

UNDER the Defamation Act 1954

BETWEEN TELEVISION NEW ZEALAND LIMITED a duly incorporated company having its registered office at Auckland and carrying on business throughout New Zealand as the operator of television services and having a principal place of business at Victoria Street, at Auckland

Appellant

A N D TERENCE ANTHONY QUINN of Auckland, Company Director

Respondent

Coram: Cooke P.  
(27.11.95.) Richardson J.  
Gault J.  
McKay J.  
McGechan J.

Hearing: 27, 28 and 29 November 1995

Counsel: J.G. Miles Q.C., W. Akel and Helen Wild for Appellant  
J.G. Kohler and Gretchen E. Joyce for Respondent

Judgment: 19 April 1996

---

JUDGMENT OF LORD COOKE OF THORNDON

---

These are an appeal and a cross appeal from the judgment of Anderson J. reported in [1995] 3 N.Z.L.R. 216 dismissing an application by the defendant in a defamation suit to set aside the jury's award of \$400,000 in respect of a television programme broadcast on 11 June 1990 but granting the defendant's application to set

aside the same jury's award of \$1.1 million in respect of a programme broadcast on 18 June 1990. The Judge ordered a new trial of the second claim, limited to damages only. At the period of the programmes the plaintiff was the president of the Auckland Trotting Club and the governing director of a company, Vetmed Laboratories (NZ) Limited, which carried on the business of supplying animal food supplements. The programmes were broadcast by the defendant as parts of a popular prime-time current affairs series presented by Mr Paul Holmes and estimated by him to reach at that time an audience of about 700,000 people.

In answer to issues the jury found that the first programme in its entirety and in its natural and ordinary meaning as understood by reasonable people meant that the plaintiff was supplying drugs for doping horses; and that this meaning was defamatory of the plaintiff. The defendant had not pleaded that this meaning was true, so no issue of justification of it was submitted to the jury: the defendant's case on it was that the programme did not bear this meaning. Similarly the jury found that the programme meant that the plaintiff was illegally selling performance enhancing drugs in the trotting or racing industries; and that this was likewise defamatory of the plaintiff. The defendant admitted this meaning but sought to put a gloss on it, contending that it amounted to something less than selling drugs for doping horses. The jury found, however, that this second meaning was not true either, which may indicate that they saw little difference between it and the first meaning. Their award of \$400,000 for the first programme was, properly, a global sum not broken down into compensatory and punitive or exemplary damages; the plaintiff had claimed \$1,700,000 for general, aggravated and exemplary damages, also without any breaking down of the amount. The High Court Rules do not require a separate amount to be specified for exemplary damages when they are claimed as part of general damages, although it should be made clear that exemplary damages *are* claimed and why: as to particulars, see now the Defamation Act 1992, s.44. Indeed

the 1992 Act, which does not apply to proceedings commenced (like the present) before 1 February 1993, provides in s.43 that in defamation proceedings against a news medium the plaintiff shall not specify in the statement of claim the amount of any damages claimed. This special 1992 provision is an exception to the ordinary practice required by R. 116 of the New Zealand High Court Rules, whereas as I understand it under the English practice the amount of general damages claimed in any proceedings is not normally specified.

On the second programme the jury found that it meant that the plaintiff was improperly involved or implicated in financial irregularities concerning the Auckland Trotting Club; and that this meaning was defamatory of the plaintiff. The defendant did not seek to justify this meaning, contending simply that it was not the meaning of the programme. The only other issue was damages. The \$1.1 million awarded was similarly a global figure; the plaintiff had claimed a global \$2,300,000 for general, aggravated and exemplary damages.

Except as to the amount of damages the defendant has not challenged any of the jury's findings. The findings on meanings and liability were obviously well open to the jury. In view of the absence of challenge to these findings it is not necessary for present purposes to do more than outline the content of each programme. The first was introduced as a follow-up to an earlier programme admitted by Mr Holmes in his evidence to be about the doping of racehorses. The introduction by Mr Holmes went as follows:

Presenter: A month or so ago we carried a couple of stories suggesting drug abuse wasn't foreign at all to the racing world in New Zealand and tonight we bring you a revelation with all the elements of a Dick Francis novel. Race horses, drugs, people in high places, a reluctance to talk, all of it. Its all about a company called Vet Med and the two men who own it - one an equine vet, and other the President of the Auckland Trotting

Club. And they're accused of unlawfully distributing performance enhancing substances. The charge comes from the Animal Remedies Board which is responsible for the licensing of all such products. And its just suspended Vet Med's licence to sell a number of products, apparently the first time its ever had to take such a step. Here's Rod Vaughan.

A theme of the following words and pictures, which included many references to and shots of the plaintiff, was that drugs, including a powerful painkiller (phenylbutazone) large quantities of which had at one stage been in the company's warehouse, allowed horses with muscular problems to push themselves through the pain barrier during races. A clip was shown of a series of horses collapsing towards the end of a race. It emerged in evidence at the trial that this film had been acquired for the purpose from an Australian programme.

The defendant's programme of 18 June 1990 was prepared and broadcast notwithstanding that in the meantime the plaintiff by his solicitors had complained of the programme on 11 June 1990 and had given notice of action. This second programme was introduced as follows:

Paul Holmes, Presenter: Tonight another disturbing report of the state of the racing industry. The sources are some of racing's most experienced people, highly respected trotting officials, and they allege wrong-doings in the Auckland Trotting Club. And we have more evidence against top trotting administrator, Mr Terry Quinn. The "Holmes" programme has already revealed Mr Quinn's company has been selling unlicensed animal remedies. That story started a flow of information. A deputation of past and present Auckland Trotting Club committee members contacted "Holmes" reporter Rod Vaughan.

There followed sundry specific suggestions of large-scale financial improprieties and other misconduct. Those touching finance concerned allegations of undisclosed excessive expenditure on a grandstand, of the disappearance of carpets and appliances and a trust fund, and of a sale of land at an under value. Four former committee

members of the Club, who had been 'deposed in a controversial ballot' and one present member were photographed in an obviously stage-managed march abreast, and much was made of the suggested withholding from them by the club officers of relevant information. In the event, however, only one of them gave evidence at the trial. He was called for and supported the plaintiff.

As a whole the evidence at the trial relating to these financial matters could well have led the jury to conclude that there was no substance in any of the suggestions and that those responsible for the programme had done little to investigate them genuinely. One of the submissions for the television company on the appeal was that the effect of the awards is of serious concern to the maintenance of investigative journalism. If, however, what was done in this case were a fair sample of investigative journalism, I do not think that concern would need to be felt about any tendency to discourage it.

A factor which was probably inflammatory of damages, and which it was legitimate for the jury to take into account, was the position taken in evidence by Mr Holmes and Mr Vaughan. There was also an executive producer, but he or she did not give evidence. The plaintiff took the bold step of calling Mr Holmes on subpoena. Mr Holmes disclaimed regarding ratings as the first priority of his current affairs programmes, saying that credibility and accuracy were vitally important; but he also said that reaching a wide audience was 'almost a sacred duty' and that, while a programme should be fair to both sides, it should be 'a good watch'. Asked by counsel for Television New Zealand what he had intended to say in the first programme, he replied:

The program was broadcast in a context of national and international concern about the use of unfair substances in sport. Here we had a company, one of whose directors had come to us, whose licences to sell certain substances had been

revoked by the Animal Remedies Board. This was the first time the Animal Remedies Board had taken such action.

He claimed that the first programme was not investigating Mr Quinn but 'a company which had a direct link across to the trotting club'.

Mr Vaughan, called for the defendant, denied that he had set out to do a story alleging that Mr Quinn was doping racehorses; 'My story very simply reflected shortcomings in a company that he ran called Vetmed'. In cross-examination he said that he thought that the two shows were good journalism and that they had got the facts right on both occasions. Both these witnesses claimed that the second programme was not directed at Mr Quinn but at concerns with the way in which the trotting club was being run. The jury were entitled to think that the hair-splitting distinctions drawn by these witnesses showed at least a lack of candour.

On the other hand, both Mr Holmes and Mr Vaughan in their evidence and Mr Miles in his submissions at the trial and since have been able to point to a number of factors capable of mitigating damages somewhat. I will list what seem to me the more significant of these.

An inspection by officers of the Animal Remedies Board of the Vetmed premises on 8 May 1990 had revealed 'Almost total absence of animal remedy control ... Prescription animal remedies held on open shelves in an open warehouse ... Many unlabelled bottles allegedly including anabolic steroids' and other shortcomings in labelling and control. The company's licences to sell four specified equine remedies were suspended on 11 May 1990 until further notice. After a further inspection report the Board was evidently satisfied that these management shortcomings had been substantially rectified, and the suspensions were lifted from 14 June 1990. Dr Deuss, the Registrar of the Board, said in evidence that it was never the intention of the Board to make any connection between Mr Quinn and the doping of racehorses. The

Board operates under the Animal Remedies Act 1967 and is largely concerned with remedies for the treatment of animal diseases, although remedies sold for 'improving the ... condition ... of any animal' are within its jurisdiction.

At the date of the programme of 18 June 1990 certain allegations were current against Mr Quinn. The Harness Racing Conference was to consider allegations that contrary to the domestic rules he had endorsed cheques, during a meeting, for persons prohibited on the course who had criminal convictions, and that he had been found in an illegal gaming house. He and others had been arrested by the police at a house where a poker championship was being held. These matters were mentioned in the programme of 18 June 1990. Subsequently the gaming house charge proved legally groundless and the Harness Racing Appeal Judges allowed an appeal by Mr Quinn from a domestic 'conviction' in that matter. Before the success of that appeal, domestic 'convictions' on the cheque cashing charges were quashed in this Court on 6 July 1992 (C.A. 385/91) on the ground that the charges were out of time under the rules.

The alleged breaches of the Animal Remedies Act and the New Zealand Rules of Harness Racing were mentioned in the two Holmes programmes in question, but the plaintiff has not complained in the defamation action of the programmes insofar as they did no more than refer to these allegations. What he has complained of are the overall and more serious imputations conveyed by the programmes. Another matter on which, throughout the case, the television company has sought to place considerable reliance in mitigation is that, mainly after the two Holmes programmes, newspapers gave extensive publicity to the allegations of breaches of the Act and the rules. Mr Quinn said in one affidavit in his judicial review proceedings relating to the Harness Racing charges that the domestic proceedings had had a catastrophic effect on him. Accordingly it has been argued that it was the other

media publicity, rather than the earlier Holmes programmes, that seriously damaged his reputation. In this Court Mr Miles went as far as to label the plaintiff, apparently because of the other publicity, as 'a social outcast'.

Some further details of the facts of the case will be found in the judgments of my brothers McKay and McGechan, which I have had the advantage of reading in draft. I have set out only what I see as the facts essential for the purposes of a discussion and application of the relevant principles of law as to damages.

### **The Principles as to Damages**

The case has now to be approached on the footing that very serious untrue allegations of involvement in the doping of racehorses and in financial irregularities within the trotting club of which the plaintiff was president were made by the two Holmes programmes. This question has been concluded by the jury's verdict, a verdict not challenged on these major points.

Traditionally, the assessment of damages for defamation has been treated by Judges as very much the province of juries, who may take into account all the facts of the case, including the conduct of the defence and the defence witnesses at the trial, which may aggravate the libel and call for increased compensation by way of further aggravated damages for injury to the plaintiff's feelings or even punitive (or exemplary) damages beyond that. But in recent times the English courts have been constrained to take a more interventionist role by 'A series of jury awards in sums wildly disproportionate to any damage conceivably suffered by the plaintiff', as it is put in the judgment of the Court of Appeal (Sir Thomas Bingham M.R., Neill and Hirst L.JJ.) in *John v. MGN Ltd*, 12 December 1995. In that case the Court of Appeal



set aside a jury's award against the Sunday Mirror of £75,000 compensatory damages and £275,000 exemplary damages for an untrue story that Elton John suffered from a form of bulimia. Under recently-conferred statutory powers not available in New Zealand the Court of Appeal substituted awards of £25,000 and £50,000. That case was decided after the oral argument in this Court in the present case, but has been the subject of written submissions to us from both sides. The judgment in *John* will be reported and traverses the previous cases in the line. There is no point in my repeating that exercise.

As a result of the decision in *John*, taking the interventionist approach a stage further than the earlier cases in the recent line, the position now reached in England is that, while juries should not at present be reminded of previous libel awards by juries ('Those awards will have been made in the absence of specific guidance by the judge and may themselves be very unreliable markers'), reference may be made in the summing up to awards approved or made by the Court of Appeal. Trial Judges are recommended to draw the attention of juries to the purchasing power of the award they are minded to make, and to the income it would produce. Judges and counsel are free to make comparisons with personal injury awards. There is no reason why counsel should not indicate to the jury the level of award which they respectively contend to be appropriate, nor why the Judge in directing the jury should not give a similar indication. Where exemplary damages may be awarded - a class of case more limited in England than in New Zealand (see *Taylor v. Beere* [1982] 1 N.Z.L.R. 81) - it should be made clear that the jury must be satisfied that the publisher had no genuine belief in the truth of what he published. The publisher must have known the words to be untrue or have suspected as much and deliberately refrained from taking obvious steps which would have turned suspicion into certainty. And '... principle requires that an award of exemplary damages should never exceed the minimum sum necessary to meet the public purpose underlying such damages,

that of punishing the defendant, showing that tort does not pay and deterring others. The same result is achieved by the application of Article 10. Freedom of speech should not be restricted by awards of exemplary damages save to the extent shown to be strictly necessary for the protection of reputations'.

The reference to Article 10 is to that Article in the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, which affirms that everyone has the right to freedom of expression but authorises restrictions prescribed by law and necessary in a democratic society for various purposes, including the protection or reputation of the rights of others. Jurisprudence of the European Court of Human Rights indicates that 'necessary' in this context implies the existence of a pressing social need, a consideration assisting the English Court of Appeal in *Rantzen v. Mirror Group Newspapers Ltd* [1994] Q.B. 670, 692, to hold that the common law if properly understood required the courts to subject large awards of damages to a more searching scrutiny than had been customary. In *Tolstoy Miloslavsky v. United Kingdom* (1995) 20 E.H.R.R. 442 the European Court of Human Rights were concerned with a supposedly compensatory award of £1.5 million for defamation in a pamphlet alleging that the plaintiff had been responsible for handing over some 70,000 Cossack and Yugoslav prisoners-of-war and refugees and their families to massacre or lingering death. The trial was before the change of practice brought about by *Rantzen*. The European Court referred favourably to *Rantzen* but held that the size of the £1.5 million award in conjunction with the lack of adequate and effective safeguards at the earlier time against a disproportionately large award meant that Article 10 had been violated.

The *John* case has understandably been treated in England as not laying down hard-and-fast rules. In *Percy v. Mirror Group Newspapers Ltd* (*The Times*, February 24, 1996) a consultant surgeon was awarded by a jury a total of £625,000

damages for articles suggesting that he had done little or nothing to obtain a hospital bed for a dying patient. I understand that neither counsel in his closing speech referred to personal injury general damages or other defamation awards, nor did the Judge do so in his summing up. It may also be that the Judge did not specifically refer to purchasing power. The verdict is under appeal. For our purposes, however, *John* must be assumed to indicate at least the current English general guidelines.

Before considering how far the recent developments in England might be reflected in New Zealand law and practice, it is pertinent to refer also to what has occurred in Canada and Australia. The leading relevant Canadian case, much relied on in this Court by Mr Kohler on behalf of Mr Quinn, is *Manning v. Hill* (1995) 126 D.L.R. (4th) 129. That was a defamation case against representatives of the Church of Scientology of Ontario. It arose from allegations proclaimed publicly in a press conference on the steps of Osgoode Hall, and given extensive publicity in the media, of criminal contempt of court on the part of a Crown Counsel whose professional activities in legal matters concerning the affairs of the Church had resulted in their labelling him 'Enemy Canada' and conducting a campaign persisting even after verdict to 'neutralise' him. It was falsely said in the press conference that he had misled a Judge of the Ontario Supreme Court and breached orders sealing certain documents. The jury made a huge award to him: general damages of \$300,000, aggravated damages of \$500,000 and punitive damages of \$800,000.

Although that was far above the general level of Canadian defamation awards, the Supreme Court of Canada, upholding the Ontario Court of Appeal, declined to disturb the verdict. They did not regard the award as shocking to the conscience in the particular circumstances of malice and other outrageous features; the case was in a 'class by itself'. There was 'little to be gained from a detailed comparison of libel awards' and they saw no reason to impose a cap on general

damages in defamation cases. The Canadian Charter of Rights and Freedoms did not directly apply, since government action was not involved, but it was accepted that the underlying values of the Charter should lead to modification of the common law if it failed to comply with them. But there were the competing underlying values of the protection of a person's reputation on the one hand and freedom of expression on the other. Balancing these, no change in the Canadian approach to jury verdicts was considered to be required. A review of jury verdicts in Canada revealed that there was no danger of numerous large awards threatening the viability of media organisations. Further, the Supreme Court of Canada declined, after an interesting discussion by Cory J., to adopt the rule in *New York Times Co. v. Sullivan* 376 U.S. 254 (1964) requiring public officials and other public figures to prove 'actual malice' or reckless disregard of truth or falsity as a condition of recovering defamation damages.

The Australian trend is the other way. A greater need to protect defendants has been discerned there. One manifestation of the trend, namely the cases based on a constitutional implication of freedom of political discussion, is not relevant for present purposes. More relevance attaches to cases such as *Carson v. John Fairfax & Sons Ltd* (1993) 178 C.L.R. 44, where by majority decisions a jury award of \$800,000 for newspaper libel of a solicitor was set aside but a second jury proceeded to award \$1.3 million; and *Australian Consolidated Press Ltd v. Ettingshausen* (13 October 1993) where the New South Wales Court of Appeal set aside a jury award of \$350,000 to a rugby league player for the publication of a photograph of himself naked in a shower, the implication alleged being that he had allowed himself to be so photographed for publication. At the new trial the jury awarded \$100,000. It is to be noted that, as pointed out in the judgments, exemplary damages for defamation are excluded by statute in New South Wales, and in all Supreme Courts of the Australian States other than New South Wales a Judge

assesses damages for defamation in the absence of some contrary order or election. The New South Wales Law Reform Commission have now recommended (Report 75, September 1995) that defamation damages should always be assessed by the Judge and not the jury. The report places great weight on having standards that will not chill freedom of speech.

In *Carson* the majority of the High Court of Australia, departing to some extent from previous High Court authority, said at 59-60 (omitting footnote references):

Although there is authority in this Court to the effect that the quantum of damages is not to be resolved by reference to a norm or standard supposedly to be derived from a consideration of amounts awarded in a number of other specific cases, there is much to be said for trial judges offering some guidance on damages - such as inviting the jury to consider the investment or buying power of the amount it might award or perhaps even indicating a range of damages which might be considered appropriate - while ensuring that the jury knows that they are to reach their own decision.

There has been no law or practice in New Zealand precluding the Judge from providing guidance to the jury in either of those ways. A reference to investment or buying power, with a practical comparison such as the cost of a house or car, will often be helpful; but it is undesirable to add to the specific duties falling on a Judge in summing up, and in New Zealand I would not go to the length of laying down any requirement to that effect. If the Judge elects not to give that degree of guidance, the quantum of the jury award may be more readily reviewed.

Counsel are certainly entitled in New Zealand to put to the jury the figures or range of figures which they contend to be appropriate.

Suggesting a range of figures is also open to the Judge in New Zealand, provided that he or she makes it clear that his range is not binding on the jury; but it is a course on which in many cases Judges will justifiably refrain from embarking, for selecting the range would be a delicate exercise inviting challenge on appeal. Suggestions of usurpation of the jury's function could also have added colour. It is significant that, notwithstanding English and Australian legislation giving Judges or appellate Courts a larger role, in New Zealand the Defamation Act 1992, s.33, provides that, where a verdict is set aside on the ground that the damages awarded are excessive or inadequate, the Court by which the verdict is set aside may, *with the consent of the plaintiff and of every defendant against whom the award was made*, substitute its own award of damages. Our legislature has thus demonstrated a continuing faith in juries, bearing in mind that by the Judicature Act 1980, s.19A, any party to civil proceedings in the High Court in which only pecuniary damages are claimed has a *prima facie* right to trial before a jury.

Insofar as the English and Australian authorities now favour comparisons in summings up with personal injuries awards, they of course can have no application in New Zealand, damages for personal injury by accident being substantially excluded by the accident compensation legislation.

Exemplary or punitive damages are available in New Zealand where the defendant's conduct has been high-handed to an extent calling for punishment beyond that inflicted by any award of compensatory (including aggravated) damages. The Defamation Act 1992, s.28, preserves them by providing that in any proceedings for defamation punitive damages may be awarded against a defendant only where that defendant has acted in flagrant disregard of the rights of the plaintiff. There is little, if any, difference between that and the former law. Mr Miles was naturally not prepared to argue that the New Zealand Bill of Rights Act 1990, s.14, affirming freedom of

expression, should lead to a modification of the common law so as to rule out this head of damages altogether. Section 28 of the Defamation Act alone would make any such argument very difficult, to say the least. Also the English Court of Appeal in *John* have not suggested that the European Convention excludes exemplary damages.

The latter case and *Riches v. New Group Newspapers Ltd* [1986] Q.B. 256 are examples of separate awards of compensatory and exemplary damages (a course perhaps reflecting contests as to whether the cases fell within the restricted categories wherein such awards are allowed in England). But the ordinary practice in both England and New Zealand is to direct a global award, even if the jury are satisfied that an added punitive element should be reflected in it. See for instance *Cassell & Co. Ltd v. Broome* [1972] A.C. 1027, 1072, per Lord Hailsham of St. Marylebone L.C., and *Taylor v. Beere, cit. supra*. This has been thought to militate against an impermissible doubling up. One consequence of this practice is that it is not possible to conclude with certainty how often New Zealand jury awards have included something for punitive damages.

It may be convenient to insert a reminder at this point that the narrowing into three categories of the types of case in which exemplary damages may be awarded, which was carried out by the House of Lords per Lord Devlin in England in *Rookes v. Barnard* [1964] A.C. 1129, has not been followed in New Zealand: see *Taylor v. Beere, cit. supra*; *Donselaar v. Donselaar* [1982] 1 N.Z.L.R. 97; *McKenzie v. Attorney-General* [1992] 2 N.Z.L.R. 14, 21 and the accident compensation cases there collected; *Aquaculture Corporation v. New Zealand Green Mussel Co. Ltd* [1990] 3 N.Z.L.R. 299. A consequence in the field of defamation is that we are not troubled with the issue that has required attention in *John* and other English cases about whether a defendant news medium made 'the requisite calculation'. This will remain so after the present case. Whether the defendant calculated or presumed that the publication complained of would be profitable on

balance, even allowing for possible liability in damages, will remain one factor relevant in considering exemplary damages. It will not be an essential condition of an award of such damages.

It was contended for Television New Zealand that the awards of \$400,000 and \$1.1 million, each figure a record in New Zealand, may indicate the beginning here of the trend to unacceptably high awards that has had to be countered in England and Australia. These particular awards will require discussion in the next part of the present judgment, but at this point I should say that as yet there is insufficient evidence of a trend. In general, exemplary awards for defamation or other causes of action have been moderate. The next highest award was in the 1994 Auckland case, *McRae v. Australian Consolidated Press Ltd*, brought on a baseless allegation in a satirical television programme that a journalist was regularly drunk. The jury awarded \$375,000. Subsequently the figure was reduced by consent to \$100,000. As against that and the present case a contrasting reference may be made to another Auckland case, arising also from a satirical television programme. The jury found an innuendo to the effect that the plaintiff had improperly received a commission on the purchase of paintings by a public art gallery of which he was chairman. The innuendo was plainly defamatory and the television company did not seek to justify it. The jury awarded only 'All legal fees', a verdict which had to be set aside in *Television New Zealand Ltd v. Keith* [1994] 2 N.Z.L.R. 84 as costs were not the province of the jury, who in truth had failed to perform their task of assessing what they obviously found to be substantial damages.

At the present stage I do not think that disquiet would be justified as to the general level of defamation awards by juries in this country. I accept, though, that juries should be aided by reasonably firm guidance from the presiding Judge. Normally it will be appropriate to stress that exemplary damages for defamation are



comparatively rare and should only be awarded if the jury are satisfied that compensatory (including aggravated) damages are not enough to punish the defendant and to deter the defendant and others from defaming people in flagrant disregard of their rights. As has been customary, the jury should be warned that in adding any punitive element within an award they should not be carried away.

I am a little more doubtful about telling them to be 'moderate', lest despite a truly outrageous case a jury might think that this means small. As already mentioned, homely practical illustrations of purchasing power should be helpful. I think, too, that a Judge should offer comments on the amount claimed by the plaintiff if the Judge considers that the amount is plainly excessive - a point to which it will be necessary to return in the next part of this judgment. The Court of Appeal has no power to fix damages except by consent, but, if help is available from decisions of this Court setting aside or sustaining awards in broadly comparable cases, it may well be desirable for the Judge to inform the jury of such decisions.

In the end the Judge must make it clear that, while he or she can make suggestions for their consideration, the decision is theirs. There should be no harm in adding that an undoubtedly excessive (or inadequate) award will be likely to lead to further proceedings in the case and may result in a setting aside by the trial Court or the Court of Appeal, thus necessitating a new trial. All in all, without trespassing improperly into the jury's sphere a Judge can find ways of helping them which they are likely to value and which should go far to reduce the risk of extravagant awards. The duty of fairness as between the parties does not forbid, and may indeed require, the Judge to play a constructive role.

One other issue of principle remains to be faced. This is whether the New Zealand Bill of Rights Act or the values enshrined in it (for present purposes I

do not think it useful to distinguish between the two) requires a new approach to summing up on damages in defamation cases. There is a suggestion that the New Zealand Act and the Canadian Charter, which both, in ss.1 and 5 respectively, allow for such *reasonable* limits prescribed by law as can be demonstrably justified in a free and democratic society, are significantly different in this respect from the European Convention, with its phrase '*necessary in a democratic society*'.

Very largely this seems to be a matter of word games. In relation to damages, liability for defamation having been established, the reasonable limit on the award is that it must not exceed what is sufficient or adequate to vindicate the plaintiff's reputation, assuage his or her injured feelings, and carry any punishment which is called for because the compensatory award is not sufficient or adequate for the purposes of punishment and deterrence: see for instance *Broome v. Cassell & Co. Ltd, cit. supra* at 1089 per Lord Reid. In other words what is reasonable is no more than what is necessary for proper compensation and punishment.

The material passage from *John* quoted earlier in the present judgment has the wording 'should never exceed' and 'strictly necessary for the protection of reputations'. Clearly the latter words were intended to comprehend punitive and deterrent awards found strictly necessary for the protection of reputations: the use of the plural 'reputations' by the Master of the Rolls and his colleagues is to be noted. But equally clearly the words *never* and *strictly*, evidently recommended to be used by Judges in the summing up, are intended to emphasise to juries the need for restraint. At this stage in New Zealand I would not favour laying down any general requirement that Judges should invariably use these particular expressions. No doubt there will be cases where the nature of the defamation and the atmosphere of the trial are such that the Judge will think it right to be so emphatic. Much should be left to the good sense of the Judge in the light of the circumstances of the case.

In not supporting any major change to the way in which Judges have summed up in the past, or indeed any change in the governing principles of defamation damages, I have also in mind a further factor not hitherto expressly mentioned. Freedom of speech is a cherished right and many judgments of this Court in which I have had some part have sought to fortify it. But very obviously it can be abused. A particular form of abuse possibly illustrated by the two television programmes now in question is that each seems to have been prompted by persons who had reason to feel animosity against the plaintiff. The first programme may well have been inspired initially by his fellow-shareholder, with whom he had fallen out and who appeared in it. The second evidently originated partly in the disappointment of men defeated in an election of club officials.

The threat of 'going to the papers' or to programmes like the Holmes one can be oppressive and unfair, especially with the power of modern mass media. Of course such a threat may be in the public interest, as in some cases of whistle-blowing. Still, in my opinion the risk of abuse is among the factors telling against changing the present balance of the law about freedom of speech.

### **Applying the Principles**

The jury were entitled to regard each of these programmes as a bad piece of defamation, most injurious to the plaintiff's reputation and grievously wounding to his feelings, although there was no evidence of financial loss. There was room for substantial added punitive ingredients in each award. The jury could have found that those responsible for the programmes, with the motive of increasing or maintaining ratings, deliberately made insinuations which they knew they could not prove, declined to retract or apologise at the time (a belated apology was published after the

trial and the judgment of Anderson J. and pending the appeal), responded to the plaintiff's complaint about the first programme by a second set of unproven and lightly investigated imputations designed to harm him further, and persisted at the trial in denying meanings which they must have expected the programmes to convey. Flagrant disregard of the plaintiff's rights is a perfectly fitting description.

Even so, considering the two awards together, which is appropriate in this case as it was in *Carson's* case in Australia, the total is startlingly high, and the second award alone is startlingly high. It is not always easy to rationalise a reaction to a jury's verdict which has provoked an exclamation of astonishment. The question is not what the trial Judge or a Court of Appeal would themselves have awarded, but whether the jury have gone beyond reasonable bounds. In this as in many other matters a trial Judge or a Court of Appeal has to take the responsibility of judging. There is no third umpire equipped with modern technology to resort to if the call is close. Members of the general public or academia will have views very likely varying, for an objective standard does not exist. But in this case it happens to be possible to go beyond reaction and impression, because there are two awards to compare.

In the light of the current purchasing power of \$400,000, the nature of the defamation and all the circumstances, I am not disturbed by the first award. Though high, it causes no shock. In line with the opinion of Anderson J. himself, I think that the second cannot be allowed to stand. The defamatory allegations, albeit serious and different from those in the first programme, cannot reasonably be seen as more serious. Some greater punitive element than was present in the \$400,000 might properly have been seen by the jury as called for in the second award to mark the vindictiveness of the defendant's conduct in returning to and widening the attack in the face of the complaint about the first programme. So I am disposed to think,

venturing to disagree with the trial Judge's remark in his judgment on the motion for a new trial 'An award even approaching the amount of the first verdict may well be amenable to striking down on the grounds of unreasonableness', that the jury could have gone to \$500,000 in the second award without that award being upset. But to give nearly three times as much as the first award was to go unreasonably far.

If the second claim is not settled and a trial with a jury becomes necessary, the acceptable level of damages may be affected by the evidence and the ways in which the cases of the parties are conducted at the second trial. Subject to that, the Judge might be wise to tell the jury that any award over \$500,000 would be at serious risk of being set aside. It would also be appropriate to tell them that the Judge is not suggesting that they should necessarily go as high as that level. In any event the Judge should explain that their task is to assess the damage to the plaintiff's reputation caused by the second programme in addition to what was caused by the first programme alone: together with any additional punishment which they may find to be required. I think that the Judge should also make it clear that the additional damage caused by the second programme would include any reminding of viewers of the defamatory allegations in the first programme.

Counsel for the television company made sundry criticisms of the summing up. By and large these savoured of attempts to rake up grievances and seem to me to be without real substance. For instance the jury was comprised, according to the occupations shown in the panel list, of an accountant, a nurse, a branch assistant, a nurse midwife, a bank officer, two housewives, a clerk, a secretary, a teacher, an administrator, and a mother. I would accept that the Judge's references in summing up to their knowledge of what a dollar is worth were enough for them on the purchasing power point. So too I think that enough - although perhaps only just enough - was said to underline to them that the plaintiff was not suing on some parts

of the programmes which would in themselves have been damaging to his reputation (see *Broadcasting Corporation of New Zealand v. Crush* [1988] 2 N.Z.L.R. 234, 238); and enough also to put before them the issue whether significant damage to the plaintiff's reputation was inevitably caused by other media publicity for which the defendant was not responsible. In general I respectfully regard the summing up as fair and correct.

But there is one way in which, without characterising anything as a misdirection, I think that the jury were left without sufficient help. This is the very question of the amounts of the plaintiff's claims. The Judge did not even give the customary direction that the amounts specified in the statement of claim were no more than upper limits. He faithfully summarised the submissions on both sides, including the argument for the defendant that the plaintiff was claiming 'vast and obscenely greedy sums', and he rightly described exemplary damages as rare. He told the jury to be neither niggardly nor extravagant, 'not to think in terms of lotto or soup kitchens'. He said repeatedly that they must be fair to both sides and reasonable. The tenor of the whole summing up is conveyed by his observation in the course of it '... my stance being absolutely neutral ...' Yet if, as may be inferred from his subsequent judgment, he considered the claim for \$2.3 million grossly excessive, I think that it would have been preferable to give some indication of that view. As it is, he gave no hint of surprise at that figure. The jury may have been encouraged by his silence to think that it was not beyond the pale. This may help to explain the extravagance of the award.

For these reasons I would dismiss both the appeal and the cross appeal. It should be recorded that in the event of that outcome Mr Kohler indicated that the plaintiff would agree to the new trial of the second claim, on damages only, taking place before Anderson J. sitting without a jury. As to costs in this Court, the

cross appeal was not much pressed, the argument being centred essentially on the defendant's appeal against the \$400,000 award. I would allow the respondent \$10,000 costs in this Court, together with the reasonable travelling and accommodation expenses of two counsel, to be settled by the Registrar.

The Court being unanimous in that result, the case will be disposed of accordingly.

Solicitors:

Simpson Grierson, Auckland, for Appellant  
Callaghan & Co., Auckland, for Respondent

BETWEEN      TELEVISION NEW ZEALAND  
LIMITED

Appellant

AND            TERENCE ANTHONY QUINN

Respondent

Coram            Cooke P  
(27.11.95)        Richardson J  
                      Gault J  
                      McKay J  
                      McGechan J

Hearing        27, 28 and 29 November 1995

Counsel        J G Miles QC, W Akel and H Wild for Appellant  
                      J G Kohler and G E Joyce for Respondent

Judgment     19 April 1996

---

JUDGMENT OF SIR IVOR RICHARDSON

---

I have had the advantage of reading in draft the extensive judgments of Lord Cooke, McKay J and McGechan J. For the reasons they give I would dismiss the appeal and the cross-appeal.

I hesitate to embark on a further discussion of the difficult question of how far New Zealand trial Judges should go in providing guidance to juries when considering the quantum of defamation awards. The relevant considerations have been canvassed in the other judgments and do not need repeating. While I would not impose a requirement on the trial Judge to indicate a ceiling or a range, there may be many



circumstances where it will be appropriate to do so. I also suggest that the trial Judge should comment on the amount claimed if he or she considers it to be exorbitant. Finally, where exemplary damages are sought, I suggest it will ordinarily be desirable to bring home to the jury that the sum awarded under this head should be no more than required to punish the defendant for the flagrant disregard of the plaintiff's rights.

Solicitors

Simpson Grierson, Auckland, for appellant  
Callaghan & Co, Auckland, for respondent

UNDER the Defamation Act 1954

BETWEEN TELEVISION NEW ZEALAND  
LIMITED

Appellant

AND TERENCE ANTHONY QUINN

Respondent

Coram: Cooke P  
(27.11.95) Richardson J  
Gault J  
McKay J  
McGechan J

Hearing: 27, 28, 29 November 1995

Counsel: J G Miles QC, W Akel and H Wild for Appellant  
J G Kohler and G E Joyce for Respondent

Judgment: 19 April 1996

---

JUDGMENT OF GAULT J

---

I have read in draft the judgments of the other members of the Court. I am content to express my full agreement with that of Lord Cooke of Thorndon.

Solicitors

Simpson Grierson, Auckland, For Appellant  
Callaghan & Co, Auckland, For Respondent.

UNDER

the Defamation Act 1954

BETWEEN

TELEVISION NEW ZEALAND  
LIMITED

First Appellant

AND

TERENCE ANTHONY  
QUINN

Second Appellant

Coram: Cooke P  
(27.11.95) Richardson J  
Gault J  
McKay J  
McGechan J

Hearing: 27, 28, 29 November 1995

Counsel: J G Miles QC, W Akel and H Wild for Appellant  
G J Kohler and G E Joyce for Respondent

Judgment: 19 April 1996

---

JUDGMENT OF MCKAY J

---

This appeal is concerned with the level of damages awarded by a jury in a claim for defamation. The trial Judge, Anderson J, refused to set aside as excessive an award of \$400,000 in respect of the first of two television programmes. A second programme, eight days later, was the subject of an award of \$1.1 million, but this was set aside and a new trial ordered, limited to the issue of damages. TVNZ appeals against the refusal to set aside the verdict in respect of the first programme, and Mr Quinn cross-appeals against the setting aside of the verdict in respect of the second. Each of the verdicts is higher than has ever previously been awarded in this

country for defamation, even after earlier verdicts have been adjusted for inflation. The matter has been argued on both sides with skill and thoroughness, and raises important questions as to the respective roles of Judge and jury on the issue of damages for defamation.

The background facts have been set out in some detail in the judgment of McGechan J, which I have read in draft, and I gratefully adopt his narrative. I am also in agreement with both his conclusions and his reasoning, and will therefore limit my judgment to certain considerations which in my view are of particular importance.

The first matter is the nature of the defamation. Mr Quinn was, at the relevant time, the President of the Auckland Trotting Club. He was also Governing Director of Vetmed Laboratories (NZ) Ltd, a company which on a modest scale carried on the business of supplying animal food supplements and animal health products. He had been associated in this business with a veterinary surgeon, but they had later parted company. Mr Quinn appears to have been appallingly lax in his administrative control and in his compliance with the legal requirements in respect of animal remedies. On 8 May 1990 the Registrar of the Animal Remedies Board, accompanied by a veterinary surgeon, inspected Vetmed's premises. They identified a number of irregularities which caused concern. Vetmed was notified of its shortcomings, and its licences for various animal remedies were suspended on 11 May. The Registrar, called as a witness by TVNZ, agreed that Mr Quinn was fully cooperative, and that he tidied up his act to the extent that his licences were restored as from 14 June. Legal action had not been contemplated. The Registrar made it clear that the Animal Remedies Act is concerned with ensuring that animal remedies are of appropriate safety, quality and efficiency. The Board was not involved in the racing industry, and at no time intended to suggest that Mr Quinn was involved in doping race horses.

The first television programme was broadcast on 11 June 1990. Mr Miles, for TVNZ, submitted that its purpose was to expose the activities of Vetmed, whose

Governing Director was the President of the Auckland Trotting Club. The slant given to the programme was very different. It can be seen by the presenter's introduction to the programme:

“Presenter: A month or so ago we carried a couple of stories suggesting drug abuse wasn't foreign at all to the racing world in New Zealand and tonight we bring you a revelation with all the elements of a Dick Francis novel. Race horses, drugs, people in high places, a reluctance to talk, all of it. Its all about a company called Vet Med and the two men who own it - one an equine vet, and other the President of the Auckland Trotting Club. And they're accused of unlawfully distributing performance enhancing substances. The charges comes from the Animal Remedies Board which is responsible for the licensing of all such products. And it's just suspended Vet Med's licence to sell a number of products, apparently the first time it's ever had to take such a step.”

The programme claimed that the Animal Remedies Board had just stopped Mr Quinn from selling “performance enhancing substances”. It referred to “a powerful pain killer which allows horses with muscular problems to push themselves through the pain barrier during races”, and said “some painkillers could cause horses to put too much stress on damaged joints, occasionally with tragic results”. This was accompanied with pictures of a horse falling during a race. The programme concluded as follows:

“Presenter: Well back in March two brave vets came on this programme and they claimed on the programme that doping had reached epidemic proportions. The racing authority said the story was unbalanced but they refused to release a report which we understand highlights grave deficiencies in their drug testing procedures. Well we believe its time for the internal Affairs Minister Margaret Austin to act. To order a Commission of Inquiry. It would be in the best interest of the poor old punter who spends a fortune on the gee gees in good faith every week. And it'd be in the best interests of the much forgotten victims, the horses themselves.”

Not surprisingly, the jury found that the programme in its entirety and in its natural and ordinary meaning as understood by reasonable people, meant that

Mr Quinn was supplying drugs for doping horses. They found that meaning to be defamatory. It was clearly so, and particularly damaging to a person holding a prominent position in the racing industry. There was no attempt to justify this meaning as being true. Surprisingly, TVNZ maintained that it was never intended to suggest that Mr Quinn was involved in the doping of horses. Mr Holmes, who was the presenter of the programme, and Mr Vaughan who appeared on it as the reporter, both gave evidence to this effect. They denied that there was any such implication in the programme. The jury were clearly entitled to reject their evidence. The jury was also entitled, in my view, to regard the persistence in such an untenable denial of the obvious as a matter in aggravation of damages. It was adding insult to injury.

The jury found that the programme also meant that Mr Quinn was illegally selling performance enhancing substances in the trotting or racing industries. Justification was pleaded in respect of this meaning, but the jury found it was neither true nor substantially true. The programme thus conveyed the most damaging of imputations against a man who not only held a high position in the trotting industry, but who was also associated with racehorses of all kinds through his business. These imputations were conveyed through the Holmes' Show in prime time on a television broadcast claimed to reach some 700,000 viewers. As Mr Kohler pointed out, the jury was entitled to conclude, contrary to the evidence of Messrs Holmes and Vaughan, that it was intended to convey the defamatory meanings, and these were included deliberately in order to make the programme more attractive to viewers. Mr Holmes in his evidence said "to me current affairs should have blood ... it should be a good watch". No opportunity was given to Mr Quinn to respond. There was no problem of urgency to impose time constraints, and there was no correction or apology until five years later, after the trial.

The second programme was broadcast eight days after the first. TVNZ had been notified that proceedings were to be issued in respect of the first programme, but through their solicitors had declined to publish any correction or retraction. The

Animal Remedies Board had by this time lifted its suspension. The second programme was introduced as “another disturbing report on the state of the racing industry”. It described its sources as “some of racing’s most experienced people, highly respected trotting officials” who alleged wrong doings in the Auckland Trotting Club. It claimed to have “more evidence against top trotting administrator Mr Terry Quinn”. It referred to its previous programme in regard to Mr Quinn, which it said had started “a flow of information”, and added that “A deputation of past and present Auckland Trotting Club committee members contacted ‘Holmes’ reporter Rod Vaughan.”

The programme continued as an interview with the past and present committee members. Allegations, suitably backed by pictures, were made as to the deliberate and suspiciously inexplicable concealment of the \$11 million price of a new grandstand; the possible disappearance of carpets and appliances worth about \$100,000, and possibly stolen; a trust fund supposed to contain nearly half a million dollars for prize money, which was not used for the purpose, with conflicting accounts as to where it had gone; and a sale of land for \$3.75 million without the knowledge or approval of committee members. The curious thing about these allegations is that they were not made by the persons interviewed. They were made by the reporter in his questions, but received no confirmation from the persons interviewed. They were unaware of any wrongdoing, but the putting of such questions created a powerful impression. One of those interviewed did consider the sale of land to have been at an undervalue, but he confirmed that he attended a special meeting to give approval to the sale. Of the five present and past committee members who appeared on the programme, only one gave evidence. He was called by the plaintiff. He attended the TVNZ studios following a request from the others to attend a meeting. He did not know the meeting was to be televised.

The jury found the programme meant that Mr Quinn was improperly involved or implicated in financial irregularities concerning the Auckland Trotting Club. They awarded \$1.1 million.

Damages in defamation are very much at large. The basis on which they should be awarded was referred to in the judgment of this Court in *Television New Zealand v Keith* [1994] 2 NZLR 84 at 86:

“Damages for defamation are intended to be compensation for the injury to reputation, and for the natural injury to feelings, and the grief and distress caused by the publication: see Gatley on Libel and Slander 8 ed para 1453; *McCarey v Associated Newspapers* [1965] 2 QB 86 at 104-5 per Pearson LJ. Damages can also be regarded as a vindication of the plaintiff and of his reputation. The Judge in this case referred to a comment by Windeyer J in *Uren v John Fairfax & Sons Pty Ltd* (1967) 118 at 150, where he said:

"It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways - as a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money."

That passage from the judgment of Windeyer J was adopted by Lord Hailsham in *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1071. Lord Hailsham, in the preceding paragraph of his judgment, said

“In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of *restitutio in integrum* has necessarily an even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge.”



At 1072 he concluded that the whole process of assessing damages where they are “at large” is essentially a matter of impression and not addition. That must make it more difficult for the Court to find, in terms of rule 494, that there has been a miscarriage of justice which justifies a new trial on the ground that the damages are excessive. The Court will nevertheless make such a finding where it is satisfied that the damages are truly excessive, in the sense of going beyond any figure which a jury could properly award. They must be such that “twelve sensible men could not reasonably have given them”; per Lord Esher in *Praed v Graham* (1889) 24 QBD 53, adopted by this Court in *Norton v Stringer* (1909) 29 NZLR 249 at 272, or “out of proportion to the injury suffered by the plaintiff so that it may be inferred that the jury could not have properly applied their minds to the relevant evidence”: per North P in *News Media Ownership v Finlay* [1970] NZLR 1089 at 1099.

Reference was made to the chilling effect excessive awards of damages for defamation can have on the media, giving rise to serious concern for the maintenance of investigative journalism and the wider dissemination of information. Similar concerns were expressed to the 1975-77 Committee on Defamation, but research carried out by the Committee showed that the level of damages awarded was not as high as had apparently been believed. Media fears were based more on the amounts claimed in some highly publicised proceedings than on the actual sums awarded. Although recommending against the imposition of a ceiling, the Committee also referred to the Court’s power to set aside an excessive award. The Committee proposed a new defence of qualified privilege for the media in matters of public interest, but this recommendation was not adopted by Parliament when the Defamation Act 1992 was passed. The proposed defence was to be subject to a number of restrictions, including a requirement for the publisher to have acted with reasonable care, and to have allowed the person defamed an opportunity for rebuttal or explanation. It would not have assisted TVNZ in this case.

The two programmes in the present case show no evidence that previous damages awards had had any chilling effect on TVNZ's investigative reporting. TVNZ had not been prepared to check the facts as to the animal remedies suspension, which was lifted after an inspection which took place while they were filming at the premises for the first programme. They were not dissuaded from adding interest to the programme by setting it in a context of horse doping and horse mistreatment. There was no foundation for linking Mr Quinn with that context.

The threat of proceedings had no inhibiting effect on TVNZ's decision to proceed with its second programme. Mr Quinn was portrayed, as the jury found, as being improperly involved in financial irregularities. That was done by an introductory statement and a series of questions asked by the reporter, but receiving no support from the persons interviewed. In its statement of defence, TVNZ did not plead justification. The last witness for the plaintiff, a journalist of some 40 years experience in England and in New Zealand in both newspapers and television, for many years a University tutor in journalism and a recipient of many awards, summed up the two programmes by saying:

“I think they were irresponsible. I think the research wasn't done. I think they were arrogant. That about sums it up. I'm ashamed of them.”

The jury may well have accepted that a substantial punitive award was necessary, not to inhibit responsible investigative journalism, but to have a “chilling effect” on what they may well have thought was an irresponsible attempt to add interest to a programme with complete disregard for truth. Counsel opened the case to the jury on the basis that the quest for ratings had made TVNZ high handedly and oppressively mindless of the damage that might be done if they were not correct in what they said. The viewing audience was put by Mr Holmes at about 700,000. The

importance of maintaining ratings, and their significance for advertising revenues, are unlikely to have escaped the jury's notice.

Punitive damages were expressly claimed in this case. They are now expressly provided for by section 28 of the Defamation Act 1992, but only where the defendant has acted in flagrant disregard of the rights of the plaintiff. The section does not apply to the present case, but it reflects the previous law in New Zealand since *Taylor v Beere* [1982] 1 NZLR 81, when this Court declined to adopt the narrower approach adopted by the House of Lords in *Rookes v Barnard* [1964] AC 1129, preferring the broader view of the High Court of Australia in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 and *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185, affirmed (1966) 117 CLR 221, [1969] 1 AC 590 (PC). The Report of the Committee on Defamation (1977) recommended (paras 387-391) that punitive damages be retained, but that their assessment be reserved to the Judge. This last proposal was not adopted, Parliament preferring to leave the assessment in the hands of the jury. The Report noted that punitive damages had never been awarded in an action for defamation in New Zealand, but this is not quite correct. There have been three reported cases, referred to in Laws of New Zealand, Defamation para 233 fn 1. Such awards have been extremely rare.

Punitive damages cannot, of their nature, be the subject of precise calculation. From the size of the awards in this case, it cannot be doubted that the jury allowed for a punitive element. Mr Miles did not suggest that it was not open to the jury to do so, and the inclusion of such an element makes it more difficult to attack the global figures awarded. The Court must nevertheless consider the awards in the light of the evidence, and reach a conclusion as to whether a jury could properly reach these figures. The fact that they exceed all previous awards for defamation in this country is an important factor to consider.

We have had many cases cited to us, and differing judicial views from many Judges in different countries. For my part, I do not believe any useful guidance could be obtained from comparing awards in personal injuries cases, even in the days before such claims were replaced by accident compensation. In England, where the Court in setting aside a verdict can itself fix the damages, it will use its own experience as a guide in order to achieve a degree of consistency. Comparisons with awards in other countries are of limited value. I believe the best guide is to apply the experience of other verdicts in other defamation cases to arrive at what appears to be the appropriate level in the particular case, and to recognise that a reasonable jury may properly go some distance above or below that figure. I do not suggest any detailed comparison of one award with another, as I believe that would be unhelpful. What is called for is rather a judgment of the particular case in the light of the overall experience. The relatively small number of cases that go to trial in New Zealand makes the task more difficult, but responsible counsel make a similar assessment when advising on the amount to be claimed, and in advising on settlement. Judges must do the same.

The broadcasts in the present case were defamation of the worst kind. I would not myself have put them individually in a worse class than the defamatory statement in *Truth v Holloway* [1960] NZLR 69, which alleged that a cabinet minister would “fix” import licences on request. That case is the highest previous award of damages for defamation to withstand challenge. But one must take account of the greater reach and impact of television, and the fact that the present claims include a punitive element. TVNZ relied on a number of matters which it said should reduce the award, including other and independent subsequent publicity, and the further allegations on which Mr Quinn elected not to sue. To me these had limited substance in comparison with the defamation which was the subject of the claim, and the jury may well have taken a similar view. I am not persuaded that the Bill of Rights has the result of putting media freedoms above the right to one’s reputation, nor that this case has anything to do with the proper freedom of the media, as distinct from a licence to be

irresponsible. In assessing a punitive element to discourage similar excesses in future, the jury was entitled to select a total figure which would in fact operate as a discouragement to a defendant of the power and size of TVNZ. Taking all these matters into account, I agree with Anderson J in the Court below that the verdict of \$400,000 for the first broadcast was at the upper limit of what might properly be awarded. I am not satisfied that it went beyond that point. I would dismiss the appeal based on excessive damages.

The second verdict of \$1.1 million is in my view excessive. It was directed to a different aspect of Mr Quinn's character, and could well have been seen as a deliberate attack on him in response to his complaint concerning the first programme. He was entitled to be compensated and vindicated in respect of the further slurs on his character. The fact that this further attack was by allegations purportedly founded on fact but not able to be sustained entitled the jury to make a further award of punitive damages. An award of \$1.1 million was clearly excessive, and was correctly set aside by the Judge. I would dismiss the cross-appeal.

The other grounds put forward for the appellant were alleged misdirections on the question of damages. These have been dealt with in detail in the judgment of McGechan J. I agree they should be rejected, for the reasons which he gives. I endorse in particular his rejection of the argument that the Judge should have indicated to the jury the range within which damages should be fixed.

In New Zealand, either party has the right to require a defamation proceeding to be tried by a jury, and the damages assessed by a jury. It is usually the plaintiff who chooses to have a jury. Issues as to reputation are commonly involved, and the damages are not a simple matter of calculation. As Lord Hailsham said in the passage quoted earlier from *Cassell & Co Ltd v Broome* [1992] AC 1027 at 1071, the assessment of compensation for loss of reputation involves a highly subjective

element. Different Judges will have different views, and at least one party is likely to be dissatisfied. If the damages are assessed by the unanimous or near unanimous verdict of 12 fellow citizens, it is difficult to complain of injustice. The exception is the extreme case where the verdict is so out of line as to suggest that the jury has not properly addressed the relevant evidence, and in such a case a new trial will be ordered. There is a strong argument for the view that public confidence in the Courts is better served by leaving the assessment to juries, rather than to the different views of individual Judges. The Committee on Defamation summarised the arguments for and against juries (Report, paras 460-472), but was divided and made no recommendation. Parliament in the Defamation Act 1992 not only retained the right to jury trial, but rejected the Committee's recommendation that the assessment of punitive damages should be reserved to the Judge (Report, para 391). While the trial Judge must direct the jury as to what are the relevant considerations, he must respect the fact that the decision is for the jury. It is not for him to suggest a figure, or even a range of figures.

Where the amount claimed is far in excess of previous awards, I think a Judge could quite properly draw this to the attention of the jury, and point out that while they could not award more than that amount, it is not otherwise relevant in making a proper assessment. It would be open to him, in an extreme case, to point out that an excessive award could be set aside, with the undesirable consequences to both parties of the delay and expense of a new trial. But I do not think any such directions should be prescribed as being mandatory. The essential requirement is to direct the jury as to the purpose of damages, and as to the need to assess them as the amount appropriate to achieve that purpose. It is appropriate to caution against extravagance. Where punitive damages are claimed, the jury should be directed to award them only if they are satisfied there has been a flagrant disregard of the plaintiff's rights, and if they are satisfied that the compensatory damages awarded will not have an adequate punitive effect without some further addition. The precise form which the directions should

take will depend on the particular case and the course of the trial, and are matters where the Judge must exercise his discretion.

In this case, where the amounts claimed were so large, some reference to their only relevance being as a ceiling, and to their irrelevance to the process of assessment would have been desirable. I agree that the omission of such a direction has not been shown to have resulted in a miscarriage of justice.

Because the claim was in respect of two separate publications, for which damages had to be assessed separately, it was important to ensure that damages were not given twice for the same thing. The Judge warned the jury of this danger of doubling up. Mr Quinn's reputation had been damaged by the first programme. Compensatory damages for the second programme had to be limited to the additional damage caused. Further punitive damages could be awarded only if the jury was satisfied that the second programme was so flagrant as to call for a punitive award, and that the compensatory damages, considered in the context of the award for the first programme, required some further increase to achieve this purpose.

Since writing the above, I have received a copy of the Times report of *John v MGN Ltd* (Court of Appeal 12 December 1995, Times Law Report 14 December 1995), and more recently a full transcript of the judgment and memoranda from counsel. The Court set aside a jury's award of £350,000, comprising £75,000 compensatory damages and £275,000 exemplary damages for defamation in respect of an article in the Daily Mirror. The Master of the Rolls, Sir Thomas Bingham, in delivering the judgment of the Court, referred to the traditional approach of Judges presiding over defamation trials to confine their jury directions to a statement of general principles, eschewing any specific guidance on the appropriate level of general damages in the particular case. He considered that the practical disadvantages of that approach had become manifest:

“A series of jury awards in sums wildly disproportionate to any damage conceivably suffered by the plaintiff has given rise to serious and justified criticism of the procedures leading to such awards.”

The Court was persuaded that the subject deserved reconsideration, despite the short period since it had reviewed the practice in directing juries in defamation cases in *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670, where it had said that there was no satisfactory way in which conventional awards in personal injury actions could be used to provide guidance for an award in a defamation action. There was continuing evidence, the Court said, of libel awards in sums which appeared so large as to bear no relation to the ordinary values of life, and the assessment of damages by libel juries failed to command the respect of lawyer and layman alike. Personal injuries would not be relied on as any exact guide, but juries might properly be asked to consider whether the injury to reputation of which the plaintiff complained should fairly justify any greater compensation than conventional awards for loss of a limb or of sight, or for quadriplegia. The Court said it was rightly offensive to public opinion that a defamation plaintiff should recover damages for injury to reputation greater, perhaps by a significant factor, than if that same plaintiff had been rendered a helpless cripple or an insensate vegetable.

The Court said the time had come when Judges and counsel should be free to draw the attention of juries to those comparisons. The Court could see no reason why counsel could not indicate to the jury the level of award they contended to be appropriate, nor why the Judge in directing the jury should not give a similar indication. If the jury made an award outside the upper or lower bounds, and the award was the subject of an appeal, real weight would have to be given to the possibility that their judgment should be preferred to that of the Judge. The Court described the changes which it favoured as modest but important.



In regard to exemplary damages, the Court said such damages should be added to the compensatory award only where the conditions for making an exemplary award were satisfied, and only when the sum awarded as compensatory damages was not itself sufficient to punish the defendant, to show that tort did not pay and to deter others from acting similarly.

The experience in New Zealand has been different. Mr Miles for the appellant submitted a table showing a “general pattern of relatively modest awards”. Only three were identified in the last decade as having exceeded the equivalent of \$100,000 after adjustment for inflation, one only marginally: *Parachutes and Para Equipment v BCNZ* (1985) BCL 1349, \$110,216. In *Crush v Radio New Zealand Ltd* [1988] NZLR 234 the total verdict as adjusted of \$192,259 covered eight publications. The last case, *McRae v ACP* (unreported, 1995) was clearly influenced by the course adopted by the defendant at trial, but the award of \$375,000 was appealed and was reduced by consent to \$100,000. There is no apparent need in this country to change the approach to jury directions.

I am not persuaded that there is any meaningful relationship between personal injuries and loss of reputation. Health and mobility are not necessarily of greater importance than reputation, and when personal injury cases were decided by juries and awards widely publicised, juries treated serious defamations as requiring substantial awards. I would see no problem in a direction of the kind proposed in *John’s* case, but I would not regard it as a requirement. In any event such a direction could no longer be given in New Zealand, as damages can no longer be obtained for personal injury by accident. There may be cases where the Judge feels it appropriate to suggest what he considers an appropriate level of damages, perhaps where counsel have been either extravagant or absurdly low, but the Judge is not required to do so, and he must be careful not to usurp the jury’s function. There are difficulties in giving any such direction, as pointed out by McGechan J.

I reject the various criticisms made of the summing up in this case, and in doing so respectfully adopt the reasons given by McGechan J in his judgment. In the result, I would dismiss both appeal and cross-appeal, with the consequential orders as to costs proposed by the President.

Solicitors

Simpson Grierson, Auckland, for Appellant  
Callaghan & Co, Auckland, for Respondent

UNDER the Defamation Act 1954

BETWEEN TELEVISION NEW ZEALAND  
LIMITED

Appellant

AND T A QUINN

Respondent

Coram: Cooke P  
(27.11.95) Richardson J  
Gault J  
McKay J  
McGechan J

Hearing: 27, 28, 29 November 1995

Counsel: J G Miles QC, W Akel & H Wild for Appellant  
G J Kohler & G Joyce for Respondent

Decision: 19 April 1996

---

**JUDGMENT OF McGECHAN J**

---

Appeal

The Appellant ("TVNZ") appeals against refusal by Anderson J to set aside judgment and to order a new trial (damages only) in respect of a defamation verdict for \$400,000. The Respondent ("Mr Quinn") cross appeals in respect of an order by

Anderson J setting aside judgment and ordering a new trial (damages only) in respect of a second defamation verdict of \$1.1 million. The awards, especially the latter, are the largest in New Zealand legal history. TVNZ takes this opportunity to urge this Court to formulate trial directions designed to moderate a perceived trend toward larger awards, particularly in their punitive elements. The proceedings do not involve the Defamation Act 1992.

### Background

There are two publications, each founding a separate claim.

The first involves a television broadcast by TVNZ on its so-called "Holmes" programme on 11 June 1990, approximately 6.30pm. Mr Quinn was, at the time, director of an animal food supplement company "Vetmed". He was also President of the Auckland Trotting Club ("ATC"). The programme ranged widely. It touched upon action taken by the Animal Remedies Board ("ARB") against Vetmed, effects which substances can have upon horses, business activities of Vetmed, its trainer clients, Mr Quinn's reluctance to talk, and an asserted need for a Commission of Inquiry. In essence however, as the jury found, it asserted Mr Quinn was supplying drugs for doping horses, and was illegally selling performance enhancing substances in the trotting or racing industries. Mr Quinn alleged knowledge of or recklessness as to falsity, with intent to injure reputation, and high handed and oppressive conduct. Mr Quinn claimed \$1.7 million "general aggravated and exemplary" damages.

The second involved a further television broadcast by TVNZ on "Holmes" eight days later, 19 June 1990. Again, the broadcast ranged widely. It opened with assertions of "wrongdoing in the Auckland Trotting Club", and spoke of "more evidence against" Mr Quinn. It canvassed elections to the Management Committee, irregularities in relation to grandstand construction, missing materials, a missing prize trust fund, and

sales of land at under value. It stated Mr Quinn was accused of endorsing betting cheques for criminals, and illegal gambling, with the possibility of charges by the New Zealand Harness Racing Conference ("NZHRC"). In essence, however, as the jury found on the meanings put, it alleged Mr Quinn was improperly involved or implicated in financial irregularities concerning the ATC. Mr Quinn again alleged knowledge of or recklessness as to falsity, with intent to injure, and high handed and oppressive conduct. He claimed \$2.3 million "general aggravated and exemplary" damages.

It will be necessary to return in more detail to the programmes' content and style when considering whether damages were excessive. Suffice it to say, for present, both programmes made an assortment of seriously damaging allegations, and were aggressive in style.

TVNZ did not, of course, deny the broadcasts. Defence, nevertheless, was robust. There was no prior apology. It denied defamatory meanings. It even denied identification of Mr Quinn in the second programme (plainly a hopeless assertion). It pleaded justification as to important elements of the first programme (sale of performance enhancing substances), along with fair comment. It did not plead justification, but again pleaded fair comment, in respect of the second programme. There were also pleas of a type of qualified privilege, plainly hopeless. Importantly, in respect of both, it pleaded damage to reputation was subsumed or mitigated by damage from publicity over charges as to corrupt practice and subsequent judicial proceedings.

The trial lasted some two and a half weeks, commencing 31 October 1994. Naturally, Mr Quinn gave evidence. He chose to call Mr Holmes as his own witness. He called a brace of veterinary, trainer, trotting club, and character witnesses, along with a

media expert. Consistently with its pleadings, TVNZ placed considerable emphasis upon Mr Quinn's problems with the ARB, and with the NZHRC disciplinary proceedings. TVNZ, having already had the gift of Mr Holmes, called the programme interviewer Mr Vaughan, and four veterinarians, one the Registrar of the ARB. After addresses and summing up, to which further reference will be needed, the jury answered issues put as follows:

"Programme 1

1. Does the first programme, in its entirety and in its natural and ordinary meaning as understood by reasonable people, mean that the plaintiff was supplying drugs for doping horses?  
Answer: ..... Yes
2. If the answer to (1) is *yes*, is that meaning defamatory of the plaintiff?  
Answer: ..... Yes
3. Does the first programme, in its entirety and in its natural and ordinary meaning as understood by reasonable people, mean that the plaintiff was illegally selling performance enhancing substances in the trotting or racing industries?  
Answer: ..... Yes
4. If the answer to (3) is *yes* then is that meaning true or substantially true?  
Answer: ..... No
5. If the answer to (4) is *no*, then is that meaning defamatory of the plaintiff?  
Answer: ..... Yes
6. If the answer to (2) is *yes* and/or the answer to (5) is *yes*, then what sum of money ought to be paid to the plaintiff by the defendant as damages?  
\$400,000

Programme 2

1. Does the second programme, in its entirety and in its natural and ordinary meaning as understood by reasonable people, mean that the plaintiff was improperly involved or implicated in financial irregularities concerning the Auckland Trotting Club?  
Answer: ..... Yes

2. If the answer to (1) is *yes*, is that meaning defamatory of the plaintiff?  
 Answer: ..... Yes
3. If the answer to (2) is *yes*, then what sum of money should be paid to the plaintiff by the defendant as damages?  
 \$1.1 million"

Anderson J entered judgment for the plaintiff in accordance with verdicts, reserving leave to apply to set aside. Application followed, with a reserved decision delivered 22 June 1995. I will return to the judgment so far as necessary at later points.

Principles: new trial: rule 494

The power to order new trial is granted and limited by High Court Rule 494, which so far as presently relevant reads:

494. Power to order new trial-(1) A new trial may be ordered only where, in the opinion of the Court, there has been a miscarriage of justice that justifies a new trial.

(2) An order under subclause (1) may be made on such terms as the Court things fit.

(3) Without limiting the circumstances in which the Court may hold that there has been a miscarriage of justice that justifies a new trial, it is hereby declared that the Court may hold that there has been such a miscarriage of justice if-

(a) The Judge has misdirected the jury on any material point of law, .....; or

.....

(c) The damages are excessive or too small... "

Rule 494 is to be read with companion Rule 495 prescribing procedure.

Appellant's submissions

Appellant's submissions in support of setting aside the verdict of \$400,000 in respect of the first programme, and resisting reinstatement of a verdict of \$1.1 million on the

second, were summarised by counsel for TVNZ as follows (the insertion "cc" in italics represents my own addition of an unlisted item emerging from subsequent text):

**"E. SUMMARY OF APPELLANT'S CONTENTIONS**

**37. The award of \$400,000 was excessive.**

- (a) The award cannot be justified on the facts of the case.
- (b) The award is clearly excessive when compared with other defamation awards.
- (c) The award clearly contains an element of exemplary damages which is beyond the level which is acceptable in New Zealand.
- (cc) *The manifestly excessive second award, and the circumstances of the case, render the first unreliable.*

**38. There were misdirections on points of law going to damages, which, both individually and when viewed as a whole, amounted to a miscarriage of justice requiring a new trial.**

- (a) The actual directions to the jury on damages were inadequate, particularly in light of the amount claimed (V I p104),
- (b) failing to direct the jury to award no more than was necessary to compensate the plaintiff and to re-establish his reputation (refer NZ Bill of Rights),
- (c) failing to give an appropriate range of damages,
- (d) failing to advise as to the financial implications of a large award,
- (e) failing to direct that the damages claimed of \$1.7 million and \$2.3 million was (sic) grossly excessive and to ignore the sums claimed.
- (f) Failing to adequately direct the jury to take into account the widespread independent publicity before and after the programmes.
- (g) Failing to direct the jury that the plaintiff was not complaining about material parts of both programmes which would affect



the plaintiff's reputation, contrary to express direction by the Court of Appeal in *BCNZ v Crush* [1988] 2 NZLR 234.

- (h) Failing to give the jury any direction that punitive damages should be moderate, and to be fair.
- (i) Failing to direct the jury that evidence relevant to a plea of justification, even if that defence is rejected, can still be taken into account in assessing damage.
- (j) Directing the jury in such a way as to lead the jury to believe that the defendant, in the conduct of its case, had set out to blacken the plaintiff's reputation and in summarising counsel for the plaintiff's submissions to this effect without putting the defendant's side.
- (k) Failing to direct the jury that the defendant did not attempt to justify the primary meanings alleged in respect of both programmes."

"Award excessive: cannot be justified on the facts of the case"

TVNZ submissions emphasised (i) the conduct of Vetmed (ii) "reasons" for the programme (iii) personal factors relating to Mr Quinn which should reduce the award.

As to conduct of Vetmed, submissions pointed to ARB concerns over Vetmed product management practices; MAF inspectors' evidence Vetmed premises were "one of the worst premises" ever visited; suspension by the ARB with reasons given; Mr Quinn's acceptance in evidence such criticisms were justified and that in retrospect the situation seemed serious; a longstanding and persistent sale of prescription products; deliberate unlicensed selling; and sales of "Letdown" against Department of Health objections.

As to "reasons" for the first programme, TVNZ claimed to have seen Vetmed as a "significant story" in the context of an asserted public concern at horse doping. As to the second programme, complaints of irregularities by club officials and Mr Quinn's

dealings with criminals were seen as legitimate subjects for investigation. As to both programmes, TVNZ had not endeavoured to justify primary meanings (supplying drugs for doping horses/illegally selling performance enhancing substances in trotting or racing industries; improper involvement or implication in financial irregularities concerning the Auckland Trotting Club) as found by the jury. (The alleged primary meaning of illegal sale of performance enhancing substances was in fact the subject of a justification plea, ultimately negated by the jury).

As to personal factors, TVNZ referred to the independent publicity arising out of Mr Quinn's role as President shortly after the programmes screened (examples produced); its "catastrophic effect", as acknowledged by him; his offer (and the initial refusal to accept) resignation; his choice not to sue on certain other damaging allegations made in both programmes; absence of financial loss as a result of the programmes (indeed, increase in other fields); his "public role" as President of the ATC; his (limited) family; and the fact his friends, for the most part, stood by him.

All three factors were put as suggesting "a relatively modest award" rather than New Zealand's largest award to date.

Mr Quinn's submissions challenged, from outset, the TVNZ assertion as to "what the two Holmes programmes were about". The first programme, despite TVNZ denials, portrayed him as someone involved in wrongdoing. The second programme associated him with four categories of "financial irregularities" relating to the ATC. TVNZ's contentions as to what the programme was about had been "patently unsustainable"; as was the assertion Mr Quinn was not identified as a wrong doer in the second programme. (I pause to observe submissions to this point have the support of jury answers to issues put).

Counsel then responded to TVNZ's position.

As to the first programme, Mr Quinn submitted TVNZ had taken a "hiccup" with the ARB, exaggerating it to run a story about horse doping. Counsel pointed to evidence Vetmed's business was geared to products mostly maintaining the health and condition of horses; room for a view references to "performance enhancing substances" were misplaced (being intended to give a "sting" to the programme); and evidence administrative problems of Vetmed were being worked through with the ARB to its ultimate satisfaction before the Holmes programmes, with suspension lifted between the first and second programmes.

As to the second programme, which was not the subject of a justification plea, counsel analysed the rolled up "irregularities" issue into its four constituent elements of grandstand, materials lost, missing trust fund, and sale of land at under value. Counsel pointed to evidence that they were not in fact irregularities; and from one of the sources for the second programme as to his embarrassment at the allegations made.

As to both, and personal factors, counsel identified TVNZ references to prosecutions of Mr Quinn as an exercise in blackening and destruction of reputation. Counsel put the alleged resulting loss of character in perspective by reference to evidence of Mr Quinn's unblemished reputation otherwise, and the actual history of the charges concerned. On one charge, a police prosecution as to participation in an illegal card game, all others had been acquitted, it being found the game was not illegal. Mr Quinn, who had previously elected diversion, nevertheless was charged before the NZHRC disciplinary sub-committee. His "conviction", some five weeks after the second Holmes programme, had been overturned on appeal. The other charges, endorsement of cheques for known criminals, had been a matter of routine, not

remembered; with convictions overturned by the Court of Appeal on a judicial review application on appropriate limitation grounds. Moreover, attention should be directed to reputation at time of defamation; not any reduced reputation which developed subsequently. Counsel cited in that connection *Associated Newspapers Ltd v Dingle* [1964] AC 371, 399; *Rochford v John Fairfax & Sons Ltd* [1972] 1 NSWLR 16, 22; Gatley 8th ed para 1415, 1419.

While I have summarised the arguments on both sides, I consider the question of "excess" should be looked at in a broad perspective. It is a question for juries, not for judges. The traditional approach has been to assess whether "the amount is so high or so low that it is outside the range of what could reasonably be regarded as appropriate to the circumstances of the case", ie is irrational (*Carson v John Fairfax & Sons Ltd* [1993] 178 CLR 44), or as it sometimes is put is "so excessive as to shock conscience" cp *Manning v Hill* (1995) 126 DLR (4th) 129, 175. Other United Kingdom formulations can be found in *Sutcliffe v Pressdram Ltd* [1990] 1 All ER 269, 282. All circumstances are relevant.

Anderson J concluded:

"If the first publication had been tried separately and all the aggravating aspects of the defendant's conduct not exclusive to the second defamation were brought into account, and the exemplary elements properly a component of a reasonable award were brought into account, I would decline to set aside the award. I think \$400,000 would be the mete of reasonableness appropriate to the circumstances of the case."

I agree, assuming "mete" means boundary rather than paradigm. The \$400,000 is right toward the upper boundaries of the rational, but not beyond the pale. The jury could well have considered this was a poisonous programme. Viewed as well as heard, it clearly set out to associate Mr Quinn with horse doping for profit, and with financial irregularities of a disreputable and even criminal nature in the course of

discharge of his functions as President of the ATC. There was precious little foundation for those extremes. Attempts at trial to repaint programme intentions and content in a different light were disingenuous. There was plain exaggeration for journalistic impact. In a telling comment in evidence Mr Holmes, presenter, said generally:

"I make no apology for wanting the programme to be watchable. All my life I've been fascinated by current affairs. I love it. I love the news and to me current affairs should have blood. It doesn't have to be cold and dispassionate, it should be fair yes, both sides or all sides should be heard but it should be a good watch, it should make you want to watch."

In this particular programme the commendable precept of "fairness" was lost in the "good watch". It is true that extraneous publicity in itself subsequently caused considerable damage to Mr Quinn's reputation. For my own part, I am not attracted to any rigid rule under which the quantum clock stops at the moment of defamatory publication. Reputation is an ongoing state. In assessing compensatory elements in damages, there seems room logically for allowance for damage which hindsight tells us would have occurred in any event. The same may not be so true of punitive damages, which have different aims. However, even with allowances made in TVNZ's favour for damage to Mr Quinn's reputation which may have been caused by other matters and media attention, there was and remained a substantial character which was significantly damaged. It was open to a jury, on certain views of the evidence, and if properly directed, to return the \$400,000 verdict which it did. It cannot be said, simply on the facts of the case, to be excessive.

"Award excessive: comparison with other defamation awards"

TVNZ submitted the Court was entitled to look at other awards. There was acknowledged conflict of authority on the point. TVNZ drew upon recognition in

New Zealand such was open, in a personal injury context, in *Gray v Deakin* [1965] NZLR 234, 236; noted approaches by Prichard J in *Jensen v Clark* [1982] 2 NZLR 268, 280 and in *Britton v Nichols and News Media (Auckland) Ltd* (unreported, High Court, Auckland, A1424/78, 6.8.81); and views in an assault and punitive damages context of Chilwell J in *A v M* [1991] 3 NZLR 228, 252. It was submitted on the basis of recognition in *Gray v Deakin* (i) that juries gradually evolved patterns for themselves and (ii) a trial judge could indicate a general range, that such comparison was appropriate. In the particular aspect of punitive damages, it would be difficult to exercise a supervisory role otherwise. Counsel canvassed authority from abroad. I accept the general accuracy of the latter review. In the United Kingdom, *Rantzen v Mirror Group Newspapers Ltd* [1993] 4 All ER 975 was noted as recognising that in course of time appellate decisions substituting for jury awards would establish standards; and as recognising the appropriateness of judicial guidelines (presumably so developed). There was conflict whether comparisons between personal injury awards and defamation awards were legitimate: *Sutcliffe v Pressdram Ltd* [1990] 1 All ER 269, 281-2 and *Rantzen v Mirror Group Newspapers Ltd supra* 996-7 ruling against; and Lord Diplock in eg *McCarey v Associated Newspapers Limited* [1964] 3 All ER 947 being in favour. In Canadian courts, little gain was seen in detailed comparison of defamation awards: *Manning v Hill* (1995) 126 DLR (4th) 129, 187. Australia to the contrary, favours comparison with both defamation and personal injury awards (at least at the appellate stage), seeing need to maintain a relationship between the reputational and the physical: *Carson v John Fairfax & Sons Ltd* [1992]1993] 178 CLR 44, 58-59; *Australian Consolidated Press Limited v Ettingshausen*, 13/10/93, NSW CA, 40079/93. Counsel did not suggest some inappropriate comparison between nonexistent personal injury awards and defamation awards; but sought to draw upon that Australian readiness as justifying New Zealand comparisons between defamation awards in themselves. There was

expressed concern at a perceived trend to unacceptably high awards. The trend so far as identified was no more than *McRae* and this present case.

Counsel for Mr Quinn endorsed Anderson J's approach that "there is limited, if any, jurisdictional value in any historical awards", such perhaps simply showing a "consistently parsimonious" approach, or reflecting the litigation rather than settlement of cases of limited damage to reputation. Without election between the options of "limited" and "any", counsel noted some of the larger United Kingdom awards, as listed in *Burrowes* News Media Law in New Zealand 3rd ed 48, the Australian *Carson* and *Ettingshausen* awards (*supra*) (dismissed as of little help), and the award in the Canadian case of *Manning v Hill supra*. In the same breath however, counsel cited observations in the Court of Appeal of Ontario in the latter (sub nom *Hill v Church of Scientology of Toronto* [1994] 114 DLR 4th 1) that "an award in one case is rarely, if ever, a useful guide in another" (44) and by Cory J in the Supreme Court of Canada *supra* 183 "... there is little to be gained from a detailed comparison of libel awards". Counsel submitted it was inappropriate to compare libel and personal injury awards, citing *Rantzen* et al and *Manning v Hill's* rejection of the Australian approach to the contrary (*ibid*, 178). Counsel acknowledged greater room for comparison with compensatory damages, as contrasted with punitive.

In my view, comparisons can have some value - not by any means determinative, but *some* value - at the extreme of determination whether an award is so irrational as to be set aside. It is a matter of commonsense. If a figure is "completely unheard of" or "unparalleled", that may be some guide as to whether it is supportable. It is artificial to ignore that human reality. However, it is only at that extreme that the exercise is at all useful; and even then, given the very different circumstances of individual cases, applicable only with real caution. As I will develop *infra* in relation to submissions juries should be assisted with "ranges", there simply is not the data or consistency of

awards in New Zealand to allow routine comparisons case by case. Comparisons are some guide to extreme limits; but within that, no guide to the appropriate.

Counsel for TVNZ produced an inflation adjusted table of selected defamation awards from 1959 (*Truth v Holloway*) to 1994 (*McRae v Australian Consolidated Press*), and a further table, not inflation adjusted, of punitive damages (all causes of action) 1986-1994. Counsel submitted there was a consistent maximum in the vicinity of \$150,000 with higher figures being exceptional.

I consider that approach and submission over-simplifies the present matter of "excess" determination. The present is not a simple matter of the "usual". There have been some awards - few, but they exist - not far away. Those noted by Anderson J were:

<u>"Case</u>	<u>Year</u>	<u>Adjusted Value</u>
Truth v Holloway	1959	\$304,000
McGaveston v Christchurch Press	1983	\$209,000
Birch v BCNZ	1983	\$369,000
McRae v ACP	1994	\$375,000"

(The last, the so-called "Felicity Ferret" matter, was settled subsequently at \$100,000). There are considerable differences amongst these four, and between all of the four and our present case. However - in contrast to the \$1.1 million award which Anderson J set aside - the \$400,000 for the first publication is not wholly outside anything previously known. So far as comparisons are useful, they do not assist TVNZ in the way claimed.



"Award excessive: element of exemplary damages beyond the level acceptable in New Zealand"

It is recognised New Zealand courts will not countenance "extravagant" awards of exemplary damages, *Sharma v ANZ Banking Group New Zealand Limited* (1992) 6 PRNZ 386, 390 *Duffy v Attorney-General* 3/2/86, Wellington HC, A No. 352/82, Eichelbaum J ("should be exercised with moderation"); and recently *G v S* 22/6/94, Auckland HC, CP 576/93 Blanchard J ("fairly modest awards"). In *Sharma supra* \$900,000 claimed was rejected out of hand; and in *Auckland City Council v Blundell* [1986] 1 NZLR 732, 740, \$500,000 was rejected likewise, even \$50,000 being seen as suspect. In *Duffy supra* a jury's award of \$45,000 was reduced to \$20,000. The like figure was adopted by Chilwell J sitting alone in *A v M* [1991] 3 NZLR 228, 252. A schedule of identified awards (mostly judge alone) put in by counsel for TVNZ did not support figures above \$45,000. Illustrating the difficulties involved in such studies, however, none was for defamation. Trends abroad are said to be similar. *Manning v Hill supra* involving an award of \$800,000, is wholly exceptional.

Mr Quinn claimed "compensatory, aggravated, and exemplary" damages. As ultimately formulated, the statement of claim did not differentiate by assigning separate figures to each. The jury were directed in terms which clearly enough required consideration of exemplary damages as a separate item. There is no way of knowing how the jury quantified the respective ingredients, in particular the exemplary damages component.

Counsel for TVNZ faces that problem by a simple contention: the total award is so high it "must have" contained an unacceptable level of punitive damages.

The matter is not quite so simple. As noted, there was evidence on the basis of which a considerable compensatory (and aggravated) element could be justified. It was a serious defamation, widely publicised, causing significant damage to reputation. It was steadfastly maintained in manner which could be regarded as giving rise to aggravation. One cannot simply assume only moderate compensatory and aggravated damages were awarded. It is quite possible a very substantial sum was assessed. Even then, a significant sum of exemplary damages would be required to make up the ultimate total of \$400,000. Possibly, it was larger than the uncertain pattern which has emerged in cases in other areas to date. However, I feel quite unable to say the sum must necessarily have been so large as to fall outside general principles and to be excessive accordingly.

"Award excessive: impact on first award of second award"

TVNZ submits the "manifestly excessive" second award (\$1.1 million), in all the circumstances of the case, renders the first award unreliable. Relationships between the two programmes and surrounding circumstances were emphasised. With such close proximity, and one award clearly dictated by improper considerations, "it is a reasonable proposition" similar considerations would have influenced the other. Counsel cited *John Fairfax & Sons Ltd v Carson* [1991] 24 NSWLR 259, 303 per Priestly JA, and the majority judgment in the High Court of Australia at pg 55.

This is an approach to be applied with considerable caution. With two separate publications, a week apart, on different fields of activity and with exemplary damages elements in issue, different considerations can arise. The fact a jury errs on one of the pair may well raise some concerns as to its approach to the other. Imperfection justifies attention. However, it goes too far to say "it is a reasonable proposition" similar error occurred. Such may or may not be the case. Significantly, the High

Court of Australia set the standard as one where "it is apparent that one or both of the jury's verdicts must demonstrably be perverse" (55). The \$1.1 million verdict is in that category. However, the \$400,000 verdict, in respect of a different programme, separated in time, is so markedly different in amount, and without anything other than fanciful correlation, that it is not sensibly regarded as infected by association. It can, and should, stand in its own right.

Misdirections: "actual directions inadequate, particularly in light of amounts claimed"

This submission, as noted in counsel's summary quoted above, referred most specifically to a passage in the summing up which reads as follows:

"Now in deciding what amount is proper to award a jury must be fair to each side. A jury must be fair and reasonable to each side. It must not be niggardly but on the other hand it must not be extravagant. It must be fair. A jury must fairly and reasonably compensate a plaintiff who has been damaged for the damage to reputation. Your responsibility if you find that the plaintiff has been defamed is not to think in terms of lotto or soup kitchens. Don't be niggardly, don't be extravagant, be fair. Mr Foreman, members of the jury, you all know what a dollar is worth. You all know what money is about. It is for you to decide, using your commonsense, being fair, applying your knowledge of the world, what you can buy for this much and what you can buy for that much, that type of thing. It is for you to decide what would be fair and reasonable compensation for the plaintiff if you find he has been defamed. Mr Miles submitted that you should approach the matter of damages as if the money involved was your own. I don't know, with respect, whether you should because what is fair and reasonable compensation for a plaintiff does not depend on your individual financial circumstances at all. What you have to do is be fair; be fair and reasonable in determining what is proper compensation, and that is for you. As I said, you use your own wisdom and experience."

The submission was not separately developed; complaints being picked up in submissions on detailed aspects which follow.

Misdirections: "Bill of Rights: failure to direct jury to award no more than "necessary" to compensate and re-establish reputation"

TVNZ submitted that in light of provisions of the Bill of Rights, and the approach adopted in light of the Convention for the Protection of Human Rights and Fundamental Freedoms recently in England, quantum directions to juries require modification. It was put as no longer sufficient to direct upon the open discretion basis, guided merely by exhortation to "be fair/not niggardly/not extravagant". The direction required in this and future cases was put as "award no more than is necessary to compensate the plaintiff and to re-establish his reputation", plus an exemplary damages direction, emphasising no doubt necessity for moderation, where exemplary damages are in issue.

The Bill of Rights (New Zealand Bill of Rights Act 1990) s14 provides:

"Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form".

It is of course to be read in the context of s28 which preserves existing rights and freedoms. TVNZ does not dispute, in its counsel's words, such include a "right to integrity of reputation"; and that both must be reconciled. It is to be read also in the light of direction in s5 that (*italics added*):

"... the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as *can be demonstrably justified* in a free and democratic society".

It is well established that limits "prescribed by law" include prescription through the common law.

Against that background, TVNZ points to the decision of the English Court of Appeal in *Rantzen v Mirror Group Newspapers Ltd* [1993] 4 All ER 975 and its approach to the Convention Article 10, as comparable and applicable.

Once again, the situation is not quite so simple. *Rantzen* involved a tabloid newspaper defamation of (ironically) a prominent television presenter. She received a very substantial damages award (£250,000). Damages were compensatory only; punitive damages not arising. The summing up (1984) was in conventional terms (fair and reasonable; not miserly or excessive; taking into account the value of money). Article 10(1) prescribes a right to freedom of expression. Article 10(2) provides that exercise of freedom of expression may be (italics added):

"subject to such formalities, conditions, restrictions or penalties as are prescribed by law and *are necessary* in a democratic society ... for the protection of the reputation or rights of others ..."

In essence, the newspaper's contention was that open and unguided jury powers as to quantum exceeded restrictions "necessary" in those terms. It was contended directions to juries should be reformulated accordingly. It was, of course, an inevitable corollary that threshold for review should reduce correspondingly: the Court would inquire whether a jury could have thought the award "necessary".

The Court responded positively. It acknowledged, of course, the Convention was not domestic law; but on authority treated the Convention as "an articulation of some of the principles underlying the common law". The Court then, on authority, recognised that (1994) "the word 'necessary' in this context implies the existence of a pressing social need". The new articulation of common law principle accordingly became one under which freedom of expression was not to be restricted, for example by defamation damages, any more than was "necessary". The criterion "necessary", in line with accepted interpretation of the Convention wording, involved a so-called

"pressing social need" for protection of reputation. Consistently (1994) "interference with freedom of expression should be no more than as is proportionate to the legislative aim pursued". Then, crucially, the Court held (1994):

"If one applies these words it seems to us that the grant of an almost limitless discretion to a jury fails to provide satisfactory measurement for deciding what is 'necessary in a democratic society' or 'justified by a pressing social need'. We consider therefore that the common law if properly understood requires the courts to subject large awards of damages to a more searching scrutiny than has been customary in the past. It follows that what has been regarded as the barrier against intervention should be lowered. The question becomes: could a reasonable jury have thought that this award was necessary to compensate the plaintiff and to re-establish his reputation?"

and then (1997)(italics added):

"It is to be hoped that in the course of time a series of decisions of the Court of Appeal will establish some standards as to what are, in the terms of s8 of the 1990 Act, 'proper' awards. In the meantime the jury should be invited to consider the purchasing power of any award which they may make. In addition they should be asked to ensure that any award they make is proportionate to the damage which the plaintiff has suffered and is a sum *which it is necessary* to award him to provide adequate compensation and to re-establish his reputation."

The Court, applying so-called "objective standards of reasonable compensation or necessity or proportionality" reduced the £250,000 to £110,000.

**Rantzen** found subsequent support from the European Court of Human Rights in ***Tolstoy Miloslavsky v The United Kingdom***, 13/07/95, European Court of Human Rights, 8/1994/455/536 para 50.

Anderson J declined to apply a **Rantzen** "necessary to compensate and re-establish", regarded as a departure from authority. His Honour, however, then took counsel's argument as being at a lower plane, ie that the verdict should be tested for excess in

light of the affirmation of freedom of expression in s14. His Honour did not feel so constrained. There was and is an acknowledged historic right to integrity of reputation. Anderson J considered it would be a "selective, merely expedient invocation of the Bill of Rights" to adopt a test for excess leaning more to the publisher than the defamed than permitted by present "tension" between the rights involved. Indeed the "overwhelming power of modern media" supported "diligently maintaining" the historical right to reputation.

In this Court counsel for TVNZ protested, orally, this reformulation "misunderstood" his argument: the essential contention was that the Bill of Rights required a "change of emphasis". The "almost limitless discretion" of juries was put as inconsistent with the approach to freedoms in s5. Previous approaches now were inadequate.

Counsel for Mr Quinn adopted Anderson J's approach; drawing added support from preliminary rejection of suggested qualified privilege for the news media; public policy implications of the refusal of greater protection within the recent Defamation Act 1992; and the decision of the Supreme Court of Canada in *Manning v Hill* (1995) 126 DLR (4th) 129, 174-186 (the latter decided subsequent to Anderson J's ruling).

As a general and opening position, I endorse alignment between jury directions and dictates of the Bill of Rights. It is an inevitability. It is the Court's duty to support freedoms in the Bill of Rights, not to frustrate them. To that extent, I have no difficulty with the aims implicit in *Rantzen*.

However, I do not proceed on to accept one should apply *Rantzen* in New Zealand so as to produce the sought after and specific "necessary to compensate and re-establish reputation" direction, or consequent adjusted review threshold.

First, *Rantzen* starts from a different basis. It starts from Convention Article 10(2) words "subject to ... restrictions ... as are prescribed by law and *are necessary*" (italics added), taken as articulating the common law. The New Zealand Bill of Rights s4, in contrast, is worded "subject only to such reasonable limits prescribed by law as can be demonstrably justified ...". The words of the Convention were passed over. The words of the Canadian Charter of Rights and Freedoms (1982) were preferred. This is not mere articulation of the common law. It is statutory direction. In *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 a full Court (Eichelbaum CJ, Greig J) considered (62) there is "a significant difference between what may be necessary and thus be of pressing social need and what may be said to be a reasonable limit demonstrably justified in a free and democratic society". I respectfully agree. I am not at all persuaded "necessary" (even in the sense of "pressing social need") and "can be demonstrably justified" are identical. The focus of the former is narrower. That which is necessary clearly can be "demonstrably justified". However, the converse does not follow. It is necessary for all in society to receive basic education. It is not necessary all in society cease to smoke, although reduction or even prohibition clearly can be "demonstrably justified", even in a free and democratic society. Section 5 Bill of Rights can be regarded as allowing a rather broader scope of restrictions upon freedom of expression than s10 of the Convention. We should not simplistically adopt the *Rantzen* and Convention "necessary" as the appropriate civil rights-driven measure.

Second, and travelling beyond wording, this is a domestic New Zealand problem. It does not have significant international ramifications to be taken into account. We should look, in the first instance, at the precise domestic problem, and the most suitable domestic solution. In doing so, we must keep local Bill of Rights policy in mind, and not impinge upon either freedom or right beyond the demonstrably justifiable. The problem is one of irrationally large jury awards, particularly in



punitive damages elements. The best solution is to directly address and curb those upper excesses. That is required, but no more. Whatever might be the most effective approach with an English jury, a topic on which of course I defer, I have no doubt as to the best approach with a New Zealand jury. The risk of irrational excess is best dealt with in a direct and focused way by emphasising (and re-emphasising) to juries that they must not go beyond the rational - must not be "extravagant" in traditional terms - and must be "moderate" in relation to exemplary damages. It would of course be possible to sidle into the issue by starting at the bottom end, adopting imported phraseology which tells juries to award not more than "necessary" (in Anderson J's words "a bare minimum"). It would not however be as effective as confronting the issue directly, at the precise point of difficulty, by counselling restraint against excess, in those very words.

Albeit for somewhat different reasons, I join with Anderson J in declining to accept New Zealand should adopt the *Rantzen* "necessary" approach to directions to quantum, or as to review threshold. I consider there is some room, in light of Bill of Rights considerations, for added emphasis to juries against extravagance; but that is a different and lesser matter. I will return to it in due course.

Misdirection: "failing to give appropriate range"

TVNZ submitted to Anderson J that since abolition of personal injuries actions New Zealand juries had no experience of damages awards, except in rare defamation cases. The only guidance before the jury had been the widely published award of \$375,000 in *McRae v Australian Consolidation Press NZ Ltd* on 27 April 1994. That, plus the high figures claimed, required the trial Judge to refer to "an appropriate range". Counsel cited Australian approaches in *Carson v John Fairfax & Sons Ltd* [1992-1993] 178 CLR 44, 59 and *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211.

Anderson J rejected the range approach. The appropriate range would be a personal and subjective view of the Judge; there should be diffidence over usurpation of the jury's function; there would be "no legal basis" for any range a Judge might suggest; counsel were unable to suggest an appropriate range; the approach had been rejected by the English Court of Appeal in *Sutcliffe v Pressdram Ltd* [1990] 1 All ER 269; no assistance could be gained from personal injury awards; it would not be helpful to examine jury awards in other defamation cases involving quite different circumstances; and it would involve the Judge in indicating a view of the facts, or exploring a complex of factual assumptions. Judicial restraint was "soundly based in jurisprudence and founded in commonsense".

In this Court, TVNZ adopted the same approach and authorities, and submitted the Judge's references to usurpation of jury function, absence of legal basis, absence of assistance from personal injury awards, unhelpfulness of jury awards in other defamation cases, and necessity to indicate a view of the facts were wrong. It was submitted all would have been relevant in personal injury days; but despite that the Court in *Gray v Deakin* [1965] NZLR 234, 237 had stated (per North P) "I know of no rule which prevents a Judge - if he thinks fit - indicating in a general way the range of possible damage". With the demise of background knowledge arising from personal injury cases, and the advent of the Bill of Rights (reference no doubt to s14 and s5) "a range of possible damages should normally be a requirement". It was, in any event, inherent in the later review process assessing whether an award was "excessive". Counsel referred also to *Rantzen's* recognition of availability of guidance to juries from Court of Appeal substituted awards. In response to questions from the Bench, counsel suggested the source for appropriate data could be the McKay report (1977) and a 1988 Legal Research Foundation paper. No doubt undue modesty foreclosed reference to schedules listing selected awards put in by counsel.

It was said there would be no duty on counsel to assist (let alone agree) with ranges to be reviewed in summing up, counsel being at liberty to reserve position. Counsel did not contemplate the Court somehow specifying "bands", with upper and lower figures, analogous to sentencing tariffs in the criminal field.

Counsel for Mr Quinn adopted the reasoning of Anderson J; reinforcing with reference to absence of legal requirement for a Judge to provide ranges in either the 1954 or 1992 Acts; the contrary views expressed in *Manning v Hill supra* 176; and in *Ward v James* [1965] 1 All ER 563; 575, 586.

Since hearing, the judgment of the English Court of Appeal in *Elton John v MGN Ltd*, 12 December 1995, not yet reported, has come to hand. The Court accepted a problem had developed in England, at least since 1981, in relation to wholly excessive jury awards in libel actions. The trend was seen as potentially affecting public confidence in the judicial system. The time had come for reconsideration of the traditional barrier upon guidance by counsel or Judges as to appropriate figures. The Court identified and considered four possible changes. (i) Reference to previous jury awards. This, at present date at least, was rejected. (ii) Reference to awards substituted by the Court of Appeal under legislative authority. That was accepted, but there was insufficient corpus of decisions to be presently useful. (iii) Reference to damages in personal injury cases. In England, such cases are now decided almost entirely by Judges sitting alone. The Court accepted awards in personal injury cases and in defamation cases could not be equated, but recognised awards in personal injury cases could properly be referred to as a cross check as to whether a proposed award in a defamation case was reasonable. It was considered potentially unreasonable to award more for damage to reputation than would be awarded in the case of very serious injuries. Counsel and the Judge should be free to develop that aspect before the jury. (iv) References by counsel and the Judge to their perceptions

of an appropriate award or appropriate bracket. Henceforward, such were to be regarded as appropriate.

I will deal with aspect (iv) later in this judgment. As to aspects (i), (ii) and (iii), significantly for present purposes the Court was not prepared to refer to previous jury awards. There is not to be guidance from the unguided. References to potential for guidance from substituted Court of Appeal awards, and from personal injury awards as a check for reasonableness, of course have no application under New Zealand conditions. None such exist.

In my view, there was no requirement upon Anderson J to provide a "range" to the jury. Indeed, I consider such would rarely if ever be appropriate in a defamation jury trial.

Certainly, the provision of a range has logical attractions. In the abstract, a jury attempting to be fair, neither niggardly nor excessive, should be helped by knowing and considering the assessments by other juries in like circumstances, whether put forward as individual instances or more broadly as "ranges". Indeed, it is human nature to look for guidance in that way (cp the juror's comment, and jury question, noted in *Rantzen supra* 994 and *Manning v Hill supra* 175). It is in fact the process enforced in the criminal field upon sentencing Judges, expected to know and apply "the range". The difficulties, as so often in the common law, lie not in logic but in practicalities.

First, in our small New Zealand context, there is insufficient data to compile worthwhile "ranges".

That was not so in the pre-1972 era of personal injury claims. They were very numerous: the staple diet of a whole sector of the bar. While no two accidents are exactly identical, there were frequent closely similar incidents and claims, with experience running back over many years. Awards were numerous and regular. They were published. The personal injury bar in fact had its own "schedules" of awards; and within that even "local" schedules. The common experience was sufficient to predict a likely outcome, within a range, for the numerous typical cases which arose. It was possible for Judges to indicate broad ranges (or maxima). Indeed, it could be desirable. As North P noted in *Gray v Deakin supra* 237, the "very large number heard" and results "often enough quite fully reported in the newspaper" meant it was "lacking in reality" to not recognise jury awareness as a general background in any event.

That is not the situation in relation to defamation awards. The number of cases is very small. Counsel for TVNZ, in a position to know, confirmed only one or two go to trial each year in Auckland. The position would be similar in Wellington, and the contribution from the provinces and South Island is not large. These cases are well publicised, but a relative rarity. They are also intensely variable in their circumstances, even within sub-categories such as "political" and "media". Moreover, perceptions and standards change with time. An allegation of homosexuality or lesbianism might be viewed less seriously now than 20 years ago. An allegation of drunken driving might be viewed more seriously. There are no reliable comprehensive schedules, or known programmes for their creation, even if such is possible. In my view, there are insufficient routine cases for worthwhile conclusions to be formulated. There may be the occasional recent and analogous fluke. There is no "run of the mill". The position may perhaps differ in larger communities overseas, including Australia; but overseas awards - and rightly - are not put forward as useful

comparisons. The attack upon the Judge's reasoning based on personal injury award comparisons cannot succeed.

Second, there is force in the point that a Judge cannot give a range without personally assuming a factual view, which may not coincide with that eventually taken by the jury. This is not a risk which can be covered simply by disclosure by the Judge of that assumed factual basis, so allowances can be made. However tentatively, that would carry a severe risk of undue influence and usurpation of function. Nor, except perhaps in the simplest of "either/or" cases, could the Judge in course of summing up risk the confusion which can arise from multiple hypotheses. There is a considerable risk any attempt at "ranging" will lead to miscarriage, rather than to justice.

Third, while there is respectable Australian authority supporting ranging, drawn from both personal injury and defamation cases, there is at least its equivalent in Canada to the contrary. The Canadian cases expressly reject the Australian approach based on personal injury awards. I refer to *Carson's* and *Coyne's* cases in Australia; *Ward's*, *Rantzen's*, and *Sutcliffe's* cases in the United Kingdom; and *Manning v Hill* in Canada. The latter is of particular interest. At 175-176, after noting recognition in *Rantzen* that Court of Appeal substituted decisions would build up a caucus of data, and dismissing that unique statutory situation, the Supreme Court of Canada opined that "if guidelines are to be provided to juries, then clearly this is a matter for the legislature". Australian Judges may feel at home on the range. The contrary Canadian experience, from a large jurisdiction in its own right, with somewhat similar civil rights legislation, is not to be dismissed lightly.

Fourth, not too much should be made of the ultimate necessity for a Judge, on review, to decide whether an award is "excessive". Certainly, in doing so the Judge must reach a view as to the rational maximum. Such is unavoidable. It is, however, a

highly subjective and to a degree intuitive process. It is a matter on which separate Judges, approaching the decision in unco-ordinated fashion, may well reach differing conclusions. Historic maxima, so far as known, can have some place in this process. Judges, from training and experience, can be relied upon to sort out the possibly helpful from the irrelevant; and to expose their reasoning in so doing. That different situation can be accepted, because it must be, at the new trial review level, with its room for appeal and further consideration by a number of Judges less at risk of idiosyncrasy; but that is not reason to attempt to project it into the critical factor of the initial jury verdict itself. Review is review; and its criteria are not necessarily appropriate for original decision making by a jury.

I do not accept there was misdirection through failure to give some (unspecified) range. Indeed, as matters stand, there are powerful considerations which weigh against any "ranging" approach to jury trials in this country.

Misdirection: "failing to advise (give adequate guidance) as to financial implications of large award"

Anderson J, in course of a conventional direction quoted above, reminded the jury "you all know what a dollar is worth". The Judge directed decision using commonsense and knowledge of the world: "what you can buy for that much" (the "that" being used in the abstract).

TVNZ submits directions should have gone further. Counsel cited *Sutcliffe v Pressdram Ltd* [1990] 1 All ER 269, 284, with its proposition large sums "lack reality" in the lives of ordinary people; juries should be invited to consider returns if invested at interest, or with small sums, what could be bought; *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211, 235 suggesting reference to buying power and

uses to which it may be put; and *Rantzen v Mirror Group Newspapers Ltd* [1993] 4 All ER 975, 984, 997 direction that the jury be invited to consider "purchasing power". In *Rantzen's* case, Neill LJ acknowledged sufficient guidance had been given by direction to take account of the value of money and to relate its purchasing power to a house, car or holiday; but considered the trial judge "might have gone further". (Anderson J, of course, did not go so far; let alone further). Counsel referred also to the *Carson v John Fairfax & Sons Ltd* [1992-1993] 178 CLR 44, 59-60 observation that "... there is much to be said for trial judges offering some guidance on damages - such as inviting the jury to consider the investment or buying power of the amount it might award ...".

Anderson J saw no necessity to refer to potential investment returns where compensation for future loss of income was not an issue. More significantly, the Judge did not accept an ordinary New Zealander was likely to award damages without appreciating money can be invested, and will produce interest at current rates. Such was elementary. The Judge did not accept a jury awarded more because it did not appreciate how much it was awarding.

TVNZ submits, in response, no reasonable jury would have awarded even \$400,000 (let alone \$1.5 million in total) if it had taken into account interest which would be derived.

It would have been wise for the trial Judge to have gone a little further. General exhortations to think about what a dollar is "worth" and, "can buy", may rather wash over a jury. There is nothing like an example to drive a message home, and ensure it is remembered, even if it takes a little precious time. Ask any teacher. Reminders that \$100,000 safely in the bank at 10% per annum means \$10,000 a year less tax; and a family car costs \$25,000; and a question "what did your last house cost you?"



concentrate the mind. However, no miscarriage of justice is shown in the circumstances of this case. Anderson J did give a basic direction which raised the topic - value of money, and its purchasing power - in those terms. The jury in this case happens to have included persons who were, or at least had been, an accountant, a bank officer, and a teacher. It is fanciful to suggest they, let alone others, would not have appreciated and applied orthodox measures in reaching the verdict on the first programme of \$400,000. That amount, in itself, sends no such signal. It would produce only some \$40,000 per annum less tax on an annual basis, and would buy only a moderate house in Auckland. The same cannot be said of the second verdict for \$1.1 million, which leaves one rather wondering.

Misdirection: "failing to direct jury damages claimed \$1.7 million and \$2.3 million were grossly excessive, and to ignore sums claimed"

Anderson J did not direct sums claimed were excessive, let alone grossly excessive; and did not give express direction sums claimed were of no significance except as setting a ceiling. The directions, quoted above, were restricted to reminder not to be "niggardly" or "extravagant"; and not to think "either in terms of Lotto or soup kitchen". Sums claimed were not mentioned.

In developing argument before Anderson J, counsel for TVNZ appears to have submitted there should have been direction "seven figure" sums would have been erroneous in law. It is not clear whether there was a separate submission in favour of a simple direction that sums claimed should have been ignored or were merely a ceiling.

Anderson J firmly rejected the propriety of any direction the jury could not lawfully award a million dollars or more. He considered a Judge should not suggest a figure or

range; and on authority of *Cassell & Co Ltd v Broome & Anor* [1972] 1 All ER 801, 1135 thinking that assessment of damages was more of a social factor than a judicial function, with no reason to suppose a Judge's view would be preferable to a jury's. There was no legal justification or necessity. The submission the jury could have been left with an impression \$4 million was not inappropriate in the circumstances was dismissed as "entirely speculative". Anderson J expressed grave reservations as to the course favoured by Nourse LJ in *Sutcliffe v Pressdram Ltd* [1990] 1 All ER 269 which postulates warning to the jury against possible consequences of awarding an excessive sum, and risks of new trial. His Honour commented "a jury enquiry as to the permissible upper limit in the particular case would simply be a matter of time". Further, a balancing direction as to awards which are too small would be necessary, and would compound the particular problems.

Since argument, as already noted, the English Court of Appeal has delivered judgment in *Elton John v MGN Ltd*. Having identified a policy need for some judicial guidance for juries as to appropriate quantum, the Court considered as a fourth and final possible solution permitting reference by counsel and the trial Judge to perceptions of appropriate figures. The Court referred to previous practice exemplified by *Ward v James* and *Sutcliffe v Pressdram supra*. The Court dismissed as "unconvincing" previous views such references could lead to an auction, or to appeals on the grounds any different awards were unreasonable or similar awards were a "rubber stamp". Noting that in personal injury actions before a Judge alone submissions as to appropriate quantum were commonplace and useful, the Court simply observed:

"We can for our part see no reason why the parties' respective counsel in a libel action should not indicate to the jury the level of award which they respectively contend to be appropriate, nor why the Judge in directing the jury should not give a similar indication."

It was observed that the plaintiff would not wish the jury to think his main object was to make money, and the defendant would not wish to add insult to injury by under rating seriousness of the libel. The figures suggested by counsel would be likely to reflect upper and lower realistic limits. The jury would be directed to make up its own mind, and would not be bound by submissions of counsel or "indication of the judge". That "modest but important" change of practice would buttress the role of the jury by rendering its proceedings more rational and so more acceptable to public opinion. With no disrespect, the essence of the approach is this: there is a need, and why not?

If counsel and the trial Judge may refer to suggested figures, or ranges, then obviously there is room for comment that figures claimed greatly in excess are "grossly excessive".

I have no difficulty with the proposed licence to counsel to suggest appropriate figures. Indeed, my impression is this has been permitted under New Zealand practice in a reasonably general way in recent times; and it seems a proper aspect of argument. It might well narrow boundaries in useful fashion. The proposed indication by the trial Judge, on any reasonably specific basis, is not quite so simple. The approach in *Elton John's* case does not automatically translate. First, as noted later, I am not entirely persuaded the perceived policy need exists, at least yet, in New Zealand. Second, as noted there are very real data deficiency difficulties in New Zealand, rendering informed suggestions more than difficult. Third, New Zealand trial Judges do not have the convenient reference point of comparisons with damages in personal injury cases as a cross check on reasonableness. Where, it must be asked, will the hapless trial Judge obtain a figure to suggest? With respect, and without doubting the appropriateness of the approach in *Elton John v MGN Ltd* in an English environment, I do not see it as much assisting for present purposes. We must look for appropriate local solutions, based on policy and local practicalities.

The first issue - sought after direction that sums claimed were grossly excessive, or at seven figures were erroneous in law - has some similarities to the "range" issue. However, the difficulties are not so extreme. In effect, it calls for a determination by the trial judge, in advance, of the limit beyond which an award would be excessive and could be set aside; a comparison of sums claimed with that limit; and a generalised comment sums so claimed were "grossly excessive", or perhaps "excessive". (Experience tells us that will often be the case).

In theory, the process would not require the Judge to decide any limit figure other than one which it may be necessary to decide in any event, at a later point; or to disclose his or her limit figure. The need to respect the constitutional position and social orientation of juries is not transgressed: the judicial power, always in reserve, to set aside excessive jury figures simply is called in early. There seems nothing inherently objectionable in that regard. Prevention can be better than cure.

The difficulties, as is so common, are practical. They are pinpointed succinctly by Anderson J. Once the trial Judge enters the arena by labelling sums claimed, or any particular sum, as "excessive", or "grossly excessive", the Judge obviously reveals the existence and some apparent relevance of a personal quantum view. Most juries will be intensely interested. Questions "what is the maximum?" will be almost inevitable. Those questions cannot be answered. That will be intensely unsatisfactory to a modern jury, by no means always as receptive and awestruck as in bygone times. That is not in the overall interests of justice. As a matter of courtroom dynamics, and indeed damage control, many judges will prefer to state at outset within summing up that no further guidance can be given; but resentment will remain. There are other complications. First, if the upper limit is to be so disparaged, then in fairness so should the lower: zero. Awards which are too small do happen, and are open to like

objection. Directions problems will compound. Second, any message that a sum claimed would be grossly excessive, or that awards above a stated figure would be so, directs attention to the top, diverting the jury from the proper process of building upwards from the bottom. The jury informed that \$1.7 million is "grossly excessive", will naturally enquire "how much less" than \$1.7 million would be right? It will degrade conventional directions to start from zero and build. That is undesirable.

In the end, although initially attracted to a "grossly excessive" standard direction, I consider the practical problems to which it will give rise outweigh its benefits. There is wisdom in the traditional "ceiling only" direction, to which I now turn.

Anderson J did not give that direction. Whether or not that omission was raised before him in argument, it is before us now. I consider TVNZ was entitled to that minimum protection, and there is misdirection (by non-direction) to that extent.

However, I am not persuaded miscarriage of justice resulted. It is significant that on a claim of \$1.7 million for the first publication the jury awarded only \$400,000. That is not any sensible percentage of \$1.7 million. Arguably, it could be regarded as 10% of the total \$4 million claimed on both causes of action; but there is no reason, particularly given clear direction otherwise, to assume the jury would have run the two programmes together as one. Moreover, the odd \$1.1 million figure for the second programme does not reconcile with any overall percentage approach. The \$400,000 on the first programme could as well be a rounding out of the widely publicised *MacRae* ("Felicity Ferret") award of \$375,000. It is at least as likely the jury built up its \$400,000 from base, in correct fashion, without actual regard to the \$1.7 million claimed. We were informed during argument that counsel for TVNZ exhorted the jury to start from zero and build up; and counsel for Mr Quinn while pressing for a large award said no more of the sum claimed than (correctly) that the

jury could not go above that figure. Counsel's addresses do not balance non-direction. However, positions taken tend to support a view the ultimate \$400,000 was not decided by some improper reckoning back. Indeed, there is no rational ground to suspect otherwise in relation to the second programme verdict of \$1.1 million either. The complaint as to direction was justified, but TVNZ has not shown miscarriage of justice.

Misdirection: "Failing to direct jury to take into account widespread independent publicity"

At commencement of trial Anderson J allowed TVNZ to plead an amended mitigation defence worded as follows:

"24. Any loss or damage to the plaintiff's reputation as alleged in paragraphs 7 and 12 has been subsumed or reduced or mitigated by damage to his reputation arising before and subsequent to the reports and independently of the publication of such reports.

Particulars

- (a) Between 16 November 1989 and 19 July 1990 there was widespread publicity throughout the media in New Zealand relating to the laying of the charges of corrupt practice against the plaintiff, the events giving rise to them, the subsequent hearing of the charges and the conviction of the plaintiff on those charges.
- (b) There was further publicity in or about June and July 1991 and July and September 1992 arising out of the decisions of the High Court and Court of Appeal in the review proceedings brought by the plaintiff seeking to set aside the convictions, and the decision of the appeal judges of the NZHRC."

The amendment was allowed against objection by counsel for Mr Quinn that no authority existed permitting account to be taken, in this way, of damage to reputation by extraneous factors after date of defamation. The point was specifically reserved.

In the result there was evidence of widespread newspaper publicity relating to Mr Quinn and the NZHRC corrupt practice disciplinary charges. It broadened, almost inevitably, to encompass other matters. There was also other media publicity, including television. Early publicity in late 1989 in "Truth" pre-dated the two Holmes programmes on 11 and 19 June 1990. One newspaper article fell between the two programmes, 12 June 1990. The remainder, and the greater majority in number and emphasis, followed the second programme, extending between 21 June 1990 and 19 July 1990. It dwelt on the NZHRC sub-committee hearing and decisions on 12 and 13 July 1990. Some was less than kind; for example Television One news on 5 July 1990 which included references to "debt ridden, dope ridden, run by corrupt officials". It reported the racecourse ban and significant penalties imposed by the NZHRC sub-committee on Mr Quinn, albeit along with his announced intentions to contest outcome in the High Court. A "New Zealand Herald" billboard of 14 July 1990 proclaimed "Trot Club President Banned". There was even a contribution from an astrologer. The convictions involved ultimately were overturned, after proceedings which stretched through until 1992, but there can be no doubt publicity arising from NZHRC action in the weeks immediately following the Holmes programmes caused significant damage in its own right to Mr Quinn's reputation. There is supporting evidence in the form of affidavits by Mr Quinn, introduced at trial, which described the publicity as "catastrophic".

The asserted diminished reputation was advanced as a significant feature of the TVNZ case. Anderson J summed up on this aspect in this way:

"Mr Miles referred to the plaintiff's affidavits and a reference to the catastrophic effect on him of the corrupt practice charges. It is the defence position that if there is a defamation then the damage was really superseded by damage to reputation caused by factors to which the defence is in no way responsible; that shortly after the second programme the racing club charges were brought and that the widespread

publicity about these matters and their impact was such as really to extinguish or largely to extinguish the damage to reputation which the programmes may have caused, if you so find. This raises interesting ideas for you to consider. Is the damage extinguished or is it exacerbated? Is the impact of the defamation still continuing even though there is something more to worry about? The defence submission is that the impact was extinguished. The plaintiff's position, as I understand Mr Kohler, is the damage carried on long after every one of the corrupt practice matters had been resolved in favour of the plaintiff in due course, that the damage still echoes. Well it is for you to decide on the basis of the evidence using your commonsense whether the damage of any defamatory impact was really superseded, lost, in the wake of other matters which are in no way referable to anything done wrong by TVNZ.

Mr Miles said if Mr Quinn's reputation suffered then it was because of the charges of corrupt practice. He referred also to matters of publicity beforehand. What he referred to is the first whiff of scandal appearing in the Truth amongst those documents you have. Mr Miles submitted that by the time Mr Quinn was convicted of corrupt practice everyone knew about it. Whether he feels he was justly convicted or not is irrelevant, says Mr Miles, because it was his reputation at the time which was damaged by these collateral matters, and the impact of those matters you can gain from all of the evidence including what Quinn said about it at a time closer to the happening. He referred you to Mr Quinn's own words and said there, he's saying it himself, look at that. That's pretty good evidence, in counsel's submission, of what it was doing to his reputation and life at the time."

Counsel for TVNZ submits the point was of such significance it required specific reference in summing up. It was not sufficient to address the matter by reference to counsel's arguments. In particular there was error in that no reference was made to Mr Quinn's affidavits which acknowledged effects; the summing up referred merely to counsel's submissions, without the necessary reinforcing direction the jury should take such matters into account; the defence was undermined by "extinguished/exacerbated" formulation; and such reference to "exacerbation" was likely to confuse and suggest TVNZ involvement, meriting punishment.

Anderson J considered the point to be obvious. It had been put in the summing up, and it could not reasonably be suggested the jury was unaware of the argument. His



Honour took the complaint relating to exacerbation as asserting misdirection by "directing that such independent publicity could have exacerbated the damage presumably caused by the two programmes". He did not regard that formulation as accurately describing directions given. It may be the point was advanced rather differently before Anderson J.

Counsel for Mr Quinn adopts Anderson J's approach. Counsel put the reference to possible "exacerbation" as merely the "inverse" of TVNZ's position. It was submitted independent publicity would have reminded the public of Mr Quinn and the two Holmes programmes; and "the combination of the two (is) greater than each individual part". Counsel referred to "significant and memorable evidence", and extensive coverage in address on the topic; put as indeed "overplayed". The jury were not unaware. Counsel acknowledged no appeal had been brought from Anderson J's ruling on the post defamation publication point.

I accept a defendant may plead the windfall of post defamation damage by extraneous causes to a plaintiff's reputation as a factor in mitigation of compensatory damage. The authorities are mixed, but it is a matter of commonsense. The damage caused, an otherwise ongoing state, is not so extreme.

I see no misdirection. TVNZ made a strong point of the extraneous damage, both in evidence and in address. I accept the jury would have been very aware of that evidence, and the point concerned. Against that loaded background, if His Honour did not dismiss the point it would have been taken by the jury as open for their consideration. In fact His Honour did reinforce its availability by direct reference. Anderson J observed it "raises interesting ideas for you to consider". Obliquely, there was a direction to "consider". I do not accept more was required by way of emphasis, such as "this is an important area to which you will give careful thought". Such

emphases must be rare to be effective, and it was well within the discretion of the trial Judge to consider the matter sufficiently covered by the reference made. Summings up are not required to meet advocacy wish lists as to emphasis. Nor do I regard the reference to "exacerbation" as improper. (I assume some on the jury knew what it meant: perhaps "made it worse" would have been safer.) There was room for a view, against a background of damage arising from extraneous causes, that the two programmes - both forthcoming and recalled - could attract added attention and be additionally destructive. There was nothing wrong with the attempt at balance so introduced.

It may be, in the end, the concerted attack on Mr Quinn, ostensibly in an attempt to reduce reputation and with that damages, excited sympathy or irritation; and the opposite effect. Such can be the realities of jury litigation, and risks taken. Nothing more can be said.

Misdirection: "failure to direct plaintiff did not complain about material parts of programmes which would affect reputation"

The alleged misdirection is non-direction in terms of *BCNZ v Crush* [1988] 2 NZLR 234.

Mr Quinn did not claim in respect of every damaging item in the two programmes. For example, as counsel for Mr Quinn put it, he did not attempt to sue in respect of Vetmed's additional difficulties with the ARB referred to in the first programme; or charges before the NZHRC in the second. In that situation, counsel for TVNZ submitted a *Crush* direction was required. Mr Quinn's reputation was to be regarded as degraded by the material not in contest, and the Judge was duty bound to bring

home to the jury that the plaintiff was not complaining about, and did not seek to deny, the uncontested allegations.

*Crush, supra*, was on different facts. It was not a so-called "pick and choose" case. The plaintiff sued on substantially the whole of the publication concerned, alleging certain meanings. The defendants denied, and did not seek to justify, those meanings. Instead, the defendants attempted to plead their own different meanings, and to justify in those terms. The attempt failed, with defendants' meanings and justification struck out. To that point, the decision has no present relevance. However, in its course a question arose (237-8) whether defendants might not, additionally, be seeking to justify some intermediate defamatory meaning; a course taken as permitted under *Polly Peck* principles. The Court proceeded to compare the "pick and choose" cases of *Polly Peck* and *Templeton v Jones* [1984] 1 NZLR 448, said by some to conflict. In the course of doing so the Court observed (238 per Cooke P, italics added):

"It may be that there is no real conflict between those two decisions. It may only be that the judgment in *Templeton v Jones* at pp 451-452 failed to make what was intended clear enough, particularly if the passage is read without reading the earlier part of the judgment. The point may be brought out by supposing an article which says that the plaintiff is a criminal and has convictions for robbery, forgery, perjury and child molestation. The thinking in *Templeton v Jones* is that it must be open to the plaintiff, although he cannot dispute the truth of the general charge and the first three specific allegations, to sue on the child molestation one, which he knows to be false. Otherwise a libeller could add with impunity a serious false charge to a string of true ones. In the supposed case the question for the jury would be whether the additional untrue allegation did any material harm to the plaintiff's reputation over and above that caused by the undisputed allegations. In other words, in *Polly Peck* language, whether it increased the sting of libel. Counsel for the defence could be relied upon, *and it would be the duty of the Judge, to bring home to the jury that the plaintiff was not complaining about and did not seek to deny the other allegations*. I am not sure whether O'Connor LJ or the other Lords Justices who have followed his reasoning would differ from any of this. As mentioned in *Templeton v Jones* at pp 452-453, observations in the House of Lords in *Speidel v Plato Films Ltd* [1961] AC 1090 appear to support it."

While it is arguably obiter, I respectfully follow. A jury, faced with a large article or programme and a number of discreditable allegations, could make the mistake of assuming all are sued upon, or that those not sued upon have no significance at all, not even reducing reputation and damages. A direction often will seem warranted. Was that so in this case?

Anderson J ruled otherwise, in words best quoted verbatim (*italics added*):

"In the circumstances of the case the defendant makes this submission in reliance upon the principle elucidated by Cooke P in *BCNZ v Crush* [1988] 2 NZLR 234 at 238. It must be observed that in that case Cooke P was indicating the injustice of a libeller adding to a string of true charges a serious false allegation. It is not clear to me how that principle - that it is wrong for a libeller to tack onto true matters which may damage reputation a seriously false charge - can assist the defendant in respect of the particular submission. The view was available to the jury in the present case that the defendant was tacking true, moderately damaging observations onto serious false material which would be no less unjust than the situation condemned in *Crush*. I do not accept that there was a misdirection on a material point of law in the context of the case, let alone a miscarriage of justice justifying a new trial through any omission to point out to the jury that the plaintiff *was not suing upon matters which he was obviously not suing upon*. The responsibility of the trial Judge included the putting of the defendant's case, not the arguing of it, and a trial Judge does not have to articulate everything a litigant said or might have said to a jury. I do not accept the defendant's submission."

With respect I have difficulty with the distinction, or non-distinction, so drawn between tacking seriously false on to true; and true on to false. The tacked total seems much the same, and as the Judge acknowledges, equally unjust. The real point seems to lie in Anderson J's conclusion that Mr Quinn *obviously* was not suing upon the additional matters concerned.

Counsel for TVNZ submits *Crush* was not distinguishable in the way seen as adopted; and the Judge had a duty to "bring home" to the jury that Mr Quinn was "not complaining about and did not seek to deny other aspects of both programmes".

In my view, it would have been preferable for the trial judge to identify and point to possible significance of damaging aspects of the two programmes not made the subject of claim, albeit perhaps in no great detail. *Crush* reasoning applies. However, I am not persuaded in respect of the first programme, an award of \$400,000, that any miscarriage occurred through the omission. The trial Judge, as is usually the case, was well placed to gauge matters which under the prevailing trial atmosphere were obvious, and matters which were not. The Judge, as his own words show, had a clear view the matters not sued upon were indeed obvious. If that was so, while it would have been safer to drive the point home, it was not essential to do so. The discretion is to be respected. Juries can be "switched off" by a Judge labouring the obvious, to ultimate detriment of summing up assistance overall.

Misdirection: "Failing to direct jury punitive damages should be moderate, and to be fair"

The summary heading mutated in text to "failing to give adequate directions on exemplary damages".

Anderson J summed up in conventional terms as to compensatory damages ("to compensate for the damage to the reputation"; and aggravated damages ("not a question of the reputation being damaged ... offending the rightful feelings"). His Honour then directed as to punitive damages in these words (italics added):

"In this case the plaintiff says "I want punitive damages as well, I want you to punish the defendant", and that brings in another element in an award. There are cases, they are rare, where a Court increases damages

beyond compensation and aggravation in order to punish a defendant, to teach a defendant a lesson, and the cases are rare because an award of damages which goes beyond compensation and extends into aggravation can itself be a condign punishment for a defendant to pay. Damages are increased in rare cases to an exemplary level where a jury is satisfied that beyond what the plaintiff should get for the damage even on an aggravated basis, the defendant should pay as a punishment to deter. As a matter of law civil cases are not essentially concerned with punishment. The criminal law is but the civil law is not essentially concerned with punishment. The civil law is concerned with compensation for people who have been damaged. But there may be cases where a jury says "look, the defendant's conduct in the particular case (and you will understand I am talking quite hypothetically) is just so outrageous that unless they are taught a lesson they might be encouraged to keep on acting like that; they have to be taught; they have to be made an example of because they have acted outrageously".

In this particular case the plaintiff says damage to the plaintiff was serious and came about in circumstances where the defendant just couldn't care less whether it damaged people so long as it appealed to the viewer. It was reckless about reputation. It was so concerned with its own impression in the marketplace of viewers that it wound things up for the sake of the story and couldn't care less about hurting the plaintiff in the process. Such an attitude, says the plaintiff, warrants punishment beyond compensating Mr Quinn. It has got to go beyond compensation, even aggravated compensation, says the plaintiff, to teach them that they cannot do this and get away with it. The plaintiff says Television New Zealand was reckless of reputation, oppressive and high handed such that, submits the plaintiff, they ought be taught a lesson which not even aggravated damages will properly teach them.

I put the plaintiff's argument on that issue not, of course, to endorse it or reject it, my stance being absolutely neutral, but in order to demonstrate the concepts involved and what a jury must not do is double up on damages and what a jury must not think is that exemplary damages are par for the course. They are not. They are unusual. A jury must be aware of the punitive elements anyway for a defendant in having to pay up whatever award a jury would give if it wasn't giving exemplary damages. We don't know what your decision on the issues will be and we don't know what amount you would fix but say you did find defamation and say you did fix an amount, then you would, on the basis say of compensation for damage to the reputation and say for aggravating aspects, and then you would look at that, if you got to that stage, and say well is that sufficient punishment in a case where you think punishment is due. Or you might say its not a case for punishment, its a case for compensation only. But if you thought it was very much a case for punishment you would have to look at the punitive impact of an aggravated compensatory award before you considered taking it up even higher simply to punish."

Counsel for TVNZ submits punitive damages are to be "moderate", and awarded only if in all the circumstances it is necessary to punish the defendant. I accept both propositions as generalities. The first is established on authorities cited supra. The second follows from the description "punitive", or "exemplary". Directions should include sufficient warning in both respects. Directions, moreover, should meet the requirements outlined, within the context of personal injury exemplary damages, in *Auckland City Council v Blundell* supra 739 per Cooke P: "something outrageous in the conduct ... which deserves to be punished ... not be more than what you would regard as fair and reasonable to match the gravity of the (defendants) conduct ... the punishment can fit the crime but I must warn you against being carried away". I note also restraints are supported by *Riches v News Group Newspapers Limited* [1985] 2 All ER 845.

Counsel for TVNZ submitted the summing up failed to direct moderation; and that exemplary damages should be awarded only if it were necessary in all the circumstances to punish TVNZ.

It is true the summing up did not specifically direct the jury to exercise "moderation", or "be modest", or the like. In *Blundell* phraseology, it did not specifically warn the jury not to get "carried away". However, it is the overall effect of total directions which determine, not ritual phrasing. I consider overall effect passes muster. There is a steady conservatism. An award extending to aggravated damages could itself be "condign punishment". Damages were only in "rare" cases, where more was needed. The civil law "was not essentially concerned with punishment". The jury must not "double up" on damages: it must look at compensating and aggravating elements, and then ask whether that was "sufficient punishment", looking at the punitive element already so existing.

I accept the jury would have gathered exemplary damages were rare, to be no more than necessary to constitute any additional punitive element needed. The direction points to restraint rather than open slather. It would have been perhaps better and safer to use the accepted key terms such as "moderation", and "not carried away"; but the totality is sufficient.

There is no substance in the second complaint. The summing up makes it plain exemplary damages are only for outrageous conduct, and where it is proper to punish. The summing up is replete with directions to be "fair".

Misdirection: "failing to direct evidence relevant to justification, even if justification is rejected, can be taken into account in mitigation"

I accept evidence primarily directed to supporting a defence of justification, which does not succeed, may - if believed - be used generally in mitigation of damages. It is commonsense. It is supported by *Pamplin & Express Newspapers Limited* (No.2) [1988] 1 All ER 287. Moreover it is almost an inevitability. If the defamatory statement is that plaintiff is "a constant liar", and justification proves no more than an occasional lie, that blemish may degrade general reputation, and reduce damages, to some extent.

TVNZ sought to justify certain aspects of the first programme. In particular, its pleading asserted involvement in supplying animal remedies and equine performance enhancing substances without prescription and/or unlicensed; and failure to comply with licensing labelling storage and other requirements of applicable statutes. It asserted involvement in supply of unlicensed or non-prescribed equine performance enhancing substances to owners and trainers of trotters. It asserted unfitness to hold



office as President of the ATC. It asserted disregard of legal and ethical requirements of the ARB and of relevant legislation. Allegations were particularised in some detail.

Some limited pleaded aspects were established. One example is admitted administrative failings in recording and administration of animal remedies by Vetmed, and disregard of certain requirements of the ARB. Explanations as to how such came about were attempted. Other pleaded aspects, given issues put and answers received, clearly were not established. In particular, the jury by its answer rejected contention Mr Quinn "was illegally selling performance enhancing substances in the trotting or racing industries". Others are doubtful. It is not easy, beyond the extremes, to segregate the accepted and the rejected. Counsel did not care to assist by any detailed attempt. Submission, simply and generally, was that the Judge "should have directed the jury as to the undisputed conduct by the plaintiff in his role as governing director of Vetmed and as president of the Auckland Trotting Club".

Anderson J dealt with this contention in the Court below somewhat tersely: "I do not recall any submission by defendant's counsel as to what evidence relevant to justification the jury might have had available to take into account as mitigating ...". The TVNZ justification defence was distilled as Mr Quinn "illegally selling performance enhancing drugs"; it failed; and there was nothing else in the Judge's view which could mitigate.

I am largely of the same mind. There may have been odds and ends - eg administration of drugs records - which were within the pleading of justification, but such were outside the main thrust. It was not incumbent on the trial Judge to fossick about locating possibilities which were not within strong focus by counsel. If there

were some such matters, in the context of overall summing up they did not call for mention. No miscarriage is shown.

Misdirection: "directing defendant had set out to blacken plaintiff's reputation, summarising plaintiff's submissions to that effect without putting defendant's side"

At a relatively early stage in summing up, Anderson J in the course of explaining aggravated damages, referred to a defendant (no name give) who kept denying the defamation; who said "far from acknowledging fault we will attack the plaintiff even more; we will blacken his name even more in how we go about our response". The hypothetical could be fitted to conduct of TVNZ on certain views of the evidence. Then, at the very end of summing up, the Judge returned to the topic:

"Mr Kohler said when you are looking at damages you should take certain matters into account. If the words are defamatory how bad is it to say that about this person? Is it a bad defamation? How extensive is the publication? How deep is the cut and how wide? What opportunity was given to him to put his view in connection with the matters that the plaintiff says the programmes actually talk about? What were the motives of television in this case, Television New Zealand? What have they done to make amends? In counsel's submission they haven't done anything, they have actually persisted in trying to blacken Mr Quinn's reputation. He submitted that this is a case where you ought go beyond compensation, beyond aggravation into the area of punishment. Please bear in mind what I have told you several times that you must not double up on the ingredients and you must be fair."

TVNZ submits this amounted to erroneous suggestion TVNZ had persisted in trying to blacken Mr Quinn's reputation. I do not agree. The Judge, as duty bound, was putting explanatory possibilities, and the opponent's case. The Judge did not direct "blackening" had occurred in fact.

TVNZ also submits the Judge failed to put the converse case for TVNZ, as required under *Riches v News Group Newspapers Limited* [1985] 2 All ER 866. The citation

hardly is necessary. Putting both sides is elementary duty. It might have been preferable to align plaintiff's and defendant's submissions at the one point, particularly given the tail-end prominence of reference to Mr Quinn's submissions. However, there was adequate balance by reference elsewhere. In course of TVNZ submissions, there was reference to Mr Holmes' emphasis upon significance of integrity and credibility of the Holmes show, with invitation to accept it was bona fide, not oppressive, high handed or arrogant. There was sufficient counterpoint to other assertions of blackening.

There was a final submission that exemplary damages should have been related to each programme individually. This ground cannot be found within the application to set aside as filed; and is not open. If it were open, in the absence of an approach along these lines by counsel in address, that course was not incumbent on the trial Judge. Carrying forward a more global approach was justifiable. There was no miscarriage.

Misdirection: "not directing that defendant did not attempt to justify primary meanings alleged in respect of both programmes"

Mr Quinn's statement of claim alleged a number of meanings in respect of both programmes. TVNZ denied those meanings; and sought to justify aspects in the event first programme meanings were accepted. The pleaded meanings ultimately were rolled up into single "primary" meanings, stated in the issues left for the jury. TVNZ can say, with some force, that while it denied such primary meanings, it did not seek to justify all aspects. In particular, TVNZ now says it "did not attempt to justify that the plaintiff was supplying drugs for doping horses, or that the plaintiff was involved in financial irregularities concerning the Auckland Trotting Club". TVNZ complains there was no express direction to that effect; expressing concern the jury would think

wider justification had been attempted and regard manner of trial as aggravating damages.

The summing up is to be considered as a whole. Anderson J, as is conventional, took the jury through the issues sequentially.

First, in relation to the first programme, the Judge explained under issue (1) the jury must determine whether the passage had the meaning concerned (supply for doping) and, under issue (2) whether such meaning was defamatory. Nothing was said as to justification of that meaning. There was no issue to that effect. Anderson J then moved to issue (3) meaning (illegally selling to industries) and (4) justification of that latter meaning. The Judge stated:

"Issue 3 - this issue is included because the programme might convey more than one meaning. Whether it does is over to you, but it might convey more than one meaning. The question is does that programme mean to the ordinary viewer who saw it once that Mr Quinn was illegally selling performance enhancing substances in the trotting or racing industries? If your answer is "yes" then you have to answer Issue 4 because the defendant says if that meaning is conveyed then that is the truth and you have to decide is it the truth. Has the defendant satisfied you on the balance of probabilities that that is the truth?"

The Judge then warned of definitional difficulties in the phrase "performance enhancing substances" and continued:

"You have to look at Issue 3 and decide on the balance of probabilities whether that meaning set out there is the natural and ordinary meaning of the programme, or a natural and ordinary meaning of the programme. If the answer is "yes" you have to decide "is that meaning true or substantially true?" The reason why "substantially" is included is because the law does not require a defendant who is justifying to get 100% in that particular test. It does not have to prove every jot of what is said. It can defend by proving substantial truth, that basically it is right, and that is why the word "substantially" is there. On the whole is it pretty right? That type of approach."

Considered as a whole, the directions were clear as to the (limited) area in which justification was raised, and as to the aspects within that area which were for consideration. The Judge perhaps could have gone further, spelling out that justification did not arise under other issues, or in respect of other aspects, but it was not necessary for him to do so.

The Judge dealt more briefly with issues on the second programme, putting issues (1) and (2) together without reference to justification. Remarks just made apply. In addition, the Judge near the end of summing up recorded the submission of counsel for Mr Quinn as:

"The second programme. He said Television New Zealand does not plead justification, does not say it is true ...".

The Judge did not dissent. The point hardly could be clearer.

There was no misdirection.

### Cross Appeal

Anderson J set aside the verdict of \$1.1 million in respect of the second programme as "beyond the pale". The Judge regarded the \$700,000 over and above a \$400,000 equivalent to the first award as being punitive, and excessively so.

I have no qualms as to the setting aside of the award of \$1.1 million, even on a worst view of the matter against TVNZ as developed by counsel for Mr Quinn. It is beyond all contemplation, on any basis. I regard *Manning v Hill supra* as a special case, not setting any useful local precedent as to quantum. In so agreeing with Anderson J as to

outcome, I do not necessarily agree with the analysis which identifies \$700,000 as being purely punitive. The verdict is a mysterious one, and dissections are purely speculative. That, or any analysis, is not necessary. It is quite simply far too much. Nor am I to be taken as tacitly endorsing the view an award "even approaching" the \$400,000 of the first verdict would be struck down. The matter is again at large, and questions should be approached without preconceptions.

#### Future directions to juries upon quantum

TVNZ seeks a reappraisal of standard directions to juries as to quantum, hopefully to the "necessary" standard of *Rantzen*, and with restraint to "moderate" standard for punitive damages. It perceives a trend abroad, translating into New Zealand in the recent *MacRae* ("Felicity Ferret") award of \$375,000 and these present awards of \$400,000 and \$1.1 million, and onwards. It contends the trend should be restrained before it develops further, imposing a "chilling" effect upon freedom of the press.

I am not so sure there is a "trend" of that sort, at least in New Zealand. It was said in the Middle Ages that "twice makes a custom", but two episodes (one of which while high was not excessive in its \$400,000) are a slender basis on which to reliably assert a "trend". Predicted trends based on overseas movements have their difficulties. Nor, if indeed there is such a trend, should the Court automatically assume it is improper, and should be stifled. As has been said, defamation awards have a social function, not merely judicial. It may be that a more sophisticated community, more critical of television and general media standards, is developing some distaste for personal attacks and tabloid style journalism by main stream media, and reflecting that in increasing awards made. Media can be forgiven for preferring a different evaluation, but this Court should perhaps pause. Bill of Rights considerations are in balance. If

there is a trend as asserted, it may need some control over aberrations, but it is not necessarily to be stifled.

On the other hand, in any policy decision the Courts should bear in mind the recent expression of Parliamentary will contained in the Defamation Act 1992, in force from 1 February 1993. Claims against the media no longer have maximum sums stated (s43). In non-media proceedings where a plaintiff recovers less than the amount claimed, and the Court considers damages claimed were "grossly excessive", the Court is required to award the defendant solicitor and client costs. There is no longer an upper ceiling which can be seen as a target against which a jury should award a percentage; and there is a severe disincentive to extravagance in other claims. Those are significant protections. There has been some broadening of justification (s8), and mitigation (s30). Punitive damages have not been eliminated (cf New South Wales), or left to the Judge alone (cf the McKay report), but may be awarded only in respect of action "in flagrant disregard" of plaintiffs' rights (s28). That may not be a novel concept, but is a clear affirmation. A new remedy is offered by way of declaration of liability, accompanied by solicitor and client costs. There are other signals to like effect. While not eliminating punitive damages, or directing any new approach to compensatory or aggravated damages, Parliament has seen fit to discourage excessive claims. That statement of legislative policy is one to be supported, not frustrated.

At risk of seeming conservative, I do not see a pressing need for any radical new approaches to quantum directions. Certainly, I am not minded to make major adjustments simply to meet the tail-end of claims predating the Defamation Act 1992, and before the effects, if any, of that legislation become manifest. I would also require rather more evidence the alleged trend towards excess actually exists before modifying the wisdom of long experience.

However, this case and policy concerns evident from the Defamation Act 1992, do bring out the desirability of *emphasising* very clearly to juries certain present orthodoxies. I refer in particular to a need to emphasise:

- (i) The sum claimed (now relevant only in non-media cases) is no more than a ceiling, with no other relevance, and is not a sum out of which a proportion should be awarded.
- (ii) The real world value of sums awarded, cross checked by reference to investment returns or (preferably) the purchase of common place items.
- (iii) That punitive damages are exceptional, and are to be awarded in addition to compensatory and any aggravated damages only so far as extra is required to adequately punish and deter; are to be "moderate", and the jury is not to get "carried away".

I am firmly opposed to any required direction as to ranges, or requirement the Judge enter the arena and say a sum claimed, or any sum above a stated level, is "grossly excessive" or even "excessive". At most, there may be room for a discretion to do so in extreme cases, but it will be for the adventurous who do not mind opening Pandora's box.

### Decision

There have been no miscarriages of justice justifying setting aside of judgment and new trial as to damages in respect of the \$400,000 award, or reversing the setting aside of judgment in respect of the \$1.1 million award.

I would dismiss the appeal and cross appeal. I agree with orders as to costs as proposed.



.....

**Solicitors:**

Simpson Grierson, Auckland for Appellant

Callaghan & Co, Auckland for Respondent