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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 65/79

BEFORE: The Hon. Mr. Justice Zacca - President
The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Carey, J.A.

BETWEEN	THE GLEANER COMPANY LTD.	DEFENDANT/APPELLANT
A N D	RICHARD SMALL	PLAINTIFF/RESPONDENT

Mr. R. H. Williams Q.C., for Appellant

D. V. Daley Esq., & Roy Fairclough Esq., for Respondent

November 13, December 8, 9, 10, 1980
January 21, 22, & October 2, , 1981

ZACCA - P.

The Respondent was awarded the sum of $24,000.00 for a libel which the learned trial judge found had been committed by the appellant in a publication of the Star newspaper. The Respondent in his pleadings alleged that there were "two stings" in the publication which were defamatory. The Learned Trial Judge held both "stings" to be defamatory.

The facts are clearly set out in the Judgment of Carey J.A., with whose conclusions I entirely agree. I would also held that the words "you know who I am" do not bear the meaning attributed to them in the Respondent's pleading. The words are therefore not defamatory of the Respondent. However the "second sting" which relate to the words "and while being taken to the station he allegedly made violent attempt to escape", are clearly defamatory of the Respondent.

The appellant nevertheless submits that the occasion was one of qualified privilege and relied on that defence. For the

occasion to be one of qualified privilege it must be shown that there is a duty to publish and a corresponding interest on the part of the public in receiving the communication.

On a consideration of the cases that have been referred to the claim of qualified privilege on the part of the Newspaper fails.

The trial judge awarded damages on the basis of "both stings" being defamatory. The damages must therefore be reduced.

Carberry J.A., in his judgment was of the view that "both stings" were defamatory but held that the damages awarded were inordinately high. He assessed the damages at $5,000.00 which is the same amount awarded by Carey J.A. on the basis of only "one sting" being defamatory. I regard the sum of $5,000.00 as being fair compensation for the libel on the Respondent.

The appeal is therefore allowed in part and the award of damages is varied to $5,000.00

CARBERRY, J.A.:

I have had the opportunity of reading the judgment of Carey J.A. in draft and find myself in agreement with all his main conclusions save one; nevertheless, in deference to the seven days of argument put forward in this case and to the intrinsic interest of this particular case, I would wish to add something of my own.

On the night of the 5th July, 1976, the plaintiff/respondent, whom it will hereafter be convenient to refer to as the plaintiff, an Attorney-at-Law, accompanied a client, Michael Campbell, to the Half-Way-Tree Police Station. Campbell a young man of only 18 years old, visiting Kingston from Montego Bay, had shortly before been involved in an accident between the car he was driving and a motor cyclist who was badly injured, and whom he had taken to Medical Associates Hospital. Their object in going to the station was to comply with the statutory requirement of duly reporting the motor vehicle accident. (See Road Traffic Act - Section 39(2)). The plaintiff advised his client of the duty to report the accident, but advised that he make no statement other than the bare essentials required for the report. Further consideration would be given to statement making later.

At the station they intimated Campbell's wish to report the accident, and a young constable, Jones, got a police accident report booklet (a standard form) and started to fill it out. The form contains a section for statements collected from witnesses and those involved. Plaintiff advised the constable that they were only reporting the accident, not making a statement.

After some delay Corporal Rance, apparently the sub-officer on duty, intervened.

Further particulars were taken, the client did not have the Insurance certificate on him, and plaintiff promised to supply information on it, gave the address of a witness and his own telephone number and they both prepared to depart.

At this stage Corporal Rance pointed out that no statement had been taken from Campbell. Plaintiff advised that they were only reporting the accident, and not making a statement. Rance enquired if plaintiff was an attorney and he said yes.

Plaintiff pointed out that there was a possibility of the client being charged with a serious offence, hence not wishing to make a statement: Rance on the otherhand disagreed, stating that police practice was to get a statement from both sides.

An impasse thus arose. Despite warning Campbell for prosecution Corporal Rance insisted on taking a statement, and plaintiff continued to advise the client to give none, other than to say that he was driving on the Constant Spring Road and had got involved in an accident with a motor cyclist.

The Corporal suggested that the plaintiff was <u>obstructing him</u> in the execution of his duty and asked his name. This was supplied. He then sought plaintiff's address: the plaintiff demurred.

After some further exchanges plaintiff enquired if anything further was required and on getting no response, he and the client Campbell walked out of the station.

They were pursued and held. Plaintiff advised the Corporal who had held him in the waist of his trousers that he had no right to arrest him. Other policemen present however encouraged the Corporal who took plaintiff to the lock up and there imprisoned him. Plaintiff denied that he tried to escape or that he offered any but the mildest protest against his arrest. He was not violent in any manner or form. He states that when handed over to the lock up he heard the Corporal telling the guard in charge that he was being charged for obstructing the police, resisting arrest and failing to give his name and address. (He had in fact given his name and telephone number).

Later that evening plaintiff was granted bail, with his client as surety (a remarkable reversal of roles). In due course of events he was charged with the three offences, obstructing the police,

resisting arrest, and failing to give his name and address, but the last charge was not persisted with and was apparently withdrawn.

It appears that the plaintiff was acquitted, though due to the rule in Hollington v. Hewthorn (1943) K.B. 587; (1943) 2 All E.R. 35, this fact does not clearly emerge.

Certainly counsel on both sides, and particularly counsel for the defendant/appellant, conducted their case on the basis that the plaintiff had properly discharged his duty to his client. Indeed this formed one of the main planks in the argument of Mr. Williams for the appellant, as he argued that for the constable to charge the plaintiff, an attorney-at-law, for obstructing him (by giving proper advise to his client) was so absurd, that to state that in a public newspaper could not possibly be defamatory of the plaintiff; he was to add later that the paper's account of this incident was in the public interest and of benefit to the public who required instruction on the proper role of an attorney in protecting his client. It is not therefore necessary for us to express any views on the merits of this unfortunate incident: the learned trial judge accepted the plaintiff's story of this incident, and it was not challenged in any shape or form, apart from a few details as to "escape" and some words that the plaintiff is alleged to have uttered. The learned trial judge pointed out that the young client was obviously in a state of shock and distress and that it was reasonable to take the view that he should not then make a statement - (if indeed a statement over and above a report is necessary. Section 39(2) of the Road Traffic Act by implication calls for the name and address of drivers involved in motor vehicle accidents, and that they report same, but is silent on any other matters).

This then was the actual incident that took place on the night of the 5th July, 1976; the instant case arises out of the following report of it that appeared in the Star Newspaper of Saturday, 10th July, 1976:

"ATTORNEY CHARGED WITH OBSTRUCTING COPS

> Attorney-at-law, Richard Small is to answer charges of obstructing the police, failing to give his name to the police, and resisting arrest, on Wednesday, August 18, in the Half-way Tree Court, following an incident which took place at the Half-way Tree Police Station on Monday.
>
> It is alleged that Small accompanied a client to the station, to report a traffic accident. While the report was being taken, Small is alleged to have told the client not to give a statement. Cpl. Clarence Rance of the same station, explained that it was necessary, but Small continued to obstruct him from collecting the statement, stating. 'You know who I am?' Small was then arrested by Cpl. Rance, and while being taken to the station, he allegedly made violent attempts to escape.
>
> Small appeared before Resident Magistrate Mr. Peter Richards, and was represented by Dr. Lloyd Barnett, Q.C. and Mr. Denis Daley."

The defendant/appellant called no evidence relating to the incident itself: they did not call either the Police Corporal or the constable. Instead they called the actual reporter, a Miss Winsome Morgan. Apparently she got news of the plaintiff's arrest, and chose to go to the Half-Way-Tree court's Office seeking further details. It is clear that what happened there was that a clerk in that office, a friend of her's, whose name (and status) she refused (or was unable) to reveal, looked at the Court file (which would contain the Information and police statements) and orally gave her the material that she used in the article above. She has apparently done this before and it is the modus operandi of the defendant newspaper and also of this reporter. The important points that emerged from her evidence were that what she got and what she published was the Police version of the incident; that she made no effort to contact the plaintiff to get his side of the story; and that it is clear that what she got was in no shape or form an official release. It could not therefore qualify under the "Defamation Act Section 9, Part III of the Schedule, paragraph 14 as "A copy or fair and accurate report or summary of any notice or other matter issued for the information of the public by or on behalf of any government

department, officer of the government or local authority." The attempt to set up the statutory defence "qualified privilege of newspapers" pleaded in paragraph 4 of the Amended Defence therefore failed, and there has been no appeal against the ruling or judgment of the learned trial judge on this issue.

The only thing that can be said for this witness is that either she, or her editor, realizing that what was being published was the police version of the incident, indicated this by the use of the word "alleged" and "allegedly" in no less than three separate phrases in the offending paragraph, paragraph 2 of the article. It should I think be brought home to court or other reporters that use of the word "alleged" or similar words does not in itself offer any excuse or defence for the publication of defamatory matter. Responsibility for such publication will remain with the publisher even if he is in effect saying "I do not say or know whether this is true or not .... it is what X said". It is not an answer to publishing defamatory matter even if the informant is named, or even if it is true that a rumour to that effect was in circulation: see McPherson v. Daniels (1829) 10 B & C 272; 109 E.R. 448; and Watkin v. Hall (1868) L.R. 3 Q.B. 396. In such cases the person who publishes the defamatory matter must either prove it true or establish the defence of "privilege" if he can.

Before turning to examine the report published in the Star in greater detail, I would make one or two preliminary observations. In English and Scottish Co-operative Properties Mortgage and Investment Society Ltd. v. Odhams Press Ltd. (1940) 1 K.B. 440 (C.A.) a newspaper published a report under the heading "False profit Return Charge Against Society" stating that the Plaintiff Society had been summoned by the Registrar of Friendly Societies for making a return wrongfully stating their profit for 1936. In point of fact what was at issue was no question of fraud, but an accountant's dispute as to whether the sale of a certain item should have been treated in its accounts as a

"profit" or not. In the event the Society was convicted eventually on the summons, but what was at issue in the Libel action which they filed against the newspaper was that the Report published suggested that they had been guilty of fraud, and this was highly damaging. The case turned on an examination of whether the words were capable of a defamatory meaning. It was held that they were, and I will consider the case again later in that context. What was at issue there was, inter alia, that it was true that the plaintiff had been so charged, and the newspaper pleaded justification, but did not seek to justify the inferences or the innuendo drawn from their headline and account, i.e. that fraud was alleged or suspected or charged.

In his judgment Goddard, L.J. at page 458 made the following remarks, so aptly suitable for our instant case. He said:

> "This case is a very good illustration, by way of warning, of the dangers which newspapers run if they publish information about pending litigation. They are amply protected in publishing reports of cases which are heard in Courts. But if they publish inaccurate information about pending litigation, they do it at their own risk."

There are two other cases of a somewhat similar nature where newspapers published such reports about pending litigation. One was Cadam v. Beaverbrook Newspapers Ltd. (1959) 1 Q.B. 412 (C.A.) where the newspaper published an article stating that a writ had been issued against four named persons for alleged conspiracy to defraud. In fact a writ had been issued to this effect, and the paper pleaded justification as to this. Once again at issue was whether the news items did not go further and suggest not merely that such a writ had been filed, but that the plaintiffs against whom it issued had been guilty of conspiracy to defraud or were at least suspected of it.

The other case is Lewis v. Daily Telegraph (1963) 1 Q.B. 340; (1962) 2 All E.R. 698 (C.A.); (1963) 2 All E.R. 151 and sub nom Rubber Improvement Ltd. v. Daily Telegraph (1964) A.C. 234 (H.L.). In this

case two national newspapers published on their front pages paragraphs headed respectively "Inquiry on firm by city police" and "Fraud Squad Probe Firm."

In point of fact there had been initiated an inquiry into the plaintiff firm by the fraud squad, acting on the complaint of a disgruntled shareholder. There was nothing in the complaint and the investigation, never very seriously undertaken, petered out.

In the meantime however the Report of it in the papers caused great damage to the reputation of the plaintiff firm, and they sued both papers for Libel. Once again the point to be argued was that even though the defendant papers pleaded justification, in that such an inquiry was in truth afoot, were the words used capable of being interpreted as suggesting that there was fraud, or a suspicion of fraud, in the conduct of the business of the plaintiff firm?

Our own instant case presents at least a part of this problem here. It was in fact true that the plaintiff had been charged as was stated in the Star, and the result is that the plaintiff could not or did not take any objection to the whole of the first paragraph, or the headline. He did not, unlike the plaintiffs above, argue that the article suggested not only that he was charged, which was true, but that he was guilty, or at least reasonably thought to be so.

His statement of claim contents itself with the "allegations" made in the second paragraph of the newspaper article:

> "It is alleged that Small ..... continued to obstruct him from collecting the statement stating "you know who I am?" Small was then arrested by Corporal Rance and while being taken to the Station he allegedly made violent attempts to escape."

A plaintiff is of course entitled to select the battle ground on which he will pitch his case. He alleges that those statements were false, and that they were defamatory of him, and that he is entitled to collect damages on that basis. A defendant who publishes a number of defamatory statements must justify all, and

defend on all. Partial justification, if the charges are severable, may secure him release on those justified, while leaving him answerable on those not justified. No doubt there is some further relief afforded in Section 7 of the Defamation Act; that section reads:

> "7. In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges."

In the instant case no real effort was made to justify as true those sections of the report on which the plaintiff pitched his case. Nor can it be said that these added details did not materially injure the plaintiff's reputation. But in my opinion when we turn to discuss the issue of damages it will be necessary to remember that the plaintiff has not in this case complained about the headline and paragraph 1, and in considering the damage done by the parts complained of and by the article as a whole we cannot ignore the effect of the first paragraph and headline, stating that the plaintiff, an Attorney-at-Law, had been arrested and charged with these three offences. That has been justified, and in fact is not complained of; the damages and the complaint will relate then to the additional damage done by those sections about which the plaintiff complains.

As to the Position at Common law, in cases of partial justification, see Cooper v. Lawson (1838) 8 Ad. & E. 746; 112 E.R. 1020. Helsham v. Blackwood (1851) 11 C.B. 111; 138 E.R. 412. Bremridge v. Latimer (1864) 12 W.R. 878. See Plato Films v. Speidel (1961) A.C. 1090 and S & K Holdings Ltd. v. Throgmorton Publications (1972) 3 All E R. 497 (C.A.).

As to the sections of the second paragraph complained of the plaintiff alleged in effect two "stings": (a) that with reference to the alleged violent efforts to escape, that the words in their ordinary and natural sense suggested that the plaintiff

acted in a violent, undisciplined manner unbecoming of a person of his professional standing et cetera, and (b) with reference to the attributed remark "You know who I am?", the statement of claim suggests that in their ordinary meaning they impute that plaintiff was haughty, arrogant and conceited person who considered himself beyond the pale of the law and not subject to the legitimate authority of the police. (c) The plaintiff has added to (b) above an innuendo meaning: In that as much as he was a brother of Senator Hugh Small (as he then was) who was at the material time Parliamentary Secretary to the Ministry of National Security, it was to be understood that he was threatening to bring political pressure to bear on the police to prevent the lawful execution of their duty.

In the argument before us Mr. Williams took two main points: the first being an added ground of appeal, ground 6.

> "The learned trial judge erred in holding that the said words bore and were understood to bear and are capable of bearing any of the meanings alleged in paragraphs 4 and 5 of the statement of claim, or any other meaning defamatory of the plaintiff."

Mr. Williams argued that the words attributed to the plaintiff "You know who I am?" were incapable of bearing a defamatory meaning in either their natural and ordinary meaning, or that they could support the innuendo that the plaintiff walked the corridors of power and was threatening to bring political and improper pressure to bear upon the police. Much depended upon the context in which the words were alleged to be used, and he suggested that the context suggested in the article was to the effect that plaintiff was telling the police that he was an Attorney-at-Law and knew the law better than they did and that his client did not have to make a statement. The innuendo suggested by the plaintiff was suggested to be strained and unlikely.

It is clear law that in deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined that meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand it in a defamatory sense. Halsbury 4th Edition Vol. 28: Libel and Slander, Paragraph 43: the test of what is defamatory: citing Lewis v. Daily Telegraph (supra). Lord Reid in his judgment in that case at pages 258-260 discussed this principle at some length. He observed that the ordinary man does not live in an ivory tower .... he can and does read between the lines in the light of his general knowledge and experience of worldly affairs. Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naive. One must try to envisage people between these two extremes, and see what is the most damaging meaning they would put on the words in question. He concluded: "What the ordinary man, not avid for scandal, would read into the words complained of must be a matter of impression. I can only say that I do not think he would infer guilt of fraud merely because an inquiry is on foot." (The last sentence related of course to the words used in that case, "Fraud squad probe firm.").

In the Daily Telegraph case Lord Hodson and Lord Devlin agreed with the impression formed by Lord Reid. Lord Morris did not: Observing at page 267:

> "It is a grave thing to say that someone is fraudulent. It is a different thing to say that someone is suspected of being fraudulent. How much less wounding and damaging this would be must be a matter of opinion depending upon the circumstances."

In the instant case before us I remind myself that the first paragraph of this news item coupled with the last intimate that the plaintiff has already been before the court and is to answer these charges on a date that has been set: there is something to answer.

The article then goes on to make the allegations, clearly coming from the police or crown side, as to what there is to answer. Why note that particular remark "You know who I am?" out of so many others that must have been made in the impasse that arose between plaintiff and police? In a country that is sensitive to allegations of political interference with the police, and small enough to know family relationships? It can only be because the remark carried a special force and significance of its own, and in the context of the incident that took place. It is, as Lord Reid remarked, a matter of impression. While realising that the point is arguable and has commended itself to Carey, J.A., for my part I am not prepared to disagree with the learned trial judge that the remark was capable of a defamatory meaning and was in fact defamatory by reason of the additional facts grounding the innuendo, namely the family relationship of the plaintiff and his brother the then Parliamentary Secretary in the Ministry of National Security. I agree however that in its ordinary meaning apart from the knowledge of family relationships et cetera, though the words do convey an impression of hauteur and arrogance that in itself is not defamatory: it may well make such a person less likeable, but does not necessarily lower him in the sight of well thinking members of society. The innuendo meaning of invoking undue political pressure to prevent the police executing their duty is however defamatory: see for example Evans v. Vere Johns & The Gleaner Co. Ltd. (1961) 4 W.I.R. 502.

As to the second "sting" relating to "violent attempts to escape," Mr. Williams has argued somewhat ingenuously that this is not defamatory either; the plaintiff had been properly advising his client, and could not possibly be said to be obstructing the police, the arrest was palpably illegal, he was entitled to use force to resist the arrest, and to say that he did so could not possibly be defamatory. Of course the article completely failed to make this clear. It has the police, in the person of Corporal Rance, (patiently) explaining to the plaintiff that it was necessary to give a statement,

the plaintiff continuing to obstruct him, the plaintiff being arrested, and then making violent efforts to escape.

In my opinion these words were capable of a defamatory meaning in their natural and ordinary meaning, and I understand that all your Lordships are of the same view.

The second main point argued before us was the question of privilege.

A few preliminary remarks may be made. Absolute privilege attaches to what is said in judicial proceedings by the parties engaged therein: the witnesses, the counsel or advocates, and the judge. By extension, a qualified privilege attaches to fair and accurate reports of the same. (See Halsbury, 5th Edition, Vol 28 Paragraphs 98 et seq: Section A. Administration of Justice and Reports). The definition of "judicial proceedings" has been progressively extended over the last hundred years to cover Preliminary Examinations: Lewis v. Levy (1858) E. B. & E 537; 120 E.R. 537 - Ex Parte Proceedings: Usill v. Hales (1878) L.R. 3 C.P.D. 319; Kimber v. Press Association (1893) 1 Q.B. 65 - Charges to the Grand Jury: R. v. Evening News (1925) 2 K.B. 158; Proceedings in a Coroner's Court: McCarey v. Associated Newspapers. As to privilege in respect of what witnesses may say see Dawkins v. Lord Rokeby (1875) L.R. 7 H.L. 744, and this privilege has been extended to cover what the witness may say to the lawyer before trial in giving him a proof of his evidence: Watson v. M'Ewan & Watson v. Jones (1905) A.C. 480. Statements given by witnesses to the police to assist in the investigation of crimes are also privileged, provided that they are not made before more persons than are necessary: Padmore v. Lawrence (1840) 11 Ad. & El. 380.

But as at present advised I know of no common law privilege extended before a trial, to publish to the world at large defamatory statements about the persons engaged therein. Though when the accused appears in open court and is first charged, publication of the charges would (apart from justification in asserting he was so charged) be also within the privilege attaching to publishing reports

of Judicial proceedings. For this reason in the United Kingdom, when the police wished to find a person they used to publish the most guarded remarks to the effect that they were seeking for X to "assist them in their enquiries." Their privileges in this respect have now been extended by the Defamation Act 1952 (Section 7(1) and paragraph 12) and see Boston v. W.S. Bagshaw & Sons (1966) 2 All E.R. 906; (1966) 1 W.L.R. 1126.

At an early stage in the development of the common law, privilege similar to that attaching to judicial proceedings was extended to cover parliamentary proceedings, both as to what was said in Parliament, and to fair and accurate reports of it outside, though consequent on Stockdale v. Hansard (1839) 9 Ad. & E. 1, it was found necessary to strengthen and consolidate that position by the Parliamentary Papers Act of 1840.

The rationale of the doctrine of privilege is to be found at large in a great many of the cases on reports of parliamentary proceedings; it is conceived of in terms of assessing the nature of the occasion, and saying that on balance, because of this, the public interest was better served by giving an immunity to utter defamatory words (either absolutely or subject to proof of abuse of the occasion: "malice") than by preserving the normal rules that protected the reputation of individuals.

A few examples will suffice:

In R. v. Wright (1799) 8 Term Rep. 293; 101 E.R. 1396, Lawrence, J. said: (1399):

> "Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings."

In Wason v. Walter (1868) L.R. 4 Q.B. 73 Cockburn C.J. followed R. v. Wright (supra) and observed at page 87:

> "It is now well settled that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible."

Cockburn C.J. rested this immunity on two grounds: (a) that malice being the gist of the action, the circumstances of the occasion (be it judicial proceedings or parliamentary proceedings) would rebut the normal presumption of malice, and leave the injured party without remedy, unless he proved, in the case of qualified privilege, express malice. His second ground (b) was broader. He said at page 88:

> "The other and broader principle on which this exception to the general law of libel is founded is, that the advantage to the community from publicity being given to the proceedings of courts of justice is so great, that the occasional inconvenience to individuals arising from it must yield to the general good."

Both of these case concerned in fact the publication of reports of Parliamentary Proceedings, but rested on the analogy of reports of Judicial Proceedings. Both of these heads involve absolute immunity for what is said by the participants in Court or Parliament, and a lesser or qualified immunity for reports thereof outside. Here privilege is based on a consideration of the nature of the occasion and the balancing of the public interest against that of private interest, and a determination that in that particuliar situation the latter must yield.

In terms of occasions other than judicial or parliamentary proceedings the law of privilege was more narrowly conceived. It was almost without exception a qualified privilege, a conditional immunity, liable to be removed or withdrawn on proof of malice, improper motive or other abuse of the occasion as by an excess of publication. It was conceived in terms of the publisher of the

defamatory matter having either a duty to communicate it, or an interest to protect in doing so, and that his audience or the person to whom it was communicated would have a similar interest in receiving it, or a duty to act on it when received.

Two or three illustrations will suffice:

The most often quoted passage comes from Toogood v. Spyring (1834) 1 C.M. & R. 181; 149 E.R. 1044, from Parke B. (at pages 1049-50).

> "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from authorised communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."

In Harrison v. Bush (1855) 5 E. & B. 344; 119 E.R. 509, Lord Campbell, C.J. (at 512) said:

> "A communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without this privilege, would be slanderous and actionable. ..... "Duty" in the proposed canon, cannot be confined to legal duties which may be enforced by indictment, action or mandamus, but must include moral and social duties of imperfect obligation..."

In Stuart v. Bell (1891) 2 Q.B. 341 (C.A.), Lindley L.J. observed at page 346:

> "The reason for holding any occasion privileged is common convenience and welfare of society...."

and at page 350, dealing with the question of when a moral or social duty to communicate arose, he said:

> "I take moral or social duty to mean a duty recognized by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal."

It should be observed that the reciprocity between the publisher of the defamatory material and the person or persons to whom he communicates it is essential. A report or complaint to the wrong person, or to a person having no corresponding duty or interest will not be privileged: Hebditch v. Mac Ilwane (1894) 2 Q.B. 54 (C.A.) and see the cases on excess of publication, such as Duncombe v. Daniel (1837) 8 Car & P 222; 173 E.R. 470: ("However large the privilege of electors may be, it is extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of a candidate," - per Lord Denman C.J. at 229). Chapman v. Lord Ellesmere (1932) 2 K.B. 431 (C.A.) (Publication of Jockey club decision 'warning off plaintiff' privileged when published in the Racing Calendar, but not in the Times). Standen v. South Essex Recorders Ltd. (1934) 50 T.L.R. 365 (publication in local paper of a charge of political favouritism in local council, privilege exceeded because too many readers would have only a casual interest and were not rate-payers with a common interest). See also White v. J. & F. Stone (Lighting and Radio) Ltd. (1939) 2 K.B. 827 (C.A.).

Nor on the other hand does the interest which the recipient of the communication has in receiving the particular communication per se justify privilege in communicating it: the person making it must have an interest in the matter communicated, or there must be a duty, legal, moral or social to make the communication: Watt v. Longsdon (1930) 1 K.B. 130 (no such interest or duty on a "friend of the family" in telling wife of alleged orgies carried on by husband working abroad).

In the case before us Mr. Williams boldly asserts two propositions, as I understand his argument: (a) that the nature of the subject matter here possessed such a quality of public interest as to fall within a very narrow range of exceptional cases where privilege attached because of the public interest per se; alternatively (b) there was duty on the newspaper on these facts to communicate what they did to the public, and a corresponding interest in the public in receiving the communication, both based on the concept that there was a public interest in knowing that a lawyer could advise his client not to make a statement to the police when reporting a traffic accident.

It appears to me that this argument echoes a certain long standing confusion in the law of defamation. Separate and apart from the defence of privilege, or qualified privilege, there is a defence of "fair comment on a matter of public interest." This defence was at one time confused with the larger defence of privilege, until clearly separated and enunciated in two cases: Campbell v. Spottiswoode (1863) 3 B & S 769; 32 L.J. Q.B. 185, and Merrivale v. Carson (1887) 20 Q.B.D. 275 (C.A.).

"Fair comment" must (a) be comment or opinion, not the assertion of facts, and (b) the facts on which it is based must be truly stated: London Artists Ltd. v. Littler (1968) 1 All E.R. 1075; (1969) 2 All E.R. 193 (C.A.) and of course (c) the comment must be fair; (d) the matter commented on must be of "public interest." (See Halsbury 4th Edition Vol. 28 paragraphs 131 et seq.). It seems clear that the "public interest" which will justify a defence of "fair comment" on facts truly stated, is different in quality from the "public interest" that may, standing alone, ground privilege for the publication of facts that are in fact untrue.

What Mr. Williams boldly asserts on behalf of his client, the newspaper, is that newspapers have a privilege to publish or republish facts which are both defamatory and untrue. Put another

way, that newspapers have a privilege to publish lies, if they are of interest to the public, or relate to some matter in which the public have an interest, even if they are defamatory.

With respect, it appears to me that this claim is much too broad to be sustained. As we have seen, absolute privilege attaches to what is said in judicial proceedings or in Parliament: that privilege will cover the telling of lies or the making of untrue statements of fact, subject to the laws with respect to perjury in respect of judicial proceedings, and of the right of Parliament to exercise its own internal discipline in parliamentary proceedings. Fair and accurate reports of what is there said, even if it is untrue, are privileged if published without malice; and that is as far as it goes.

Mr. Williams' proposition goes however much further, and is based on four unusual or exceptional cases in the law of privilege. These were cases in which the judgments asserting privilege at first glance appear, as expressed, to be based on "public interest" only rather than on the existence of reciprocal duty and/or interest between publisher and receiver or audience.

The first of these is Cox v. Feeney (1863) 4 F. & F. 13; 176 E.R. 445. In this case a local newspaper published, some three years late, the report of an investigation made into the affairs of the University of Birmingham by the Inspector of Charities. The plaintiff, a distinguished member of the academic staff but apparently a poor administrator sued the paper because the report contained a letter of complaint about his administration. Cockburn, C.J., the trial judge, in his summing-up to the jury advised them in effect that they should ask themselves whether the report was a matter which it interested the public to know, and whether the defendant published it with the honest desire to afford the public information; if so they should find for the defendant. He observed that the report had been

published in its entirety, and that there was no real evidence of malice. The jury found for the defendant.

While it is true that Cockburn. C.J. did not use the expressions as to reciprocal duty and interest which had by then become established by cases such as Toogood v. Spyring and Harrison v. Bush (supra) and which were repeated in Campbell v. Spottiswoode (supra) decided a few weeks later by a court over which he presided and in which Mellor, J. and others used the traditional language requiring a reciprocal duty or interest, Cox v. Feeney does not really support the proposition that public interest, if any, can dispense with the need for this reciprocity in privilege. It can be defended as a case of common interest between publisher and readers.

The second case is Henwood v. Harrison (1872) L.R. 7 C.P. 606. In this case the background was that shortly before the matter arose an iron clad turret ship, "The Captain", had capsized and sunk with all hands. The Admiralty had conducted an inquiry and issued a Report which was to be laid before Parliament (when it would have become a Parliamentary report, privileged by statute), but shortly before it was so laid, they allowed it to be issued to the public. The Report contained a passage that reflected gratuitously and adversely on the plaintiff and on plans for armour plating wooden ships which the plaintiff had some years before submitted to the Admiralty, though he was in no way connected with the design plans and conversion of the lost ship. He sued for libel. At trial the trial judge, Brett, J., non suited the plaintiff on the ground of privilege, though it was expressed in terms really of "fair comment on a matter of public importance." On the plaintiff moving for a new trial on the ground of misdirection, the direction was approved. Grove, J. dissenting, observed that the premature release of the report deprived it of statutory Parliamentary privilege nor did he see

the comment as fair, and he noted that plaintiff's own plans had never been laid before the public, so could not be a matter of public interest. The majority judgment by Willes, J. observed however that the occasion was one of national public interest, and treating "fair comment" as a species of privilege, (see page 621), he observed at page 622:

> "The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals...."

He then went on to cite Toogood v. Spyring and Harrison v. Bush, and concluded that the communicator here had both an interest and a duty in the subject matter, in that he was communicating to the public a statement of the Lords of Admiralty and the public officers under their control, accounting for their proceedings as to the reconstruction of the navy .... in which every subject of the Queen had an interest of the deepest character. Willes, J. did therefore acknowledge and adopt the traditional language of reciprocal duty and or interest, despite the widith of the dictum cited above.

Fifteen years later in Merrivale v. Carson (1887) 20 Q.B.D. 275 the Court of Appeal was to re-establish the distinction between "fair comment" and privilege and Bowen, L.J. at pages 282/3 commented adversely on the judgment of Willes, J. in Henwood's case as confusing privilege and fair comment.

Further in Davis & Sons v. Shepstone (1886) 11 App. Cas. 187, their Lordships in the Judicial Committee summarily dismissed an argument based on Henwood v. Harrison. A newspaper had published in Natal, material sent to them by the Bishop of Natal, purporting to come from Chief Cetewayo accusing the Resident Commissioner in

Zululand of conduct which would, if true, have rendered him quite unfit for that office. The defendant relied on Henwood v. Harrison as authority for the proposition that public interest in the administration of the territory clothed their publication with privilege. Delivering the judgment of their Lordships, Lord Herschell, L.C. said: (at page 190).

> "There is no doubt that the public acts of a public man may lawfully be the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of facts, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct....."
>
> "In their Lordship's opinion there is no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of privilege....." (emphasis supplied).

This case establishes, if it were necessary to do so, that "public interest" cannot per se establish a privilege to publish false allegations of fact that are defamatory, as distinct from commenting upon facts truly stated.

The third case suggested as supporting the proposition that "public interest" alone may create a situation of privilege, licensing the publication of false allegations of fact that may be published though defamatory is a more recent Privy Council case, Perera v. Peiris (1949) A.C. 1; 64 T.L.R. 590.

In this case a newspaper in Ceylon (as it then was) published a number of extracts from the Report of the Bribery Commission which had been set up by the government to investigate and report on allegations that "gratifications" had been paid to certain members of the then existing State Council for the purpose of influencing their judgment and conduct in certain matters that came before them.

The Report had been laid before the Ceylon Legislature and ordered to be printed, a limited quantity of copies was on sale to the public and had been exhausted. Free copies had been sent to all newspapers in Ceylon. Among the many extracts which were published by the defendant, who published almost the whole Report, was one which contained a remark by the Commissioners to the effect that the plaintiff, who had appeared as a witness before them, "was completely lacking in frankness and pretended that he knew very much less about the transaction than he actually did."

Their Lordships upheld the decision that the publication, published without comment or malice, was privileged. Observing that it was arguable whether the publication might not be privileged as a fair report of proceedings in the nature of judicial proceedings, or in the nature of parliamentary proceedings, their Lordships preferred "to relate their conclusions to the wide general principle which was stated by their Lordships in Macintosh v. Dun (1908) A.C. 390 to be the "common convenience and welfare of society" or "the general interest of society", and other statements to much the same effect which are to be found in Stuart v. Bell (supra) and in earlier cases..." in short to the "public interest." Delivering the judgment, Lord Uthwatt said at pages 21-22:

> "On a review of the facts their Lordships are of opinion that the public interest of Ceylon demanded that the contents of the report should be widely communicated to the public. The report dealt with a grave matter affecting the public at large, namely the integrity of members of the Executive Council.....
>
> The due administration of the affairs of Ceylon required that this report in the light of its origin, contents and relevance to the conduct of the affairs of Ceylon and the course of legislation should receive the widest publicity.....
>
> Their Lordships take the view that the respondents as respects publication stand in no better and no worse position than any other person or body in Ceylon. A newspaper as such has in the matter under consideration no special immunity.....

> "In their Lordships' view the proprietor and printer of the newspaper and the public had a common interest in the contents of the report and in its wide dissemination. The subject matter created that common interest. ....." (emphasis supplied).

It should be conceded that there may be occasions, when the subject may be of such overwhelming national importance that it may create a duty or interest in both the publisher and the recipients, and so become privileged, assuming the non-existence of malice, and that the privilege so created may cover the incidental publication of false allegations of fact which are defamatory. These cases are few and far between: the state of the navy (Henwood v. Harrison); the state of the army (Adam v. Ward); or the need to eliminate corruption from public life (Perera's case). But even in these cases it is possible and desirable to "translate" the privilege into terms of reciprocal common interest and or duty and interest, as was done in Perera's case.

The fourth case, and the case upon which Mr. Williams principally relied is the decision of Pearson J. in Webb v. Times Publishing Co. Ltd. (1960) 2 Q.B. 535; (1960) 2 All E.R. 789.

In this case one Hume had been tried in 1950 for the murder of one Setty, the Crown alleging that this was due to his jealously of Setty's attentions to Mrs. Hume. Mrs. Hume gave evidence to the effect that she had never even met Setty, and after the first jury disagreed Hume was eventually released on the charge of murder, but pleaded guilty to being an accessory after the fact in that he had disposed of the body on behalf of the real murderer. Having served his sentence and been released he again fell foul of the law, was "wanted" in England, and had been arrested and tried in Switzerland for attempted bank robbery and murder there. At his Swiss trial Hume told the Swiss Court that he had in truth been guilty of the murder of Setty, that the motive was jealousy, and that his wife's child was not his but Setty's.

The defendants published a fair and accurate account of the Swiss trial, including these remarks by Hume. Mrs. Hume now Mrs. Webb, (she had re-married having divorced Hume) now sued the defendants, for libel contending that the effect of their publication meant that she had committed perjury, and also adultery. The defendants set up privilege, and the issue before Pearson, J. was a preliminary one, did the defence as pleaded amount to a good defence in law?

It was argued that the common law privilege which attached to fair and accurate reports of judicial proceedings applied to the report of the Swiss trial. It was also argued that privilege applied apart from that, in that there was a common interest in publishing this account of the trial between the publishers and an English reading public interested in seeing how well their judicial system had worked in the original murder trial.

The plaintiff argued that the common law privilege did not apply to foreign trials, and that the details published were irrelevant to the Swiss trial and the Swiss offences, and were gratuitously wounding to her.

After a careful review of the cases Pearson, J. held that common law privilege did not extend to reports of foreign judicial proceedings; these did not fall within the ratio or principle on which the privilege in respect of English judicial proceedings was based. However it was conceivable that there might be occasions when the report of foreign judicial proceedings might be of such intrinsic interest to English persons that privilege should attach to their publication, though this might involve incidental defamation. He relied on Cox v. Feeney (supra) and on Allbutt v. General Medical Council (1889) 23 Q.B.D. 400 (where the publication of the reasons for striking off a Doctor was held to be privileged: but note - in that case the court held that the public had an interest in knowing who was struck off and why, and the G.M.C. a duty to satisfy the

public that they had acted properly, and the position was held analogous to the position of judicial reports: see Lopes L.J. at pages 408-410).

Pearson, J. also relied on Perera v. Peiris (supra). He agreed that the "public interest" which would per se create a common interest between the publisher and his audience would depend upon an "appropriate subject matter" and an "appropriate status." He said at page 569:

> "One has to look for a legitimate and proper interest as contrasted with an interest which is due to idle curiosity or a desire for gossip. There is not anything wrong in newspapers publishing news items which appeal only to idle curiosity or the desire for gossip. But if they do, there is not the subject-matter or any such legitimate and proper interest as is needed to confer privilege for an(y) incidental defamation that may be involved.
>
> There is thus a test available for deciding whether the subject matter is appropriate for conferring privilege. A report of the decision of the United States Supreme Court on an important question of commercial law has legitimate and proper interest.
>
> On the other hand a report of a judicial proceeding wholly concerned with an alleged scandalous affair between Mrs. X and Mr. Y is unlikely to have such interest and is likely to appeal only to idle curiosity or a desire for gossip."

Applying the suggested test, Pearson, J. went on to find that this report of the Swiss trial was privileged: it involved the administration of justice in England, "a matter of legitimate and proper interest to English newspaper readers."

Pearson, J. also suggested (at page 565) - Could there be a plea of 'fair information on a matter of public interest' which would co-ordinate with the familiar plea of 'fair comment on a matter of public interest'?

Mr. Williams relies on this and refers to Gatley on Libel and Slander, 7th Edition (1974) paragraphs 529 et seq.

With respect, I must confess to not being able to appreciate where the suggested plea would take us. It would be designed to cover cases in which a newspaper (or private citizen) had circulated a "news item" which was in fact both false and defamatory. What could excuse this? Would it be "fair" if the reporter did not take the trouble to check on the information before publishing it? Would it merely introduce into defamation concepts drawn from the law of negligence, and perhaps expand and confuse the existing liability for negligent statements? Would it arm the verandah gossipers with a new defence for the circulation of false and defamatory statements on the score that the more eminent the person who was the subject matter of the rumour the greater the "public interest" in it, and so the privilege?

Webb's case is, with respect, justifiable as a case in which the learned judge held that the importance of the subject matter was such as to confer a "common interest" between publisher and the English reading public. The subject matter does not seem to be of the same importance as the state of the navy (Henwood v. Harrison), the state of the army (Adam v. Ward) or integrity in the Cabinet (Perera's case), but the incidental or accidental light thrown on the trial of an important murder case some years before is arguably a matter of "public interest" so important as to itself create the necessary common interest between publisher and reader to justify privilege. Yet, assuming the innocence of the plaintiff Mrs. Webb, one cannot but have some sympathy with her predicament: having made a bad marriage to a self confessed murderer, for how much longer is she to be humiliated and embarrassed by the casual remarks he may choose to make at any time or occasion?

In my opinion Webb's case does not support the extended proposition for which Mr. Williams cites it. I do not think that the unfortunate "squabble" between counsel and a police corporal as to the latter's view of the Road Traffic Law is on par with the "public interest" topics suggested as being of sufficient importance

to create a common interest between publisher and reader. It seems to me that the true view of the state of the law is correctly expressed in the following passage taken from Fleming on the Law of Torts (4th Edition 1971) at page 499:

> "4. Public Interest.
>
> A defamatory publication has no claim to privilege merely because it deals with a matter of public interest. True, all privilege is based on the publication being 'in the public interest'. But from this (it) does not follow that publication of all matters of public interest is in the public interest. In contrast to American law, our own has steadfastly declined to sacrifice individual reputation to extravagant demands by the press for privileged dissemination of so-called "news".
>
> Discussion of public affairs is sufficiently encouraged by offering... a defence for fair, if defamatory, comment upon true facts, without going to the length of also condoning the dissemination of false defamatory facts."

Fleming cites a number of cases in support of the passage above, and these are also relied on in the 17th Edition of Salmond on Torts (1977) which has a similar passage at page 177: "Newspapers in no special position." These cases were cited to us by Mr. Daley for the plaintiff for the proposition that privilege did not attach in these circumstances, and I turn to look at them.

In Truth (N.Z.) Ltd. v. Holloway (1960) N.Z.L.R. 69 (N.Z.C.A.) it appears that the defendant newspaper was conducting "investigative journalism" in respect of the grant of import licences to import goods from certain "iron and bamboo curtain" countries, and in the course of this series of four articles they published the remark of an importer that they had interviewed, "See Phil and Phil would fix it." This was a reference to the Hon. Philip N. Holloway, the Minister of Industries and Commerce. He sued for libel on the ground that the remark meant and was understood to mean that he as Minister was prepared to act dishonestly in connection with the issue of import licences.

The defence set up privilege; based on Perera's case they argued that in view of the importance of the subject matter, the system of granting import licences, privilege attached to incidental defamation, as the grant of such licences affected the lives of everyone in New Zealand, and so created a common interest between publisher and readers. The New Zealand Court of Appeal did not accept the argument. Of Perera's case they said, at page 82 (North, J.).

> "In our opinion Perera's case did not break new ground. What it did do was to emphasize that the mere fact that a particular case could not be fitted into an existing category did not mean that the publication was not privileged: that the wide general principle which underlay all the cases was whether the publication was necessary for the common convenience and welfare of society."

The judgment continued at page 83:

> "But, in our opinion, the argument presented... looses sight of the distinction which requires to be drawn between different functions performed by newspapers. One function is to provide its readers with fair and accurate reports of proceedings, judicial and otherwise and of public meetings and the like. In this field, clearly, there is room for the application of the principles applied in Perera's case, and indeed the Defamation Act, 1954 and its earlier English counter part gives statutory recognition to the right of a newspaper to carry out this task .....
>
> Another function performed by a newspaper is to provide its readers with news, and even gossip, concerning current events and people. It would not, we think, be an overstatement to say that some newspapers in particular acquire and hold their circulation by emphasizing this aspect of journalism. In this second field, in our opinion, there is no principle of law, and certainly no case that we know of, which may be invoked in support of the contention that a newspaper can claim privilege if it publishes a defamatory statement of fact about an individual merely because the general topic developed in the article is a matter of public interest. .....
>
> ..... it seems to us manifest that a journalist who obtains information reflecting on a public man or a public officer has no more right than any other private citizen to publish his assertions to the world at large. His only

> right is to approach whoever is in authority over the person concerned, and, if he proceeds decorously in this way he will be protected: Harrison v. Bush. .....
>
> In what we have described as the second field, we think the decision in Perera's case cannot be relied upon as affording privilege to a newspaper merely because the defamatory statement is made in the course of dealing with a topic of general public interest....."

The judgment referred to Arnold v. King Emperor (1914) 30 T.L.R. 462 at 468 (the passage cited by Carey, J.A.) and to Davis v. Shepstone (supra) and held that the occasion was not privileged.

The defendants appealed to the Privy Council, but not on the ground of privilege: their appeal failed: see (1960) 1 W.L.R. 997 (P.C.). The approach of North, J. and the New Zealand Court of Appeal seems to me both interesting and correct, and leads to the same position indicated earlier.

Globe & Mail Ltd. v. Boland (1960) 22 Dom.L.R. (2D) 277; (1960) S.C.R. 203 was an "election campaign" case. The Newspaper in an editorial attacked the character of a candidate in the Federal elections. The Supreme Court of Canada decided that the campaign did not declare an "open season" on candidates and give to newspapers the privilege of defaming them. Newspapers were sufficiently protected by the defence of fair comment, without extending to them the privilege of publishing false and defamatory facts about candidates.

Banks v. Globe and Mail Ltd. (1961) 28 Dom. L.R. (2D) 343; (1961) S.C.R. 474 was another decision by the Supreme Court of Canada. In this case the newspaper published an attack on the plaintiff, a trade union leader whose union was then engaged in an unpopular strike, and in it suggested that he had a criminal record in the United States. The defence of qualified privilege once again failed. The fact that the strike was a matter of public interest did not give to the newspaper the right to publish false and defamatory

facts about the strike leader involved: following Arnold v. King Emperor (supra) and Globe & Mail Ltd. v. Boland, (supra).

In Dunford Publicity Studios Ltd. v. News Media (1971) N.Z.L.R. 961 an interesting position developed. The Minister of Transport in New Zealand was persuaded to lend his official blessing to a road safety campaign. It turned out that the promoters were not as disinterested as he thought, and that it involved the commercial sales of Christmas cards. The Minister on this discovery made a statement and withdrew his patronage, and this was published by the defendant in their paper. They went further however, and published follow up material which was defamatory. Sued for libel they set up qualified privilege. Held, that the defence succeeded as to the article publishing the Minister's withdrawal of patronage, they (and the Minister) had a duty to publish the Minister's statement, properly made when he found he had been misled into supporting a private commercial venture. That privilege did not however extend to the subsequent article.

A further example of the limits of privilege occurred in Brooks v. Muldoon (1973) N.Z.L.R. 1. The New Zealand Parliament had passed legislation setting up new conciliation machinery for the resolution of industrial disputes, which involved the appointment of a chief mediator. The government set up a committee to advise them on who should be appointed. The committee after considering several applications, themselves invited the plaintiff to apply and recommended him highly for the post. The Government however was for reasons of its own unwilling to appoint him. The defendant, then Minister of Finance, pressed in the House to give reasons was then content to "spar". Under subsequent pressure from the news media however he gave interviews outside of Parliament stating inter alia some reasons why the Government had not appointed plaintiff. Some of those reasons involved false statements of fact that were injurious to plaintiff's reputation. He sued the Minister of Finance and succeeded. No

complaint could be made of the Minister's parliamentary answer: he was under a duty to answer, and had parliamentary immunity. Not so however his subsequent interviews. There was no such proper "public interest" as opposed to natural curiosity to justify him in giving reasons for the non-appointment of a civil servant, and where the reasons advanced were false and defamatory liability in libel followed.

For the reasons indicated above and on a consideration of the cases that have been referred to I am of opinion that the claim for privilege put forward on the part of the defendant newspaper here fails. The judgment as to liability therefore stands.

This brings me now to the question of damages: As to the the approach of an appellate Court to appeals with respect to the damages awarded by a judge sitting alone I think it would be useful to make reference to some of the cases in the United Kingdom and in Jamaica on this point.

In Flint v. Lovell (1935) 1 K.B. 354 (C.A.) (a case on personal injuries and loss of expectation of life, tried by a judge sitting alone) Greer L.J. said, in a passage often quoted, at pages 359-360.

> "I should like to add a few words about the jurisdiction of this Court in appeals where the only contention, or one of the contentions, is that the damages awarded by a judge hearing a case without a jury are excessive. It is not possible to say that the tests which have been laid down in cases like Phillips v. London & South Western Railway Co. ((1879) 5 C.P.D. 280) apply to an appeal from a judge trying a case without a jury, because an appeal is a rehearing by the Court with regard to all the questions involved in the action, including the question what damages ought to be awarded, but though the established rules with regard to the decisions of juries do not apply to appeals from the decisions of judges trying cases without the assistance of a jury, I think it right to say that this Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would

> have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. ....."
> (emphasis supplied).

In Owen v. Sykes (1936) 1 K.B. 192 (C.A.) (another personal injuries case with an appeal from the damages awarded by a judge sitting alone) Greer, L.J. at page 198 repeated the passage above, and Slesser, L.J. at page 199, (distinguishing Watt v. Watt (1905) A.C. 115), observed:

> "In the case of trials by a judge alone this Court has power, as the hearing is by way of rehearing, to consider the matter and decide what damages ought to be awarded."
> (emphasis supplied)

He then went on to accept as a criterion the dictum of Greer, L.J. in Flint v. Lovell (ante).

In Davies v. Powell Duffryn Assocd. Collieries Ltd. (1942) A.C. (H.L.) 601 (Fatal Accident claim, appeal from award by Judge) Lord Wright reviewed the principles applicable to both jury awards and awards made by a Judge, and as to the latter he said, at pages (616-617):

> "Where, however, the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer L.J. in Flint v. Lovell (ante).
>
> In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered.

> It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."
>
> (emphasis supplied).

Lord Porter said much the same thing in his judgment at page 623-624 after citing Owen v. Sykes (ante), and see also Lord Russell of Killowen at page 608.

These principles have been adopted and approved by the Judicial Committee of the Privy Council: see Nance v. British Columbia Electric Railway (1951) A.C. 601, at 613 where Viscount Simon after citing Flint v. Lovell (ante) and Davies v. Powell Duffryn Collieries (ante) in a personal injuries case, (on appeal from Canada) said:-

> "Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking account of some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. ...."

See too Singh (an infant) v. Toorg Fong Omnibus Co. Ltd. (1964) 3 All E.R. 925 (P.C.) (an appeal from Malaysia in a personal injuries case where damages were assessed by a judge alone).

These decisions have been adopted and followed by this Court of Appeal, as the following cases show:

Bailey v. Gore Bros. Ltd. (1963) 6 W.I.R. 23 (actually an appeal from a Jury's award in a personal injuries case, where inter alia, Davies v. Powell Duffryn Collieries Ltd. (ante), and Nance v. British Columbia Railway were cited, and in particular Scott v. Musial (1959) 2 Q.B. 429; (1959) 3 All E.R. 193).

Plummer and Graham v. Lewis (1967) 10 J.L.R. 107 (Appeal from Registrar's assessment in a personal injuries case: follows Davies v. Powell Duffryn Collieries Ltd. (ante)).

Robinson & Co. Ltd. and Jackson v. Lawrence (1969) 11 J.L.R. 450, follows the dictum of Greer L.J. in Flint v. Lovell (ante) in an appeal from the award of a judge in a personal injuries case.

See also Priestly v. Forbes (1974) 12 J.L.R. 1479; 21 W.I.R. 450, an appeal from a judge's assessment in a personal injury case, where the award was substantially increased, this Court following the Privy Council decision in Singh v. Toong Fong Omnibus Co. Ltd. (ante).

To return for a moment to the English decisions, in Kerry v. Carter (1969) 3 All E.R. 733, (C.A.) Lord Denning M.R. at page 726 rather widened the circumstances in which a Court of Appeal will review an assessment by a judge. He said at page 726 E:

> "This court adopts in regard to apportionment the same attitude as it does to damages. We will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts; but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong. After all, the function of this court is to be a court of appeal. We are here to put right that which has gone wrong. If we think that the judge below was wrong, then we ought to say so, and alter the apportionment accordingly."
>
> (emphasis supplied).

In Redburn v. Kemp (1971) 3 All E.R. 249 (C.A.) Edmund Davies L.J. at page 253 reviewing the award made for personal injuries in that case, said at page 253 h:

> "It is said by counsel that the sum awarded was nevertheless entirely adequate compensation for the injuries sustained. He had reminded us of those authorities of this court in relation to interference with awards of damage; and we have in turn had our attention drawn by counsel for the plaintiff to the judgment of Lord Denning M.R. in Kerry v. Carter (ante) to the effect that the apportionment of damages stands on the same basis as damages themselves - in other words, that if this court thinks that they are radically wrong, then it ought to interfere even though the error cannot be pinpointed." (emphasis supplied).

Both Kerry v. Carter and Redburn v. Kemp are cited for the following proposition in 4th Edition Halsbury, (1975) Vol 12 Damages: paragraph 1207: Appeal from award by judge alone.

> "..... but, if the appeal court thinks the damages are radically wrong it ought to interfere even though the error cannot be pinpointed."

The principles that have been referred to above have been applied not only to personal injury cases in which damages have been assessed by a judge sitting alone, but have been applied to cases of defamation, though these are more uncommon, because until recently plaintiffs usually exercised their right to have a jury. Examples of defamation cases in which they have been applied are:

Bull v. Vasquez (1947) 1 All E.R. 334: an appeal in a slander case heard by Charles J. in which the plaintiff had been awarded £1,000 for words reflecting on him in his profession as a soldier (that he had been sent back from the front not for being wounded but for drinking too much). There the Court of Appeal refused to interfere with the damages, citing Flint v. Lovell, (ante), not being satisfied that the judge had erred or acted on any wrong principle. The damages were on the high side, but the slander was thought to be a "peculiarly wicked one."

Dingle v. Associated Newspapers Ltd. sub nom. Associated Newspapers Ltd. v. Dingle (1964) A.C. 371; (1962) 2 All E.R. 737 (H.L.) is another such case, and one that has in it certain common features with our instant case. In Dingle's case, the plaintiff, the Town Clerk of Manchester, was concerned with the Manchester Corporation's plans to acquire certain property, then used as a cemetery, from its owners. In the course of these negotiations he made to the then shareholders an offer for their shares, which most accepted. However when the Corporation's private Bill involving this acquisition came before Parliament, the Select Committee to whom it was referred reported to Parliament in most unfavourable terms on Mr. Dingle's efforts to get in the shares of the cemetery company,

in effect accusing him of deceiving the shareholders on the value of the property, and in such terms that he appeared guilty not merely of "sharp and unethical practice" but possibly of fraud. This made "news". The defendants (along with other national newspapers) published extracts from this report. They went further: in a second article they interviewed the representatives of the cemetery company and published further material, which was false, purporting to give supporting background material showing alleged undervalue et cetera. In course of time the Attorney General in Parliament advised that certain evidence given by the Board of Trade to the Select Committee had been misunderstood, and he indicated that Mr. Dingle was not guilty of fraud. This was duly published by the defendants, but it left untouched the suggestions of sharp practice falling short of fraud, and as to this no apology or retraction was ever offered. Mr. Dingle sued for libel, in respect of the second article. His action was heard before Pearson, J. sitting alone. The judge awarded him damages in the sum of £1,100. See (1960) 1 All E.R.294./ The plaintiff appealed to the Court of Appeal claiming that this sum was too low and that the judge had made certain errors of principle in making the award. The details of these do not concern us in this case: they included inter alia treating the publication of the Attorney General's remarks in Parliament as a complete vindication (it was not), and treating the fact that other papers had published similar accounts of the Parliamentary Report as mitigating the damages due from this particular defendant. The Court of Appeal <u>increased</u> the damages awarded by Pearson, J. from £1,100 to £4,000 acting on the principles of <u>Davies v. Powell Duffryn Collieries</u> (ante) and <u>Nance v. British Columbia Electric Railway Co.</u> (ante), see Sellers, L.J. at pages 908-909 of the Court of Appeal Report (1961) 1 All E.R. 897; (1961) 2 Q.B. 162 at page 177.

The defendants appealed to the House of Lords: see (1964) A.C. 371; (1962) 2 All E.R. 737. The House of Lords dismissed their appeal and affirmed the increase made by the Court of Appeal.

Apart from its application of the principles governing the review of the trial judge's award of damages in a libel action, what is of some interest to our present case is that there, as here, a large section of the libellous article could not be sued upon at all: in Dingle's case this was due to the privilege attaching to Parliamentary Reports and the publication of extracts from them: as to this see Lord Denning at page 407; and Lord Radcliffe at page 389, and again at page 394 where he observes:

> "Next the judge had to eliminate that part of the article that consisted of extracts from the select committe's report, since under the Act of 1840 (Parliamentary Papers Act, 1840) such extracts could not in law be treated as a libel. Having done all this, he had to ascertain and measure what was the actionable defamation and assess a figure of damages in relation to the injury it had caused."

I pause here to note that Marsh, J. in the instant case would have had a similar duty to perform. The first paragraph of the article in this case, stating that the plaintiff had been charged with obstructing the police, resisting arrest et cetera and was to answer these charges, was true: he had been charged. It would be necessary in assessing damages to limit the exercise only to that damage caused by the second paragraph, the one which was in fact the subject of the libel action, and it would be necessary to remember that in considering the impact of the whole upon the plaintiff's reputation and the damage that he suffered, that which was caused by the first paragraph must be so to speak deducted: and only that due to the second paragraph, by itself, was due for compensation, (for the plaintiff did not adopt the approach in English and Scottish Co-operative Properties etc. Ltd. v. Odhams Press Ltd. (see ante)).

Returning to Dingle's case, Lord Radcliffe at page 393 reviews and applies to this libel case the familiar concepts of Davies v. Powell Duffryn Collieries Ltd. and Nance v. British Columbia Electric Railway Ltd. (ante). See also Lord Cohen at page 404.

In Dingle's case the Court of Appeal increased the award made by the trial judge in that libel action: In Fielding v. Variety Incorporated (1967) 2 Q.B. 841 (C.A.) that court reduced the damages assessed by the Master in a libel action, which also had a complaint of injurious falsehood: the damages were reduced from £5,000 to £1,500 (and from £10,000 to £100 for the injurous falsehood). The plaintiff had produced highly successful play called "Charlie Girl" (still running at the time of trial some few years later), but in a magazine which enjoyed a circulation amongst the cognoscenti in theatrical circles on both sides of the Atlantic, the defendant dismissed it casually in a three line review as a "disastrous flop." The plaintiff complained that this review had impaired his chances of taking the play over to America. It had also reflected on plaintiff's competence as an impressario. At page 850, after reducing the damages for injurious falsehood from £10,000 to £100 (actual pecuniary loss estimated), Lord Denning turned to the claim for libel and said:

> "I must now consider the claim for libel. By describing "Charlie Girl" as a "disastrous flop", the defendants reflected on Mr. Fielding's competence. The damages here are at large. They are not confined to pecuniary damage. At one time in the case of libel it was the understanding of all of us that a jury (or a judge, if it was tried by a judge) could mark the disapproval of the court by awarding exemplary or punitive damages.
>
> But the House of Lords, in Rookes v. Barnard, in a speech delivered by Lord Devlin, ((1964) A.C. 1129 at 1221) in which the other Lords concurred, have told us that we must not give damages of an exemplary or punitive nature. ...."

Lord Denning went on to refer to the Australian case of Uren v. John Fairfax Ltd. (in which the High Court of Australia refused to follow Rookes v. Barnard), and then to McCarey v. Associated Newspapers Ltd. (1965) 2 Q.B. 86 which did follow Rookes v. Barnard, and observed that the motives and conduct of the defendant could be taken into account in as much as it aggravated the injury to the plaintiff's feelings: having taken that into consideration he held that the award of £5,000 was in the traditional words "a wholly erroneous estimate", and the court after consultation substituted the sum of £1,500.

It is of interest to note that though in Fielding's case Lord Denning dutifully followed Rookes v. Barnard, he attempted to distinguish or "overrule" it in the Court of Appeal in Cassell & Co. Ltd. v. Broome (1971) 2 Q.B. 354; (1971) 2 All E.R. 187, and was duly reproved by the House of Lords: (1972) A.C. 1027; (1972) All E.R. 801.

It is clear then what are the principles which the Court of Appeal applies in reviewing the award of damages made by a judge sitting alone. It is in general reluctant to do so unless it comes to the conclusion that the judge has acted on some wrong principle of law, as by taking into account some irrelevant factor or leaving out of account some relevant one, or has misapprehended the facts, or made a wholly erroneous estimate of the damage suffered. Further if the appeal court thinks the damages are radically wrong it ought to interfere even if the error cannot te pinpointed.

Having reviewed the authorities above, I have come to the conclusion that the damages awarded in this case for this libel are a wholly erroneous estimate and that the award of $24,000 damages cannot stand. I have come to the conclusion that the learned trial judge mistook the principles on which damages are now awarded in libel actions, that he also in part misapprehended the facts, and that the award is completely out of line with comparable awards in this jurisdiction, and possibly in the West Indies, and the United Kingdom.

To deal with the facts first:

The learned judge observes that the defendant failed to answer the plaintiff's attorney's letter, Exhibit 2, pointing out that the article was inaccurate and demanding an apology. He states that:

> "The defendant's response was one of complete indifference and silence. No attempt was made to obtain the plaintiff's version of events with a view to publishing it. No apology was ever offered or published, nor was any suggestion made that the defendant did not consider any apology necessary, or appropriate in the circumstances of the case. In fact, the defendant failed to even acknowledge receipt of the plaintiff's letter."

He went on to note that the defendant had offered a plea of justification; but had then failed to call the police witnesses of the original incident, and he concludes: "I can only describe the behaviour of the defendant in this case as replusively arrogant and irresponsible."

With respect, this is too simplistic a view of the matter. It fails to come to grips with the complexity of the affair.

The plaintiff's letter, Exhibit 2, dated two days after the article in the Star, stated:

> "This article which purports to be truthful is in fact quite inaccurate and is highly defamatory of my client. .....
>
> I write therefore to ask you to publish in the next issue of your newspaper a full and complete withdrawal of the article under reference and an apology to Mr. Small in terms to be approved by me on his behalf....."

The letter then requested legal costs and asked "to know what sum you are prepared to pay Mr. Small for the very severe injury which his reputation has suffered without cause because of your publication."

It should be noted that no indication was given of the respects in which the article was "quite inaccurate." In point of fact the whole of the first paragraph was accurate: there had been an incident, and the plaintiff had been charged and did appear in court

and answer to these charges. That alone had no doubt caused severe damage to the plaintiff's reputation, but it was not due to any fault of the defendant. What was the "complete withdrawal" to cover? Should it cover the fact of the charges having been preferred? It was true that they had: and had the paper been content to publish merely an account of the plaintiff's court appearance on those charges, there could have been no cause of complaint. Their "sin" was to publish a resume of the police version of the matter, but at that stage they had no way of knowing whether it was true; they could have enquired from the plaintiff what his version of the incident was, but had this been supplied and published, they would still not know which was the truth or not. I should think that they were in a quandry, that they did not know what to do, and in that situation decided to do nothing. They may have been waiting to see what would ultimately happen in the case. If in fact they called no evidence, no police evidence, at the trial of this action, it must I think be presumed that they had accepted that that version was untennable. They were at fault in having published it originally, they could have behaved more "handsomely," and it would have been prudent to do so, but, with great respect, I don't agree that their conduct can be termed "repulsively arrogant and irresponsible." To do so is to misread the situation. The plaintiff's letter with its demand for damages to be paid to Mr. Small, with no indication of what for, or how much, was hardly calculated to produce an amicable or productive exchange. The defendant was at fault in publishing the "police version", and for that they must pay damages, but those damages must be calculated after eliminating that part of the article which was justified and was true. I can see nothing to indicate that the learned trial judge ever addressed his mind to this aspect of the matter, and of course he did not have the benefit of having Dingle's case brought to his attention, or for that matter English and Scottish Cooperative Properties etc. (false profit charge), or Lewis v. Daily Telegraph (Fraud Squad probe firm).

There is one remarkable evidential gap in this case: the plaintiff was tried on these charges, and as we understand acquitted: did the defendant ever publish any news item on the actual trial? The absence of any information on this leaves a number of questions unanswered. Such a report might have been some mitigation of damage: it might for ought we know have been an aggravation. I think, that as in Dingle's case it might have had some effect, though probably it would not have significantly affected the amount of damages for the actual libel here.

In the event then, though the defendant could and should have behaved better or more handsomely, I have been unable to come to the conclusion that there was present in this case factors which should be considered as significantly giving rise to aggravated damages, added hurt to the plaintiff's feelings which should be reflected in the damages to be awarded to him. After all the real occasion of the plaintiff's humiliation was apparently the conduct of the police, and though the common law has no love for "tale bearers" this fact should not be forgotten.

Has the learned trial judge erred on any principle of Law? I am of opinion that he has: what he has failed to do is to take into account the effect which two cases have had on the law of damages, in general, and in respect to defamation in particular. The two cases are Rookes v. Barnard (1964) A.C. 1129, as to exemplary damages, and Cassell & Co. Ltd. v. Broome (1972) A.C. 1027 as to the proper approach to the problem of assessing damages in libel actions. Unfortunately, neither case was cited to him. Indeed they were not cited to us either.

The only real indications of the thought process of the learned trial judge lies in the citation of three cases, cited to him, and referred to in his judgment:

Praed v. Graham (1889) 24 Q.B.D. 53 (often cited on upsetting the award of a jury in a libel case, and used here to show that the court is entitled to consider the total conduct of the

defendant); Smith v. Harrison (1856) 1 F & F 565 (delay by a newspaper in publishing a correction of an entirely erroneous news items which it had published, may affect damages); Ley v. Hamilton (1935) 1153 L.T. 384, with Lord Atkin's dictum at page 386 to the effect that damages are at large. "It is precisely because the "real" damage cannot be ascertained and established that the damages are at large....." This dictum, relied on by the Court of Appeal in its "revolt" in Cassell & Co. Ltd. v. Broome, was exhaustively analysed in the House of Lords and is not now authority for the award of exemplary damages in defamation generally; see Lord Hailsham at pages 1072 and 1075; Lord Reid at pages 1072-1073; (but Viscount Dilhorne, (dissenting) found the dictum in Ley v. Hamilton irreconcilable with Rookes v. Bernard).

Judging from the size of the award it is clear that what the learned trial judge did in this case was to follow the old practice set out in the quotation from Lord Denning's judgment in Fielding v. Variety Incorporated quoted earlier:

> "At one time in the case of libel it was the understanding of all of us that a jury (or a judge, if it was tried by a judge) could mark the disapproval of the court by awarding exemplary or punitive damages. ....."

This is wrong, as Lord Denning himself admitted there, and as Cassell's case clearly established later.

I will examine Cassell's case hereafter, but by way of preface, regardless of whether one personally agrees with the House of Lords' view in Rookes v. Barnard and Cassell's case, or prefers the Australian view in Uren v. John Fairfax & Sons Pty Ltd. (1966) 117 C.L.R. 118, and Australian Consolidated Press v. Uren (1966) 117 C.L.R. 185 and (1969) 1 A.C. 590; (1967) 3 All E.R. 523 (Privy Council: refusing to impose Rookes v. Barnard on Australian Courts) - our Jamaica Court of Appeal in Douglas v. Bowen (1974) 12 J.L.R. 1544; 22 W.I.R. 333, in a fully argued and considered judgment decided, by a majority, to follow Rookes v. Barnard and Cassell's case: (Perkins J.A. dissenting).

It should be noted that there had been even before Cassell's case a series of cases in which the English Court of Appeal had applied the principles of Rookes v. Barnard, restricting the award of exemplary damages to the two particular types of case or situation indicated by Lord Devlin. These cases were approved by the House of Lords in Cassell's case. They are:

McCarey v. Associated Newspapers Ltd. (1965) 2 Q.B. 86; (1964) 3 All E.R. 947 (C.A.) was a case in which a Doctor, whose patient had died on the operation table as a result of an injection that he gave, sued a newspaper which published an account of the ensuing Coroner's Inquest, and in it had published a passage in which the Coroner was purported to be taxing the doctor with trying to shelve his own responsibility by blaming the assisting nurse. This particular part of the report was held to be inaccurate, and so not privileged, and a generous jury awarded £9,000. The Court of Appeal had no difficulty in setting aside that award. It was pointed out that the true measure of damage for libel was compensatory. No actual loss had been established. Exemplary damages did not arise, and the award of £9,000 was so excessive that the jury must have included either an element of punishment of the defendants or of bounty for the plaintiff. Pearson, L.J. at page 104 usefully sets out the areas of compensatory damage that may be awarded in a libel action today. See also the passage by Lord Diplock at pages 107-108.

It must be pointed out that this court has in fact adopted the reasoning in McCarey's case, in our own case of Ying v. Richards (1972) 12 J.L.R. 754, a case in which a Doctor sued for slander the manager of a nearby estate who told two workers who had reported sick, armed with the Doctor's medical certificate, that they should not have gone to that gangster Doctor, he is no good and no one recognizes him, with the result that they went back to the Doctor, repeated what had been told them in front of his patients, nurse et

cetera in his office, and demanded return of their fees for the certificate. This court, following Diplock L.J.'s dictum in McCarey's case, reduced the damages awarded to the Doctor of $600 for each of the two slanders to $250 each, observing that the injured plaintiff was entitled only to compensatory damages, and that the award of exemplary damages is (usually) not permissible in defamation cases. There was no evidence that the plaintiff's professional practice had diminished, or that he suffered any other pecuniary loss. There was no evidence that the attitudes of people with whom he came in contact had altered as a result of the slanders, nor any real evidence of his feelings having been hurt et cetera. (See generally the judgment of Smith, J.A. in whose judgment Graham-Perkins and Fox, JJ.A. concurred).

In Broadway Approvals Ltd. v. Odhams Press (1965) 2 All E.R. 523 (C.A.) (the postage stamp dealers case): the English Court of Appeal again followed Rookes v. Barnard. Here the defendant had published an article critical of the plaintiff's mode of conducting business by sending expensive packets of stamps to children on approval, and then threatening them with solicitor's letters if they delayed in paying for them or returning them. Awards by the jury of £5,000 and £10,000 were set aside, applying the principles of Rookes v. Bernard and of McCarey's case, (ante): Sellers L.J. at page 536 H said:

> "It is now established that compensation is the normal basis for damages for defamation and that punitive or exemplary damages should only be awarded in the case of a defendant who profited from his own wrong-doing in publishing the defamation. ...."

He added that newspapers though publishing news for profit, did not normally fall into Lord Devlin's category of those who publish for profit.

Once again it must be pointed out that this court has in fact specifically considered and approved and followed Broadway Approvals Ltd. in another local case United Printers Ltd. v. Hector Bernard (1967) 10 J.L.R. 135; 11 W.I.R. 269. Here the plaintiff had

sued the defendants, printers of a magazine "New Day" and the editor and author, Mr. Evon Blake, for publishing a news item about plaintiff's failure to obtain the post of manager of the Jamaica Broadcasting Corporation when it suddenly became vacant, though the (plaintiff) had been next in line. The article reflected on plaintiff's competence as a journalist and wounded his feelings. It was untrue and defamatory. The trial judge awarded the plaintiff £4,000 damages. The Court of Appeal (Duffus P. Waddington and Eccleston JJ.A.) reduced the award to £500, citing McCarey's case, Rookes v. Barnard and Broadway Approvals Ltd., observing that there was no real evidence of pecuniary loss, and little real cause for personal hurt on the part of the plaintiff.

It should also be noted that in Scott v. Wilkie (1970) 12 J.L.R. 200 this court once more endorsed and followed Rookes v. Barnard, in an assault case brought by a patron of a public beach who was bullied and beaten by the parish council's appointed lifeguard. The court, while approving the actual award of £47 held that this was not a case for exemplary damages, the defendant's acts not falling within the first category or "Oppressive, arbitrary, or unconstitutional acts by government servants."

I should observe, in passing, that though Rookes v. Barnard had been cited, and some of its U.K. Court of Appeal derivatives cited and approved in the Jamaican Court of Appeal cases mentioned above, viz. Powell v. Stewart (1967), Scott v. Wilkie (1970), Ying v. Richards (1972) and United Printers v. Bernard (1967), none of these cases was in fact cited when the Court of Appeal in Douglas v. Bowen (1974) considered, de novo, whether Jamaica should follow Rookes v. Barnard or not. It is possible that this is due to the fact that there was such delay in printing the Jamaica Law Reports, that it was only comparatively recently that we received in one "rush" Volumes 9 to 13 J.L.R. reporting cases dating from as far back as 1964. I might also perhaps add that while Douglas v. Bowen re-affirms the applicability of Rookes v. Barnard and Cassell's case to Jamaica, it is by no means

clear why the plaintiff in that case failed to recover her exemplary damages on the ground of the second category of Lord Devlin, i.e. where the defendant's conduct has been calculated to make a profit for himself even allowing for the risk of the plaintiff suing him in respect of it: compare Valentine v. Rampersad (1970) 17 W.I.R. 12 where the Trinidad Court of Appeal allowed a tenant protected by the Rent Acts to recover exemplary damages following on harassment and eviction by the landlord.

Turning now to Cassell & Co. Ltd. v. Broome (1972) A.C. 1027, here the House of Lords had occasion to reconsider the general principles of Rookes v. Barnard and its restriction of the award of exemplary damages (or punitive damages) to the two exceptional cases indicated by Lord Devlin (with a third to cover possible cases of express statutory exceptions, if any), and the application of those principles to the award of damages in defamation actions. The House re-affirmed the limitation of exemplary damages to the two situations indicated in Rookes v. Barnard, though it held that in the peculiar circumstances of this case the plaintiff was entitled to retain the exemplary damages awarded to him by the jury, and that (by a majority) the trial judge had adequately instructed them on that and other issues.

It is not perhaps easy to summarize the effect of the seven speeches in Cassell's case, but the main propositions that are relevant to our own case emerge clearly from the 5 to 2 majority; such differences as existed turned largely on the question of whether the trial judge had in fact directed the jury adequately as to the applicable law. The majority decided that he had. Apart from Viscount Dilhorne and Lord Wilberforce there was no serious issue as to what the principles of the law should be or were and I attempt to summarize them in so far as they affect the instant case. Omitting the problem of joint publishers the net results of Rookes v. Barnard and Cassell & Co. Ltd. v. Broome appear to be:

(1) The object of damages in the law of torts generally, and in the law relating to defamation in particular, is to compensate the plaintiff for the injury that he has received, not to punish the defendant for any offence he has committed. (Punishment belongs to the criminal law).

(2) In the result exemplary or punitive damages ought not to be awarded in actions in tort (or contract).

(3) There were however certain cases in which the award of such damages had been permitted by the common law for so long a period that they had to be recognized or accepted as exceptions, or anomalies not covered by the basic rule that damages are compensatory only.

(4) Following on Lord Devlin's analysis of these cases, these exceptions were narrowed down to two or possibly three categories:

(a) cases of oppressive, arbitrary or unconstitutional conduct by government servants;

(b) cases where the defendant's conduct had been calculated to make a profit for himself which probably would exceed any liability in damages that he might incur to the plaintiff;

(c) cases, if any, in which the recovery of exemplary damages had been authorized by statute law.

(5) The categorizing of the exceptions in paragraph 4 above was not meant to extend their range, or the range of torts to which the exceptions could be applied.

(6) The boundaries or limits of the exceptions in paragraph 4 remain to be worked out:

as to (a): it is not necessarily limited to government servants in the narrow sense of the word; it can conceivably be extended to persons having or exercising governmental authority, and just possibly to corporations so large or powerful as to be considered to be endowed with "state authority."

as to (b): it is not necessary to show that a defendant actually made this mathematical calculation: (such evidence might be impossible to obtain). It would be enough to show from the nature of the situation and the defendant's knowledge that it is a reasonable inference from the evidence that he did so.

It might for example cover the case of a landlord harassing a tenant protected by the Rent Acts so as to secure possession in order to embark on new development on the land.

7. Where damages are awarded as compensatory, it is realized that compensation may have to cover both pecuniary and non-pecuniary loss, or loss that is subjective and not easily measured in money terms.

8. In some of these cases the courts have fixed nominal or arbitrary limits to measure the immeasurable: e.g. for loss of expectation of life. (See Benham v. Gambling (1941) A.C. 157).

9. In most other cases the attempt to measure subjective loss still has to be made.

10. In cases of defamation the true measure of damages is compensatory only: exemplary or punitive damages can be recovered only in the rare cases falling under paragraph 4.

Primarily what is recoverable by the plaintiff is:

(a) actual pecuniary loss, and anticipated pecuniary loss;

(b) compensation for any social disadvantages that result or may result, caused by the changed attitude towards him of other people as a result of the defamation;

(c) compensation for injury to plaintiff's feelings, which may be increased by the high handed, oppresive or insulting behaviour of the defendant, which may affect the plaintiff's pride and self-confidence: (aggravated damages, but these are compensatory, not punitive. They are not intended to let in exemplary or punitive damages by the back door).

11. If exemplary damages are awarded under a case falling within clause 4, it is to be awarded only where the compensatory damages (including any aggravated damages awarded under 10(c)) are deemed inadequate: (they might for example still leave the defendant making a net profit as a result of his conduct). Such exemplary damages as are awarded should be moderate. If such damages are to be claimed, the plaintiff should specifically so plead, (though at the time of Cassell v. Broome pleading such damage was not mandatory).

12. Exemplary damages need not be separately awarded, though if awarded it may be desirable to indicate this.

13. So far as defamation and newspapers are concerned, seeing that they normally provide news items et cetera in the normal course of their business, they would not normally be regarded as falling under clause 4(b) above, unless perhaps the item was a "special" issue on its own, in which the intention to make a profit from the particular items - come what may - can be more readily seen and determined.

Having regard to the language employed by the learned trial judge in this case, I have come to the clear conclusion that he assessed damages on the old pre Rookes v. Barnard basis, and that he intended to award not merely compensatory damages but exemplary and punitive damages to mark displeasure with what he deemed to be behaviour of the defendant that was "repulsively arrogant and irresponsible."

In this case the plaintiff did not allege or prove any financial loss. Unfortunately, the publication caused him pain and embarrassment, but so did the original incident of his encounter with the police, and for this last the defendant in this action is not responsible. No evidence was given of any loss or falling off in the plaintiff's practice, and nothing to show any loss of, or social disadvantage.

In the course of the argument our attention was drawn to some recent awards by the courts in Jamaica: so far as the reported cases go, those that have been referred to earlier show awards that are such as to make the present award grossly excessive.

As to unreported cases, the most recent is Gleaner Co. v. Wright (S.C. Civil Appeal 29/1975; Privy Council Appeal 25/1979) where a jury awarded the sum of $2,000 damages to a plaintiff whose divorce had been featured in the Star, with his wife reported as saying that he had been treated by Dr. Cooke at Bellevue (the state run insane asylum) when in truth he had been treated by Dr. Cooke at St. Joseph's Hospital. There, the report in the Star had led to the plaintiff being embarrassed by co-workers referring to him as "mad man" and writing graffiti on the walls to this effect.

For these reasons I would dismiss the appeal against liability, but allow the appeal against damages, and would reduce the learned judge's award from $24,000 to $5,000. I think that $24,000 was a wholly erroneous estimate of the damage for which the plaintiff was to be compensated. It was due in part to a misunderstanding of the facts of the case, and perhaps even more to the learned judge having applied the old law as to the award of damages in libel actions, and having failed, because the cases were not brought to his attention, to realize the change that has taken place since Rookes v. Barnard in 1964 and eventually Cassell & Co. Ltd. v. Broome in 1972.

CAREY J.A.

The respondent in this appeal was arrested by a police officer in Half Way Tree and charged with obstructing the police, failing to give his name and resisting arrest. He is an attorney at law and a member of a well-known and distinguished legal family. His arrest was therefore news. It gained the popular evening paper "The Star" and was doubtless read by a great many people throughout the country. The respondent consulted his legal advisers who wrote the appellants demanding a withdrawal of the article, an apology, indemnity as to costs and compensation. They pointed out that the article was inaccurate and defamatory.

The appellants did not comply with any of these demands. Conceivably they considered the article neither inaccurate nor defamatory. When action was filed, they pleaded justification, among other defences but at the hearing they did not lead evidence in support. The learned judge described, in mordant terms, the conduct of the appellant as "repulsively arrogant and irresponsible." I do not, with respect, think that the conduct of the appellants justified those opprobrious epithets but I will deal with this aspect of the matter, at a later stage in this judgment, when I come to consider the question of damages.

The impugned article contained two stings; first as regards the words "You know who I am?" There it was alleged that the ordinary and natural meaning of these words was that the (respondent) "was a haughty, arrogant and conceited person who considered himself beyong the pale of the law and not subject to the legitimate authority of the police." The second sting was contained in the words "and while being taken to the station he allegedly made violent attempts to escape." The meaning ascribed was that the (respondent) "acted in a violent, undisciplined and unprincipled manner unbecoming of a person of his professional standing, it being consequently imputed that he was not fit and proper to be an attorney-at-law."

The test in determining whether words are capable of conveying a defamatory meaning is one of reasonableness. In Capital and Counties Bank v. George Henty & Sons (1882) 7 App. Cases 741 at p. 745, Lord Selborne L.C. said:

> "The test, according to the authorities, is, whether under the circumstances in which the writing was published, reasonable men to whom the publication was made, would be likely to understand it in a libellous sense."

In Jones v. Skelton (1963) 1 W.L.R. 1362 at p. 1370 Lord Morris said "In deciding whether words are capable of conveying a defamatory meaning the court will reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation." To the like effect dicta in Morris v. Sanders Universal Products (1954) 1 W.L.R. 67 at page 74:

> "The judge will construe the words according to the fair and natural meaning which would be given them by reasonable persons of ordinary intelligence and will not consider what persons setting themselves to work to deduce some unusual meaning, might succeed in extracting from them."

It is plain from these authorities that the judge must put himself in the place of a reasonable fair minded person to see whether the words suggest disparagement, that is, would injure the plaintiff's reputation, or would tend to make people think the worse of him. The trial judge came to the conclusion that the phrase "You know who I am?" would convey to the reasonable reader that the respondent "was arrogant and considered himself beyond the pale of the law and not subject to the legitimate authority of the police."

The argument pressed before us on behalf of the appellant was that the respondent was merely asserting his professional status as a lawyer advising his client against the giving of a statement to the police. The meaning attributed to the words by the learned judge was a strained and forced interpretation.

The phrase "You know who I am?" is a well-known Jamaican expression and I would not dissent from the learned judge's comment that "the expression is usually understood in an intimidatory sense, and as embodying strong undertones of social superiority and of familiarity with and access to the corridors of power and influence." But the words must, nevertheless, be construed in the context in which they appear. The article which gave rise to the action, dealt with the arrest of the respondent, and set out the circumstances in which the arrest took place. It was a factual statement in which it was reported that the respondent was advising his client not to give a statement, which, as an attorney, he had an undoubted right to do. The question (the sting) was asked in a situation where a lawyer was tendering proper advise and the police were holding fast to the contrary view, that no such right existed. Viewed in this light the report of the use of these words, with all respect to the opinion of Marsh J. as to their particular connotation, does rather suggest that the respondent was indicating his right as a lawyer to give advise. This approach respects the principle enunciated in Captial & Counties Bank v. Henty (supra) that reasonable men to whom the publication was made would more likely than not understand it in a libellous sense. This is not to deny the underlying hauteur which is the most conspicious factor, in the use of those particular words.

It is important to bear in mind that those words were not reported as express in a situation where the user had himself been treated with discourtesy or worse by the police. If it were the fact that those words were reported as uttered by the respondent after he had been arrested, for example, then the suggestion of "familiarity with, and access to the seats of power and influence" and the intimidatory factor, would be validly established and unchallengeable. On a fair construction of the words in the context in which they appear, I do not agree they convey the imputation as appears in the pleading.

The second sting concerns the imputation of conduct unbecoming an attorney. It was contended for the appellants that the respondent was entitled to resist an unlawful arrest and consequently a right thinking person would not consider the words as suggesting the imputation averred. The respondent's conduct was justified and to report that state of affairs could not be held to be disparaging of the respondent. I bear in mind that the authorities enjoin the judge against strained or forced interpretation. See Jones v. Skelton (1963) 1 W.L.R. 1370. I think this contention on behalf of the appellants would require the judge to do precisely what he is forbidden to do. The words which appear in the report are ordinary English words viz. "made violent attempts to escape," not that he resisted this arrest. The reasonable man in this country would, I have no hesitation in saying, interpret the words in the manner as pleaded. I do not therefore think that the Judge's finding in this regard can be successfully impugned.

In paragraph 5 of his statement of claim the respondent pleaded an innuendo meaning and this aspect of the appeal must now be considered. It was averred that the words "you know who I am" meant and were understood to mean that the (respondent) was a person who used his connections with persons who held high public offices to flout the law of the land and was threatening to bring political and other improper pressure to bear on the police so as to prevent the lawful execution of their duty. It follows of course that if the words in there plain and ordianry meaning were incapable of and did not mean that the respondent considered himself beyond the pale of the law and not subject to the legitimate authority of the police, then it is unlikely that the words would bear the special interpretation placed on them in the innuendo. The circumstances and context in which the words were reportedly used do not lend themselves to such a construction for the very reasons already indicated. The respondent was not "pulling rank" so to speak on his own behalf. He was insisting, it appears to me, on his right as an attorney to advise his client not to give a statement. I fail to see how connections in high places could assist the respondent in the particular circumstances in which he was situated. The matter

would readily be understood in the meaning of the innuendo if the report was that the respondent had used the precise words after being arrested.

The learned judge said on this aspect of the case:

> "I have no hesitation in holding that this phrase is capable of bearing the special defamatory meaning relied on by the (plaintiff) that is to say, that he was a person who would not scruple to use his connections with person of influence and power in the community to flout the law; and that he was threatening to bring political and other improper pressure to bear on the police."

With respect I do not agree with that conclusion. It seems to me to ignore the setting in which the words appear and to dwell on the popular view as to the effect and understanding of those words as a phrase in the Jamaican lexicon. In my judgment, to allow the conclusion at which the learned judge arrived to prevail is to pay no heed to the dictum already cited in Morris v. Sanders (supra) The judge must not consider what persons setting themselves to work to deduce some unusual meaning might succeed in extracting from them.

With regard to the question of qualified privilege the arrest of an attorney, especially one so highly connected as the respondent, was plainly newsworthy, and one in which the public had an interest. The learned judge found that the arrest of an attorney was a matter in which the public had an interest. He held however that the nature of subject matter of the words as argued by the (appellants) was not a matter of public interest and the privilege was destroyed because the appellants included matters which were not relevant to the privileged occasion. He came to this conclusion on the footing that the whole tenor of the article was that the plaintiff was behaving in an unlawful and disorderly manner which behaviour culminated in his quite "properly" being arrested. My only small criticism of this view is that bearing in mind that the article was factual in content, and made no comment of the conduct: the use of the word 'properly' cannot therefore be supported.

Was there any duty on the part of the appellant to publish to the world minor criminal activities of an attorney, and a corresponding interest on the part of the public to hear it? I think not. That such information is newsworthy cannot be doubted. That it creates an occasion where defamatory matter is protected in the absence of malice, I would emphatically deny. A newspaper, it has been said, has no special privilege: the defence of qualified privilege is open to private citizen and newspaper alike: the bases are the same. In Arnold v. The King Emperor (1914) 30 T.L.R. at 468 Lord Shaw stated the law:

> "The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but apart from statute law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments is as wide as, and no wider than, that of any other subject. No privilege attaches to his position."

It is as well too to recall the words of Cockburn C.J. in Campbell v. Spottiswoode (1863) 3 B & S 769 at p. 777.

> "It is said that it is for the interests of society that the public conduct of men should be criticised without any other limit than the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honour and character, and made without any foundation."

A balance must be struck between the freedom of the press, or free speech and the right of the individual to his privacy. A public figure must accept some degree of public attention and be able to withstand public scrutiny: but a newspaper has no right to titillate its readers with every trivial occurrence in the life of that figure and if it does so, must be prepared to accept the consequences, where what it publishes is factually untrue and more seriously, defamatory.

The authorities make it I think perfectly clear that newsworthiness is not to be equated with qualified privilege, otherwise mere salacious gossip would be protected. There must be a duty to publish and a corresponding interest so as to create an occasion of qualified privilege. The privilege depends not on any assumed duty or responsibility of the press to advise the public, but on whether the subject matter is such that the public should know. In Banks v. Globe & Mail Ltd. & Another (1961) S. Cr. 474 the Canadian Supreme Court held that the proposition of law that, given proof of the existence of a subject matter of wide public interest throughout Canada without proof of any other special circumstances, any newspaper in Canada (and semble therefore any individual) which sees fit to publish to the public at large, statements of fact relevant to that subject matter, is to be held to be doing so on an occasion of qualified privilege, was untenable.

This case would be authority for saying that the nature of the subject matter is a matter to be taken into account, but the fact that public interest exists in the subject matter, is not the sole consideration. This view is borne out by another Canadian case Globe & Mail Ltd v. Boland (1959) S. Cr. 203. It was held there that the defence of qualified privilege, based on the plea that the newspaper had a duty to inform the public and the public had an interest in receiving information relevant to the question of the candidate's fitness for office, is not open to a newspaper which has published defamatory statements about the candidate. Although I would have thought that a candidate's fitness for office in national elections would create an occasion of qualified privilege, that is not the law. Rather in Duncombe v. Daniel (1837) 8 C & P 222 Coleridge J. in response to an argument that it was justifiable for an elector bona fide to communicate to the constituency any matter respecting a candidate which he believed to be true, and believed to be material

to the election said, "you must go further than that and make out that the elector is entitled to publish it to all the world." Lord Denman expressed the view that however large the privilege of electors may be, it was extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of a candidate.

The instant case is a fortiori, for it would be extravagant to suppose that it is right to communicate to the world injurious information about a lawyer on the occurrence of a trivial incident involving a lawyer, his client and a police officer.

In my judgment the plea of qualified privilege fails. I do not find it necessary to consider the learned judge's finding that the words were not relevant to the occasion, having regard to the view I take of the law in this regard.

I turn now to the question of damages. It was contended that the amount awarded was inordinately high. In view of the conclusion at which I arrived, it becomes necessary to consider only what would be appropriate compensation for the second sting. The libel was a serious and grave one which would tend to affect the respondent in his calling as an attorney and a gentleman. Justification which had been pleaded had not been proceeded with. There had been no apology or retraction. But I do not think, with respect, these omissions make the appellant's conduct 'repulsively arrogant or irresponsible;' they do however enable the court to aggravate damages to be awarded. See Davies L.J. in Broadway Approvals v. Odham's Press (1965) 2 W.L.R. 805 at p. 822:

> "If the libel outrages the plaintiff, it is a proper element in compensatory damages, but if the jury awards damages because the libel outrages them that would be punitive."

The use of those adjectives however suggests that the learned trial judge thought that the appellants ought to be punished for their reprehensible conduct. This is clearly not the function of damages in tort, except where Lord Devlin's categorizations may be prayed in aid. See Rookes v. Barnard (1964) A.C. 1124. An award of $24,000.00 in the circumstances of this case was in my view inordinately high. On this aspect of the case I have had the advantage of reading in draft the judgment of Carberry J.A. and I agree with his exhaustive analysis and his conclusions of law.

It should not be forgotten that in spite the defamatory meaning which the court has found the words bore, it was nevertheless a fact that the appellant was arrested and charged for the offences stated in the articles. What then is a fair compensation for this serious libel on the appellant, bearing in mind the Respondent's conduct identified above. A fair figure I would assess at $5000.00. In my judgment the appeal should be allowed in part to enable this variation of the award made in the court below, to be substituted.