2013

IN THE MATTER OF PROPOSED LEGISLATION INTRODUCING

EXEMPLARY DAMAGES FOR A CATEGORY OF "RELEVANT PUBLISHERS"

JOINT OPINION

Introduction

1. Five out of eight clauses in the draft Bill contain the proposed new provisions for exemplary damages. These proposed new provisions for exemplary damages are in our view (i) inconsistent with authority, (ii) incompatible with Article 10 of the Convention, and (iii) objectionable in principle due to their arbitrary extension of what is widely regarded as an anomalous feature of English law.

2. The proposed new provisions single out for punishment a particular category of defendant, rather than a particular kind of conduct. This is particularly objectionable where the category of defendant singled out includes the press. To punish the press for what others may do without punishment is inconsistent with the special importance that both domestic and Strasbourg jurisprudence attaches to freedom of the press.

3. In addition the proposed new provisions would bite on individual bloggers, NGOs, and indeed anybody uploading from anywhere in the world information on to the internet that could be downloaded and read in this jurisdiction. As such they go far beyond the recommendations contained in the Leveson report, which were confined to "media torts". The chilling effect of this on free expression is obvious and unjustifiable.

4. In any event, the recommendations in the Leveson report relating to exemplary damages, on which Lord Justice Leveson neither invited nor received submissions, were based on an out of date Law Commission report[1], which was prepared before the enactment of the Human Rights Act 1998, and which has been overtaken by judicial developments.

5. For the reasons we develop below, we consider that the incompatibility of the proposed provisions with Article 10 of the Convention is so striking that no Minister of the Crown would be able to make a statement of compatibility in relation to the draft Bill as required by section 19 of the Human Rights Act 1998.

[1] Law Com. No.247 (1997) on Aggravated, Exemplary and Restitutionary Damages.

Existing Authority

6. Exemplary damages are a peculiarity of English law – per Lord Devlin in *Rookes v Barnard* [1964] AC 1129 at 1221. They have never been available in Scotland[2]. They have had a mixed reception in other common law jurisdictions[3], and have been abolished by statute for libel cases in Australia[4].

7. Exemplary damages have been repeatedly described as "anomalous" in the modern English authorities. In *Rookes v Barnard* at 1227, Lord Devlin speaking for a unanimous House of Lords on this issue[5], recognised "the anomaly inherent in exemplary damages". In *Broome v Cassell & Co* [1972] AC 1027, where a panel of seven Law Lords sat to reconsider the limitations imposed on exemplary damages by *Rookes v Barnard*, Lord Reid (with whose speech Lord Kilbrandon agreed) described exemplary damages as "highly anomalous" at 1086, as "an undesirable anomaly" and a "form of palm tree justice" at 1087, and as "anomalous and indefensible" at 1090. Lord Diplock in the same case at 1128 and 1130 also described exemplary damages as an "anomaly". In *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122 at [119] Lord Scott described exemplary damages as an "anomalous remedy". Eady J. in *Mosley v News Group Newspapers Ltd* [2008] EMLR 20; [2008] EWHC 1777 (QB) at [194] said "it is trite knowledge that punitive damages are anomalous in civil litigation".

8. The reasons why they are regarded as anomalous are explained in the judgment of Eady J. in *Mosley v News Group Newspapers Ltd* at [194] as follows:-

> "First, they bring the notion of punishment into civil litigation when damages are usually supposed to be about compensation. Secondly, the defendant's means can be taken into account because these damages are in some ways analogous to a fine: see e.g. the remarks of Lord Reid in *Cassell v Broome* at p.1086. Thirdly, despite that, every such sum awarded goes not to the state itself, as is the case with a fine, but to the claimant in the litigation. It represents to that extent a windfall. Fourthly[6], in the context of those civil claims where a jury is still available, it is the jury rather than the judge which determines the amount of the appropriate penalty."

One could add to this list the objection that the civil, rather than criminal, standard of proof applies to a claim for exemplary damages.

9. At common law exemplary or punitive damages can only be awarded in two types of tort case. First, where there has been oppressive, arbitrary or unconstitutional action by the servants of the government. Secondly, where (i) there has been wrongful conduct deliberately and knowingly carried out and (ii) there has been a calculation that more is to

[2] *Broome v Cassell & Co* [1972] AC 1027 at 1114 (Lord Wilberforce) and 1133 (Lord Kilbrandon). See also Gatley on Libel and Slander, 11th edn (2008) p.288, n.173.
[3] Broome v Cassell & Co at 1067 (Lord Hailsham).
[4] Gatley p.286, n.164.
[5] Lord Devlin delivered the only speech dealing with the issue of exemplary damages. Lords Reid, Evershed, Hodson and Pearce agreed with Lord Devlin's speech on this issue – see pp. 1179, 1197, 1203 and 1238.
[6] The fourth anomaly is addressed in the draft Bill at clause 2(7), the other anomalies identified by Eady J. are not addressed in the draft Bill.

be gained by carrying out the wrongful act than by paying compensatory damages[7]. See *Rookes v Barnard* [1964] AC 1129, 1226-7, and *Broome v Cassell & Co* [1972] AC 1027. It is important to note the two requirements of the second category.

10. In addition, the House of Lords recognised that a statute can expressly authorise the grant of exemplary damages, but doubted whether any statute has actually ever done so. The two statutes[8] that used the term "exemplary damages" were both interpreted as referring to what are properly to be categorised as aggravated damages – see in particular Lord Kilbrandon in *Broome v Cassell & Co* at 1133.

11. For a time it was held – in particular by the Court of Appeal in *AB v South West Water Services Ltd* [1993] QB 507 - that exemplary damages could only be awarded in respect of torts for which they had been awarded prior to the decision of the House of Lords in *Rookes v Barnard* in 1964. However, this "cause of action test" was disapproved by the House of Lords in *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122. This point is important when assessing the significance of the Law Commission report relied on by Lord Justice Leveson – see below.

12. The first common law category – oppressive etc conduct by servants of the government – does not apply here. What clause 2(5) of the draft Bill does is to authorise the award of exemplary damages in certain specific cases ("relevant claims" against "relevant publishers") where the second requirement of the second common law category – a calculation of gain - is not made out.

13. This is a remarkable proposal. It singles out a particular type of claim where "the conduct complained of arose out of activities carried on for the purposes of, or in connection with, publication of any material (whether or not the material was in fact published)", and a particular type of defendant – newspapers, magazines and websites containing news-related material – and authorises the award of exemplary damages <u>where the common law would not do so</u>. It is axiomatic at common law that the mere fact that a libel appears in a newspaper published for profit does not allow an award of exemplary damages to be made[9].

14. The touchstone for such an award under clause 2(5) is "a deliberate or reckless disregard of an outrageous nature for the claimant's rights". Since almost all publication of information concerning an individual takes place in the knowledge that the individual's Article 8 rights are engaged the requirement that the defendant has deliberately or recklessly overridden

[7] Lord Devlin's first formulation of the second category at 1226 in *Rookes v Barnard* referred only to cases "in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff". However, at 1227 Lord Devlin referred to a situation where "a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk". Later formulations have referred to two requirements for the second category: deliberate wrongdoing and a calculation of gain. See in particular Lord Reid in *Broome v Cassell & Co* at 1088.

[8] The Law Reform (Miscellaneous Provisions) Act 1934 and The Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951.

[9] *Broome v Cassell & Co* at 1101 (Viscount Dilhorne); *John v MGN Ltd* [1997] QB 587, 619.

the claimant's rights will be met in most if not all cases. Accordingly, the focus will inevitably be on whether the defendant's conduct was "of an outrageous nature" – a matter on which views may well differ. This leaves it to the individual judge to either feel or not feel outraged by what has happened – a self-evidently uncertain and unpredictable situation.

15. It may be suggested that Parliament should be free to introduce a new test of outrageous conduct, not sanctioned by the common law. However, the key point to note is that when the House of Lords in *Rookes v Barnard* and *Broome v Cassell & Co* imposed a limitation on the second category of cases in which exemplary damages are available it did so because it found that a touchstone of "outrageous" conduct was unsatisfactory and legally uncertain. In *Rookes v Barnard*, in a powerfully worded passage at 1229, Lord Devlin rejected the use of words such as "outrageous" in the earlier authorities as mere "epithets", and stated that " It would, on any view, be a mistake to suppose that [such a word] can be selected as definitive..". In *Broome v Cassell & Co* it was specifically contended that the court should be allowed to award exemplary damages wherever the defendant's conduct was outrageous, and that the limits imposed in *Rookes v Barnard* should be overruled. A seven judge court rejected this submission. Lord Reid at 1087 stated that such a test would be "far too vague". Lord Diplock at 1129 dismissed a test of "outrageous" conduct as merely one of "a whole gamut of dyslogistic judicial epithets", and explained that the rejection of such a test in *Rookes v Barnard* was a decision of legal policy[10].

16. Whilst Parliament is capable of departing from the accumulated wisdom of twelve Law Lords, it should be cautious about doing so. Further, even if Parliament did reject the wisdom of the common law, the Strasbourg court would in our view consider that the touchstone of "outrageous" conduct lacked the legal certainty required before a measure which interferes with freedom of expression under Article 10(1) of the Convention can be said to be "prescribed by law" and capable of justification under Article 10(2).

The Convention

17. The evidence and argument at the Leveson Inquiry did not cover the issue of exemplary damages. The proposals set out in the Leveson report at Vol IV, p.1511 paras 5.9-5.12 were not foreshadowed during the Inquiry and no submissions were invited or made in relation to them.

18. Perhaps for this reason the Leveson report makes only passing reference in Appendix 4[11] to the ruling of Eady J. in *Mosley v News Group Newspapers Ltd* [2008] EMLR 20; [2008] EWHC 1777 (QB) that exemplary damages are not available in claims for misuse of private information. The decision is not referred to at all in the section of the report that considers and makes recommendations in relation to exemplary damages.

[10] See also Viscount Dilhorne at 1109 explaining that *Loudon v Ryder* [1953] 2 QB 202, where the Court of Appeal recognised outrageous conduct as a ground for awarding exemplary damages, was specifically overruled in *Rookes v Barnard*.
[11] Vol IV, p.1891, para 3.142.

19. In *Mosley* Eady J. initially declined to strike out the claim for exemplary damages prior to trial on the grounds that the facts ought first to be ascertained. However, in his judgment on the strike-out application [2008] EWHC 2341 (QB) at [22] he expressed the clear preliminary view that as a matter of principle there was no place for this common-law anomaly in the careful balance between Article 8 and 10 rights required in such a case. Eady J. stated:-

> "I do not consider it necessary in a democratic society that the scope of exemplary damages should be extended into the process of finding the right balance between competing rights under Article 8 and Article 10. There is no warrant for doing so in the common law and I see no justification for extending this anomaly, having taken into account the relevant considerations arising under the Human Rights Act 1998."

20. In his judgment following trial [2008] EMLR 20; [2008] EWHC 1777 (QB) Eady J. confirmed his preliminary view. At [173] he stated:-

> "My primary reason for not extending the scope of this anomalous form of relief into a new area of law was that such a step could not be justified by reference to the matters identified in Article 10(2) of the Convention. It could not be said to be either "prescribed by law" or necessary in a democratic society. That is to say, I was not satisfied that English law requires, *in addition* to the availability of compensatory damages and injunctive relief, that the media should also be exposed to the somewhat unpredictable risk of being "fined" on a quasi-criminal basis. There is no "pressing social need" for this. The "chilling effect" would be obvious."

21. At [197] after an extensive review of the authorities Eady J. concluded:-

> "I therefore rule that exemplary damages are not admissible in a claim for infringement of privacy, since there is no existing authority (whether statutory or at common law) to justify such an extension and, indeed, it would fail the tests of necessity and proportionality."

22. The words underlined in the quotation from [197] of *Mosley* are significant, as they show that Eady J. was clearly of the view that even if Parliament purported to authorise the grant of exemplary damages in privacy cases by statute, this would fail the tests of necessity and proportionality required before a measure which interferes with the Article 10(1) right to freedom of expression can be justified under Article 10(2).

23. Eady J.'s judgment in relation to damages in *Mosley* was referred to with apparent approval by Lord Dyson JSC in the leading speech in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at [99] where he said that Eady J. had recognised *"the compensatory nature of damages for infringements of privacy"*. This appears to approve Eady J.'s ruling that damages for misuse of private information must be compensatory rather than punitive. Although the Supreme Court was divided on certain issues in *Lumba*, on exemplary damages all eight of the other Justices agreed with Lord Dyson.

24. *Mosley* went to the European Court of Human Rights on the narrow question whether in setting the correct balance between Article 8 and 10 rights there is or should be a requirement of prior notification before private information about an individual is published. The Strasbourg court held that there was no such requirement, and part of its reasoning is

instructive on the question whether an award of exemplary or punitive damages in a claim for misuse of private information would be compatible with Article 10.

25. In the Judgment reported at (2011) 31 BHRC 409; [2011] ECHR 48009/08 at [128]-[129] the Strasbourg court considered how a requirement of prior notification could be enforced, and whether it would be compatible with Article 10 to impose a punitive fine for non-compliance. The court concluded that such punitive fines would risk being incompatible with Article 10. The court stated:-

> "128. Second, and more importantly, any pre-notification requirement would only be as strong as the sanctions imposed for failing to observe it. A regulatory or civil fine, unless set at a punitively high level, would be unlikely to deter newspapers from publishing private material without pre-notification. In the applicant's case, there is no doubt that one of the main reasons, if not the only reason, for failing to seek his comments was to avoid the possibility of an injunction being sought and granted (see paras 21 and 52 above). Thus the *News of the World* chose to run the risk that the applicant would commence civil proceedings after publication and that it might, as a result of those proceedings, be required to pay damages. In any future case to which a pre-notification requirement applied, the newspaper in question could choose to run the same risk and decline to notify, preferring instead to incur an *ex post facto* fine.
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> 129. Although punitive fines or criminal sanctions could be effective in encouraging compliance with any pre-notification requirement, the Court considers that these would run the risk of being incompatible with the requirements of art 10 of the Convention. It reiterates in this regard the need to take particular care when examining restraints which might operate as a form of censorship prior to publication. It is satisfied that the threat of criminal sanctions or punitive fines would create a chilling effect which would be felt in the spheres of political reporting and investigative journalism, both of which attract a high level of protection under the Convention." (emphasis added)

26. A power to award unpredictable punitive damages for publication of private information would have exactly the same chilling effect as the threat of punitive fines referred to by the court. It follows, on the court's reasoning, that the availability of punitive damages would run the risk of being incompatible with Article 10.

27. There are at least two further reasons why the current proposals are incompatible with Article 10.

28. First, the Article 10 right of free expression is available to and exercised by each individual person. There may be justified interference by the judicial arm of the state with a particular person's exercise of the right of free expression based upon what that person has said or proposes to say in particular circumstances. But clauses 3(5) and 4(4) of the draft Bill allow an interference with A's right of free expression in order to deter B and C from exercising their rights of free expression. This is a statutory form of *pour encourager les autres*. We know of no Strasbourg authority in which a person has been punished not because of the way in which that person has exercised or proposes to exercise his or her right of free expression, but in order to deter someone else from investigating or saying the same thing. These provisions would allow the court to punish The Sun to deter The Mirror from investigating or publishing a particular story, or to punish blogger A to deter other bloggers. We have no hesitation in saying that this is unlikely to be compatible with Article 10.

29. Second, clause 2(2) of the draft Bill confers immunity from exemplary damages on members of an approved regulator. This discriminates between substantial commercial publishers whose business model allows them to afford such membership, and small publishers and bloggers which cannot afford membership or regard it as unnecessary or undesirable. It is noteworthy that the Leveson report acknowledged that small publishers and bloggers would not need to be regulated. This discrimination would, in our view, be impossible to justify.

Arbitrary

30. Further, the proposed introduction of exemplary damages in the draft Bill is arbitrary in effect. It seeks to penalise only certain types of publishers, rather than penalising specific types of conduct. This offends against the cherished principle that the law should be the same for all subjects.

31. Under the draft bill only a "relevant publisher" is exposed to an award of exemplary damages – see clause 2(1). A "relevant publisher" is defined as a person who publishes in the UK (i) a newspaper or magazine containing news-related material, or (ii) a website containing news-related material (whether or not related to a newspaper or magazine): clause 1(2).

32. These provisions do not define "publisher" and it seems that the ordinary legal meaning of "publisher" applies. At common law any person knowingly involved in the publication of a newspaper or magazine is a publisher of that newspaper or magazine. Any person who is the author of material uploaded from anywhere in the world on to the internet which is available to download and read in the UK is a publisher of that material[12]. Although the Leveson report suggested a threshold for websites providing "press-like services" based on influence and a substantial audience[13], these proposals would bite on any website containing news-like material, including individual bloggers, NGOs and indeed anybody using the internet to comment on current affairs.

33. These provisions single out for punishment a particular category of defendant, a "relevant publisher", rather than a particular kind of conduct. This is particularly undesirable where the category of defendant singled out includes the press. To punish the press for what others may do without punishment is inconsistent with the special importance that both domestic and Strasbourg jurisprudence attaches to freedom of the press. Endless authority might be cited here to demonstrate that special importance.

34. The provisions would also have arbitrary results. Consider the case of a man who decides to disclose private information that a work colleague is having an affair. If he does so by shouting this information out loud in the staff canteen in front of hundreds of people, or publishing it in the employer's in-house newsletter, he is not exposed to exemplary

[12] See *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946 – each time a person in this country downloads and reads material from the internet there is a publication of the words in question in this jurisdiction.
[13] Vol IV pp.1792-3, paras K6.11-6.21.

damages. However if he posts the information on his blog that has only three readers, or publishes it in a letter to a local newspaper which has only a limited circulation, he is so exposed (and in the latter case so also are the editor and proprietor of the newspaper). He is punished not because of what he has done – disclosed private information – but because of who he is: a blogger or a newspaper publisher. He is punished not for what he says but for how he says it – in a newspaper or on the internet.

The Law Commission Report

35. The Law Commission report on Aggravated, Exemplary and Restitutionary Damages on which Lord Justice Leveson based his recommendations relating to exemplary damages was published in September 1997, prior to the enactment of the Human Rights Act 1998 and just over three years before that Act came into force. It was therefore written before the Convention became part of our law. It was written long before the new cause of action for misuse of private information came to be recognised, and with it the need for an "intense focus" in any given case on the balance between the competing rights under Articles 8 and 10 of the Convention[14]. The report plainly could not and did not consider whether the extension of exemplary damages to the as yet undiscovered cause of action for misuse of private information would be incompatible with Article 10.

36. The Law Commission report was shelved at the time[15] and has never been accepted. The proposals it contained on exemplary damages have been dismissed in the leading textbook on the law relating to damages as *"a retrograde step, with its inevitable and twin results of allowing the civil law to enter the very different domain of the criminal law and of providing windfalls for claimants which are in truth unmerited"*[16].

37. The Law Commission report has also been overtaken by judicial developments. The particular problem which concerned the Law Commission was the inflexible "cause of action rule" laid down by the Court of Appeal in *AB v South West Water Services Ltd* [1993] QB 507 – ie that exemplary damages could only be awarded in respect of torts for which they had been awarded prior to the decision of the House of Lords in *Rookes v Barnard* in 1964. It was this particular limitation that the Law Commission felt should be removed by legislation – see eg Part I paras 1.2, 1.24, and Part V paras 1.1 – 1.3 of the report. However, as noted above, this "cause of action test" was disapproved in *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122. Accordingly the need for reform identified by the Law Commission fell away.

38. The Law Commission's proposals were only supported by a minority of those consulted at the time[17]. They were also inconsistent with the conclusions of the Supreme Court Procedure Committee, chaired by Lord Justice Neill, which in July 1991 had unanimously

[14] The same intense focus is required in at least one other "relevant claim" included in clause 2(5) of the draft Bill, namely harassment - see *Trimingham v Associated Newspapers Ltd* [2012] 4 All ER 717 at [55].
[15] HC Debates, Col.502 (9 November 1999).
[16] McGregor on Damages, 18th edn (2009) para 11-006.
[17] Report p.96, para 1.15 (49%).

recommended the abolition of exemplary damages. That Committee included the future libel judges, Eady J. and Sharp J. Significantly in terms of chilling effect, that Committee recognised that exemplary damages were sometimes pleaded "in terrorem" in situations where they were not strictly available.

39. In any event, the Law Commission report provides no basis whatsoever for singling out a particular category of defendant, rather than a particular type of conduct, for punishment. On the contrary, the Law Commission recommendations envisaged a principled extension of the availability of exemplary damages to all torts[18], not to particular torts and certainly not to a particular category of defendant.

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[18] See Part V para 1.42 of the report.