MARRACHE v SMITH

Court of Appeal
Forbes, P., Bourke and Hogan, JJ.A.
21 July 1971

Libel — pleading — whether rumour can be pleaded for the purpose of establishing identity.

Libel — pleading — whether necessary to plead alleged repetition of prior libel

Libel — whether repetition of rumour — function of jury to decide.

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1 (1721) Bunb. 79.

2 [1898] A.C. 735.

Libel — refusal of apology — whether capable of aggravating damage.

Damages — when appellate court will interfere with quantum.

Summing-up — non-direction — failure of counsel to request that question be put — whether ground for new trial.

The respondent sued the appellant for a libel published by him in a newspaper El Calpense and as she was not named in the article, invoked a prior rumour for purposes of identification. The jury found the libel proved and awarded damages of £4,000. The appellant appealed, alleging misdirections and non-directions on the part of the trial judge and claiming, in any case, that the damages awarded were excessive.

Held: (i) A prior rumour may be pleaded and proved for the purpose of establishing identity and for the purpose of establishing approval, adoption or repetition of it.

(ii) It was for the jury, not the judge, to decide whether the words complained of repeated the earlier rumour.

(iii) The intention of the writer of a libel is irrelevant to the question whether the words are defamatory.

(iv) (Bourke, J.A., dissenting) The absence of an apology may be relevant to the quantum of damages as part of the conduct of the defendant in persisting in the defamatory statement.

Per Bourke, J.A. It is not essential expressly to plead a repetition of an alleged libel as an extrinsic fact in support of an innuendo.

Per Bourke, J.A. A misdirection on any part of the libel which might have influenced the jury in assessing damages is ground for a new trial.

Per Bourke, J.A. Failure to apologise cannot aggravate the damages where an apology would be inconsistent with the defence

Per Hogan, J.A. If counsel had an opportunity of asking he judge to put a matter to the jury and abstained from doing so, a new trial will not be granted on the basis of non-direction.

Appeal dismissed.

Cases referred to in the judgments.

Astaire v Campling [1965] 3 All E.R. 666.
Morgan v Odhams Press Ltd. [1971] 1 W.L.R. 1239.
McCarey v Associated Newspapers Ltd. [1964] 3 All E.R. 947.
Broadway Approvals Ltd. v Odhams Press Ltd (No. 2) [1965] 1 W.L.R. 805.
Lewis v Daily Telegraph Ltd. [1964] A.C. 234.
Van Ingen v Mail & Express Publishing Co. (1898) 156 N.Y. 376.
Cassidy v Daily Mirror Newspapers Ltd. [1929] 2 K.B. 331.
Hough v London Express Newspaper Ltd. [1940] 2 K.B. 507.
Grubb v Bristol United Press Ltd. [1963] 1 Q.B. 309.
Bruce v Odhams Press Ltd. [1936] 1 K.B. 697.
Heaton v Goldney [1910] 1 K.B. 754.
Clark v Molyneux (1877) 3 Q.B.D. 237.
Wells v Lindop (1888) 15 Ontario App. R. 695.
Phillips v London and South Western Rly. Co. (1879) 5 Q.B.D. 78.
Johnston v Great Western Rly. Co. [1904] 2 K.B. 250.
M'Grath v Bourne (1876) I.R. 10 C.L. 160.
Mechanical & General Inventions Co. v Austin [1935] A.C. 346.
Davies v Powell Duffryn Associated Collieries Ltd. [1942] 1 All E.R. 657.
Bray v Ford [1896] A.C. 44.
Rookes v Barnard [1964] 1 All E.R. 367.
"Truth" (N.Z.) Ltd. v Holloway [1960] 1 W.L.R. 997.
Brembridge v Latimer (1864) 12 W.R. 878.
Watkin v Hall (1868) L.R. 3 Q.B. 396.
Hip Foong Hong v H. Neotia & Co. [1918] A.C. 888.
Nevill v Fine Arts Co. (1897) 66 L.J.Q.B. 195.
Simmons v Mitchell (1880) 6 App. Cas. 156.
Praed v Graham (1889) 24 Q.B.D. 53.

Appeal

This was an appeal by the defendant against a decision of the Supreme Court (the Chief Justice sitting with a jury) awarding the plaintiff £4,000 damages for libel.

F. Ashe Lincoln, Q.C., and L.W. Triay for the appellant.
P.J. Isola for the respondent.

20 October 1971: The following judgments were read—

Forbes, P.: The appellant (hereinafter referred to as "the defendant") is Editor-in-Chief of the newspaper, El Calpense, which is published in Gibraltar. He was sued by the respondent (hereinafter referred to as "the plaintiff") for damages for libel in respect of an article which appeared in El Calpense on 31 May 1969. The action was tried in the Supreme Court by the learned Chief Justice sitting with a special jury, and on 19 February 1971, the plaintiff was awarded £4,000 damages. The defendant is appealing to this court against that decision.

The plaintiff is a married woman living in Gibraltar. At the material time she was a director of the Gibraltar Housewives Association, and had been President of that Association. She was also a director of the Housewives Trading Company Ltd. She was well known in Gibraltar, having from time to time received much publicity in the capacities mentioned, and especially in 1966 in relation to a petition to Her Majesty the Queen signed by the women of Gibraltar, which the plaintiff had personally taken to London.

The article published in El Calpense on 31 May 1969, of which the plaintiff complained was headed ' "La Vie est Belle" and the Angel Flies Away' by "Fanny Gaslight", and the particular passage alleged to contain the libel read as follows:

> "But no coup d'etat here, although the Hon. Moonface, well aided by in-laws tried to chop the Chief's head off, to no avail. The axe has simply rotted in Mather's sweaty hands. Well, feed Mather to keep her fat and silly-faced! How silly he must feel, after seeing all his work gone to nothing in preparing what he thought was their biggest vote catcher and guardian angel fly away, with Cupid close behind".

The plaintiff claimed that the words "their biggest vote catcher and guardian angel fly away, with Cupid close behind" meant and were understood to mean that she was having an illicit love affair with one Michael Holbourne, and that she had flown to England recently closely followed by Michael Holbourne. This innuendo was pleaded by para. 5 of the statement of claim, and the particulars pleaded in support of the innuendo were as follows:

> "(A) The Plaintiffs Christian name in Spanish means "angel" in the feminine sense.
>
> (B) "Mather" referred to in the article was and is the name by which the said Major the Hon. A.J. Gache, is generally known.
>
> (C) The Plaintiff because of her great popularity as the President of the Gibraltar Housewives Association and Gibraltar's own Ambassadress to the United Kingdom was clearly meant and identifiable as the biggest Vote-Catcher.

(D) There was a rumour at the time of the publication of the article in Gibraltar that the said Michael Holbourne had left Gibraltar immediately after the departure of the Plaintiff to England to join her there.

(E) The said Michael Holbourne is a married man and left Gibraltar for the United Kingdom on or about the 25th day of May, 1969.

(F) The Plaintiff left Gibraltar for the United Kingdom for medical reasons on May 3rd, 1969".

The grounds of appeal set out in the Memorandum of Appeal are as follows:

"1. That the Chief Justice was wrong in law in failing to uphold the submission made by Counsel on behalf of the Appellant that the particulars under Paragraph 5(d) of the Statement of Claim should be struck out.

2. That the Chief Justice was wrong in law in failing to withdraw from the Jury the innuendo pleaded.

3. That the Chief Justice, having ruled that the publication complained of did not repeat the prior defamatory rumour, failed to direct the Jury in accordance with this ruling.

4. That the Jury, having been directed not to give punitive or exemplary damages, perversely awarded a sum which was grossly excessive in all the circumstances of the case and having regard to the evidence"

In addition, at the hearing of the appeal with the leave of the court two further grounds of appeal were added:

"5. That the learned judge was wrong in law in directing the jury that it was a matter for them to consider what was the intention of the writer or publisher of the article.

6. That the learned judge misdirected the jury as to damages; in particular

(a) as to the effect of the absence of an apology

and

(b) as to the necessity to limit the damages to those directly attributable to the publication".

As regards ground 1 of the Memorandum of Appeal, counsel for the defendant had, at the commencement of the trial, applied to strike out the reference to a rumour in the particulars supplied in support of para. 5 of the statement of claim, that is, sub-para. 5(D) and, following that, to strike out the whole paragraph.

He relied on *Astaire v Campling* [1].

The ruling of the Chief Justice on this application was as follows:

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[1] [1965] 3 All E.R. 666.

> "I'll give my ruling now on the two points that have been raised by learned counsel. The first was an application on behalf of the defence to strike out paragraph 5(D) of the Statement of Claim which pleads a rumour as an extrinsic fact in support of the alleged innuendo. It is apparent from the judgments in *Astaire v Campling* that other statements including in my view a rumour, can be pleaded for the purpose of establishing identity, and as identity is in issue in the present case I consider that the rumour is properly pleaded in paragraph 5(D). The application to strike out the pleading is accordingly refused. It further appears from the judgments referred to above that other statements are also relevant for the purpose of establishing that a defendant in his alleged defamatory statement has by implication approved, adopted or repeated a defamatory statement appearing in another publication. In my view the pleadings are wide enough to enable the plaintiff to raise this issue in the present case. I need hardly add that of course the question after we've heard the evidence, whether a rumour is capable of identification or capable of amounting to a repetition will of course be a question of law for me to decide and a question whether they in fact do so is a question of fact for the jury."

In this court counsel for the defendant again relied strongly on *Astaire v Campling*. He argued that courts must be diligent to see that the publisher of a statement should not be liable in damages for the defamation of another, but only for the defamation which he himself publishes, unless the second publication by express or necessary implication repeats or endorses the original publication; that it must be possible to say that the original publication is repeated in clear terms; that that was not the case here and that it was not sufficient that there was a wide-spread defamation of the plaintiff by rumour, and the mention of the plaintiff in the publication by the defendant called the original defamation to mind. He conceded that a previous publication could be referred to for the purpose of establishing the identity of a plaintiff, but argued that the Chief Justice went much further than that and allowed the rumour to be introduced to establish the defamatory nature of the article; that a rumour cannot be pleaded as a "fact"; that the Chief Justice admitted the rumour not only to identify the plaintiff, but also to identify Michael Holbourne, and that this imported wholesale the defamatory rumour into the innuendo; and he submitted that without the rumour the words in the article were innocuous and not capable of being read as indicating an "illicit love affair".

The headnote in *Astaire v Campling* sufficiently sets out the principle established in that case as follows:

> "To be actionable as a libel a statement must itself be false and defamatory of the plaintiff; if it is itself innocent, it is not possible, by pleading innuendoes, to make the defendant responsible for defamatory statements by other persons which are not either expressly or by implication approved, adopted or repeated in the statement by the defendant in respect of which the action is brought".

In *Astaire v Campling* the article which was the subject of the action was itself innocent, but it was sought to impute to the words a defamatory meaning by reason of and by reference to publications by other people on

other occasions. It is to be noted that the other publications had not been "either expressly or by implication approved, adopted or repeated" in the article. And it is also to be noted that in the course of his judgment Sellers, L.J., said:

> "It may well be that in circumstances where the identity of a plaintiff is not expressly referred to in an article extrinsic evidence may be given to establish identity.....The public mind may no doubt be relevant in a case of identity.....".

In the instant case the position as I see it is far different from that in *Astaire v Campling*. The complaint is that the words "biggest vote catcher and guardian angel fly away, with Cupid close behind" are themselves defamatory when the plaintiff is identified as the "biggest vote catcher and guardian angel". Thus there is clearly an issue as to the identity of the plaintiff; and, although it is not expressly so alleged, the pleading in para. 5 does in substance raise the issue whether the article in question has "approved, adopted or repeated" the rumour. The issue is not that the mere mention of the plaintiff (assuming her to be identified) has brought to mind a defamatory rumour about her, but that the words "fly away with Cupid close behind" are in themselves defamatory and are an adoption and repetition of the defamatory rumour.

Accordingly, I consider that the Chief Justice was right to refuse to strike out the pleading on both grounds that he gave. In my judgment the first ground of appeal should fail.

The second ground of appeal again relates to para. 5, and it is convenient to consider it along with the third ground of appeal.

In a libel action it is for the judge to decide whether on the evidence the words complained of are capable of bearing a defamatory meaning and whether an ordinary sensible man could draw an inference that they refer to the plaintiff.

In the instant case the Chief Justice, after hearing the submissions of counsel in the absence of the jury, ruled that the issue of fair comment did not arise and would not be put to the jury, and indicated that he would take time till the following day to give his formal ruling on the other issues raised. In so stating he said, *inter alia*,

> "I've already indicated the way in which I will put it to the jury, I'm not satisfied that it's strictly a repetition. I think that is the right way to approach it. I think it's identification and you must look to the words themselves and not to the rumour and I will so direct the jury".

The following morning the Chief Justice duly gave his ruling as follows:

> "Mr. Ashe Lincoln, Mr. Isola, I have to make the specific rulings on whether the words are capable, so that being so I shall make it now.
>
> (1) The words in their ordinary meaning are reasonably capable of bearing a defamatory meaning provided that Angela Smith is identified (2) the evidence in my view established that the words are reasonably capable of referring to

the plaintiff Angela Smith (3) the words in my view are reasonably capable of bearing the meaning alleged in the innuendo provided that both the plaintiff and Michael Holbourne are identified. The evidence in my view established that the words are reasonably capable of referring to the plaintiff and Michael Holbourne".

The standard to be applied has been laid down in a recent case before the House of Lords, which was not available at the trial of the instant action. This is *Morgan v. Odhams Press Ltd.*[1] At the hearing of this appeal the only report available was in The Times of 30 June 1971. It was there held that a defamatory article in a popular daily newspaper may be capable of being held to refer to a person who is neither named nor described in it if it is proved that ordinary sensible people scanning their newspaper without great attention to detail, in the way ordinary people generally do, conclude, because of special facts known to them, that it refers to the unidentified person.

In the course of his judgment Lord Reid said:

"If we are to follow *Lewis'* case [2] 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 after thought.

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.....

This case could only have been withdrawn from the jury if it was proper for the judge to say that all these six witnesses *must* be regarded as having acted unreasonably in reaching that conclusion."

Applying this test to the instant case, and having regard to the evidence given, it is sufficient to say that in my view the first two rulings of the Chief Justice as given above are amply justified. The third ruling "that the words are reasonably capable of bearing the meaning alleged in the innuendo" was stated by the Chief Justice to be dependent on the identification of both the plaintiff and Michael Holbourne. As already mentioned, the Chief Justice had expressed a view, in the absence of the jury, that the article was not strictly in repetition of the rumour. After giving the three rulings referred to, however, he was pressed very hard by counsel for the defendant to rule categorically that the article did not repeat the rumour. This the Chief Justice refused to do, saying that he "was not putting it in that way." Later, when pressed again, he said:

"What I felt was that I wasn't putting it to the jury in that way but the whole of my summing up will be directed to the fact that the rumour is to

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1 [1971] 1 W.L.R. 1239. 2 *Lewis v Daily Telegraph Ltd.* [1964] A.C. 234.

identification. We'll get more muddled than ever if we go on to all this. But it is in fact directed to identification and if the parties are identified do those words with the two parties identified, do they bear the meaning alleged in the innuendo?.....

I would simply leave it. My own inclination in a case like this is to simply leave it straight to the jury, are those words re Michael Holbourne, those considered words, are they defamatory? and I shall direct them that they cannot look at the other statements for the purposes of adding to it. I don't think that I am going to go further than that because we can get terribly confused. I'm simply putting the general principle that you cannot use the rumour for the purposes of adding to the defamatory statement, and I'll then say that they are entitled to look at that for the purposes of identification. Then in the end they have to say; do those words bear a defamatory meaning?"

The learned Chief Justice was, it is clear, properly concerned to keep separate in the minds of the jury damage which the plaintiff might have suffered by reason of the defamatory rumour, and damage flowing from the article itself, assuming it to be defamatory. Nevertheless, I think, with great respect, that he failed to appreciate that the question of the identification of Michael Holbourne was in substance synonymous with the question whether the article was in fact an adoption or repetition of the defamatory rumour. Either the article could be read as an adoption and repetition of the rumour, in which case the identity of "Cupid" was clear, or it could not, in which case the rumour would be irrelevant. I have no doubt on the evidence that the article was, and was intended to be, an adoption and repetition of the rumour, and that it would be so understood by readers in Gibraltar, and I think it would have been clearer if the Chief Justice had directed the jury to consider whether this was the case. He in fact directed them as follows:

"I think I should say here that you are not entitled in a libel action to look at another publication (which would include a rumour) for the purposes of adding to the alleged defamation and to be actionable a libel must itself be false and defamatory of the plaintiff. You are however entitled to look at other publications for the purpose of identifying the persons referred to in the alleged libel and to consider the surrounding circumstances in order to decide the way in which the words would be understood by reasonable persons reading them."

This, in effect, I consider, in the circumstances of the case, amounts to a direction to consider whether the article was a repetition of the rumour; for if it was found that the article was defamatory, it could only be defamatory in the precise way that the rumour was defamatory. Accordingly, though the Chief Justice had at one stage expressed a tentative view on the question of repetition, the only "ruling" he made was that the words were reasonably capable of bearing the meaning alleged in the innuendo provided both the plaintiff and Michael Holbourne were identified; and this ruling in fact depended on whether the article amounted to an adoption and repetition of the defamation contained in the rumour.

Accordingly, I consider that the Chief Justice expressly refrained from ruling that the article did not repeat the prior defamatory rumour; that he would have been wrong so to rule; and I am satisfied that the innuendo was properly left to the jury. I consider the second and third grounds of appeal should fail.

Grounds 4 and 6 relate to the quantum of the damages awarded, and it is convenient to consider ground 5 next. This is that the judge was wrong in directing the jury that the intention of the writer or publisher of the article was a matter for them to consider.

In my judgment there is no substance in this ground. The Chief Justice had properly directed the jury:

> "What you have to decide is not what the person publishing the article intended. What you have to ask yourselves is whether in the circumstances in which the statement was published a reasonable man to whom the publication was made, would understand the words as referring to the plaintiff in a defamatory sense."

Later, when dealing with the defences put forward, and in particular with a plea as to what was intended by the publisher of the article and the way it was generally understood, he said:

> "But of course the defendant is not bound to call evidence to say the way in which the words could have been interpreted. He is not bound to do so. But in the end it is not a matter for the witnesses, it is a matter for you. You are entitled to take into account the fact that not a single person has gone into the witness box and said that when he read the article he interpreted it in that way. That is a matter for you and you will have to consider yourselves whether you think it could be interpreted in a defamatory sense and, of course if it is merely these alternatives, if there's no defamatory statement, well there it is – just what was intended? But there's nobody who has gone into the box to support this. I do stress that he is not bound to do so. Now, that's really all I can say about it, in other words you'll have to decide as reasonable men, how you would interpret all this."

The use of the words, in the course of that passage, "just what was intended" was no doubt an unguarded phrase on the part of the Chief Justice, but in the context of the passage, and of the summing-up as a whole, I consider it could have had no effect on the jury which would be adverse to the defence. The judge had made it perfectly clear to the jury that it was for them to say whether the words would be understood in a defamatory sense.

Finally, there is the question of damages. Ground 4 complains that the sum awarded was grossly excessive. In *Morgan* (supra) it was also contended that the damages awarded were excessive. As to this Lord Reid said:

> "The jury found for the appellant and awarded damages of £4,750..... It was also argued that even if there was no misdirection the amount of the damages is excessive: about that I shall say no more than that, if the jury was properly directed, I could not hold that this amount was so clearly and greatly excessive that the verdict could not stand."

Lord Morris of Borth-y-Gest had this to say:

> "Then it is said that the damages are excessive. In a case of this sort the quantum of the damages is essentially a matter within the province of the jury and whatever individual view might be formed in regard to the sum which was awarded I cannot think that it could be said to be such as no reasonable jury could properly give. The award must stand unless there was any misdirection."

In my judgment the position in the instant case is the same. I am certainly not prepared to say that the damages awarded are so excessive that no reasonable jury could have awarded them, and I consider the award should stand unless there was a misdirection.

Ground 6 of the memorandum of appeal complains that the judge misdirected the jury as to damages, and in particular as to (a) the effect of the absence of an apology; and (b) as to the necessity to limit the damages to those directly attributable to the publication.

As to the necessity to limit damages to those directly attributable to the publication, the Chief Justice said, towards the end of his summing-up:

> "Now a number of particular matters were raised regarding damages..... One question raised was the question of the rumour. You cannot of course give damages for what she suffered by rumour. You have got to try and get a sense of proportion on it but on the other hand, of course, you will take into account this factor. The rumour was something which was going round, but (presuming you come to the conclusion that it was defamatory) this put a similar sort of allegation into written form. So that, obviously, is the point you take into account in considering the question of damages."

There is an express direction here to the jury that damages must not be given for what the plaintiff had suffered by reason of the rumour. The Chief Justice went on to indicate, in my view rightly, that the jury could come to the conclusion that the publication was a repetition in print of the substance of the rumour, but this does not detract from the express direction that damages must not be given for anything suffered by reason of the rumour. I can see no misdirection here.

I come finally to the alleged misdirection in regard to the absence of an apology, which I find the most difficult point to decide in this appeal.

The Chief Justice in his summing-up expressly directed the jury that this was not a case for the award of punitive or exemplary damages, and that no special damages were pleaded.

He continued:

> "But the plaintiff is entitled to damages, nevertheless, if you are satisfied that defamation is established..... The amount that she ought to receive is such as would show the untruth of the defamatory words and the nature of the charge made against her. That is really what I would say is the general rule. I will repeat those words, it is the amount which would show the untruth of the defamatory words and the nature of the charge made against her."

The Chief Justice then proceeded to draw attention to matters that could be taken into account in aggravation and mitigation of damages. On the question of aggravation he said:

> "On this you are entitled to take into consideration the conduct of the plaintiff, her position and standing, the nature of the libel, the mode and extent of the publication (on the question of mode and extent of the publication it was suggested that the paper had the largest circulation in Gibraltar but we know and take judicial notice of the fact that it's not a paper with a publication like the News of the World or Daily Express or anything like that, its a local paper) and you can take into account the absence of an apology and indeed the whole conduct of the defendant from the time when the libel was published to the moment you give your verdict."

Subsequently the Chief Justice also told the jury that they were entitled to consider whether the defendant was malicious over the whole thing.

In Gatley on Libel and Slander (6th Ed.) at para. 1380, in dealing with the assessment of damages by the jury, it is stated:

> "They are entitled to take into their consideration the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, and 'the whole conduct of the defendant from the time when the libel was published down to the very moment of their verdict. They may take into consideration the conduct of the defendant before action, after action, and in court at the trial of the action,' and also, it is submitted, the conduct of his counsel, who cannot shelter his client by taking responsibility for the conduct of the case."

On the face of that statement, and the cases cited on which it is based, the Chief Justice was right to direct the jury to take into account the absence of an apology. However, in *Morgan* (supra), which, as I have already indicated, was not available at the trial of this action, it was held that a direction to the jury to take into account the fact that there had never been an apology was a misdirection. Lord Reid said:

> "The learned judge directed the jury that they could take into account the fact that there had never been a word of apology from the respondents. In an ordinary case where the statement alleged to be defamatory clearly was made of or concerning the plaintiff an apology may well go to mitigating damages. Whether mere failure to make an apology can ever justify aggravation of damages may be doubted – I need not decide that here. In the present case I do not see what room there was for an apology. The respondents' case throughout was that they never said anything at all about the appellant. The question for the jury was whether what they said should be regarded as applying to him or not. To have apologised – I do not know how – might have seemed to be going some way towards admitting that they had defamed the appellant. I think that here there was a misdirection."

The majority of their Lordships concurred in this view; but it may be noted that Lord Morris of Borth-y-Gest, who dissented from the majority on the damages issue, said:

> "It is said that it was a misdirection to mention that there had been no apology. In the context of the summing-up I do not consider that it was. The learned judge was at pains to tell the jury that if their conclusion in the case was that the plaintiff was entitled to damages then they would be awarding damages to compensate the plaintiff and not to punish the two defendants. The sum would relate to the damage to the good name of the plaintiff and to the injury to his feelings and pride. The defendants made the suggestion to the jury that the action had been brought as a money-making venture. In those circumstances I cannot think that what the learned judge said need be regarded as a misdirection..... The injury to the plaintiff's reputation and feelings might have been diminished if the defendants had said that they had not had an intention of referring to the plaintiff and if there had been an expression of regret. They remained silent. I cannot think that in the circumstances it was wrong to refer to the fact that there was an absence of what might have diminished the injury to the plaintiff's feelings."

The instant case was a very different one from *Morgan*. In the instant case, in addition to the plea that the publication did not and would not be understood as referring to the plaintiff, the defences of fair comment and jest had been raised; while the question whether the publication was malicious was also before the jury. In *McCarey v Associated Newspapers Ltd.*[1] Diplock, L.J., said:

> "In an action for defamation, the wrongful act is damage to the plaintiff's reputation. The injuries that he sustains may be classified under two heads: (i) the consequences of the attitude adopted to him by other persons as a result of the diminution of the esteem in which they hold him because of the defamatory statement; and (ii) the grief or annoyance caused by the defamatory statement to the plaintiff himself. It is damages under this second head which may be aggravated by the manner in which, or the motives with which, the statement was made or persisted in."

In the instant case it was open to the jury to conclude, and in fact they obviously did conclude, that the publication was a deliberate adoption and repetition of a scandalous rumour which was without foundation. It may be noted that at the trial, although it was conceded by the defence that there was no foundation for the rumour, the plaintiff and her witnesses were cross-examined at length, apparently with a view to extracting circumstances which could have given colour to the rumour. Lord Reid in *Morgan* does not decide that failure to make an apology can *never* justify aggravation of damages, but only that in the circumstances of *Morgan* the absence of an apology was not material to the question of damages. Only Lord Guest among their Lordships in *Morgan* expressed the view that failure to apologise can never increase the damages. In the instant case, while the failure to make an apology when demanded is not evidence of malice, it is part of the conduct of the defendant in persisting in the defamatory statement, which, despite the defence, was clearly referable to

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[1] [1964] 3 All E.R. 947 at p. 959.

to the plaintiff. In *Broadway Approvals v Odhams Press Ltd. (No. 2)* [1], Davies L.J. said:

> "If the libel outraged the plaintiffs, that would be a proper matter for consideration in awarding compensatory damages. But if the libel outraged the jury – a question which the judge clearly invited them to consider – that would not be a proper matter for them to take into account; for to give effect to that would be not to compensate but to punish."

The refusal of an apology in the instant case was a material part of the defendant's conduct before trial which was calculated to outrage the plaintiff.

In the circumstances I am not prepared to hold that the Chief Justice's direction to jury, that is "you can take into account the absence of an apology and indeed the whole conduct of the defendant from the time the libel was published to the moment you give your verdict" amounts to a misdirection.

For these reasons I would dismiss the appeal with costs.

Bourke, J.A.: ***(After setting out the nature of the proceedings, the circumstances, the facts relating to the publication, the words complained of, para. 5 of the statement of claim and the particulars)***

These particulars were of course offered in support of the defamatory imputation as extrinsic facts known to the reader and imparting into the words some secondary meaning as an addition to or alteration of their ordinary meaning *(Lewis v Daily Telegraph Ltd.)* As will be seen, exception on behalf of the defendant has been taken, both here and below, to the inclusion of para. 5(D) as not supplying an extrinsic fact within RSC Ord. 82, r. 3(1) and as producing by its inclusion an effect contrary to the law as laid down in *Astaire v Campling*; if this objection was sustained it was contended that as a consequence the whole of para. 5 should go out. Indeed, apart from submissions relating more directly to the damages, this is expressly the main ground argued upon this appeal.

By the defence it was denied that the words complained of were published concerning the plaintiff and that in their natural and ordinary meaning they were defamatory. As to para. 5 of the statement of claim it was alleged that the words were incapable of bearing or being understood to bear the meanings alleged. Then there was a rolled-up plea, and by para. 7 it was averred that the passage complained of was intended to refer to three persons composing a political group. Particulars were given, the reference to "their biggest vote-catcher and guardian angel" being alleged to be "intended to refer to one Willie Isola who at that time was frequently out of

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[1] [1965] 1 W.L.R. 805 at p. 822.

Gibraltar and would be so generally understood". Finally there was the further alternative plea that the words, if they related to the plaintiff, which was denied, were written in jest and were so understood by any reasonable person reading them. By the reply it was alleged with regard to para. 7 of the defence: "that the defendant was referring to the plaintiff in the said issue of "El Calpense" of 31 May 1969, and not to Mr. William Isola, as recently as April 1969, a similar kind of reference has been made in "El Calpense" which clearly referred to the plaintiff and to no one else". Among the further and better particulars rendered of para. 6 of the defence regarding fair comment is the allegation of fact that the plaintiff's husband: "at the time of the publication of the said article was preparing to follow or had already followed her".

No proof was offered as to the allegations contained in para. 7 of the defence. The evidence as to the husband of the plaintiff following her went to show that he left Gibraltar unexpectedly on 28 May 1969, to join her in England and to acquaint her with rumours of a damaging nature concerning her that were going around in Gibraltar. There seems to have been some suggestion that "Cupid" mentioned in the article might be taken as a reference to the plaintiff's husband, but in the course of argument at the close of the evidence on this plea of fair comment, counsel for the defendant stated – "I accept what your Lordship says that if the jury accept that I have established the facts on which I based this particular comment, then my Lord, the word "Cupid" could not refer to her husband". The defence of fair comment failed on an adverse ruling of the judge; and the jury decided that the defence of jest had not been established.

Apart from the question concerning jest, and having regard to the rulings of the learned judge, the following four agreed questions were left to the jury on the issue of liability. The answers to the first three were in the affirmative and in view of the way the questions were couched no answer was required or given in regard to the fourth question:

(1) Are you satisfied that the plaintiff has established that the words "their biggest vote catcher and guardian angel" would be read as referring to the plaintiff, Angela Smith?

(2) If yes, are you satisfied that the plaintiff has established that the word "Cupid" would be read as referring to Michael Holbourne?

(3) If your replies to (1) and (2) are both in the affirmative, are you satisfied that the plaintiff has established the imputation alleged in the innuendo?

(4) If your reply to (1) is in the affirmative but to (2) in the negative, has the plaintiff established that the words are defamatory in their natural and ordinary meaning?

It will be noted that it was ruled by the judge that once the plaintiff was identified as "their biggest vote catcher and guardian angel" the words complained of were capable of a defamatory meaning. No one, as I understand it, quarrels with that nor, I think, could reasonably do so.

Apart from proof in support of the impugned para. 5(D) of the statement of claim, there was other evidence going clearly to establish the identity of the plaintiff. As a starting point one has therefore a statement that is not in itself innocent in the above sense. Since so much argument has turned upon the application of *Astaire v Campling*, it is as well to set out fairly fully what was decided in that case. It was concerned with a statement that was in itself not open to objection as being false and defamatory of the plaintiff. The defendant published an article in a newspaper stating of the plaintiff that he was "the man in the fight game known as Mr. X." The plaintiff pleaded 8 innuendos and as facts relied on to support them offered extracts from newspapers and a broadcast interview published by persons other than the defendant before or on the same day as the alleged libel. Objection was taken and upheld as to such pleading. Thompson, J., made the interlocutory order – "In my judgment paras. 4 and 5 of this statement of claim should be struck out on the ground that no reasonable reader would in the light of or by reason of the so-called extrinsic facts particularised in para. 5 read the article complained of as bearing any of the meanings alleged in the eight legal innuendos pleaded in para. 4". On the appeal this order was upheld, it being decided that to be actionable as a libel a statement must itself be false and defamatory of the plaintiff; if it is of itself innocent it is not possible by pleading innuendos to make the defendant responsible for defamatory statements by other persons which are not either expressly or by implication approved, adopted or repeated in the statement by the defendant in respect of which the action is brought. Sellars, L.J. considered that the innuendos alleged could not be derived from the article complained of when read in the light of the extrinsic facts set out in support but arose, if at all, in the material set out as extrinsic facts for which the defendant was not responsible.

He went on:–

> "It may well be that in circumstances where the identity of a plaintiff is not expressly referred to in an article extrinsic evidence may be given to establish identity, but it seems to me a wholly different matter to seek to add to the alleged libel defamatory views expressed and published by somebody else".

There was then a reference to the majority opinion of Martin J. in the American case of *Van Ingen v. Mail & Express Publishing Co.*[1] which was apparently approved but distinguished (see Gatley 6th Ed. para. 1238) and which I think is of interest having regard to the most recent authorative decision in *Morgan v Odhams Press Ltd.*[2] to which I will come. The American case was quoted for the reference to "the information the public possessed upon the subject of the article and the consequent inference which it would readily draw from reading it". The learned Lord Justice continued:

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1 (1898) 156 N.Y. 376.

2 The Times 29 June 1971.

"The public mind may no doubt be relevant in a case of identity but if it has been affected by the defamatory statements made by someone other than the defendant and not by the defendant, the article does not seem to me to make the defendant liable for anything more than it contains. It must be brought home by the evidence of innuendo to a reader that the article itself, which is the article complained of as the libel, has in the light of all the circumstances a defamatory meaning."

Davies, L.J., agreed and went on to say:

"If the words of this alleged libel are defamatory in their natural and ordinary meaning – a matter which is not before this court — then, subject to any defences, the plaintiff would be entitled to damages for that; but the contention on behalf of the plaintiff is that, if the alleged libel in its natural and ordinary meaning is innocent, it is nevertheless possible and permissible to impute to the words a defamatory meaning by reason of and by reference to publications by other people on other occasions. That, as it seems to me, is not permissible. Statements made, whether 'on the air' as alleged in one of the particulars, in a broadcast, or in other articles in other papers, in this context seem to me not to be 'facts' within the meaning of RSC Ord. 82, r.3(1). To permit what the plaintiff is seeking to do in the present case would, as I think, have the effect of allowing any jury that tries the action to give against these defendants damages for what other people have said on other occasions; and that of course would be hopelessly wrong.

The only other thing is this. If in the alleged libel the particular defendant has adopted, republished, reinforced or expressly agreed with, what other people have published on other occasions, that would be a very different matter; but it is not suggested by counsel for the plaintiff in the present case that these defendants did any such thing".

The following passage is from the judgment of Diplock, L.J.,[1]

"A statement does not give rise to a cause of action against its publisher merely because it causes damage to the plaintiff. The statement must be false and it must also be defamatory of the plaintiff: that is to say, the statement must *itself* contain, whether expressly or by implication, a statement of fact or expression of opinion which would lower the plaintiff in the estimation of a reasonable reader who had knowledge of such other facts, not contained in the statement, as the reader might reasonably be expected to possess. I emphasise this: the statement of fact or expression of opinion relied on as defamatory must be one which can be reasonably said to be contained in the statement in respect of which the action is brought and not merely in some other statement... The plaintiff is not entitled by adopting the device of pleading innuendos to recover from the defendants damages for defamatory statements made about him by other persons which are not either expressly or by implication approved, adopted or repeated in the statement by the defendant in respect of which the action is brought".

The position, then, is quite clear. In the case just referred to there was a statement innocent in itself and the innuendos could never get off the

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[1] At p. 668.

ground supported as they were, in the particular context, by so–called extrinsic facts relating to publications by persons other than the defendant. Were it otherwise the plaintiff would be obtaining damages for what persons other than the defendant had said on other occasions which, as Davies L.J. pointed out, would be hopelessly wrong. As it is put in Gatley *op.cit.* para. 86—

> "A statement is not defamatory of the plaintiff merely because it has the consequence that the plaintiff is lowered in the estimation of those to whom it is published, if this results from its identifying the plaintiff to them for the first time as having been the subject of a previous defamatory statement by another, or from its causing them to remember a previous defamatory statement about him... And so when the defendant's article stated that the plaintiff was known as "Mr. X" in the world of boxing, and other publications had contained disparaging references to "Mr.X" the plaintiff was not entitled to rely on those publications in support of an allegation that the defendant's article disparaged him".

It is as well to refer at this stage to *Morgan v. Odhams Press Ltd.* which has been called in aid by both sides, for the appellant mainly on the point of damages. In that case a "novel doctrine" based on *Astaire v Campling* was disapproved of by the House of Lords and nothing turns upon that in the present context. But the authority is illuminating in relation to the sensible reader in possession of special knowledge; in the instant case, where fancy names are used, the knowledge of matter the subject of rumour passing from mouth to mouth in Gibraltar. In the case under reference the words complained of were defamatory and the questions were whether they were capable of referring to Mr. Morgan and whether they did so refer. I quote some extracts from the speech of Lord Reid:

> "It must often happen that a defamatory statement published at large did not identify any particular person and that an ordinary member of the public who reads it in its context could not tell who was referred to, but that readers with special knowledge could and did read it as referring to a particular person... But when people said that they thought that the plaintiff was referred to by a statement which did not identify anyone there must be some protection for a defendant thus taken unawares. The law provides some protection — the plaintiff must give particulars of the special facts on which he or his witnesses relied and the Judge might have to rule whether the words were capable of referring to the plaintiff. How was he to make that decision? The effect of*Lewis v Daily Telegraph* was that the Judge had to consider how ordinary sensible people having the special knowledge proved could understand the words complained of".

His Lordship referred to *Cassidy v Daily Mirror Newspapers Ltd.*[1] and *Hough v London Express Newspaper Ltd.* [2] and saw nothing wrong in those decisions, but considered that they did show that the court recognised that rather far–fetched inferences might be made by sensible readers. Having

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[1] [1929] 2 K.B. 331. [2] [1940] 2 K.B. 507.

rejected the argument that Mr. Morgan must fail because the article contained no "pointer or peg" for his identification he proceeded:

> "Should the case therefore have been left to the jury? Six witnesses, of whom three were or had been in the police force, said they thought the article referred to Mr. Morgan. So on what ground was it to be said that the article could not be so understood, and that there was no case to go to the jury? It was for the judge to decide whether on the evidence an ordinary sensible man could draw an inference that the article referred to the plaintiff... It was true that the six witnesses gave different reasons for thinking that the article referred to Mr. Morgan, some were not very good reasons. But it did not occur to any of them that the article did not refer to him at all.
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> If *Lewis's* case was to be followed one had to accept a certain amount of loose thinking. The ordinary reader did not formulate reasons in his own mind: he got a general impression. The publishers of newspapers must know the habits of mind of their readers, and (His Lordship) saw no injustice in holding them liable if readers honestly reached conclusions which they might be expected to reach. Everything depended on the way one was required to assume a sensible reader would react on reading the relevant kind of article in a newspaper. The case could only have been withdrawn from the jury if it was proper for the judge to say that all the six witnesses must he regarded as having acted unreasonably in reaching their conclusion. Nothing in the evidence justified that conclusion. The case was properly left to the jury".

I will have occasion to return to that case when dealing with the question of damages. Before coming to the legal arguments concerning para. 5(D) of the statement of claim, it is convenient to look at the evidence of witnesses as to how they reacted on reading the statement complained of. It was expressly not sought to give evidence–in–chief of the rumour through the plaintiff; but she was asked about it in cross–examination.

(Part of the evidence was then set out. The judgment continues)

It is not necessary to set out here the evidence as to this particular rumour as deposed to by Mr. Ernest Pizzarello, Mr. Alfred Gache, Mr. Azzopardi and Mr. Dumas, which is referred to in some detail in the summing–up. Their testimony combined with other evidence went to establish that there was a slander going around as to a scandalous association between the plaintiff and the man with a beard, who was the Manager of the Housewives Trading Company, who was Michael Holbourne, and that he had followed Mrs. Smith from Gibraltar. Having read the article in "El Calpense" Mr. Pizzarello and Mr. Gache associated it in their minds with the circumstances of the rumour; while the witness Mr. Norton, who had heard no rumour prior to reading the article, had no doubt that it referred to the plaintiff and took it to mean that she had left Gibraltar and had a lover who was following close behind her or who had left at more or less the same time.

The arguments put forward at the outset of the trial in support of the application for the striking out of para. 5(D) of the statement of claim follow very closely those urged upon this appeal. I think, however, judging by the full notes on record, that it is a new departure that it is now said by Mr.

Lincoln for the defendant that had there been a further fact pleaded as a particular in para. 5 to the effect that the words complained of as a libel repeated or adopted the rumour alleged in 5(D), then all would have been well and the objection taken would be unsustainable. Mr. Isola, counsel for the plaintiff, styles this to be at best a nicety of pleading. Had this point impinged below there might have been an application, in an attempt to meet the defendant, for an amendment. But it does not seem to me to be a necessary matter of pleading; certainly no direct authority has been produced as to the necessity to aver expressly a repetition, adoption, agreement, reinforcement or approval either directly or by implication of an alleged libel as an extrinsic fact in support of an allegation as to a secondary meaning of words under complaint, that is, an innuendo. A repetition, for instance, repeats the libel: it does not go as a fact to establish a defamatory meaning of words. If, as I see it, and this was apparent by the view of the trial judge, at the end of the day the evidence goes to show a repetition etc., that is surely enough; the pleading as it stands implies the element of repetition and that should be sufficient to surmount the difficulty propounded as based upon *Astaire's* case.

Leaving aside *Astaire* for the moment, what the plaintiff had to do is reflected by the following passage from Gatley (*op.cit.* para.95): "If however the plaintiff wishes to rely on any special facts as giving the words a defamatory meaning, he must plead and prove such facts, including where necessary any special knowledge possessed by those to whom the words were published which gives the words that meaning, and must set out the meaning in his pleadings", (*Grubb v. Bristol United Press Ltd.*[1]; *Lewis v Daily Telegraph Ltd.).* As was said by Holroyd Pearce, L.J., in *Grubb v Bristol United Press Ltd.*[2]:

> "Thus there is no one cause of action for the libel itself, based on whatever imputations or implications can reasonably be derived from the words themselves, and there is another different cause of action, namely, the innuendo, based not merely on the libel itself but on an extended meaning created by a conjunction of the words with something outside them. The latter cause of action cannot come into existence unless there is some extrinsic fact to create the extended meaning. This view is simple and accords with common sense. Unless, therefore, the alleged innuendo has the support of such a fact, it cannot go to the jury, and in the interlocutory stages of the action it may be struck out".

This, as it seems to me, is what the plaintiff has done in pleading the innuendo — what the words meant and were "*understood to mean*" — and in support extrinsic facts are pleaded, including the rumour going to identification and the provision of a special knowledge to show what the words could be understood to mean by the reasonable and sensible reader.

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1 [1963] 1 Q.B. 309. 2 At p. 327.

The argument for the defendant is that the whole case was fought and bedevilled by reason of the pleading of the rumour as an extrinsic fact upon the basis of defamatory statements made prior to and contemporaneously with the publication of the newspaper article. The slanderous rumour was let in wrongly to establish the defamatory nature of the article — it was incorporated into the libel as alleged. By thus bringing in for the purpose of imputation as to meaning what was said by other persons on other occasions, the jury were ultimately giving damages not for the defamation complained of as a libel but for the earlier and existing defamatory rumour. This, it is contended, went quite contrary to *Astaire v Campling*. No evidence of the rumour should have been admitted at all; para. 5(D) of the statement of claim should have been struck out and, if it was found to be at fault, the whole paragraph alleging innuendo should also go out.

Mr. Isola's rejoinder is that in the *Astaire* case even if "Mr. X" was identified as the plaintiff there would remain a statement that was neither false nor defamatory *in itself* and one could not import or add to it another defamatory statement to render it injurious as a libel and obtain damages. But here there was a statement that in itself was far from innocuous once there was identification of the plaintiff as the person about whom the statement was made. There were other facts pleaded, and evidence led in support, going to this point of identification, but the plaintiff was also entitled to plead and establish the rumour for this purpose alone putting the matter at its lowest (and see *Bruce v Odhams Press Ltd.*[1]; *Van Ingen v Mail & Express Publishing Co.*) But the rumour was also pleadable as being an extrinsic fact and admissible for the purpose of showing the whole surrounding circumstances as to special knowledge and to show what the publisher of the newspaper, knowing the habits of his readers, might expect them to reach as a conclusion from the words he saw fit to print and publish (*Morgan v Odhams Press Ltd.*). There was some evidence extraneous to proof of the nature of the rumour going to establish the facts alleged in para. 5(E) of the statement of claim as to the departure of Michael Holbourne from Gibraltar subsequent to the leaving of the plaintiff, and this departure, it was contended, was never really in dispute on the way the case was conducted below. But anyway the plaintiff was entitled to prove the rumour in order to show the background of information on which an ordinary sensible reader with knowledge of the rumour might reasonably be expected to understand the printed words and read them as referring to a particular person. This would apply not only to the plaintiff as being the "biggest vote catcher and guardian angel" but also to Michael Holbourne as being "Cupid": it was not a matter of bolstering up the alleged libel by the addition of what somebody else had said so as to provide a wrong basis for damages. Further than that, and pleaded as it was, evidence as to the rumour was admissible as going to show that the alleged libel was a clear repetition of what other persons had published by word of mouth on other occasions as a slanderous reflection on the plaintiff.

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[1] [1936] 1 K.B. 697.

I think that fairly accurately renders the core of the arguments on this aspect of the case. The Chief Justice refused the application to strike out para. 5(D) holding that the rumour could properly be pleaded since identity was in issue; and also for the purpose of establishing that the defendant "in his allegedly defamatory statement has by implication approved, adopted or repeated a defamatory statement in another publication". He went on to say — "I need hardly add that of course the question after we've heard the evidence, whether a rumour is capable of identification or capable of amounting to repetition will of course be a question for me to decide and a question whether they in fact do so is a question of fact for the jury". Dealing with the knowledge of the ordinary sensible reader, the judge said in his summing up:

> "You are however entitled to look at other publications [a reference to the rumour] for the purpose of identifying the persons referred to in the alleged libel and to consider the surrounding circumstances in order to decide the way in which the words would be read by reasonable persons reading them. There is one general point I would make, and that is that witnesses have been called to say the way in which they construed the alleged defamatory statement. Their evidence is of course important: that is the evidence of the way in which reasonable persons might construe them, but it is not binding on you and it is for you as a jury to decide the way in which the words would be read by reasonable persons reading them. The test is simply this, would ordinary persons reading them read them in a defamatory way"?

In my opinion the submissions made on behalf of the plaintiff on this point are sound. I think that the Chief Justice came to a correct decision in declining to strike out para. 5(D) of the statement of claim. The first ground of appeal must, in my estimation, therefore fail.

It is then a ground of appeal that the Chief Justice was wrong in law in failing to withdraw from the jury the innuendo pleaded; and coupled with that is the complaint that — "the Chief Justice, having ruled that the publication complained of did not repeat the prior defamatory rumour, failed to direct the jury in accordance with this ruling". These grounds may be taken together. I do not think that the judge did so rule. That is Mr. Isola's contention and he says that he would have cross-appealed if it were otherwise. There was a good deal of involved and rather confused discussion at the close of the evidence on questions that, to one out of the immediate arena, appear, rightly or wrongly, to be reasonably simple and straight-forward. As it seems to me, on a fair reading of the notes, the judge was repeatedly invited by Mr. Lincoln to rule that there was no repetition of a libel or, rather, of a slanderous rumour. This the judge declined to do in any direct and definite way. He indicated that he was not going to put it to the jury in the way sought by counsel. From the way he approached the case I do not at all think that he did come to the conclusion that the evidence was incapable of establishing a repetition or adoption of the rumour, and the following passage from the summing up, though more expressly going to identification, does, I believe, reinforce my view:

> "Now, that is the evidence which was given on identification and I would suggest one test which you might apply when considering this question is, supposing that the defendant had shown this article just before it was published to somebody who knew about this rumour that was circulating in Gibraltar,

> would he have said to him "This is an innocent and amusing article" or would he have said to him "Mr. Marrache, don't publish this article at the present time because if you do people will think that you are referring to Angela Smith and Michael Holbourne". This is a test which I suggest you might consider".

To my mind, once the identification of the persons with the fancy names employed was achieved there was, as Mr. Isola has put it, as close a repetition as there could be of the rumour which everyone agrees was of a defamatory character or at the very least was capable of being so regarded; and in answering the questions as they did, I find it difficult to think that the jury did not consider that there was a repetition particularly when they were directed:–

> "The rumour was something that was going round but (presuming that you come to the conclusion that it was defamatory) this [the alleged libel] put a similar sort of allegation into written form".

Further as to ground 3 of the grounds of appeal, which complains of a non–direction. If learned counsel for the defendant considered that there was a specific ruling as to repetition in his favour it was open to him, as Mr. Isola points out, to ask for the direction he desired since an opportunity to do so was accorded in the course of the summing up when the judge said—"If there is anything counsel feel that I haven't raised or if I have gone wrong in law on any point perhaps they will draw my attention to it". Mr. Lincoln's answer to this is that he had done all he could to thrash the matter out in argument at the close of the evidence and an intervention at that stage was uncalled for and might only mean a recasting of the whole summing up. I do not fully appreciate this. Either the ruling was made or it was not. I have endeavoured to explain why I think it was not. But if counsel believed it was, I do not see, with respect, that he was at that juncture (or indeed at an earlier stage) placed in such an impossible position that he could not suitably act upon the invitation of the judge, assert that there was such a ruling and ask for the direction he wanted. But I do not wish to make too much of this: it is evident that Mr. Lincoln felt he was in a difficulty and considered it was not an appropriate moment to pursue the question any further.

I am not persuaded, having regard to the evidence, and particularly as, in my judgment, para. 5(D) was properly allowed in pleading, that the innuendo should have been withdrawn from the jury. I think the case was properly left to the jury. Nor do I see any substance in the contention as to the giving of a definite ruling against the element of repetition and a consequent omission in direction. In my estimation these two grounds must fail.

It is then submitted that the judge: "was wrong in directing the jury that it was a matter for them to consider what was the intention of the writer or publisher of the article". It is evident from material upon the record that the learned judge fully realised that intention was neither here nor there. (*Heaton v Goldney* [1]; *Hough v London Express Newspaper Ltd.*). The

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[1] [1910] 1 K.B. 754.

criticism is levelled at the following passage from the summing up:

> "But, of course the defendant is not bound to call evidence to say the way in which the words could have been interpreted. He is not bound to do so. But in the end it is not a matter for the witnesses, it is for you. You are entitled to take into account the fact that not a single person has gone into the witness box and said that when he read the article he read it in that way. That is a matter for you and you will have to consider yourselves whether you think it could be interpreted in a defamatory sense and, of course, if it is merely those alternatives, if there's no defamatory statement well there it is — just what was intended. But there's nobody who has gone into the box to support this. I do stress that he is not bound to do so. Now, that's really all I can say about it, in other words you'll have to decide, as reasonable men how you would interpret all this."

My impression is that it was not sought to set much store by this point. The offending words "just what was intended" in this context of a passage that was, I think, endeavouring to be fair to the defendant, do not seem to me to make much sense. It is not easy to know what they mean. One suggestion coming from the plaintiff's counsel is that the judge meant no more than something like — "How would you understand it"? The tenor of the whole summing up does not suggest that at any time in addressing the jury the judge was under the erroneous belief that intention was relevant. But if it is to be taken that the jury were being invited to consider intention as affecting the question whether the words were to be read in a defamatory sense or not, we have something, I suppose, in the nature of a misdirection. But, if so, I do think it is properly to be regarded as one of those isolated or detached expressions that can occur which cannot reasonably be held to vitiate a trial by causing a miscarriage of justice. As is said in Gatley (*op. cit.* para. 1420): "In determining whether there is such misdirection as to warrant an order for a new trial, the summing up will be considered as a whole. Too much weight will not be attached to isolated or detached expressions, nor will a single sentence be separated from its context, unless it dominates the reasoning on which that part of the summing up is based. The question to be considered is not whether every expression in the summing up is perfectly accurate, but whether there is reason to believe that a verdict which is not warranted by the evidence may have been caused or induced by an erroneous enunciation of the law by the judge". I think the authorities [1] referred to in Gatley's work cover the point. But I consider myself, though I do not recollect that anyone has adverted to this, that what the learned judge had in mind was the pleading of the defendant in para. 7 of his defence where it was alleged – "Further to para. 3 the defendant says that the paragraph complained of in the said newspaper was intended to refer to the three persons composing the political group known as the 'Isola Group' " Earlier in the same context the judge referred to the words of this pleading and thus, I have little doubt, the offending words crept in again

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1 *Clark v Molyneux* (1877) 3 Q.B.D. 237; *Wells v Lindop* (1888) 15 Ontario App. R. 695.

to the passage under criticism since he was concerned to invite the jury to consider the value of the defendant's case as made on his pleading. I really think that the defendant has no solid ground of complaint under this head, for it was he introduced what he intended by the published matter in the first place. Throughout the summing up the jury were directed to take an objective approach as to the meaning of the words as alleged by the plaintiff.

On the question of liability I can see no merit in the appeal.

I pass to the matter of damages. The fourth ground of appeal is –"that the jury, having been directed not to give punitive or exemplary damages, perversely awarded a sum which was grossly excessive in all the circumstances of the case and having regard to the evidence". Counsel for the plaintiff has gone to the trouble of referring to cases settling the problem as to when an appellate tribunal is justified in the absence of misdirection in interfering as to damages and as affording the tests as to what amount may properly be regarded as excessive. As this is the first civil appeal from the higher court to a court of appeal determined in Gibraltar, it may not be inappropriate to make fairly full reference here to some such authorities at the risk of overloading this judgment:

> "...judges have no right to overrule the verdict of a jury as to the amount of damages, merely because they take a different view, and think that if they had been the jury they would have given more or would have given less" (*per* James L.J. *Phillips v. London and South Western Rly. Co.)*[1]

> "...In such a case I think a new trial might be ordered without reference to any perversity of mind of the jury in regard to the quantum. In any case in which you are able to draw the inference that the jury either included a topic which ought not to have been included, or measured the damages by a measure which ought not to have been applied, I think there ought to be a new trial." *(Johnston v. Great Western Rly. Co.)* [2]

> "It is true... that we cannot set aside a verdict merely because the damages are more than we — were we the tribunal to decide the amount — should be disposed to give; but it is equally true that there is some amount of damages which will be sufficient to induce the court to interfere. This amount is variously described in different cases. In some cases the epithet applied is 'scandalous', in some 'outrageous', in others 'grossly extravagant'. None of these expressions convey any very accurate idea to the mind, and in this respect resemble the adjective 'gross' when applied to negligence. A more clear, legal and accurate definition was given by my brother Fitzgerald during the argument, when he stated that the amount should be such that no reasonable proportion existed between it and the circumstances of the case. In determining whether or not this amount has been exceeded, we should remember that the jury are the constitutional tribunal to determine the amount of damages, and we should not on light grounds review the decision at which they have arrived. But if, of the various views of the facts which are

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1 (1879) 5 Q.B.D. 78 at p. 85. 2 [1904] 2 K.B. 250.

capable of being taken by reasonable men, we adopt that which is most favourable to the plaintiff, and if, adopting this view, we arrive at the conclusion that no reasonable proportion exists between the damages which we would be inclined to give and the amount awarded by the jury, then the verdict ought not to stand. Each case must rest on its own peculiar facts". (*Per* Pallas C.B. in *M'Grath v Bourne.*[1])

"I do not in the least say that I should have awarded the same amount myself. But that is not the relevant consideration. Most of the reported cases on the question of excessive damages are naturally cases of tort: in contract the damages are generally capable of more or less precise ascertainment though it sometimes happens — as here — that they must be a matter of conjecture. But in general in contract a new trial is ordered, if at all because of some error in law. But where there is no error in law the principles are well stated by Lord Esher in *Praed v Graham*, 24 Q.B.D. 53, 55, where he said — 'The rule of conduct for the appellate court when considering whether the verdict should be set aside on the ground that the damages are excessive is nearly as possible the same as where the court is asked to set aside a verdict on the ground that it is against the weight of the evidence'. Lord Esher adds that the court cannot set aside the verdict merely because it is larger than they themselves would have given, but only if having regard to all the circumstances of the case, the damages are so excessive that no twelve men could reasonably have given them." (*per* Lord Wright in *Mechanical & General Inventions Co. v Austin.*[2]).

"No doubt an appellate court is alway reluctant to interfere with a finding of the trial judge on any question of fact, but it is particularly reluctant to interfere with a finding on damages. Such a finding differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate... At the other end of the scale would come damages for pain and suffering or wrongs such as slander. These latter cases are almost entirely a matter of impression and common sense and are only subject to review in very special cases... Where the verdict is that of a jury, it will only be set aside if the appellate court is satisfied that the verdict on damages is such that it is out of all proportion to the circumstance of the case." (*per* Lord Wright in *Davies v Powell Duffryn Associated Collieries Ltd.* [3]).

Finally I refer to *McCarey v Associated Newspapers Ltd.* That was a case which involved compensation in respect of inferential injury to the plaintiff's reputation and honour as a professional medical man, £9,000 being awarded as damages. It was there recognised that there was a substantial wrong and substantial damages were a proper award, but the sum in fact awarded was held to be so excessive so as to justify interference. Pearson,L.J., said[4]:

"It is in the end a matter of impression, and I cannot resist the impression that this sum is much, much too large. It does not reveal a sensible way of approach in this case, nor is it a reasonable sum. This award by the jury of

1 I.R. 10 C.L. 160, at p. 164.
2 [1935] A.C. 346, at pp. 377-8.
3 [1942] 1 All E.R. 657 at p. 664.
4 At p. 958.

> £9,000 goes far beyond what can be regarded as proper compensation to the plaintiff. It must include either an element of punishment for the defendants or an element of simple bounty for the plaintiff. As compensation to the plaintiff for the wrong done in the present case, it is an excessive and extravagant and exorbitant sum, and, in my view, should not be allowed to stand".

Willmer L.J. expressed doubts as to whether there should be interference though £9,000 was "a very, very large sum", but in the end was not prepared to dissent from the majority order to set the verdict aside. He accepted on the authorities that it was only in exceptional cases that a court of appeal can be justified in interfering with an award of damages and thought that this applied with particular force to such an award by a jury. The learned Lord Justice referred to the statement of principle by Lord Herschell in *Bray v Ford*[1]:

> But in the case of an action for libel, not only have the parties a right to trial by jury, but the assessment of damages is peculiarly within the province of that tribunal. The damages cannot be measured by any standard known to the law; they must be determined by a consideration of all the circumstances of the case, viewed in the light of the law applicable to them. The latitude is very wide".

Willmer, L.J., also referred to a phrase used by Holroyd Pearce, L.J., in *Lewis v Daily Telegraph Ltd.* which he considered afforded some help and a useful test in deciding whether a case is one in which it is proper for a court of appeal to interfere. Adopting the phrase, if it could be said that the course which the jury has taken is really *divorced from reality* then interference could be justified.

Diplock, L.J., in the same case said that it was a matter of equating incommensurables. He considered that it was relevant to see whether there was evidence going to the attitude of persons socially etc. as a result of the libel and said — "I agree that the jury was perfectly entitled to infer, even without specific evidence, that some change in that attitude would be bound to occur". To paraphrase further words of the learned Lord Justice as applicable to the instant case, the jury having seen the plaintiff were in a position to form their own view of her personality and to assess the grief and annoyance and, I add, distress and unhappiness, which it would cause her as the sort of person whom they thought her to be. It is to be accepted on the authority of that case and on *Rookes v Barnard* that a distinction in libel must be made between compensatory and punitive damages.

The award of £4000 may be regarded as substantial but I see no reason whatever to think that the jury in assessing such a sum must have perversely disregarded the direction not to give punitive or exemplary damages. As to whether the amount is excessive if there was no misdirection, I shall say no more than that, if the jury was properly directed, I certainly could not hold that the award was so clearly and greatly excessive that the verdict could not stand.

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1 [1896] A.C. 44.

But further grounds of appeal going to alleged misdirection on damages were added by consent at the commencement of the hearing before this court and fall to be examined.

It is alleged that the judge misdirected the jury as to damages (a) as to the effect of an absence of apology; and (b) as to the necessity to limit the damages to those directly attributable to the publication. At the outset let me say that I recognise that a misdirection on any part of the libel which might have influenced the jury in assessing damages is ground for a new trial The court cannot take on itself to say that the misdirection would not have had any influence merely because the court thinks that the jury might still have reasonably given the same damages under proper direction (*Bray v Ford, (supra)*; Pollock 12th Ed. p. 278).

To deal first with (b). The passage complained of in the summing up is as follows:–

> "Now a number of particular matters were raised regarding damages. Particular ones. One question raised was the question of the rumour. You cannot of course give damages for what she suffered by the rumour. You have got to try and get a sense of proportion on it but on the other hand, of course, you will take into account this factor. The rumour was something which was going round, but (presuming you come to the conclusion that it was defamatory) this put a similar sort of allegation into written form. So that obviously is the point you take into account in considering damages".

It is contended that here the judge was inviting the jury to do precisely what was said in *Astaire's* case cannot be done, that is, to give damages for a defamatory statement made by persons other than the defendant on other occasions. Thus the jury must have or are likely to have included in the award some amount in respect of the rumour itself. But there was the very clear direction that damages for the rumour could not be given. What the learned judge meant by his further references to the rumour are perhaps not easy to comprehend without the help of inflexion of voice; but I hope I am not straining things in a line of thought which induces one to think and believe that what the judge was doing was putting it to the jury that though they were not to give damages for the rumour, they were not to leave it out of account as a factor for the other purposes he had adumbrated in the course of his address. It is inconceivable that he should tell the jury, or be understood to tell them, to disregard the rumour for the purpose of assessing damages and in the next breath tell them to take it into account for such purpose. I think that what the judge meant, and that in face of the more direct and precise direction the jury were not misled, was that evidence as to the rumour should not be taken as going out of account altogether. As a factor in the case the evidence as to it went to identification and repetition. It is true that he dealt in no very direct way with the element of repetition but the drift of the summing up went in my view to it, and it would anyway be evident to the jury, if they accepted the evidence, that there was a repetition. As great an injury may arise from wrongful repetition as from the first publication of a slander (Gatley *op.cit.* para. 262). In *Lewis v*

Daily Telegraph Ltd.[1] Lord Reid said:

> "I can well understand that if you say there is a rumour that X is guilty, you can only justify it by proving that he is guilty, because repeating someone else's libellous statement is just as bad as making the statement directly".

Again it is said in Gatley (*op.cit.* para. 261) — "Every republication of a libel is a new libel, and each publisher is answerable for his act to the same extent as if the calumny originated with him. Where the defendant newspaper printed an article purporting to report a conversation... a direction that the jury could treat the case as if the defendant had said this was approved. Although J. might have slandered the plaintiff... if the words had not been repeated by the newspaper, the damage done by J. would be as nothing compared to the damaged done by this newspaper when it repeated it. It broadcast the statement to the people at large....." This was approved in *"Truth" (N.Z.) Ltd. v Holloway*[2]. I think that the judge was endeavouring to convey, and did sufficiently convey, to the jury that though they must not give damages for the rumour, when it came to damages for the libel complained of it was as bad or worse than the rumour, and could be treated in that way when it came to damages. Thus he said in the passage quoted – "this (the alleged libel) put a similar sort of allegation (as the alleged rumour) into written form. So that obviously is the point you take into account in considering the question of damages". In my judgment there was no misdirection as alleged, for I consider that the judge did adequately advert to the necessity to limit the damages to those directly attributable to the publication in the newspaper.

Then there is the submission that there was misdirection as to the effect of an absence of apology. The plaintiff requested a withdrawal but also asked for damages. In rendering the heads under which damages could properly be given as an aggravating feature, the judge, I think not surprisingly having regard to the way the topic is dealt with in Gatley, told the jury that they could take into account the absence of an apology. When the matter was argued before this court there was only the shortened report available of *Morgan v. Odhams Press Ltd.* that is mentioned above, in which reasons did not appear for the majority decision that a direction as to failure to give an apology amounted to a misdirection in the circumstance of the case, which went as one of the misdirections to make a retrial necessary on the issue as to damages. I have now seen the full report[3]. I had found myself thinking along the lines of the dissenting speech of Lord Morris of Borth–y–Gest. But the law as laid down is quite clear. Lord Reid said[4]:

> "The learned judge directed the jury that they could take into account the fact that there has never been a word of apology from the respondents. In an ordinary case where the statement alleged to be defamatory clearly was made of or concerning the plaintiff an apology may well go to mitigating damages.

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1 At p. 260.
2 [1960] 1 W.L.R. 997.
3 [1971] 1 W.L.R. 1239.
4 At p. 1246.

Whether mere failure to make an apology can ever justify aggravation of damages may be doubted — I need not decide that here. In the present case I do not see what room there was for an apology. The respondents' case throughout was that they never said anything at all about the appellant. The question for the jury was whether what they had said should be regarded as applying to him or not. To have apologised — I do not know how — might have seemed to be going some way towards admitting that they had defamed the appellant. I think that here there was a misdirection".

Lord Guest expressed the following view on this point[1]:

There was another misdirection when the learned judge told the jury that they might, in considering the amount of damages, take into consideration the fact that the respondents had never apologised. They maintained the position that the article did not refer to the appellant. Consistently with this defence they could not apologise without widening the area of publication... In my view, this direction of the judge does not represent the law. Failure to apologise is not evidence of malice (*Broadway Approvals Ltd. v Odhams Press Ltd.* (No. 2). By parity of reasoning it cannot increase the damages".

Lord Donovan concurred with the view that the amount awarded must be reconsidered for the reasons given by Lord Reid and Lord Guest. Lord Pearson, after referring to the summing up, said[2]:

"Certain matters of aggravation were mentioned. One of them was the absence of an apology. But I do not think an apology or disclaimer or explanation published in the newspaper would necessarily have helped the plaintiff, because the thought of a possible connection between this article and the plaintiff would have been brought to the minds of readers to whom no such thought had occurred. A letter from the newspaper to the plaintiff, which could have been shown to his friends and neighbours, would have been better, but it does not appear that the plaintiff ever asked for such a letter".

In the instant case the circumstances are similar in that the defendant's main case was throughout that he never published anything at all about the plaintiff and the article complained of did not refer to her. It was not defamatory of her or any other person. An apology would be inconsistent with that defence and amount to something in the nature of an admission running contrary to the denial and touching an issue that was for the jury to decide. There is also the consideration to which attention has been drawn, that an apology published in the newspaper in such circumstances would not necessarily have helped the plaintiff and might have done more harm than good by extending the field of publication so that the plaintiff would have been brought to the minds of readers who had not heard the rumour. I can see nothing whatsoever that would go to distinguish the present case from the authority under reference. I hold that there was a misdirection.

Accordingly in my judgment the verdict of the jury must stand on the question of liability and I would dismiss the appeal to that extent. I would however, direct a new trial on the quantum of damages.

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1 At p. 1262.

2 At p. 1271.

Hogan, J.A.:

[*After setting out particulars of the parties, the events leading up to the publication of the offending words and the words themselves, para. 5 of the statement of claim and the particulars*—]

The defence filed on behalf of the defendant made no admissions of the allegations in the statement of claim; the publication or printing of the alleged words was expressly denied and the statement of defence went on to say:

> "3. The Defendant further says that if the said words set out in Para. 4 of the Statement of Claim were printed and published on the date alleged and in the said paper, they were not printed and published of and concerning the Plaintiff as alleged or at all. None of the said words referred to or were understood to refer to the Plaintiff as alleged or at all.
>
> 4. The said words in their natural and ordinary meaning are not defamatory.
>
> 5. In answer to Para. 5 of the Statement of Claim the Defendant says that the words alleged are incapable of bearing or of being understood to bear the meanings alleged. The Defendant makes no admissions with regard to the facts alleged in Para. 5 or under the Particulars thereto.
>
> 6. In the alternative the Defendant says that insofar as the said words consist of statements of fact they are true, and insofar as they consist of comments they are fair comments upon a matter of public interest
>
> 7. Further to Para. 3 the Defendant says that the Paragraph complained of in the said newspaper was intended to refer to the three persons composing the political group known as the 'Isola Group'.
>
> *Particulars*
>
> (a) The reference to the "Hon. Moonface" was intended to refer to one Peter Isola and would be so generally understood,
>
> (b) The reference to "Mather" was intended to refer to one Major Alfred Gache and would be so generally understood.
>
> (c) The reference to "their biggest vote catcher and guardian angel" was intended to refer to one Willie Isola who at that time was frequently out of Gibraltar, and would be so generally understood.
>
> 8. Further and/or in the alternative the Defendant says that if the said words are related to the Plaintiff, which is denied, such words were written in jest and were so understood by any reasonable person reading them."

A reply was filed and there was a considerable interchange between the parties of requests for further particulars but these need not concern us now. There was, however, an application by the defendant to strike out sub-para. 5(D) of the claim and, following that, to strike out the whole paragraph, whilst the plaintiff sought to have paras. 6 and 7 of the statement of defence struck out. But, on Mr. Ashe Lincoln, for the defendant, stating that nothing in the article was fact and that it was all merely comment, Mr. Isola, for the plaintiff, expressed himself as satisfied in regard to para. 6 but continued to press his application for striking out para. 7.

On these applications, the Chief Justice held that sub–para. 5(D) of the statement of claim should not be struck out because other statements, including a rumour, can be pleaded for the purpose of establishing identity and, as identity was an issue in the present case, he considered the rumour was properly pleaded in sub–para. 5(D). He continued:–

> "It further appears... that other statements are also relevant for the purpose of establishing that a Defendant in his allegedly defamatory statement has by implication approved, adopted or repeated a defamatory statement appearing in another publication. In my view the pleadings are wide enough to enable the plaintiff to raise this issue in the present case. I need hardly add that of course the question after we've heard the evidence, whether a rumour is capable of identification or capable of amounting to a repetiton will of course be a question of law for me to decide and a question whether they in fact do so is a question of fact for the jury."

As for para. 7 of the defence, the Chief Justice said that *Brembridge v Latimer* [1] and *Watkin v Hall* [2] established the principle that a defendant may not place on the words a meaning of his own, which differs from the natural and ordinary meaning of the words and from the meaning assigned to them in the innuendo, and by thus taking a second meaning of his own, seek to justify them. But the Chief Justice did not think that the paragraph in question infringed this principle because the pleading was not seeking to put forward a secondary meaning and justify it but pleaded that there was no defamatory meaning "alleged" against the plaintiff and further pleaded, without "alleging" a defamatory meaning, that the reference was to some person other than the plaintiff. The only objection the Chief Justice saw to the pleading was that it might, perhaps, be a pleading of evidence rather than fact but he was not prepared to strike out the paragraph on that account. It was on pleadings in this form that the parties went to trial.

At the hearing; evidence was given for the plaintiff but none was given on behalf of the defendant. At the conclusion of the evidence, however, both counsel made submissions in the absence of the jury. The Chief Justice then acceded to a submission by the plaintiff that the defence of fair comment should not go to the jury and, having reserved until the following morning his ruling on the other application, he gave it in the following terms:–

> "Mr. Ashe Lincoln, Mr. Isola I have to make the specific rulings on whether the words are capable so that being so I shall make it now. (1) The words in their ordinary meaning are reasonably capable of bearing a defamatory meaning provided that Angela Smith is identified, (2) the evidence in my view established that the words are reasonably capable of referring to the plaintiff Angela Smith, (3) the words in my view are reasonably capable of bearing the meaning alleged in the innuendo provided that both the plaintiff and Michael Holbourne are identified. The evidence in my view established that the words are reasonably capable of referring to the plaintiff and Michael Holbourne.

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1 (1864) 12 W.R. 878.

2 (1868) L.R. 3 Q.B. 396.

I think those are the only ones on which I have to give a ruling There are so many different functions of judge and jury in libel cases but I think on the issues before us those are the only ones I'm called upon to do apart from the ruling I made yesterday."

With the agreement of counsel the judge put to the jury the following questions, which received the answers indicated below:–

"(1) Are you satisfied that the plaintiff has established that the words "their biggest vote catcher and guardian angel" would be read as referring to the plaintiff, Angela Smith? YES

(2) If yes, are you satisfied that the plaintiff has established that the word "Cupid" would be read as referring to Michael Holbourne? YES

(3) If your replies to (1) and (2) are both in the affirmative, are you satisfied that the plaintiff has established the imputation alleged in the innuendo? YES

(4) If your reply to (1) is in the affirmative but to (2) in the negative has the plaintiff established that the words are defamatory in their natural and ordinary meaning?

(5) Has the defendant established the defence of jest? NO

(6) If the answer to (3) or (4) is in the affirmative and the answer to (5) is in the negative, what are the damages? £4000

Against the judgment entered on these findings the defendant filed four grounds of appeal.

[*There follow the four grounds and the two additional grounds, as at p. 273 supra.*]

In support of the first two grounds, Mr. Lincoln argued that the judgment of the Court of Appeal in *Astaire v Campling* showed that the second statement must repeat the original in clear terms so that one can read into it, when seen apart from the original, the same defamatory meaning — that merely calling a person to mind is not sufficient; that the innuendo must be clear and evidence which was admissible for the purpose of establishing the identity of an individual mentioned in the second statement would not be admissible to add to, or create, a defamatory statement; that a defamatory rumour, just like a defamatory statement, could not be pleaded as a fact; the defamation though it may be express or implied must be found in the words themselves and not in the facts extrinsic to them on which reliance was placed to show the identification.

Counsel claimed to find confirmation of these propositions and approval of the decision in *Astaire v Campling* in the later case of *Morgan v Odhams Press* which was subsequently taken to the House of Lords where, by a narrow margin, the decision of the Court of Appeal was set aside. Counsel

argued that the House of Lords found no fault with the law as stated in the Court of Appeal, which required that not only should the alleged defamatory statement contain in itself the defamation relied upon but also that it should, in cases of identity, provide a sufficient pointer or peg to link the second statement with the facts or circumstances which were said to provide the appropriate identification. Counsel maintained that the House of Lords, accepting this as a proper statement of the law, then went on to find, as a fact, that, in *Morgan v Odhams Press* there was a sufficient peg or pointer to ble the plaintiff to succeed. It was permissible, counsel claimed, for iff to show that "Angela" and "vote catcher" could be used as a hang the identification and she could assert, as a fact, that ch a date and that Mr. Holbourne left on such a date such as that she was a wife and mother; she lbourne were frequently in each others this, counsel said, would be per- ordinary reader would read ne because there was did not deny — ne; to do of

per Mr.

In my matter point are s stage declining to summing ground of app it was not. sel believed

It is then a gr or indeed at an failing to withdra uld not suitably that is the compla h a ruling and ask publication complain o much of this: it is failed to direct the jury considered it was not an may be taken together. ce, and particularly as, in Mr. Isola's contention and pleading, that the case was properly were otherwise. There was think the case in the contention as to the discussion at the close of the t of repetition and a consequent immediate arena, appear, right these two grounds must fail. straight-forward. As it seems to was wrong in directing the jury that it judge was repeatedly invited by M that was the intention of the writer or repetition of a libel or, rather, of a ent from material upon the record that declined to do in any direct and definite intention was neither here nor there. going to put it to the jury in the way sou *London Express Newspaper Ltd.*). The approached the case I do not at all think tha that the evidence was incapable of establishi the rumour, and the following passage from th expressly going to identification, does, I believe,

> "Now, that is the evidence which was given on ide suggest one test which you might apply when consid supposing that the defendant had shown this article just bef to somebody who knew about this rumour that was circula

judge's ruling that the libel was not a repetition of the rumour and that the latter could only be admitted for the purposes of identification was insufficient, counsel argued, to stem the damage flowing from the original mistake of allowing the plaintiff to plead a rumour as an established fact. To prove the innuendo, counsel claimed, the plaintiff had to identify Mr. Holbourne and could only do this by relying on the rumour as an additional defamatory statement; the existence of the rumour was itself a fact but not a fact on which the plaintiff could rely to establish defamation because in so doing she would be using another person's defamatory statement to penalise the defendant. To prove that the plaintiff left for the United Kingdom on 3 May 1969 and that, within three weeks, her husband and Mr. Holbourne had left Gibraltar, if the latter was indeed proved, would be, counsel said, in themselves innocuous without knowledge of the rumour; without the rumour it was an open question whether the jury, in view of the departure of her husband within three weeks, would have found the alleged libel defamatory.

As pleaded, counsel said, the rumour did nothing to identify the plaintiff and should not have been admitted for that purpose, since it merely set out other defamatory matter.

[*After considering the evidence of Mr. Holbourne's departure from Gibraltar, the judgment continues*—]

I think there was sufficient evidence before the jury to justify a conclusion that Mr. Holbourne had left the Colony. Whether it was equally clear that he had gone to the United Kingdom was not, I think, in all the circumstances, sufficiently material to the questions at issue to justify any interference with the verdict in the court below because of an absence of direct evidence stating categorically that Mr. Holbourne had left for England.

As a preliminary to his argument in support of the judgment Mr. Isola, for the plaintiff, argued that even if there might possibly be some merit in the first two grounds of appeal they did not give rise to any substantial miscarriage of justice and that nothing less would justify the defendant's demand for a new trial.

Coming then more specifically to the detailed grounds of appeal, Mr. Isola argued that the first two must fail, quite apart from the decision in *Astaire v Campling*, because a plaintiff is bound to plead all facts on which reliance is placed for identification of a party not specifically named in the libel. He referred to the case of *Bruce v Odhams Press Ltd.* where Lord Justice Greer said that special facts and circumstances from which it was to be inferred that the words were published of the plaintiff must be pleaded. See the old RSC Ord. 19 and the new Ord. 82, r. 3 which requires a party to plead the facts and matters from which it is to be inferred that the libel in question referred to the plaintiff. Consequently, said Mr. Isola, since the plaintiff had to plead the facts and circumstances which would show that the libel referred to her, the direction given by the Chief Justice on the submission of the defendant's advocate was entirely correct.

Coming then to *Astaire v Campling*, and its bearing on the first two grounds of appeal, Mr. Isola said that the case is authority for two propositions:–

1) A statement that is itself innocent cannot be pleaded to make a defendant responsible for other defamatory matter published by a third party,

2) It is an entirely different matter if the later statement adopts or repeats the earlier statement.

From this Mr. Isola turned to para. 1238 of Gatley's Libel and Slander (6th Ed.), which reads as follows:–

> "1238. *Surrounding circumstances*. Evidence is also admissible of any "relevant surrounding circumstances" which would or might lead those who read the libel to conclude that the plaintiff was the person referred to. Thus where an action was brought for a libellous article in an evening paper which did not name the plaintiff, but which was based on articles published on the same day in the morning papers, which did name the plaintiff, so that anyone who read the latter would know to whom the former referred, it was held that the plaintiff was entitled to put in evidence the articles in the morning papers."

For this statement the authority mentioned by the authors is the American case of *Van Ingen v Mail & Express Publishing Co.* which they say was apparently approved by Sellers L.J. in *Astaire's* case but distinguished in that case because in it the defendant had not himself published a defamatory statement.

In *Astaire's* case, the defendant had published an entirely innocent article but one which would enable a reader to identify the plaintiff as the subject of another different and defamatory statement not published by the defendant.

In *Morgan's* case the Lords Justice of Appeal went astray in trying to carry the principle set out in *Astaire's* case too far, and in doing so disapproved of two earlier cases *Cassidy v Daily Mirror Newspapers Ltd.* and *Hough v London Express Newspaper Ltd.* When *Morgan's* case came before the House of Lords that House clearly preferred the earlier authorities, *Cassidy* and *Hough*, to the view taken by the Court of Appeal in *Morgan's* case. The decision of the House was also authority, Mr. Isola claimed, for the proposition that, when seeking to determine whether the second publication adopted or approved or repeated the earlier publication, one need not find that the second statement meticulously repeated what had been said in the first and that it was quite sufficient to rely on the general impression which the casual reader, not actively comparing each word and each sentence, would get of the two publications.

Mr. Isola went on to argue that, quite apart from sub-para 5(D) of the statement of claim, it would have been open to the jury to find the innuendo proved, because the words appearing in El Calpense were patently capable of defaming the plaintiff once she had been identified as the Angel therein

referred to; the word Cupid clearly referred to a lover in an illicit sense, and even without the rumour it was open to the jury to find that the word referred to Mr. Holbourne.

To the question whether the jury had either expressly or implicitly found that the paper publication was a repetition of the rumour, Mr. Isola replied that the jury had found the innuendo to be proved and, by implication, this finding meant the jury thought the article adopted the rumour.

Even putting aside sub–para. 5(D), Mr. Isola maintained that to prove the innuendo by identifying the plaintiff or the plaintiff and Mr. Holbourne the jury could look to the rumour, the existence of which was a fact and admissible as such for the purpose of proving the state of mind of a section of the public in Gibraltar at the time.

Whilst stoutly maintaining the correctness of the Chief Justice's direction, Mr. Isola went on to argue that even if fault might be found with his ruling on sub–para. 5(D) there had been no sufficient miscarriage of justice to warrant interference with the verdict of the jury. He illustrated this proposition by a reference to *Bray v Ford* and then went on to say that in the instant case the only significant complaint was against the effect the rumour might have had on damages but the judge had told the jury not to give any damages for the rumour and this fairly distinguished the case from *Bray v Ford* where the misdirection was inseparably mixed up with the finding of the jury on damages. Having referred to the case of *Hip Foong Hong v H. Neotia & Co.*[1] counsel went on to contend that the evidence was so overwhelming it was quite clear that the jury must have come to the same conclusion that they had reached on any issue raised in the present appeal.

He supported this by referring to one of the witnesses, Mr. Norton, who had not heard the rumour but nevertheless from earlier articles and other circumstances identified the plaintiff as the Angel referred to in the defamatory article.

Mr. Lincoln has rested the main weight of his argument on the judgments in *Astaire v Campling*, which he claimed were endorsed by the speeches in the House of Lords in *Morgan's* case. This submission would clearly have gained in strength if the decision of the Court of Appeal in *Morgan's* case had remained unchanged but the majority of their lordships found that decision erroneous. Lord Reid put it thus:—

> ..."the judge had to consider how ordinary sensible men, having the special knowledge proved could understand the words complained of. But the Court of Appeal imposed a further, to my mind artificial, limitation — ...'the court must be satisfied that there is something in the article itself to serve as a peg upon which to hang the alleged identification of the plaintiff as the person referred to — something...which expressly or by implication points to the plaintiff.'...

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[1] [1918] A.C. 888.

> There was no peg or pointer in *Cassidy v Daily Mirror Newspapers* or in *Hough v London Express Newspapers Ltd.* I see nothing wrong with those decisions.They do, however, show that the court recognises that rather far fetched inferences may be made by sensible readers. I therefore reject the argument that the appellant must fail because the respondent's article contained no pointer or peg for his identification."

Mr. Lincoln's argument was that the House of Lords in *Morgan's* case endorsed the statement of the law made in *Astaire v Campling* but distinguished *Morgan's* case as differing in fact from that decision. Although the House did not purport to overrule the decision in *Astaire v Campling*, they clearly thought that the principle which the judges in the lower court purported to derive from the decision in *Astaire v Campling* was an erroneous statement of the law.

In *Astaire's* case the head note reads as follows:–

> "To be actionable as a libel a statement must be false and defamatory of the plaintiff; if it is itself innocent, it is not possible, by pleading innuendoes, to make the defendant responsible for defamatory statements by other persons which are not either expressly or by implication approved, adopted or repeated in the statement by the defendant in respect of which the action is brought."

Sellers L.J., expressed himself as follows:–

> "It may well be that in circumstances where the identity of a plaintiff is not expressly referred to in an article extrinsic evidence may be given to establish identity, but it seems to me a wholly different matter to seek to add to the alleged libel defamatory views expressed and published by somebody else. Counsel for the plaintiff relied on ... some of the observations in an American case in the last century, *Van Ingen v Mail & Express Publishing Co.* and... laid stress on the following words to be found in the opinion given by Martin, J., which was the majority opinion of the court:—
>
> "To determine the effect of the defendant's article and to whom it applied, it would seem proper to show the condition of the public mind, the information the public possessed upon the subject of the article, and the consequent inference which it would readily draw from reading it. ...In other words, it seems to me that a defendant cannot publish a libel of another and shield himself by not disclosing the name of the person to whom it was intended to refer, when he knows and understands that by reason of former publications the public mind is in a condition where it would necessarily understand the article as applying to him alone."
>
> The public mind may no doubt be relevant in a case of identity, but if it has been affected by defamatory statements made by someone other than the defendant and not by the defendant the article does not seem to me to make the defendant liable for anything more than it contains. It must be brought home by the evidence of innuendo to a reader that the article itself, which is the article complained of as the libel, has in the light of all the circumstances a defamatory meaning."

Davies L.J., said:–

"...the contention on behalf of the plaintiff is that, if the alleged libel... in its natural and ordinary meaning is innocent, it is nevertheless possible and permissible to impute to the words a defamatory meaning by reason of and by reference to publications by other people on other occasions. That, as it seems to me, is not permissible. Statements made, whether "on the air", as alleged in one of the particulars, in a broadcast, or in other articles in other papers, in this context seem to me not to be "facts" within the meaning of RSC Ord. 82, r. 3(1). To permit what the plaintiff is seeking to do in the present case would, as I think, have the effect of allowing any jury that tries the action to give against these defendants damages for what other people have said on other occasions. ...

The only other thing is this. If in the alleged libel the particular defendant has adopted, re-published, reinforced or expressly agreed with, what other people have published on other occasions, that would be a very different matter."

Diplock, L.J., as he then was, said:–

"The proposition... of the plaintiff really amounts to this: that, if a false and defamatory statement is made by a third party about an unidentified person, anyone who subsequently publishes, to readers whom he might reasonably expect to have read the previous defamatory statement, any statement about the plaintiff, however true and in itself innocuous, which would enable such readers reasonably to identify the plaintiff as the person referred to in the previous defamatory statement, is liable for any damage caused to the plaintiff's reputation by the previous defamatory statement as a result of such identification, even though the subsequent statement could not be reasonably understood as approving or adopting or repeating the previous defamatory statement."

It seems to me that the direction given by the learned Chief Justice to the jury is entirely consistent with the views expressed by the judges in that case and with the later and even more authoritative decision of the House of Lords in *Morgan's* case. The difference between the instant case and that of *Astaire v Campling* is that the former is concerned with a situation where the defamation complained of was itself libellous once the persons referred to in it were identified and if, as in the American case mentioned by Sellers, L.J., a plaintiff is entitled, for the purposes of identification, to refer to the contents of an article in an earlier edition of a paper, I can see no reason why he or she should not equally refer to the contents of a rumour. To my mind the existence of the rumour and the form which it took are both matters of fact, which stand quite apart from the veracity of the rumour's contents, and that both could be proved for the purpose of identifying the plaintiff with the 'guardian angel' in the publication and Mr. Holbourne with 'Cupid'. Whether the reference to Mr. Holbourne is introduced as part of the identification of the plaintiff or whether it is introduced for the purpose of identifying 'Cupid' seems to me immaterial, as I think that either would be permissible and that neither goes beyond the purpose of identification for which the Chief Justice told the jury they were entitled to look at the rumour.

Moreover I think that Mr. Isola was correct when he said that the *Lewis* and *Morgan* cases were authority for the proposition that you can give evidence of the state of the public mind and for this purpose could show what had come to the attention of those individuals who were alleged to have had special knowledge.

Turning to his third ground of appeal, Mr. Lincoln contended that the trial judge had, at the conclusion of the evidence and in the presence of counsel but in the absence of the jury, ruled that the alleged libel was not a repetition of the rumours and indicated his intention to give a similar ruling to the jury but in fact failed to do so in the course of his summing up.

Mr. Isola argued that the Chief Justice had never ruled that the statement in El Calpense was not a repetition of the rumour although he had been invited to do so by Mr. Lincoln. The invitation was couched in the following terms:—

> "...I venture to submit with respect that it is your lordship's ruling which has to be made and one must be precise about this not as to whether the words in question are capable of being interpreted as repeating the rumour but as to whether your lordship rules that they do repeat the rumour."

Judge and counsel came back to this subject at the end of that day, just before the adjournment, when the judge was ruling on the question of fair comment and continued as follows:—

> "That issue doesn't go. I havn't given a formal ruling have I on ... I want a little bit of time to write something on this, perhaps I can give it first thing in the morning, because my own view is the substance of what I'm going to find is that the words are capable of a defamatory meaning, they are not(sic) natural ordinary meaning, provided that the plaintiff is identified. Then I'm going to say they are capable of bearing the meaning in the innuendo and I've already indicated the way in which I will put it to the jury, I'm not satisfied that it's strictly a repetition. I think that's the right way to approach it. I think it's identification and you must look to the words themselves and not to the rumour and I will so direct the jury."
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> Mr. Lincoln: "I'm much obliged."

The following morning the Chief Justice gave the ruling already quoted in this judgment. The record continued :—

> Mr. Lincoln: Your lordship ruled yesterday that it did not repeat the rumour.
>
> Chief Justice: Well, I was saying that I was not putting it in that way. It might be helpful to say now the question and I would like to have agreed questions with learned counsel if possible, the questions would ultimately go to the jury. ....."

Immediately before the summing up there was a final interchange on this point which appears on the record as follows:—

"Mr. Lincoln My lord, I should remind your lordship that you did give a ruling last night.

Chief Justice Yes.

Mr. Lincoln That except on the question of identity.

Chief Justice I did, yes.

Mr. Lincoln The rumour was not repeated or adopted.

Chief Justice What I felt was that I wasn't putting it to the jury in that way but the whole of my summing up will be directed to the fact that the rumour is to identification. We'll get more muddled than ever if we go on to all this. But it is in fact directed to identification and if the parties are identified do those words with the two parties identified, do they bear the meaning alleged in the innuendo?

Mr. Lincoln Yes and if they do ... but that must be then therefore without reference to the rumour but the meaning of the words.

Mr. Isola Your lordship has ruled on that on the preliminary basis when my learned friend made his submission.....

Chief Justice I would simply leave it. My own inclination in a case like this is to simply leave it straight to the jury, are those words re Michael Holbourne, those considered words, are they defamatory? and I shall direct them that they cannot look at the other statements for the purposes of adding to it. I don't think I'm going to go further than that because we can get terribly confused. I'm simply putting the general principle that you cannot use the rumour for the purposes of adding to the defamatory statement, and I'll then say that they are entitled to look at that for purposes of identification. Then in the end they have to say: do those words bear a defamatory meaning."

Mr. Isola argued that these passages did not give Mr. Lincoln the ruling he was seeking and that nowhere else in the proceedings did he get it. Mr. Isola went on to say that if the judge had ruled that the alleged libel was not a repetiton or adoption of the rumour, he would certainly have made a cross-appeal but as things stood he thought that the issue was left, even if somewhat tenuously, to the jury and as the finding was in his favour he did not complain about it. He went on to argue that what completely put the defendant out of court on this ground was his failure to raise the matter with the Chief Justice when invited to do so shortly before the end of the summing up. As authority for this, Mr. Isola referred us to *Nevill v Fine Arts Co.*[1] where Lord Halsbury L.C. said, anent a similar failure,

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[1] (1897) 66 L.J.Q.B. 195, at p. 199.

"...what puts him out of court ... in that respect is this — that where you are complaining of non-direction by the judge, or that he did not leave a question to the jury, if you had an opportunity of asking him to do it, and you abstained from asking him no court would ever have granted a new trial."

I think this ground of appeal must fail. Mr. Isola was, I believe, correct when he said that the Chief Justice never gave to the jury a ruling that the publication in El Calpense was not a repetition or adoption of the rumour, either because he thought better of it or because he thought it unnecessary in view of the manner in which he put the case to the jury. Had he acceded to Mr. Lincoln's request to rule that the statement was not a repetition or adoption of the rumour, I think he would have been wrong. That would be, in my opinion, a question for the jury and the most the Chief Justice could tell them was whether the words in the statement were or were not capable of being a repetition or adoption of the rumour. They were, I think, quite capable of being an adoption or repetition of the rumour — they were indeed the rumour without the proper names — but I do not think that the decision of the Chief Justice not to put separately and distinctly to the jury the question whether the statement did amount to a repetition or adoption of the rumour can afford any ground of appeal to the defendant. The jury's finding on the innuendo necessarily implied the adoption and repetition of the pith of the rumour.

The fourth and sixth grounds of appeal were in effect argued together and before turning to them it will be more convenient to deal first with the fifth ground of appeal.

Although the defendant, in para.7 of his defence, alleged that the offending paragraph in the newspaper was not intended to apply to the plaintiff but to members of a political group, Mr. Ashe Lincoln, in his fifth ground of appeal, complained that the judge was wrong to direct the jury to consider the question of intention.

Mr. Isola argued that the Chief Justice had given no such direction as that set out in the fifth ground of appeal and that if counsel was wrong in this submission, then the whole of the summing up should be looked at so as to give the proper weight to the brief reference by the Chief Justice to intention in a paragraph that was primarily devoted to pointing out to the jury that nobody had gone into the box to support the interpretation suggested by the defendant. The question of intention was in fact raised by the defendant in para. 7 of his statement of defence. The Chief Justice's brief reference to that and his use of the phrase "just what was intended" in a context where one would have expected a reference to what a reader would understand from the passage in question would not, I think, have materially influenced the jury to the disadvantage of the defendant. A similar use of the word "intended" appears in the passage quoted from the case of *Simmons v Mitchell* [1] by Lord Pearson in *Morgan's* case where it appears to have attracted no criticism.

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1 (1880) 6 App. Cas. 156, at p. 158.

This leaves the question of damages which has been made the subject of the fourth and sixth grounds of appeal.

Mr. Ashe Lincoln in his sixth ground of appeal claimed that the trial judge had misdirected the jury by telling them to take account of the absence of an apology and by failing to direct their attention to the necessity of limiting the damages to those directly attributable to the publication. These two complaints rested on passages in the speeches in the House of Lords in the case of *Morgan v Odhams Press Ltd.* where Lord Reid said there was misdirection on the absence of an apology and the jury should also have been warned that it was only publication to the few readers with knowledge of special facts that could in any way have damaged Mr. Morgan's reputation.

Concluding, on his fourth ground, counsel for the defendant argued that the size of the sum awarded for damages clearly showed that, although they were directed not to give punitive or exemplary damages by the Chief Justice, the jury had perversely awarded a sum which was grossly excessive in the circumstances.. In support of this contention counsel argued that the only damage for which his client could be made responsible was that flowing directly from the publication in El Calpense but, if the evidence for the plaintiff was to be accepted, a damaging rumour in similar terms had spread throughout the whole of Gibraltar before this publication was made and, therefore, since El Calpense had a very much more limited circulation than the whole of Gibraltar, the publication in that paper could have done her very little harm particularly as she was a woman of the highest repute and unlikely to suffer from the kind of innuendo that had been suggested, as very few would give it the slightest credit.

Mr. Isola challenged Mr. Lincoln's reliance on *Morgan's* case as an authority for saying that the jury should not have been told to take account of the absence of an apology. On the other hand Mr. Isola said that para. 1380 of Gatley's Libel and Slander, 6th Ed., correctly reflected the position when it said that there was no legal rule but the jury could take account of the absence or refusal of an apology.

Unfortunately at the hearing we only had available The Times newspaper report and not the more detailed reports of this case[1]. The headnote in the former, though not, in the latter gives the impression that the House of Lords made a pronouncement of principle on the point but a perusal of their speeches seems to suggest otherwise.

Lord Reid said:–

> "Whether mere failure to make an apology can ever justify aggravation of damages may be doubted — I need not decide that here. In the present case I do not see what room there was for an apology."

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1 [1971] 1 W.L.R. 1239; [1971] 2 All E.R. 1156.

Lord Morris of Borth–y–Gest said:–

"The injury to the plaintiff's reputation and feelings might have been diminished if the defendants had said that they had not had an intention of referring to the plaintiff and if there had been an expression of regret. They remained silent."

Lord Guest took the opposite view:–

"Failure to apologise is not evidence of malice (*Broadway Approvals v Odham's Press Ltd. (No. 2)*). By parity of reasoning it cannot increase the damages."

Lord Donovan would have dismissed the appeal and consequently would not have concerned himself with damages but, as a majority thought otherwise, he agreed to a retrial on damages for the reasons (sic) advanced by Lord Reid and Lord Guest. He made no reference to the difference in their reasons.

Lord Pearson said:–

"Certain matters of aggravation were mentioned. One of them was the absence of an apology. But I do not think an apology or disclaimer or explanation published in the newspaper would necessarily have helped the plaintiff because the thought of a possible connection between this article and the plaintiff would have been brought to the minds of readers to whom no such thought had occurred. A letter from the newspaper to the plaintiff, which could have been shown to his friends and neighbours, would have been better, but it does not appear that the plaintiff ever asked for such a letter."

It would seem therefore that only one Law Lord thought that the law precluded a reference to the absence of an apology and I am not at all sure that his reason for this view would command general support. Both Lord Reid and Lord Pearson confined themselves to the pragmatic conclusion that the facts of the particular case did not lend themselves to an apology. Indeed, in this context, that was the only view that had the support of a majority, (Reid, Donovan and Pearson) though Lord Donovan's support may, to some extent, be discounted as he did not deal with the difference between Lord Reid and Lord Guest. Lord Morris of Borth–y–Gest clearly thought the absence of an expression of regret was an aggravating feature.

If the presence or absence of an apology is a cardinal factor in a defendant's conduct, as I think it must be, one would surely require a more explicit and less divided opinion than the differing approach to this question revealed in the House of Lords in *Morgan's* case. before creating an exception to the general rule that the jury, in assessing damages, is entitled to take into consideration the defendant's conduct before the action, after action and in court at the trial of the action. See *Praed v Graham*[1] and Gatley on Libel and Slander 6th Ed. paras. 1260 and 1261.

1 (1889) 24 Q.B.D. 53.

To say that you may take account of the presence of an apology but not of its absence would tend, I think, to create a somewhat artificial distinction and though this is not unknown in our law I would be reluctant, in the absence of clearer authority, to see it introduced into the law of defamation.

I think that the ground of appeal numbered 6(a) must fail, as must the ground numbered 6(b) because the judge did direct the jury not to give any damages for the rumour when he said "You cannot of course give damages for what she suffered by the rumour." As Mr. Isola said if there was any error on this point after that direction it was the jury not the judge that went wrong.

Turning to ground 4 and the suggestion that the jury, although appropriately directed by the judge not to give punitive or exemplary damages had perversely taken that course, Mr. Isola argued that although the damages were undoubtedly high they were not excessive and it was, he said, impossible to hold that a body of reasonable men acting reasonably could not have arrived at such a figure In Gibraltar, he said, the honour of a woman was particularly important and a young woman with three children such as the plaintiff whose public activities frequently brought her into contact with members of the opposite sex outside the home circle was particularly vulnerable. He claimed that the speed and determination with which she moved to protect her honour was a clear indication of how deeply wounded she had felt; it had been suggested that the rumour did far more damage than the publication in the paper but there is a big difference between a mere verbal rumour and the crystallization of it in black and white in Gibraltar's oldest paper and a paper which claimed to have the largest circulation in the town. It was the province, he said, of the jury to find what were reasonable damages and the only way in which a jury could show that a damaging article was untrue was by the award of a substantial sum of damages; a small sum would leave some question mark. Moreover, the whole conduct of the defendant right down to the jury's verdict could properly be taken into account and the case in the lower court, no doubt on the instructions of the client, had been conducted in a manner likely to aggravate the injury already done. In this connection Mr. Isola referred to the lengthy and gruelling cross–examination to which the plaintiff was subjected and during which she had put to her such questions as whether she thought Mr. Holbourne was a good–looking young man. Efforts were also made by searching cross–examination of other witnesses, such as Dr. Giraldi, to probe into her home life. The only object of these questions could have been to sow a seed of doubt in the minds of the jury although the defendant had not pleaded justification for his damaging statement. See *Hay v Star* cited in Gatley (6th Ed. para. 1261).

The defendant, he contended, had produced no evidence of any kind to justify mitigation. He could have shown the care taken in checking the information etc. but in fact he did absolutely nothing and in these circumstances it was not surprising that a special jury, properly directed, had put the damages at £4,000.

Mr. Lincoln replied that the aim and object of his cross–examination was to show that the principal anxiety and real distress of the plaintiff at that time flowed from the bankrupt state of the Housewives Trading Company Ltd., and from her foolish and precipitate departure from the Colony when there was much money owing by that company; unpleasant facts for which the defendant was in no way responsible.

Taking account of the nature of the libel and the conduct of the defendant throughout I am not satisfied that a body of reasonable jurymen considering the proper, and only the proper, material before them could not arrive at a figure of £4,000.

I would dismiss the appeal with costs.