Neutral Citation Number: [2023] EWCA Civ 892

Case No: CA-2023-000045

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
MR JUSTICE CHAMBERLAIN
[2022] EWHC 2068 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2023

Before :

LORD JUSTICE SINGH
LADY JUSTICE ANDREWS
and
LORD JUSTICE WARBY

- -

Between :

DR CRAIG WRIGHT	**Claimant/ Appellant**
- and –	
PETER MCCORMACK	**Defendant/ Respondent**

- -
- -

Lord Wolfson KC, Greg Callus and Lily Walker-Parr (instructed by **Ontier LLP**) for the **Appellant**
Catrin Evans KC and Ben Silverstone (instructed by **RPC LLP**) for the **Respondent**

Hearing date: 15 June 2023

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Approved Judgment

LORD JUSTICE WARBY:

1. The issue on this appeal is whether damages for defamation can properly be reduced to reflect the claimant's fraudulent exaggeration of the claim. That is what the trial judge did here. The appellant says that he was wrong in law to do so because it can never be legitimate to make a reduction on that ground.

Background to the appeal

2. The appellant is Dr Craig Wright. He is a businessman active in the field of cryptocurrency who maintains that he is Satoshi Nakamoto ("Satoshi"). Satoshi is the name used by the author or authors of a famous 2008 "White Paper" entitled *Bitcoin: a Peer to Peer Electronic Cash System.* It is widely believed that Satoshi invented the cryptocurrency of that name and currently holds a large quantity of Bitcoin. Dr Wright is involved in the promotion of something called "Bitcoin Satoshi Vision" or BSV. Dr Wright's claim that he is Satoshi has been widely published.

3. In April 2019 Peter McCormack, a blogger and podcaster about cryptocurrency, posted a series of tweets about the appellant's claims and conduct. He began with "Craig Wright is not Satoshi". He repeated that assertion, adding "Craig Wright is a fraud", "BSV is a fake Bitcoin run by frauds", "Craig Wright fraudulently claimed to be Satoshi", "let's go to court and prove once and for all that he is a liar and a fraud", and other similar statements. In October 2019 Mr McCormack also took part in a video discussion on YouTube in which he said, among other things, "Craig Wright is a fucking liar, and he's a fraud; and he's a moron; he is not Satoshi." Dr Wright sued him for libel.

4. At the trial before Chamberlain J ("the judge"), Mr McCormack admitted responsibility for all the tweets, that they meant that "Dr Wright is not Satoshi and his claims to be Satoshi are fraudulent", and that this meaning was defamatory at common law. The judge held that Mr McCormack was also responsible for the publication of the words he spoke in the YouTube broadcast and that those words meant, in their context, that "there were reasonable grounds for questioning or enquiring into whether Dr Wright had fraudulently claimed to be Satoshi". Mr McCormack accepted that this imputation was also defamatory at common law.

5. Mr McCormack had abandoned any attempt to prove that his allegations were true, and he advanced no other defence to the claim. The outcome of the case therefore turned on the serious harm requirement laid down in s 1(1) of the Defamation Act 2013. This provides that "A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant." This means that a claimant must prove as a fact that his reputation has actually suffered serious harm as a result of the publication complained of, or that this is likely to happen: *Lachaux v Independent Print Ltd* [2019] UKSC 27, [2020] AC 612.

6. The judge held that the case on serious harm which Dr Wright presented at the trial did satisfy the statutory requirement. But he also found that the different case on serious harm which Dr Wright had been putting forward until he abandoned it shortly before the trial was "deliberately false". In other words, Dr Wright had told lies. The judge said that although damages would have been reduced for other reasons, he would still

have made "a more than minimal award" were it not for the lies. Because of the lies the judge reduced his award to a nominal £1.

7. Dr Wright now appeals on the single ground that "the trial judge was wrong to hold that the Claimant's litigation misconduct could or should serve to reduce his general compensatory damages to a nominal sum of £1." Dr Wright does not challenge any of the judge's findings of fact.

The lies

8. The judgment below explains in some detail the development of the case on the issue of serious harm, the judge's findings about it, and his reasons for those findings. For present purposes it is enough to summarise the salient features.

9. To meet the serious harm requirement Dr Wright initially relied on the inherent gravity of the imputations complained of, their widespread publication, and an inference that they had a seriously harmful impact which had been amplified by the "grapevine effect". Once the Supreme Court's judgment in *Lachaux* was handed down Dr Wright added or proposed to add specific factual allegations. He did so in a series of amendments or draft amendments to his case in October and November 2019.

10. The first key allegation was that after the publications complained of Dr Wright was "often excluded from cryptocurrency related events and appearing on industry panels" and that it was to be inferred that the publications complained of were "a significant cause" of such exclusions. He then put forward a further draft amendment complaining that individuals at SOAS in London and CNAM in Paris, both institutions where he was studying, had raised "concerns" with him "following the publication of the tweets". Those allegations were soon abandoned after Mr McCormack sought further information about them, as was a claim that serious harm had been caused to Dr Wright's reputation in EU states.

11. Dr Wright then advanced a further amendment alleging that before the publications complained of he had been invited to speak at numerous academic conferences, including eight between 1 January and 31 March 2019, but that following publication 10 such invitations were withdrawn. Details were given and the inference was invited that the publications were "the primary cause of these exclusions". That was the case on serious harm which Dr Wright pleaded and pursued from December 2019. In November 2020, he served a witness statement in support of an application for summary judgment, which verified the truth of that pleaded case.

12. In May 2022, Mr McCormack served statements from two of the organisers of two of the conferences relied on by Dr Wright. One of these explained that Dr Wright had submitted a paper but it had been rejected as a result of negative peer reviews. The other said that Dr Wright had neither submitted a paper nor been invited to speak at the conference. Dr Wright then abandoned substantial parts of his pleaded case. He gave an explanation in a further witness statement, his third. He accepted that some of the pleaded case was wrong but maintained that "most of it" was correct. To explain dropping the "correct" parts he said that he had confined his case to harm caused in this jurisdiction and many of the withdrawals were likely to have resulted from publication abroad. Later the same month Dr Wright stated that he would not be relying on any of

the relevant parts of his witness statement and formally withdrew the whole of his pleaded case on disinvitation from conferences.

13. At the trial Dr Wright was cross-examined about these matters. Having heard his evidence and considered the relevant circumstances the judge concluded that "[t]he explanation given by Dr Wright for abandoning this part of his case … does not withstand scrutiny" ([108]); that although "a conclusion that a witness has given deliberately false evidence should not be drawn lightly … … there is no other plausible explanation" ([110]); and that "Dr Wright's original case on serious harm, and the evidence supporting it, both of which were maintained until days before trial, were deliberately false" ([111]).

14. The claim succeeded on liability despite these conclusions because the judge was persuaded by the fall-back position adopted by Dr Wright at trial. This was that it was more likely than not that the publications complained of caused serious reputational harm given the inherent seriousness of the imputation they conveyed, the significant extent of publication and the evidence of actual harm in the form of "retweets and replies" to some of the tweets.

15. The evidence as to the extent of publication was that each of the tweets had been published to over a hundred people in the jurisdiction; at least seven had been published to over 1,000; and at least three reached over 10,000 Twitter users. There was also evidence, which the judge accepted, that influential Twitter users had retweeted and replied to four of the tweets and evidence of a specific adverse response to the YouTube video by another named and influential individual.

The judge's reasoning on damages

16. The judge began by reminding himself of the general approach to the assessment of damages in defamation, citing the summary in *Monroe v Hopkins* [2017] EWHC 433 (QB), [2017] 4 WLR 68 [75]-[78]. The judge then referred to other authority supporting three well-established propositions: (1) "a person should only be compensated for injury to the reputation they actually possess" (2) "it is accordingly open to a defendant to adduce evidence of a claimant's bad reputation in mitigation of damages"; and (3) "in assessing the proper level of damages or in mitigation of damages the court can take into account evidence admitted on another issue".

17. The judge continued:

> "143. In a libel action brought by an individual, compensation is awarded for injury to reputation (objectively assessed) and for injury to feelings. Had it not been for Dr Wright's deliberately false case as to serious harm, a more than minimal award of damages would have been appropriate, though the quantum would have been reduced to reflect the fact that Mr McCormack was goaded into making the statements he did and, having found Dr Wright not to be a witness of truth, I would have rejected in its entirety his case as to the distress he claims to have suffered.
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> 144. But the deliberately false case on serious harm advanced by Dr Wright until days before trial in my judgment requires more

> than a mere reduction in the award of damages. In my judgment, it makes it unconscionable that Dr Wright should receive any more than nominal damages."

18. The judge referred to two first instance decisions in which the court awarded nominal or low damages for libel because, or partly because, the claimant had advanced a false case and supported it with false evidence in an attempt to deceive the court: *Joseph v Spiller* [2012] EWHC 2958 (QB) and *FlyMeNow Ltd v Quick Air Jet Charter GmbH* [2016] EWHC 3197 (QB). At [145] the judge cited a passage in *Joseph* at [178] where Tugendhat J held that because the claimant had carried on "a sophisticated deception of the court" there "would be no injustice to [him] if he is awarded only nominal damages". At [146] the judge cited paragraph [128] of *FlyMeNow*, where I described the claimant's false case and dishonest evidence as "disreputable facts that are properly before the court, which logically affect the extent to which the claimant is entitled to the vindication of its reputation through an award of damages."

19. At [147] the judge held that "the same principle applies here" and explained:

> "(a) Dr Wright advanced a deliberately false case as to the disinvitations from academic conferences in his Amended Particulars of Claim and his first witness statement. That case was designed to show that the Publications had caused serious harm, which is now an essential element of the tort of defamation. It was also relevant to the quantum of damages sought. These were both central issues in the claim.
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> (b) The case was maintained until shortly before the trial and, on my findings, would have been maintained at trial had Mr McCormack not served evidence from two of the organisers of the academic conferences from which Dr Wright said he had been disinvited after previously having had papers accepted following blind peer review.
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> (c) Dr Wright's response to this evidence was to change his case and withdraw significant parts of his earlier evidence, while seeking to explain that the errors were inadvertent. I have rejected that explanation as untrue.
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> (d) I have found that the Publications did cause serious harm without reference to the earlier deliberately false case as to the academic conferences. However, I am entitled to take into account my findings as to the earlier false case in assessing damages.
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> (e) As in *Joseph v Spiller*, I find that there would be no injustice if Dr Wright were to recover only nominal damages."

20. The judge expanded on his reasoning when considering and dismissing Dr Wright's application for permission to appeal. This was filed in writing by Lord Wolfson KC (who did not appear at the trial) and Mr Callus and Ms Walker-Parr (who did). It was

argued orally by Mr Callus at a hearing some months after the handing down of judgment.

21. Two main strands of argument were advanced. The first was that the judge's decision was contrary to basic principles. At common law the court may not reduce or disallow compensatory damages to which a claimant is entitled as a remedy for a substantive breach of contract or tort to reflect the claimant's litigation misconduct. In a wholly exceptional case the court can strike out the entire claim as an abuse. Otherwise, the remedy for misconduct is to reduce or disallow costs or interest, or through proceedings for contempt or for perverting the course of justice. In support of these propositions Mr Callus relied on two personal injury cases, *Ul Haq v Shah* [2009] EWCA Civ 542, [2010] 1 WLR 616 and *Summers v Fairclough Homes Ltd* [2012] UKSC 26, [2012] 1 WLR 2004. None of these points had been made to the judge at the trial.

22. The second strand of Counsel's argument addressed a decision about the quantification of damages for libel that had not been cited to the judge at trial either: the decision of this court in *Campbell v News Group Newspapers Ltd* [2002] EWCA Civ 1143, [2002] EMLR 43 that (to quote the headnote to the report) "a claimant's conduct up to and including trial is capable of reducing damages". The argument for Dr Wright was that (1) the principle which the judge had taken from *Joseph* and *FlyMeNow* was derived solely from *Campbell*; but (2) the decision in *Campbell* was wrong in law and not binding because it relied on a misapplication of some *obiter dicta* of Lord Hailsham in *Broome v Cassell* [1972] AC 1027, was in conflict with *Ul Haq*, and could not stand with that case or with *Summers.*

23. At the hearing before Chamberlain J, Mr Callus elaborated on these points, submitting that the law was stated wrongly or at best much too broadly in *Campbell*: just as a claimant's bad reputation can only be relevant to damages if it is in the same sector of the claimant's life as the libel, so post-publication misconduct can only be admissible in relation to damages "if relevant to the gravamen of the libel", which was not the position here.

24. In his reserved judgment dismissing the application for permission to appeal the judge began by observing that none of these arguments had been made at trial. He said that if they had been he would have been obliged to reject them because he was bound by *Campbell*, which would also bind this court save in the exceptional circumstances identified in *Young v Bristol Aeroplane Ltd* [1944] KB 718, none of which applied. The judge said he would also have been required to follow *Joseph* and *FlyMeNow* because, so far from being convinced they were clearly wrong, he considered they were correctly decided.

25. The judge explained:

> "47. Damages in defamation serve three functions: "to act as a consolation to the claimant for the distress he or she suffers from the publication of the statement; to repair the harm to reputation…; and to act as a vindication of the claimant's reputation": *Gatley on Libel and Slander* (13th ed., 2022), para. 10-004

> 48. As to distress, I indicated at [143] of my judgment that, having found Dr Wright not to be a witness of truth, I would have rejected in its entirety his case as to the distress he claims to have suffered. As to compensation for injury to reputation and vindication of reputation, I found that Mr McCormack's publications caused serious damage to Dr Wright's reputation at the time when they were made. But any damages would have been awarded at the date of my judgment. By that time, Dr Wright had been shown in a public judgment to have advanced a deliberately false case on an essential part of his claim and to have given deliberately false evidence on oath about it. The question of what award of damages was necessary to "vindicate" his reputation fell to be assessed on that basis. I found that there would be no injustice if he were to receive only nominal damages.
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> 49. The analogy with other torts is, in my judgment, not a good one. Dishonest exaggeration of a personal injury claim does not lead to a reduction in the damages payable (*Ul-Haq*…), though in an extreme case it may entitle the defendant to strike out the claim, even after trial (*Summers* …). But damages in personal injury claims compensate for injury to interests which are unaffected by the dishonesty. The award needed to make good the injury suffered by a claimant with a broken leg is the same whether the claimant has been honest or dishonest. A libel claimant who has been found in a public judgment to have dishonestly advanced a deliberately false claim, on the other hand, may have so injured his own reputation that an award of substantial damages is no longer called for to vindicate it. Vindication has a moral element. If, as here, it would be unconscionable for a claimant to receive substantial damages, that is a good indication that damages are not required for the purpose of vindication."

The appeal

26. The written argument advanced on the application to this court for permission to appeal was the same as that rejected by the judge. I granted permission on the basis that it was arguable with a real rather than fanciful prospect of success that the *ratio decidendi* of *Campbell* was overbroad and either inconsistent with later authority on the relevance of litigation misconduct or, if binding, deserving of consideration by the Supreme Court.

27. I warned, however, that the court might agree with the reasoning of the judge which I have cited above and dismiss the appeal on that footing or, to the extent this is different, on the following basis:

> "In libel, uniquely, a guiding principle in the assessment of damages is that they should provide appropriate vindication of the claimant's reputation. The established rule, not challenged on this appeal, is that any *relevant* facts which properly emerge

> in the course of trial may go to reduce damages. In this case Dr Wright sought vindication in respect of allegations of fraud and mendacity. It emerged that he had conducted his case fraudulently and mendaciously. The right analysis could be that on the particular facts of this case it was necessary or at least legitimate for the judge to take these facts into account …"

28. On the hearing of the appeal Lord Wolfson emphasised the need for coherence in the law and advanced submissions on the following lines.

29. This appeal is exclusively about general compensatory damages for injury to reputation. Although defamation law has its own peculiarities it must nonetheless adhere to the general principles of tortious liability. The overarching principle, which Lord Wolfson called the *restitutio* principle, is that the aim of damages for non-financial injury caused by a tort is to restore the claimant to the position he occupied before the injury caused. A reduction in tort damages may be legitimate and proper if it is in pursuit of the *restitutio* principle but not otherwise. A reduction for litigation misconduct would not be in accordance with this principle. As *Ul Haq* and *Summers* establish, the mechanisms for punishing such misconduct do not extend to reducing general compensatory damages. The same is true in defamation.

30. Lord Wolfson likened damages for injury to reputation to damages for pain, suffering and loss of amenity in a personal injury case. He acknowledged that some of the established rules as to damages in defamation are consistent with the overarching principle of compensation for tortious injury. But he argued that the common law has accumulated rules for reducing damages by the accretion of precedent, and that this has led to a body of case law that is not always clear or consistent with principle. He identified two categories of case: (1) those in which the application of the *restitutio* principle itself demands a reduction in general damages, because the compensatable loss is less than it would first appear by reason of mitigation properly so-called; and (2) cases where general damages to which the claimant has shown a right are reduced without regard to the *restitutio* principle purely because of misconduct, which is wrong in principle.

31. Thus, argued Lord Wolfson, the authorities rightly say that it is legitimate to reduce damages on the grounds that the claimant's general reputation in the relevant sector was bad before or at the time of the publication complained of, but not because of post-publication misconduct. The principle in *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579 (that in assessing damages the court may take account of "directly relevant background context") may not be expressly limited to pre-publication conduct but it does contain a proximity test, the application of which would hardly ever allow for the admission of evidence about post-publication events. The principle that damages may be reduced "perhaps almost to vanishing point" on the grounds that the statement, though not substantially true, was true in part (see *Pamplin v Express Newspapers Ltd* [1988] 1 WLR 116, 120 (Neill LJ)) "reflects the *restitutio* principle perfectly", submitted Lord Wolfson. He said that this is "because *restitutio* does not require compensation for [injury to] a reputation that a claimant is not entitled to." But, he argued, there is a need for caution when it comes to the broader proposition in *Pamplin*, that in assessing damages regard may be had to "any other evidence which is properly before the court".

32. Lord Wolfson accepted that there are circumstances in which the claimant's own conduct can justify a reduction in his damages. That may for instance be so where, as here, it is shown that the claimant provoked the libel complained of. But he submits that defamation law has taken a wrong turn by accepting that damages can be reduced on account of a claimant's litigation misconduct. That, he said, is contrary to principle. To this extent, the reasoning in each of *Campbell, Joseph* and *FlyMeNow* is flawed and should be rejected.

33. Lord Wolfson submitted that the judge stated the law much too broadly in his paragraph [142]: the court cannot, when assessing damages, take account of all and any evidence just because it has been "admitted on another issue", there has to be some principled basis for doing so. Here, the judge advanced two separate but related reasons for taking account of Dr Wright's lies: that they "required" a reduction in damages and that this made it "unconscionable" to award more than nominal damages. Both reasons were unsound because the lies did not go to show the partial truth of the libellous allegation: the case was not about Dr Wright's attendance at overseas conferences but about his claim to be Satoshi, a critical biographical fact. There was a fundamental qualitative difference between the two.

34. Lord Wolfson argued that on a proper analysis *Campbell* is no obstacle to the success of this appeal, for two reasons. The first is that the court's decision in that case was not based on any principled analysis but on a statement of Lord Hailsham at page 1071H of *Broome v Cassell* to the effect that "the jury in assessing damages are entitled to look at the whole conduct … [of the plaintiff] from the time the libel was published down to the time they give their verdict". It was submitted that Lord Hailsham's statement itself was an unreasoned *obiter* expression of a personal view with which none of the other six members of the House of Lords agreed and it was, on analysis, wrong. The second aspect of Lord Wolfson's argument was, as already mentioned, that the ratio of *Campbell* cannot stand with the later decisions of this court in *Ul Haq* and the Supreme Court in *Summers.* That was said to place the case in the first and second of the three categories of case identified in *Bristol Aeroplane* in which the Court of Appeal can depart from its own previous decisions.

35. A further submission was advanced, that in any event the judge went too far in concluding that his rejection of Dr Wright's original case on serious harm meant that there was "evidence" of disreputable facts. Lord Wolfson submitted that there was no such evidence; where a party adduces evidence which is not accepted by the court it does not follow that the contrary is established as a fact.

Assessment

36. It is appropriate to begin with the nature, status and significance of the judge's conclusions about Dr Wright's original case on serious harm. In my judgement, these have been misunderstood and understated.

37. This is not a case in which the claimant merely failed to satisfy the judge on the balance of probabilities that some proposition of fact was true. The judge made findings of fact that Dr Wright's original case on serious harm (supported by a statement of truth), his written witness statement on that issue (also supported by such a statement) and his oral evidence on the matter (given on oath) were all deliberately false. As the judge explained at [110] those findings were based on a combination of (i) the circumstances

in which the case on serious harm was pleaded; (ii) the extent to which that case and Dr Wright's witness statement in support of it were later "shown to be false"; (iii) the timing of Dr Wright's explanatory witness statement; (iv) his "vague and unimpressive" evidence at trial; and (v) the lack of any adequate or convincing explanation for the falsity of the case and supporting evidence.

38. Although the judge did not say so in terms, the substance of the matter is that he found that the claimant had told lies. Dr Wright accepts that this finding cannot be challenged. Among the judge's other unchallenged findings was that the purpose of telling these lies was to obtain judgment on liability by persuading the court of a false case on serious harm, and that the attempt to deceive the court would have continued had Mr McCormack not produced the contradictory evidence he did. In substance, on the judge's findings, Dr Wright attempted to obtain an advantage by deceiving the court.

39. These can be characterised as findings of "litigation misconduct". That term was a leitmotif of the submissions on behalf of Dr Wright. But it is important not to be beguiled by labels of this kind. This is not the terminology used by the judge when giving the reasons for his decision. Nor, in my opinion, does this language fairly reflect the substance of the judge's reasoning.

40. The issue raised by this appeal is whether the judge was entitled as a matter of law to regard the findings of fact which I have summarised as relevant to his assessment of the damages to be awarded to Dr Wright for tweets and a YouTube broadcast conveying the defamatory imputation that Dr Wright's claims to be Satoshi were fraudulent. The fundamental submission for Dr Wright is that it was inconsistent with principle and authority for the judge to take that view. I disagree.

41. In my opinion, the judge's decision was a legitimate application of sound principles of defamation law, which are not inconsistent with the aims and general principles of compensation for tort. Those rules do not depend on or flow from *Campbell* but are independent of it. The judge's decision was properly made without reference to *Campbell,* or *Ul Haq* or *Summers.* That is not just because none of those cases was cited to the judge, it is also because none of them has a bearing on the outcome of this case.

Legal principles

42. I agree that there is a need for coherence in the law of tort, as in the structure of the law more generally. Any award of compensatory damages for defamation should be consistent with the overarching aims of damages in tort.

43. The starting point is that the court should award "that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation": *Livingston v Raywards Coal Co* (1880) 5 App Cas 25, 39 (Lord Blackburn). However, a number of important limits are engrafted on this general rule which may lead to compensation being less than the loss calculated by this method. The court must identify the interests protected by the tort in question, the kinds of loss and damage that are legally recoverable for that tort, and apply relevant rules about causation, remoteness, reduction and mitigation of damages, and certainty. This summary reflects the law as stated in *McGregor on Damages* 20th edition paragraphs 2-002 to 2-004.

44. The process of assessment calls for a comparison between the claimant's position before and since the commission of the wrong. Damages will be assessed at trial. Compensation for past loss will be determined on the basis of the facts as they are found to stand at that time. Compensation for future loss is assessed on the basis of an estimation of what is likely to happen.

45. To my mind the argument on this appeal has served more to demonstrate that the rules on damages for defamation that were applied by the judge in this case are consistent with these general principles, than to show the contrary. It is true that the defamation rules have some peculiarities, but those which are relevant here can be explained as reflecting the particular nature of the interest protected by the tort of defamation, coupled with some case management considerations.

46. The overall approach to the assessment of damages for defamation is well established and uncontroversial. The passage from *Monroe v Hopkins* relied on by the judge begins in this way:

> "75. A person who proves they have been libelled is entitled to recover a sum in damages that is enough to compensate for the wrong suffered. The heads of compensation, and the key factors, were identified by Sir Thomas Bingham MR in *John v MGN Ltd* [1997] QB 586, 607–608 (the numbers and letters are added by me):
>
> > "That sum must [1] compensate him for the damage to his reputation; [2] vindicate his good name; and [3] take account of the distress, hurt and humiliation which the defamatory publication has caused. … A successful plaintiff may properly look to an award of damages to vindicate his reputation …"

47. "Vindication" is not a term used in the law of damages generally and "vindicatory damages" are not usually recoverable in tort. It is therefore worth emphasising that in this context the word does not denote an award made in the absence of proven harm, to mark the infringement of a right. It refers to a process of repairing or making good a reputation that has suffered actual damage. The aim is to ensure the effects of the libel are erased by awarding a sum "sufficient to convince a bystander of the baselessness of the charge": *Broome v Cassell* 1071C (Lord Hailsham). Vindication is sometimes viewed as separate from compensation but the judge adopted my analysis in *Monroe v Hopkins* which was this:

> "76. Heads [1] and [2] can be seen as complementary or overlapping, because the overall aim of compensation is, as usual in the case of civil wrongs, to restore the claimant to the position they would have been in if the wrong had not been committed. Head [3] is parasitic on proof of harm to reputation …"

In this case we are not concerned with head [3], injury to feelings. I shall return to the issue of vindication. I shall begin, however, by considering the narrower question of compensation for reputational harm.

48. Some of the rules in defamation to which Lord Wolfson has referred are straightforward manifestations of the general principles I have identified, with obvious analogues in other areas of tort law. The rule that a claimant will recover only for injury to the

reputation he possesses at the time of the libel is one of these. In personal injury, if the claimant's hand was already damaged before it was tortiously injured by the defendant the damages will be lower than if the hand had been in perfect physical condition. In each case, the starting point of the calculation is the state of the relevant interest before the tort. The rule that a claimant in defamation will recover less if he has culpably contributed to the offending publication, for instance by provoking a libel, may be compared with the reduction of damages for personal injury where the claimant has negligently contributed to the harm.

49. There are however some differences in the way that the laws of personal injury and defamation approach proof of the pre-existing interest and proof of the extent of the injury it has sustained as a result of the tort. These differences derive largely from the nature of the interest under consideration, but they also reflect considerations of case management and pragmatism.

50. A personal injury claimant can normally establish their pre-existing physical condition and the nature, extent and likely consequences of a personal injury without difficulty by pointing to medical records and expert evidence, coupled with the claimant's own evidence. The defendant may refer to photographs, third party evidence, or undercover observations to show that the claimant was less able before the injury or not so badly affected afterwards. In defamation, the interest protected is the esteem in which the claimant is held by others, which is not so easily observed or demonstrated.

51. The law presumes that the claimant's reputation before publication of the defamation was good. The presumption is rebuttable, but evidence is admitted for that purpose only if it goes to the relevant sector of the claimant's reputation and falls within one of a limited range of categories: see Gatley on Libel and Slander 13th ed at paras 34-081 to 34-091. The underlying rationale for this approach is heavily influenced by case management considerations and in particular the need to avoid "mudslinging" defences: see *Burstein* at [41]-[42] (May LJ) and *Turner v News Group Newspapers Ltd* [2006] EWCA Civ 540, [2006] 1 WLR 3469 at [29], [34], [42], [50] (Keene LJ). One recognised category of admissible evidence of bad reputation is previous criminal convictions (see *Goody v Odhams Press Ltd* [1967] 1 QB 333) later extended to "judicial strictures in previous civil litigation" (see *Turner* at [47]-[48]). Such authoritative public denunciations are deemed to result in reputational harm.

52. As for proof that the offending publication led to reputational harm, it is generally hard for a claimant to give evidence of the state of their own reputation. The publishees are often numerous and hard to identify. Even where they can be traced, they are unlikely to be willing to give evidence that they think badly of the claimant. The assessment of harm is often a matter of inference from matters such as those successfully relied on here: the gravity of the imputation and the nature and extent of publication, coupled with such outward manifestations of reputational harm as may be available. These points are all commonplace: see for instance *Monroe v Hopkins* [68]-[69].

53. Moreover, the analogy with damages for pain, suffering and loss of amenity in personal injury is not perfect. In some respects defamation approaches compensation differently. Again, this is for sound reasons reflecting the nature of the interest protected by the tort.

54. My leg is either broken or mended, regardless of what other people think about the matter. An apology from the person who injured my leg may make me feel better but

will do nothing to ameliorate the physical injury. By contrast, whether my reputation is broken or restored depends entirely on what other people think of me. If the person who libelled me makes a full public retraction and apology that will not only reduce the distress I feel. It will also tend to repair my injured reputation. An inference may be drawn that it has in fact done so. A retraction and apology may also serve the further objective of vindication.

55. The rule that evidence of partial truth may reduce damages is well-established. The authority usually cited is *Pamplin*, but that was not its origin. As Keene LJ explained in *Turner* at [43] the rule goes back to the early 19th century. Its rationale has not been much discussed, but it is clear that it does not depend on the state of the claimant's actual reputation at the time of the libel. I would agree with Lord Wolfson's analysis. The underlying principle is that the claimant in a defamation case should not be awarded damages for injury to a reputation which is not deserved.

56. That is how Lord Denning explained the matter in *Speidel v Plato Films* [1961] AC 1090, 1142: "If it were not so, the plaintiff would recover damages for a character which he did not possess *or deserve*; and this the law will not permit" (the emphasis is mine). The reasoning of Neill LJ in *Pamplin* at 120B-D, with which Purchas LJ expressly agreed, appears to me to be on these same lines. It is also the way that Oliver LJ approached the matter in *Pamplin* at 124F when he observed that "by his … actions [the claimant] had forfeited *any right to be regarded* as of good general reputation" (again, I have added the emphasis).

57. *Grobbelaar v News Group Newspapers Ltd* [2002] UKHL 40, [2002] 1 WLR 3024 provides a more recent and authoritative statement of the rationale. The claimant, a football goalkeeper, sued for an allegation that he had "thrown" matches. The defendant failed to prove that he had, but the evidence it adduced made plain that he had made a corrupt agreement to do so. The House of Lords upheld the jury's verdict in favour of the claimant but held that the claimant was deserving of no more than £1 in nominal damages. Lord Bingham explained at [24]:

> "… *The tort of defamation* protects those whose reputations have been unlawfully injured. It *affords little or no protection to those who* have, or *deserve to have, no reputation deserving of legal protection*. Until 9 November 1994 when the newspaper published its first articles about him, the appellant's public reputation was unblemished. But he had in fact acted in a way in which no decent or honest footballer would act … It would be an affront to justice if a court of law were to award substantial damages to a man shown to have acted in such flagrant breach of his legal and moral obligations."

At [54] Lord Hobhouse explained why the trial judge should have given the jury "a *Pamplin* direction":

> "A *Pamplin* direction addresses the situation where a plaintiff is entitled to a verdict in his favour on the justification issue but *the evidence properly before the jury* on the issue of justification *has disclosed that the reputation to which he is entitled is so depreciated that the damages which he should be awarded* for

> the damage to his reputation by the (ex hypothesi) defamatory publication *should be reduced below the level that would be appropriate for a plaintiff with an impeccable reputation, maybe even to a nominal figure*."

(Again, I have added the emphasis to these citations).

58. None of this has any analogue in the rules on the assessment of damages for pain, suffering and loss of amenity for personal injury. That is because the reasoning in these cases reflects the vindicatory purpose of an award of damages for defamation which, if not unique to defamation, is entirely absent in the context of personal injury and most other torts.

59. An award of damages under the head of vindication looks at least in part to the future. As this court observed in *Jones v Pollard* [1997] EMLR 233, 243 the matters which "in arriving at the correct figure for damages …. it is appropriate to take into account" include "[v]indication of the plaintiff's reputation past and future." Where the trial process has revealed that the defamatory allegation complained of, though not substantially true, was largely or partly true it may be considered excessive, unjust and contrary to the public interest for the court to award the claimant a sum in damages which would "convince a bystander of the baselessness of the charge". Vindication to that extent would be inappropriate as it would not fairly reflect the court's findings. From a Convention perspective, such an award could be viewed as an unnecessary and disproportionate interference with freedom of expression.

60. In *Pamplin* the court approved reliance by way of mitigation on evidence adduced in an unsuccessful attempt to prove justification or fair comment. But it did so only by way of example, derived from the facts of that case. The principle identified by Neill LJ was wider, embracing "any other evidence which is properly before the court and jury". I do not believe those words were intended to suggest that evidence properly admitted can be treated as mitigating damages regardless of relevance. The passage was not so interpreted in *Turner,* where Keene LJ considered *Pamplin* to be authority for the admission of "matters which are directly relevant to the subject matter of the libel", as opposed to "aspects of [the claimant's] life unconnected with the subject matter of the defamatory publication": see [42]-[43]. On the other hand, in assessing whether evidence relied on under the *Pamplin* principle relates to a relevant sector of the claimant's reputation "the court should not be astute to draw too precise boundaries between various sectors of the plaintiff's life particularly where there is some linkage, albeit perhaps indirect, between the matters relied upon in reduction of damages and the sector of the plaintiff's life primarily under consideration": *Jones v Pollard* at 251 (Hirst LJ). Drawing the boundary will be a matter for judicial assessment in the particular case.

61. In the light of the above analysis it seems to me that, as a matter of logic, the wider category of evidence referred to in *Pamplin* should embrace any evidence properly admitted that would be relevant in assessing what award of damages would be necessary and proportionate to the legitimate aims of compensation and vindication. At a minimum, this wider category would seem to include any evidence (on whatever basis it was originally admitted) that tends to establish that the defamatory statement complained of was partly true or that an aspect of the claimant's reputation, being one

which the court considers relevant in all the circumstances, was at least partially undeserved so as to reduce the need for vindication.

62. The legal analysis above is reflected in at least the following first instance authorities:-

(1) In *FlyMeNow* the libel was that the claimant had defaulted on its debts due to insolvency. The defendant failed to prove the truth of this imputation but did establish by way of partial justification that the claimant had "failed to pay its debts … over many months, was perilously close to insolvency and was financially risky to do business with": [126]. In the attempt to prove insolvency, the defendant also "incidentally proved that the claimant behaved disgracefully by fobbing it off with a series of dishonest excuses": [127]. Further, the central element of the claimant's case was false, and its principal had supported that case with evidence he knew to be untrue. The first of these three matters reduced damages on the basis of the partial justification principle. The second and third matters served to reduce the award on the basis that they were disreputable facts properly before the court which ought to be taken into account in mitigation as "facts which go to a relevant sector of the claimant's business reputation, and show that it is undeserving of a sum which appear to the outside world to represent substantial vindication of its reputation.".

(2) In *Dhir v Saddler* [2017] EWHC 3155 (QB), [2018] 4 WLR 1 the claim was for slander in respect of the defendant's allegation that the claimant had "threatened to slit my throat". This was not so. The defence of truth failed. But evidence admitted on other issues showed that the claimant had been violent to his daughter and made other threats of violence against the claimant. Applying *Pamplin* and *Turner*, Nicklin J reduced the damages on this account, observing that "This conduct is in the same sector of his reputation as the allegation made by the defendant": see [119]-[120].

63. *Joseph* is not so easy to analyse. It was a case of partial justification, and one where the misconduct of the claimant was "properly before the court" as a result of cross-examination. Thus far, there is nothing unorthodox about the case. The judge's approach to relevance is more difficult. The libel was that the claimants had a contemptuous or cavalier attitude to contractual relations and that there was a real possibility they might not comply with all their contractual obligations. The misconduct was presenting dishonest and fabricated evidence to support a bogus case on special damages. In his judgment after trial and his subsequent ruling on costs the judge gave several reasons for his conclusion that this deception meant "there would be no injustice" to the claimant if his award for these falsehoods was limited to £1. I do not find all those reasons persuasive. But in my view at least two were consistent with the authorities and the analysis above, and correct as a matter of law.

64. The first is that "The vindication of his reputation to which he is entitled has been given in the reasons for this judgment set out above. He requires no further vindication of his rights": see [178] of the trial judgment. The second, at [8] of the further judgment, is that the fraudulent evidence was "serious misconduct in the course of this action, which is relevant to damages, such that I concluded that it would be an affront to justice if he were to be awarded more than a nominal sun for general damages".

The judge's decision in this case

65. At paragraphs [144] to [147] of the judgment under appeal the judge gave three reasons for making a nominal award rather than "more than minimal" one he would otherwise have made. These were that (i) it would be "unconscionable" for Dr Wright to receive more than this; (ii) the principle identified at [128] of *FlyMeNow* applied to this case; and (iii) a nominal award would be "no injustice" to Dr Wright. When refusing permission to appeal the judge expanded on the first strand of this reasoning, tying the moral "unconscionability" of a larger award to the purpose of vindication. He also explained (iv) that by the date of judgment, at which time damages fell to be assessed, Dr Wright had been shown in a public judgment to have advanced a deliberately false case and had thereby so injured his own reputation that an award of substantial damages was no longer required for the purposes of vindication.

66. I have reservations about the judge's first reason. I am not sure it is helpful to use morality or tests of "unconscionability" as tools for assessing damages for a common law tort. The law would risk becoming too loose and unpredictable. In my judgment, it is better to approach these issues in the way I have outlined above, using (in particular) the familiar concepts of compensation and vindication, justice, relevance, necessity and proportionality.

67. The judge's fourth reason appears to be an extension of the *Goody* principle discussed at [51] above. That principle has so far been applied only to convictions and judicial findings before the publication complained of. Here, the judge took into account a post-publication event in the shape of his own judgment in the case itself. That is novel but I do not consider it to be wrong in principle. On the contrary, it seems to be to be a logical step which is not precluded by authority. As explained in *Burstein* and *Turner*, the restrictions which the authorities place on the admission of evidence in mitigation of damages are largely rules of procedure and case management rather than rules of law. The mischief at which they are aimed is the introduction of irrelevant prejudice and satellite litigation. The *Goody* principle is an exception, which is not considered to justify concerns of those kinds. I see no reason why it should not be carried forward to post-publication events. It is, moreover, established law that in appropriate circumstances a reasoned judgment in favour of the claimant may be regarded as reducing the need for vindication by way of damages: see *Purnell v BusinessF1 Magazine Ltd* [2007] EWCA Civ 744, [2008] 1 WLR 1. The judge's approach in this case illustrates a different way in which the interplay between a reasoned judgment and damages may reduce the latter. The potential for such interplay was recognised in *Joseph.*

68. In my view the judge's other reasons were conventional applications of the recognised principles I have considered above. He was clearly right to treat Dr Wright's lies and deception as "disreputable facts that are properly before the court". That aspect of his reasoning is not challenged. The issue is whether he was legally wrong to conclude that these disreputable facts were relevant to damages or, as he put it, whether they logically affected the extent to which Dr Wright was entitled to vindication through an award of damages. In my opinion the judge's conclusion on that issue was lawful and proper. Indeed, I agree with it for essentially the reasons I gave when granting permission to appeal (see [27] above). I would reject Lord Wolfson's argument that the libel and the "litigation misconduct" are not properly comparable. The libel here was not that Dr Wright "is not Satoshi". It was that Dr Wright had made fraudulent claims, in other

words that he had deceived or tried to deceive the public about his status. The sting of the libel was one of dishonesty.

69. The extent to which relevant disreputable conduct that emerges in the course of a trial should affect the ultimate award of damages is a matter of judgment, peculiarly within the province of the trial judge. Although it was and remains Dr Wright's case that the libel in this case was a serious one, worthy of six-figure damages, his case on this appeal is "all-or-nothing". It was no part of Lord Wolfson's argument that even if we rejected his contention that the judge was wrong in law to take account of Dr Wright's lies we should nevertheless review the weight the judge attributed to the lies, take a different view, and substitute a different assessment of damages.

Campbell v News Group

70. I have dealt with the matter so far without reference to this case, because it is not necessary to my conclusion any more than it was to that of the judge below. *Campbell* is certainly a striking case on its facts. The *News of the World* libelled the claimant by accusing him of being a pervert and an habitual sexual abuser of children. The newspaper accepted this was "exceptionally serious" and did not seek to challenge the jury's verdict on liability. It challenged the award of £350,000. The court agreed that the jury had been misdirected and that the award was manifestly excessive. It held that the libel would not have justified an award in excess of £100,000. The award was then "further and severely" reduced to £30,000 to reflect the fact that the claimant had engaged in "an elaborate and long-lasting attempt to pervert the course of justice" in the case itself. This had involved fabricating and procuring false testimony and accusing innocent third parties of corruption and lying. That would appear to be conduct of a very different kind from the behaviour falsely imputed by the libel.

71. Having reached the conclusions I have I do not think it necessary or appropriate to address in any detail the question of whether *Campbell* is authority for a broad principle that all and any disreputable conduct by the claimant may be taken into account as reducing damages; or whether any of the exceptions identified in *Young v Bristol Aeroplane* apply to the case. I would say only this.

(1) The decision in *Campbell* was that the "wholly disreputable conduct" of the claimant "established in the course of determining the issues in the litigation itself" was "relevant" (see [32]) as it went to the question of what damages the claimant would "merit" for a defamation that "could be shown to have injured his reputation" (see [33]). The reduction was required because it would be "an affront to justice" to do otherwise ([33]), when the claimant had "shown himself prepared" to engage in the misconduct I have outlined [119]. This language reflects that used in the authorities I have mentioned, and is not obviously inconsistent with the principles I have identified. It is the application of these propositions to the particular facts of the case that may appear unorthodox.

(2) That said, apart from citation of *Pamplin* and Lord Hailsham's dictum, the conclusions I have cited were not explained. The claimant was unrepresented. *Campbell* is an outlier in the jurisprudence. It does not appear to have been cited to the House of Lords in *Grobbelaar* or to this court in *Turner*. We know that it was not cited in *Joseph* or in the present case until after judgment had been given. It was not cited to me in *FlyMeNow* at any stage. In *Dhir v Saddler*, it was cited (see [99])

> but not relied on by the judge, whose relied on *Pamplin* and *Turner* to reduce damages on the footing that the collateral misconduct was in the same sector of the claimant's reputation as the libel. In *Riley v Murray* [2021] EWHC 3437 (QB), *Campbell* was cited but distinguished: see [148].

Ul Haq and Summers

72. I deal with these cases last of all because, as I have said, I do not consider that they affect my conclusions.

73. *Ul Haq v Shah* [2009] EWCA Civ 542 [2010] 1 WLR 616 is authority for the proposition that there is no general rule of law, in contract or tort, that the dishonest exaggeration of a genuine claim will result in the dismissal of the whole claim. As Arden LJ put it:-

> "17. … I am unaware of any reported case in which a judge has dismissed the whole of a claim because he has found that the claim has been dishonestly exaggerated. The invariable rule is that, in those circumstances, the judge awards the limited damages which are appropriate to his findings. Of course, a *claimant's* credibility may be so damaged that he fails to prove any part of his loss, but if he proves some loss, he recovers that even though he has fraudulently attempted to recover far more.
>
> …
>
> 20. …. it is well established that a claimant will not be deprived of damages to which he is entitled because he has fraudulently attempted to obtain more than his entitlement."

74. In *Summers v Fairclough Homes Ltd* [2012] UKSC 26 [2012] 1 WLR 2004 the Supreme Court held (overruling the second ground of decision in *Ul Haq*) that in an extreme case of fraudulent exaggeration, the court does have the power under CPR 3.4(2) to dismiss the entire claim as an abuse of process; it can do so even after a trial at which the court has been able to make a proper assessment of liability and quantum; but this power will be exercised only in very exceptional circumstances. The court concluded that it would be unwise to limit in advance the circumstances in which abuse might be found ([44]) but emphasised that the power to strike out is "not a power to punish but to protect the court's process": [45]. It was "very difficult" to think of circumstances in which it would be proportionate to take the draconian step of striking out for abuse where this would "deprive the claimant of a substantive right to which the court had held he was entitled after a fair trial": [49]. In the vast majority of cases the balance should be struck "by assessing both liability and quantum and, providing that those assessments can be carried out fairly, to give judgment in the ordinary way": [50]-[51]. There are many ways in which the desirable aim of deterring fraudulent claims could be achieved, other than by striking out; they include "ensuring that the dishonesty does not increase the award of damages, making orders for costs, reducing interest, proceedings for contempt and criminal proceedings": [51].

75. The most obvious points to make about *Ul Haq* are these. The case holds that no general rule exists that dishonesty will result in the dismissal of the whole claim, or a reduction of damages. It does not exclude the possibility that a specific rule of law may do so.

Indeed, the court expressly recognised that in the law of insurance dishonesty can defeat a claim altogether. The case itself was one of personal injury. There was no consideration of the law of defamation let alone any of the cases I have discussed and analysed in this judgment.

76. But there is a broader point, which clearly emerges from the language used in the passages I have cited from each of these two cases. The cases hold that, save in a very exceptional case of abuse of process, a court should not "deprive" a claimant of rights to which he is "entitled". But that is not what happened here, or in the other defamation cases which I have analysed. Skilful though it is, the argument for Dr Wright contains a fallacy. The judge in this case did not engage in the prohibited process of ascertaining the damages to which the claimant was entitled and then reducing that figure to reflect the claimant's "litigation misconduct". The judge took account of the claimant's lies and his attempt to deceive the court as part of the process of ascertaining the claimant's entitlement, namely a sum in damages that would be proportionate to the aims of compensating and appropriately vindicating the relevant aspect of the claimant's reputation. In this case, where the libel was an accusation of dishonesty, the dishonest conduct of the litigation was relevant for that purpose. This follows from the particular nature of the interest protected by the law of defamation.

77. No such reduction would have been appropriate if the claim had been for personal injury, but that is for the reason given by the judge: damages in personal injury claims compensate for injury to interests which are unaffected by dishonesty.

Conclusion

78. For the reasons I have given, I would dismiss this appeal.

LADY JUSTICE ANDREWS:

79. I agree.

LORD JUSTICE SINGH:

80. I also agree.