctant to interfere. But, they held the sustainability of defamation verdicts is

⁶⁷ Id 219.

⁶⁸ [1991] 1 QB 153.

⁶⁹ *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211, 220.

⁷⁰ Id 221.

⁷¹ *Broome v Cassell & Co Ltd* [1972] AC 1027, 1085 per Lord Reid.

⁷² (1993) 178 CLR 44.

⁷³ *John Fairfax and Sons Ltd v Carson* (1991) 24 NSWLR 259, 275.

⁷⁴ s 46(3), *Defamation Act 1974* (NSW).

the same as other jury verdicts.⁷⁵ Given judges' common role in setting defamation awards, this position seems preferable.

The majority also investigated the relevance of personal injury awards. They held that *Coyne* did not prohibit comparisons with general components of personal injury awards, perhaps surprisingly stating it concerned whether the jury had been wrongly directed as to personal injury verdicts and that the decision did not apply to appellate review.⁷⁶ The majority endorsed the comments of Mason CJ and Deane J in *Coyne* that although differences exist between the classes of verdict, an appellate court must ensure 'a rational relationship between the scale of values applied in the two classes of case'.⁷⁷

The policy behind this 'rational relationship' can be seen in later comments about appellate review of awards by Mason CJ, Toohey and Gaudron JJ in *Theophanous v Herald and Weekly Times Ltd*:⁷⁸

That relationship stands on the foundation represented by the scale of awards for general damages in cases of serious physical injuries which, in their severity and disabling consequences, may transcend injury to reputation.

That is to say, not only should there be a relationship between the two classes of case, but defamation damages should be less than those for serious personal injury on the policy that the general harm in defamation is less.⁷⁹

The *Carson* majority also considered the trial role of personal injury verdicts and noted their 'rough comparison' would provide less assistance at that stage. No danger was perceived, however, in judge or counsel telling the jury the ordinary quantum of general personal injury damages.⁸⁰ This direction or submission would go further than indicating the purchasing power of money, or even a range of appropriate verdicts, which could be based just on other defamation actions.⁸¹

Toohey J, in dissent, developed his statements in *Coyne* about dangers in comparisons with personal injury verdicts. His Honour went further and said it is appropriate for a trial judge to indicate a range of figures to the jury. It would 'have regard to the judge's experience in and knowledge of awards in other defamation actions'.⁸² McHugh J dissented voicing strong concerns about the practical difficulties of personal injury comparisons.⁸³

Several approaches are apparent, although their achievability has since been doubted in part: a rational relationship with personal injury com-

⁷⁵ *Carson v John Fairfax and Sons Ltd* (1993) 178 CLR 44, 61–2, relying upon *Triggell v Pheaney* (1951) 82 CLR 497, 516.

⁷⁶ *Id* 56–60.

⁷⁷ *Id* 58.

⁷⁸ (1994) 124 ALR 1, 20.

⁷⁹ This position may also accord with earlier comments by Hutley JA: *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225, 245.

⁸⁰ *Carson v John Fairfax and Sons Ltd* (1993) 178 CLR 44, 59.

⁸¹ Brennan J, in dissent *id* 72–3, referred to appellate courts determining permissible awards by reference to other defamation awards and community standards rather than personal injury verdicts.

⁸² *Id* 73.

⁸³ *Id* 98 ff.

pensatory awards, required by the majority at appeal, and perhaps at trial; and directions to the jury in relation to defamation awards via a range of figures, related to other defamation awards or to personal injury awards.

The *Carson* saga continued. At retrial on damages the plaintiff was awarded \$1.3 million, more than double the original, excessive compensation.⁸⁴ Levine J did not direct the jury to consider personal injury awards. His Honour emphasised significant practical difficulties if such directions were given.⁸⁵ These would include which personal injury cases would be referred to, by whom and in what manner; how much information would be needed to clarify the context of those verdicts for the jury; and whether a time limit would be placed on the process.⁸⁶ Levine J also noted several conceptual difficulties as to the differences between the classes of verdicts, notably what role statutory limits on personal injury damages would have in directions to defamation juries.⁸⁷ The broad approach accords with the concerns of McHugh J in dissent in *Carson*, there concerned with personal injury comparisons even on appeal. Similar concerns have been suggested by the Queensland Supreme Court in *Kendell v North Queensland Newspaper Co Ltd*.⁸⁸ While an appeal court could clearly consider personal injury awards, a situation of trial by jury would seem quite different. A trial judge should probably decline to make such comparisons for the jury 'following the dictum of Toohey J in *Coyne*'. Levine J also drew on these comments by Toohey J, and suggested: 'One can comfortably infer that something which may be of "no help" could be "dangerous"'.⁸⁹ Support can also be seen in *Bateman v Shepherd*.⁹⁰ Hogan AJ noted the comments in *Carson* as to personal injury comparisons being made on appeal, 'are hardly in point for a judge at first instance assessing damages as a tribunal of fact' in the Australian Capital Territory. And in *Thompson v Australian Capital Television Pty Ltd*, Miles CJ preferred to consider appellate defamation awards in judicially determining damages at trial.⁹¹

Even if these difficulties exist, some must be faced in New South Wales under current legislation. In cases commenced since 1 January 1995, judges rather than juries assess damages.⁹² Judges must ensure an 'appropriate and rational relationship between the relevant harm and the amount of damages awarded' and consider the 'general range of damages for non-economic loss in personal injury awards', including awards affected by statute.⁹³ Of course, questions about counsel or judge explaining issues to a jury are avoided. New

⁸⁴ *Carson v John Fairfax and Sons Ltd; Carson v Slee* (1994) 34 NSWLR 72. See also Quinlan, 'Defamation: Suing for an arm and a leg' [Dec 1993] *Queensland Lawyer* 67; 'The tangled philosophy of defamation damages' (1993) 20 *Gazette of Law and Journalism* 23; and Reidy and Pullen, 'The seven figure ouch' (1994) 14 *Communications Law Bulletin* 4.

⁸⁵ Id 87-8.

⁸⁶ Id 89-90.

⁸⁷ Id 90-1.

⁸⁸ (1994) Australian Torts Reports, 81-272, 61,285.

⁸⁹ *Carson v John Fairfax and Sons Ltd; Carson v Slee* (1994) 34 NSWLR 72, 77.

⁹⁰ (1997) Australian Torts Reports, 81-417, 63,894.

⁹¹ (1997) 129 ACTR 14.

⁹² s 7A, *Defamation Act 1974* (NSW) introduced by *Defamation (Amendment) Act 1994* (NSW).

⁹³ s 46A, *Defamation Act 1974* (NSW).

South Wales has implemented, in effect, the *Carson* decision, but how these changes will be applied by a judiciary with concerns about *Carson* remains to be seen.⁹⁴ Not surprisingly, *Carson* has subsequently settled without the need for a third attempt by a jury to award an appropriate sum.

The *Carson* majority, however, need not be seen as a solitary instance: an example of its strong application exists in one judgment in *Australian Consolidated Press Ltd v Ettingshausen*.⁹⁵ A general interest magazine published a photograph of a sports player naked in a shower, imputing he deliberately exposed his genitals to the public. The New South Wales Court of Appeal held the jury award of \$350 000 in compensatory damages was excessive, being far beyond permissible bounds, especially given it could include no exemplary damages.⁹⁶ Gleeson CJ and Clarke JA focused upon the range of damages which would be permissible and whether the actual award was within this.⁹⁷ These two judgments did not draw on *Carson*. Kirby P went further in finding for a full retrial due to the initial hearing's conduct. His Honour also explicitly applied the *Carson* holding requiring a rational relationship between defamation and personal injury awards. The lack of this relationship made the award unsustainable. Noting the High Court in *Carson* took account of two recent awards for quadriplegia, Kirby P referred to a recent medical negligence case, in which a \$500 000 verdict was set aside and a second award of \$275 000 was sustained on appeal.⁹⁸ His Honour stated:

It is simply impossible to suggest that compensation for the harm done to the reputation of Mr Ettingshausen required or permitted general damages greater in magnitude than those awarded to persons suffering profound quadriplegia.⁹⁹

Aggravation of damages has been commented on little here, although an important issue in these cases. It could be suggested as impinging on the comparability of personal injury verdicts,¹⁰⁰ but it can be noted here that aggravation is often seen as a source of high damages awards. As explained above, aggravated damages are meant to be entirely compensatory, but it may be that juries consider the defendant's conduct in the act of publication or during the trial when assessing them. An antipathy to the defendant's conduct may lead to greater sums being awarded, at the risk of the award being

⁹⁴ The NSW Law Reform Commission argues against Levine J, at least in terms of the changes that have been made in that state, and those the Commission proposes: *Defamation*, Report No 75 (1995) 121.

⁹⁵ (unreported, NSW Court of Appeal, 13 October 1993) per Kirby P, Gleeson CJ and Clarke JA. (*Ettingshausen*); an earlier aspect is reported at *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443.

⁹⁶ *Ibid.*

⁹⁷ s 46(3), *Defamation Act* 1974 (NSW). Clarke JA also discussed failing to apologise and assessing ordinary or aggravated damages, and the distinction between them: *Ettingshausen* (unreported, NSW Court of Appeal, 13 October 1993) 23–32.

⁹⁸ *St Margaret's Hospital for Women (Sydney) v McKibbin* (unreported, NSW Court of Appeal, 14 May 1987).

⁹⁹ *Ettingshausen* op cit (fn 95) 40, per Kirby P.

¹⁰⁰ For example, Halpin, 'Law, Libel and the English Court of Appeal' (1996) 4 *Tort Law Review* 139, 152 commenting how conduct subsequent to publication can aggravate defamation damages.

characterised on appeal as punitive and being disallowed.¹⁰¹ It also may be, as Post's work suggests, that juries in assessing harm to reputation seek to enforce social boundaries of conduct via large damages awards.

In summary, for determining the quantum of common law damages at trial, the judge should direct the jury at least as to money's purchasing power, but by the High Court *Carson* majority could also refer to general damages in personal injury awards. However, the actual method of reference remains to be explained and some decisions doubt an appropriate method exists. Under New South Wales legislation, the trial judge now assesses damages and should have regard to personal injury awards, including ones limited by statute. As to reviewing damages on appeal, the position is shown by the *Carson* majority judgment. The appellate court should apply the same test for sustainability as for other jury verdicts, namely whether the amount is outside the range of what could be considered appropriate, and the appellate court must ensure a 'rational relationship' exists between defamation and personal injury awards.

That would appear to be the moderately clear position. But just what the rational relationship entails is yet to be explained, as is any possible method of comparison at trial. The changes do not necessary mean verdicts will decrease as the more recent New South Wales appellate decision in *Crampton v Nugawela*¹⁰² illustrates. Dr Nugawela was accused, in effect, of lying in a professional capacity to advance his own standing in a specialised and developing aspect of Australian medical practice. A letter found to convey these defamatory imputations was sent to 22 medical professionals with interests closely related to those of Nugawela. The jury award of \$600 000 was sustained on appeal. The facts supported aggravated damages and compensation for economic loss. Two judges, however, noted the figure would have been allowable even if completely comprised of general compensatory damages.¹⁰³ The particular value in a professional reputation made the high award open. The case could be contrasted with *Nationwide News Pty Ltd v Hartley*.¹⁰⁴ At trial, the jury awarded \$935 000 for imputations made in a suburban newspaper alleging illegal and dishonest conduct by a migration agent. Cole JA, in the leading judgment, did not need to investigate the significance of comparisons to personal injury awards. While the effect on the plaintiff was 'exceptionally severe',¹⁰⁵ the Court of Appeal had no difficulty setting aside the award.¹⁰⁶

In *Crampton*, the judges paid only passing attention to *Carson*. Mahoney ACJ suggested the only comparison possible between general damages in

¹⁰¹ For example, *Ettingshausen* op cit (fn 95) 3, per Gleeson CJ.

¹⁰² (1996) 41 NSWLR 176.

¹⁰³ Mahoney ACJ and Handley JA, as noted in Hryce, 'Mahoney's revenge: *Crampton v Nugawela*' (1997) 41 *Gazette of Law and Journalism* 12, 13-14.

¹⁰⁴ (unreported, NSW Court of Appeal, Gleeson CJ, Powell and Cole JJA, 3 April 1996).

¹⁰⁵ *Ibid*, per Cole JA referring to comments by trial judge Levine J.

¹⁰⁶ *Cooke v Wood* (unreported, Victorian Court of Appeal, Ormiston, Charles and Batt JJA, 11 December 1997) could also be noted. It did not involve the media. A judicial award of \$50 000 plus interest was upheld. Charles JA, in the leading judgment at 20-26, discussed quantum and held this amount as not excessive — it included aggravated damages — and 'not even at the top of the available range,' at 26 of his judgment.

personal injury awards and defamation is that both have a normative aspect — they both, in part, relate to articulating socially desired standards of conduct, and a social valuation of the harm.¹⁰⁷ In *Carson*, which also featured serious allegations in relation to professional behaviour, Mahoney JA dissented in the Court of Appeal holding the \$600 000 total awarded was not excessive.¹⁰⁸ In *Crampton v Nugawela*, Handley JA emphasised non-economic harm in a loss of professional standing, possibly substantial in this case.¹⁰⁹ Giles AJA relied more on the possible economic, compensatory element in the award, but also noted the difficulty of applying *Carson* solely on appeal. When the jury had been given no information on the comparability of personal injury awards, it appeared difficult to review the award on that basis.¹¹⁰ The case suggests if trial judges are not disposed to direct juries on personal injury awards, appellate reliance on such awards may be problematic. It also raises the continuing, related difficulty of just what type of comparison is possible or desirable. In their approach in *Crampton v Nugawela*, judges emphasised different aspects of reputation in Post's terms. This also might highlight the desirability of further articulating, theoretically, the harms defamation does and the differing ways they may be remedied. This is returned to, briefly, in the paper's concluding section. In all this, it should not be overlooked that Dr Nugawela offered to settle his claim for \$30 000. That may suggest a different magnitude of loss than the unguided jury perceived.

3.2 Decisions on English law

England has also seen a trend to higher awards in defamation, with similar concerns expressed about the discrepancy between awards for injury or death and for defamation. Its courts have also made some moves to address the discrepancy, as have those in Europe. Three cases illustrate the developments.

In *Tolstoy Miloslavsky v United Kingdom*,¹¹¹ the European Court of Human Rights unanimously held English defamation law, in permitting a jury award of £1.5 million, breached Article 10 of the *European Convention on Human Rights*. The damages restricted freedom of expression in a way not 'necessary in a democratic society' nor required for a 'pressing social need'.¹¹² Miloslavsky had defamed Lord Aldington in a pamphlet, admittedly very seriously. The allegations imputed he was a war criminal. The trial judge refused to guide the jury with a range of figures, but commented upon money's purchasing power. The European Court noted the *Convention* requirement of necessity in a democratic society required reasonable proportionality to exist between injury and damages. The scope of judicial control then available in

¹⁰⁷ (1996) 41 NSWLR 176, 190–2.

¹⁰⁸ *John Fairfax and Sons Ltd v Carson* (1991) 24 NSWLR 259.

¹⁰⁹ Hryce, op cit (fn 103) 14.

¹¹⁰ (1996) 41 NSWLR 176, 203. The defendants did not seek leave to appeal to the High Court: Hryce, op cit (fn 109) 15.

¹¹¹ (1995) 20 EHRR 442.

¹¹² These qualities are criteria under Article 10 which allow restrictions upon expression.

England was inadequate to ensure this. *Tolstoy* may raise another point for Australian consideration: free speech and international conventions. The *International Covenant on Civil and Political Rights* is accessible to Australians under the optional protocol process. Its Article 19 provides some protection to free expression.¹¹³ It may if the law limits damages guidance for juries, or the *Carson* trial approach is not adopted, it could breach the *International Covenant*. This could prompt a legislative response beyond New South Wales.¹¹⁴

Since 1 February 1991, the English Court of Appeal can substitute its own damages for a jury's figure.¹¹⁵ The court exercised these powers in *Rantzen v Mirror Newspapers (1986) Ltd*,¹¹⁶ and prophetically stated leaving the jury an almost unlimited discretion could breach the *Convention's* Article 10. The court also reconsidered common law powers to interfere with jury defamation verdicts, although not changed expressly under the legislation. To set aside a verdict, English law had required damages that could not have been made sensibly, or were capricious or irrational. The test for review became whether a reasonable jury could have thought the award necessary to compensate and reestablish the plaintiff's reputation. The court rejected referring to other defamation trial verdicts, or to personal injury awards, but said in time a series of its decisions under the new legislation may guide juries. Until then, juries should be directed as to any award's purchasing power, in order to ensure proportionality between damage and compensation.

Few cases have come before the Court of Appeal's substitution power.¹¹⁷ Perhaps due to this, the situation has been reviewed, both as to comparisons between verdicts and jury directions. In *John v Mirror Group Newspapers Ltd*,¹¹⁸ the Court of Appeal reconsidered jury directions in defamation actions. The court held a judge may refer the jury to personal injury awards and the judge or counsel could indicate the appropriate bracket of verdicts. Using its substitution power, the court set compensatory and exemplary damages totalling £75 000 instead of jury verdicts of £350,000 for imputations of bulimia against a pop star. Courts appear to be reining in awards and some commentators see the damages issues as substantially resolved. Practitioner David Price suggests compensatory awards, not including elements for economic loss, should now not generally exceed £130 000.¹¹⁹ He refers to Hirst LJ who noted 'save possible in the most exceptional case, I find it difficult to imagine any defamation action where even the most severe damage to reputation, accompanied by maximum aggravation, would be comparable with

¹¹³ Article 19 provides for freedom of expression, allowing for restrictions only as necessary to respect others' rights or reputations, or to protect national security, public order, public health or morals.

¹¹⁴ In *Ettingshausen* op cit (fn 95)13, Kirby P noted defamation law inhibits free speech and referred to conventions, including the *ICCPR*, and their 'inevitable' influence on common law.

¹¹⁵ s 8, *Courts and Legal Services Act* 1990 (UK).

¹¹⁶ [1993] 4 All ER 975.

¹¹⁷ Price, op cit (fn 11) 443 ff lists relevant cases.

¹¹⁸ [1996] 2 All ER 35.

¹¹⁹ Price, op cit (fn 11) 174.

such appalling physical injuries' as quadriplegia.¹²⁰ Richard Shillitto and Eric Barendt suggest awards will be kept to a similar amount, although that may increase over time.¹²¹ It should be noted that the *John* directions have not always been given; for example, the *Percy* jury was told merely to 'keep their feet on the ground'.¹²² However, the changes appear to be gaining acceptance.¹²³

3.3 A Canadian decision in contrast

The English review is somewhat unexpected, as seen from the comments of the Canadian Supreme Court in *Hill v Church of Scientology of Toronto*.¹²⁴ It said England had 'unequivocally rejected' comparing defamation and personal injury verdicts, citing earlier decisions such as *Rantzen*.¹²⁵ The *Hill* decision allows clear distinctions between Australian and English developments and the traditional common law approach to defamation damages which it largely approved.

The leading judgment of Cory J emphasised the conduct of the defendant, Scientology.¹²⁶ Scientology alleged that Hill, when acting as a lawyer for the Crown Law Office, authorised the improper release of documents sealed under court order. It commenced private contempt proceedings against Hill without establishing the claim's factual basis. Scientology continued the action knowing it lacked any supporting evidence. When Hill subsequently sued in defamation, Scientology maintained a justification defence. The jury awarded defamation damages totalling Can\$1.6 million, comprising \$300 000 general, \$500 000 aggravated and \$800 000 punitive damages.

On appeal, assessment of damages was held to be within the jury's special competence.¹²⁷ Overturning a verdict, therefore, requires the court's conscience to be shocked. This was held even though the jury explicitly requested assistance. The jurors asked 'what, if any, are realistic maximums that have been assessed by society in recent history?'¹²⁸ With no state statute authorising guidance in defamation, whilst such legislation existed for personal injury actions, Cory J agreed with the trial judge and counsel that the jury could receive no guidance on quantum.

¹²⁰ *Jones v Pollard* (unreported, Court of Appeal (Eng), 12 December 1996).

¹²¹ Shillitto and Barendt, 'Libel Law' in *Yearbook of Media and Entertainment Law* (1996) Vol 2, 317, 321. Tobin, 'Developments in Defamation: A Comment on the New South Wales Law Reform Commission's Report' (1996) 4 *Tort Law Review* 155, 160 suggests the history of judicial personal injury assessment indicates judicial defamation awards under the NSW Act may gradually increase.

¹²² Skidmore, 'If This is Justice, I'm a Banana (Again) or Libel Damages Revisted' (1996) 4 *Tort Law Review* 101.

¹²³ Shillitto and Barendt, *op cit* (fn 121) 320 give two examples of figures being put to the jury by judge or counsel. Commentators have widely supported the need for change, although some have criticised the method of case law development or result: For example, Halpin, *op cit* (fn 100) argues the court usurped legislative roles.

¹²⁴ (1995) 126 DLR (4th) 129.

¹²⁵ *Id* 178.

¹²⁶ La Forest, Gonthier, McLachlan, Iacobucci and Major JJ concurring; and L'Heureux-Dubé not differing as to the damages aspects.

¹²⁷ (1995) 126 DLR (4th) 129, 174-5.

¹²⁸ *Id* 175.

Other options for limiting damages were considered and rejected by the court; for example, the court found the action was quite different to that for personal injury, and there was no pressing social need for a cap. Defamation verdicts in Canada do not appear to have included the notably high awards of other jurisdictions. Reported judgments in the last decade suggest the average award has fallen from Can\$30 000 to \$20 000. Cory J added if a defamer knew in advance what amount could be awarded, the sum could be seen as the 'cost of a licence to defame'.¹²⁹ This may confuse questions of remedies for the plaintiff and deterring potential defamers. The comment was about general damages rather than any separate punitive element. In Post's approach, it highlights the problems of aiming to compensate a defamed individual as well as maintain social bounds of behaviour; that is, the social concept of dignity.

The Australian High Court's endorsement of personal injury comparisons in *Carson* was raised but dismissed. Cory J noted practical difficulties suggested by McHugh J, in dissent in *Carson*.¹³⁰ Injured reputation was seen differently to other injury. Cory J approached reputation as a central individual right linked to individual dignity.¹³¹ The difficulty is that the damages seem to do more than merely compensate, and perhaps even more than vindicate Hill. Reputation was seen as particularly vital to a lawyer and to be compensated accordingly, even though no actual pecuniary loss was apparent. Hill was a young lawyer when defamed, who was later promoted and appointed a judge.¹³² And this was held in the judgment's consideration of general compensatory damages. The comments of Alec Samuels questioning the quantum in *Yousoupoff v MGM*¹³³ may be apt: 'No doubt the damages are very large for a lady who lives in Paris, and who has not lost, so far as we know, a single friend and who has not been able to show that her reputation has in any way suffered.'¹³⁴

Given Scientology's conduct, the court allowing the aggravated and punitive awards was less surprising. The conduct was 'recklessly high-handed, supremely arrogant and contumacious.'¹³⁵ The court also rejected a protection for defamation expression based on *New York Times v Sullivan*.¹³⁶ The extensive criticism possible against the *Sullivan* doctrine in practice may explain this result.¹³⁷ But a tendency for deficiencies perceived in law reforms to be attacked vigorously, while faults in present doctrine are accepted almost without consideration could be noted.¹³⁸ As Grant Huscroft has suggested, *Hill* appeared a strong case for reviewing damages: The plaintiff was not

¹²⁹ Id 178.

¹³⁰ Id 178-9.

¹³¹ Id 160-3.

¹³² Id 180.

¹³³ (1934) 50 TLR 581.

¹³⁴ Samuels, op cit (fn 28) 66.

¹³⁵ (1995) 126 DLR (4th) 129, 185.

¹³⁶ 376 US 254 (1964).

¹³⁷ Chesterman, op cit (fn 38), 303-9.

¹³⁸ Schauer, 'Uncoupling Free Speech' (1992) 92 *Columbia Law Review* 1321, 1324 and its note 10.

financially harmed and the jury had sought guidance.¹³⁹ While the court's deference to Parliament may be understandable, it would now remain for Parliament to act.

4 Reforms to defamation

The above review suggests those jurisdictions which apparently face the greater problems have taken remedial action. The degree to which the remedies actually will be employed in trials is far from clear. A need for effective reform may remain.

The courts could take at least two responses to the issue of high awards — limit their size or the area of liability. The latter option has been far more common. It can be seen, for example, in the pivotal United States case *New York Times v Sullivan*.¹⁴⁰ The jury award of US\$500 000 was very high; equalling approximately Can\$3.5 million in 1995.¹⁴¹ It also was the first of several actions against the newspaper for one publication about civil rights reforms. The Court was concerned about the defendant's commercial viability and chose to create an area of privilege for defamatory speech under the First Amendment. This focus upon a 'privilege' is also evident in England and Australia which have recently seen developments limiting the area in which defamation can operate.¹⁴² Courts, stating their deference to Parliament, generally have not pursued limiting award size. But the success of judicially expanded defences is open to serious question. At least in the US, litigation costs are seen to have increased and to be a most serious limit on media speech.¹⁴³

Legislative reforms have had a tortuous history with frequent and significant reports not being acted upon.¹⁴⁴ An exception, to some degree, is the significant English reforms in 1996.¹⁴⁵ Another may be possible changes in New South Wales following its Law Reform Commission report in 1995.¹⁴⁶ The reforms make various moves towards simplifying procedure and opening

¹³⁹ Huscroft, 'Defamation, damages, and freedom of expression in Canada' (1996) 112 *Law Quarterly Review* 46, 49.

¹⁴⁰ 376 US 254 (1964).

¹⁴¹ *Hill*, (1995) 126 DLR (4th) 129, 165.

¹⁴² See fns 35–37, *supra*.

¹⁴³ Soloski and Bezanson, *op cit* (fn 17).

¹⁴⁴ Dating at least from England's Porter Committee, *Report of the Committee on the Law of Defamation* (1948, Cmnd 7536) paras 157–160 recommending substitution powers for the Court of Appeal. See also England, *Faulk Committee* (1975, Cmnd 5909), Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979), Attorneys-General of NSW, Queensland and Victoria, *Discussion Paper on Reform of Defamation Law* (1990) and *Reform of Defamation Laws Discussion Paper (No 2)* (1991). Note could also be made of Samuels, *op cit* (fn 28) 86 who called for judicial assessment of damages in 1963, referring back to Wade: (1950) 66 *Law Quarterly Review* 348, 355.

¹⁴⁵ *Defamation Act* (1996).

¹⁴⁶ *Defamation Bill* (1996); NSW Law Reform Commission, *op cit* (fn 94). See generally: Walker, 'Defamation law reform: the New South Wales Defamation Bill 1996 and the Australian Capital Territory's Defamation Report' (1997) 5 *Torts Law Journal* 88 and Tobin, *op cit* (fn 121).

up the litigation process, but do not directly tackle damages.¹⁴⁷ They may assist interests in both reputation and communication if the law's unpredictability is reduced. The United States similarly has seen extensive calls for reform of remedies, for example, retractions, corrections, rights of reply and judicial declarations.¹⁴⁸ One point perhaps has not been emphasised enough; many reforms include a form of retraction or reply which would limit the plaintiff's ability to sue. These would assist in vindication other than by damages. It may be an obvious point, but with such reforms there would be at least a possibility of change in how vindication is seen to be achieved.

In Australia, New South Wales is awaiting possible changes recommended by that state's Law Reform Commission, presently before the state's upper house of Parliament. The reforms do not now include a cap on damages, which had been considered earlier.¹⁴⁹ Similarly, although the Commission Report suggested general damages would not normally be given for vindication,¹⁵⁰ but for injury to reputation and hurt feelings, the Bill does not explicitly affect this. Provisions directly affecting damages are absent although substantial changes to remedies would be introduced. Notable changes would provide alternative remedies of a declaration of falsity with court ordered publication, or a formal request for correction to bar damages for non-economic loss.¹⁵¹ Greater changes to damages may not have been included because substantial changes already have been enacted in that State, as noted above, although their effectiveness or practicality remains to be seen.

England has seen the enactment of the *Defamation Act 1996*. It introduces a 'fast-track' procedure allowing claims for damages up to £10 000 to be heard by a judge alone. This is available where no reasonable prospect of a defence exists and summary relief offers appropriate compensation. The court can also order a correction or apology to be published.¹⁵² An offer of amends defence could also operate with damages similarly assessed by the judge, or agreed between the parties.¹⁵³ Some commentators doubt these changes will improve matters much. Defendants may still be in the invidious position of having to decide if they can afford an appeal.¹⁵⁴ More relevantly, the Act has not directly reduced damages. Patrick Milmo illustrates the quantum of damages that remains presumed necessary:¹⁵⁵

¹⁴⁷ In NSW, damages may be barred for non-economic loss when some 'fast-track' procedures are used.

¹⁴⁸ For example, Annenberg Libel Reform Proposal: Bezanson, Cranberg and Soloski, 'Libel Law and the Press: Setting the Record Straight' (1985) 71 *Iowa Law Review* 215; and some 65 unsuccessful reform Bills in the US since 1989, noted in Chesterman, *op cit* (fn 38) 323.

¹⁴⁹ *Id* 324.

¹⁵⁰ For example, Tobin, *op cit* (fn 121) 159 notes the exceptional role damages would retain for vindication.

¹⁵¹ NSW Law Reform Commission, *op cit* (fn 94), recommendations 10–20, and 22–8.

¹⁵² *Defamation Act 1996* (UK), ss 8–11. The Act received assent on 4 July 1996 but many changes were expected to commence only in 1998.

¹⁵³ *Defamation Act 1996* (UK), ss 2–4.

¹⁵⁴ Scott-Bayfield, *op cit* (fn 7), 36.

¹⁵⁵ Milmo, 'Fast track or gridlock?' (1996) 146 *New Law Journal* 222.

In some cases — say a public figure suing a newspaper about an article accusing him of dishonesty — the decision will be a formality; the action must go to trial. Even if there was no defence the damages must exceed £10 000.

This suggests many actions may not be brought under these provisions. United States research, however, could be relevant. The Iowa Libel Research Project suggests people upset by media reports often may not even sue if an apology or correction is easily forthcoming, and that the quantum of damages is not a primary issue, at least in the early stages of a dispute.¹⁵⁶ Perhaps England will prove similar. In any event, the nascent *John* directions may be more significant than the 1996 Act.

Within these reforms, an emphasis can be seen on improving access to defamation law for both plaintiffs and defendants. This is mainly through creating or formalising alternative avenues to full trial. They should be quicker and cheaper for the parties, and the state so far as it funds the courts. Lower damages are being pursued indirectly in the legislation, through promoting other remedies such as a published apology and requested corrections. Damages, however, could often still be available, and their assessment problematic.

5 Conclusion: problems in damages

Two broad sets of damages issues can be seen by returning to Post's investigation of reputation and by considering the questions of the 'scales of value' in defamation and personal injury awards and possible methods of comparison. In Post's terms, to the extent reputation is a proprietary interest, damages for its harm would be warranted, but perhaps more so if that harm was proven.¹⁵⁷ Tort law does not remedy all harms — some are perhaps too subtle for law. The question could be whether harm to reputation, stated to be difficult to prove, should be presumed. To the extent reputation is dignity interest, then damages analogous to those for pain and suffering in personal injury cases would follow. These could well be presumed, but not necessarily irrebutable. As in personal injury cases, policy would probably support capping such a damages component. One could go further and investigate loss shifting concepts in personal injury compensation and consider their applicability to defamation.¹⁵⁸ Desiring vindication can be related to reputational interests understood as based in concepts of dignity or, the perhaps now archaic, honour. Contrary to judicial pronouncements, if this element is conceptually separated from other reputational harms, vindication could come to be remedied through the verdict more than through a damages award. One could note again, reputation's elemental connection to honour is seen in

¹⁵⁶ Bezanson et al, op cit (fn 148).

¹⁵⁷ Although the contrary suggestion could be noted that presumption of harm in defamation should continue because interference with property can be tortious without proof of damage. But such presumption would arguably make reputation more protected than property interests: eg Cane, op cit (fn 53) 48.

¹⁵⁸ Schauer, op cit (fn 138) does something quite like this in discussing the often overlooked aspect of free speech theory; that is, who bears the loss.

comments placing reputation being beyond monetary value. Perhaps publicity rather than money would answer a defamatory attack on this element of reputation. The approach may gain acceptance if alternative 'fast-track' remedies come to be widely used.

Post also notes reputation, understood as dignity, is relevant to maintaining communal identity. If so, one could query whether associated damages, in effect an instrument more of regulatory control, should be thought of as civil or even paid to the plaintiff at all. Should the plaintiff profit, or appear to, by a social desire to control certain communication? That is to say, the plaintiff may suffer two types of harm warranting compensatory damages. Reputation, understood as analagous to a property interest, may be damaged and appropriate to remedy where loss is proven. Instances of professional reputation could exemplify this situation. Reputation, understood as dignity, could give rise to damages analogous to those for personal injury pain and suffering. Those two harms may be the theoretical extent of compensatory damages, if vindication were achieved by the judgment. Other harms to reputation may not all be able to be related to individual plaintiff interests at all, and be better appreciated theoretically as connected to a system of social control. Related to this division of reputation, the allowance to be made for the type of defendant could be explicitly addressed; whether the defendant is corporate or individual and has large or small resources would affect the style and quantum of any appropriate control. While such consideration may come into play in punitive awards, Post's point is that reputation may inherently raise these social elements and so likewise may any compensation of harm to reputation.

Perhaps it would be preferable to consider these issues explicitly; that is, whether limits on reputational speech are wanted beyond the need for individual compensation and vindication. This is not to suggest that there are not powerful arguments for such controls on speech, two examples being the democratic participation arguments advanced by writers such as Cass Sunstein,¹⁵⁹ or arguments focussing on a need to control the harm to particular individuals and groups by certain speech, for example as explored by Richard Delgado and Jean Stefancic writing about hate speech.¹⁶⁰ The appropriateness, however, of using defamation as a prime means of control could be debated. One could note suggestions linking defamation and sedition, and not just as to its historical operation and development in law of criminal libel.¹⁶¹ In its present operation, with large awards and high costs of litigation, there may be a potential for abuse of defamation by entities with large financial resources, whether governmental entities or not.¹⁶²

Various reforms emphasise that vindication may be obtained as much, or even more fully, by publicising a judicial determination. The reforms, however, could go the further step of requiring vindication to be obtained only by

¹⁵⁹ For example, Sunstein, *The Partial Constitution* (1993).

¹⁶⁰ Delgado and Stefancic, 'Apologize and Move On? Finding a Remedy for Pornography, Insult and Hate Speech' (1996) 67 *Colorado Law Review* 93.

¹⁶¹ For example, Chesterman, *op cit* (fn 38) 302.

¹⁶² *Ibid.*

way of such a judgment. If, as John Fleming has long argued,¹⁶³ damages are particularly unsuited to this aspect of the remedy in defamation, they should not be awarded in a vain attempt to achieve vindication. Changes to defamation such as requiring vindication to be sought by verdict and not damages may seem radical, but are far from unprecedented. In a paper emphasising the need to be aware of who pays for free speech in the United States context, Harvard's Professor of the First Amendment, Frederick Schauer, proposes various options for defamation law.¹⁶⁴ These include the media absorbing the costs; consumers contributing it through purchasing publications at a higher price; the public contributing via government insurance;¹⁶⁵ and an administrative victim compensation scheme.¹⁶⁶ Schauer highlights that society chooses where the loss falls: hardly a novel point in tort law, but little investigated in relation to defamation, and perhaps even less in the United States with its constitutionalised defamation regime. Further to his point, the importance of quantum and who should benefit, rather than who should pay, could both be addressed.

The cases considered above also raise issues, more directly related to law as practised, about whether and how personal injury and defamation awards can be compared. Concerns with comparisons tend to stem from the perceived differences in the harms each action addresses. Even those generally supportive, can see that 'such comparisons may not always be apt.'¹⁶⁷ There are differences to personal injury awards, for example, in the practice of allowing some economic loss to be considered under general damages in defamation, in what is considered relevant for aggravation in defamation damages, as well as the commonly raised issues of vindication. And all damages for non economic loss raise major difficulties in valuation.¹⁶⁸

It may be worth considering further what methods of comparison could be used. The strongest judicial call for the use of personal injury awards is the English Court of Appeal in *John*. But the differences in the two awards' qualities were noted, with the court stating:¹⁶⁹

Much depends, as we now think, on what is meant by guidance: it is one thing to say (and we agree) that there can be no precise equiparation between a serious libel and (say) serious brain damage; but it is another to point out to a jury considering the award of damages for a serious libel that the maximum conventional award for pain and suffering and loss of amenity to a plaintiff suffering from very severe brain damage is about £125 000 and that this is something of which the jury may take account.

In this sense, the jury would no longer be 'in the position of sheep loosed on an

¹⁶³ For example, Fleming, 'Retraction and Reply: Alternative remedies for defamation' (1978) 12 *University of British Columbia Law Review* 15.

¹⁶⁴ Schauer, *op cit* (fn 138).

¹⁶⁵ *Id* 1341-2 which Schauer notes could well lead to the limiting of damages.

¹⁶⁶ *Id* 1326-43.

¹⁶⁷ Shillito and Barendt, *op cit* (fn 121) 321

¹⁶⁸ For example, Tilbury, 'Non-Economic Loss and Personal Injury Damages: A Comment on the Law Commission's Consultation Paper' (1997) 5 *Tort Law Review* 62, 66.

¹⁶⁹ *John v MGN Ltd* [1996] 2 All ER 35, 53.

unfenced common, with no shepherd'.¹⁷⁰ A similar argument may be plausible in Australia. However, there have also been strong concerns raised in Australia about which personal injury awards would be referred to at trial, and how they would be placed into context. England has an explicit system of conventional tables for personal injury awards.¹⁷¹ Australia does not. In Australia, authority suggests the figure is determined on the facts of each individual case 'against the background of a judicial consciousness of "current ideas of fairness and moderation"'.¹⁷² But an unofficial Australian range of tariffs can be argued to exist for the judicial assessment of non-economic loss.¹⁷³ And arguments for the more open acknowledgement and development of such an approach in Australia could be relevant to the question in defamation damages.

It may be, that as Roscoe Pound suggested in 1915, jury discretion in assessing defamation damages can hide a breakdown in the application of academic rules.¹⁷⁴ The changes suggested in *John* may not 'undermine the enduring constitutional position of the libel jury'¹⁷⁵ but perhaps even lessen any such breakdown through the guidance they offer. A particular type of comparison *may* be useful and not deny the different scales of value involved, nor the unique aspects of defamatory harm to reputation. The different formal situation as to personal injury damages tables need not necessarily prevent this. At the same time, a more detailed analysis of the varying interests in reputation which defamation law is called on to address could assist the whole area. The interests can diverge and, at times, conflict. Remedying them all through damages may be simplistic and unnecessary. If defamation is to address individual interests in reputation of a proprietary nature, individual interests related to personal dignity and honour, and also respond to social interests in maintaining some legal conception of communal identity, the various remedial possibilities might be better debated with all the interests explicitly addressed. Perhaps then more varied and more appropriate remedies could be tailored.

¹⁷⁰ Id 49.

¹⁷¹ Judicial Studies Board, *Guidelines for the Assessment of General Damages in Personal Injuries Cases*.

¹⁷² Tilbury, *op cit* (fn 168) 67

¹⁷³ *Ibid*, and citing in support Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed, 1990).

¹⁷⁴ Pound, *op cit* (fn 50) 453.

¹⁷⁵ *John v MGN Ltd* [1996] 2 All ER 35, 55.