Privy Council Appeal No. 19 of 1986

Kenneth Gordon *Appellant*

v.

Daniel Chokolingo as Executor of the Will of Patrick Chokolingo (deceased) and Others *Respondents*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH AUGUST 1988

Present at the Hearing:

LORD KEITH OF KINKEL
LORD TEMPLEMAN
LORD ACKNER
LORD JAUNCEY OF TULLICHETTLE
SIR JOHN MEGAW

*[Delivered by **Lord Ackner**]*

The appellant is and was at all material times the Managing Director of Trinidad Express Newspapers Limited, which publish a daily newspaper the "Express" circulating in Trinidad and Tobago. This appeal arises out of a libel action which he brought against *inter alios* Patrick Chokolingo, who died on 15th June 1985. On 14th May 1987 their Lordships ordered that Daniel Chokolingo, as executor of the will of the deceased, be substituted in this appeal for the deceased and the appeal has proceeded accordingly. The deceased was the editor, and is so referred to hereafter, and the second and third respondents were at all material times the proprietors and publishers of "The Bomb" which is a weekly Trinidad and Tobago newspaper, with a circulation at the material time of some 200,000 copies.

The alleged libel was contained in an article published as a "Letter from the Editor" in the issue of The Bomb dated 20th February 1976 under the heading "I walked out on (Dr) Gairy's prayers". The article concerned a luncheon hosted at a Trinidad hotel by the then Prime Minister of Grenada, Eric

Gairy. On 15th December 1980 des Iles J. gave judgment for the appellant against the respondents for $40,000 with costs. On 21st July 1985 the Court of Appeal of Trinidad and Tobago (Kelsick C.J., Braithwaite and Bernard JJ.A.) allowed the respondents' appeal and set aside the award. This appeal is brought pursuant to an order of the Court of Appeal (Warner, Narine and Persaud JJ.A.) made on 27th February 1986.

The Issues.

The following issues are raised by this appeal:-

(1) Whether the trial judge was entitled to hold that the words complained of were defamatory of the appellant.

(2) If so, whether the trial judge was entitled to hold that in the circumstances of the case he was entitled to make an award of "aggravated compensatory damages", as he purported to do.

(3) If so, whether his award of $40,000 was excessive.

The Article.

The article, which is set out below, contained a number of short paragraphs and, for ease of reference, they have been numbered.

"(1) Eric Gairy, Prime Minister of Grenada obviously believes that Trinidadians are as gullible, as naive and as stupid as his own people.

(2) And after the gross display of hypocrisy I saw displayed last Wednesday at the Holiday Inn by about 40 leading members of this community, I can see why Gairy is right in believing what he does.

(3) I had accepted an invitation along with the others to a 'working luncheon' at the hotel to be hosted by the Grenada Government to discuss plans for an Easter Water Parade in that country.

(4) Dr. Gairy (as he styles himself) walked into the banquet hall half an hour late and the first sign of Trinidad hypocrisy that was displayed was to hear my people calling him 'DOCTOR' Gairy.

(5) Now each and every one of them knew as well as I did, that the closest that Eric Gairy has ever been to earning the title of

'Doctor' was when he spent some time in a hospital.

(6) But he decided that if our Prime Minister could be called 'Doctor' then who is he?

(7) Then I suppose there is no harm in humouring a visitor to the country.

(8) But then we sat for lunch, but before being served, this king of hypocrites Eric Gairy called on the gathering to pray.

(9) And what followed for the next five minutes out of that man's mouth almost made me bring up my stomach right there at the table.

(10) Eric Gairy is so ignorant that he couldn't even make praying sound genuine.

(11) He destroyed certain parables of the Bible, misquoting some of the Church's Psalms and all in all made a complete mockery of everything that is holy in prayer.

(12) And there with bowed heads, taking part in the whole disgusting and hypocritical affair were my Trinidadians, - men supposedly of quality, leaders in our community.

(13) I looked long and hard for instance, at a man like Commander Mervyn Williams and could only think that just a few short days ago he was talking with the power of a whole army.

(14) Then there was Ken Gordon, manager of the Express and Louis Rostant, top-brass of TATIL with such looks of sanctimonious piety on their faces that I had to look up to see which hole in the roof the angel was expected to come through.

(15) There were others too, who I knew hadn't been into a church or said a prayer to the good Lord in the last twenty years of their lives, encouraging this Grenadian hypocrite with his phoney accent to con them into his bull.

(16) There is nothing that gets me more and more mad than to hear someone using prayer as an instrument to con people, and last Wednesday's display by Eric Gairy was the worse (sic) that I have seen in my life.

(17) It was too much for me to have to swallow and so it was that I walked out on the Prime Minister of Grenada and his hyprocritical gathering.

(18) When I was in Grenada last year as the manager of a cricket team I had to swallow a lot of Gairy's crap and he obviously also believes that my acceptance of him in his country makes me one to be conned.

(19) Let me assure Eric Gairy, doctor, that I am a true blooded Trinidadian, not like some of those gathered around him last Wednesday at the Holiday Inn, - but a true, true Trinidadian.

(20) And he will have to get up a lot earlier in the morning before he will ever be able to con me with his brand of holy hypocrisy.

(21) Away with you, - 'Doctor' Gairy."

It is common ground that the article was clearly defamatory of Dr. Gairy. Braithwaite J.A. in his judgment said that he had no doubt that the word "hypocrite" when directed at him would be understood by a reasonable reader to mean that he was insincere and dishonest, at least in the sense of being intellectually dishonest. He added that a reasonable reader of the article must have thought that "Gairy was prepared to go so far with his hypocrisy as to become positively blasphemous".

However, it is equally clear that the article is also directed at the Trinidadians who attended the occasion. The second paragraph in the article refers to the "gross display of hypocrisy I saw displayed last Wednesday at the Holiday Inn by about 40 leading members of this community...". The first sign of Trinidad hypocrisy alleged in the article was calling the Prime Minister 'DOCTOR' Gairy (see paragraph 4) but this, and only this, was excused on the basis that "there is no harm in humouring a visitor to the country" (paragraph 7). The main thrust of the criticism in the article was directed at the five minute long recital of prayers by the Prime Minister, which the editor found nauseating (see paragraph 9). The criticism was then focused on the Trinidadians who "with bowed heads, taking part in the whole disgusting and hypocritical affair were my Trinidadians, - men supposedly of quality, leaders in our community" (paragraph 12). The editor singled out three individuals for mention after he had "looked long and hard", particularising the appellant "manager of the Express and Louis Rostant, top-brass of TATIL with such looks of sanctimonious piety on their faces that I had to look up to see which hole in the roof the angel was expected to come through" (see paragraphs 13 and 14).

Emphasising that the whole scene was intolerable, the editor said that "it was too much for me to have

to swallow and so it was that I walked out on the Prime Minister of Grenada and his hypocritical gathering" (paragraph 17) and "let me assure Eric Gairy, doctor, that I am a true blooded Trinidadian, not like some of those gathered around him last Wednesday at the Holiday Inn, - but a true, true Trinidadian" (see paragraph 19).

The Apology.

In his able argument on behalf of the first respondent, Mr. Antony White conceded that the words used in the article were certainly capable of being defamatory of the appellant. This was clearly the view of the editor, who must be taken to have some understanding of his readers and the impact upon them of the articles in his newspaper. In the very next issue of "The Bomb" published on 27th February 1976 he published an apology in the following terms:-

"NO DOCTOR GAIRY

OH MY GOD!

Just look at my crosses today.

That man Eric Gairy of Grenada who did all this set of praying down at the Holiday Inn last week had me so cuffuffled and mad with his hypocrisy that I began seeing things.

This is the only explanation I can offer for having named Ken Gordon manager of the Express and Louis Rostant, the big boy at T.A.T.I.L. as amongst those who had looks of sanctimonious piety on their faces.

You see, both Ken and Louis had left the function before the prayers, one being annoyed at Gairy's unmannerly late arrival and the other being annoyed at something else the Grenadian P.M. had done.

So that when the set of prayers time came around, they were not there at all and it must have been, or in fact it was, two other people whose faces shined with this piety business.

I could tell you that my face is red over the affair, my sincere apologies to them both.

Incidentally before anyone reaches the wrong conclusion, neither of the two have rushed off solicitor letters or anything else about my mistake, and I am glad to say they didn't.

As was to be expected, many of Gairy's admirers over here got really mad with me for walking out on him and saying what I felt about him.

> And amusingly, most of them could not understand why I was against calling him 'Doctor' - if he insisted on it.
>
> MICKEY MOUSE DOCTORATE
>
> I do not suppose they can understand that if I did recognise Gairy's mickey mouse doctorate title, it would be disrespecting those who really earned the title, - particularly our own Prime Minister.
>
> Say what you want, Eric Williams went through a lot to deserve being called Doctor.
>
> And I am not about to confer the same respect on someone else who as I said earned his by spending some time in a hospital.
>
> In any case to hell with those who did not like what I said and thanks to those who did."

The Proceedings.

On 25th June 1976 the appellant issued a writ and three days later delivered the statement of claim. In paragraph 3 it was alleged that "notwithstanding that the Plaintiff was not present for and knows nothing of the matters described therein, the Defendants ... falsely and maliciously printed and published or caused to be printed and published of the Plaintiff and of him in the way of his office and in relation to his conduct therein" and then there were there set out paragraphs 8 to 17 inclusive of the article. In the penultimate paragraph of the statement of claim it was alleged that "by the said words the Defendants meant and were understood to mean that the Plaintiff was a hypocrite and was dishonest".

The defence was delivered on 8th July 1976, that is some four months after the apology had been published. By paragraph 2, the defendants admitted the publication, but otherwise denied paragraph 3 of the statement of claim. They therefore denied the allegation in the statement of claim that the plaintiff was not present and knew nothing of the matters described in the article. Paragraph 5 of the defence turned that denial into a positive contention by alleging that "in so far as the said words [in the article] consist of statements of facts they were true in substance and in fact ...". In paragraph 6, the defendants alleged that the words were part of a fair and accurate report of a public meeting and in paragraph 8 it was asserted "that if the said publication was libellous (which is denied) the Plaintiff's real object of commencing this action is not to vindicate his character but merely to make

money out of the publication". No reference of any kind was made to the apology.

In the reply delivered the following year, the appellant alleged that in publishing the article the respondents were actuated by express malice in that, prior to the publication of the article, they had persistently printed and published articles containing matters derogatory and/or defamatory and/or unfavourable to the appellant and he gave particulars of such publications. The appellant further relied, in support of his plea of malice, on the allegation in paragraph 8 of the defence referred to above.

There the matter rested until the trial of the action in October 1980, over four years after the delivery of the defence. An application was then made for leave to amend the defence by deleting *inter alia* the paragraphs containing the plea of justification and fair comment, as well as that of imputing an improper motive to the appellant in bringing the action. Thus the only issues for determination at the trial were whether the words, in their natural and ordinary meaning, meant that the appellant was a hypocrite and was dishonest, as alleged in the statement of claim, and if so to what damages he was entitled. It would not appear, from the terms of the judgment of des Iles J. or from the judgments of the Court of Appeal, that any explanation was given for the terms in which the defence had been originally drafted and why it had taken four years for the amendments to be made. In their Lordships' judgment it would be quite wrong to speculate. Certainly, the plea in paragraph 8 of the defence dispels any suggestion that the pleader had merely slavishly followed some well established precedent and that he was totally unaware of the existence of the prior apology.

The Trial.

On 27th October, the first day of the trial, the respondents served a notice pursuant to Order 79 rule 7 of the Rules of the Supreme Court 1975 that they intended, in mitigation of damages, to give evidence of the apology which they had published on 27th February 1976. No oral evidence was given at the trial by either the appellant or the respondents. The judge admitted in evidence the other newspaper articles which had been particularised in the appellant's reply.

It is convenient to deal with the judgment under two distinct headings:-

(i) Were the words complained of defamatory of the appellant and did they mean that he was a hypocrite and was dishonest?

The judge recorded in his judgment the submission on behalf of the respondents "that the words were not capable of being understood in a sense defamatory of the plaintiff" and in particular "that the expression 'the Prime Minister of Grenada and his hypocritical gathering' was a case of 'a transposed epithet' and should properly be read as 'the hypocritical Prime Minister of Grenada and his gathering'". According to counsel for the respondents, who stressed that the article should be read as a whole and that reliance should not be placed upon the selected isolated passages, the most that it could be said the words meant was that the appellant was gullible, naive and stupid. The judge then set out the contentions of counsel for the appellant, namely that the words were not only capable of a defamatory meaning, but they in fact meant that the appellant was a hypocrite, being a member of the "hypocritical gathering" referred to in the article.

The judge then considered the meaning of "defamatory", and quoted the classic definition given by Parke B. in *Parmiter v. Coupland* (1840) 6 M. & W. 105 at page 108:-

> "A publication without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a libel."

He then decided that the words in the article were capable of being defamatory.

The judge then referred to the definitions in the Concise Oxford Dictionary of the word "hypocrite" as meaning "dissembler, pretender, actor of a part, not genuine" and in Webster's 3rd International Dictionary, Volume 11, page 1115, as "one who gives a false appearance of virtue or religion", and in Webster's New 20th Century Dictionary, 2nd Edition at page 897, as "one who feigns to be what he is not, especially one who pretends to be pious and virtuous without really being so". As to the word "dishonest", he took this as meaning "not honest", "fraudulent" or "deceiving". He said that "in this linguistic setting" he concluded the article was defamatory of the plaintiff, since it meant he was a hypocrite and dishonest.

(ii) Damages.

Here again the judge set out the respondents' contention that they had published an apology or retraction at the first opportunity and that that showed a lack of malice. In contrast, the contention on behalf of the appellant was that there had been a consistent pattern of abuse of the appellant, as manifested by the long list of articles that were, to

say the least, unfavourable to the appellant. The appellant further relied, in support of his plea for aggravated damages, upon the publication of the libel at a time when there was an action pending by the appellant against the respondents for libel (an action in which he subsequently succeeded in recovering substantial damages) and also upon the allegations made in the original defence, which were not withdrawn for some four years.

The judge described his award as one of "aggravated compensatory damages". He took into account:-

(i) the pleas made in the original defence and the failure to amend these until the trial. He said:-

> "One wonders how the defendants could have been acting in good faith and without malice when they purport to rely upon facts which they knew to be false, the first of which being that the plaintiff was not even present at the alleged function."

He added:-

> "This court takes a very serious view of a situation such as this because it constitutes an abuse of pleadings. It is a trifling with the court and a trifling with the reputation of another, neither of which the law permits."

(ii) the publication of the article at a time when another action in libel was pending by the appellant against the respondents. He said:-

> "What is significant is that before the High Court judgment of Maharaj J. was delivered on 10th June 1976 and whilst it was pending the defendants published the subject article on 20th February 1976 which I have found was libellous."

(iii) His finding:-

> "... that the defendants have followed a pattern of abuse of or at least unfavourable comments relating to the plaintiff, by a series of articles between 31st December 1970 and 19th November 1976 inclusive .... Suffice it to say, however that this court finds that the attention given to the plaintiff by the defendants in these articles, is not accidental and it is a matter of some concern to this court that some journalists should find it necessary to treat a competitor in this way."

The Decision of the Court of Appeal.

It may be of some significance that the notice of appeal, both in its original and extensively amended form, never took the point that the words complained

of were neither capable of being defamatory nor were in fact defamatory of the appellant. It attacked the conduct of the judge at the trial, alleged that he had acted unjudicially and further complained that the damages which he had awarded were inordinately high. That the words in the article did not bear any defamatory meaning of the appellant appears to have been a point taken by the court of its own motion.

Kelsick C.J., in his judgment, only dealt with the issue as to whether the appellant had been defamed by the article. Like the trial judge he too referred to dictionary meanings of "hypocrite" and "dishonesty". As regards the latter word, he recorded that the Britannica World Edition of the Oxford Dictionary included in the definition of "dishonesty" "not straightforward or honourable". In his opinion:-

> "... in its context, the natural and ordinary meaning which ... would be attributed by the ordinary man to the word 'hypocritical' is 'dissimulation, pretence or sham'."

He would not include "dishonesty" in the sense of "not honest", "fraudulent" or "deceiving" as found by the judge. He concluded that:-

> "Far from viewing with disapprobation the reaction of the guests, the ordinary man would interpret it as an act of tolerance, civility and respect expected of a responsible 'leading member of the Trinidad and Tobago community' for the office of Prime Minister of a friendly neighbouring country (though not for the holder of that office in the person of Mr. Gairy), and albeit by way of pretence, dissimulation or sham."

He therefore concluded that the use of the word "hypocritical" in the article would not convey to the ordinary man any meaning defamatory of the appellant.

It is significant that, in his judgment, the learned Chief Justice in no way refers to the speed with which, or the terms in which, the editor apologised for his article, an apology which was wholly otiose if the reader would have interpreted the editor's comments upon the appellant in the complimentary sense of exemplifying his "tolerance, civility and respect expected of a responsible leading member of the Trinidad and Tobago community".

Braithwaite J.A., having set out in his judgment the terms of the article, the pleadings and the apology, then commented on the strictures passed by the trial judge on the late amendments. He concluded that:-

> "The trial judge had in his mind clearly developed pre-conceived ideas with respect to the liability

> of the appellant [the editor] on material which was not before him when the trial commenced. This must of necessity have coloured his thinking when he came to resolve the main issue in the matter."

Mr. White has accepted that Braithwaite J.A. was in error in making these observations. He had referred to the judgment of Hodson L.J. in *Warner v. Sampson* [1959] 1 Q.B. 297 at 321:-

> "Once pleadings are amended, what stood before amendment is no longer material before the court and no longer defines the issues to be tried." (emphasis added)

But this is not authority for the proposition that the pleadings in their original unamended form are irrelevant for all purposes. What has formed the basis of the original defence before amendment is frequently subjected to justifiable critical comments by the plaintiff, particularly so in libel actions. The trial judge was wholly justified in making his observations quoted earlier in this judgment as to whether "the defendants could have been acting in good faith and without malice etc ...". Their Lordships do not accept that the trial judge's observation as to the serious view that he took of the pleadings was, as Braithwaite J.A. observed, "an unwarranted criticism of the appellant's [the editor] right to seek amendment to his original pleadings".

Despite the Chief Justice having, in his concurring judgment, made use of dictionary meanings, Braithwaite J.A. stated that it was wrong for the trial judge to look at the dictionary meaning of a particular word. Their Lordships cannot agree. Of course, dictionary meanings cannot be conclusive as to what is the natural and ordinary meaning of words used in a particular context, but they may assist.

While rightly concluding that the court should look at the whole of the article in order to determine the natural and ordinary meanings of the words complained of, the learned justice of appeal then said that "the court should enter upon a full analysis of the article as well". He then proceeded to enter into a detailed analysis, paragraph by paragraph of the article, and in so doing he treated the article as though it would and should be read and construed in severable parts. He thereby arrived at the conclusion that, although the first eleven paragraphs of the article, read in isolation from the rest, appeared to level charges of hyprocrisy and at least intellectual dishonesty against Dr. Gairy, it was inconceivable that any reasonable reader of the article would have concluded that the later paragraphs (including the paragraph which specifically referred to the

appellant) were levelling the same or similar charges at anyone else who was said to have attended Dr. Gairy's meeting.

In adopting this approach the learned justice of appeal omitted from his quotation from the speech of Lord Reid in *Lewis v. Daily Telegraph Limited* [1964] A.C. 235 at 258 the following important statement:-

> "There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction."

Moreover in the subsequent case of *Morgan v. Odhams Press Limited* [1971] 1 W.L.R. 1239 at 1245 Lord Reid said:-

> "If we are to follow *Lewis'* case [1964] A.C. 234 and take the ordinary man as our guide then we must accept a certain amount of loose thinking. The ordinary reader does not formulate reasons in his own mind; he gets a general impression and one can expect him to look again before coming to a conclusion and acting on it. But formulated reasons are very often an afterthought.
>
> The publishers of newspapers must know the habits of mind of their readers and I see no injustice in holding them liable if readers, behaving as they normally do, honestly reach conclusions which they might be expected to reach."

In the same case Lord Pearson in his speech at page 1269 said:-

> "... I do not think the reasonable man - who can also be described as an ordinary sensible man - should be envisaged as reading this article carefully. Regard should be had to the character of the article; it is vague, sensational and allusive; it is evidently designed for entertainment rather than instruction or accurate information. The ordinary, sensible man, if he read the article at all, would be likely to skim through it casually and not to give it concentrated attention or a second reading. It is no part of his work to read this article, nor does he have to base any practical decision on what he reads there. The relevant impression is that which would be conveyed to an ordinary sensible man ... reading the article casually and not expecting a high degree of accuracy."

Although Braithwaite J.A. had set out the terms of the apology in his judgment, like the learned Chief

Justice, he derived no assistance from the fact that the very writer of the article, the editor of this successful newspaper, who must be attuned to a significant degree to the thoughts of his readers, clearly thought that his article was defamatory and that an urgent apology was therefore needed.

In their Lordships' opinion, whether the article complained of is read as a whole in the manner of the ordinary reader of a popular newspaper or even construed in the manner adopted by Braithwaite J.A., it plainly accused those Trinidadians who were present, and in particular the appellant who was singled out for special mention by name, as being a hypocrite and intellectually dishonest, words which were plainly defamatory of him.

Damages.

Having decided that the words bore no defamatory meaning at all, Braithwaite J.A. nevertheless proceeded to deal with the damages which had been awarded. He said:-

> "The trial judge awarded 'punitive' or 'exemplary' or 'aggravated' damages in the amount of $20,000.00 [in fact $40,000]. The terms are interchangeable."

The trial judge did not use the word "punitive" or "exemplary". He used the word "aggravated". While "punitive" or "exemplary" damages may be terms interchangeable with one another, "aggravated" damages is not interchangeable with either of them. Aggravated damages, it is common ground, are compensatory damages. Braithwaite J.A. then criticised the trial judge's award on the basis that it included an element of exemplary damages. But this was not so. The learned judge was careful to say that he was making "an award of aggravated compensatory damages". Although he referred to *Broome v. Cassell & Co. Ltd.* [1972] A.C. 1027, Braithwaite J.A. overlooked two important passages from the speech of Lord Hailsham and Lord Reid:-

> "Not merely can [the plaintiff] recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge. As Windeyer J. well said in *Uren v. John Fairfax and Sons Pty. Limited* (1966) 117 CLR 118 at 150:
>
> > 'It seems to me that, properly speaking, a man defamed does not get compensation <u>for</u> his damaged reputation. He gets damages <u>because</u> he was injured in his reputation, that is simply

> because he was publicly defamed. For this reason, compensation by damages operates in two ways - as a vindication of the plaintiff to the public and as consolation to him for wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.'
>
> This is why it is not necessarily fair to compare awards of damages in this field with damages for personal injuries. Quite obviously the award must include factors for injury to the feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology, or the reaffirmation of the truth of the matters complained of, or the malice of the defendant."

Per Lord Hailsham at 1071.

> "It has long been recognised that in determining what sum .... should be awarded, a jury, or other tribunal, is entitled to have regard to the conduct of the defendant. He may have behaved in a high handed, malicious, insulting or oppressive manner in committing the tort or he or his Counsel may at the trial have aggravated the injury by what they there said. That would justify going to the top of the bracket and awarding as damages the largest sum that could fairly be regarded as compensation."

Per Lord Reid at 1085.

What has been strongly relied upon by the respondents before their Lordships, and indeed before the Court of Appeal, is the passage at the end of the trial judge's judgment:-

> "I accordingly give judgment for the Plaintiff against the defendants and in order that this court might show its thorough disapproval of this type of conduct ... I make an award of aggravated compensatory damages in the sum of $40,000.00."

This, it has been urged, shows that the court was inflicting punishment upon the respondents. However, in making this criticism, the judge's observation is being taken out of its context. The judge had, a few lines above this final paragraph, made the following quotation:-

> "In *Fraser on Libel and Slander* 7th Edition at page 97 under Article 22 with regard to the abandonment of the plea of justification the learned author says 'it is a dangerous plea to put on record because if the defendant cannot prove it or withdraws it at the trial it may and most certainly will aggravate the damages'. In *Broome v. Cassell & Co. Ltd.* [1972] A.C. 1027, Lord Hailsham said at page 1073:-

> 'In awarding 'aggravated' damages the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and, as the result of the conduct exciting the indignation, demands a more generous solatium'.
>
> and added "I adopt the words of this learned law lord."

Clearly the judge was doing no more than following the observations of Lord Hailsham.

Their Lordships accordingly reject the suggestion that the judge was awarding punitive damages. This however still leaves to be decided whether this was a case for only nominal damages, or compensatory damages, and if the latter, whether the sum awarded by the judge was inordinately high.

Their Lordships do not take the view that the libel was so trivial as only to justify the award of $50 nominal damages - as Braithwaite J.A. thought appropriate if, contrary to his view, the article contained any defamatory meaning. The words used were, and were intended to be, a serious attack on the integrity of a person holding a prominent position in the community. This was no technical publication. It was a publication in a newspaper with a large circulation. Even after the publication of the apology, the appellant was entitled to more than nominal damages since the court should allow "for the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm it has done or the hurt it has caused" per Lord Radcliffe in *Dingle v. Associated Newspapers* [1964] A.C. at page 399. "It is impossible to track the scandal, to know what quarters the poison may reach", per Lord Atkin in *Ley v. Hamilton* (1935) 153 L.T. at page 386. Moreover the judge was entitled to take into consideration, as aggravating the damages, the conduct of the respondents from the time when the libel was published down to the very moment of his verdict. His finding, justified by the series of articles which had been admitted in evidence, that the respondents had followed a pattern of abuse is of importance. The publication of the article, which singled out the appellant as one of three persons to be named and identified in the attack, called for particular care, the more so since there was a libel action pending and shortly to be tried between the parties. To have recorded that not only was the appellant present, but was there, with a look of "sanctimonious piety" on his face, when he was not there at all, was an indication, at least, of a

reckless desire to injure the appellant. The adherence in the defence, for a period of some four years, to the allegation that the appellant had indeed been at the meeting and had behaved as described in the article, together with the allegation that the appellant had only brought the claim as a money-making action, was additional material which entitled the learned judge to award generous compensation. As stated by Pearson L.J. in *McCarey v. Associated Newspapers Limited* No. 2 [1965] 2 Q.B. 86 at 104:-

> "Compensatory damages, in a case in which they are at large, may include several different kinds of compensation to the injured plaintiff. They may include not only actual pecuniary loss and anticipated pecuniary loss or any social disadvantages which result, or may be thought likely to result, from the wrong which has been done. They may also include the natural injury to his feelings - the natural grief and distress which he may have felt at having been spoken of in defamatory terms, and if there has been any kind of high-handed, oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering caused by the defamation and may constitute injury to the plaintiff's pride and self-confidence, those are all proper elements to be taken into account in a case where the damages are at large."

This however still leaves unanswered the question as to whether the trial judge awarded far too much. The point made strongly by Mr. White, and by Dr. Ramsahoye S.C. on behalf of the second and third respondents, is that the trial judge failed to give any proper consideration to the effect, in mitigation of damages, of the prompt apology published by the respondents. This apology, which must have reached, and have been read by, a substantial portion of the readers who had read the libel, established the fact that the appellant was not at the meeting when the prayers took place, that the editor had no basis for accusing him of hypocrisy, and accordingly he offered him his "sincere apologies". The trial judge's only comment, having set out in his judgment the apology, was:-

> "Now this article is a clear indication in the view of this court, that the defendants, and more particularly the first defendant, were fully aware of the harm that could have been done to the reputation of the Plaintiff by the words complained of, and this was a positive public statement to the effect that the plaintiff was not in fact present at the alleged function at the relevant time and what the defendants had stated earlier to the contrary in the subject article was false."

However, he made no reference at all to the fact that the respondents relied heavily on this apology in mitigation of any damages which might be awarded and had therefore given specific notice to this effect. While the sum awarded by the trial judge might have been justified, if there never had been an apology by the respondents, it cannot be supported having regard to the speed with which and the terms in which the apology was published. Their Lordships are accordingly of the opinion that no or no proper consideration was given to this very important mitigatory factor, with the result that the award is far too high and must be set aside.

After this lengthy passage of time, their Lordships are most reluctant to involve the parties in further ligitation, assuming that they are unable to settle their differences. However, although at one stage their Lordships thought that, subject to the parties agreeing, they might themselves consider deciding the quantum of damages, on reconsideration they have decided that this is a matter which should be determined by the local court with its special knowledge of local conditions and values.

Accordingly their Lordships will set aside the order of the Court of Appeal, reinstate the decision of des Iles J., but only in so far as it gave judgment in favour of the appellant, and order that there be a new trial as to the quantum of damages, in the light of the observations made in this judgment. The respondents must pay the appellant's costs in the courts below and one half of his costs before the Board.