FOLL. (1974) 2 NSWLR 348.
appl. 81 ACTR 2
cons 99 ALR 252.

FOLL. 117. CAR. 118

[HIGH COURT OF AUSTRALIA.]

TRIGGELL . . . . . APPELLANT;
PLAINTIFF,

AND

PHEENEY . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1951.

SYDNEY, *April* 3, 4; *May* 10.

Dixon, McTiernan, Williams, Webb and Kitto JJ.

Defamation—Libel—Innuendo—Publication—Qualified privilege—Malice—Conduct at trial—Dishonesty of plaintiff—Belief of defendant—Damages—Excessive—Changing value of money—Death of appellant after appeal instituted.

In assessing damages for defamation the jury may not take into account as a ground for giving or increasing damages, whether exemplary or compensatory, conduct of the defendant which was bona fide and justifiable or proper and therefore the jury cannot use for such a purpose a defence which is bona fide and raised properly or justifiably in the circumstances known to the defendant or evidence honestly given in support of such a defence. But the conduct of the defendant up to and including the trial may be taken into consideration not merely as evidence tending to show retrospectively malice at the time of publication or the intent with which the wrong was done. It may also be taken into consideration as improperly aggravating the injury done to the plaintiff if there is a lack of bona fides in the defendant's conduct or it is improper or unjustifiable. So *Held* (*McTiernan* J. dissenting) on the authority of *Herald and Weekly Times Ltd.* v. *McGregor*, (1928) 41 C.L.R. 254.

A new trial should not be granted in an action of defamation on the ground that the damages awarded by the jury to the plaintiff are excessive unless the amount is such that no reasonable body of men could have awarded it,

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'but great latitude must be allowed to juries who are entrusted with the duty of estimating the general damages which should be awarded in an injury to his reputation, that being a matter regarded as peculiarly appropriate to be determined by a jury.

Decision of the Supreme Court of New South Wales (Full Court): *Triggell* v. *Pheeney*, (1950) 50 S.R. (N.S.W.) 192; 67 W.N. 112, reversed.

APPEAL from the Supreme Court of New South Wales.

An action for libel was brought in the Supreme Court of New South Wales by Daniel Triggell against Arthur James Pheeney in which the plaintiff claimed damages in the sum of £2,000 in respect of certain words written of him by Pheeney in a letter published by Pheeney to one Claude Lock Shearer, of Wolumla, New South Wales.

Triggell was a dairy farmer, aged seventy years, who for the greater part of his life had resided in or about the district of Bega. At all material times Triggell had occupied, as a share-farmer, a dairy farm near Bega, known as "Spring Dale" and owned by Pheeney, who claimed to have had a lifetime experience in dairy farming.

In 1945 Triggell and Pheeney entered into an oral arrangement whereby Triggell was, on 28th May 1945, to go into occupation of "Spring Dale" under a share-farming agreement. That agreement was not reduced to writing but, amongst other features, it appeared to have provided that the net returns from the supply of cream to the butter factory and from the sale of pigs should be shared equally between the parties. One of the matters discussed and agreed upon related to pigs, the arrangement being that Triggell was to raise pigs on the farm, or buy them, and from time to time to sell such as were then marketable. Triggell was to market the pigs through local stock agents, who would send the account sales and the proceeds of the sales to Pheeney.

The pigs were conveyed between the farm and Bega by lorry owned by Shearer, who charged cartage therefor which was paid by Pheeney and debited against the returns to be divided.

The relations between Triggell and Pheeney, although friendly enough for a while, became unfriendly and this attitude towards one another worsened as time went on. Triggell complained that heifers from the farm were not brought back to it in due time, that horses were borrowed and that cows were demanded in exchange for heifers. He suspected or believed that this was due to the

acquisition by Pheeney of another farm and that Pheeney desired to get rid of him. This was denied by Pheeney, who, however, on his part, complained that Triggell was not carrying on the work of dairy farming satisfactorily. By letter dated 2nd August 1947, Pheeney notified Triggell that unless before 6th August 1947 the latter entered into a written agreement regarding the working of "Spring Dale" he would instruct his solicitor to give Triggell notice to leave. This matter was not pursued. Pheeney visited "Spring Dale" on several occasions, accompanied by various persons, for the purpose, *inter alia*, of serving notices or inspecting the farm, and invariably there was an altercation, if not worse, as a consequence. Amongst the notices so given was one dated 22nd December 1947, notifying that Pheeney intended to terminate the share-farming agreement on 1st June 1949. The effect of a more formal notice dated 28th February 1948, was to require Triggell to do certain work about the dairy bails, to destroy noxious weeds and to refrain from buying or selling pigs unless expressly approved by Pheeney. That notice also required Triggell to account to Pheeney for the proceeds of the sale of three sows, said to have been sold on 25th November 1947, the estimated value being £8 each, and four pigs, said to have been sold on 20th January 1948, the estimated value being £4 16s. 0d. each. At the hearing of the action Pheeney said that his solicitors used the word "sold" in mistake for the word "missing". Triggell said that Pheeney never told him orally that pigs were missing or unaccounted for. This was denied by Pheeney, who said also that a sow, identifiable by a black mark, and litter had been missing since 30th September 1947, when they were placed on Shearer's lorry to be taken back to the farm. In an account for the month of April 1948, prepared by Pheeney's solicitors on 5th June 1948, a deduction of £33 12s. 0d. was made said to be half the value, based on market values, of six sows at £8 each and four store pigs at £4 16s. 0d. each, alleged to be "not accounted for since August 1947" and it was stated that Pheeney was "prepared to make any adjustment which may be necessary on the sows and pigs referred to being accounted for by you (Triggell) to his satisfaction." Triggell maintained that there were not any sows or pigs unaccounted for.

Under date 24th May 1948, Pheeney notified Triggell that he, Pheeney, intended to terminate on 28th May 1949, Triggell's use and occupation of "Spring Dale" containing 570 acres which were in Triggell's use and occupation under his share-farming agreement with Pheeney.

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A letter dated 12th July 1948, signed by Pheeney and forwarded by him to Shearer, omitting formal parts, was as follows :—

" Doubtless you are aware that pigs have been removed from my place at Sth. Wolumla, & not accounted for by Mr. Triggell. Some time since I asked your wife & son Noel to convey to you that until this matter of missing pigs has been cleared up, not to remove or deliver any pigs from my place. This request you failed to observe. Some time since you took charge of certain pigs (from Bega Sale Yard) that had not been sold. These pigs were not delivered back to ' Spring Dale ' that day, or any day since. I ask you for an explanation in a friendly way. If a satisfactory answer is not received by 1.30 p.m. today 12th July/48 I will be leaving for Bega at that time, & will consult a Solicitor, also I will place the whole business before a certain Board of Directors in a few days' time. I ask you again in a co-operative manner to treat this as urgent."

The Board of Directors referred to was the Board of a butter factory.

In a letter dated 14th July 1948, Pheeney's solicitors informed Shearer that " Mr. A. J. Pheeney has instructed us to communicate with you with regard to the matter mentioned below.

We are instructed that on the 30th September last you took delivery at the Bega Sale Yards of 1 sow and litter from Mr. Pheeney's property known as ' Spring Dale ', Wolumla, which had not been sold and which were to be returned by you to ' Spring Dale '. We are also instructed that Mr. Pheeney has not been able to ascertain what happened to the sow and litter after you took the same from the Bega Sale Yards.

Please advise us whether the sow and litter referred to were delivered by you to ' Spring Dale ' and if so to whom and on what date."

During the course of his examination in chief, Pheeney said that when he wrote his letter of 12th July 1948 he believed each statement to be true, he did not have any doubt about it, and he gave what he said were the grounds for his belief. Pheeney agreed in cross-examination that he had become suspicious of Triggell's actions, that he had first believed that he was dishonest shortly after 30th September 1947 and said that he could not think anything but that Triggell had in fraud of him disposed of the sow and litter, that in his heart he had no doubt of it; but later in the cross-examination he was reluctant to use the word " thief " and said that he did not think that Triggell was a very honest person.

He agreed that from August 1947 his feelings towards Triggell were feelings of enmity and hostility.

In the course of his summing-up, the trial judge, *Herron* J., said :—" Lastly, and this is a thing that has to be approached with some caution, a jury is entitled to take into consideration the conduct of the defendant right from the start to the finish, including this trial. For instance, the attitude of a man in a court of law might be that ' this is a Heaven-sent opportunity for me to repeat what I said about the plaintiff in writing. I can now say publicly what I previously said in writing, and it is a great opportunity for me to spread the calumny a bit further than I could have otherwise '. But of course that is a matter, gentlemen, that I think must be a rare type of proceeding on a defendant's part, but you are entitled to consider the fact here, none the less, that the defendant said that he really believed that the plaintiff was guilty of dishonesty. Then, of course, you have to consider that along with the conduct of the case, because if he did not really believe what he said about the pigs that would constitute a good weapon of attack by the plaintiff against him for having written the letter ; in other words, it might provide evidence of malice. So that he is in a cleft stick : if he said he did not believe it, he would be in a difficulty, and if he came out with what he claimed was the truth of the matter, then the plaintiff's counsel would say : ' Well, he has in effect broadcasted in a court of law that the plaintiff is a thief '. Anything that is relevant can be said here without parties having to be fearful that a jury will find heavy damages against them for having given the evidence that is appropriate to the various issues. So that as I say—and I mean it—you have to look at these things with a good deal of caution and sound commonsense before applying general principles of law to the particular case under review. But it is the jury's province, nonetheless, and its privilege, in such a case as this, to find damages at large. They are not restricted in any way by counsel or the judge. You can put your own figure on the verdict if you think the plaintiff is entitled to a verdict ; they can be anything from nominal damages to substantial damages. I do not think there is anything further I can say to assist you and I propose to ask you to consider your verdict."

Counsel for the defendant submitted there was nothing in the conduct of the trial which could possibly be called aggravation.

The trial judge said : " I am not going to rule on it as a matter of law. Your client said in the course of the proceedings he

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believed the plaintiff was dealing dishonestly, but it seems to me it is a matter for the jury."

Further particulars of the summing-up appear in the judgment of the majority of the High Court hereunder.

The jury gave a verdict for the plaintiff and awarded damages in the sum of £1,955.

The defendant appealed to the Full Court of the Supreme Court on the grounds that the damages awarded were excessive; that the jury failed to apply their minds to the real matters in issue; that the trial judge was in error (a) in directing the jury that anything had occurred in the conduct of the trial which could be considered by them as matter in aggravation of damages, and (b) in the circumstances of the case, in directing the jury that the fact that the defendant swore at the trial that at the time of the publication of the matter complained of he honestly believed that such matter was true, might be considered by them as matter in aggravation of damages; and that the verdict was against the evidence and the weight of evidence.

The Supreme Court (*Street* C.J., *Maxwell* and *Owen* JJ.) allowed the appeal, the verdict was set aside and a new trial was ordered generally (*Triggell* v. *Pheeney* (1)).

From that decision Triggell, by leave, appealed to the High Court.

After the appeal had been instituted in the High Court, Triggell died. An application was made to the High Court by John Alwin Triggell and Walter James Triggell, executors of the will of the appellant and to whom probate thereof had been granted, that they be made parties to the appeal and that the said appeal be carried on and prosecuted by them as such executors in like manner as such appeal might have been carried on and prosecuted by the said Daniel Triggell if he had not died. The application was not opposed by the respondent Pheeney (see *Ryan* v. *Davies Bros. Ltd.* (2)), and an order was made accordingly.

W. R. Dovey K.C. (with him *H. W. Robson*), for the appellant. The court below wrongly ordered a new trial on the grounds that portions of the summing-up of the trial judge were not justified on the evidence or in law, and that the damages awarded were excessive. There was nothing objectionable either in the direction

(1) (1950) 50 S.R. (N.S.W.) 192; 67 W.N. 112.

(2) (1921) 29 C.L.R. 527.

to the jury that they could take into account the conduct of the defendant right from the start to the finish, including the trial, or in his Honour's amplification of such direction. Although not obliged to do so, the defendant had chosen to say in court that he really believed that the plaintiff had been guilty of dishonesty and to give alleged reasons for such belief. It was open to the jury to disbelieve the whole of the defendant's evidence and if they thought that there was no basis for a belief in the plaintiff's dishonesty they were entitled to take that into consideration in approaching the question of damages. They could, on the evidence, find that the story of the missing pigs was deliberately invented by the defendant to damage the plaintiff and drive him off his property. The reference in the summing-up to the defendant's "conduct" was made in such a way that the jury could be in no doubt that it meant "reprehensible conduct". The passage where the trial judge spoke of the defendant as "being in a cleft stick", when taken in its context, was of assistance in making it clear to the jury what were the rights of an honest defendant. The summing-up read as a whole was fair to the defendant and was correct in law. Those portions against which the main criticism was directed by the court below were in accordance with the principles clearly laid down by this Court in *Herald and Weekly Times Ltd.* v. *McGregor* (1) and could not be taken by the jury in any other way (*Gatley* on *Libel and Slander*, 3rd ed. (1938), pp. 624-628; *Praed* v. *Graham* (2); *Warwick* v. *Foulkes* (3); *Lamb* v. *West* (4); *Raftery* v. *Russell* (5)).

[DIXON J. referred to *McGregor* v. *Herald and Weekly Times Ltd.* (6).]

Although the damages were heavy, it could not be said that in the circumstances of this case the amount was unreasonable. Appellate courts have always been slow to disturb the verdicts of juries in libel actions. In view of the defence of qualified privilege the jury could not have found for the plaintiff without being satisfied that the defendant had acted maliciously. Once they believed that the purpose of the defamatory words was to drive the plaintiff off the farm and deny him his means of livelihood, they could register their disapproval by awarding heavy damages. The odd amount of £1,955 was unusual, but was not evidence that

(1) (1928) 41 C.L.R. 254.
(2) (1889) 24 Q.B.D. 53, at p. 55.
(3) (1844) 12 M. & W. 507, at p. 508 [152 E.R. 1298, at p. 1299].
(4) (1894) 15 L.R. (N.S.W.) 120.
(5) (1910) 10 S.R. (N.S.W.) 200; 27 W.N. 20.
(6) (1928) A.L.R. 379.

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the jury had failed to act as reasonable men. The explanation may be that, having decided to award substantial damages, they sought assistance in the fact that the *Agricultural Holdings Act* 1941 prevented the defendant from ejecting the plaintiff from the farm before 28th May 1949, and on the documents put in evidence the average profits of the plaintiff were approximately £195 per month. If, therefore, the defamatory letter had achieved its purpose of driving the plaintiff off the farm he would have lost approximately ten months of profits in that amount: see *Gatley* on *Libel and Slander*, 3rd ed. (1938), pp. 735-737; *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures Ltd.* (1); *Ley* v. *Hamilton* (2); *Guise* v. *Kouvelis* (3); and *Smith's Newspapers Ltd.* v. *Becker* (4).

J. W. Shand K.C. (with him *W. P. Ash*), for the respondent. The direction of the trial judge was incorrect, in so far as it indicated that the evidence by the defendant, that at the time he wrote the subject letter he honestly believed in the truth of its contents, could be considered by the jury as evidence of malice to increase damages awarded against him. A party cannot be penalized for exercising his ordinary right of defence (*Herald and Weekly Times Ltd.* v. *McGregor* (5); *Turner* v. *Metro-Goldwyn-Mayer Pictures Ltd.* (6)). The evidence given by the defendant as to which the trial judge gave his direction was that at the time when the defendant wrote the statement he believed it. While the jury might punish the defendant if they thought he did not believe in the statement, they could not punish him again for stating at the trial that he believed in the statement at the time when he published it. The amount of the damages was so excessive that reasonable men could not have given them, and the jury must have proceeded upon a wrong principle (*Miles* v. *Commercial Banking Co. of Sydney* (7); *Praed* v. *Graham* (8); *Bates* v. *Producers and Citizens' Co-operative Assurance Co. Ltd.* (9)). The fact that the damages were so large is explicable only upon the grounds that the jury were influenced by the erroneous direction with regard to malice. There should be a new trial, because there was an erroneous direction which may have been the foundation of the verdict (*Godhard* v. *James Inglis & Co. Ltd.* (10)). The Court, in such a case, will adopt

(1) (1934) 50 T.L.R. 581, at p. 585.
(2) (1935) 153 L.T. 384.
(3) (1947) 74 C.L.R. 102, at pp. 112, 114.
(4) (1932) 47 C.L.R. 279, at p. 289.
(5) (1928) 41 C.L.R., at p. 267.
(6) (1950) 1 All E.R. 449, at p. 456.
(7) (1904) 1 C.L.R. 470, at p. 478.
(8) (1889) 24 Q.B.D., at p. 55.
(9) (1935) 52 W.N. 95.
(10) (1904) 2 C.L.R. 78, at p. 92.

the same attitude as when improper evidence has been admitted (*Piddington* v. *Bennett and Wood Pty. Ltd.* (1)). The new trial should be a new trial generally, and not limited to damages only, because the facts bearing on damages are not easily separable from the facts establishing liability (*King* v. *Ivanhoe Gold Corporation Ltd.* (2) ; *Bell* v. *Thompson* (3)).

W. R. Dovey K.C., in reply. Although counsel for the respondent argued that the summing-up by the trial judge was wrong in law, he failed to show how it departed from the principles stated in *Herald and Weekly Times Ltd.* v. *McGregor* (4).

Cur. adv. vult.

May 10.

The following written judgments were delivered :—

DIXON, WILLIAMS, WEBB and KITTO JJ. This is an appeal by leave from an order of the Supreme Court of New South Wales setting aside a verdict for the plaintiff in an action of libel and directing a new trial. By the verdict the plaintiff recovered £1,955 damages. The grounds upon which the verdict was set aside are concerned with the assessment of damages and no question arises with respect to the establishment of the cause of action. The Supreme Court considered that the amount of damages awarded was excessive and based the order setting aside the verdict on that ground. But the court held also that the jury had been erroneously directed in relation to the use which might be made, in assessing damages, of the position adopted by the defendant at the trial.

The plaintiff, who in this Court was the appellant, occupied a dairy farm near Bega belonging to the defendant. He occupied it as a share farmer. The arrangement between them had not been reduced to writing, but, so far as material, it appears to have provided for the equal division of the net returns from the supply of cream to the butter factory and from the sale of pigs. It was for the plaintiff to market the pigs through local stock agents, who would send the account sales and the proceeds of the sales to the defendant. Correspondingly the plaintiff might buy

(1) (1940) 63 C.L.R. 533, at pp. 554, 565.
(2) (1908) 7 C.L.R. 617, at pp. 621, 622, 628.
(3) (1934) 34 S.R. (N.S.W.) 431, at p. 440 ; 51 W.N. 138.
(4) (1928) 41 C.L.R. 254.

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pigs through the same agents. The pigs were taken between the farm and Bega by lorry. The lorry belonged to a carrier named Shearer who charged cartage which was paid by the defendant and debited against the returns to be divided. The plaintiff went into occupation of the dairy farm as a share farmer on 28th May 1945 and, under the *Agricultural Holdings Act* 1941, Part V., 28th May would be the annual date for the expiry of any notice to quit the defendant might see fit to give the plaintiff. For some two years matters seem to have gone well enough between them; but in the later part of 1947 their relations appear to have become unfriendly and as time went on a condition of open warfare developed. The plaintiff, who was a man of seventy years of age, worked the farm with the aid of his sons. The defendant, whom the plaintiff represented to be a man of substance and not without influence in the district, acquired another farm in the neighbourhood. The plaintiff complained that some of the heifers from the farm he was working were not brought back to it in due time, that horses were borrowed and that cows were demanded in exchange for heifers. He suspected or believed that the reason lay in the acquisition of the new farm and that the defendant wished to get rid of him. The defendant, who disputed these facts, complained on his side that the plaintiff took no steps to keep down the rabbits, a responsibility the plaintiff however disclaimed, that he failed to take proper steps for herd recording, that he did not do some work in connection with building further pig pens, that he bought inferior pigs and that otherwise he did not carry on the work of dairy farming satisfactorily.

At the beginning of August 1947 the defendant sent to the plaintiff a written communication notifying him that unless he entered into a written agreement with the defendant the latter would instruct his solicitor to give the plaintiff notice to leave the farm. The result was the resort by both parties to their respective solicitors, between whom correspondence continued to pass for some time. The notion of reducing the arrangement between the parties to writing was not pursued and unfortunately the defendant did not leave questions between himself and the plaintiff exclusively to his solicitors. He visited the farm on several occasions accompanied by various supporters or witnesses, sometimes for the purpose of serving notices, sometimes for the purpose of inspecting the farm and no doubt complaining, but always with an altercation, if not worse, as a consequence. As might be expected, conflicting accounts of these encounters were given in evidence.

The defendant next gave the plaintiff a written notice dated 22nd December 1947 of his intention to terminate the share-farming agreement on 1st June 1949, a notice certainly of a long enough currency but expiring not upon the right date. Then, on 28th February 1948 he gave the plaintiff a written notice of a most formal character containing various directions and requirements concerning the dairy farm. Its effect was to require the plaintiff to stop buying and selling pigs without the defendant's specific approval, to do certain work about the dairy bails and to destroy noxious weeds. It concluded with a demand more material to the issues raised by the libel. It required the plaintiff to account to the defendant for the proceeds of three sows and four pigs said to have been sold on 25th November 1947 and 20th January 1948. In evidence the defendant said that "sold" was a mistake of his solicitors for "missing". The plaintiff swore that never did the defendant tell him orally that any pigs were missing or unaccounted for. The defendant gave evidence to the contrary. He said, moreover, that a sow and litter had been missing at an earlier date and that he did speak of these matters to the plaintiff. The defendant's story about the sow and litter was that on 30th September 1947 they were taken by the carrier Shearer to Bega for sale, but were not sold and that he saw Shearer re-load them into his lorry to take back, but that when subsequently he visited the dairy farm to inspect it he was unable to find the sow and litter there. The sow was identifiable by a distinctive black mark. There is no reference to this matter in any of the written communications from the defendant or his solicitors, but the three sows and the four pigs are mentioned in subsequent letters and later three more sows were alleged to be missing. In an account between the parties sent on 5th June 1948 by the defendant's solicitors the plaintiff is charged with the value of the six sows and four pigs. In the letters by the plaintiff's solicitors the request to account for the pigs is not specifically dealt with, though a number of cross demands is made. But the plaintiff swore that no pigs were unaccounted for.

On 24th May 1948 the defendant gave the plaintiff a notice to quit, terminating on the correct date, namely, 28th May 1949. On 12th July the defendant wrote a letter to Shearer which constitutes the libel. It said:—"Doubtless you are aware that pigs have been removed from my place at Sth. Wolumla, & not accounted for by Mr. Triggell. Some time since I asked your wife & son Noel to convey to you, that until this matter of missing pigs has

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been cleared up, not to remove or deliver any pigs from my place. This request you failed to observe. Some time since you took charge of certain pigs (from Bega Sale Yard) that had not been sold. These pigs were not delivered back to 'Spring Dale' that day, or any day since. I ask you for an explanation in a friendly way. If a satisfactory answer is not received by 1.30 p.m. today 12th July/48 I will be leaving for Bega at that time, & will consult a Solicitor, also I will place the whole business before a certain Board of Directors in a few days time. I ask you again in a co-operative manner to treat this as urgent." The reference to the Board of Directors is to that of the butter factory. Two days later the defendant's solicitors wrote a letter to Shearer in which they said that he had instructed them to communicate with him in regard to this matter. The letter continued :—" We are instructed that on the 30th September last you took delivery at the Bega Sale Yards of 1 sow and litter from Mr. Pheeney's property known as 'Spring Dale' Wolumla which had not been sold and which were to be returned by you to 'Spring Dale'. We are also instructed that Mr. Pheeney has not been able to ascertain what happened to the sow and litter after you took the same from the Bega Sale Yards. Please advise us whether the sow and the litter referred to were delivered by you to 'Spring Dale' and if so to whom and on what date."

There can be little doubt that the reference in the libel complained of is to the sow and the litter put up for sale on 30th September 1947, as indeed the text of the libel shows. It is not disputed that it is open to a construction charging the plaintiff with dishonesty in his dealing with the sow and litter and that the jury must be taken to have placed such a meaning upon it. Apart from a denial of the defamatory meaning of the libel, the defence to the action was that the letter to Shearer was a privileged communication. The plaintiff, however, made a case of malice and this case the judge at the trial submitted to the jury, who must be taken to have accepted it. His Honour's direction upon malice is necessarily connected with his direction concerning the assessment of damages, which is challenged. The effect of the direction upon malice as defeating privilege was that if the words turned out to be untrue in fact that would not matter provided a defendant honestly believed in them when he wrote them and was bona fide in the use of them, but if the defendant used them not for the purpose of expressing views upon the matter of common interest but in order to injure the plaintiff, that would destroy the privilege ;

thus if the defendant Pheeney wrote the letter to Shearer not to put a matter of common interest to him but to gratify an animosity he felt towards the plaintiff, he would lose the protection of the privilege. His Honour told the jury that the plaintiff said that the defendant in writing the letter was actuated by spite and ill-will. As a separate or additional head of malice the learned judge informed the jury that the plaintiff alleged that the defendant wrote falsities or what he did not believe to be true, namely, that the pigs had been removed from his place and had not been accounted for. He said that it was a matter for them whether the defendant really believed that there was anything to be inquired into and that the plaintiff said that the defendant had worked himself up by manufacturing in his mind the idea that the pigs were missing and unaccounted for in order to give him an opportunity to put a twist into the knife against the man he had come to hate so that he could stop the carting of pigs altogether or do him an injury with Shearer and perhaps cause him harm as a share farmer. His Honour then discussed some of the facts and in the course of doing so remarked that what they were really engaged in was an inquiry perhaps into the question whether the defendant believed there was some difficulty about accounting for the pigs.

When his Honour turned to damages he began with a direction that prima facie the plaintiff was entitled to recover some damages without proof of specific loss and he then distinguished between a widespread dissemination of a libel and the single publication of a letter in the present case. The learned judge next referred to malice in the publication of the libel as a ground upon which, if they found it, the jury might add to their verdict any sum which they thought fit for the purpose of marking their disapproval of the defendant's conduct. His Honour said in effect that if they thought the defendant was using his position as a person of influence to injure the plaintiff by means of the libel their verdict might be something more than compensatory, it might include what was called punitive or exemplary damages to mark the jury's disapproval.

The learned judge then gave the direction complained of. He said that it was a thing to be approached with some caution, but the jury might take into consideration the conduct of the defendant right from the start to the finish, including the trial. He gave as an example the case of a defendant who regarded the trial as a great opportunity of further spreading a calumny. He said such a thing must be rare, " but you are entitled to consider the fact

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here, none the less, that the defendant said that he really believed that the plaintiff was guilty of dishonesty". His Honour added that of course they had to consider that along with the conduct of the case, because, putting the learned judge's statement shortly, the defendant could not support his plea of privilege except by saying that he believed in the charge contained in the libel and yet upon his saying this the plaintiff's counsel said he broadcast the libel: thus he was in a cleft stick. He directed them that anything relevant could be said in court without parties having to fear that a jury would find heavy damages against them for giving evidence appropriate to the issues: they must therefore look at these things with caution and sound common sense before applying general principles of law to the particular case. But it was their province to find damages at large: anything from nominal damages to substantial damages. The defendant's counsel thereupon objected that there was nothing in the conduct of the trial which could be called aggravation, but his Honour refused so to rule as a matter of law.

It is convenient to deal with the effect upon the validity of the trial of this direction before discussing the question whether the amount of damages awarded is so excessive as to vitiate the verdict. But before doing so it is necessary to refer to the position which was adopted by the defendant in giving evidence. In his examination-in-chief his counsel took him over the libel sentence by sentence and he said that when he wrote it he believed each statement to be true. As to the opening sentence, that the pigs had been removed and not accounted for by the plaintiff, his grounds for believing it to be true were that the plaintiff had been approached and written to on several occasions and he the defendant had received no useful information. As to the statement that doubtless Shearer was aware they had been removed and not accounted for by the plaintiff, his ground was that Shearer was the carrier, the pig had not been returned to the farm and it necessarily followed he must know she had not been returned: he did not have any doubt about it. In his cross-examination the defendant agreed that he had become suspicious of the plaintiff's actions, that he first believed that he was dishonest shortly after 30th September 1947 and said that he could not think anything but that the plaintiff had in fraud of him disposed of the sow and litter: that in his heart he had no doubt of it, but, later, when cross-examining counsel pressed him with the view that he thought that the plaintiff was a thief he was reluctant to employ such an expression, saying,

however, that he did not think he was a very honest person. He had agreed that from August 1947 his feelings towards the plaintiff were feelings of enmity and hostility.

Now it is apparent that two distinct questions arise upon the direction complained of concerning damages. The first is whether there was ground for treating the defendant as taking up a position at the trial which the jury could reasonably regard as what his counsel called " aggravation ". The second is whether the direction can be supported in point of law.

Upon the first of these questions it is said on the defendant's behalf that his evidence is no more than a statement of his real beliefs and that what is drawn from him in cross-examination cannot be treated as an attempt on his part to intensify the wrong done to the plaintiff by the libel. But upon the materials before the jury the view was open to them that no ground had ever existed for the imputation of dishonesty against the plaintiff, and that notwithstanding the absence of any answer or any definite answer to the demand in the correspondence that the plaintiff should account for missing pigs the defendant had no other basis for his aspersions upon the plaintiff's honesty than his animosity to the plaintiff, his willingness to believe evil of him and his desire to get rid of him. The jury had the advantage of seeing both men, as did the learned judge. Upon the question how the plaintiff's evidence should be explained that is no small advantage and his Honour did not think that it was not open to the jury to regard the defendant's attitude as an aggravation of damages. It must be borne in mind that the defendant was not obliged to rely upon privilege: he was not obliged to claim in evidence that he believed in the truth of the libel, believed that the plaintiff was dishonest shortly after 30th September 1947. The jury perhaps would make no nice analysis of the defendant's state of opinion and its cause, but it would not be an untenable view that the defendant was more intent upon supporting his defence of privilege and vindicating his conduct towards the plaintiff than upon a dispassionate statement as to the real reasons for writing what he did in the libel and that his evidence reflected a readiness on his part to support an imputation which, unprompted by animosity, he would have seen to be no longer sustainable if it ever was. It is nothing to the point to say that the jury ought not to have taken such a view and that a court would not do so. The facts are for the jury and the court's only concern is to see that the jury do

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not go beyond the inferences or conclusions reasonably open on the evidence.

Upon the second question the first matter to consider is the effect of the direction objected to as it would be understood by the jury. For that purpose it must be read in its position as part of a consecutive treatment of the whole case. It is plain that the question whether the defendant ought to be believed when he claimed that he really thought that the plaintiff had been dishonest was treated throughout as an essential matter. When the learned judge spoke of their considering the defendant's conduct from start to finish, including the trial, and referred to his statement that he believed the plaintiff was guilty of dishonesty, the jury would not understand him as meaning that they could increase the damages because of this statement although they accepted it as truthful evidence honestly given. The conduct of the defendant to which his Honour referred was plainly conduct which they found to be improper conduct, in other words misconduct, and, the charge being permeated with the question of malice in the two senses of *animus* towards the plaintiff and want of bona-fide belief in the imputation against him, the direction upon damages clearly enough took up the same conduct in relation to that subject. The reference to the defendant being in a cleft stick is part of a warning against inflicting damages upon him simply because of his swearing he believed what he wrote and the jury would so understand it. The learned judge in the first place deals with malice at the time of publication as a possible reason for awarding exemplary damages. Then, in that part of the direction of which the defendant complains, his Honour turns to the contingency of the jury's taking into consideration the defendant's subsequent conduct, including his conduct at the trial. His Honour's reference to the defendant's claim to a real belief in the plaintiff's dishonesty could not be taken by the jury to invite them to visit damages on the defendant because he deposed to a belief which he in truth possessed. They had already been told that the inquiry upon which they were engaged was whether the defendant did believe that a difficulty existed in the plaintiff's accounting for the pigs and the genuineness of the defendant's belief in the plaintiff's dishonesty was the chief issue submitted to them. In other words, conduct of the defendant meant improper conduct of the defendant. The direction does not instruct the jury that exemplary or punitive damages are to be given because of the malice, wantonness, high-handedness, insult or other circumstances of aggravation attending the publica-

tion of the libel, that is, the commission of the tort, and that the conduct of the defendant, up to and including the trial, can be taken into consideration only as evidence tending to show retrospectively the existence of such malice or the intent with which the tort was committed or the like. But the law as settled by authority in this Court does not require a direction in such terms. In point of principle much perhaps might be said for the view that the ultimate matter for consideration is the character of the tort and the *quo animo* and other circumstances of its commission, and that subsequent events are to be used only as evidentiary of the defendant's then state of mind and conduct. But that is not the view of the law taken by this Court or by the majority of the Supreme Court of Victoria in *Herald and Weekly Times Ltd.* v. *McGregor* (1). In that case *Isaacs* J. and *Higgins* J., who dissented from the conclusion that the particular direction given at the trial did not render the verdict unsustainable, adopted the view that failure to prove a legitimate defence raised bona fide could not expose the defendant to an award of greater damages and that the conduct of the defendant after the commission of the tort up to and including the trial could be taken into account only as affording evidence of malice either at the time of publication or at a later date. The majority of the Court, however, did not so limit the use of such facts or material. They appear to have accepted as applicable to defamation the principle enunciated in relation to a charge of felony by *Parke* B. in *Warwick* v. *Foulkes* (2), that the plaintiff has a right to give evidence to show that the charge was not one lightly made and soon abandoned, but that it was seriously made and persevered in to the last moment. The reasons do not actually quote the statement nor that of Lord *Esher* in *Praed* v. *Graham* (3), that the jury in assessing damages are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they give their verdict. But their Honours do say, " 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,

(1) (1928) 41 C.L.R. 254; (1929) V.L.R. 215.

(2) (1844) 12 M. & W., at p. 509 [152 E.R., at p. 1299].

(3) (1889) 24 Q.B.D., at p. 55.

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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." It is to be noticed that in *Walter* v. *Alltools Ltd.* (1), a case like *Warwick* v. *Foulkes* (2), dealing with damages for false imprisonment on a criminal charge, *Lawrence* L.J., in reference to that authority, says:—"In my opinion that case lays down that any evidence in a case of false imprisonment which shows, or tends to show, that the defendant is persevering in the charge which he originally made in bringing about the false imprisonment, is evidence which may be given for the purpose of aggravating the damages. In the same way, the defendant would be entitled to give any evidence which tended to show that he had withdrawn, or had apologised for having made, the charge on which the false imprisonment proceeded. The general principle, in my view, is that any evidence which tends to aggravate or mitigate the damage to a man's reputation which flows naturally from his imprisonment must be admissible up to the moment when damages are assessed. A false imprisonment does not merely affect a man's liberty, it also affects his reputation. The damage continues until it is caused to cease by an avowal that the imprisonment was false."

It is no doubt true that the jury cannot take into consideration as a ground for giving or increasing damages, whether exemplary or compensatory, conduct of the defendant which was not merely bona fide but was justifiable or proper. A bona-fide defence raised properly or justifiably in the circumstances known to the defendant and evidence honestly given in support of such a defence doubtless cannot be used for such a purpose. But the decision of the majority in *Herald and Weekly Times Ltd.* v. *McGregor* (3) must mean that the conduct of the defence may be taken into consideration not only as evidencing malice at the time of publication or afterwards, as, for instance, in filing a plea, but also as improperly aggravating the injury done to the plaintiff, if there is a lack of bona fides in the defendant's conduct or it is improper or unjustifiable. In the present case the direction of the learned judge could not have been understood by the jury as going beyond this. For the bona fides of the defendant's belief was what they had been invited to pass upon. In the Supreme Court the reasons

(1) (1944) 171 L.T. 371, at p. 372.
(2) (1844) 12 M. & W. 507 [152 E.R. 1298].
(3) (1928) 41 C.L.R. 254.

of the learned judges for regarding the direction as erroneous though similar were not identical. *Street* C.J. was of opinion that there was nothing but the evidence of the defendant that he believed at the time of publication that the plaintiff was dishonest, and it was evidence that he was entitled to give. *Maxwell* J. considered that it was not open upon the evidence for the jury to regard the defendant as having repeated his statement of belief in the plaintiff's dishonesty and so as having broadcast in a court of law that the plaintiff was a thief. *Owen* J. said :— "In the present case I have little doubt that the learned trial judge intended to convey to the jury that, if they formed the opinion that the defendant was lying when he deposed that at the time he wrote the letter he believed the plaintiff to be guilty of dishonesty, they could treat the fact that he had told a lie in this respect as showing malice, and take it into account in assessing damages ; but the actual words of the summing up seem to me to have been capable of being understood by them to mean that the mere fact that the defendant had given that piece of evidence might be treated as a ground for increasing the damages which they would otherwise award. Even, however, if the direction was understood by the jury to mean that they could only take that course if they thought the evidence was untrue, such a direction would in my view, be unsound" (1). Then, after quoting from *Somerville* v. *Hawkins* (2), his Honour added :—"I think that the fact that a defendant in a defamation action gives untrue evidence is much more consistent with a desire to escape liability than with the conclusion that he is maliciously disposed towards the plaintiff. Such conduct is reprehensible, but the proper punishment is not to be found by the award of heavier damages" (3). With respect this last observation of *Owen* J. gives more effect to what, it may be conceded, is more attractive as an *a priori* principle than to the reasons given in *Herald and Weekly Times Ltd.* v. *McGregor* (4). As to the interpretation of the direction reasons have already been given for the view that the jury should not have understood it in the sense which his Honour says the words are capable of bearing. But the essential reason for respectfully differing from the decision of their Honours is to be found in the two considerations : first that it was open to the jury to regard the defendant as having no genuine belief in the plaintiff's dishonesty and as improperly

(1) (1950) 50 S.R. (N.S.W.), at p. 204 ; 67 W.N., at p. 115.
(2) (1872) L.R. 4 P.C. 495, at p. 508.
(3) (1950) 50 S.R. (N.S.W.), at p. 205 ; 67 W.N., at p. 115.
(4) (1928) 41 C.L.R. 254.

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putting forward the possession of such a belief in his defence, and secondly that such conduct may lawfully be taken into account in the assessment of damages.

The Supreme Court actually placed the order setting aside the verdict on the ground that the damages awarded were excessive and it is now necessary to consider the question of the correctness of that view of the case. Putting aside cases in which there has been a misdirection or a wrongful rejection of evidence or evidence has been wrongly admitted, a court to which an application for a new trial is made on the ground of an excessive award of damages must consider whether the damages are at large as they are in libel and so peculiarly within the discretion of the jury and in such a case it is for the court to decide not whether the verdict seems to it to be right but whether the verdict is such as to show that the jury have failed to perform their duty: cf. per Lord *Halsbury*, *Metropolitan Railway Co.* v. *Wright* (1) and *Miles* v. *Commercial Banking Co. of Sydney* (2). The rule when a court of appeal is asked to set aside a verdict of a jury on the ground that the damages awarded are excessive is the same in libel actions as in any other cases, viz., that the verdict should not be disturbed unless the amount is such that no reasonable body of men could have awarded it: per *McArthur* J., *Falcke* v. *Herald and Weekly Times Ltd.* (3); in citing *Miles* v. *Commercial Banking Co. of Sydney* (4). But, as *McArthur* J. pointed out in *Falcke's Case* (3), "Courts of Appeal have always recognized that great latitude must be allowed to juries who are entrusted with the duty of estimating the general damages which a plaintiff should be awarded for an injury to his reputation—that being a matter which is regarded as peculiarly appropriate to be determined by a jury. But nevertheless a Court of Appeal still exercises control in libel actions over juries' verdicts as to damages, and will set them aside if, on consideration of all the circumstances of the case, it is convinced that the amount awarded is unreasonable" (3). The warning of *Hamilton* L.J.

(1) (1886) 11 App. Cas. 152, at p. 156.
(2) (1904) 1 C.L.R., at pp. 473, 474.
(3) (1925) V.L.R. 56, at p. 75.
(4) (1904) 1 C.L.R. 470.

in *Greenlands Ltd.* v. *Wilmshurst* (1) must be borne in mind, namely, that there must be some reasonable relation between the wrong done and the *solatium* applied. But *Scrutton* L.J., in *Ley* v. *Hamilton* (2), in the course of a judgment approved on appeal by the House of Lords (3), said, in dealing with damages, "it is clear that 'libel or no libel is for the jury', and it follows that the Court of Appeal is extremely slow to interfere with the amount of damages awarded by the jury for the publication of what the jury have found to be a libel."

In the present case the publication was to a single person and one not unfavourably disposed to the plaintiff. Undoubtedly the sum awarded is very large. The fact that it is not a round figure (£1,955) is curious but, unless the explanation is clear and is inconsistent with a proper assessment, it cannot affect the question. It is true that the plaintiff's counsel did suggest an explanation and one making the verdict no easier to defend, but the explanation was entirely speculative and lacking any apparent justification.

The jury must have taken a very adverse view of the defendant's conduct and at bottom the question whether the amount of damages can be sustained depends upon its being open to the jury to do so. It is not for us to substitute a view of our own for that of the jury, but merely to consider what interpretations of the defendant's conduct are reasonably open upon the materials placed before the jury. No useful purpose can be served by discussing the more extreme complexions which may be placed upon the matters of which there is evidence, but it is desirable to mention two general considerations. One is that in a country district the imputation by a landowner against a share farmer of dishonest dealing may have very serious consequences indeed for him. The other is that in the changing value of money not much reliance can be placed on conceptions concerning the amounts customary in actions of tort in various circumstances when the conceptions are based upon traditions from former days. On the whole, in the present case the amount of £1,955 does not appear

(1) (1913) 3 K.B. 507, at pp. 532, 533.
(2) (1934) 151 L.T. 360, at p. 364.
(3) (1935) 153 L.T. 384, at p. 386.

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so excessive as to show that the jury must have failed to perform their duty. For these reasons the verdict ought to be restored.

After the appeal had been instituted in this Court the plaintiff died. An application was made to this Court to substitute as appellants the plaintiff's executors, to whom probate had been granted. This application was not opposed by the defendant respondent, perhaps in view of *Ryan* v. *Davies* (1), and an order was made accordingly.

The appeal should be allowed with costs: the order of the Supreme Court discharged and it should be ordered that the verdict of the jury be restored and that the motion to the Supreme Court that the verdict be set aside and that a new trial be had be dismissed with costs.

McTIERNAN J. I agree with the opinion of the Full Court that the verdict of the jury should be set aside on the ground that the damages awarded by the jury are excessive. Their Honours applied the correct principles. I can find nothing in the facts of the case, including the defendant's conduct of his case in court, which enables me to hold that their Honours have fallen into error in applying the relevant principles. The libel was published to one person only and it did not cause him to change his good opinion of the plaintiff. There is no evidence that the publication of the libel did any substantial injury to the plaintiff. The jury were entitled to compensate the plaintiff generously for the injury done by the publication of the libel and to punish the defendant with heavy damages for his conduct towards the plaintiff from the beginning of the quarrel until the case went to the jury.

Their Honours took all these matters into consideration and they did not neglect the principle that in an action for libel the damages are peculiarly within the province of the jury. But they all agreed that the amount of the damages is excessive and unreasonable. They applied the right test. *Maxwell* J. said: "The substantial question which directly falls for determination is whether the amount of the verdict is such as to warrant the intervention of

(1) (1921) 29 C.L.R. 527.

this Court (1). If the Court thinks that, having regard to all the circumstances of the case, the damages are so excessive that no twelve men could reasonably have given them, then they ought to interfere with the verdict. If the authorities are looked at that will be found to be the rule of conduct which the judges have adopted (*Praed* v. *Graham* (2)). The power and the duty of the Court to intervene is not lessened in modern times when ordinarily the decision is that of a jury of four, and not a jury of twelve. In the present instance I am of the opinion that, keeping in mind the language used, the limited nature of the publication, the damage or lack of it proved in fact, but giving full weight to matters of aggravation which alone explain, if anything can be said to explain, the large damages awarded, the amount is so disproportionate to the occasion that for that reason alone I am of opinion that it is so excessive as to require this Court's intervention " (3).

The second question is whether the jury were misdirected. I agree again with the Full Court that there was a misdirection which was likely to result in injustice to the defendant. *Maxwell* J. stated the point clearly. His Honour said " It is clear enough that when the learned Judge told the jury that if the defendant did not really believe what he said about the pigs that would provide evidence of malice, it was demonstrably accurate " (4). The criticism which *Maxwell* J. made of the direction is this :— " But the direction that his statement in the witness box that he believed that the plaintiff was dealing dishonestly amounted to a broadcasting in a court of law that the plaintiff was a thief, and for that reason could be taken into account as part of the defendant's conduct at the trial, does in my opinion afford ground for objection on the part of the appellant. After careful consideration I feel that the jury might well have thought that they were entitled to have regard to the defendant's conduct at the trial in that he had repeated his statement of belief in the plaintiff's dishonesty and had broadcasted in a court of law that the plaintiff was a thief ;

(1) (1950) 50 S.R. (N.S.W.), at p. 199 ; 67 W.N., at p. 114.
(2) (1889) 24 Q.B.D., at p. 55.
(3) (1950) 50 S.R. (N.S.W.), at pp. 199, 200 ; 67 W.N. 112.
(4) (1950) 50 S.R. (N.S.W.), at p. 201 ; 67 W.N. 112.

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whereas with the opportunity of examining the evidence in its setting I have reached the conclusion that this was not open to the jury" (1). I agree with that criticism. It is not inconsistent with any principle laid down by the majority in *Herald and Weekly Times Ltd.* v. *McGregor* (2).

I should dismiss the appeal.

Appeal allowed with costs. Order of the Supreme Court discharged. Restore verdict of jury. Motion to Supreme Court that the verdict be set aside and a new trial be had dismissed with costs.

Solicitors for the appellant, *Walker, Gibbs, Cook & Donald.*

Solicitors for the respondent, *Robbie, Blomfield & Oliver*, Bega, by *Bland & Garnock.*

J. B.

(1) (1950) 50 S.R. (N.S.W.), at pp. 201, 202; 67 W.N. 112.

(2) (1928) 41 C.L.R. 254.