Neutral Citation No. [2016] NIQB 8 | *Ref:* **STE9849**

Judgment: approved by the Court for handing down | *Delivered:* **03/02/2016**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

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BETWEEN:

THOMAS ELLIOT

Plaintiff:

and

PHILIP FLANAGAN

Defendant:

_____

STEPHENS J

Introduction

[1] The plaintiff, Thomas Elliot, brings this application to enforce the defendant's, Philip Flanagan's, qualified offer to make amends in relation to a defamatory statement published by the defendant on his Twitter account on 1 May 2014. The agreed defamatory meaning of the statement is that "the plaintiff was responsible for harassing and shooting people during his service with the UDR." In the event the only outstanding issue for my determination is the assessment of the amount of compensation to be paid by the defendant to the plaintiff.

[2] David Dunlop appeared on behalf of the plaintiff and Desmond Fahy appeared on behalf of the defendant. I am grateful to both counsel for their detailed analysis of the case and for their assistance.

Factual background

[3] The plaintiff is from, and was educated in, County Fermanagh. He initially followed his family's tradition of a career in farming, attending Enniskillen College of Agriculture and then for a period of time running the family farm. He still farms on a part time basis but, in the event, he decided to enter politics becoming a member of the Ulster Unionist Party. He was first elected as an Ulster Unionist Councillor on Fermanagh District Council in 2001 and since that date he has been and remains, an elected public representative. He was a member of the Northern Ireland Assembly between 2003 and 2015 and in May 2015 he was elected as the

Member of Parliament for the constituency of Fermanagh and South Tyrone. Between September 2010 and March 2012, he was the leader of the Ulster Unionist Party.

[4] The plaintiff is not only a politician and a farmer but also between 1982 and 1992 he served in the Ulster Defence Regiment ("the UDR") and then between 1992 and 1999 he served in the Royal Irish Rangers which due to amalgamations became the Royal Irish Regiment ("the RIR"). His service was on a part time basis except for a period of 2 years and 9 months when he was a full time member. The plaintiff gave evidence, which I accept, that he had an entirely clear disciplinary record in relation to his service in both the UDR and in the RIR. I find that his work as a farmer and his subsequent association with farming, his work as a politician and his service in the UDR and the RIR all formed core aspects of the plaintiff's life.

[5] The defendant, Phillip Flanagan, is also a politician from, and a public representative for, County Fermanagh and South Tyrone. He is a member of Sinn Fein and also a member of the Northern Ireland Assembly.

[6] It can be seen that as at the date of the publication on 1 May 2014 both the plaintiff and the defendant were elected members of the Northern Ireland Assembly, they both held responsible positions representing the public, though they were members of different political parties.

[7] On 1 May 2014 the plaintiff had appeared on the Stephen Nolan radio programme. Following that appearance and at 9.45 a.m., the defendant published a tweet on his Twitter account in the following terms:

> "Tom Elliot talks to @StephenNolan about the past. I wonder if he will reveal how many people he harassed or shot as a member of the UDR."

The tweet was taken down from his Twitter account by the defendant within an hour of the time of it being posted. The plaintiff gave evidence, which was not challenged, that despite the tweet being taken down from the defendant's Twitter account it still remained accessible on the internet, on social media sites and on political blogs though this was "some time ago" with no definition being brought to how long ago this was. At the date of trial the plaintiff was not sure whether the Tweet had by then been deleted from all these locations on the internet and I infer that this lack of clarity was because he had not checked for "some time." The plaintiff did not specify what search terms he had used in order to find the tweet on the internet when he last searched for it "some time ago." There was no evidence as to whether the search term had to be focussed or whether it only required the insertion of the name of either the plaintiff or the defendant into search engines, such as Google, for the tweet to appear. There was no evidence as to whether the tweet would appear on the first page of the results of an internet search or within a reasonable number of pages of search results. I will proceed on the basis that after

the defendant had taken down the tweet from his Twitter account an individual searching for the tweet on the internet would have required to have entered focussed search terms to have found it. I consider that after the defendant had taken down the tweet from his Twitter account that the majority of individuals searching on the internet and who found the tweet would have known for what they were searching so that there would have been republication to individuals who knew of or about the original publication. However I also consider that there would have been a limited element of entirely new publication by virtue of the tweet being accessible on the internet.

[8] I find that the tweet remained accessible in that manner on the internet for a limited period of time. I do not consider that it is necessary to bring exact definition to the period except to find that the tweet could still be read and was read, even after it had been taken down from the defendant's Twitter account so that publication did not come to an end on 1 May 2014.

[9] At the time of publication the defendant had some 5,000 followers to his Twitter account. He now has some 7,122. The defendant did not give evidence but in an affidavit sworn on 22 October 2015 he stated that Twitter provides a service which is known as "Twitter Analytics" which measures the engagement of individual tweets. That he accessed this service on 1 May 2014 after posting the tweet which is the subject of these proceedings. From this he knew that the tweet was seen by 167 of his followers on Twitter and that 6 of those 167 retweeted the original tweet. One of those 167 "favourited" the tweet. I accept that evidence. I find that the tweet was not read by all 5,000 of the followers of the defendant's Twitter account but rather was read by 167 of them and retweeted by 6 of them.

[10] The defendant gave no evidence at trial. Accordingly there was no evidence as to whether he was able to identify those who had retweeted the defamatory statement and if so whether he requested them to take down the retweets from their Twitter accounts. I consider that the original tweet continued to appear on the Twitter accounts of those who had retweeted it. I find that in this manner the tweet could still be read and was read, even after it had been taken down from the defendant's Twitter account so again in this manner publication did not come to an end on 1 May 2014.

[11] There was no evidence as to the identity of the 6 individuals who re tweeted the defendant's tweet or as to the number of followers that those individuals had at the time. Accordingly there is no evidence as to the exact numbers who read the defendant's tweet as a result of it being retweeted by 6 of the defendant's followers. There was no evidence as to whether any of the persons who received a retweet from the 6 individuals themselves retweeted it. It is also not possible to say whether any of the original 167 individuals not only read the tweet but also showed it to others so that they read it. Accordingly it is not possible to accurately calculate the number of people to whom the defamatory statement was published though the original circulation was limited to 167 of the defendant's followers but in addition

there would have been a relatively limited number of other individuals to whom it was published.

[12] On 1 May 2014 the defendant's tweet was brought to the attention of the plaintiff by the victims campaigner, Ann Travers, whose sister Mary Travers, was murdered by terrorists. The plaintiff was also made aware of the tweet by a number of other people who contacted him including Mr Gault, a victims campaigner and by Arlene Foster, another public representative from County Fermanagh and presently First Minister and the leader of the Democratic Unionist Party. There was no evidence that anyone who contacted him informed him that they believed that the defamatory statement was true or that they questioned him to obtain his assurance that the statement was untrue or that they thought anything the worse of him by virtue of the statement. However I consider that there were other people to whom this statement was published who would have considered that it was true and would have thought the worse of the plaintiff and in doing so would have relied on the responsible position and standing of the defendant assuming that he would not have published such allegations unless he was sure that they were true and that he had information from which he knew that they were true.

[13] Having been informed of the tweet the plaintiff accessed it on the defendant's Twitter account. The plaintiff gave evidence, which I accept, that at the time he was astonished and shocked. That he also felt disappointed and frustrated. That his immediate concern was that it was inaccurate and wrong. His concerns developed as a result of the number of people who contacted him about the tweet. He became concerned about his personal security and the security of the members of his family. He stated in evidence that he thought that if people believed that he had harassed and shot people while in the UDR that would have an impact on both his and his family's security. These concerns were to be seen in the context of a prior particular, but unspecified, threat to his personal safety. The effect on the plaintiff is also to be seen in the context that there was no direct evidence that anyone treated him with hostility or contempt or that anyone who knew him and upon meeting, changed their approach to him or their attitude towards him. There was no evidence that anyone who met him used any pejorative term in relation to him or taunted him either in public or in private with the defamatory allegations. There was no evidence of any letters being sent to him repeating the defamatory allegations and accusing him in the terms of that statement. The plaintiff's political life continued and within approximately one year of the publication, he was elected as the Member of Parliament for the constituency of Fermanagh and South Tyrone. The level of upset caused by the publication is that he was astonished, shocked, disappointed, frustrated and became worried about his security and the security of his family members but not, for instance, that he was depressed or that he felt the need to withdraw or to avoid people. I infer that after the initial shock and upset he was confident that there were and remained at all times a considerable number of people who believed that he was entirely innocent, though that there were others who believed that he was not together with a category that entertained reservations about whether the allegations were true or false.

[14] The plaintiff contacted his solicitor, who on 2 May 2014 sent a letter of claim to the defendant. The letter identified the defamatory publication asserting that it was a most serious libel and was grossly defamatory. It also stated that it inevitably put the plaintiff's "security and welfare at risk of attack from inter alia Republican dissidents." It demanded the publication of an apology and the payment of damages though it concluded with the following significant paragraph:-

> "We would further advise that the issue of defamation and libel proceedings and the measure of damages associated therewith will be *influenced by the immediacy and nature of your response to this correspondence*." (emphasis added)

That paragraph emphasised and brought to the defendant's attention, the need for an immediate response rightly indicating that the speed of response is a particularly relevant matter to be taken into account in defamation proceedings. There was not only no immediate response but rather there was no written or oral response to that letter by or on behalf of the defendant. The plaintiff gave unchallenged evidence, which I accept, that at no stage has the defendant spoken to him about the publication or apologised to him personally. As far as the letter of claim was concerned there was no reply and from the plaintiff's perspective it was simply ignored. The defendant did not give any evidence or call any evidence at trial and accordingly there is no evidence as to why he did not respond to the letter of claim and there is no evidence as to what if anything he did with it, when he received it.

[15] A month later and on 2 June 2014 the plaintiff issued proceedings for defamation with the writ being served on the defendant by letter of the same date.

[16] On 17 June 2014 the defendant's solicitors wrote to the plaintiff's solicitors stating that they had entered an appearance in the proceedings. Accordingly it is apparent that by 17 June 2014 at the latest the defendant had instructed solicitors to deal with the plaintiff's claim however there was still no substantive response to the letter of claim dated 2 May 2014.

[17] On 18 June 2014 the Statement of Claim was served and on 29 July 2014 the defendant's solicitors wrote stating that the defendant was to consult with counsel on 1 August 2014 with a view to drafting a defence.

[18] On 21 August 2014, some 3 weeks after 1 August 2014, the defence had not been served. The plaintiff's solicitors wrote indicating that they intended to mark judgment in default of defence. In response it was indicated that the defendant had consulted with counsel and that the defence should be ready for service during week commencing 26 August 2014. In the event the defence was not served during that week but a month later and some 4½ months after the letter of claim, by letter dated 26 September 2014 the defendant made a qualified offer of amends.

[19] The letter dated 26 September 2014 relied on Section 2(2) of the Defamation Act 1996. In that letter the defendant accepted that the publication had the defamatory meaning that:-

> "The plaintiff was responsible for harassing and shooting people during his service with the UDR".

The defendant stated that he was prepared to post an apology on his Twitter account as follows:-

> "On May 1 2014 I posted a tweet alleging that Tom Elliot was responsible for harassing and shooting people during his service with the UDR. I now accept this was untrue and wholly without foundation and I apologise for all offence caused."

The letter went on to say that the defendant would pay such compensation as can be agreed between the parties and reasonable costs to be agreed or taxed in default of agreement. The letter also stated by way of "background information" that "the tweet complained of was deleted within an hour of being posted and that it was seen by 167 of the Plaintiff's followers on Twitter, of whom six re-tweeted it and one favourited it."

[20] Some three weeks later and by letter dated 9 October 2014, the plaintiff's solicitors accepted the defendant's solicitors' qualified offer of amends. A number of points emerge from that letter:-

(a) In relation to the defamatory meanings the plaintiff accepted the meaning contained in the defendant's letter dated 26 September 2014. Accordingly the issue as to the meaning of the defamatory statement was resolved between the parties.

(b) In relation to the apology the plaintiff accepted the form suggested by the defendant. However the plaintiff went on to observe that the apology was longer than 140 characters and accordingly may not be capable of being published on Twitter. The plaintiff sought the defendant's proposal for publication of an apology on Twitter having regard to the character limit. The plaintiff also reserved the right to make a statement in open court citing the authority of *Winslet v Associated Newspapers Ltd* [2009] EWHC 2735. The plaintiff sought the defendant's acceptance of the plaintiff's entitlement to make a statement in open court reading out the defendant's apology. Accordingly the form of the apology had been resolved but the method of publication of the apology and whether the defendant objected to a statement in open court were outstanding issues.

(c) In relation to compensation and costs the plaintiff accepted the defendant's offer to pay compensation and costs. The plaintiff sought the defendant's proposal in relation to compensation. The amount of damages and the amount of costs were outstanding issues.

(d) In relation to the defendant's assertion that the original tweet was seen by 167 of the defendant's followers of whom 6 retweeted it and one "favourited" it the plaintiff stated that he required proof of this extent of publication and sought discovery from the defendant as to this aspect of the case.

[21] There was no response from the defendant to the letter dated 9 October 2014. The defendant did not publish the apology on his Twitter account. He did not state whether he objected to a statement in open court. He did not make any proposal in relation to compensation. He did not give discovery of any documents to establish the extent of publication.

[22] A reminder was sent to the defendant's solicitors on 16 December 2014. On 4 February 2015 the plaintiff issued a summons seeking an order for discovery and for the offer of amends to be enforced. On 16 April 2015 the defendant's solicitors indicated that they were currently investigating an insurance indemnity issue in relation to this action. The matter entered my list on 9 October 2015 and I ordered discovery by noon on 23 October 2015. I listed the application to enforce the offer to make amends for hearing on 8 January 2016. I gave directions on 16 October 2015 in relation to a related action brought by the defendant against AIG (Europe) Limited on foot of an insurance policy. On 8 January 2016 it was suggested during oral submission on behalf of the defendant that the insurance position affected the defendant's ability to deal with the plaintiff's claim. However no discovery was given by the defendant in these proceedings in relation to the insurance issue and no reference was made to that issue in the defendant's skeleton argument dated 18 December 2015. Furthermore no evidence has been given during the hearing on 8 January 2016 either by the defendant or on his behalf, as to what the issues are in the related insurance action or as to whether and if so how, they explain any delays on the part of the defendant in responding to the plaintiff's claim. I will determine the issues before me on the evidence that was given during the course of the hearing.

[23] On 8 January 2016 and upon the plaintiff's application to enforce the offer of amends coming on or hearing:-

(a) The defendant by his counsel stated that the defendant would publish the apology on his Twitter account and would overcome the 140 character limit by incorporating the apology in two or, if necessary, three tweets. The defendant was willing to provide an undertaking to the court that he would publish the apology in that way but did not specify when the apology would be published on his Twitter account

nor did he produce the proposed undertaking in writing. In response to an inquiry from the court it was indicated that the apology would be published on the defendant's Twitter account on 8 January 2016 and an undertaking was given by the defendant to that effect. There was no evidence as to why the apology had not been published at an earlier and more appropriate stage. By virtue of the fact that the apology had not been published there was no evidence using Twitter analytics as to the numbers who had seen it, though I note that the number of the defendant's followers at the date of the apology was greater than at the date of the publication of the defamatory statement.

(b) The plaintiff's counsel produced a draft statement which he proposed to read in open court. The defendant by his counsel accepted that the plaintiff was entitled to read a statement in open court and despite some initial reservations on behalf of the defendant, which involved some short submissions, he did not object to the form of the statement, as suggested by the plaintiff.

(c) The statement was read in open court on 8 January 2016.

(d) The parties agreed that the plaintiff was entitled to an order for costs against the defendant to be agreed or taxed in default of agreement.

The hearing then proceeded in relation to the single outstanding issue as to the amount of compensation.

[24] During the course of that hearing counsel on behalf of the plaintiff submitted that in defamation proceedings in Northern Ireland any reference to personal injury awards should be a reference to personal injury awards in Northern Ireland and that there were two consequences. The first was that any reference to a ceiling on awards in defamation cases in Northern Ireland, should take into account the upper limits of the value of personal injury cases in Northern Ireland, as opposed to the upper limits of the value of personal injury cases in England and Wales. The second was that when considering awards in defamation cases in England and Wales these differences should be borne in mind. Mr Fahy on behalf of the defendant chose not to make any contrary submission in relation to any of these propositions.

[25] The plaintiff gave evidence, which evidence was not challenged, except that an issue was put to the plaintiff as to why his security concerns, despite appearing in the letter of claim, were not repeated in the Statement of Claim. I do not consider that the omission of any reference to security concerns in the Statement of Claim should lead me to the conclusion that the plaintiff did not have those concerns. I find as a fact that he did have those concerns and that for a period of time a significant cause of those concerns was the defendant's defamatory publication.

Legal principles in relation to the assessment of compensation

[26] Section 3(5) of the Defamation Act 1996 provides that:-

> "If the parties do not agree on the amount to be paid by way of compensation, it shall be determined by the court on the same principles as damages in defamation proceedings."

It also provides that:-

> "The court shall take account of any steps taken in fulfilment of the offer and (so far as not agreed between the parties) of the suitability of the correction, the sufficiency of the apology and whether the manner of their publication was reasonable in the circumstances, and may reduce or increase the amount of compensation accordingly."

[27] As the amount to be paid by way of compensation is to be determined by the court on the same principles as damages in defamation proceedings it follows that the same three functions of general damages apply under Section 3(5) as in a normal defamation trial. Those functions are:-

(i) To act as a consolation to the plaintiff for the distress he suffers from the publication of the statement.

(ii) To repair loss to his reputation.

(iii) As a vindication for his reputation.

It also follows that damages are at large in the sense that they cannot be assessed by reference to any mechanical, arithmetical or objective formula (see *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1071). The court is entitled to take into account a wide range of matters and in that regard I note the checklist that was adopted by Hirst LJ in *Jones v Pollard* [1996] EWCA Civ 1186 which was in the following terms:-

> "1. The objective features of the libel itself, such as its gravity, its prominence, the circulation of the medium in which it was published, and any repetition.
>
> 2. The subjective effect on the plaintiff's feelings (usually categorised as aggravating features) not only from the publication itself, but also from the defendant's conduct thereafter both up to and including the trial itself.

3. Matters tending to mitigate damages, such as the publication of an apology.

4. Matters tending to reduce damages, *e.g.* evidence of the plaintiff's bad reputation, or evidence given at the trial which the jury are entitled to take into account in accordance with the decision of this court in *Pamplin v Express Newspapers Ltd* [1988] 1 W.L.R. 116.

5. Special damages.

6. Vindication of the plaintiff's reputation past and future."

Vindication is an aspect of the award so that if the allegations should re-emerge, the damages must be large enough to proclaim the baselessness of the libel or as put in *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1071 the plaintiff "must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge." Also vindication can be achieved, either in whole or in part, by an apology or by a categorical statement by the defendant that the statement is unfounded.

[28] It also follows that all evidence going to aggravation or mitigation which is admissible in a normal defamation trial will be equally admissible in an assessment of damages under Section 3(5). Accordingly the plaintiff may draw attention to all matters that can be taken into account when determining general damages for defamation such as his status and reputation, the mode and extent of publication, the conduct of the publisher and any injury to the claimant's feelings the result of the defamation or a consequence of highhanded, oppressive or insulting behaviour by the publisher. In this case there is no question of an award of exemplary damages. The award is compensatory for which see paragraphs [41] - [42] of the *Gleaner Co. Limited and another v Abrahams* [2004] 1 AC 628.

[29] The fact that the defendant has made an offer of amends under Section 2 of the Defamation Act 1996 is a substantial factor in mitigation. The earlier it is made then, unless there is some valid reason for delay, the greater the likely impact on the level of damages. The procedure that I will follow is first to assess the appropriate level of damages leaving out of account the offer of amends and other matters in mitigation and then to apply a reduction given the content of the offer of amends together with all the other mitigating factors in this case. In arriving at an appropriate reduction I also take into account the levels of reduction applied in England and Wales of between 30% and 50% in cases such as *Nail v Newsgroup Newspapers Ltd* [2004] EWCA Civ 1708, *Campbell-James v Guardian Newspapers Ltd* [2005] EWHC 893, *Veliu v Mazrekaj* [2006] EWHC 1710, *Turner v Newsgroup Newspapers Ltd* [2005] EWHC 892 and *KC v MGN Ltd* [2013] EWCA Civ 3. I consider that these cases demonstrate that the award of damages is significantly sensitive to appropriate steps taken by the defendant in mitigation.

[30] Freedom of expression is protected by Article 10 ECHR. A disproportionate award of damages will constitute a violation of that Article, see *O'Rawe v William Trimble Ltd* [2010] NIQB 135 at paragraph [115]. Any award of damages must bear a reasonable relationship of proportionality to the injury to reputation as suffered, see *Steel & Morris v UK* App No 68416/01: ECHR 2005-11; [2005] EMLR 15 ECtHR. In that case the awards became disproportionate when compared to the meagre incomes and resources of the defendants. In this case the defendant has chosen to give no evidence as to his income or as to his resources and has chosen to give no evidence as to whether he has the benefit of an insurance policy. There is no evidential foundation for it to be suggested that any award in this case is disproportionate when compared to the income and resources of the defendant. Furthermore any award is compensatory and is based on the plaintiff's loss. A fundamental and long-established principle of domestic law is that the means of a defendant are irrelevant to the assessment of damages for a tort. It has nothing to do with what the defendant can afford to pay, see *Rai v Bholowasia* [2015] EWHC 382 at paragraph [181] and *Gur v Avrupa Newspaper Ltd* [2009] E.M.L.R. 4.

[31] In arriving at an award in this case I take into account the purchasing power of money in accordance with the practice set out in *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153 and followed in cases such as *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670, 696 and *John v MGN Ltd* [1997] QB 586, 608. In arriving at an award I will consider what the result would be in terms of weekly, monthly or annual income if the money were invested in a building society deposit account without touching the capital sum awarded or, if I have in mind smaller sums, to consider what could be bought with it.

[32] I do not take into account awards made by juries in other cases but following the decision in *Rantzen* it is appropriate to, and I do, take into account awards which have been approved by the Court of Appeal or which have been made by the Court of Appeal in the exercise of its powers to make its own awards in cases in which that of the jury has been disallowed on appeal. It is also appropriate to, and I do, take into account reasoned awards made by first instance judges sitting without a jury, see *Gur v Avrupa Newspaper Ltd* [2008] EWCA Civ 594; [2009] E.M.L.R. 4 at [28]. I was referred to a number of awards that had been approved or made by the Court of Appeal in England and Wales or by first instance awards by judge alone both in this jurisdiction and in England and Wales. I have taken them all into account but in doing so I consider that there is a danger in making comparisons with other cases in that there may be a tendency for different features of the different cases being stressed by the different parties and this may not only be inconclusive but also produce its own injustice, as well as being time consuming and costly. In addition there is a limit to the value of supposedly comparable first instance decisions, because the facts of each case vary so much, see *Applause Store Productions Limited, Matthew Firsht v Grant Raphael* [2008] EWHC 1781 (QB) at paragraph [77] and the variables may be too many to be "conducive to making worthwhile comparisons" see paragraph [58] of the *Gleaner*. Furthermore a consideration of comparables must

take into account the particular assessment of, for instance, the effect of the defamatory publication on the particular plaintiff involved in the case which is to be decided. That is an assessment peculiar to each individual case and the impact on the particular individual is an assessment at the hearing of the particular action. Finally in taking into account awards in England and Wales I also note that conventional awards in personal injury cases in England and Wales were taken into account as a check on the reasonableness of a proposed award of damages for defamation and the personal injury awards in England and Wales are lower than in Northern Ireland.

[33] At paragraph 9.7 of *Gatley on Libel and Slander 12th Edition* it is stated that:-

> "The level of damages for non-pecuniary loss in personal injury cases is now a relevant `comparator' for libel damages and in that area the maximum, taking into account the Jackson reforms, is now of the order of £300,000. That can be awarded for an outrageously bad case of libel, but it seems safe to assume that, putting aside exemplary damages and proved financial loss, no higher figure would now be tolerated and there are few examples since 2000 of that amount being exceeded."

The Jackson Reforms are a reference to Sir Rupert Jackson's final report on Civil Litigation Costs December 2009 as a subsequent part of which the 13th Edition of the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases was published on 12 June 2015. This was also signed by Sir Rupert Jackson. Those guidelines provide that in England and Wales the range of general damages for quadriplegia is between £271,430 and £337,700. The comparable range in Northern Ireland is £400,000 - £575,000. In England and Wales the guideline for very severe brain damage is £235,790 - £337,700. In Northern Ireland it is £300,000 - £550,000. It can be seen that there is a substantial difference between awards in our jurisdiction for damages for personal injuries and the equivalent awards in England and Wales. The reasons for these differences were explained by Lord Lowry LCJ in *Simpson v Harland & Wolff* [1988] NI 432 and have been maintained in each edition of the Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland.

[34] In order to consider the submissions on behalf of the plaintiff that any ceiling on damages for defamation in Northern Ireland should be fixed by reference to the upper limits of personal injury awards in Northern it is necessary to consider the decision in *John v MGN Limited* [1997] QB 586, [1996] 2 All ER 35. In that case the Master of the Rolls, Sir Thomas Bingham, in giving the judgment of the Court of Appeal in England and Wales stated that whereas there can be no precise equiparation between a serious libel and (say) serious brain damage, that it was appropriate in future cases for the jury to take into account conventional awards in personal injury cases as a check on the reasonableness of a proposed award of

damages for defamation. The Master of the Rolls set out the purpose of damages in a defamation action in the following terms

> "The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way."

It can be seen that the purpose of compensation in personal injury cases and in defamation cases is different and that is why it is not possible to equiparate personal injury and defamation damages. In the *12th edition of Gatley on Libel and Slander* at paragraph 9.9 it is stated that a number of reasons can be given for this. "First, one is not comparing like with like. The loss of a leg and the loss of an eye are injuries of the same broad type, but even if one takes the view that it is undesirable that the victim of a libel should receive more in damages than the victim of quadriplegia there is no way in which one can use any particular point on the personal injury tariff as a guide to a correct figure for a particular libel. Secondly, damages for defamation contain an element of vindication which is not directly comparable with personal injury compensation. Thirdly, even leaving aside cases where there is a claim for exemplary damages, damages in defamation cases may be aggravated to take account of the wounding effect of the defendant's behaviour upon the hurt suffered by the claimant, but almost all personal injury cases arise from negligence, where such damages are not possible. Fourthly, damages in personal injury cases are in total very much larger than libel damages and raise issues of what "society can afford".

[35] I consider that the differences between damages for personal injury and damage to reputation are too great for comparisons to be made (see *Gur v Avrupa Newspaper Ltd*) except as a check on the reasonableness of a proposed award of damages for defamation. In Northern Ireland that check should be with personal injury awards in Northern Ireland, see paragraph [119] of *O'Rawe v William Trimble Limited* [2010] NIQB 135 and the charge to the jury of Coghlin LJ in *Convery v The Irish News Limited*, unreported but which is referred to in *O'Rawe*. In directing a jury in Northern Ireland the question of a ceiling ordinarily will not arise because in giving a jury the range of personal injury awards as a check it would only be in the case of an outrageously bad libel that the range of personal injury awards would include awards for quadriplegia or brain damage. Ordinarily the check would be with awards for less severe categories of personal injuries.

[36] I also consider that the question of a ceiling, in cases such as this, where damages are assessed without a jury, is not particularly helpful in that the assessment of damages for defamation does not involve an arithmetical calculation calling for positioning on a defined scale with a fixed or defined upper limit to the scale. The process of assessment is by definition far more general to arrive ultimately at a figure which is "necessary to compensate the plaintiff and re-establish his reputation" see *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670 at 692. Taking into account conventional awards in personal injury cases as a check on the reasonableness of a proposed award of damages for defamation should not distract from the three functions of damages for defamation and a consideration of aggravating and mitigating circumstances in the particular case. In *Jones v Pollard* [1997] EMLR 233 at 257 Hirst LJ said that "(the) purpose of the personal injuries comparison sanctioned in *John* is in my judgment to assist juries and the Court of Appeal to maintain a sense of proportion, by drawing a comparison between any prospective award of damages for defamation with the type of personal injury which would lead to a similar award, without of course seeking any precise correlation." I will assess damages in accordance with the principles applicable to defamation and seek to maintain that sense of proportion with personal injury awards in Northern Ireland.

Discussion

[37] I will now consider the various matters, which are relevant to this case, set out in the checklist in *Jones v Pollard*. That list commences with a consideration of the objective features of the libel itself. To state that a senior politician, who had been the leader of a political party in Northern Ireland, was responsible for harassing and shooting people during his service with the UDR, involving, as it does, most serious conduct which is completely contrary to the plaintiff's duty, is a most serious libel and is grossly defamatory. It was an outrageous libel in relation to an individual of considerable standing attacking his integrity at a most fundamental level. It affected a core aspect of the plaintiff's life with implications as to his trustworthiness in public life and as a representative for all the members of the constituency which he had represented and which he was seeking to represent in the future. In short one of

the objective features is that this was an outrageously bad libel. However the objective features also include the prominence of the libel, the circulation of the medium in which it was published and any repetition. In this case the limited period of publication of the libel on the defendant's Twitter account, the limited numbers who saw the defamatory statement and the limited repetition are significant factors. I consider that the appropriate award, despite its gravity, is significantly sensitive to the limited nature of the publication.

[38] The next aspect is to consider the subjective effect on the plaintiff's feelings. I do not repeat my findings in relation to the impact on the plaintiff together with his serious concerns. I make it clear that I accept that the plaintiff was astonished and shocked by the defamatory statement. However as I have already indicated the effect on the plaintiff is to be seen in the context that he had not checked for "some time" whether the tweet was still accessible on the internet from which I infer that his concerns and upset have diminished over time. I consider that some of the plaintiff's dominant emotions were of disappointment and frustration rather than upset. I consider it to have been a grave libel but that it had less effect on the plaintiff than it would have had on others who, for instance, do not have the experience of having to deal with the heat of political debate. I have also considered how other people have treated the plaintiff as an aspect of the effects on him. Again I will not repeat all my findings but these effects are not of a high order there being no suggestion that the plaintiff was physically shunned, pilloried or ostracised but rather he was subsequently elected as the member of Parliament for the constituency of Fermanagh and South Tyrone. However, I also take into account as aggravating features the lack of any response by the defendant to the letter of claim, the impression that this created that he was ignoring the plaintiff, the defendant's failure to respond to the letter dated 9 October 2014, his failure to say anything in person to the plaintiff, his failure to publish the apology until the date of the hearing and his failure to make any offer of compensation despite stating that he would do so, which has resulted in the plaintiff being required to give evidence.

[39] I turn to consider vindication. In part the plaintiff's reputation is vindicated by the apology which has now been published but there should also be a part of the award sufficient to convince a bystander of the baselessness of the charge. As I have indicated this was a most serious libel and there should be no doubt as to the baselessness of the allegations. There should be an element of vindication in the award but that element is reduced given the apology.

[40] Finally, I consider mitigation which is substantial given the defendant's apology and his use of the offer of amends procedure. The elements in mitigation of damages would have led to a reduction in the award of fifty percent if the response had been in an appropriate timescale, if the defendant had actually published the apology and if he had offered a realistic amount in compensation. Those did not occur and so I will reduce the level of any award by thirty five percent.

Conclusion

[41] I consider that the appropriate award absent mitigation is £75,000. I reduce that by thirty five percent and award the plaintiff £48,750.

[42] I order the defendant to pay the plaintiff's costs to be agreed or taxed in default of agreement.