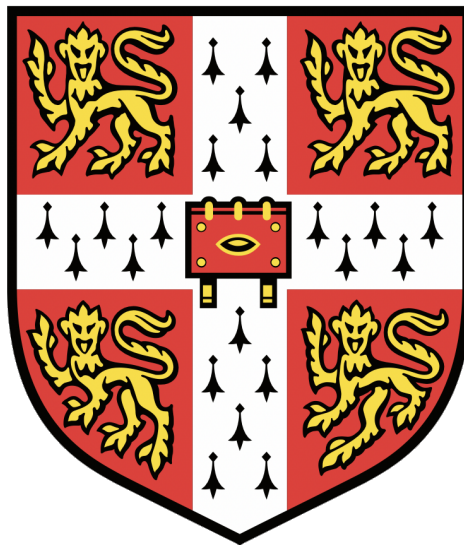


An Analysis of UK and US Libel Law



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Abstract

This paper examines the differences between libel law in England and Wales and in the United States, using the ongoing legal battle between Johnny Depp and Amber Heard as an example. Firstly, this dissertation establishes the general view that the courts in England and Wales are more friendly to libel claimants than the US courts. This, however, contradicts the outcomes of the Depp/Heard case study, in which Johnny Depp's libel claim was unsuccessful in England and Wales but was then subsequently successful in the state of Virginia. This contradiction could be explained by either the differences in the facts of the cases or the differences in the law between the jurisdictions. This dissertation explores both possibilities, finding that although there were differences in the cases, they did not sufficiently explain the results. It seems likely, then, that differences in procedural law were what led to the inconsistent judgements.

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Introduction

The now infamous relationship between actor Johnny Depp and actress Amber Heard has been the subject of two high-profile defamation cases, the first in England and Wales¹ and the second in the state of Virginia in the United States.² Despite the core issue in both cases being the same— whether Johnny Depp had abused Amber Heard— Mr Depp’s application was unsuccessful in England but successful in the United States. It is rare for two nearly identical cases to be brought under two legal systems and even rarer still for two different judgements to be reached. This topic is thus ripe for legal analysis and the Depp/Heard case study is a valuable medium to compare the English and American approaches to libel law.

Mr Depp’s loss in England and Wales and subsequent win in the US came especially as a shock to those acquainted with English and American libel law, with the perceived wisdom being that it is easier to win a libel case in England and Wales than in the US (Samson, 2012; Kirtley, 2020; Syal, 2022). This therefore prompts the question: why did Mr Depp lose in London but win in the United States?

The answer to this question may lie in the differences between the cases. Significantly, Mr Depp’s applications centred on different articles in England and Wales and in the US, in consequence of which the defendants were different. Moreover, there were differences in the evidence that was presented in the English Court and the US Court. However, this is only part of the answer. Although there were significant differences in the facts of the cases, the central allegation was the same. It is arguably contradictory for the English Court to have found there had been at least 12 incidents of abuse by Mr Depp towards Ms Heard but for the American Court to have found none. Thus, this dissertation considers the idea that Mr Depp lost in England and Wales but won in the US not because of differences between the facts of the cases, but rather because of the differences between libel law under the UK and US legal systems.

However, it would be inappropriate to suggest that firm conclusions could be made based on the findings of just one case study. This dissertation is only a starting point. To this end, Section 1 will provide a detailed background on *Depp v. NGN* in England and Wales and *Depp v. Heard* in the US. Section 2 will compare the present law in libel in the UK and the US, raising the argument that the UK tends to be pro-claimant in libel cases while the US tends to be pro-

¹ *John Christopher Depp II v. News Group Newspapers Ltd* [2020] EWHC 2911 (QB)

² *John C. Depp, II v. Amber Laura Heard* No. CL-2019-2911 (2022)

defendant. Having established this, the question arises: if the perceived wisdom is that the UK is pro-claimant and the US is pro-defendant, why was Mr Depp's application unsuccessful in the English Court but successful in the US Court? Section 3 will consider the possibility that this contradiction is due to the differences between the cases. Section 4 will then consider the other possibility that this contradiction is due to the differences between the legal systems; more specifically, that libel trials are by judge in England and Wales but by jury in the US, and that Virginia law permitted the US trial to be televised where it was not in England. This section will include a discussion on the impact of social media on the legal process. Lastly, this dissertation will make tentative conclusions about the differences between UK and US libel law based on this case study. To reiterate, because this dissertation only considers one example, the conclusions made are merely a starting point for further research.

Section 1

This section will give a brief background on Johnny Depp and Amber Heard's relationship history and then provide a detailed summary of the two cases.

Johnny Depp and Amber Heard were married in February 2015. Ms Heard filed for divorce in May 2016, and less than a week later, Ms Heard was granted a temporary restraining order against Mr Depp, claiming publicly that he had been physically and verbally abusive during their relationship. Ms Heard pledged to donate the divorce settlement of \$7 million to the ACLU and the Children's Hospital of Los Angeles. Then, crucially, there are two articles published in 2018. The first is in the UK tabloid *The Sun* and is titled: "GONE POTTY How Can JK Rowling be 'genuinely happy' casting wife beater Johnny Depp in the new Fantastic Beasts film?". The second is an op-ed by Amber Heard and published in *The Washington Post* under the headline: "I spoke up against sexual violence — and faced our culture's wrath. That has to change".

John Christopher Depp II v. News Group Newspapers Ltd

Johnny Depp commenced libel claims in respect of both articles, alleging that they defamed him by implying that he was a domestic abuser when he was not. In England and Wales, the claimant, Johnny Depp, sued two defendants: the publisher and owner of *The Sun*, and the Executive Editor (Wootton), who wrote the offending article. The defendants relied on the defence of the truth, stating that "the Claimant beat his wife Amber Heard causing her to suffer

significant injury and on occasion leading to her fearing for her life”. The defence described 14 separate incidents of abuse. Johnny Depp’s Reply denied the allegations, stating that he never abused Ms Heard and instead claiming that it was Ms Heard who assaulted him in their relationship.

There was little dispute that the publication had caused, or was likely to cause, serious harm to Mr Depp’s reputation. Thus, under the Defamation Act 2013, Mr Depp had the grounds to make a claim in libel. The natural and ordinary meaning of the words was set out by Sir Justice Nicol as follows: *(i) the Claimant had committed physical violence against Ms Heard, (ii) this had caused her to suffer significant injury, and (iii) on occasion it caused Ms Heard to fear for her life*. It was then up to the defendants to prove these meanings to be substantially true, with the standard of proof being a balance of probabilities, and with this standard of proof being applied more severely in this case because of the nature of the accusation.³

In July 2020, after a three-week hearing, the High Court found that 12 out of 14 of the incidents were proven to the civil standard. This included an incident, which will be referred to again in Sections 3 and 4, in which Ms Heard admitted that she had punched Mr Depp. The Court accepted that this was in defence of her sister and ultimately concluded that Mr Depp had abused Ms Heard in this incident. Incidents 6 and 11 were the exceptions, but because “the great majority of alleged assaults of Ms Heard by Mr Depp [were] proved to the civil standard”, the defendants had succeeded in proving the substantial truth of the published words. The Court accepted that the allegations had had a negative effect on Ms Heard’s career, rejected the argument that Ms Heard had fabricated the abuse allegations as part of a hoax, and rejected the characterisation of her as a gold-digger, citing her donation of the \$7 million divorce settlement to charity as evidence to the contrary. Thus, the claim was dismissed.

Mr Depp’s appeal was rejected by the Court of Appeal, on the grounds that it had “no real prospect of success” (*Depp v. NGN*, 2021). This decision is further explored in Section 3.

³ See *Richards LJ in R (N) v. Mental Health Review Tribunal (Northern Region)* [2006] QB 468 at [62] (“the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities”).

John C. Depp, II v. Amber Laura Heard

Having lost in the English Court, Mr Depp pursued a separate claim in the US. He sued Ms Heard for \$50 million in damages over three statements in *The Washington Post* op-ed. These statements were as follows:

- a) I spoke up against sexual violence — and faced our culture’s wrath. That has to change.*
- b) Then two years ago, I became a public figure representing domestic abuse, and I felt the full force of our culture’s wrath for women who speak out.*
- c) I had the rare vantage point of seeing, in real time, how institutions protect men accused of abuse.*

The jury was instructed to consider, for each statement, a series of issues. The issues were as follows (Jury Instructions, 2022):

- (1) Did Ms Heard make or publish any of the statements?*
- (2) Do any of Ms Heard’s statements imply or insinuate anything about Mr Depp?*
- (3) Were Ms Heard’s statements seen by anyone other than Mr Depp?*
- (4) Did Ms Heard’s statements convey a defamatory implication to someone who saw them other than Mr Depp?*
- (5) Are the implications or insinuations about Mr Depp in Ms Heard’s statements false?*
- (6) Did Ms Heard make the statements with actual malice?*
- (7) If Mr Depp is entitled to recover, what is the amount of Mr Depp’s damages?*

Issues (1) to (5) had to be proven by the greater weight of evidence and Issue (6) had to be proven by clear and convincing evidence. Mr Depp had the burden of proof here.

The phrase “the greater weight of the evidence” was defined as the evidence that the jury found more persuasive, when evaluated against all of the evidence admitted in the case. This could be the testimony of one witness whom the jury believed.

The phrase “clear and convincing evidence” was defined as evidence produced by the party with the burden of proof that created a firm belief or conviction that the burdened party had proven the issue.

Ms Heard then countersued Mr Depp for \$100 million over comments made by his agent and attorney, Adam Waldman, that were published in various online platforms. The counterclaim asserted that Mr Depp “authorised and conspired with... Adam Waldman (acting on Depp’s behalf), to attempt to destroy and defame Ms Heard in the press, accusing her of being a serial liar who created the abuse she endured from Depp, which is not true” (Counterclaim, 2020). This will be addressed again in Section 4.

Before the trial began, Mr Depp requested that it be televised. Ms Heard, however, objected to the filming of the trial. As under Virginia law, the “presiding judge shall advise the parties of such coverage in advance of the proceedings and shall allow the parties to object thereto” (Code of Virginia, 19.2-266, p1), this issue was addressed in full at a pre-trial hearing on 25 February 2022. Ms Heard argued that she was a victim of sexual assault (Siegel, 2022) and Virginia statute prohibits coverage where there are “victims and families of victims of sexual offenses” (Code of Virginia, 19.2-266, p3). However, the US Court did not accept this reading of the statute, finding that the rule did not apply to civil cases (Maddaus, 2022a). Thus, Court TV was permitted to operate cameras in the courtroom.

Additionally, following the verdict in *Depp v. News Group Newspapers Ltd*, Ms Heard argued that the case in Virginia should be dismissed under the doctrine of collateral estoppel, which prevents a party from relitigating an issue that had already been resolved in a previous proceeding. She argued that the US case concerned the same issue as the UK case—whether Mr Depp had abused Ms Heard—and that this issue had already been resolved by the UK verdict and so should not be relitigated. However, this motion was rejected by the Court, which argued that the requirements for collateral estoppel were not met (Gardner, 2021). This decision perhaps suggests that the two cases were different enough to warrant separate adjudication in the US and will be discussed in greater detail in Sections 3 and 4.

Thus, the trial went ahead on 11 April 2022. In the opening statements, Mr Depp and his team maintained that the abuse allegations were false and that Ms Heard had been the aggressor in their relationship. Ms Heard and her team contended that the words in the article were protected by the First Amendment and that there was “very, very significant evidence” (Opening Statements, 2022) of Mr Depp’s abusive behaviour.

What followed was six weeks of conflicting testimony, with varying accounts of abuse from both Mr Depp and Ms Heard. After three days of deliberations, the jury found in favour of Mr Depp’s claim on all three counts, awarding him \$10 million in compensatory damages and \$5 million in punitive damages.⁴ The jury also found in favour of Ms Heard’s claim against Depp for one statement made by Mr Waldman, awarding her \$2 million in compensatory and nothing in punitive damages. This was a resounding victory for Mr Depp.

Section 2

This section will compare the present law in libel in the England and the US.

Before the landmark case of *New York Times Co. v. Sullivan* in 1964, the English and US approach to libel were essentially identical. Even now, there are aspects of US defamation law that overlap with England. For example: truth is an absolute defence; certain statements are protected by qualified privilege, such as where there was a public interest; and whether a statement is defamatory is determined from the perspective of a reasonable person.

More striking than the similarities, however, are the differences between English and US libel law. Generally, the US shares a “proud common law legal tradition with the United Kingdom” (Shapiro, 2015) and tends to align on legal issues. On the topic of free speech and reputation, however, there is significant disagreement. The US approach to libel is governed by the First Amendment (Bertelsman, 1968; McFall, 2012), which protects the freedom of speech and the press. On the other hand, English law places more importance on an untarnished reputation, which is codified in the Human Rights Act (McFall, 2012). Thus, the English approach tends to be pro-claimant, whereas the US approach is more pro-defendant (Samson, 2012; Kirtley, 2020).

⁴ See Code of Virginia § 8.01-38.1. (The punitive damages were reduced to \$350,000 due to a limit imposed by Virginia state law).

This manifests itself most clearly in the onus of burden of proof (Samson, 2012). In legal disputes, one party has the burden of proof to produce evidence to establish the facts that support their case. In England and Wales, the defendant in libel cases has the burden of proof, and so the claimant is presumed to be correct, while the defendant must provide evidence of the contrary. The opposite is true in the US, with the burden of proof resting on the claimant.

Another aspect of US libel law that demonstrates its pro-defendant nature is the requirement of actual malice. Before 1964, the US Supreme Court followed the English tradition closely and did not use the First Amendment to rule on libel cases.⁵ This changed with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The facts of this case are as follows: a civil rights group paid the New York Times to publish an advertisement attacking the Montgomery police. It was uncontroverted that many of the statements were false and that no effort had been made by the Times to substantiate the facts. The judge ruled that the statements were defamatory, and the jury returned the verdict for the Claimant, awarding the Montgomery Police Commissioner damages amounting to \$500,000. This was affirmed on appeal to the Supreme Court of Alabama. However, on certiorari, the US Supreme Court reversed the decision, creating the legal standard of actual malice. Under this standard, public officials must prove that the defamatory statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not” (*New York Times Co. v. Sullivan*, 1964). This standard made it more difficult for public figures, like Johnny Depp, to recover damages in libel lawsuits.

This difference is even more pronounced because of the stringent way that actual malice has been interpreted by the Supreme Court (Johnson, 2016). For one, the evidence of actual malice must be “clear and convincing” (*Shenandoah Pub’g House v. Gunter*, 1993). It is not enough to have a large quantity of evidence; the evidence must be of high quality. Secondly, it is not sufficient to prove that the defamatory statement was made out of spite (*Harte-Hanks Commc’ns, Inc. v. Connaughton*, 1989). This is unlike in English courts, which determined in *Reynolds v. Times Newspaper Ltd and Others* [1999] UKHL 45 that “freedom of speech does not embrace freedom to make defamatory statements out of personal spite”. Lastly, “reckless disregard” (*New York Times Co. v. Sullivan*, 1964) under the actual malice standard is judged subjectively, meaning it is not enough to show that the Defendant acted unreasonably or

⁵ See *Near v. Minnesota*, 283 U.S. 697, 715 (1931) (“But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common-law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our Constitutions”).

unprofessionally (*Harte-Hanks Commc'ns, Inc. v. Connaughton*, 1989). This is entirely contrary to the English approach, under which libel and slander are strict liability torts (Gill & Gropo, 2022), meaning that if the defendant published or said defamatory words about the claimant, they will be liable regardless of intention, negligence, or recklessness.

Matters of public interest are, however, an important exception to the strict liability principle of English libel law. The Defamation Act 2013 (s. 4) provides the terms of the public interest defence. The public interest defence allows for a defendant to escape liability if they can prove that the offending statement was a matter of public interest and that they reasonably believed that publication of the statement was in the public interest. The public interest defence is different in the US. In the US, as established before, the burden of proof is on the claimant rather than the defendant. Thus, if a defamatory statement concerns a matter of public interest, it is the claimant that must prove, if they are a private person, that the defendant was negligent. If they are a public figure, then the claimant must prove that the defendant acted with actual malice.

Another example of the American partiality for the defendant in libel cases is the enactment of anti-SLAPP legislation. Currently, thirty-two US states have anti-SLAPP laws— SLAPP standing for Strategic Lawsuits Against Public Participation. These laws provide protection for defendants in SLAPP suits, most commonly defamation. They place a burden on the claimant to provide evidence that they have a chance of winning before the case can even go to court. If they cannot meet this burden, the suit is dismissed and the defendant can collect attorney's fees from the claimant (Understanding Anti-SLAPP Laws, n.d.). This has acted as a deterrent for potential libel claimants and has made it more difficult for libel cases to go to trial. At the time of writing, England and Wales does not have any anti-SLAPP legislation in place.

In recent years, however, there has been a change to English legislation that has arguably shifted libel law towards being more pro-defendant. The Defamation Act was introduced in 2013 to address the imbalance in the common law rules that seemed to favour the protection of reputation at the expense of freedom of speech. To this end, among other things, the Act (s. 1) adds the requirement that the Claimant show that the defamatory statement caused “serious harm” to their reputation. By placing this burden of proof onto the Claimant, English libel law has aligned itself closer to its US counterpart.

Significantly, there is one aspect of US libel law that is uncharacteristically more pro- claimant than the English approach (Bertelsman, 1968). The right to a trial by jury is enshrined in the US Constitution,⁶ and so claimants can plead their case to a jury of their peers. In the UK, however, the Defamation Act 2013 (s. 11) declares that libel cases in England and Wales would be considered without a jury unless the court decided otherwise. Consequently, since the Act's inception, there have been no trials by jury in libel cases, the last one being *Boyle v. MGN Ltd* [2012] EWHC 2700 (QB).

On one hand, a trial by jury is likely to take longer and be more expensive, perhaps pricing out potential claimants from pursuing a libel claim. The available data generally agree that jury trials take about twice as long as judge trials (Eisenberg & Clermont, 1996), which rings true when comparing the trial lengths in England and Wales and in Virginia. This again reinforces the idea of the English system as pro-claimant and the US system as pro- defendant. However, and more importantly for Mr Depp, a jury may be more susceptible to strategies that a judge would be able to spot and may be more likely to be influenced by irrelevant factors (Polavin & Garrett & Wang, 2019), such as media reporting (McEwen & Eldridge & Caruso, 2018). This is further explored in Section 4.

Evidently, England and the US have differing approaches to the field of defamation. This can be seen by the fact that the US have routinely refused to enforce English judgements because they are “antithetical to the First Amendment” (*Abdullah v. Sheridan Square Press*, 1994). This is demonstrated by Judge Azcarate’s decision to overrule Ms Heard’s request for collateral estoppel, to which she writes that “upholding English libel judgements in the United States would create the chilling effect and could create a dangerous precedent”. Furthermore, applying the idea that people vote with their feet, the preponderance of libel tourism from the US to England and Wales (Samson, 2012)—a practice in which people take their defamation claims to the jurisdiction where they are most likely to win—lends itself to the conclusion that England and Wales is pro-claimant and the US is pro-defendant in libel. However, if this is to

⁶ See Guidance on the Right to Counsel in Legal Financial Obligation Cases (2019) (“Although there is no Sixth Amendment right to counsel in civil cases, the Supreme Court has held that the Due Process Clause may require appointment of counsel for an indigent in some civil proceedings”), see also *The Indigent's "Right" to Counsel in Civil Cases* (1975) (“The most significant development in this area since Gideon is found in *Argersinger v. Hamlin*, where the Court expressly extended the right to appointed counsel to misdemeanour cases. The Court, however, did not rely on the “fundamental” right theory it had enunciated in *Gideon*. Instead, the Court discussed the assistance of counsel in terms of the right to a fair trial. This approach, with its inherent concept of fairness, is of course much less restrictive than the “fundamental” right standard and lends itself much more readily to application in civil cases”).

be believed, Mr Depp's application should have had a better chance in London than in the US (Brown, 2020; Syal, 2022). This raises the central question: why, then, was Mr Depp's application unsuccessful in England and Wales but successful in the United States? The next two sections will consider the possible answers to this question.

Section 3

This section will consider the possibility that the differences between the cases were such that Mr Depp's chances were worse in the English Court than in the US Court. There are three differences between the cases that will be discussed. The first two are identified by the Court in Virginia: "[Mr Depp] brought forth a different suit with a different defendant based on different statements" (Opinion Letter, 2021). The third difference is in the evidence and testimonies that were presented in the English Court and the US Court.

Differences in the Offending Statements

There is one glaring difference between the cases: in England and Wales, the claim was over an article in *The Sun* and in the US, the claim was brought against three statements made in *The Washington Post*. The US Court identifies this difference in an opinion letter (2021), writing that "[a]lthough the claims are similar in the sense they both relate to claims of abuse by [Mr Depp], the statements being defended in the UK case are inherently different than the statements published by [Ms Heard]".

Indeed, the statements in the offending articles are substantively different. The natural and ordinary meaning of the statements in *The Sun* article were taken by the English Court to be that Mr Depp had physically abused Ms Heard, inflicting significant injury, and causing her to fear for her life (*Depp v. NGN*, 2020). On the other hand, the implications or insinuations of the words in *The Washington Post* op-ed were taken by the US Court to be that Mr Depp had abused Ms Heard. This is far less demanding than in England and Wales: as Ms Heard's attorney in the US stated in his closing arguments, "if Amber was abused by Mr Depp, even one time, then she wins. One time. And we're not just talking about physical abuse. We're talking about emotional abuse, psychological abuse, financial abuse, sexual abuse. That's what we're talking about" (Cevallos, 2022b; Closing Arguments, 2022). While this difference between the cases is significant, it does not explain why Mr Depp's application was unsuccessful in England and Wales but successful in the US. On the contrary, it places a greater

burden of proof on the defendants (NGN and Wootton) in England and Wales than on the claimant (Mr Depp) in the US.

Another difference is that Mr Depp brought his claim against the entire article in *The Sun* but against only three statements in the op-ed in *The Washington Post*. However, the jury in the US case was instructed to “read the statements in the context of the op-ed as a whole” (Jury Instructions, 2022). It is thus necessary to compare the articles in their content and meaning. The article in *The Sun* is a rebuke of JK Rowling for continuing to work with Mr Depp, calling him a “wife beater”⁷ and including pictures of bruising on Amber Heard’s face. The op-ed in *The Washington Post*, on the other hand, is primarily about the #MeToo movement and about proposed changes to legislation to protect abuse victims. Ms Heard’s attorney argues this in his opening statement (Opening Statements, 2022):

The article isn’t about Johnny Depp. The article is about the social change for which she is advocating and that the First Amendment protects. And so I hope you remember, as this case goes on, that you saw from Mr Chew [Mr Depp’s attorney] only the three statements in isolation, because they want you to forget that. They don’t want you to pay attention to what the article is about.

Evidently, there are differences between the statements made by *The Sun* in the UK and by Amber Heard in the US. However, these differences do nothing to explain why Mr Depp’s application was unsuccessful in England and Wales but successful in the US. Rather, they only reinforce the impression that the inverse was more likely. The article in *The Sun* was “far more brazen in its language” (Winter, 2022), and yet it was the op-ed in *The Washington Post* that was found to be defamatory to Mr Depp.

Difference in the Defendants

Another difference between the cases, as the US Court identifies, is that there was no mutuality between the parties. Mr Depp sued NGN and Wootton in England and Wales, but sued Ms Heard in the US. Arguably, this could have improved Mr Depp’s position in the US because it

⁷ See *John Christopher Depp II v. News Group Newspapers Ltd* [2020] EWHC 2911 (QB) (“From about 7.58am on 28th April 2018 the headline of the website article was changed to, ‘GONE POTTY How Can J K Rowling be “genuinely happy” casting Johnny Depp in the new Fantastic Beasts film after assault claim?’ (‘the amended headline’). The online article was otherwise the same as it had been”).

meant he could launch an attack on Ms Heard's credibility (Syal, 2022), given that she was the defendant. However, this was also true in the English Court, where part of Mr Depp's defence was a "challenge to the credibility of Ms Heard independent of particular allegations of abuse" (*Depp v. NGN*, 2020). The more significant difference, then, is the susceptibility of either the judge or the jury to Mr Depp's argument against Ms Heard's credibility. Thus, this speaks more to the differences between the legal systems than to the differences between the cases. As such, this discussion will be continued in Section 4.

Differences in the Evidence and Testimony

Significantly, there were differences in the evidence and testimony that were presented in the English and Virginia Court. Firstly, there was new evidence that surfaced in the US case, after the English verdict had been announced. Secondly, evidence that was heard by the English Court was deemed inadmissible by the US Court. Lastly, the US case included testimony that was not heard in England and Wales.

As mentioned in Section 1, Ms Heard pledged to donate the \$7 million from the divorce settlement to the ACLU and the Children's Hospital of Los Angeles. However, a testimony in the US case from an attorney with ACLU revealed that Ms Heard had only donated \$1.2 million of the \$3.5 million that she had pledged, and that some of that had come from Mr Depp and Elon Musk. This became a major point in the US case.

Although this evidence was not considered by the English Court, it was brought to the Court of Appeal in the UK in Mr Depp's application for permission to appeal the English verdict. Mr Depp argued that "the apparent fact that Ms Heard had donated the entirety of her divorce settlement to charity was bound, or was at least very likely, to have influenced the Judge's assessment of her overall credibility" (*Depp v. NGN*, 2021). However, the Court of Appeal found that "whether Ms Heard had given a misleading impression about her charitable donations was in itself nothing to do with the case which the Judge had to decide" and that "[the Judge] does not refer to her charitable donation at all in the context of his central findings: on the contrary, he only mentions it in a very particular context... and after he had already reached his conclusions in relation to the fourteen incidents" (*Depp v. NGN*, 2021).

The Court of Appeal concluded that "the Judge would [not] have reached a different conclusion if it had been established before him that Ms Heard had given a misleading impression about

how much of the \$7m which she said that she had donated to charity had in fact been paid” (*Depp v. NGN*, 2021). Thus, this difference in evidence cannot be why the English Court and the US Court came to opposite judgements.

There were also differences in the evidence that was heard in England and Wales but that was not considered by the jury in the US. Significantly, there were years of therapist notes and personal text messages that the judge in the US Court deemed inadmissible as hearsay (Keller, 2022; Strause & Cho, 2022) and so was not shown to the jury. However, that same evidence was considered by the Court in England and Wales and mentioned in the final judgement. One such piece of evidence was a text exchange between Mr Depp’s former personal assistant, Mr Deuters, and Ms Heard.

Ms Heard texted Mr Deuters,

Obviously he has no idea what he did or to the extent that he did it. If someone was truly honest with him about how bad it really was, he’d be appalled. The man johnny is would be humiliated. And definitely wouldn’t say to me that he doesn’t deserve it. I’m sad he doesn’t have a better way to really know the severity of his actions yesterday. Unfortunately for me, I remember in full detail everything that happened.

To which Mr Deuters responded,

He was appalled. When I told him he kicked you, he cried ... It was disgusting. And he knows it.

This was included in the English judgement but was not allowed to be shown to the jury in the US (NBC, 2022, 09:40).

However, rather than being a difference between the cases, this demonstrates a fundamental difference between trials by judge and trials by jury. A judge will have access to all of the evidence and ultimately decide what is admissible and what is not (Kretzer, 2022). A jury, however, will never see the evidence that has been excluded by the judge. When there is no jury, as in libel cases in England and Wales, then the judge will see all of the evidence and cannot unsee it. Therefore, this is less a difference between the cases and more a difference between procedural law in England and Wales and the United States.

A final difference between the cases was in the testimonial evidence (Aguilar, 2022). Firstly, there were witnesses called in the US trial that did not give testimonies in England and Wales: Kate Moss, a former girlfriend of Mr Depp; Morgan Tremaine, a former employee of the entertainment news organisation TMZ; and Morgan Night, the manager of the Hicksville Trailer Palace, where one of the incidents of abuse allegedly took place. Secondly, while the English Court refused the defendant's application for permission to adduce expert evidence, the US Court heard expert testimonies from the following people: psychologists Dr Shannon Curry and Dr Dawn Hughes, orthopaedic surgeons Dr Richard Gilbert and Dr Richard Moore, and metadata experts Norbert "Bryan" Neumeister and Julian Ackert.

Kate Moss was called to the stand as a rebuttal witness to address the rumour that Mr Depp had pushed her down a flight of stairs when they dated. It is not typically permitted for attorneys to bring up alleged misconduct that is unrelated to the case (Gissen, 2022). However, in what many called a "misstep" by Ms Heard (Cevallos, 2022a; Gissen, 2022; Rosenberg, 2022), she mentioned Kate Moss in a testimony about a fight between herself and Mr Depp, where she (Ms Heard) alleged that she believed he would push her sister down a flight of stairs, and so she had hit him in defence of her sister.

Because Ms Heard brought up the rumour herself, Mr Depp's team was allowed to call Kate Moss in as a rebuttal witness. This was much to his benefit, made clear by the fact that one of Mr Depp's attorneys gave a fist pump when Ms Heard mentioned Kate Moss (Youtube, 2022, 00:35). Indeed, in Ms Moss's testimony, she stated, "He never pushed me, kicked me, or threw me down any stairs". This may have been significant to the jury in the US, not least because it meant that Ms Heard justified hitting Mr Depp based on a rumour that was not true (Cevallos, 2022a). However, because of the effect this may have had on a jury as compared to a judge, this speaks more to the differences between the way libel trials are held in England and Wales and in the United States and so this discussion will be continued in Section 4.

The testimonies of Morgan Tremaine and Morgan Night will also be considered in Section 4, as both witnesses only came forward because they had seen the trial live streamed in the US (Aguilar, 2022). Again, this speaks more to the differences between the English and US Court, as English trials are never televised or broadcast in the way that *Depp v. Heard* was in the US (Chaney, 2022).

Lastly, the US Court heard testimonies from expert witnesses that were not called in England and Wales. However, it is difficult to say the effect that the expert opinions might have had on the outcome, as the expert testimonies were mostly speculative and largely contradictory (Honderich, 2022). Dr Curry, a psychologist called to the stand by Mr Depp's team, testified that Ms Heard suffered from histrionic and borderline personality disorder (McAlinden, 2022), stating that people with these personality disorders "could use manipulation tactics to try to get their needs met" and are "very needy of attention" (*Depp v. Heard*, 2022). However, Dr Hughes, called as a witness by Ms Heard's team, rejected this diagnosis, and instead testified that Ms Heard had post-traumatic stress disorder.

The US Court also heard testimonies by orthopaedic surgeons who gave their professional opinions on a finger injury that Mr Depp sustained after an alleged incident of abuse. Mr Depp claimed that the tip of his middle finger was severed when Ms Heard had thrown a vodka bottle at him, while Ms Heard claimed that Mr Depp had caused his own injury. Dr Moore was called first by Ms Heard's team and testified that the injury was "not consistent" with what Mr Depp described, stating that "if a bottle struck the nail, there certainly would have been an injury to the nail bed" (Johnson & Patten, 2022). However, he conceded that he could not say definitively what had caused the injury. Mr Depp's team then called Dr Gilbert as a witness, who disagreed with Dr Moore, finding that the injury was caused by a "sharp laceration", like a broken vodka bottle (Sachdeva & Sheets, 2022). However, he did agree with Dr Moore in admitting that it was impossible to say conclusively how Mr Depp had injured his finger.

As part of her defence, Ms Heard presented pictures that showed injuries that Mr Depp had allegedly caused her. Mr Depp called metadata expert Bryan Neumeister as a witness to determine if any of the pictures had been altered. Neumeister testified that the images had likely been edited with a third-party software, but that there was "no way to authenticate any photo that was presented in the way the evidence was collected" (*Depp v. Heard*, 2022). However, in what is now a well-established pattern (Honderich, 2022), Ms Heard called in their own metadata expert, Julian Ackert, who disagreed and testified that the images were authentic (Getahun, 2022).

Evidently, the expert testimonies were contradictory and inconclusive, and so it is unlikely that they would have been the difference that led to Mr Depp's win in the US. Instead, it highlights the importance of who controls the narrative on social media and holds favour in the so-called court of public opinion. The expert testimony that is the most seen, i.e., most widely shared on

social media, will be the one that is believed. On social media platforms like TikTok, courtroom clips were taken out of context and widely shared, creating a “scroll of highlight reels that cherry-pick evidence in Depp’s favour” (Lampen, 2022). This topic will be revisited in the next section.

To conclude, there is some merit to the idea that the differences between the cases led to the difference in outcome. The articles in the cases were different, Mr Depp sued different defendants, and the evidence was different. However, none of these differences can satisfactorily explain why Mr Depp’s application was unsuccessful in England and Wales but successful in the US, especially given the strict libel laws and reversed burden of proof in England and Wales (Winter, 2022) and the actual malice standard in US libel cases with public figures.

Section 4

Finally, as has been alluded to throughout this dissertation, this section will identify two significant differences between procedural law in England and Wales and in the US and evaluate the extent to which they can explain the result in the English and US Court. The first difference is that the English trial was by judge while the US trial was by jury. The second difference is that the US trial was televised, and the trial in England and Wales was not. Unfortunately, the reasoning of the jury in the US will be mostly conjecture because they deliberated in secret, unlike in England and Wales, where the Court explained its decision in a document that is available online (Aguilar, 2022; Corcoran, 2022). Although much of this section will be speculative, it will be based on the opinions of legal experts and libel specialists.

Trial by Judge or Trial by Jury

As was established in Section 2, libel cases in England and Wales are typically decided by a judge alone, whereas the US Constitution guarantees the right to a trial by jury. This may have affected the outcomes because a jury may be influenced by extra-legal factors (Reskin & Visher, 1986; Blanck, 1991), like victim credibility (O’Neal & Tellis & Spohn, 2015) and media reporting (McEwen et al., 2018). Consequently, a judge may be more resistant to DARVO—Deny, Attack, Reverse Victim and Offender—tactics.

It has been widely suggested that Mr Depp employed a DARVO strategy (Editors of GQ, 2022; Headley, 2022; Harsey & Freyd, 2022; Rowles, 2022): “they deny that they did anything, they deny they’re the real perpetrator, and they attack the credibility of the individual calling out the abuse, and then reverse the roles of the victim and the offender” (Syal, 2022). DARVO has been found to work with juries, who may be more amenable to the extra-legal issue of the victim’s credibility (O’Neal et al., 2015), but almost never works with judges, who are trained to look at the evidence (Izadi & Ellison, 2022). This is reflected in the cases in England and Wales and in the US, as “there was more evidence in the US proceedings about Heard’s credibility, on which the judge in the UK placed little importance: that is likely to have been a deliberate strategic decision by Depp’s team” (Syal, 2022).

It does appear, from a reading of the English judgement, that the Court placed little importance on Mr Depp’s challenge to Ms Heard’s credibility, finding that the nature of most of the evidence in this regard was “so far removed from the evidence which Ms Heard gave in this trial that its relevance for her credibility is marginal at most” (*Depp v. NGN*, 2020). Furthermore, the Court of Appeal, in rejecting Mr Depp’s application to appeal, found that “[the Judge] was already aware that Ms Heard was capable of exaggeration”, but “that that was of marginal relevance to the determination of the issues before him” (*Depp v. NGN*, 2021).

In contrast, the US trial placed more importance on Ms Heard’s credibility. As mentioned in Section 3, a major point in the US case was the testimony by the ACLU attorney that revealed that Ms Heard had not donated the money that she said she had under oath (Aguilar, 2022). The Court spent four hours on this issue and on debating the difference between a pledged donation and an actual donation (Guarino & Lantz, 2022). Another piece of evidence that may have damaged Ms Heard’s credibility, according to attorney Brett Turnbull (Rosenblatt, 2022), was audio that was played in the US courtroom. The audio is transcribed below:

JD: You punched me

AH: ... hit you across the face in a proper slap, but I was hitting you, it was not punching you. Babe, you’re not punched.

JD: Don’t tell me what it feels like to be punched.

AH; I know you’ve been in a lot of fights, you’ve been around a long time. I know, yeah.

JD: No, when you fucking have a closed fist –

AH: You didn't get punch. You got hit. I'm sorry I hit you like this. But I did not punch you. I did not fucking deck you. I fucking was hitting you. I don't know what the motion of my actual hand was, but you're fine. I did not hurt you. I did not punch you. I was hitting you.

The English Court accepted Ms Heard's explanation that she did sometimes fight back in self-defence and that she was being sarcastic in the recording. The English view was that recorded conversations are different from evidence given in court and so should not be given too much weight.⁸ For a jury, on the other hand, this evidence may have been damning for Ms Heard.

Ms Heard's credibility may have also suffered from inconsistencies in her case (Rosenblatt, 2022). For example, in the opening statements, Ms Heard's attorney held up a Milani Cosmetics colour-correcting palette that Ms Heard had allegedly used to hide bruising. However, Milani Cosmetics rebutted this claim, releasing an online statement that that particular product had not been released until December 2017, more than a year after Ms Heard had filed for divorce. This certainly would not have helped her credibility, and Halim Dhanidina, a criminal defence attorney and retired judge, stated that "moments like that could have raised flags in the minds of the jurors".

Attorneys that followed the case have also suggested that the jury may have found Ms Heard's acting on stand to be less convincing than Mr Depp's. This is corroborated by a member of the jury in this case, who gave the following statement after the verdict was announced (Bryant, 2022; Guarino & Lantz, 2022):

[Mr Depp] was more believable. He just seemed a little more real in terms of how he was responding to questions. His emotional state was very stable throughout.

⁸ See *Depp v. NGN and Wootton* (2020), para 175 ("In my view no great weight is to be put on these alleged admissions by Ms Heard to aggressive violent behaviour. It is trite to say, but nonetheless true, that these conversations are quite different to evidence in court. A witness giving evidence in court does so under an oath or affirmation to tell the truth, the whole truth and nothing but the truth. Questioning can be controlled by the judge. Questions which are unclear can be re-phrased. If a question is not answered, it can be pressed (subject to the court's control) and if still unanswered may be the proper object of comment. None of these features applied to these conversations which, in any event, according to Ms Heard had a purpose or purposes different from simply conveying truthful information").

As for Ms Heard, the same juror said the following:

The crying, the facial expressions that she had, the staring at the jury—all of us were very uncomfortable... She would answer one question and she would be crying and then two seconds later she would turn ice cold. Some of us [referring to the jurors] used the expression ‘crocodile tears.’

However, as pointed out by Valentina Shaknes, an attorney based in New York, this is a defamation case, not a “verdict on their acting ability” (Maddaus, 2022b). If, as suggested by the anonymous juror, the case was impacted by the believability of Ms Heard’s acting rather than the evidence, then the jury in the US was in fact influenced by extra-legal matters. As for the actual legal matter at hand—if Ms Heard had defamed Mr Depp in her op-ed—the anonymous juror seemed to contradict his own verdict: “Ultimately, what I think is truthful was that they were both abusive to each other... But to rise to the level of what she was claiming, there wasn’t enough or any evidence that really supported what she was saying”. This line of thinking may have also contributed to the inconsistent ruling of the jury in which both Mr Depp and Ms Heard simultaneously won and lost the case (Cevallos, 2022b; Editors of GQ, 2022; Rosenblatt, 2022; Scott, 2022; Zoledziowski, 2022), an unusual outcome that has led both parties to appeal the decision (Barakat, 2022). However, it must be stressed that the words of this juror are hearsay and should not be overvalued.

Ultimately, the jury in the US may have been more susceptible than the judge in the English Court to extra-legal factors, like Ms Heard’s credibility, which in turn may have been affected by irrelevant issues like her acting abilities. Another extra-legal factor that may have affected the jury’s verdict is media reporting, as, unlike in England and Wales, the US trial was televised. Indeed, Jennifer Freyd, who coined the term DARVO in 1997, commented that the traducing of Ms Heard’s reputation had transcended the courts and made its way online (Syal, 2022). This leads us to the next difference between procedural libel law in England and Wales and in the United States.

Private or Live Streamed

As was explained in Section 1, the presiding judge in the US Court, using a Virginia statute, allowed for the filming and live streaming of the trial. This is not entirely unusual in the US, with other high-profile trials being similarly broadcast, like the OJ Simpson criminal trial in

1995, or most recently, the Gwyneth Paltrow ski collision trial that ended on 30 March 2023. In England and Wales, on the other hand, trials are never broadcast in their entirety (Chaney, 2022).⁹ As such, the English trial was not filmed and had limited space for public spectators, made even more limited given the social distancing requirements of a COVID lockdown (Williams QC, 2022). In contrast, the US trial was widely shared on social media, with the broadcast reaching 3.5 million viewers at its peak and amassing 83.9 million hours watched (Zaveruha, 2022). This does not include the video clips that were shared on social media platforms like Facebook and TikTok, which would have accounted for most of the public engagement with the trial.

The jury was not sequestered and had a 10-day break in the middle of the trial because of a judicial conference. This could suggest at the possibility that the jurors were exposed to, and thus influenced by, the so-called court of public opinion and the overwhelming support for Johnny Depp online (Chaney, 2022; Cho, 2022; Hibberd, 2022; Skyes, 2022; Zoledziowski, 2022). To give an idea of how widespread the support was for Mr Depp, a week before the verdict, the hashtag #IStandWithAmberHeard had garnered about 8.2 million views on TikTok, while the hashtag #JusticeforJohnnyDepp had nearly 15 billion views. Research conducted by Cyabra, a social threat intelligence company, also found that 93 percent of 2,300 Twitter profiles talking about the trial were on Depp's side (Tenbarger, 2022; Zoledziowski, 2022). So, if any of the jurors had been on social media during the proceedings, they most certainly would have been bombarded by the swell of public support for Depp and disdain for Heard.

There is a chilling effect, to borrow the phrasing in *New York Times v. Sullivan*, when it is possible to control public opinion with targeted advertisements. The media non-profit, the Citizens for VICE World News, investigated The Daily Wire, a conservative media outlet, during the trial. Its findings were that it had spent between \$35,000 and \$47,000 on Facebook and Instagram ads that promoted anti-Amber Heard propaganda and had elicited some four million impressions (McCool & Narayanan, 2022).

Additionally, it is possible that the witnesses in the US, aware that the trial is being broadcast, may have given their testimonies with “two audiences in mind, the judge/jury and wider public

⁹ See Press release: Cameras to broadcast from the Crown Court for first time (“The Crown Court (Recording and Broadcasting) Order 2020 will allow cameras to broadcast the sentencing remarks of High Court and Senior Circuit judges... Filming will be restricted to sentencing remarks only and no other court user – including victims, witnesses, jurors and court staff – will be filmed”).

opinion” (Williams QC, 2022). This is exemplified by the experience of Dr David Spiegel, a psychiatrist that was called to the witness box by Ms Heard (O’Connell, 2022). He testified that Mr Depp exhibited behaviours consistent with someone who is a “perpetrator of intimate partner violence” (*Depp v. Heard*, 2022) and that he showed signs of impairment from abuse of drugs and alcohol. However, after his testimony, fans of Mr Depp began leaving comments under YouTube videos of Dr Spiegel and flooded his WebMD page with hundreds of fake reviews (O’Connell, 2022). Dr Spiegel’s experience would likely deter any witness from testifying against Mr Depp, which is particularly significant because there were witnesses that came forward in this case because they had seen the broadcast. It is therefore likely that the testimonies of these witnesses would have been affected, not least because they would have been cognisant of the public opinion (Shamsian, 2022).

Unsurprisingly, the testimonies of the witnesses Morgan Tremain and Morgan Night, who admitted to having seen the trial on social media and testified after Dr Spiegel, were wholly in support of Mr Depp. Morgan Tremain, a former employee of TMZ, testified about a video of Mr Depp smashing cabinets and yelling at Ms Heard: “You wanna see crazy? I’ll give you fucking crazy”. Mr Tremain stated that the ending of the video played in court was different from the video that had been emailed to TMZ’s tip line in 2016, and that the original footage had “a bit at the end, where [Ms Heard] is seemingly snickering and looks at the camera” (Barrand, 2022). Morgan Night, the manager of the Hicksville Trailer Palace, refuted Ms Heard’s account of an alleged incident of abuse, stating that “Amber was the one acting all jealous and crazy” (Parkel, 2022). These testimonies may have caused further damage to Ms Heard’s credibility to the jury in the US.

This reflects another difference between the English and US approach to this case (Aguilar, 2022). The Court in England and Wales seems to have been most convinced by the contemporaneous evidence than by the witness testimonies, perhaps guided by the famous words of Mr Justice Leggatt in *Gestmin v. Credit Suisse* [2013] EWHC 3560 (Comm), in which he argues the dangers of relying on the recollection of witnesses (Scott, 2022).¹⁰ On the other

¹⁰ See *Gestmin v. Credit Suisse* [2013] EWHC 3560 (“A witness is asked to make a statement, often... when a long time has already elapsed since the relevant events... Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to... cause the witness’s memory of events to be based increasingly on... interpretations of it rather than on the original experience of the events... In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses’ recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts”).

hand, US courts “generally prefer evidence in the form of live testimony over out- of-court statements (hence the general ban on hearsay)” (ASU, 2018).¹¹ This difference in the hierarchy of evidence can be seen in the decision of the US Court to dismiss as hearsay much of the contemporaneous evidence that the English Court relied on.

Ultimately, it is entirely likely that Mr Depp’s application was unsuccessful in England and Wales but successful in the US because of differences in how the law is applied.

Concluding Remarks

There has been a consensus that libel law is different in England and Wales than in the United States, often with reference to the idea that it is easier to win a libel case in the former than in the latter. However, the outcomes of the legal battle between Johnny Depp and Amber Heard offer another perspective, perhaps suggesting that the differences in procedure in libel law made it so that Johnny Depp had a better chance in the US. Despite that a court in England and Wales looked at nearly the same exhibits as a court in the US, Mr Depp’s application was wholly unsuccessful in London, whereas he was awarded millions in Virginia. This may reflect the fact that libel cases are heard by a judge in England and Wales and by a judge and jury in the US. It may also be a consequence of the US case being televised, which suggests at the dangers of the court of public opinion in the age of social media. Ultimately, differences in how libel law is applied are becoming increasingly important in our more globally integrated world, and where the potential consequence of libel tourism and forum shopping is an inconsistent meaning of justice.

¹¹ See Law Professor Explains the Hierarchy of Evidence and How Contemporaneous Notes Would — or Wouldn't — Hold up in Court (2018) (“... because the opposing party has an opportunity to cross-examine the witness and the jury has the opportunity to judge the credibility of the witness based on the witness’s demeanor. A sweating, shifty-eyed witness might not be believed as readily as a congenial witness in clerical garb, for example”).

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