

ATTORNEY-GENERAL v KAPWEPWE (1974) ZR 207 (SC)

SUPREME COURT

DOYLE CJ, BARON DCJ AND GARDNER JS 35

8th OCTOBER 1974

SCZ Judgment No. 37 of 1974.

Flynote

Tort - Joint tortfeasors - Right of plaintiff to sue in succession - Restriction on sums recoverable in subsequent actions - Costs - When plaintiff entitled to after first action - Plaintiff's liberty to select one defendant - 40 Law Reform (Miscellaneous Provisions) Act, s. 9 (1).

Tort - Joint tortfeasors - Series of actions against different defendants - Duty of court in first case to compensate fully bearing in mind that he shall not be compensated twice - Later action to take into account damages in first - Compensatory damages as if action consolidated . 45

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Tort - Exemplary damages - Nature of - Whether such damages can be offset against compensatory damages - Where Government defendant - Purpose of award.

Tort - Damages - When appellate court can interfere - Assessment against background 5 of local conditions.

Tort - Alteration of common law rule - Mitigation of damages - Evidence of previous actions for damages - Defamation Act, s. 12.

Defence - Failure to enter - Assumption by court.

Headnote

The appellant, the Attorney-General, appealed against the amount 10 of an assessment of damages by a High Court judge in an action taken for libel by the respondent. The action related to the publication of allegations of treason and subversion against the respondent from the broadcasting and television stations as a result of a Press release issued by a Government news agency.

The 15 appellant had obtained damages earlier against two newspapers as a result of publications based on the same Press release. No defence was entered and damages were assessed at K30,000, being K10,000 compensatory and K20,000 exemplary damages.

Held:

- (i) Section 9 (1) 20 of the Law Reform (Miscellaneous Provisions) Act, Cap. 74, envisages different actions against joint tortfeasors.

The plaintiff may sue a number of tortfeasors in succession and may get judgment against them. The sums that can be recovered on such judgments cannot, however, exceed the sum awarded 25 in the first of such actions.

- (ii) Under s. 9 (1) (b) of the Law Reform (Miscellaneous Provisions) Act, where a plaintiff brings different actions against joint tortfeasors, he puts himself at risk for his costs after the first.

They cannot be given to him unless the court is satisfied that 30 there was reasonable ground for bringing the actions.

- (iii) There is no obligation upon a plaintiff to sue more than one tortfeasor. He is at liberty to select, if he wishes, one defendant whom he considers good for the total amount of damages which may be awarded. It is entirely a matter for the defendant to 35 recover contributions made from any other persons who may jointly have been guilty of the tort.

- (iv) Section 12 of the Defamation Act, Cap. 70, altered the common law rule and permitted evidence to be given in mitigation of damages that the plaintiff had already recovered damages, or 40 had brought actions for damages for libel and slander in respect of publication of similar words to those upon which the action was founded.

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- (v) Exemplary damages are punitive in nature and the result is a gratuitous gain to the plaintiff outside his proper compensation.

Such damages cannot be offset against compensatory damages.

- (vi) Where the Government is the defendant the use of the award of exemplary damages is to induce the Government to discipline its servants whose action has resulted in loss to the Government, and so to serve as a deterrent for future cases. It is not necessary to give extravagant sums for this purpose.
- (vii) Where no defence is entered by a defendant a court may assume that no defence was possible. 10
- (viii) The measure of damages to be awarded in any case must be assessed against the background of local conditions.
- (ix) Before an appellate court can interfere with an award of damages it must be shown that the trial judge has applied a wrong principle or has misapprehended the facts or that his award is 15 so high or so low as to be utterly unreasonable. It is no ground for varying an award made by the trial judge that the judges in the appellate court would have awarded a different sum.
- (x) Where there is a series of actions against different defendants in respect of the same or substantially the same libel, the court 20 in the first case can deal with the matter only on very broad lines, doing its best to ensure that the plaintiff is fully compensated for the damage caused by the publication of the particular libel which is the subject of that action, bearing in mind that he should not be compensated twice for the same loss. 25
- (xi) It is the duty of the court hearing a later action to take into account the damages awarded in an earlier action.
- (xii) Where the various defendants have been brought before the court at different times the court must do its best to consider the compensatory damages as if the actions had been consolidated. 30
- (xiii) For this purpose awards of exemplary damages made in earlier actions cannot be taken into account.
- (xiv) Compensation payable by radio and television should not be any different from that payable by the newspapers.

Cases cited:

- (1) *Cassell & Co. Ltd v Broome* (1972) 1 All ER 801.
- (2) *Harrison v Pierce* (1859) 1 F & F 567.
- (3) *Creevy v Carr*, 7 C & P 64.
- (4) *Fresco v May* (1860) 2 F & F 123.
- (5) *Times Newspapers Zambia Limited v Kapwepwe* (1973) ZR 292. 40
- (6) *Flint v Lovell* (1935) 1 KB 354.
- (7) *Rookes v Barnard* (1964) 1 All ER 367.

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Legislation referred to:

Law Reform (Miscellaneous Provisions) Act, Cap. 74, s. 9 (1).
Law Reform (Miscellaneous Provisions) Act, Cap. 74, s. 9 (1) (b).
Defamation Act, Cap. 70, s. 12.
The Attorney-General, the Hon. A M. Silungwe, SC, with him D. M. Zamchiya, State Advocate, for the appellant. 5
AP Annfield, Peter Cobbett - Tribe & Co., for the respondent.

Judgment

Doyle CJ: This is an appeal by the defendant against the amount of an assessment of damages by a High Court judge in an action taken 10 for libel by the plaintiff against the defendant.

The history of the matter, derived from the evidence and the published documents, is as follows. A Mr Liyoka, who is an ex - University student aged twenty - three and who also was an organiser for the United Progressive Party, defected from that party. He then proceeded in the 15 presence of a district governor named Ntabo to make to ZANA a number of allegations against members of the UPP. These included allegations of treason and subversion against the plaintiff who was then the president of that party. It is these allegations which are the subject of this action. ZANA, which is a Government news agency, issued a Press release 20 containing the libel. This was issued to the two daily newspapers, *Times of Zambia* and *Daily Mail*, and also to the Government broadcasting and television services. The libels were published in both newspapers and from the broadcasting and television stations.

The plaintiff demanded retraction and apology from all concerned. 25 He received neither and in July, 1972, he issued separate writs against the Zambia Publishing Company Limited, owner of the *Daily Mail* and Times Newspapers Limited, owner of the *Times of Zambia*. No defence was entered to these writs and the plaintiff obtained judgment in default against both of these defendants. Times Newspapers Limited declined 30 to apologise and ultimately damages were assessed by the Deputy Registrar at K20,000, being K10,000 compensatory and K10,000 exemplary damages. The appeal against this assessment to the Supreme Court was dismissed. Zambia Publishing Company Limited published a retraction and apology and settled for K10,000. At some time or other the plaintiff 35 also issued a writ against Mr Liyoka but no further step has been taken.

In October, 1972, plaintiff issued a writ against the appellant in respect of the publication on the radio and television. He had been in correspondence with the Government's legal advisers for some considerable time before the issue of the writ but all he had received from them 40 was a statement that they were taking instructions. No defence was issued to this writ and plaintiff obtained judgment by default.

I may interpose to say that as no defence was entered one may assume against the appellant that no defence was possible.

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The matter then went for assessment of damages before a judge and the learned judge assessed damages at K30,000, being K10,000 compensatory and K20,000 exemplary damages. It is this assessment which is the subject of this appeal.

In making the assessment the learned judge referred to the fact that 5 the plaintiff had already received K30,000. He pointed out that the damage caused by the various media overlapped. Accepting the difficulties of assessing the damages he made an estimate that the total compensatory damages caused by the publications by the newspapers, the radio and the television would amount to K30,000. As the plaintiff had already received 10 K20,000 damages for the damage caused by the newspaper reports, he gave judgment for K10,000 compensatory damages, being the balance of what he considered to be the total compensatory damage caused. He considered that in the circumstances this sum would not be adequate to mark the disgraceful behaviour of the defendant and he also awarded a 15 sum of K20,000 exemplary damages, giving judgment for a total of K30,000. The appellant appeals on the following grounds -

1. The learned trial judge misdirected himself in law and in fact in awarding K10,000 compensatory damages and K20,000 ²⁰exemplary damages in that the said award is excessive for the following reasons:
 - (a) The respondent had already been awarded a total sum of K20,000 by this honourable court against the Times Newspapers Zambia Limited for the same libels as those ²⁵upon which this action was founded; and
 - (b) The respondent had already received a sum of K10,000 compensation from the *Daily Mail* for the same libels as those upon which this action was founded.
2. The learned trial judge misdirected himself in law and in fact ³⁰in that he failed to take full or adequate or sufficient account of the fact that the respondent had already recovered a total sum of K30,000 for the same libels as those upon which this action was founded.
3. The learned trial judge erred in law and in fact in that he ³⁵failed to consider or give full or sufficient or adequate consideration to the provisions of section 15 of the Defamation Act, Cap. 70 of the Laws of Zambia, and to take into account the fact that the respondent sued the various defendants, including the appellant, at different times, thereby depriving the ⁴⁰appellant of an opportunity to apply for the consolidation of the actions with the other defendants, namely: Times Newspapers Zambia Limited, *Daily Mail* and Liyoka (the action against the latter seems to have been discontinued by conduct) and also, as a result of the deprivation of the right as mentioned ⁴⁵

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above, the learned trial judge was also deprived of the opportunity to decide at once and for all the damage in one sum to the respondent against all the defendants including the appellant.

4. The ⁵ learned trial judge erred in law and in fact in that he failed to take into account the fact that the originator of the libels, namely, a Mr Liyoka, has not been brought to court by the respondent as mentioned above to meet his liability to the respondent by way of damages.

I ¹⁰will deal with the third and fourth grounds of appeal together. They relate to alleged errors by the learned trial judge caused by the failure of the plaintiff to sue Times Newspapers Limited, Zambia Publishing Co. Limited and Mr Liyoka at the same time. If, as is highly probable, Mr Liyoka was a party to the publications ¹⁵by radio and television, he was a joint tortfeasor. If, on the other hand, he was merely a maker of a similar defamatory statement, he was a separate tortfeasor.

The law relating to joint tortfeasors is clearly stated by Lord Hailsham at page 817 of *Cassell & Co. Ltd v Broome* [1]. He said: "As counsel ²⁰conceded, however, plaintiffs who wish to differentiate between the defendants can do so in various ways, for example, by electing to sue the more guilty only, by commencing separate proceedings against each and then consolidating, or, in the case of a book or newspaper article, by suing separately in the same proceedings for the publication of the manuscript to the ²⁵publisher by the author. Defendants, of course, have their ordinary contractual or statutory remedies for contribution or indemnity so far as they may be applicable to the facts of a particular case."

The matter is put beyond any doubt by section 9 (1) of the Law Reform (Miscellaneous Provisions) Act, Cap. 74, which reads as follows: ³⁰

9. (1) Where damage is suffered by any person as a result of a tort (whether a crime or not) -
 - (a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint ³⁵tortfeasor in respect of the same damage;
 - (b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the dependants of that person, against tortfeasors liable in respect of the damage (whether ⁴⁰as joint tortfeasors or

otherwise), the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first 45 given, the plaintiff shall not be entitled to costs unless the court is of the opinion that there was reasonable ground for bringing the action;

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- (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this 5 section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

This section envisages different actions against joint tortfeasors. The provisions are clear. The plaintiff may sue a number of joint tortfeasors 10 in succession and may get judgment against them. The sums which can be recovered on such judgments cannot, however, exceed the sum awarded in the first of such actions. Furthermore, in respect of the actions after the first the plaintiff puts himself at risk for his costs. They cannot be given to him unless the court is satisfied that there was reasonable ground for 15 bringing the actions. The section also provides for contribution from joint tortfeasors.

It is apparent, therefore, that there is no obligation upon a plaintiff to sue more than one tortfeasor. He is at liberty to select, if he wishes, one defendant whom he considers good for the total amount of damages 20 which may be awarded. It is entirely a matter for that defendant to recover contributions made from any other persons who may jointly have been guilty of the tort. The court must, however, in the first action, give the full amount of any damage actually suffered from the tort.

Upon the basis that *Liyoka, Times Newspapers (Zambia) Limited* 25 and *Zambia Publishing Co. Ltd* were separate tortfeasors of substantially similar defamatory statements to those made by the appellants, it seems to me the obligation on the plaintiff is no different. If one is not required to sue all tortfeasors, it seems to me, *a fortiori*, that one cannot be required to sue all separate tortfeasors. Section 15 of the Defamation Act does not 30 require a plaintiff so to do. It is solely procedural where there are in fact several actions brought.

The position at common law was quite clear. The common law rule that evidence could not be given, in mitigation of damages, of any recovery of damage or any action for damages by the plaintiff, against 35 other persons in respect of statements to the same effect as that sued upon. *Harrison v Pierce* [2], *Creevy v Carr* [3] and *Fresco v May* [4], all cited in *Mayne & McGregor on Damages*, are to this effect. Section 12 of the Defamation Act altered this rule of law and permitted evidence to be given in mitigation of damages that the plaintiff had already 40 recovered damages, or had brought actions for damages for libel and slander in respect of publication of similar words to those upon which the action was founded. It did not extend to actions which had not yet been brought. The rule, however, was merely procedural and did not require that all actions should be brought at the same time. The learned 45 trial judge in fact did consider the fact that damages had already been awarded and the amounts of such damages. The only possible error he

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might have fallen into was in not expressly taking into account any amounts which might have been recovered against Mr *Liyoka* (if he were a separate tortfeasor) against whom an action was in being. I imagine that the learned trial judge did not consider that any material 5 amount of damages could be received from Mr *Liyoka* and so disregarded him. In my opinion there is no evidence that any material amount of damages could be recovered from Mr *Liyoka*. The *onus* of proving this lay on the defendant, present appellant, as it was a matter of mitigation. Even if the learned trial judge erred in law in failing to consider this 10 possibility, I do not consider that in fact it would have caused any alteration in his estimate.

In my opinion, grounds 3 and 4 of the Memorandum of Appeal must be rejected. As to ground 2 of the Grounds of Appeal, it seems to me that the ¹⁵learned trial judge did fully consider the fact that the respondent had already received a total of K30 000 and he did in fact take that into account. He assessed the total compensatory damages caused by the various libels at K30,000 and came to the conclusion that as K20,000 compensatory damages had already been awarded he could award the ²⁰balance of K10,000 compensatory damages in this action.

It does not seem to me that in principle the learned trial judge erred. I do not consider that the amount of K20,000 given as exemplary damages can be set off against any compensatory damages awarded. Exemplary damages are not given as compensation but are punitive and the result ²⁵is a gratuitous gain to the plaintiff outside his proper compensation. To offset such sums against compensatory damages would in my view lead to anomalies. For example, let me take the case where separate actions have been brought against each of two persons who have published similar defamatory statements which have equally contributed to compensatory ³⁰damages amounting to K2,000, but only one of the defendants had behaved in such a manner as to merit an award of K5,000 exemplary damages. If the exemplary damages were awarded in the first of such actions, the judgment would be for K6,000 being K5,000 exemplary and K1,000 compensatory damages, having taken into account the fact ³⁵that a further K1,000 compensatory damage would be received in the second action. That sum being in excess of the actual damages suffered the second defendant would have to pay nothing despite the fact that compensatory damages were awarded on the basis he would have to pay half. If the actions were dealt with in reverse order, the result would ⁴⁰be different. Consolidation of the actions would involve the judge in a circular exercise which would be almost insoluble.

The first ground of appeal is that the damages are excessive. Two reasons are given for this in the grounds of appeal, but in fact the first ground also was argued outside this reason on the general allegation of ⁴⁵excessive damages. Had I been the trial judge, I doubt if I would have assessed the total of compensatory damages at as high an amount of K30,000. I think that I would have given some less sum. The matter has, however, already been before the Supreme Court in *Times Newspapers*

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Zambia Limited v Simon Kapwepwe [5]. There the Supreme Court considered that K10,000 was a proper estimate of the compensatory damage caused by the publication made by the defendant in that action in a newspaper. A sum of K10,000 was also accepted by plaintiff in respect of publication of a similar libel in another newspaper. In the present case ⁵there is not the overlap caused by the broadcasts reaching the same persons who would read the newspaper. In the case of the television broadcasts this might be largely the same group. The radio broadcasts would, however, reach a far wider audience. If the amount of K10,000 awarded or received in respect of each of the two newspapers' publications ¹⁰is correct, I do not see how an estimated additional K10,000 compensatory damages, in respect of the publications in the present action, can be considered to be excessive.

That, and what I have earlier said about offsetting exemplary damages, disposes of the two reasons given in the first ground of appeal. ¹⁵That first ground of appeal states that the damages were excessive, and that ground has been argued for reasons outside the two reasons set out. In my opinion an appeal against the *quantum* of damages is sufficient in itself and allows argument on any point that may go to show that the damages are excessive. ²⁰

I do not, as I have already said, consider that the compensatory damages were excessive. I now turn to the amount of the K20,000 exemplary damages awarded. It does not seem to me that there is any substantial material difference between the present defendant and *Times Newspapers Limited*, against whom K10,000 exemplary damages were ²⁵awarded in another action. The only distinction between the two is that the news item was in fact supplied by another agency of the present appellant.

Exemplary damages are given for the purpose of bringing home to a defendant the error of his ways. In the case of Government it is impossible 30 reasonably to award a sum that would hurt the Government pocket. The use of the award of exemplary damages is to induce Government to discipline its servants whose action has resulted in loss to Government, and so to serve as a deterrent for future cases. In my opinion it is not necessary to give extravagant sums for this purpose. I would hope that 35 already Government has taken action against its servants who, without any investigation, issued this gross libel, and having issued it persisted in refusing either to apologise or to retract it. If Government has not done so, I consider that an award of K10,000 as exemplary damages will be sufficient to bring this consideration to mind. I see no reason to enrich 40 a plaintiff beyond the sum that is necessary for this purpose. I would allow the appeal to the extent of reducing the sum of K20,000 awarded as exemplary damages to K10,000, making a total sum of K20,000 damages.

Judgment

Baron DCJ: This is an appeal from a decision of the High Court 45 in which the respondent, to whom I will refer hereafter as the plaintiff, recovered K10,000 compensatory damages and K20,000 exemplary damages from the defendant in respect of libels disseminated by the radio

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and television services of the Government on the 10th and 11th November, 1971. Substantially similar, although not identical, libels were published on the 11th November, 1971, by the two daily newspapers circulating in Zambia and, since the text of those libels is set out in the report of the 5 case of *Times Newspapers Zambia Limited v Simon Kapwepwe* [5], I do not propose to set it out again; it is sufficient to say that the libels in question accused the plaintiff, who had for many years been a leading political figure in the country and had held high office including that of Vice - President, of treason and subversion, the major allegation being that 10 he had sent some hundreds of Zambians to places outside the country for training in guerrilla warfare.

The defendant, on behalf of the two news media in question, made no attempt to defend the action on the merits. The present appeal is directed solely to the *quantum* of damages awarded by the learned judge 15 in the High Court. The grounds of appeal, although expressed somewhat differently, reduce themselves to the following:

- (a) that the award was excessive because the plaintiff had already received a total of K20,000 from the *Times* newspaper and a sum of K10,000 from the *Daily Mail* newspaper for publication of the same libels;
- (b) that the learned judge failed to take into account that the originator of the libels, a Mr M. Liyoka, had not been brought to court to meet his liability to the plaintiff;
- (c) that the learned judge had failed to give adequate consideration 25 to the provisions of section 15 of the Defamation Act, Cap. 70, and that the plaintiff had sued the various defendants at different times.

The learned Attorney-General argued that both the compensatory and the exemplary damages were excessive. He argued that there appeared 30 to be a tendency to follow English cases in awarding huge damages in libel actions, and submitted that the measure of damages to be awarded in any case must be assessed against the background of local conditions. I am in full agreement with this proposition. However, before this court can interfere with an award of damages it must be shown that the trial judge has 35 applied a wrong principle or has misapprehended the facts or that his award is so high (or so low) as to be utterly unreasonable. It is no ground for varying an award made by the trial judge that the judges in the appellate court would have awarded a different sum. It is worth quoting again the oft - quoted dictum of Greer, LJ, in *Flint v Lovell* [6] at page 360: 40

"I think it is right to say that this court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum."

In the *Times Newspapers* case [5] this court followed *Rookes v Barnard*⁴⁵[7] to the extent that we adopted the approach to the question of damages. We said at page 12:

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"[The court] should consider first what sum to award as compensation and . . . should take into account the whole of any aggravating conduct of the defendant, and . . . only then . . . turn to consider whether [the] proposed award is sufficient to punish and deter the defendant." ⁵

This approach is straightforward where there is only one defendant, but where there are several defendants and the actions are not consolidated difficulties arise both in the earlier cases and in the later cases. For instance, in the first case in a series the court does not know on what basis, if at all, the later cases will be defended or whether any such defence will be ¹⁰successful, and does not know what will be the conduct of the defendants in the later cases. In the words of Gatley, at that stage the court can deal with the matter only on very broad lines, doing its best to ensure that the plaintiff is fully compensated for the damage caused by the publication of the particular libel which is the subject of that action, bearing in mind that he ¹⁵should not be compensated twice for the same loss. That was precisely the position of the trial court and of this court in the *Times Newspapers* case [5]: that action was not defended on the merits, but that did not mean that subsequent defendants would necessarily adopt the same course nor did it mean that the conduct of subsequent defendants would be similar ²⁰to the conduct of the *Times Newspaper*. If for the sake of example there were five defendants before the court at the same time in consolidated actions and all were held to be responsible in equal proportions for the total loss suffered by the plaintiff, and the total damages to which the court considered the plaintiff was entitled was for example K30,000, this would ²⁵have been apportioned between the five defendants as to K6,000 each. But inevitably in cases of this kind the audiences reached by each news medium will overlap to a greater or lesser degree the audience reached by another medium and, consequently, it could not in such a case be said that the damages to which the plaintiff was entitled in respect of the ³⁰publication by any one medium was K6,000. Hence, if for instance four of the five defendants were successful in their defences, the damages awarded against the fifth defendant, using the figures I have postulated above, would certainly be greater than K6,000.

It was for this reason that in the *Times Newspapers* case [5] I ³⁵considered that a compensatory award of K10,000 was appropriate. This did not mean that I considered that a proper compensatory award for the total loss suffered by the plaintiff by reason of the publication of this libel by the newspapers and the radio and television series was K40,000; for the reasons I have indicated I would regard an award of this magnitude as excessive. ⁴⁰ It is of course the duty of a court hearing a later action to take into account the damages awarded in an earlier action in respect of the same or substantially the same libel. This later court may be faced with the additional complication that an earlier court has awarded both ⁴⁵compensatory and exemplary damages; in considering what compensation to award in the later action I was at one stage in some doubt whether it was not proper to have regard to the fact that the plaintiff had received exemplary

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damages in the earlier action. I am satisfied, however, that, although logic demands that account be taken of a sum of money which has in fact been received by the plaintiff, albeit that it was awarded as a punishment against the defendant and given to the plaintiff only because there was ⁵no one else to whom it could be given, to attempt to adjust subsequent awards of compensatory damages on this ground would create even greater illogicalities. If all the various defendants had been brought before the court at the same time the approach would have been to consider one total compensatory award and apportion this between the various defendants ¹⁰according to the extents to which the various publications were held to have been responsible for the total loss; thereafter for the purposes of any awards of exemplary damages the court would have considered the case of each defendant individually. The position having been created that the various defendants have come

before the court at different times we 15 must do our best to consider the compensatory damages as if the actions had in fact been consolidated, and for this purpose we cannot take into account awards of exemplary damages made in the earlier actions.

In considering what sum to award as compensatory damages in the case before him the learned judge considered what total compensatory 20 sum should be awarded in respect of the dissemination of this libel throughout Zambia by all the media in question. He arrived at a figure of K30,000, and while I might regard this as somewhat on the high side in the Zambian context I would not be able to regard it as "an entirely erroneous estimate" of the compensation to which the plaintiff was entitled. Having arrived 25 at this total figure the learned trial judge deducted the compensatory damages awarded to the plaintiff in the previous actions and awarded the balance in the present action; in my view this approach was correct.

Turning to exemplary damages, I cannot accept the learned judge's reasons for awarding K20,000. He said that his disapproval of the conduct 30 of the defendants was "the greater because the defendant is the State with a monopoly in the field of radio and television broadcasting". The reason why the conduct of the radio and television services was reprehensible to the extent that an award of exemplary damages was fitting is that there was a failure to make any effort to check the facts before 35 publication and a failure to apologise after publication, even when the decision had been made not to defend the action on the merits, and the court felt that the compensatory award was inadequate to mark its disapproval of this conduct and deter its agencies from a repetition. The monopoly aspect of the matter is a good reason for saying that the news 40 medium in question has a duty to take particular care to ensure the truth of the news it disseminates, but for myself I would not regard the existence of competitors as being any great mitigating factor where the defendant by its conduct has rendered itself liable to an award of exemplary damages. I see no significant difference between the conduct of the radio and 45 television services in this case and the defendant in the *Times Newspapers* case [5] and, although here we have two news media, it is relevant that they are both Government agencies. The plaintiff has already been awarded all that he is entitled to receive by way of compensation, and the

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issue at this stage is only to fix a sum which will bring home to the defendant the court's disapproval of the conduct of its various agencies and to deter them from similar conduct in the future. I would, therefore, award the same additional sum in respect of exemplary damages as I consider appropriate in the *Times Newspapers* case, namely, K10,000. 5 In the result I would allow this appeal and reduce the total damages to K20,000.

Judgment

Gardner JS: The Acts of this appeal have already been set out fully, and so have detailed answers to the specific grounds of appeal raised by the appellant. I agree entirely that an amount awarded as exemplary 10 damages cannot be taken into account when assessing the total amount of compensatory damages.

The two expressions are quite clear. The first relates to compensation to an aggrieved plaintiff for loss of reputation and kindred matters - the second expression shows that it is intended to set an example to a 15 particular defendant in order to deter him and others from acting in a contumelious manner again. The learned trial judge was therefore correct when he took into account the compensatory damages which had been awarded or agreed and considered what further amount was required to affect further compensation to the plaintiff. 20

Although I myself might have arrived at a different figure from a total of K30,000 as compensation, I cannot say that the calculation of that sum is wrong in principle and, in finding this, I have taken into account the provisions of section 12 (2) of the Defamation Act, which allows a defendant to put forward in mitigation the argument that the 25 plaintiff had brought actions for damages in respect of the same defamatory words or has agreed to receive compensation therefor. In fact, no evidence was led on behalf of the appellant to substantiate such mitigation.

The learned trial judge did not in his judgment take into account 30 the possibility of the continuation of an action against the original perpetrator of the libel, Mr Liyoka. With regard to Mr Liyoka, although he was referred to in part of the evidence of the plaintiff, there is no indication that the plaintiff would continue an action against Mr Liyoka having regard to the fact that he is an impecunious ex - university student 35 and, as the learned Chief Justice has said, the learned trial judge probably did not consider that any material amount of damages could be recovered from him.

I note that in his judgment, the learned trial judge, having referred 40 to radio, television and newspaper reports, went on to say:

"I have decided that the total compensatory sum should be fixed at K30,000 for the dissemination of this libel throughout Zambia by the media concerned."

By these latter words he was obviously referring to radio, television and newspaper reports and his estimate of the total compensatory sum did 45 not take into account compensation which might have to be payable by any others.

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GARDNER JS

I cannot see that the compensation payable by radio and television should be any different from that payable by the newspapers. I therefore agree that the sum of K10,000 compensatory damages was a proper award in this case.

With 5 regard to the exemplary damages I cannot find that the conduct of the broadcasting media was any worse than that of the *Times of Zambia* in the *Times Newspapers* case [5]. I therefore consider that the award of K20,000 as exemplary damages against the appellant was excessive and unwarranted and I would reduce that award to one of 10 K10,000.

Judgment

Doyle CJ: The order of the court is that the appeal is allowed and the damages reduced to K20,000. The appellant's costs of the appeal will be paid by the respondent.

Appeal allowed 15

Damages reduced

1974 ZR p220