

[2021 Gib LR 271]

**ALLEN and WOOD v.
PANORAMA LIMITED and OLIVERO**

SUPREME COURT (Restano, J.): May 17th, 2021

2021/GSC/11

Tort—defamation—trial by jury—right to jury trial (based on previous English common law) still applies in Gibraltar notwithstanding legislative changes in England and Wales restricting jury trials in defamation claims

The claimants brought a libel claim against the defendants.

The defendants applied for a trial by jury, which was opposed by the claimants. The defendants submitted that although legislative developments in England and Wales had made jury trials in defamation claims the exception rather than the norm, the position in Gibraltar reflected the position in England and Wales prior to the reforms, namely that a party to a defamation claim was entitled to a jury trial. The claimants submitted that because the Supreme Court's practice and procedure followed the law and practice in England and Wales, there was no proper basis to order a trial by jury.

Held, ruling as follows:

A party to a defamation claim in the Supreme Court had the right to a trial by jury. The right to a jury trial in defamation proceedings had existed under English law since at least 1882. This right formed part of the law of Gibraltar under the 1884 Order in Council, which applied English law in Gibraltar as it existed on December 31st, 1883 insofar as it was applicable to the circumstances of Gibraltar. The position changed with the enactment of the Supreme Court Order in 1888, which specifically dealt with jury trials in civil proceedings and at that point and for some years the right to a jury trial in Gibraltar appeared to have been more limited than it was in England. The position was largely brought back into line with English law as a result of the 1902 amendment to the Supreme Court Order and thereafter, and certainly by 1935, the pre-1888 position was reinstated, which meant that the position was again governed by the common law. Following the passing of the Supreme Court Act 1960, the right to a jury trial continued to be governed by the common law as it stood on December 31st, 1883. In England and Wales, the Defamation Act 2013 brought about wide-ranging reforms which included the virtual abolition of jury trials by amendment of

s.69 of the Senior Courts Act 1981. Whilst some other sections of the Senior Courts Act had been extended to Gibraltar, s.69 had not. The Civil Procedure Rules of England and Wales had been amended to reflect the reforms made by the Defamation Act 2013. CPR r.26.11(2) now provided that a claim for libel or slander must be tried by judge alone unless an order was made at the first case management conference for a trial by jury. As there had been no similar underlying legislative reforms in Gibraltar which resulted in the amendments to this rule, it did not apply in Gibraltar. The defendants were entitled to a jury trial (paras. 22–31).

Cases cited:

- (1) *Almeda v. Att.-Gen.*, [2003] UKPC 81; 2003–04 Gib LR 307, considered.
- (2) *Capital & Counties Bank Ltd. v. Henty & Sons* (1882), 7 App. Cas. 741, referred to.
- (3) *Rothermere v. Times Newspapers Ltd.*, [1973] 1 W.L.R. 448, considered.
- (4) *Yeo v. Times Newspapers Ltd.*, [2014] EWHC 2853 (QB); [2015] 1 W.L.R. 971; [2014] EMLR 32; [2014] 5 Costs LO 823, considered.

Legislation construed:

English Law (Application) Act 1962, s.2: The relevant terms of this section are set out at para. 12.

Senior Courts Act 1981 (c.54), s.69: The relevant terms of this section are set out at para. 5.

Supreme Court Act 1960, s.15: The relevant terms of this section are set out at para. 11.

Supreme Court Consolidation (Gibraltar) Order 1888, s.31: The relevant terms of this section are set out at para. 8.

D. Hughes (instructed by Phillips) for the claimants;
D. Feetham, Q.C. and *J. Emmerson* (instructed by Hassans) for the defendants.

1 **RESTANO, J.:** The claimants have brought a libel claim against the defendants in relation to two articles which were published in *The Panorama* daily newspaper on December 20th, 2018 and January 10th, 2019. *The Panorama* is owned by the first defendant and the second defendant is the author of the articles in question.

2 The defendants contend that whilst legislative developments which have taken place in England make jury trials in defamation claims the exception rather than the norm, the position in Gibraltar reflects the position in England and Wales prior to these reforms, namely that a party to a defamation claim is entitled to a jury trial. On that basis, the defendants have applied for a trial by jury in this claim. This is opposed by the claimants who consider that because the Supreme Court's practice and

procedure follows English law and practice, there is no proper basis to order a trial by jury in this case.

3 The discrete point which falls to be determined on this application, therefore, is whether a party to a defamation claim in the Supreme Court of Gibraltar has the right to a trial by jury.

The defendants' submissions

4 Mr. Feetham, Q.C., who appeared for the defendants, submitted that whilst the right to a jury trial in defamation claims previously existed at common law in England, this was no longer the case because of legislative reforms which had taken place in that jurisdiction. To illustrate how the position had developed in England over the years, Mr. Feetham referred to the review carried out by Warby, J. (as he then was) in *Yeo v. Times Newspapers Ltd.* (4) on this area of the law. The starting point was the fact that for centuries a party's right to a jury trial in a civil action for libel or slander was so important that it was referred to as a constitutional right of the highest importance by Lord Denning in *Rothermere v. Times Newspapers Ltd.* (3). This right was then qualified by the Administration of Justice (Miscellaneous Provisions) Act 1933 which abolished jury trials for most civil actions but afforded special treatment to defamation claims as well as some other types of claim. This resulted in the former unqualified right to a jury trial being replaced with a qualified right to a jury trial which required an application for a jury trial to be made in time and which would be granted unless the court considered that one of the prescribed exceptions applied, notably that the complexity of the case was such that it could not be conveniently dealt with by way of a jury trial. Further, the court retained a residual discretion to order a jury trial. These restrictions on jury trials were set out in s.69 of the Senior Courts Act 1981.

5 A fundamental change came when the Defamation Act 2013 was passed. Under s.11 of that Act, s.69 of the Senior Courts Act 1981 was amended so that the position was reversed, namely that an action: "shall be tried without a jury unless the court in its discretion orders it to be tried with a jury." Thus, the qualified right in favour of jury trials, sometimes referred to as the presumption in favour of jury trials, became a presumption against jury trials so that defamation cases ceased to be treated any differently from other civil claims. Since the decision in *Yeo v. Times Newspapers*, where the court declined to order trial by jury, this has meant that jury trials are theoretically possible but very limited in practice.

6 Mr. Feetham then referred to the application of this aspect of English common law in Gibraltar law over the years. Although English law applied in Gibraltar when the Supreme Court was established under the Fifth Charter of Justice in 1830, there was some doubt about the extent to which English law applied and this led to Orders in Council being passed to deal

with this uncertainty. The first of these was passed in 1867 and this was updated on February 2nd, 1884 (“the 1884 Order in Council”). Section 1 of the 1884 Order in Council provided that unless already provided for by any Order in Council, Ordinance or Act of Parliament expressly or by necessary inference extending to Gibraltar or otherwise, English law applied in Gibraltar as it existed on December 31st, 1883 insofar as it was applicable to the circumstances of Gibraltar. Mr. Feetham submitted that the common law right to a jury trial in defamation proceedings as it existed in 1883 entered into force in Gibraltar, if not before, when the 1884 Order in Council was passed.

7 On August 27th, 1888, the Jury Ordinance came into force which consolidated the enactments in Gibraltar relating to juries. Although there were only a few references to civil jury trials in that ordinance, Mr. Feetham submitted that those references presupposed the existence of jury trials in civil proceedings and that this reinforced his contention that English law in this regard applied in Gibraltar at that time.

8 Mr. Feetham submitted that the position then changed under the Supreme Court Consolidation (Gibraltar) Order 1888 which later came to be known as the Supreme Court Order (“the Supreme Court Order”). This came into operation on January 5th, 1889 and repealed and replaced the Fifth Charter of Justice. Section 31 of the Supreme Court Order stated that if the plaintiff and defendant in any action or suit applied for a jury to determine any issue of fact, the Chief Justice would order a trial by jury instead of a trial by assessors. If, however, the application for a trial by jury was made by only one of the parties, the Chief Justice “may award or refuse a trial by jury.” Further, the second part of s.31 stated conferred an overriding discretion on the court to refuse to order a jury trial even when the application was made jointly as follows:

“It shall be lawful for the chief justice upon the application of both plaintiff and defendant in any action or suit as above mentioned to try any such action or suit without assessors or a jury.”

9 The position changed again in 1902 when the Supreme Court Amendment Ordinance was passed which amended s.21 of the Supreme Court Order so that either party could elect trial by jury in various civil actions including libel and slander. It is not clear why this amending ordinance amended s.21 of the Supreme Court Order when the material provision of the Supreme Court Order was previously s.31 but it appears likely that this is because the Supreme Court Order had been amended prior to 1902 which had resulted in some change in the numbering of the sections. The position at this stage was to bring the position back in line with the English common law although it was still regulated by statute. This changed by the time the 1935 edition of the consolidated laws of Gibraltar was issued as the iteration of the Supreme Court Order contained

in that consolidated edition of the laws of Gibraltar shows that there was no longer a specific provision dealing with jury trials in civil proceedings. Section 40 of the Supreme Court Order at that stage, however, replicated s.1 of the 1884 Order in Council and provided that except insofar as specifically provided for, the law in England as it existed on December 31st, 1883 applied to Gibraltar so far as it may be applicable to the circumstances of Gibraltar.

10 Mr. Feetham submitted that the effect of this was that the legal position did not change in substance between 1902 and 1935 but that at some point after 1902 and before 1935 the mode of trial in civil defamation cases ceased to be governed expressly by statute in Gibraltar and the position reverted to what it had been under the 1884 Order in Council, namely this was governed by the application of English law to Gibraltar as it stood on 1883 insofar as it was applicable to the circumstances of Gibraltar. This continued to be the position under the 1950 edition of the laws of Gibraltar albeit that the number of the section replicating the 1884 Order in Council in the updated version of the Supreme Court Order changed from s.40 to s.38.

11 Turning to the various statutes that apply in Gibraltar today, the Supreme Court Act 1960 confers on the Supreme Court specific powers as a superior court of record. This recognizes the availability of jury trials in civil cases but is otherwise silent in this regard. Section 15 of the Supreme Court Act 1960 deals with practice and procedure and states as follows:

“15. The jurisdiction vested in the court shall be exercised (as far as regards practice and procedure) in the manner provided by this or any other Act or by such rules as may be made pursuant to this Act or any other Act and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice.”

12 The English Law (Application) Act (“ELAA”) was then passed in 1962 and also continues to apply today in Gibraltar. This is in effect the successor to previous provisions which applied English law and declares the extent to which English law applies in Gibraltar although no temporal limit is set as to the applicable law as had previously been the case. Instead, s.2 of the ELAA provides that:

“2.(1) The common law and the rules of equity from time to time in force in England shall be in force in Gibraltar, so far as they may be applicable to the circumstances of Gibraltar and subject to such modifications thereto as such circumstances may require, save to the extent to which the common law or any rule of equity may from time to time be modified or excluded by—

- (a) any Order of Her Majesty in Council which applies to Gibraltar; or
- (b) any Act of the Parliament at Westminster which applies to Gibraltar, whether by express provision or by necessary implication; or
- (c) any Act.”

13 Mr. Feetham submitted that the right to a jury trial is not expressly provided for in existing Gibraltar legislation but that an historical overview showed that this is an important right which has formed part of the law of Gibraltar for many years and which continues to apply under the ELAA in the absence the legislative reforms of the sort which had taken place in England.

14 Mr. Feetham referred to the Defamation Act 1960 which consolidated the law relating to libel and slander in Gibraltar and is based on a number of English sources, the most recent of which is the English Defamation Act 1952. In Mr. Feetham’s submission, the abolition in England of the presumption in favour of a jury in defamation claims, which came about when the Defamation Act 2013 was passed, formed part of a suite of reforms on the law of defamation which have not been introduced in Gibraltar. This means, for example, that, unlike the position in England and Wales, the Defamation Act 1960 does not contain the “serious harm” test, the limitation period is still six years and absolute and qualified privilege are still largely governed by the common law. Further, he submitted that it would be surprising if the right to jury trial had been removed in Gibraltar when the Defamation Act 1960 refers to jury trials: see ss. 13, 18 and 28(2).

15 Mr. Feetham submitted that there was no difference in substance between this case and *Almeda v. Att.-Gen.* (1) where the removal of the common law immunity for nonfeasance by a highway authority in England under the Highways (Miscellaneous) Provisions Act 1961 had no effect in Gibraltar where the common law immunity remained in place as no similar legislative changes had taken place. Further, he submitted that there was little to be gained in drawing a distinction between procedural and substantive law as the claimants contended because, regardless of whether the right to a jury trial in a libel case was a matter of substantive or procedural law, there was no doubt that it was a fundamental common law right which formed part of the law of Gibraltar.

The claimants’ submissions

16 Mr. Hughes, who appeared for the claimants, submitted that regardless of the historical position, the right to a jury trial is a matter of practice and procedure which is governed by s.15 of the Supreme Court

Act. Further, he said that the position was reinforced by r.6 of the Supreme Court Rules which provides that the rules of court that apply from time to time in England in the High Court apply to original civil proceedings.

17 Accordingly, Mr. Hughes submitted that by virtue of s.15 of the Supreme Court Act the practice and procedure in England on a libel claim is as set out in s.69(3) of the Senior Courts Act 1981 (as amended by the Defamation Act 2013) applied to Gibraltar. This provides the court with a discretion to order trial by jury but one which should only be sparingly exercised in favour of ordering a jury trial in accordance with the guidance laid down in *Yeo v. Times Newspapers Ltd.* (4) ([2015] 1 W.L.R. 971, at para. 48):

“This is whether, despite all the modern safeguards of judicial impartiality, there are in the particular case such grounds for concern that judge might show involuntary bias towards one or other of the parties on grounds of their status or rank that ‘a judge might not appear to be as impartial as a jury’: *Cook’s case*, para.108. Such cases will be rare.”

18 Mr. Hughes further submitted that the ELAA was irrelevant and that the matter was in fact covered by s.15 of the Supreme Court Act which extended English practice and procedure on jury trials in defamation proceedings to Gibraltar. Further, Gibraltar legislation over the years had specifically dealt with jury trials in civil proceedings including libel and slander actions, including the original s.31 of the Supreme Court Order (as later amended) and s.113 of the Supreme Court Order (1950 edition), the latter providing for trial by jury under the Supreme Court’s summary jurisdiction. Mr. Hughes submitted that the legal instruments repealing these provisions were not before the court, that it was therefore still possible that there was specific legislation governing jury trials in force in Gibraltar and that this was another reason why the common law was not relevant.

19 Mr. Hughes did not consider that the sections in the Supreme Court Act which refer to trial by jury in civil cases took matters further one way or another as they only recognized that jury trials can take place in civil proceedings, not the circumstances under which a jury trial might be ordered. Similarly, he submitted that the Defamation Act 1960 did not take matters further either as the only reference in that Act to jury trials was contained in s.28(2) which was only a practical measure for the consolidation of claims.

20 Mr. Hughes sought to distinguish *Almeda* (1) on the basis that the common law immunity which was held to apply in Gibraltar in that case only applied because there was no Gibraltar legislation abrogating that legal rule. In this case, however, he submitted that s.15 of the Supreme Court

Act which applied English practice and procedure governed the position. Mr. Hughes conceded that other provisions of the Defamation Act 2013 which concerned substantive law such as the “serious harm” test would not apply in Gibraltar pursuant to s.15 of the Supreme Court Act. In Mr. Hughes’s submission, there should therefore be no concern that the Defamation Act 2013 was being introduced into Gibraltar law through the back door as this only came about through the application of s.15 of the Supreme Court Act, and he noted that the legislature in Gibraltar was always free to alter the position.

21 Finally, Mr. Hughes submitted that there were significant advantages to a trial by judge alone, including a determination as a preliminary issue on the meaning of words complained about, together with whether those meanings are ones of fact or opinion.

Analysis

22 The right to a jury trial in defamation proceedings has existed under English law since at least 1882. In *Capital & Counties Bank Ltd. v. Henty & Sons* (2), Lord Blackburn said that whilst the Libel Act 1792 only provided for jury trials in criminal proceedings, it was universally accepted that the same right applied in civil proceedings: see Lord Denning’s historical review of this right in *Rothermere v. Times Newspapers* (3) ([1973] 1 W.L.R. at 452–453). This right then formed part of the law of Gibraltar under the 1884 Order in Council which applied English law in Gibraltar as it existed on December 31st, 1883 insofar as it was applicable to the circumstances of Gibraltar. Lord Denning described the right to a jury trial in a defamation claim in *Rothermere* as a “constitutional right” and went on to say that it was a right of “the highest importance” (*ibid.*, at 452). Lawton, L.J. also referred to this mode of trial as having “become identified in the minds of many with constitutional rights and liberties” (*ibid.*, at 456). The right to a jury trial is not a constitutional right in Gibraltar in the sense that it is not a fundamental freedom contained in the Gibraltar Constitution Order 2006 (nor its predecessor the Gibraltar Constitution Order 1969) but that does not detract from its importance historically.

23 The position changed in Gibraltar in 1888 when the right to a jury trial in civil proceedings was enshrined in the Supreme Court Order which circumscribed that right. This gave the Chief Justice a discretion as to whether to allow a jury trial to proceed especially when only one party requested it. By means of a further amendment to the Supreme Court Order in 1902, a party’s right to require a trial by jury in various types of civil proceedings including claims for slander and libel was restored, provided the request was made promptly and subject to the court retaining a discretion not to order a jury trial in complex cases. At some point prior to

1935, however, the specific provisions relating to civil jury trials vanished from the Supreme Court Order. The Supreme Court Order did, however, replicate the provisions of the 1884 Order in Council which remained in force subject to amendments which are not material.

24 Pausing there for a moment, it can be seen that the right to a jury trial in defamation proceedings took root in Gibraltar in 1884 (if not before) with the passing of the 1884 Order in Council which applied English law as appropriate. The position changed with the enactment of the Supreme Court Order in 1888 which specifically dealt with jury trials in civil proceedings and at that point and for some years the right to a jury trial in Gibraltar appears to have been more limited than it was in England. The position was largely brought back into line with English law as a result of the 1902 amendment to the Supreme Court Order and thereafter, and certainly by 1935, the pre-1888 position was reinstated which meant that the position was governed by the common law again.

25 The suggestion by Mr. Hughes that the specific provisions on jury trials contained in the Supreme Court Order, more specifically the 1902 amendments, may somehow have remained on Gibraltar's statute books is based on nothing more than speculation and it is not consistent with the subsequent editions published of the consolidated laws of Gibraltar which shows this not to be the case. Similarly, Mr. Hughes's submission that the rules relating to jury trials under the court's summary jurisdiction might still be in force is only based on conjecture. In fact, the Supreme Court's summary jurisdiction disappeared when the Court of First Instance Act was passed in 1960 and which was itself repealed by the Administration of Justice Act 2004. There is therefore no force in the submission that jury trials in defamation proceedings are still expressly governed by statute as was the case many years ago as these provisions have long been consigned to history.

26 What then happened when the Supreme Court Act 1960 was passed? Did the right to jury trials in defamation cases cease to be governed by the common law and, as Mr. Hughes contended, go down a different path because it was procedural in nature and fall under what is now s.15 of the Supreme Court Act 1960 (originally s.25 of that Act) in the absence of any specific Act or rules made under an Act dealing with this? I do not consider that the references to civil jury trials in the Jury Ordinance, the Defamation Act or the Supreme Court Act take matters much further one way or another other and only show that jury trials were provided for over the years in civil claims and, in the case of the Defamation Act, in defamation claims. In my view, an examination of the nature of the right in question is more instructive.

27 It is true that the mode of trial in a defamation claim is not concerned with the legal norms which apply to a libel claim and, in that sense, cannot

be classed as substantive law. This is, nevertheless, an important right imbued with a substantive quality which was woven into the fabric of the law of Gibraltar by the time the Supreme Court Act was passed, whatever label one attaches to it. I do not therefore consider that the intention behind the Supreme Court Act 1960 was to alter the legal position in Gibraltar in relation to this important right by drawing a binary distinction between substantive and procedural law. In my view, the correct analysis of the position at that stage is that this right continued to be governed by the common law as it stood on December 31st, 1883, which is the extent of the English common law which applied in Gibraltar at that time, as appropriate, under the original version of the Supreme Court Act 1960 (as had been the case under the 1884 Order in Council) and prior to the enactment of the ambulatory provisions of the ELAA.

28 Even if this right were to fall within what is now s.15 of the Supreme Court Act 1960 as a result of a mechanical division of procedural and substantive law, it would not make any difference. This is because s.15 provides a hierarchy of practice and procedure: first compliance with Gibraltar Acts; second, compliance with rules made under Gibraltar Acts; third, “in default thereof, in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice.” In this case, there is a Gibraltar Act which governs the position, currently the ELAA (previously the Supreme Court Act itself) which applies the common law as appropriate which includes the right to a jury trial in a defamation claim as it existed in England prior to the legislative reforms which have taken place there over the years and which do not apply to Gibraltar. There is therefore no need to go any further and resort to the default position of applying English practice and procedure.

29 The position is therefore similar to that in *Almeda v. Att.-Gen.* (1). In *Almeda*, the claimant brought a claim against the government for failing to repair the paving along Line Wall Road which had resulted in her tripping over broken paving stones and injuring herself. The claim failed as the Privy Council held that the Gibraltar Government was entitled to rely on a defence under the common law of Gibraltar that it was not liable for non-repair of the highway. Although this defence had been abrogated in England and Wales by the Highways (Miscellaneous Provisions) Act 1961, it continued to apply in Gibraltar. Just as the Privy Council held that the rule that the highway authority enjoyed immunity for non-repairs continued to apply in Gibraltar because there had been no abrogation of it, so too does the right to a jury trial in defamation proceedings continue to apply in Gibraltar in the absence of legislative reform in this regard. In my view, the fact that the right to a jury trial concerns the mode of trial does not make any difference because we are concerned with an important right entrenched in the common law of Gibraltar.

30 The Defamation Act 2013 brought about wide-ranging reforms in England and Wales which included the virtual abolition of jury trials by the amendment of s.69 of the Senior Courts Act. The fact that this was done by means of primary legislation shows the nature and importance of this right under the common law. Whilst some other sections of the Senior Courts Act 1981 have been extended to Gibraltar, namely, ss. 21–24 of the Senior Courts Act 1981 (see Admiralty Jurisdiction (Gibraltar) Order 1987), s.69 of the Senior Courts Act 1981 has not been extended to Gibraltar. The English Civil Procedure Rules were amended to reflect the reforms made by the Defamation Act 2013: see Civil Procedure Rules (Amendment No. 8) Rules 2013. CPR r.26.11(2) now provides that a claim for libel or slander must be tried by judge alone unless an order is made at the first case management conference for a trial by jury. As there have been no similar underlying legislative reforms in Gibraltar which resulted in the amendments to this rule, it does not apply in Gibraltar.

Conclusion

31 For the reasons set out above, the defendants are entitled to a jury trial and I will hear the parties on further directions for the progress of this claim and any other matters arising from the handing down of this judgment.

Ruling accordingly.
