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UK Legal News Analysis

How should damages for libel be calculated?

LNB News 13/11/2012 33

Published Date

13 November 2012

Jurisdiction

UK

Abstract

IP & IT analysis: In conjoined cases concerned with the assessment of damages in libel actions--both concerning serious, but very different allegations--the CA has handed down a judgment that has significant implications for future cases regarding libelous or defamatory statements made on social media, argues **Kirsten Sjøvoll, barrister at Matrix Chambers.**

Analysis

Original news

Cairns v Modi; KC v MGN Ltd [2012] All ER (D) 01 (Nov)

The Court of Appeal, Civil Division, set out the approach to be taken to determine the appropriate measure of damages to be awarded in libel proceedings.

What issues do these cases raise?

These cases consider how important the extent of the publication of the defamatory statement will be when the court is awarding damages in libel claims.

The allegation in *Cairns* was on Twitter and even though the actual publication was small (to 65 followers) and there was no evidence that it had spread more widely than this (beyond publication in a cricketing magazine read chiefly by cricketing professionals), the court attached great weight to the fact that the statement was made on the internet and had the potential to 'go viral' much more easily than through print publication.

While a wider readership was established in *KC*, the statement having appeared in a national newspaper, the CA held that the judge had attached too much weight to the circulation of the newspaper. The complainant's identity had never been disclosed and so few people would have associated the allegation with him personally.

These two decisions don't sit that well together. The court infers a wider readership in *Cairns* because the statement was made on the net; there was a far greater readership in *KC*, but damages were reduced because he was anonymous. It seems that even when there is no evidence that something has not spread beyond the group of people to whom it's published, the court can infer that it has spread more widely simply because it began on a social media site, where repetition and rumour-spreading can increase the inferred readership and, concomitantly, the amount of damages awarded.

To what extent is the judgment helpful in clarifying the law in this area?

It is always difficult in libel cases to assess the amount of damages one can expect to be awarded. I think this judgment does little to add clarity or consistency to the approach the court is likely to take.

Mr Modi on appeal argued that the court should assess damages for libel in a scientific fashion, more akin to the way discrimination or personal injury claims are settled. However, the CA disputed that a scientific pro-

cess was appropriate, as it was compensating for injury to reputation on a subjective level, and thus the context was not the same.

I am not sure whether this finding has much force but if it clarifies anything, it is that the bottom line is what counts. On the one hand, the CA said the approach to damages is not scientific and that there are a variety of factors it needs to consider. On the other hand, it argues that there is no force in the argument that a reasoned judgment is itself vindication because members of the public will be genuinely concerned about the amount of damages awarded: less a case of what did the court decide, as how much did they get? This offers up the suggestion that the lower the award, the greater the public perception will be that the damage complained of wasn't as serious as claimed.

What are the implications for lawyers?

Lawyers should proceed with caution when advising clients on liability; one is always reluctant to give a figure to clients to avoid raising expectations. On the other hand, if the trial is going to be heard by a judge sitting alone it would be prudent to point out that vindication is more closely linked to the size of the award (and the resulting public perception) rather than whether a reasoned judgment is given. This means that a defendant cannot rely on vindication through judgment in the hope that the award of damages will be reduced.

Secondly, if a client pleads justification, they should be advised that they run the risk of aggravating the amount of damages. In Cairns' case the conduct involved was enough to award 20% aggravated damages. This to me suggests that a client must be sure that they have strong prospects of succeeding on justification before they plead it. This is of course nothing new--it has long been established that putting a claimant through the stress of a full trial and having the allegations against him submitted as true in open court aggravates the damage already incurred. Nonetheless, this judgment reminds us to think very carefully before running a justification defence.

Thirdly, lawyers should look at the context in which the defamatory statement is made. A statement made in print media where the core size of readership is going to be important will be more straightforward to approach than one made on Twitter or an online blog. Even if the actual readership is small, the court will infer a wider readership by virtue of the statement being made online and will increase its award of damages on that basis. This introduces a degree of unpredictability which brings obvious difficulties for counsel when advising.

Are there still any grey areas lawyers will need to watch out for?

See my comments above. The CA made the surprisingly honest statement--although perhaps one which raises a little concern--that you can have a reasoned judgment that provides complete vindication of the claimant, but the public will invariably infer their own conclusions from the amount of damages awarded rather than taking the time to read the judgment. I also think, as noted above, that the unpredictability of online readership introduces a significant degree of uncertainty for defendants.

Are there any trends emerging in the law in this area?

It is likely will see an increase in the number of defamation claims arising out of statements made on Twitter--indeed, with the Jimmy Savile abuse scandal very much in the headlines, David Cameron has warned of the so-called 'trial by Twitter' of public figures who may or may not have played a part in the abuse. It will be interesting if we see a claim brought over a comment made on a Twitter page which has a closed following and is not open to the public how the court will approach it.

Lawyers will also be watching with interest to see how defamatory statements will be dealt with in the future--by a scientific exercise to work out the extent of the publication's readership, or whether it is sufficient to establish that it was made on a public forum, thereby inferring a wider publication than may in fact exist.

Interviewed by Duncan Wood.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.

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