Only Eleven Shillings

Abusing Public Justice in England in the Late Eighteenth Century (Part 2 of 2)

James Oldham

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Excessive Damages (continued)

On June 13, 1787, the motion to set aside the verdict and grant a new trial was heard. Serjeants Bolton and Rooke appeared for the defendant; Serjeants Adair, Bond and Lawrence were for the plaintiff. Serjeant Adair noted the "extreme reluctance which the Court always feel when a verdict is given by a respectable Special Jury." After commenting on the perverseness of Watson's malicious prosecution, Adair argued that the case before the court was "a matter which was peculiarly the province of a Jury to decide upon; of a Jury of the County, where the conduct of both the parties were under their considerations; of a Jury, composed of Gentlemen, who were acquainted with both the parties, who knew the character and the circumstances of both the parties."[1]

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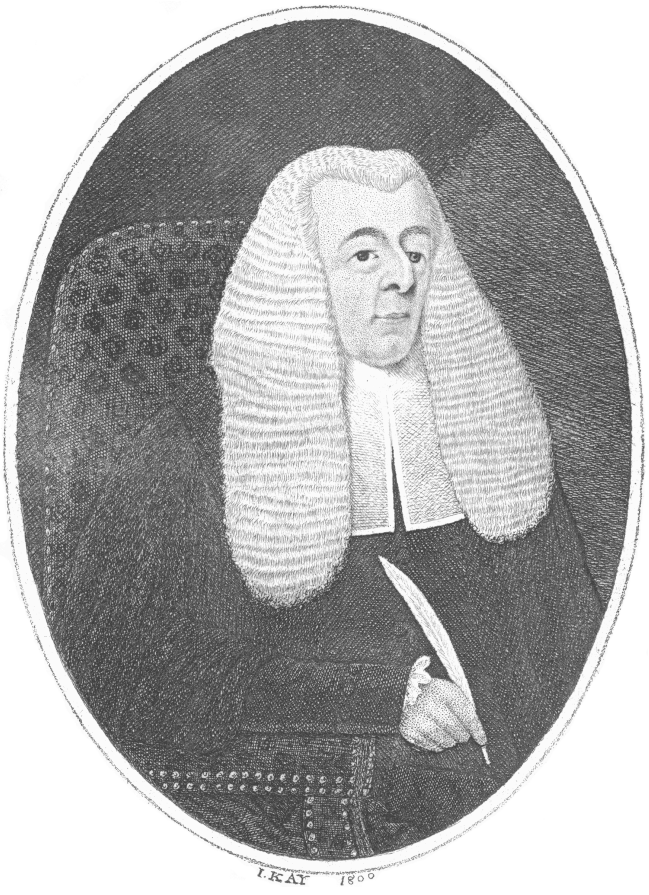
[1] In the case of *McCarthy v. Leeson* in January 1791, Serjeant Bond sought to overturn a jury verdict of £1,000 for false imprisonment on the ground of excessive



Chief Justice Loughborough, Court of Common Pleas (Alexander Wedderburn, later 1st Earl of Rosslyn).

Counsel for the plaintiff, however, faced some resistance from Lord Loughborough on the question of damages. Loughborough noted the evidence of very heavy expenses for the prosecution, saying, "I dislike that very much" – "It is probable that the Jury in esti-

damages, and after Justice Gould observed that the case had been tried by a special jury, Serjeant Bond said, "a Special Jury was not infallible." Lord Loughborough then said, "it certainly was not." *See The Times*, 28 January 1791, reporting on King's Bench sittings at Westminster Hall, 27 January 1791.

mating their damages, started from the £600 which was proved upon the trial to have been laid out by the present plaintiff." Serjeant Bond responded by claiming that, "When I go to a Jury, I have a right to state to that Jury what damages I find sustained in procuring counsel to protect me," and he argued that, in any case, if counsel for the defendant thought "that the expence of £800 for fees ought not to have brought in evidence, they ought at the trial to have stated their objections."[2]

Serjeant Lawrence gave the most extensive argument on Hurry's behalf for upholding the jury verdict. He cited all the relevant cases in which damages that were said to be excessive were upheld. One seventeenth-century case, *Lord Townsend v. Hughes*,[3] upheld a jury verdict for £4,000 in a case for words, but Chief Justice Loughborough put little stock in that case, observing that it was decided in a time "of high political ferment." For the defendant, as shown earlier, Serjeant Bolton attributed the jury's award "more to the speech of Mr. Erskine than to anything that Mr. Hurry actually suffered."

Lord Loughborough gave his opinion that the plaintiff was entitled to "substantial and very considerable damages," but if excessive, "the enquiry is open to another Jury; because from the circumstances of the excess, it is to be inferred, that the verdict was given in the hurry of *Nisi Prius*; the Court does not arrogate hereby to itself the right of assessing damages, nor does it affect the credit of a Jury. The Court does nothing more, than direct a cooler enquiry should be made."[4]

In these reflections, Lord Loughborough seems to have been of the same mind as Chief Justice Raymond of the Court of King's Bench in *Chambers v. Robinson*,[5] a case that also involved an action for

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[2] The £600 figure mentioned in early proceedings had subsequently grown.

[3] 2 Mod. 150 (C.P. 1677).

[4] The Chief Justice's opinion was not altogether logical. Why would not another jury trial be conducted "in the hurry of *Nisi Prius*"? Why would another jury be expected to conduct a cooler inquiry? Perhaps Loughborough surmised that no client could afford Erskine twice, in which case the atmosphere might indeed be cooler.

[5] 2 Str. 691 (1726).

malicious prosecution of an indictment for perjury. The jury had awarded damages of £1,000, but the court ordered a new trial, saying that "it was but reasonable he [the Plaintiff] should try another Jury, before he was finally charged with 1,000l." Later, however, Chief Justice Pratt of the Court of Common Pleas in *Beardmore v. Carrington*[6] disapproved the *Chambers* case, calling the reason given by Chief Justice Raymond ("to give the defendant a chance of another jury") "a very bad reason; for if it was not, it would be a reason for a third and fourth trial, and would be digging up the constitution by the roots; and therefore we are free to say this case is not law."[7]

Nevertheless, given the gaping disparity between the original eleven shillings claimed by Hurry and the £3,000 verdict, intervention by the court was unsurprising. Yet even though Chief Justice Loughborough thought the verdict may have been excessive, he was clearly outraged by John Watson's behavior, since he volunteered his opinion that £1,000 would not be too much. He also made the following observations:

> Where the injury is of a personal nature; where the comfort and happiness of a man are concerned, you have no measure by which to form your judgement. You cannot ascertain a matter of this kind, by pounds, shillings, and pence; nor are the abilities of the defendant to regulate the verdict: for if the plaintiff should be intitled to a particular verdict, the incapacity of the defendant to fulfill it, ought not to be considered as a reason, why it should not be given. But in a case, where the defendant is subjected to no particular injury, in that case, perhaps, some consideration may be thereto had. . . . Whether the verdict for three thousand pounds be one of those palpably excessive cases, which would warrant interference of the Court, I wish for some days to consider.

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[6] 2 Wils. 244, 249 (1764).

[7] 2 Str. at 692. Chief Justice Pratt, who later became Lord Camden, failed to mention the fact that in *Chambers*, a second trial was held in which the verdict was the same as in the first trial, and the defendant's request for a third jury was rejected – the court said "it was not in their power to grant a third trial." *See generally* J. Oldham, *Trial by Jury: The Seventh Amendment and Anglo-American Special Juries* (NYU Press, 2006), 65-66.

JUROR AFFIDAVITS

The fourth reason given by Serjeant Le Blanc in *Hurry v. Watson* for setting aside the verdict and ordering a new trial was that the special jury had used an improper method of arriving at damages. Le Blanc said that when the jurors had differed in their opinions, they adopted the foreman's suggestion that each juryman should put down a sum, all the sums would be added together, and the median figure should be their verdict. Lord Loughborough's first reaction was that, "If that was the mode of estimating the damages, the verdict ought not to stand."

The problem, however, was how to prove what the jury had done. Counsel for the defendant offered an affidavit of one of the jurors, supported by affidavits from two other persons who allegedly heard the jurymen describe this mode of having reached the verdict.[8] When this offer of proof was first made by Serjeant Le Blanc, Judge Wilson asked, "Do you know, Brother Le Blanc, any case where the affidavit of a Juryman has been received in evidence?" Le Blanc responded, "I know it was refused lately in the Court of King's Bench,"[9] adding, "I think I recollect in the books more cases than one, where a rule was granted to show cause, when it appeared from the affidavit of a Juryman, that the Jury had taken improper methods to form their verdict; that they had tossed up, &c."

On further argument, Serjeant Adair asked opposing counsel, Serjeant Bolton, exactly what the juror's affidavit said. Serjeant Bolton "then read the affidavit of one Zachariah Death, of Diss,[10] the purport of which was, that the jury did all agree to put each their separate sums, and having done so, and something being mentioned respecting Mr. Watson's circumstances, they fixed upon £3,000."[11]

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[8] The court said that the question was whether the juror's affidavit could be received; if it were inadmissible, so also were the affidavits of the other two persons.

[9] Le Blanc was referring to the case of *Vaise v. Delaval*, 1 T.R. 11 (1785), in which an affidavit that the jury had "tossed up" in order to reach a verdict was rejected.

[10] Diss was a small town in Norfolk.

[11] What "Mr. Watson's circumstances" were is unclear, but perhaps these special jurors, gentlemen from Great Yarmouth, realized that Mayor Watson would be protected.

Chief Justice Loughborough then said that the mode used by the jury was admittedly "idle," but "the £3,000 does appear to have been agreed to then by them all." Thus, even if allowed, the affidavit would have been to no purpose. Justice Heath closed the issue by stating: "I am glad, in the present case, the affidavits are not admissible, on account of the precedent."

The rule against admitting jury affidavits had been firmly established in the Court of King's Bench early during Lord Mansfield's term as Chief Justice. In *Rex v. Thirkell*,[12] eight of the jurors signed a paper disapproving of the verdict that they had just given, and Lord Mansfield "expressed great dislike of such representations made by jurymen, after the time of delivering their verdict." It invited a "very bad consequence, to listen to such subsequent representations contrary to what they had before found upon their oaths; and which might be obtained by improper applications subsequently made to them." Justice Wilmot agreed, declaring that representations made by jurymen after their departure from the bar "ought to be totally disregarded." This view was reaffirmed in 1772 in an unreported decision of King's Bench,[13] and again in 1788 in *Jackson v. Williamson*[14] while Lord Mansfield was yet Chief Justice, although inactive. But the decision that came to stand for the rule against admitting juror affidavits was *Vaise v. Delaval*,[15] a case that continues to be cited in the twenty-first century. In a six-line opinion, Lord Mansfield said that such affidavits were not admissible, "but in every such case the Court must derive their knowledge on some other source such

[12] 3 Burr. 1696 (1765).

[13] In *Priest v. Pidgeon*, 17 June 1772, a bankruptcy case, the jury found for the plaintiff apparently on the theory that the plaintiff, a victualler, had nevertheless become a trader in wine and brandy and thus had been properly declared bankrupt. Afterwards, some of the jury filed an affidavit that they did not mean to find that the defendant was a bankrupt, but according to a note by Edward East, "the court would not hear it read, it being an established practice never to receive such affidavits." Manuscript Notes by Buller J & Sir E.H. East 1754-92, Inner Temple Library, Misc. MS 96, London I: 109.

[14] 2 T.R. 281 (1788).

[15] 1 T.R. 11 (1785).

as from some person having seen the transaction through a window, or by some such other means."[16]

Lord Mansfield was willing to receive an affidavit from jurors who realized that they had simply made a mistake that they wished to correct. In *Bevan v. Slade*, the plaintiff sued for damages and expenses caused by a lethal infection transmitted to the plaintiff's wife by the defendant's wife. The jury gave a verdict for the plaintiff for £10 *and all the expenses*, which the trial judge interpreted to include the £40 that, according to one witness, had been spent by the plaintiff trying to cure his wife. Thus a verdict of £50 was announced in the courtroom and entered on the record. Subsequently, eight of the jurors submitted an affidavit saying that they meant only the plaintiff's costs, thinking the proof of the £40 insufficient. Lord Mansfield was reported to have said: "The word 'Expences,' was ambiguous. The Jury themselves, who are the properest persons, now inform the court what they meant by it, and the verdict must be altered accordingly."[17]

Similarly, in *Cogan v. Ebden*,[18] the Court of King's Bench accepted an affidavit from eight of the jurors that the foreman had reported their verdict incorrectly as for the defendant on both issues presented, whereas the verdict should have been for the plaintiff on one of the issues. The foreman declined making any affidavit "because, he said, he should make himself appear a fool, to the Court of King's Bench." The court said that the mistake should be rectified.

In an earlier King's Bench case, however, the judges were cautious. In *Palmer v. Crowle*,[19] two jurors signed an affidavit that the jury "intended to give but 7s. besides the money brought into Court, instead of the sum for which the verdict was declared and entered up." Counsel for the defendant argued that it would be unjust to found a judgment on an untruth. But the court, per curiam,

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[16] Lord Mansfield's example seems far-fetched – that an observer might happen to see through a window that the jurors were flipping a coin to reach their verdict.

[17] *The Times*, January 13, 1786, p. 3.

[18] 1 Burr. 383 (1757).

[19] Andrews 382 (1739).

said "it would be of very dangerous example to suffer jurors to come in and suggest a mistake in order to invalidate their acts upon oath, especially where their verdict is not contrary to evidence, as this case is." The motion to correct the verdict was, therefore, denied.

In the Court of Common Pleas, the issue about the admissibility of juror affidavits remained uncertain until 1805, when the case of *Owen v. Warburton* was decided.[20] There, an affidavit of a juryman was offered to show that the verdict had been decided by lot. After argument centering upon the case of *Vaise v. Delaval* and other precedents, Chief Justice James Mansfield[21] seemed to have been of two minds about how the issue should be decided, but took the case under advisement since the authorities were contradictory. Later, he delivered the following opinion of the court:

> We have conversed with the other Judges upon this subject, and we are all of opinion that the affidavit of a juryman cannot be received. It is singular indeed that almost the only evidence of which the case admits should be shut out; but, considering the arts which might be used if a contrary rule were to prevail, we think it necessary to exclude such evidence. If it were understood to be the law that a juryman might set aside a verdict by such evidence, it might sometimes happen that a juryman, being a friend to one of the parties, and not being able to bring over his companions to his opinion, might propose a decision by lot, with a view afterwards to set aside the verdict by his own affidavit, if the decision should be against him.[22]

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[20] 1 Bos. & P. (NR) 326 (1805).

[21] No relation to Lord Mansfield, Chief Justice of the Court of King's Bench, 1756-88.

[22] *Ibid.*, 329-30. (NB: The headnote in the printed report is incorrect. It states that the court *will* set aside a verdict on an affidavit by a juror that it was decided by lot. As the quotation above shows, the court's ruling was the opposite.) By "the other judges" Chief Justice Mansfield referred to the judges of the Court of King's Bench and the Court of Exchequer. On this informal practice of consultation, *see* J. Oldham, "Informal Law-Making in England by the Twelve Judges in the Late Eighteenth and Early Nineteenth Centuries," *Law and History Review*, 29: 181 (2011).

THE OUTCOME IN *HURRY V. WATSON*

On June 27, 1787, as reflected in a consent order in the Common Pleas, the parties settled the case of *Hurry v. Watson* for £1,500. The consent order is unclear whether the £1,500 was inclusive of Watson's costs, but according to a later report in *The Times*, Watson was responsible for £800 costs in addition to the £1,500.[23]

At the initial hearing of the case in Easter Term, Serjeant Le Blanc had asserted that the jury's assessed damages, independent of all the costs, were "more than he [Watson] is worth in the world." As speculated earlier, if Serjeant Le Blanc's statement were true, it would seem that the settlement of £1,500, plus £800 costs would surely send Watson to the King's Bench Prison, where he would join other incarcerated debtors indefinitely.

In fact, however, Watson had to pay nothing at all. Less than ten weeks after the date of the consent order, 20 members of the Corporation of Yarmouth, including Mr. Watson, voted, on motion of Mr. Watson, to reimburse Mr. Watson the sum of £2,300 "for the expences incurred by him in preferring a bill of indictment for perjury against Mr. Hurry, and in defending an action brought by the said William Hurry against the said John Watson in consequence thereof."[24] According to *The Times*, the resolution of the Corporation stated, in effect,

> That Mr. Watson was the Register of the Admiralty-Court, and the late Mayor of Yarmouth, and that in consequence of such offices, he had been involved in divers suits and controversies with Mr. Hurry, and had incurred thereby considerable expences; and that the assembly were sensible that Mr. Watson was influenced in his conduct by motives of public regard for the interests of the Corporation, and the dignity of the Chief Magistrate of Yarmouth, and that he bore no *ill-will* to Mr. Hurry.[25]

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[23] *The Times*, March 28, 1789, p. 4.

[24] *Ibid*.

[25] *Ibid*.

John Watson was not, however, completely out of the woods. On January 25, 1788, a show cause order was heard by the Court of King's Bench on why an information should not be exhibited against Watson and nineteen other members of the Corporation of Yarmouth for having committed a libel on public justice by the action of the defendants in reimbursing Watson.[26] After argument of counsel, Justice Ashhurst said that the reimbursement resolution did indeed import a libel on the public justice of the country. He said that, "he happened to be the Judge who tried this cause; and in the course of his recollection he did not remember a grosser or stronger case of malice." He pointed out that, "The moment Mr. Hurry was acquitted on the charge in that indictment, Mr. Watson puts in a paragraph in the papers, that the cause only went off on account of a flaw in the indictment, and that a new indictment would soon be preferred." Further, "this certainly reflects on the Jury that found that verdict, and on the Judge who suffered that verdict to be found." Justice Buller concurred, as did Justice Grose. The show cause order was therefore made absolute.

The information against Watson and nineteen other members of the Yarmouth Corporation was tried during the Winter Assizes at Thetford before Justice Grose and a special jury. After two witnesses had been examined by counsel for the prosecution (Thomas Erskine), and the Assembly-Book of the Corporation containing the reimbursement order had been examined, Justice Grose determined that there was a material variance between the order entered in the Assembly-Book and the libel as laid in the information; thus, "after several ingenious arguments by the Counsel on each side, the Jury found a verdict of Not Guilty, for all the defendants."[27]

Thus this eleven-shilling contest ended, with the imposing sum of £2,300 unwittingly bankrolled by the good citizens of Great Yarmouth. William Hurry emerged triumphant, and John Watson managed to escape financial ruin, apparently (if the behavior of the other nineteen members of the Corporation of Great Yarmouth is a

[26] *The Times*, January 26, 1788, p. 3.

[27] *The Times*, March 28, 1789, p. 4.

reliable indicator) with his reputation intact. The judicial system was the stage on which this dysfunctional drama was acted out.

Could the case have been cut short and the waste of municipal funds prevented? It is difficult to see how. The perjury action was thrown out by Justice Nares, and the first malicious prosecution action was thrown out by Chief Baron Skynner. The Court of Common Pleas could have stopped the proceedings by denying the motion to set aside Skynner's nonsuit, but Chief Justice Loughborough used the occasion to try to loosen the strictures of special pleading. After a full discussion of somewhat inconsistent precedents, Loughborough concluded that the variance in the pleadings considered by Skynner to be fatal was immaterial. This decision generated the second malicious prosecution action and the entry on stage of Thomas Erskine, evidently an oratorical force of nature, at least in the eyes and hearts of the special jurors.

Had there been no jury, of course, the excessive damages undoubtedly would not have been given. The view has been advanced that the public veneration of the civil jury in eighteenth-century England and the counterproductive effects that the system produced were unfortunate. That, however, is another story.