H. C. OF A. 1928.

WHITTAKER v. THE KING.

Special leave to appeal from such a decision ought not to be granted by this Court.

Special leave to appeal refused.

Solicitors for the applicant, *W. A. Windeyer, Fawl & Osborne.*

Solicitor for the respondent, *J. V. Tillett,* Crown Solicitor for New South Wales.

J. B.

Cons *David Syme & Co Ltd v Grey* (1992) 38 FCR 303

Foll *Uren v John Fairfax & Sons Ltd* (1966) 117 CLR 118

Appl *Rowan v Cornwall (No5)* (2002) 82 SASR 152

[HIGH COURT OF AUSTRALIA.]

THE HERALD AND WEEKLY TIMES LIMITED Appellant; Defendant,

AND

McGREGOR . . . . . Respondent. Plaintiff,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1928.

MELBOURNE, *Oct.* 5, 8; *Nov.* 8.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke JJ.

Defamation—Libel—Innuendo—Whether words capable of innuendo alleged—Plea of justification—Persistence in at trial—Damages—Assessment—Direction to jury—Whether plea of justification can be considered in assessing exemplary or compensatory damages—False plea—Penal damages—New trial—Substantial wrong or miscarriage—Rules of the Supreme Court 1916 (*Vict.*), *O. XXXIX., r.* 6.

In an article published in its newspaper in 1927 purporting to narrate events relating to a horse-race run in 1912 the defendant said concerning the plaintiff:—"A bookmaker from New Zealand was credited with accumulating a small fortune over Wingarara at that period. He had been taken into the confidence of McGregor. Both the jockey" (the plaintiff) "and his punter have passed away. Neither was of frugal habits. Despite the disclosure of stable information, Robertson" (the owner) "profited handsomely." The plaintiff, who at the time he brought the action was a retired jockey and was employed in the training of race-horses, alleged that the words meant that he

had been guilty of serious and wilful misconduct in his employment as a jockey and/or had lived a riotous and dissolute life and/or had in consequence of his mode of living died prematurely. The defendant pleaded justification. The trial Judge directed the jury that the words complained of were capable of sustaining the innuendo alleged, and, on the plea of justification, that they were not entitled to take that plea into consideration by way of giving penal damages, but that where such a plea was persisted in at the trial they could take it into consideration in estimating the amount of damages they should award for the wrong done to the plaintiff, if they found that the plea was not sustained.

Held, by the whole Court, that the direction on the question of the innuendo was sufficient.

Held, also, by *Knox* C.J., *Gavan Duffy* and *Starke* JJ. (*Isaacs* and *Higgins* JJ. dissenting), that the direction as to damages was sufficient.

Decision of the Supreme Court of Victoria (Full Court) affirmed.

APPEAL from the Supreme Court of Victoria.

The respondent, John Nicol McGregor, brought an action for libel against The Herald and Weekly Times Ltd. The action was heard before *Irvine* C.J. and a jury.

The respondent was, at the time of the events referred to in the article complained of, a professional rider and jockey and was registered as such by the Victoria Racing Club. At the time when the action was brought he was a retired jockey and was employed in the training of race-horses. In his statement of claim the respondent alleged that on 30th May 1927, in an issue of *The Herald* newspaper, the defendant falsely and maliciously printed and published of and concerning the respondent the following defamatory matter :—" Second String Scored.— . . . Wingarara in the previous April ran second to Light Ballast in a Mentone hurdle-race. He wasn't produced again until the end of June, when, with J. N. McGregor up, he vanquished a good field of hurdlers at Williamstown. A bookmaker from New Zealand was credited with accumulating a small fortune over Wingarara at that period. He had been taken into the confidence of McGregor. Both the jockey and his punter have passed away. Neither was of frugal habits. Despite the disclosure of stable information, Robertson profited handsomely over the victory of Wingarara at headquarters. Apart from the stake and bets, he received a share of sweep money." The respondent alleged that by such defamatory matter the appellant

H. C. OF A. 1928.

THE HERALD AND WEEKLY TIMES LTD. v. MCGREGOR.

meant and was understood to mean, contrary to the fact, that the respondent had been guilty of the conduct alleged in the said defamatory matter and/or had been guilty of serious and wilful misconduct in his employment as a jockey, and/or had betrayed his employer's confidence, and/or had contrary to his duty to his employer disclosed stable information, and/or had, for the purpose of the same being utilized to the financial disadvantage of his employer and/or for his own benefit, disclosed the said information, and/or had acted contrary to the rules of racing, and/or had lived a riotous and dissolute life and/or had in consequence of his mode of living died prematurely. The appellant, by its defence, denied the innuendo, and also alleged that the words complained of were true in substance and in fact and gave particulars in support of the latter plea.

In his direction to the jury the learned Chief Justice said (*inter alia*):—"What the plaintiff asks you to believe is conveyed by that article is that it is intended to convey and does convey to an ordinary reader the meaning that McGregor, who was the jockey complained of employed by Robertson, had taken into his confidence a bookmaker from New Zealand, and the phrase 'taken into his confidence,' having regard to the other words 'despite the disclosure of stable information,' is capable of meaning, 'taken into his confidence by disclosing to him stable information.' Therefore, I say to you that those words are capable . . . of the innuendo which I have already read to you from the pleadings, and that they are capable of the meaning that he had betrayed his employer's confidence and had, contrary to his duty to his employer, disclosed stable information. I having stated that those words are capable of that meaning, it is your duty to say whether they possess that meaning. . . . Coming now to the second part of the alleged libel, arising from the words 'Both the jockey and his punter have passed away. Neither was of frugal habits,' a somewhat greater difficulty arises. . . . Now it is alleged on behalf of the plaintiff that the collocation of those two sentences, neither of which might be libellous in itself, taken together implies a great deal more than the mere statement that the plaintiff has died, coupled with the mere statement that he was a man of uneconomical habits. It is said that they

are capable of this meaning . . . that they had passed away because they were not of frugal habits, and that in that sense the word 'frugal' has a very much wider and probably a quite different —possibly a quite incorrect—construction: that it bears a construction of a different kind—that their habits were loose, or, to use the language of the pleader, the plaintiff lived a riotous and dissolute life and in consequence of his mode of living died prematurely. Again I have to say to you . . . in my opinion those words in that context are capable of bearing the meaning which is alleged. . . . It is for you to say whether" the phrase "does bear that meaning. . . . If you come to the conclusion that this article is calculated to convey to a man of ordinary understanding . . . either that he betrayed his employer's confidence by giving away stable information or that he lived a dissolute life and brought on a premature death by that means . . . then you have to determine whether such a meaning is defamatory." On the question of damages his Honor said to the jury:—"Here, assuming it to be a libel, the libel was not only printed and published, but the defendant comes into Court continuing to say it is true. That is a matter which you are not entitled to take into consideration by way of giving penal damages or what are called vindictive damages, but you are entitled to take it into consideration in connection with the issue, where a defendant has not only libelled a man to begin with but continues right up to trial and through trial to assert the truth of what he has said—I am assuming that you find that what he has said is not true—you are entitled to take that into consideration in estimating the amount of damages which you are awarding to a man for the wrong which has been done to him."

The jury found a verdict for the respondent for £1,000.

The appellant gave notice to the respondent that it would apply on motion to the Full Court of the Supreme Court of Victoria, that the whole of the findings and verdict of the jury and the whole of the judgment entered on the trial of the action should be set aside and reversed and a new trial had between the parties. The Full Court dismissed the appeal. The Court was unanimous in its opinion that the direction of the learned trial Judge was correct on the question of the innuendo, but *Lowe* J. differed from the other

H. C. OF A. 1928.

THE HERALD AND WEEKLY TIMES LTD. v. MCGREGOR.

two members of the Court (*Mann* and *McArthur* JJ.) on the direction on the question of damages: his Honor was of opinion that it was not a proper direction to a jury in an action of defamation to say that the mere setting up of a plea of justification by the defendant and the supporting it by evidence and the relying on it at the trial are to be considered as elements in assessing the damages which a plaintiff is entitled to recover by way of compensation for the wrong done to him.

From the decision of the Full Court, the defendant Company now appealed to the High Court.

Owen Dixon K.C. (with him *Coppel*), for the appellant. The plea of justification was not contained in the original defence, but was added, by leave, before the trial. The damages were not in themselves so excessive as to entitle the appellant to a new trial. The direction to the jury was erroneous on the question of justification, and the Chief Justice should have directed the jury that if they found that the defendant justified from a reckless disregard of the plaintiff's character they could take that matter into consideration in assessing the amount of damages. The conduct of the appellant showed that it was not publishing the matter complained of for the purpose of injuring the respondent's character. The Chief Justice has, in his direction to the jury, treated the whole question as one of compensation for injury and not as one for the punishment of a wrong. The words "neither was of frugal habits" were not capable of meaning that the respondent was of dissolute habits which brought him to a premature death. Though failure to prove a plea of justification may, in the circumstances of the particular case, afford evidence of malice in the original publication, it is only as evidence of malice in the original publication that pleading and failing to prove a plea of justification is relevant to the question of damages (*Simpson* v. *Robinson* (1); *Caulfield* v. *Whitworth* (2); *Mangena* v. *Edward Lloyd Ltd.* (3)).

[HIGGINS J. referred to *Moran* v. *Lyons* (4); *Mayne on Damages*, 10th ed., p. 465.]

(1) (1848) 12 Q.B. 511; 18 L.J. Q.B. 73, at p. 76.
(2) (1868) 18 L.T. (N.S.) 527.
(3) (1908) 98 L.T. 640.
(4) (1878) 4 V.L.R. (L.) 379.

Merely putting a plea of justification on the record and failing to support it would not be enough to entitle the jury to increase the amount of damages for so doing. The criterion for the assessment of damages was stated in *Praed* v. *Graham* (1), where it was said that the jury in assessing damages are entitled to look at the whole of the conduct of the defendant from the time the libel was published to the time when the verdict was given. The Court may consider the conduct of the defendant for the purpose of seeing what was his purpose in publishing the libel complained of. The mere plea of justification does not of itself impose liability to further damages. The honesty of the defendant in raising the plea must be considered. [Counsel referred to *Gatley on Libel and Slander*, pp. 611-614; *Warwick* v. *Foulkes* (2); *The Queen* v. *Newman* (3); *Darby* v. *Ouseley* (4); *Blake* v. *Stevens* (5); *Risk Allah Bey* v. *Whitehurst* (6); *Lamb* v. *West* (7); *Watt* v. *Watt* (8); *Swinburne* v. *David Syme & Co.* (9).]

[STARKE J. referred to *Brooke* v. *Avrillon* (10).]

Unless the defendant has done something which is sufficient to establish that he has put forward the plea of justification recklessly, the jury cannot on that ground award exemplary damages (*Swinburne's Case* (11); *Raftery* v. *Russell* (12); *Brown* v. *McGrath* (13)). The fact that the plea of justification was not pleaded until the witnesses Cox and Rae came forward should have been put to the jury. There was no evidence in this case which would justify the learned Judge in leaving to the jury the question whether the damages ought to be punitive. In this case there was no evidence of malice or of circumstances of aggravation in publishing the libel, and the learned Judge ought to have directed his mind to consider whether there was or was not evidence of malice or of such circumstances. It is impossible, in principle, that anything which happens after the wrong done can *per se* affect the quantum of damages recovered. No facts which come into existence after the cause of

(1) (1889) 24 Q.B.D. 53.
(2) (1844) 12 M. & W. 507.
(3) (1853) 1 E. & B. 558.
(4) (1856) 25 L.J. Ex. 227.
(5) (1864) 4 F. & F. 232.
(6) (1868) 18 L.T. (N.S.) 615.
(7) (1894) 15 N.S.W.L.R. 120.
(8) (1905) A.C. 115.
(9) (1909) V.L.R. 550; 31 A.L.T. 81; 10 C.L.R. 43, at pp. 59, 62.
(10) (1873) 42 L.J. C.P. 126.
(11) (1909) V.L.R., at p. 575; 31 A.L.T., at p. 92.
(12) (1910) 10 S.R. (N.S.W.) 200.
(13) (1920) S.A.L.R. 97.

H. C. OF A. 1928.

THE HERALD AND WEEKLY TIMES LTD. v. McGREGOR.

action has arisen can affect the question of damages. The litigation cannot be considered as brought about by the defendant's subsequent wrongful act. If there has been a miscarriage of justice the appellant is entitled to a new trial unless the respondent proves that the miscarriage is not substantial. The relevant rule is Order XXXIX., rule 6. It is for the plaintiff, respondent, to show that the misdirection did not influence the result at which the jury arrived (*Bray* v. *Ford* (1)); and in *Anthony* v. *Halstead* (2) it was established that the onus of showing that there was no substantial wrong or miscarriage of justice was on the person supporting the charge once the mistake is shown, and it is for the person relying on the judgment to show that the miscarriage did not influence the result, and he must show it by authentic evidence. It is a substantial wrong for a man not to have his case decided according to law. If there has been a misdirection it is necessary to consider the topic to which it relates, and if the topic is one on the fringes of the case the Court should consider whether it is likely to influence the result if the matter is properly considered. If two conclusions are open, then the Court should conclude that a substantial miscarriage has occurred (*Anthony* v. *Halstead*; *Holford* v. *Melbourne Tramway and Omnibus Co.* (3); *Pratten* v. *Labour Daily Ltd.* (4); *Lionel Barber & Co.* v. *Deutsche Bank* (*Berlin*) *London Agency* (5); *White* v. *Barnes* (6)).

[STARKE J. referred to *Hoyt's Pty. Ltd.* v. *O'Connor* (7), where the High Court refused to grant a new trial though there had been a misdirection.]

Addis v. *Gramophone Co.* (8) limits the instances of exemplary damages. The matter is also considered in *Salmond on Torts*, 6th ed., p. 129. The only exceptions to the ordinary rules as to damages in contract are dishonour of a cheque, breach of promise of marriage and seduction. In *Salmond on Torts*, 6th ed., p. 129, it is stated that it is only a " contumelious disregard of another's rights "

(1) (1896) A.C. 44.
(2) (1877) 37 L.T. (N.S.) 433.
(3) (1909) V.L.R. 497, at p. 521; 29 A.L.T. 112, at p. 122.
(4) (1926) V.L.R. 115; 47 A.L.T. 147.
(5) (1919) A.C. 304, at p. 335.
(6) (1914) 136 L.T.Jo. 429; (1914) W.N. 74.
(7) (1928) 40 C.L.R. 566.
(8) (1909) A.C. 488.

which will entitle a plaintiff to exemplary damages. The libel is not capable of the meaning assigned to it in the innuendo.

The respondent appeared in person.

Cur. adv. vult.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. This is an action for libel in which a verdict was found for the respondent, McGregor, for £1,000 damages. A motion for a new trial was made to the Supreme Court of Victoria, but was dismissed, and from that decision an appeal has been brought to this Court.

The appellant raked up some gossip of 1912 for the pleasure of its readers, and published it in 1927 in its newspaper *The Herald*. According to this gossip, the respondent, who had been a jockey, disclosed some stable information to a bookmaker which enabled him to win a " small fortune " on a hurdle-race. And to this wanton and cruel statement the appellant added :— " Both the jockey and his punter have passed away. Neither was of frugal habits." The respondent had not passed away : on the contrary he was endeavouring to support himself, his wife and family as a stable hand in a racing stable. The respondent, by an innuendo in his statement of claim, alleged that these words meant that he had led a riotous and dissolute life, and, in consequence of his mode of living, had died prematurely. The learned trial Judge, *Irvine* C.J., was of opinion that the words, in the collocation in which they were found, were reasonably capable of being understood in the meaning attributed to them in the innuendo, and he left it to the jury to say whether they had the meaning so ascribed to them. The learned Judges of the Supreme Court, on the motion for a new trial, supported this direction. *McArthur* J. thus stated the reasons of the Court :—" In using the expression ' neither was of frugal habits ' the writer was obviously indulging in sarcasm. The words were not intended to be read literally. There is a sinister insinuation behind the expression, and the defendant cannot complain if a meaning going to the full limit of the insinuation is placed upon the words used. The expression ' neither was of frugal habits ' is linked

H. C. OF A. 1928.

THE HERALD AND WEEKLY TIMES LTD. v. MCGREGOR.

Knox C.J. Gavan Duffy J. Starke J.

up with the immediately preceding expression 'both the jockey and his punter have passed away'—otherwise the former expression would have no relevancy. And the two expressions are linked up in such a way as to suggest that they are connected as cause and effect—that the want of frugality in their habits was such as to have caused or hastened their death; and that such a result could only have been brought about if they had lived the sort of life that might well be described as riotous and dissolute." The argument addressed to us was that these words in their ordinary and well known meaning were not capable of this meaning; but we adopt the reasoning of the learned Judges of the Supreme Court, and think the direction of the trial Judge is not open to objection.

Next it was contended that the learned trial Judge had misdirected the jury upon the question of damages. He said:—"Every man is entitled, no matter what his position in life, to have his self-respect before his fellows maintained. Here, assuming it"—the publication—"to be a libel, the libel was not only printed and published, but the defendant comes into Court continuing to say it is true. That is a matter which you are not entitled to take into consideration by way of giving penal damages or what are called vindictive damages, but you are entitled to take it into consideration in connection with the issue, where a defendant has not only libelled a man to begin with but continues right up to trial and through trial to assert the truth of what he has said—I am assuming that you find that what he has said is not true—you are entitled to take that into consideration in estimating the amount of damages which you are awarding to a man for the wrong which has been done to him." In our opinion the only part of this direction open to objection is that which instructs the jury that they are not entitled to take into consideration the plea of justification by way of penal or vindictive damages. There was ample material in this case to go to the jury that the plea of justification was made with reckless indifference to its truth or falsity, and was what is in the books described as a false plea (*Brooke* v. *Avrillon* (1)). As for the rest, the learned Judge instructed the jury, in substance, that they were entitled to give the respondent such damages as in their opinion would compensate

(1) (1873) 42 L.J. C.P. 126.

him for the injury done to his reputation. The amount cannot be measured by any standard known to the law: it must be determined by a consideration of all the circumstances of the case viewed in the light of the law applicable to them (*Bray* v. *Ford* (1)). In point of law, the learned trial Judge would have been right if he had instructed the jury that in assessing damages they were entitled to take into consideration the mode and extent of the publication, that the defamatory statement was never retracted, that no apology was ever offered to the respondent, and that the statement had been persisted in to the end; because all these circumstances might in the opinion of the jury increase the area of publication and the effect of the libel on those who had read it or who would thereafter read it, might extend its vitality and capability of causing injury to the plaintiff. But even if any circumstance left for the consideration of the jury was properly only to be considered by them on the question of malice in the defendant at the time of publication and as a ground for vindictive damages, the direction complained of was substantially right. The Chief Justice had erroneously intimated that vindictive or penal damages could not be given because the appellant had come into Court continuing to say that the defamatory words were true, but it does not matter under what name or denomination the Judge classified the damages if he was right in instructing the jury that a particular fact was one for their consideration in assessing damages. If the direction erred, it was because it was too favourable to the appellant, and clearly no substantial wrong or miscarriage was thereby occasioned.

The appeal should be dismissed.

ISAACS J. The respondent sued the appellant for libel and obtained a general verdict for £1,000 damages. On a motion for new trial the State Full Court dealt with three contentions on the part of the appellant: (1) misdirection in telling the jury that the words complained of were capable of the innuendoes alleged; (2) damages excessive, and (3) misdirection as to damages. By a majority the motion was dismissed. *Lowe* J. agreed with the majority on the first two points, but thought the third was sustained, and entitled

(1) (1896) A.C., at p. 52.

H. C. OF A. 1928.

THE HERALD AND WEEKLY TIMES LTD. v. MCGREGOR.

Isaacs J.

the appellant to a new trial. His Honor further considered that, as the question of damages could not easily be separated from the other evidence in the case, there should be a retrial of the whole action. From that decision this appeal is brought.

The respondent appeared in person and read a short but clear statement of some reasons against allowing the appeal. They do not cover the whole ground, but in the circumstances I have the more anxiously considered all the questions involved.

On the first two questions I entirely agree with the whole Full Court. My conclusion, however, on the third is the same as that arrived at by *Lowe* J.

(1) As to the first point, defamatory sense, the appellant is not called upon to convince the Court that the words are not capable of conveying the libellous imputation. All it has to do is to satisfy the Court that the onus of showing that in the circumstances they may reasonably convey such an imputation is not satisfied. (See per Lord *Blackburn* in *Capital and Counties Bank Ltd.* v. *George Henty & Sons* (1) and per Viscount *Haldane* in *John Leng & Co.* v. *Langlands* (2).) Still, bearing the principle in mind, I have to agree with what the learned Judges of the Supreme Court said on this point. (2) The second point was but faintly suggested, and cannot be supported as a separate and independent ground. (3) On the third point, as I have said, I am of opinion the appellant is right.

It is essential that the matter should be marked out with precision. The learned Chief Justice of Victoria, in charging the jury on the subject of damages, said :—" Here, assuming it to be a libel, the libel was not only printed and published, but the defendant comes into Court continuing to say it is true. That is a matter which you are not entitled to take into consideration by way of giving penal damages, . . . but you are entitled to take it into consideration in connection with the issue, where a defendant has not only libelled a man to begin with but continues right up to trial and through trial to assert the truth of what he has said—I am assuming that you find that what he has said is not true—you are entitled to take that into consideration in estimating the amount of damages which you

(1) (1882) 7 App. Cas., 741, at p. 776. (2) (1916) 114 L.T. 665.

are awarding to a man for the wrong which has been done to him." Analysing that statement for present purposes, it amounts to this: (1) Assuming the article both defamatory and untrue, the mere fact that the plea of justification was pleaded and adhered to throughout the trial was sufficient to enable the jury to give increased damages if they thought it right; (2) those damages were not penal but compensatory only.

Practically all the relevant cases were cited, both in the Supreme Court judgments and at the Bar on this appeal. I shall endeavour to collect their effect as to the defendant's conduct subsequent to the libel. Their effect is: (1) that the conduct of a defendant subsequent to the publication of a libel may be taken into account by the tribunal of fact—the Court or the jury, as the case may be —either (a) to prove malice in publishing the libel, or (b) in aggravation of damages; (2) that to aggravate damages the subsequent conduct must be malicious, as that is understood in law, but not necessarily so as to indicate malice at the time of publishing the libel.

For the general statement that subsequent conduct may affect damages, the case of *Praed* v. *Graham* (1) is now the classic authority. But it must not be overlooked, as it easily may be, that the only objection there made to the damages was that they were excessive. The objection corresponded to the second ground in this case. The Court had not to direct its attention to the third point with which we are concerned, and so the relation of Lord *Esher's* words to that point remains to be considered. For the proof of malice in publishing the libel furnished by subsequent conduct, whatever be the consequence of that malice—that is to say, loss of privilege or aggravation of damages—cases of the type of *Simpson* v. *Robinson* (2) are relevant. They support the view that subsequent behaviour may be regarded in order to indicate motives or animus, or state of mind generally, as existing at an earlier time. But that is only an illustration of a very familiar principle of the general *law of evidence*. (See, for instance, *Barrett* v. *Long* (3) and *Thompson* v. *The King* (4)). What we are here concerned with, however—the

(1) (1889) 24 Q.B.D. 53.
(2) (1848) 12 Q.B. 511.
(3) (1851) 3 H.L.C. 395.
(4) (1918) A.C. 221.

H. C. OF A. 1928.

THE HERALD AND WEEKLY TIMES LTD. v. McGREGOR.

Isaacs J.

relevance of subsequent conduct to damages—stands in a different category. It is a branch, not of the law of evidence, but of *substantive law*, and is governed by a principle outside the ordinary law as to damages. This is the central consideration in connection with the third point. I would refer to a judgment of my own in *Whitfeld* v. *De Lauret & Co.* (1), not, of course, as an authority, but because I have there collected some very important authorities. I summarize what is there stated, and particularly with reference to the judgment of Lord *Shaw*.

There are two kinds of damages, namely, (a) compensatory and (b) exemplary. Compensatory damages in principle represent "restoration," although sometimes, as in libel or physical injury, the task has to be accomplished by means of what the learned Lord graphically calls "the broad axe." That, however, when done, exhausts the range of compensatory damages. But for any reprehensible conduct sufficiently related to the injury sued for, some just remedy was obviously requisite. As to suing for a plea of justification, as *Parke* B. said in *Warwick* v. *Foulkes* (2), "no one ever heard of an action being brought on such a ground." Permitted by law as a means of defence, such a plea is primarily privileged. What was the remedy? The Court found the common law wide enough to supply it as for all reprehensible conduct by means of a special doctrine of substantive law which was gradually evolved. It allows damages by way of retribution as contrasted with compensation, representing what *Pollock* calls "indignation at the defendant's wrong rather than a value set upon the plaintiff's loss" (*Torts*, 12th ed., p. 189). "For example's sake," said *Wilmot* L.C.J. in *Tullidge* v. *Wade* (3). In *Merest* v. *Harvey* (4) *Heath* J. speaks of juries being "permitted to punish insult by exemplary damages." The conduct so visited is not what is sued for; nor is it the continuation or the consequence of the subject matter of the action—the publishing of the libel. It is later and independent conduct of the defendant, and is met with exemplary damages when found after examination *by the proper tribunal of fact* in the particular case to be of a reprehensible

(1) (1920) 29 C.L.R. 71, at pp. 80, 81.
(2) (1844) 12 M. & W., at p. 508.
(3) (1769) 3 Wils. 18.
(4) (1814) 5 Taunt. 442, at p. 444.

character. A gratuitous personal insult or a wanton repetition of the libel outside the curial proceedings would almost of course be considered by a jury reprehensible. But if it is only the ordinary plea of justification or cross-examination of the plaintiff, or any phase of the regular procedure open to every litigant, then all that can be said is it may or may not be reprehensible, and whether it is so or not in fact must be judged of by the appropriate tribunal in the light of the circumstances. If the defence be conducted in good faith for the proper purpose, that is to say, for the purpose for which the law has devised it, it cannot be the groundwork of retributive damages, no matter how signally the defence falls short of success. It is impossible that the law at once permits and forbids, invites and punishes, the identical behaviour.

Therefore, in my opinion, it is an essential factor in connection with conduct subsequent to a libel that for the purpose of increasing damages the conduct complained of should be impelled by "what the law calls actual malice" (per Lord *Penzance* in *Henty's Case* (1)). That involves either of two elements. It must be either not honest—that is, there must be an absence of genuine belief in the truth or reality of the subject matter of the conduct; or else it must be not genuinely pursued for the single-minded purpose for which the law permits it, namely, defence from attack. That is what I take to be the true bearing of cases such as *Simpson* v. *Robinson* (2) and *Warwick* v. *Foulkes* (3). Conduct found to be malicious in the legal sense may serve either of the two purposes mentioned. That is, it may serve as *evidence* of malice at the time of publication, so as to displace privilege (if necessary), and it also then affords a reason for exemplary damages if the plaintiff succeeds; or it may establish malice subsequently only, in which case it is again a legitimate reason for exemplary damages if the plaintiff otherwise obtains a verdict.

Summarizing, I am of opinion (1) that conduct subsequent to the cause of action in libel is not the subject of compensatory damages; (2) that it may be evidence of malice, either at the time of publication or only at a later date; (3) that if accepted as indicating malice at

(1) (1882) 7 App. Cas., at p. 756. (2) (1848) 12 Q.B. 511.
(3) (1844) 12 M. & W. 507.

H. C. OF A. 1928.

THE HERALD AND WEEKLY TIMES LTD. v. McGREGOR.

Isaacs J.

the time of publication, it will destroy privilege otherwise available, and also entitle the jury to award exemplary damages to a successful plaintiff; and (4) that if it be taken as establishing malice only at a subsequent time, it cannot affect privilege, but will entitle the jury to give exemplary damages.

Applying these views to the portion of the charge complained of, whereby the jury were told they might award compensatory damages, which are independent of malice, and were left without the requisite guidance as to the necessity for malice in connection with a plea of justification, the direction was, in my opinion, erroneous.

It is not a sufficient answer to the appellant that, since compensatory damages are lighter than penal damages, the error was innocuous. If the jury had been told simply that they could give penal damages, there would still have been error—indeed, more serious error—because, possibly, with heavier results. The vital error so far as the defendant is concerned was in not qualifying the direction by telling the jury that *in respect of the conduct referred to they were not entitled to award any damages at all unless they found it to be malicious.* The error was not only real but on an essential issue, and incurable except by a new trial. From the material before us the Court cannot possibly say to what extent it operated. For all we know, and I am disposed to say in all probability, it induced a very considerable part of the damages actually awarded. But malice is an inference of fact for the jury alone, and no Court can usurp its functions. In some cases, as in *Hoyt's Pty. Ltd.* v. *O'Connor* (1), recently before this Court, and in *Lionel Barber & Co.* v. *Deutsche Bank (Berlin) London Agency* (2), there appears affirmative material from which the Court is in a position to judge of the probability or extent of operation of the error at law, as to whether it produced or how far it produced error in fact. Here it is not so.

A new trial is therefore necessary here, subject to three considerations which have been discussed and require separate examination. These are (1) that no objection was taken to the direction as given, (2) that there is a provision in the Rules of Court as to substantial wrong or miscarriage and (3) the restriction of the new trial to assessment of damages. I take these in order.

(1) (1928) 40 C.L.R. 566. (2) (1919) A.C. 304.

It is a settled practice that an "imperative duty resting upon the Judge at nisi prius is to direct the jury as to any rule of law by which they ought to be governed in their assessment of damages" (*Mayne on Damages*, 10th ed., at p. 577). That statement is borne out by the authorities (*Knight* v. *Egerton* (1); *Miles* v. *Commercial Banking Co. of Sydney* (2); *Holmes* v. *Jones* (3)). The fact that counsel did not take the point at the trial does not affect the matter.

Next, the relevant provision in the rule is: "A new trial shall not be granted on the ground of misdirection . . . unless in the opinion of the Full Court some substantial wrong or miscarriage has been thereby occasioned in the trial." There is really nothing new in principle in that provision:—"In all applications for a new trial the fundamental ground must be that there has been a miscarriage of justice" (per Lord *Buckmaster* for the Privy Council in *Hip Foong Hong* v. *H. Neotia & Co.* (4). In *Lionel Barber's Case* (5) Lord *Shaw of Dunfermline* points out that this was the rule in the time of *Tindal* L.C.J. About sixty years earlier, in *Edmondson* v. *Machell* (6), *Ashurst* J. said: "An application for a new trial is an application to the discretion of the Court, who ought to exercise that discretion in such a manner as will best answer the ends of justice." The rule was refused in that case because "all the Judges are unanimously of opinion that as complete and substantial justice has been done, there is no reason to grant a new trial." (And see per *Parke* B. in *Brandford* v. *Freeman* (7).) No doubt the discretion is a judicial discretion and must be exercised "according to law" (Lord *Loreburn* L.C. in *Brown* v. *Dean* (8)), which means that the determination of the question as to substantial wrong or miscarriage must be according to recognized principles, and not to be measured by the caprice of the Judge, or any unregulated and arbitrary conclusion as to the deserts of the parties. In *Bray* v. *Ford* (9), in the House of Lords, Lord *Halsbury* L.C. held that "a substantial wrong" had been done to the defendant because he was prevented by misdirection from having his full case

(1) (1852) 7 Ex. 407.
(2) (1904) 1 C.L.R. 470.
(3) (1907) 4 C.L.R. 1692, at p. 1696.
(4) (1918) A.C. 888, at p. 894.
(5) (1919) A.C., at p. 331.
(6) (1787) 2 T.R. 4, at p. 5.
(7) (1850) 5 Ex. 734, at pp. 736-737.
(8) (1910) A.C. 373, at p. 375.
(9) (1896) A.C., at p. 48.

H. C. OF A. 1928.

THE HERALD AND WEEKLY TIMES LTD. v. McGREGOR.

Isaacs J.

considered by the jury. Lord *Watson* said (1) it was "a miscarriage in the sense in which that word was understood by the legal profession at the time when the Rules of 1883 were framed," and that it was a substantial miscarriage. Lord *Herschell* said (2) that "in the case of an action for libel, not only have the parties a right to trial by jury, but the assessment of damages is peculiarly within the province of that tribunal." His Lordship thought there was a substantial miscarriage. In *Lionel Barber's Case* (3), *Bray* v. *Ford* (4) was distinguished by the majority because in the later case there was material from which the Court could see that substantial wrong or miscarriage had not occurred. Lord *Atkinson*, who dissented, agreed, on the principle of *Anthony* v. *Halstead* (5) and *White* v. *Barnes* (6), that if it could be shown that notwithstanding the error no miscarriage had occurred, the verdict would stand. The difficulty in each case is to find the material to satisfy the Court that an error which may have caused injustice has in all probability not caused any. That was the principle on which I acted in *Hoyt's Case* (7) in respect of portion of the learned trial Judge's charge, and which I act on now. There I found the necessary material in the charge itself and the general circumstances. Here it is entirely absent, and the matter stands precisely as in *Bray* v. *Ford*. The same principle is insisted on by Viscount *Haldane* in *Hill & Sons* v. *Edwin Showell & Sons Ltd.* (8).

The remaining question is as to whether the new trial should be limited to merely the assessment of damages. *Lowe* J. thought that the question of damages could not be easily separated from the other evidence in the case, that the whole verdict was a general verdict, and there should be a retrial of the whole action. I do not see how it can be avoided without injustice to the appellant or the respondent. The words complained of are undoubtedly capable of defamatory meanings—whether they are so in truth in the circumstances, and to what extent, is essentially for the jury. Although we know the last jury found some defamation, we do not know, and have no means of arriving at even a probable

(1) (1896) A.C., at p. 49.
(2) (1896) A.C., at p. 52.
(3) (1919) A.C., at p. 316.
(4) (1896) A.C. 44.
(5) (1877) 37 L.T. (N.S.) 433.
(6) (1914) W.N. 74.
(7) (1928) 40 C.L.R. 566.
(8) (1918) 87 L.J. K.B. 1106, at p. 1108.

conclusion as to, what portion was so considered, or if any portion was not so considered, or to what extent. A new jury would not know, and the Court could not assume anything as to that. To assess damages for conjectural defamation would be absurd and unjust. Similarly as to justification: we know nothing as to the extent that the last jury found want of justification, and the Court could not direct the new jury on that point. These are matters as to which we are bound not to usurp the functions of the jury or to guess at the unknown. The Rules of Court do not, in my opinion, apply so as to enable the Court to split the case. The latter portion of rule 6 of Order XXXIX. would enable a distinct part of a controversy to be segregated, but that cannot apply so as to "give final judgment" in respect of undescribed defamation and undelimited want of justification, the extent of which remains buried in what was the collective mind of the former jury, and can never be discovered. Similarly as to rule 7, we are not in a position to ascertain the "finding." A general verdict has its advantages and its disadvantages. Whichever in the present position it may be thought to have, the result is that, in my opinion, it is impossible to sever the assessment of damages from the rest of the case.

The order of the Court ought, in my opinion, to be that the appeal be allowed, and a new trial ordered before a Judge of the Supreme Court with a jury. (See rule 9A.)

HIGGINS J. I concur with the learned Judges of the Supreme Court in the view that the words of the article are capable of the meaning ascribed to them in the innuendo (par. 6). It is not, as I understand, contended that the article did not distinctly accuse the plaintiff, a jockey, of having disclosed to a bookmaker, stable information by which the bookmaker profited; but, in my opinion, the other words of the article were also fully capable of the meaning that the plaintiff had lived a riotous and dissolute life, and in consequence thereof had died prematurely. "Frugal" has a meaning of being careful and sparing in the use of food, &c.; and the denial of frugality may well have meant, in the context, to suggest, by ironical litotes, that the plaintiff was an example of the principle of Dr. *Johnson's* generalization, "He seldom lives frugally who lives by chance."

H. C. OF A. 1928.

THE HERALD AND WEEKLY TIMES LTD. v. MCGREGOR.

Higgins J.

But the members of the Full Court differ as to the correctness of the direction given by the trial Judge as to damages; and the difference is by no means surprising when one examines the phraseology used in English cases. The question here turns, ultimately, on the actual words used by the trial Judge on the subject, as a whole. The jurors were told first that, if they found for the plaintiff, they were entitled to give substantial compensation for outraged feelings as well as for any pecuniary loss; and this direction seems to be right—so long as the theory stands that "the jingling of the guinea helps the hurt that honour feels." The jury was entitled to form its own opinion of the plaintiff, and the effect of the accusation on him. As for the second direction, that the jury was not entitled, if the plea of justification failed, to give punitive damages (even if the plea were pleaded in actual malice), I am not, as at present advised, prepared to agree with it. I do not know on what ground the Court could interfere with the jurors' freedom of action as to damages, if they thought that the circumstances were such as to justify a punishment (see *Merest* v. *Harvey* (1)). Is not the jury as free to give punitive damages as to give contemptuous damages? (See *Odgers on Libel and Slander*, 5th ed., pp. 373-375; and see *Anderson* v. *Calvert* (2).) The plaintiff was a jockey whom the newspaper accused of a gross violation of his fiduciary relation towards his employer; and the jury was entitled to take a very unfavourable view of the reckless conduct of the newspaper, through its contributor, as having, for the sake of profit, recklessly calumniated a man supposed to be dead and therefore unable to vindicate his character against the calumny. But the mistake here, if any, was a mistake tending against the plaintiff; and the plaintiff does not complain of it.

But the main stress of argument relates to the direction that damages may be increased by the mere fact that the defendant pleaded justification and failed on that issue, and that he continued to assert the truth of the libel to the end. How can a defendant be mulcted in damages for merely exercising his right of defence? As I understand the matter, what a defendant asserts in his defence to an action is privileged; and, as in other cases of privilege, privilege

(1) (1814) 5 Taunt. 442.

(2) (1908) 24 T.L.R. 399 (C.A.).

is an answer to the action unless he has abused the privilege—by exhibiting actual malice in the use of the privilege. If there is need of authority for this position, I can refer to the case of *Caulfield* v. *Whitworth* (1), before the Court of Common Pleas (*Bovill* C.J., *Willes* and *Byles* JJ.). I think that Mr. *Gatley*, in his recent work on *Libel and Slander* (p. 614), is justified in his summary of the position: "But the mere fact that the defendant has pleaded justification is not in itself evidence of malice, even though he abandons such plea at the trial, or fails to establish it, and therefore should not be taken into account in assessing damages." This is substantially, as I understand it, the view of the dissenting Judge, *Lowe* J., and I agree with him. (See also *Brooke* v. *Avrillon* (2).)

I admit that *McArthur* J., in his comprehensive review of the cases, has shown that learned Judges have used expressions not so carefully guarded, perhaps, as might have been expected—expressions which appear to favour the contrary view, until the circumstances of the cases before them have been examined. It is often very difficult to express, in a brief phrase, all the conditions and qualifications which are before the mind in the particular case. But there is no case that I know of that denies the simple obvious position which I have stated.

Incidentally, there is an anomaly to which allusion has not been made—an anomaly that exists whichever view be taken as to the need for actual malice; but the Courts seem to have taken up a practical, rather than a logical, position. The only wrongful conduct alleged (par. 5 of statement of claim) is a publication of the libel in a newspaper of a fixed date—30th May 1927—not a publication *in the pleadings*. How can damages attributable to publication in the pleadings be treated as attributable to the publication in a newspaper of the specific date mentioned? The point was raised during argument in *Warwick* v. *Foulkes* (3). Counsel urged: "If the plea were placed upon the record maliciously, it might have formed the ground of a distinct action, and therefore ought not . . . to have been made a ground of increasing the damages in this." But that suggestion was stamped upon by *Parke*

(1) (1868) 18 L.T. (N.S.) 527. (2) (1873) 42 L.J. C.P. 126.
(3) (1844) 12 M. & W., at p. 508.

H. C. OF A. 1928.

THE HERALD AND WEEKLY TIMES LTD. v. McGREGOR.

Higgins J.

B., who said: "No one ever heard of an action being brought on such a ground." So it appears to be the practice to allow the jury to add any damages resulting from the (malicious) repetition of the libel in the pleadings to the damages resulting from the libel, the subject of the action—I presume on the principle *ut sit finis litium*.

The essence of the position is that a defendant may honestly believe that the accusation is true, and yet fail to prove it; but the failure to prove it in legitimate defence is not a ground for damages unless the accusation was repeated in actual malice towards the plaintiff. Such an abuse of privilege in order to injure the plaintiff may well be found to involve actual malice.

In the result, I see no course open but to allow the appeal, and to order a new trial for the misdirection. For the jury *may* have been influenced in assessing the damages by the misdirection; the jury never has had the issue put before it of actual malice in the plea of justification; the burden of showing that the damages were not increased by the misdirection lies on the plaintiff, and we cannot act on mere speculation; and the only remedy is a new trial (*Bray* v. *Ford* (1)).

Appeal dismissed with costs.

Solicitors for the appellant, *Fink, Best & Miller.*
Solicitor for the respondent, *J. Lynch.*

H. D. W.

(1) (1896) A.C., at pp. 52-53, per Lord *Herschell.*