INTERNATIONAL TOBACCO CO (SA) LTD v UNITED TOBACCO CO (SOUTH) LTD (1) 1955 (2) SA 1 (W) *

Citation	1955 (2) SA 1 (W)
Court	Witwatersrand Local Division
Judge	Clayden J
Heard	May 6, 1954; March 18, 1954
Judgment	May 20, 1954
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Defamation - Publication - Defendant's agents publishing false and malicious statements about plaintiff and a make of its cigarettes - Names of publishers and publishees in certain instances known - Acts of conduct on other occasions also alleged - Particulars not known - Averment that defendant was conducting a campaign - Evidence of such other occasions admissible - *Onus* on plaintiff to prove statements alleged - Statement by one agent can be used to show that statement made by another probable - Evidence - Defendant interviewing plaintiff's witnesses - Proper to notify plaintiff previously - Damages - Assessment of - Based on loss of profit - Prospective damages awarded - Interest from date of judgment awarded.

Headnote : Kopnota

In an action for damages arising out of false and malicious statements published of the plaintiff firm and about a make of cigarette manufactured by it, the plaintiff had pleaded that agents employed by the defendant had carried out a campaign of maliciously discouraging and preventing natives from buying this brand of cigarette. In several instances the names of the publisher and publishee were given: in other instances the name of the publisher was not known. The declaration averred that similar acts of conduct on occasions other than those pleaded had been committed and these had to be inferred from the facts to be adduced at the trial. Representatives of the defendant had interviewed witnesses to be called by the plaintiff.

Held, since a campaign was pleaded, that facts, other than those pleaded and proved, could be used to show that a campaign was being conducted.

Held, further, to have avoided any suggestion of impropriety, that the defendant should have notified the plaintiff previously of the interviews with plaintiff's witnesses.

Held, further, that the *onus* was on the plaintiff to prove the statements alleged.

Held, further, that a statement by one agent could be used to show that a statement by another was probable.

Held, further, that on the evidence the plaintiff had proved that one or other or all of the defendant's agents had published certain of the statements pleaded.

Held, further, that these statements, made by agents in the course and scope of their employment, were false to their knowledge and were calculated, both in fact and to the

knowledge of the agents, to cause injury; i.e. they had been made maliciously.

Held, further, that the plaintiff was entitled to recover damages based on its loss of profits.

Held, further, that the plaintiff was entitled to recover prospective damages.

Held, further, that the plaintiff was entitled to interest on the amount awarded from date of judgment.

Case Information

Action for damages. Facts not material to this report have been omitted.

N. E. Rosenberg, Q.C. (with him *H. M. Bloch, Q.C., George Coleman* and *W. G. Trollip)* for the plaintiff.

H. M. Bloch, Q.C.: The action is founded on actionable falsehood. For proof of malice, see *Gatley*, 4th ed. p. 149; de Villiers, *Injuries* p. 28; *Orkin Bros. Ltd v Bell*, 1921 T.P.D. 92; *Wessels v Bosman*, 1918 T.P.D. 431; *Hazaree v Kamaludin*, 1943 AD 108; *Fichardt v The Friend*, 1916 AD 7. As to defendant's responsibility for statements of employees, see *van der Byl v Swanepoel*, 1927 AD 141; *Feldman (Pty.) Ltd v Mall*, 1945 AD 733; *Hailsham*, vol. 22 para. 409. The occasional admissions of the employees are important, see *Lawson & Kirk v SA Discount and Acceptance Corp.*, 1938 CPD at p. 282. As to admissibility of reports, see *Phipson*, 9th ed. p. 230. The evidence against one of the propagandists can be used to corroborate evidence against any of the others. See *R v Katz*, 1946 AD 71; *Harris* v. Director of Education, 1952 A.C. 694; *R v Gouws*, 1935 E.D.L. 391.

N. E. Rosenberg, Q.C., on the same side: If the defendant is not responsible for the whole of the rumour relating to plaintiff's products it is for defendant to unravel the causes as best it can, see Spencer Bower, *Actionable Defamation*, p. 154 note. Defendant is responsible for repetition of the disparagement, see *Ratcliffe v Evans*, 1892 (2) Q.B. at p. 524; as to the amount of damages plaintiff is entitled to be compensated for all loss as proved at date of trial as well as probable loss of future sales. See *Sutherland*, 3rd ed. vol. 1 sec. 63; *Spencer Bower, supra* at p. 154; *Restatement of the Law*, Torts vol. IV secs. 906, 910. The damages need not be proved with certainty. Damages must be ascertained from the *data* put before the Court provided such *data* is sufficient. See *Hailsham* vol. 10 para. 111; vol. 20 para. 652; *Sutherland*, vol. 1 sec. 53; *Chaplin v Hicks*, 1911 (2) K.B. 786; *Turkstra v Richards*, 1926 T.P.D. 276; *Hersman v Shapiro* 1926 T.P.D. 367; *Sandler v Wholesale Coal Suppliers*, 1941 AD 194; *Restatement of the Law*, Torts sec. 912; *Ledger Sons & Co v James Munro*, 33 R.P.C. 53; *Lampakis v Dimitri*, 1937 T.P.D. 138. The basis of damages is *restitutio in integrum*, See *Hailsham* vol. 10, sec. 101; Clerk & Lindsall on *Torts*, 10th ed. p. 174; *Admiralty Commissions v S.S. Valvia*, 1922 A.C. 242; see *Edison*, 1933 A.C. 449. See also *Shrog v Valentine*, 1949 (3) SA 1228 (T).

George Coleman on the same side on the facts.

W. G. Trollip on the same side: Plaintiff is entitled to interest as from the date of judgment, see *Victoria Falls Power Co v Langlaagte Mines*, 1915 AD 1; *Fouche v Corporation of London Assurance*, 1931 W.L.D. 145; *Roberts v London Assurance Co.*, 1948 (2) SA 840 (W); *West Rand Estates v N.Z. Assurance Co.*, 1926 AD 173. See also

Voet, 22.1.11; 42.1.37; *Buffalo v Federal Cold Storage Co.*, 24 S.C. 243; *Caledonia Shipping Co v East London Harbour Board*, 17 C.T.R. 579.

B. A. Ettlinger, Q.C. (with him *I. A. Maisels, Q.C., A. Fischer, Q.C.*, and *I. Isaacs* for the defendant).

I. A. Maisels, Q.C.: Plaintiff has not proved its case on a preponderance of probabilities. The test to be applied is laid down in *National Employers Mutual Ins. Co v Gani*, 1931 AD 187. As to approach to the evidence of witnesses whose memories have been prodded, see Moore on *Facts*, vol. 2, para. 815; *Pierce v Brady*, 53 E.R. 25; *Crouch v Hooper*, 51 E.R. 747. As to the question of identification of defendant's employees, see *R v Masemang*, 1950 (2) SA 488 (AD) As to approach to the evidence of private detectives, see *Sopwith* v. Sopwith, 164 E.R. 1509.

A. Fischer, Q.C., on the same side. The mere fact that the evidence of defendant's employees may not be satisfactory does not mean that this is evidence to support plaintiff's case, see *R v du Plessis*, 1944 AD at p. 323; *Goodrich v Goodrich*, 1946 AD at p. 396.

B. A. Ettlinger, Q.C., on the same side: As to the approach to plaintiff's case and the evidence of defendant's employees, see *Wigmore*, vol. 2, para 278; *Hunt v Brown*, 1952 (2) P.H.J. 14 (C); *R v Weinberg*, 1939 AD 71. As to the damages, the plaintiff must show a quantitative connection between the trade libel and the damages claimed. The proof of the damage and the *quantum* thereof are the gist of the action, see *Hailsham*, vol. 20, para. 669; *Restatement of the Law*, Torts vol. III para. 652; *Fichardt Ltd v The Friend*, 1916 AD 1; *Grobbelaar v du Toit*, 1917 T.P.D. 433; *van Zyl v African Theatres Ltd.*, 1931 CPD 61; *Dunlop Pneumatic Tyre Co v Maison Talbot*, 20 T.L.R. 579; *Barrett* v. Associated Newspapers, 23 T.L.R. 666; *Royal Baking Powder Co v Wright, Crossby & Co.*, 18 R.P.C. 95. The mere fact that plaintiff's sales fell is not proof of damage. See *Ratcliffe v Evans*, 1892 (2) Q.B. 524; Maine on *Damages*, 11th ed. p. 511; *White v Mellin*, 1895 A.C. at p. 164; *Brook v Rawl*, 19 L.J. Ex. 114; *Prinsloo v Luipardsvlei*, 1933 W.L.D. 6; *Restatement of the Law*, Torts vol. IV para. 912; vol. III para. 633; *Evans v Harris*, 156 E.R. 1197; *Riding v Smith*, 1 Ex. D. 191; Spencer Bower, *Actionable Defamation* (2nd ed. pp. 33, 280). The *onus* to prove damages remains on the plaintiff throughout. *Frankel v Ohlsson's Brewery*, 1909 T.S. 557; *Klaassen v Benjamin*, 1941 T.P.D. 80; *Tregea v Goddard*, 1939 AD 33. Plaintiff has failed to show it has suffered special damage in that it has not excluded other causes for the loss of sales, see *Clippens Oil Co. Ltd v Edinburgh Trustees*, 1907 A.C. 291. The plaintiff cannot recover any damages if the matter complained of was wholly or partly disseminated by its own agents. See *Bennett v Morris*, 10 S.C. 223; *Sutherland* vol. 1 para. 5; *Restatement of the Law*, Torts, para. 646. As to future loss the claim is based on mere conjecture and not recoverable; see *Hailsham* vol. 10, para. 114; Maine on *Damages*, 11th ed. p. 511; *Sutherland* vol. 1, para. 121; *Spencer Bower, supra*, p. 154. The damages cannot be future loss of profits; cf. *The Edison*, 1930 A.C. 442.

I. Isaacs, on the same side: Interest on the judgment should not be awarded. It would be prejudicial to defendant who might have to pay

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the judgment without having security *de restituendo* should it wish to appeal. There may

also be a danger of perempting the appeal. Cf. *Hlatswayo v Mare & Deas*, 1912 AD 242.

Bloch, Q.C., Rosenberg, Q.C., and *Trollip* in reply.

Cur. adv. vult.

Postea (May 20th, 1954).

Judgment

CLAYDEN, J.: *General:* The cigarette named Max has been manufactured in this country since 1936 by the International Tobacco Company of South Africa Ltd. (referred to as the I.T.C.). Max cigarettes now cost 1s. 2d. for 20, and there are many other cigarettes in the same price class. The largest cigarette manufacturer in this country is the United Tobacco Companies (South) Ltd. (referred to as the U.T.C.). The U.T.C. manufactures a number of different brands in the 1s. 2d. class; in the years 1947 to 1952 its main brands in that class were C to C, Commando Round, Flag, Springbok and Springbok Medium.

In the Transvaal from 1947 to 1949 the chief rival of these cigarettes of the U.T.C. was Max. In 1947 Max sales were 869 million, and in 1949 the sales had risen to 987 million. The U.T.C. sales of cigarettes in the 1s. 2d. class in 1949 were 4,376 million.

Towards the end of 1946 the U.T.C. decided to employ native propagandists to advance the sale of its brands in the Transvaal. Two natives, Tutu and Moss, were selected as suitable for this work. Moss soon left; and Anderson Mehlomakulu was engaged in his place in June, 1947. The other propagandists who were employed were Zwakala from October, 1948, Walaza from November, 1948, Tsotsobe (also referred to as Ruthven or Beam) from February, 1949, Ginger Molefe From June, 1950, Mtante and Mdingi from February, 1951, and Pheku from March, 1951. Except for Zwakala these natives are still in the employ of the U.T.C., though some of them are now salesmen and not propagandists.

The originator of the idea of employing native propagandists was Mr. van der Spuy, an employee of the U.T.C., and he was primarily in charge of them until May, 1951, assisted by Mr. Mulder. Until about June, 1948, Tutu and Anderson were not openly acknowledged as employees of the U.T.C. They were engaged in the name of Mr. van der Spuy, who paid them personally and was reimbursed by the U.T.C.; they were told to pretend to be sports organisers unconnected with the U.T.C. if anyone asked who employed them; they were not to talk in the presence of Europeans; in the words of Tutu they were carrying out a 'whispering campaign'; and they were interviewed daily, and given cigarettes and instructions, by Mr. van der Spuy from his car at meeting places away from the U.T.C. offices until August, 1947.

The one reason for the engagement of these natives in the name of Mr. van der Spuy was that the U.T.C. had undertaken to abide by a Wage Determination which made no provision for such employees, who would have to have been paid at the rate for European travellers,

and it was felt that this would cause dissatisfaction amongst other non-European employees. But chiefly the reason for pretence in regard to these propagandists was that the U.T.C. did not wish rival firms to learn of this essay in advertising. There is not I think foundation for the suggestion that it was because disparagement of other

cigarettes was to be made that these employees were not to be acknowledged; quite apart from the denial of this suggestion by those in control of the U.T.C., it appears, for reasons later to be discussed, that the officials of the U.T.C. paid little regard to the activities of their native propagandists, and could not have designed what was done.

The instructions which were given to Tutu were not complicated. He was told that he was to give away the cigarettes which were provided, and to tell the persons to whom he spoke of the assistance which the U.T.C. gave to native sport, and to ask natives to support the firm which so supported them. He was told not to run down other manufacturers or their cigarettes. At the time when Tutu started to work the U.T.C. had given two trophies, each costing about six guineas and some £25 worth of cigarettes as prizes to native sporting organizations. It was largely because the emphasis was to be on assistance to sport that the instruction to pose as the sporting organizer was given. Tutu then went off and worked on his own. As other propagandists were engaged they were trained by the existing ones. At no time was there any supervision of the work as it was done, but daily written reports of the work done were handed in at a conference which was held daily by Mr. van der Spuy with the propagandists. At these conferences the work of the preceding day, reflected in the reports, was discussed if there was anything which needed discussion, instructions as to the area or places of work were given, suggestions and ideas were put forward, and each propagandist was given 250 cigarettes, and such other free gifts as were from time to time being distributed.

Apart from the very early period the propagandists were told to go where large bodies of natives would be met, to places such as beerhalls and sports meetings, and to use natives in positions of authority, such as indunas at firms, as contact men to pass on their advertising talk and cigarettes and gifts to those under them. The propagandists were allotted areas for work on the Witwatersrand, with Tsotsobe in Pretoria, but they also worked together, especially in beerhalls. This work has been carried out by the propagandists continuously from 1947. The propagandists refer to the talk which they used as the 'mission'.

The basis of the present action is that the U.T.C., mainly through these propagandists, has since about August, 1949, carried out a campaign of maliciously discouraging and preventing natives from buying Max cigarettes. Particulars of the statements complained of are set out in paras. 7 and 10 of the declaration. Para. 7, as amended, consists of allegations in regard to 74 different statements by named employees of the U.T.C. In 70 of these the publisher of the statement is alleged to be one or other of the propagandists. Para. 10 sets out certain alleged statements by unknown European employees of the U.T.C.

Para. 12 of the declaration is a matter of dispute in argument. It reads:

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> 'The plaintiff says that the defendant acting through its said employees or agents carried out the aforesaid campaign or course of conduct by committing similar acts of conduct on occasions other than those set out in paras. 7 and 10 hereof. The plaintiff has no proof at present of such other occasions, but says that it is to be inferred from the facts that will be adduced in evidence at the trial of the action (being the facts set out in the declaration) that the said conduct took place on other occasions.'

For the defendant it is argued that the only facts from which the Court can be asked to infer other similar facts are those set out in paras. 7 and 10, and the only approach of the Court should be to investigate the allegations of paras. 7 and 10 and to judge of

proof of the campaign by the success of the plaintiff in that regard. The answer of the plaintiff is that among the 'facts set out in the declaration' is the fact that there was a campaign, and facts, other than those proved under paras. 7 and 10, can be used to show the campaign if they do go to show it. This must I think be correct. If for example one of the propagandists had admitted the persistent making of a statement similar to one enumerated in paras. 7 and 10 it would be artificial to exclude that from consideration. It seems that under either method of approach if no one statement alleged in paras. 7 and 10 is proved it would be difficult for the plaintiff to succeed. But if there is proof of statement under those paragraphs the probability of other similar statements and of the real matter to be proved, the campaign of disparagement, must I consider be judged in the light of other facts in the case, such for example as the manner of working of the propagandists and not merely from the degree of proof under paras. 7 and 10.

In regard to the incidents alleged - in paras. 7 and 10 the first problem is how to approach the evidence. With one exception the allegations of each incident are denied by the propagandists concerned. In argument the plaintiff has presented its case by submitting that from the evidence and reports of the propagandists there is a probability that they would have made the statements alleged, by submitting that the propagandists are untruthful witnesses, and by asking the Court to consider each incident against that background.

After an endeavour to consider the incidents first, before considering the evidence of the propagandists as a whole, I have come to the conclusion that the latter is the only practicable way to approach the case, although it involves the unusual approach of reviewing the evidence for the defendant before that of the plaintiff. In considering the evidence on the incidents pleaded in the order in which they were argued the problem of the credibility of several of the propagandists is quickly met, in the incidents deposed to by Adnewmah (3). (The numbers in brackets are the numbers of the witnesses in the order in which they were called.) The nature of the evidence given by the propagandists is such that in many respects it has to be considered as a whole. And it seems to me not to affect my approach to the case that I consider the evidence of the propagandists before I actually reach the evidence of one publishee, when it would have to be considered at that stage in any event.

Before I come to deal with the evidence of the propagandists there are other general matters to be considered. It is a main part of the defence in the action that many of the plaintiff's witnesses have either

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been encouraged to give favourable evidence by payments to them, or have had the vital portions of their evidence suggested to them by Mr. Plumley. There is criticism of the plaintiff's case in the late pleading of incidents, in the late addition of other names in pleaded incidents, and in the variance of dates and statements as pleaded and as given in evidence. In many cases these matters will have to be dealt with separately with the witness or incident involved, but there are general considerations which cannot be repeated every time. I must also discuss generally the interviews which the defendant held with many of the plaintiff's witnesses, and the effect of the claim of privilege put forward by the plaintiff in regard to the statements given by witnesses.

When first the I.T.C. learnt of the destruction of Max cigarettes in the beerhalls its sales organisation was handled by Jacoby and Co. Ltd. Mr. Ettling, the sales manager in

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Jacoby and Co. Ltd., in November, 1949, sent certain of its native employees into the beerhalls in Johannesburg to try to discover what was being done, and by whom. In the same month a firm of private detectives, Hannon's Detective Agency (Pty.) Ltd., was engaged to investigate. Mr. Plumley was an employee of that firm, and he was assigned to the work with four non-European assistants, Peter Bobby (87) and Mbale, Adams and Kleezer, who appear in the declaration but were not witnesses. This investigation became dormant in mid December. In February, 1950, when the rumour to the effect that Max gives tuberculosis became known, Hannon's Ltd. was again engaged to investigate the fall in the sales of Max and the source of the rumour. Mr. Plumley was again detailed for the work with Peter Bobby to assist him. From that time on Mr. Plumley has been engaged on the investigation of the case. From August, 1950, he began to be paid directly by the I.T.C., although he was still employed with Hannon's Ltd. and although this fact was not made known to that firm. He then did part-time work for the I.T.C. In October, 1951, he resigned from Hannon's Ltd. and became a full time employee of the I.T.C.

At a time which is not certain, but which was after the first engagement of Hannon's Ltd., and probably in early 1950, another private detective Mr. van den Heever was engaged by Jacoby and Co. Ltd. He seems to have engaged in some very improper efforts to obtain information, but I need not consider his activities except in regard to certain of the witnesses.

Oscar Mabeka (89) joined Hannon's Ltd. in 1951. While with that firm he did a good deal of part-time work for Mr. Plumley and he went to work full-time for Mr. Plumley early in 1952. While discussing the private detectives I must also mention that Peter Bobby from April, 1950, to April, 1951, was working for Mr. Balharry, who was engaged by the U.T.C. in August, 1950, to make enquiries about Mr. van den Heever, and whilst there Bobby gave an affidavit to the defendant in regard to his work for the I.T.C. with Hannon's Ltd. Towards the end of 1952 or early 1953 Mr. Balharry was instructed to approach Mr. Hannon for information. At first Mr. Hannon refused to give information, but in April, 1953, in the words of Mr. Friedman, he had 'a change of heart' and gave considerable information to the defendant.

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There have also been efforts by Mr. Mulder, an employee of the U.T.C., to trap Mr. Plumley, Bobby and Vil Nkomo (17). On the part of the I.T.C. there was an effort to persuade Zwakala to give information which I shall deal with later.

The contention that much of the evidence of the plaintiff is suspect is entirely bound up with the activities of Mr. Plumley. He was a detective constable in the Southampton Police Force, and he came to this country and joined Hannon's Ltd. in September, 1948. It is quite clear that he has lied in many respects, and I can only regard him as an unreliable witness. In regard to his own past history he has been found out in many untruths. Probably the origin of these was an effort to build up his reputation for the purposes of his work; but I am concerned not with his misrepresentations as to himself in the past but with his repetition of them on oath.

One other instance I can mention in which it seems clear that Mr. Plumley was not truthful. When Adnewmah (3) gave evidence the date of a wedding at Springs became of importance. He was taken to Springs by Mr. Plumley after he had given evidence, and clearly enquiries as to the wedding would have been instigated. In answer to a question whether he had taken any steps to find out if there was a wedding in early 1951 in

Springs Mr. Plumley said 'I did not'. Oscar Mabeka who went to Springs with them, makes it quite clear, in his re-examination, that Mr. Plumley was engaged on such enquiry.

It is also clear from many of the passages in cross-examination that Mr. Plumley was prepared to answer questions without really thinking of the accuracy of his answer.

But despite the unreliability of Mr. Plumley as a witness it is quite clear, as Mr. *Bloch* argues, that the opposite to what he says is not proved by his statement, which may be untrue, on any matter. In *Rex v Weinberg*, 1939 AD 71 at p. 80, STRATFORD, C.J., says:

> 'This story was disbelieved, but the non-acceptance of a statement of a witness by the Court does not of course prove the contrary. Indeed it is no evidence at all. The disbelief of the truth of a witness' statement merely removes an obstacle to the acceptance of evidence tending to prove the contrary.'

Broadly the foundation of the argument that witnesses were paid and so were prepared to give evidence favourable to the plaintiff is that Mr. Plumley had money available to pay witnesses, that no reliance can be placed on his explanation of how he dealt with money, that there are witnesses who received substantial payments and amongst those some who are shown to have fabricated evidence against the defendant, and that what has happened in the one case will probably have happened in the others.

[The learned Judge then dealt with part of Mr. Plumley's evidence and continued.]

No witness, except Mzikinya (51), who was recalled for another matter, and Vil Nkomo (17), has been cross-examined to show that gifts influenced his evidence. Mzikinya on his recall said that he had got small amounts of money many times from Mr. Plumley; but it is obvious that he did not know what many times were, or really have any reliable recollection of the payments. It is argued that his evidence on this subject indicates that others too, if they had been asked, would

have indicated that they had been paid. But I do not think that that argument is sound. That there was no cross-examination of the other witnesses was due to the fact that the accounts, on which the argument is now really based, had not been disclosed at the stage of their cross-examination. But the fact remains that the Court is now asked to infer, in most cases that the witnesses did get money, and in all cases that they have lied because of money gifts without that suggestion ever having been put to them. I do not think it proper to make any such finding without the opportunity to explain being given, even if I were otherwise inclined to make it: see *The Queen's* case, 2 Brod. & B. 284: 129 E.R. 976 at p. 988.

It is significant that in favour of the suggestion, made only by inference, the defendant has been able to produce no scrap of direct evidence of the fabrication of evidence. The propagandists were instructed to watch out for cases of bribery, and found none. According to Mr. Friedman substantial attention was paid to the possibility of Mr. Plumley having concocted the whole case through bribery, and, when the plaintiff's witnesses were interviewed, as many of them were, by the defendant's representatives an attempt was made to find out if they had been bribed. Traps were laid for Mr. Plumley and Bobby which failed. It was put to Bobby in cross-examination that a native 'Matanda says that you tried to get him to make a statement', but Matanda was not called. Makalusa, who is one of the persons put in the forefront in the bribery allegation, is a brother-in-law of

Walaza, and had given an affidavit in regard to concoction of a story to the defendant, but he was not called. Olifant was sent out to trap Bobby, and was allowed to go the extent of making a false statement to the plaintiff's attorneys, but he was not called to testify that Bobby had instigated the fabrication.

This failure to try to substantiate the suggestion made makes me much the less inclined to infer bribery, or a tendency to favour the plaintiff on the part of witnesses because of favourable treatment.

In considering the possibility of concoction of evidence by Mr. Plumley I have not forgotten the submissions made in regard to the incidents to which he himself deposes, and the identification of Walaza by Mr. Muller. It will be more convenient to deal with those when I come to the specific incidents. The submissions made do not I consider affect my finding on this issue. There is also criticism in that Mr. Simon who had control of the payments made to Mr. Plumley was not called. If it were a matter of fine probabilities for or against the suggestion made by the defendant the fact that Mr. Simon was not called might have affected the issue. But I do not think that that is the position.

My finding is that I should not draw the inference suggested without cross-examination of the witnesses concerned. and that even if I do consider the question it is not proper to regard the evidence generally as suspect on the reasons advanced.

The next general submission in regard to the plaintiff's witnesses as to publication is that the dates of the alleged publications were suggested to them by Mr. Plumley, and adopted by the witnesses. From this I am asked to infer that, as the dates were suggested, so the vital part

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of the statements, that 'Max gives T.B.', was suggested. The submission is made under two heads: firstly that with few exceptions the witnesses who testify to statements in regard to disease were not found in 1950, when the rumours were strongest, but only in 1952, and there is no acceptable explanation of this fact, and with very few exceptions they were all found by Mr. Plumley; and secondly that in 1952 it became obvious that the case of the plaintiff needed to be strengthened in regard to the period when statements should have been made to cause a rumour in early 1950, and then the great body of evidence is found, fitting in to a pattern to make allegations against the propagandists of statements in late 1949 or early 1950. There is then examination of the evidence as to the dates given by these witnesses and argument to show that each is unreliable as to date, so as to indicate that the date must have been suggested.

[The learned Judge dealt with these submissions and continued.]

The submissions therefore that in considering the evidence of the publishees generally I should bear in mind the honesty of their interviewer, and that I should scrutinise their evidence generally with Mr. Plumley in the background, do not seem to me to be well founded if they require of me any other than the ordinary approach to evidence. As I have in places indicated there are particular witnesses in whose case monetary persuasion or suggestion will have to be considered.

The next general matter I must deal with is the submission that where there has been a pleading of an incident in a later declaration when the statement of the witness concerned was taken in time to plead it earlier, or where there has been the addition of the name of another publishee when the statement of that other publishee was in the

possession of the plaintiff when the allegation to which he speaks was pleaded, the Court should infer that the statement originally given by the witness was not such that it could be pleaded, and was therefore contrary to the evidence which has been given. This is bound up with the claim to privilege which was made generally in regard to witnesses' statements, for the argument is that where the plaintiff had it in its power to dispel the inference, and did not do so, the inference to be drawn should be unfavourable to the plaintiff.

In *Wentworth v Lloyd*, (1864) 10 H.L.C. 591: 11 E.R. 1151, LORD CHELMSFORD, said:

> 'The exclusion of evidence is for the general interest of the community, and therefore to say that when a party refuses to permit professional confidence to be broken, everything must be taken most strongly against him, what is it but to deny him the protection which for public purposes the law affords him, and utterly to take away a privilege which can thus only be asserted to his prejudice?'

See too Wigmore on *Evidence*, 3rd ed. vol. VIII, para. 2322 and *Hailsham*, vol 13, para. 705 note *(c).*

As I understand it then the position will be that if from the facts on which the defendant can rely, the late pleading and the early statement, the probable inference is that the witness did not at the early stage say what is later pleaded in regard to him that inference can be drawn, but I cannot have regard to the failure to make the statement available to show that that inference is probable, or more probable than other reasons which may suggest themselves on the evidence. The same will be the position in regard to variance of the evidence from

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the pleading. The plaintiff cannot avoid criticism of the witness because it has claimed privilege for his statement; but I must not make assumptions unfavourable to the plaintiff because it has not cleared up the matter by production of the statement.

In regard to the late pleading of incidents, in which the criticism was chiefly in regard to paras. 7 (RR) and (YY), it will be better to deal with these when I deal with the incidents.

In regard to the late addition of the names of other persons as publishees, instances of which are the incidents pleaded in paras. 7 (L), (RR) and particularly (DDD), the incident spoken to by Gobo (9) and Mr. Wheeler (5), it was suggested for the plaintiff that the reason for not pleading these names might be that counsel were uncertain whether or not in law it was necessary to plead them having regard to the decision in *Cramer & Others v Tothill*, 1945 T.P.D. 365 at p. 366. But Mr. *Maisels* quite rightly I think points out that elsewhere in the declaration, in paras. 7 (A) (B) (C) and (R), counsel seem to have suffered from no such hesitation as to the legal position in pleading. In so far as an inference can be drawn on the principles above set out there does not seem to be reason not to consider the matter. This will be done as the cases are considered.

Coming then to the general approach to the variance between pleading and evidence I have already indicated the effect which the plaintiff's refusal to produce statements has. Mr. Plumley suggested that witnesses were interviewed in a hurry, during the lunch hour sometimes, and in conditions in which it was difficult to take a statement, but he does not instance any particular case where the differences may be due to these conditions. Generally however, the efficiency of Mr. Plumley, the language difficulties, the places at which interviews took place are factors in judging of the effect of discrepancies. Then too what the pleader has done must be borne in mind. Where for example a witness

speaks of only three incidents in a beerhall and it has been pleaded that the propagandist over a period habitually said something I do not consider that the words of the pleading would probably have come from the statement; probably the paragraph reads in those terms because the pleader hoped that the evidence led would by inference justify the pleading. I propose to consider the instances of variation rather in the particular cases, because the personality of the witness, the language spoken, the occasion of the interview and the degree of variation, must all affect the matter.

The next general matter to be considered is the interviews which representatives of the defendant held with witnesses to be called by the plaintiff. In many cases the witnesses interviewed were known to be prospective witnesses for the plaintiff. These interviews were held originally by Mr. Boy and Mr. Mulder, later by Mr. Fouché, Mr. Braun and Mr. Boy. Mr. Mulder was not called as a witness. Mr. Boy was for many years in the South African Police; after he had retired he went to work as a mine detective and he was lent by the company which employed him to the U.T.C. to assist in the enquiries. He gave his evidence very fairly, and obviously in his conduct of the interviews was careful to make it clear what his position was in seeking a statement. In the one instance, reflected in ex. 98, where he thought that

the statement recorded was an unfair reflection of what the witness Miti (47) had said he caused a correction to be made, and this illustrates that he was in no way trying to trap the witnesses. There is the possibility of mistaken recollection in regard to the interviews with Hlabane (8) and Kumalo (23) when he interviewed them with Mr. Braun, a matter which I shall deal with later. Mr. Fouché and Mr. Braun are attorneys in the firm which is the attorney for the defendant. They too conducted the interviews which they held in a properly fair manner. These three witnesses all gave their evidence truthfully. In some cases I shall have to consider whether their notes of interviews, made after they had left the witness, may be quite accurate and whether they may have been mistaken in their recollection of what was said when the notes were made. On the whole they rely on these notes for their evidence as to what was said. Although in fact there is no suggestion of impropriety in the conduct of these interviews, the plaintiff does protest that the interviews should not have been held without notification to it. No notification was in fact given. On 3rd March, 1953, the plaintiff's attorneys wrote complaining that there was a 'campaign of interviewing the plaintiff's witnesses'. The reply to this was that on the advice of counsel witnesses had been interviewed in a fair and proper manner, but there was no 'campaign'. The defendant did not stop interviewing witnesses, but then arranged for Mr. Fouché or Mr. Braun or both to carry out the interviews: there was however no notification that the interviews would continue.

On the 11th March, 1938, GREENBERG, J.P., wrote to the Johannesburg Bar Council as follows:

> 'I have submitted your letter . . . to all the members of the Bench. Our opinion is that a litigant or an accused are entitled to interview any person who they have reason to believe is in the possession of information which may assist their client in his case, and cannot be deprived of this right by the fact that the other side has subpoenaed or taken a statement from such person, or that he has been called by the Crown as a witness at a preparatory examination, but that the other side should be notified. It is felt that to avoid any suggestion of impropriety the notification should precede the interview.'

The interviews were held on the advice of senior counsel, who were aware of this letter. The reason advanced for disregarding the terms of the letter was the suspicion which

was held by the defendant in regard to the activities of Mr. Plumley. It would I think have been proper if the terms of that letter had been observed; the more so as the object of many of the interviews does not seem to have been because it was thought that the witnesses were in possession of information which might assist the U.T.C., but, on the evidence of Mr. Friedman, it was to obtain material for the cross-examination of Mr. Plumley, and the witnesses themselves. In the event, that there was not in fact impropriety in the conduct of the interviews, it is unnecessary to say more in this regard. I shall have occasion later to deal with the interviews with Zwakala which were held by the I.T.C.

Generally in regard to the effect of statements made at these interviews Mr. *Bloch* argues that as the statements at them were not made with the careful precautions for understanding and accuracy which are present in a Court the Court should be hesitant to reject evidence on oath, with all its safeguards, because of a statement made in circumstances where the possibility of misunderstanding, of unintentional

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overreaching of the witness, of incomplete investigation of the intended effect of the words used, of fright on the part of the witness, of deliberate misstatement by the witness to the interrogator to conceal what he has said to the other side, and of faulty recording of what was said, cannot be afterwards fully investigated or understood.

These are undoubtedly all factors in assessing the effect to be given to inconsistent statements at the interviews. But I do not think that I should reject generally argument which can be based on an inconsistent statement because there may be these criticisms. I think it better to deal with the examples which are given by Mr. *Bloch* in argument rather as arguments relating to the particular witness than as illustrating some probability in regard to the interviews which is of general application. The words of VAN DEN HEEVER, J.A., in *Rex v Gumede*, 1949 (3) SA 749 at p. 755 (A.D.), apply:

> 'If a witness has 'switched' that fact must ordinarily reflect upon his credit. But for the same reason that a person convicted of perjury is no longer held to be inadmissible as a witness, there is no compulsion to reject the evidence of a witness who at different times has given conflicting narratives of the events in issue. There may be motives inducing a witness at one stage to tell falsehoods and subsequently to confess the truth, and it would be arbitrary rashness to hold that the later evidence must necessarily be rejected.'

One other matter I must refer to in regard to the interviews. In the case of native witnesses there is generally some difficulty in examination which relates to previous statements by them. In this case the matter was more complicated. On several occasions, and I sometimes indicated it, it seemed to me that a witness could not really grasp questions which involved not only one but several prior conversations. And when a native witness was asked a question of this nature: 'Did you tell Mr. Boy that you had told Mr. Plumley that Walaza had said to you that Max gave T.B.?', I do not pay much attention to the answer.

Quite correctly I consider Mr. *Maisels* has contended that in the case of the publishees there is no need for the defendant to show a motive to lie in regard to the doings of a propagandist. The correct approach is set out in *Rex v Roga*, 1935 T.P.D. 101, where it is indicated that the Court can consider the probability of an accusation being made without any motive in judging of its truth, but cannot use the fact that the person accused is unable to suggest a motive as a factor weighing against that person.

Reliance is also placed for the defendant on the judgment of WESSELS, J.A., in *National Employers Mutual General Insurance Association v Gany*, 1931 AD 187 at p. 199:

> 'Where there are two stories mutually destructive, before the *onus* is discharged, the Court must be satisfied upon adequate grounds that the story of the litigant upon whom the *onus* rests is true and the other false. It is not enough to say that the story told by Clark is not satisfactory in every respect. It must be clear to the Court of first instance that the version of the litigant upon whom the *onus* rests is the true version, and that in this case absolute reliance can be placed upon the story as told by A. Gany . . .'

It has been pointed out that this passage puts too high a burden on the litigant upon whom the *onus* lies by its use of the phrase 'absolute reliance'. In *Maitland & Kensington Bus Co. (Pty.) Ltd v Jennings*, 1940 CPD 489 at p. 492, DAVIS, J., said:

> 'With the very greatest deference I venture to think that the use by the learned Judge of the word 'absolute' cannot be correct. . . . And in a civil case the *onus* is less heavy. For judgment to be given for the plaintiff the Court must be

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> satisfied that sufficient reliance can be placed on his story for there to exist a strong probability that his version is the true one.'

Though a 'strong probability' may be less than 'absolute reliance' it still seems, with respect, that an unnecessary adjective has been introduced. In *Ley v Ley's Executors and Others*, 1951 (3) SA 186 at p. 192 (A.D.), CENTLIVRES, C.J., said:

> 'All those cases show that no matter how serious an allegation of fact may be, the *onus* of proving the fact is, in civil cases, discharged on a preponderance of probability . . .'

That is the test which I propose to apply, with the realisation that the *onus* is on the plaintiff to prove the statements alleged.

The degree to which the evidence of one publishee can be relied on to corroborate that of another will be dealt with in considering the evidence of the publishees.

[The learned Judge then dealt with the evidence of the propagandists and their reports; the 'mission' as used in their reports to cover the talks used and the actions which accompanied it, i.e. the destruction of cigarettes, the use of indunas, the use of herbalists, gifts, assistance by the defendant firm to native sports' funds and generally towards native welfare; the use of phrases, e.g. 'that the plaintiff does not employ Africans', 'that the plaintiff is a wrong firm, an enemy firm'; 'that 'Max' cigarettes are apartheid cigarettes'; 'that 'Max' is a wrong cigarette for the Africans'; 'that when the weather becomes inclement 'Max' is damp and becomes blocked when lighted'; 'that 'Max' is bad for the health'; 'that 'Max' makes you cough' 'that 'Max' causes chest trouble'; and the control and credibility of the propagandists, and the incidents as pleaded. He then proceeded as follows.]

It is argued for the defendant that, because in some instances witnesses who say that a propagandist talked of T.B. are shown to have made up their evidence, an inference should be drawn generally against the plaintiff in regard to its case. But there is a difference between conscious fabrication of a case by a party and the *bona fide* use of witnesses proved to be untruthful. See *Hunt v Brown*, 1952 (2) P.H. J.14. In this case the plaintiff did not knowingly put forward false evidence.

One other matter I must deal with here: the degree to which support for one incident

can be derived from evidence on another.

The argument for the defendant is that as the case for the plaintiff involves that much of the propaganda used by the propagandists was innocent no added likelihood of one of them having made a particular statement on one occasion is afforded by proof that he said it on another. Reliance is placed on *Rex v Butelezi*, 1944 T.P.D. 254 at p. 259, where SCHREINER, J., said:

> 'But when it is not proved that X did act D, the act in issue, but only that he did acts A, B and C, the basis for inference as to his having done act D is, as a matter of common sense and experience, far less secure. There is really no good reason, in general, to regard it as more probable than not that he did act D, because it has been shown that he did acts A, B and C which are similar to act D. His series of acts must stop somewhere and might just as well stop at C as at D.'

And it is argued that it would be mere conjecture and not inference to say that because a statement was made to one person it was also made to another; reliance being placed on a passage in the speech of LORD WRIGHT in *Caswell v Powell Duffryn Associated Collieries Ltd.*, 1940 A.C. 152 at p. 169.

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In *Rex v Katz and Another*, 1946 AD 71, on charges of selling meat at excessive prices statements by the accused and other acts were held admissible as showing that the accused was habitually selling meat at excessive prices and intended to go on doing so, and as showing that he did so on the occasions charged. WATERMEYER, C.J., at pp. 78 - 79 said:

> '. . . facts which may be regarded as logically relevant to establish a fact in issue are sometimes excluded by the rules of evidence ..... the exclusionary rule is not an absolute one. It only operates to exclude such evidence when such evidence is solely relevant to show that the accused, by reason of his bad character or his commission of other crimes, had a criminal propensity, and was, therefore, likely to commit the crime with which he was charged. If, for any other reason, it is relevant to the question before the Court it is admissible.'

In this case evidence that on one occasion a propagandist had said that Max gave T.B. goes to show more than that he might be a person with a propensity to say such things: it shows that on that occasion that statement was a part of his propaganda, and part of his system of talk. And, quite apart from the effect on credibility from the proof of the one incident in the dispute between the witnesses on the other, the evidence that the statement has been used in the propaganda, taken with the other proved fact that here there was a system of attacking the Max cigarette by statements, has in my view weight to show that it might probably be used on another occasion. Probability of repetition of the act is shown not by the character of the propagandist but by the content of the talk.

It is because of this too that in my view it might also be legitimate, if necessary, to use a statement by one propagandist to show that a statement by another was probable. Normally of course that X had done acts of a certain nature could not go to show that Y was likely to do them. But if persons are shown to be engaged in a common purpose, and to be conferring on the means to be used, or adopting the means used by each other, to bring about that purpose, what is proved to be done by the one may help to show that evidence that it was done by the other is acceptable. I shall indicate it if an incident is used in this way.

[The learned Judge then dealt with the evidence of certain detailed incidents, which he

found proved, and then proceeded.]

The plaintiff then has proved that the native propagandists of the U.T.C. one or other or all of them did say that the I.T.C. did nothing for the native, that the I.T.C. did not employ natives, that the I.T.C. was connected with the Nationalist Party, that the I.T.C. was the enemy of the native, that Max was the wrong cigarette for the native to smoke, that there were various other wrong attributes of Max, that Max caused coughing, and that Max caused T.B. They systematically destroyed Max cigarettes in conjunction with these remarks.

It is quite clear that all these remarks were made as part of a campaign carried out with the object of discouraging natives from smoking Max and of injuring the I.T.C. in its trade. All the statements were false. All of them were made with the knowledge of their falsity and were calculated both in fact, and to the knowledge of those making them, to cause injury; they were therefore made maliciously.

There can be no doubt that the propagandists in making these statements were acting in the course and scope of their employment. The

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defendant through its higher officials authorised the campaign, and left it to the propagandists to carry it out. Mr. van der Spuy, who was in charge of them, knew of many of the falsehoods which they were spreading about Max, and certainly impliedly authorised the continuance of those. No one in authority seems to have realised the manner in which the propaganda was growing. There was no indication in the reports that there was talk of T.B. But that cannot avail the defendant. These agents of the defendant were given a free hand to develop the the propaganda as they chose; in many of their acts such as the destruction of cigarettes and the statement that the I.T.C. did nothing for the native, and was the enemy of the native, the manner of development was approved. Their authority to use the licence given to them in other ways cannot be denied.

The plaintiff is therefore entitled to recover those damages which it has proved.

Damages - General.

The basis on which the plaintiff claims its damages is that it has shown that its sales of Max in 1950 and subsequent years, but for the rumour, would have been greater than they were in 1949; that it has shown that the cause for the fall in its sales of Max in 1950 and subsequent years was the rumour; and that it is entitled to the loss of profits on the differences between the actual sales and the sales which it would have made, but for the rumour.

The defendant's answers to this claim for damages are:

(a) That the plaintiff has not proved that the defendant's servants started this rumour. This I have already dealt with to a large extent. I consider that the plaintiff has proved that the rumour was caused by the agents of the U.T.C. Two at least of the propagandists were making statements that Max caused T.B. in a beer hall in Johannesburg to large numbers of natives at a time shortly before the rumour became known. No other cause of the rumour is indicated; I have already dealt with the argument that the rumour was caused, or further spread, by Kuna or Moyene, and with other suggested causes.

(b) That the plaintiff has not proved damages on the basis put forward at all because it has not proved what its sales would have been in the years after 1949, and there is therefore no proved figure from which its actual sales can be deducted to show loss of profit.

(c) That the plaintiff has not proved any, or if any what, amount of its drop in sales was caused by the rumour.

(d) That even if under *(b)* and *(c)* some loss of sales due to the rumour is proved the arguments under those heads, and other arguments, show that the loss claimed is excessive.

(e) That if a definite loss of sales due to the rumour is shown the damages are calculated on the wrong basis.

To a large extent the arguments under *(b), (c)* and *(d)* are interrelated. This will involve a certain amount of repetition in dealing with them.

Damages are only claimed for the years after 1949. For the three calendar years 1950, 1951 and 1952 figures of actual sales of Max are available, and since damages are claimed starting with the calendar

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year 1950 I shall use the figures for the calendar years and not those for the financial years. Also I do not propose to discuss damages flowing from statements other than those which caused the rumour. The real case of the plaintiff is that it was the rumour which caused its loss. If damages are awarded for that loss it will be on the basis that proved loss of native trade flowed from the rumour. If amongst that loss some was caused by other statements the defendant cannot complain, and the plaintiff is compensated.

The legal principles on which I must approach the proof of damages in this case are in some respects in dispute and there are submissions with which I must deal. Mr. *Ettlinger* does not dispute that in a case such as this damages need not be proved with mathematical precision. In *Turkstra Ltd v Richards*, 1926 T.P.D. 276, there was no complaint that the plaintiff had not brought forward the best available evidence of damage, but the defendant contended that on the evidence made available it was not possible to assess damages. STRATFORD, J., at p. 282, said:

> 'So that if we arrive at the conclusion that some loss of custom must have resulted because of the nuisance, it is the duty of the Court to assess the damage in the best way possible.'

See too *Sandler v Wholesale Coal Suppliers Ltd.*, 1941 AD 194 at p. 198. In the *American Law Institute, Restatement of the Law, Torts*, vol. 4, para. 912, it is said:

> 'A person to whom another has tortiously caused harm is entitled to compensatory damages therefor if, but only if, he establishes by proof the extent of such harm and an amount of money representing adequate compensation with such certainty as the nature of the tort and the circumstances permit.'

Illustration 12 to this paragraph, p. 583, reads:

> 'A is conducting a manufacturing business in which the net profits are $5,000 per year. B, a competitor, is guilty of unfair trade practices and the demand for A's goods begins to fall off instead of to increase as had been true hitherto. Some of the changes may be due to

competition by new competitors. The amount of harm which has been done by B cannot be told with any substantial degree of accuracy. A is nevertheless entitled to compensatory damages based on such facts and figures as are reasonably available.'

In *The Duke of Leeds v The Earl of Amherst*, 52 E.R. 595 at p. 596, a decision of SHADWELL, V.C., the head-note reads:

'Where a wrong has been committed the wrongdoer must suffer for the impossibility of ascertaining accurately the amount of damages.'

But this does not mean that there is a bias against the wrongdoer but only that he cannot be heard to complain if in the circumstances created by himself damages may have been over-estimated against him. It was a case in which the Court was hearing exceptions to the fixing of damages by a Master on the ground that the evidence did not warrant his findings. It was also argued for the plaintiff that in a case such as this there is a presumption against the wrong-doer. Reliance was placed on Spencer Bower on *Actionable Defamation*, 2nd ed. p. 154 note 'y', and other cases. *Spencer Bower* says:

'In the case of the co-existence, and possible/or even probable cooperation of other causes than the defendant's defamation . . . if the defendant suffers from a too liberal estimate by the jury of the harm done by his act, and a too restricted one of that resulting from other causes, this is no great hardship upon him at all events if the judge has cautioned the jury in his summing up, which is his duty. . . . He is the wrongdoer and it is for him to disentangle the skein.'

The author refers to the *Duke of Leeds'* case, *supra*, and *The Star of India*, 1 P. 466 at pp. 471 - 2. The latter case sets out no such principle, but expresses only the principle to which I have already referred:

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'He (the wrongdoer) has no right to fix this inconvenience (the higher cost of a new article to replace a damaged one than the value of the damaged one) upon the injured party, and if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden which the law will not place upon him.'

The passage too about the Judge warning the jury shows that the law does not set out to over-compensate, but rather does not listen to complaints if there has been over-compensation.

In *Livingstone v The Rawyards Coal Co.*, 5 A.C. 25 at p. 39, a case of the working of another's coal by mistake, LORD BLACKBURN said:

'I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. That must be qualified by a great many things which may arise - such, for instance, as by a consideration whether the damage has been maliciously done, or whether it has been done with full knowledge that the person doing it was doing wrong. There can be no doubt that there you would say that everything would be taken into view that would go most against the wilful wrongdoer - many things which you would properly allow in favour of an innocent mistaken trespasser would be disallowed as against a wilful and intentional trespasser on the ground that he must not qualify his own wrong.'

This passage I consider refers to the principle that damages may be increased because of malicious motive, see Mayne on *Damages*, 11th ed. p. 41 'Punitive damages'; Gahan *Law of Damages*, pp. 18 - 19; *Hailsham* vol. 10 para. 108, 'Exemplary damages'. In McKerron *Law of Delict*, 4th ed. pp. 149 - 150 the matter is dealt with and the author says that

> 'The award of exemplary damages is justified where the defendant's conduct involves an element of *injuria*'.

But damages are not claimed on that basis in this case; and Mr. *Rosenberg* is wrong I consider in trying to apply LORD BLACKBURN'S words to the present case to show that there is a presumption against the defendant and everything must be taken against it because the delict was malicious.

An illustration of the attitude of a Court to a case such as this is *Juggi Lal-Kamlapat Mills of Cawnpore v Swadeshi Co. Ltd.*, 46 R.P.C. 74, a passing-off action which came on appeal to the Privy Council. LORD DUNEDIN, after pointing out that if the case had come before a jury it would have disposed of it in a rough and ready way, said at p. 79:

> 'Their Lordships cannot say that there is any cut and dried rule which can be laid down by a court of law for the estimation of damages in a case like this, but think that on the figures given the safer figures on which to work are the figures which are given which show the falling off in the respondent's trade which came in after this pirated mark was introduced on the market. If it is assumed that the whole of the falling off was due to the use of the pirated mark that would bring out (£4,500). That does not give anything for a possible increase in trade and their Lordships think that on a rough calculation £500 may be added for that.'

It is unnecesary to consider the facts on which the assumption was made, or the basis on which the lower Court had calculated damages; the case shows how the Court is not too careful in the calculation. In *Ledger Sons & Co v James Munro & Son Ltd.*, 33 R.P.C. 53, a passing off action in Scotland LORD HUNTER referred to the remarks of the LORD JUSTICE CLERK in an earlier case:

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> '. . . it is not easy to make a safe calculation of the exact damage, but that is just what occurs in a great many cases. It must be estimated in a reasonable way. If it cannot be estimated with exactitude, one must form one's opinion as a juryman would of the damage due upon the whole circumstances of the case and make the best reasonable estimate that one can.'

In regard to the attitude to be adopted to other possible causes of loss Mr. *Ettlinger* I consider correctly argues that the plaintiff must prove that the loss was caused by acts of the defendant. To a large extent that involves the negativing as probable of other possible reasons for the loss. For example here the plaintiff obviously has to prove that the drop in its sales was probably caused by the rumour and not by ordinary competition. But he requires too much of the plaintiff in my opinion when he argues that because the loss is claimed on the basis of a fall in business every portion of that fall must be proved to be due to the delict. I may have misunderstood this argument to some extent: it may be that it was meant to involve that if the whole loss of business was to be recovered the whole must be proved to be due to the cause. If it was meant otherwise I can only say that if the plaintiff proves it to be probable that some portion of his total loss of business was due to the cause assigned I can see no reason why he should not recover that portion. It was argued that loss of business was a sum total; but just as the plaintiff in a proper case is allowed to prove general loss of business, because he cannot be expected ever to know, far less to prove, what particular customers he had

lost - see *Ratcliffe v Evans (1892) 2 Q.B. 524 - so it seems to me that he can prove that his business has fallen as a whole, that for part of that fall the defendant may not be responsible, but for part of it the defendant probably is responsible.*

There are some other causes, perhaps possible, with which the plaintiff need not be expected to deal. I do not think that the position arises on the facts, but I shall deal with it. In a passage in the *Restatement, Torts*, vol. 4 p. 579 it is said:

> 'In some cases in order to show that the loss was attributable to the wrongful act, rather than to other circumstances, proof may be necessary that the other conditions continued equally favourable. Ordinarily, however, in the absence of evidence to the contrary, it may be assumed that similar conditions continued after the tort.'

It would not be a criticism of the proof by the plaintiff in my view that it has not dealt with every possible cause of a fall; there must be something in the evidence, whether suggested by the plaintiff itself or put forward by the defendant, to suggest that that cause enters into the probabilities on causation.

From para. 632 of the *Restatement, Torts*, vol. 111, Mr. *Rosenberg* argued that it was enough if the plaintiff proved that the defendant's wrong was a substantial factor in the loss; but that paragraph speaks of the loss of a particular contract. This argument arose, it seems because he was relying on note *(f)* on p. 349, a note which refers to unknown purchasers; but that note is a note to para. 633.

I shall deal later with the argument of Mr. *Ettlinger* that the plaintiff has not put before the Court all the evidence on damage which it should have, because that is related to the turning of a loss of sales of cigarettes into a loss of profit. And I shall also later refer to the legal submissions in regard to the correct basis for an award of damages.

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[The learned Judge then dealt with the effect of the rumour on the sales of 'Max' and calculated the proved loss for 1950, 1951 and 1952. He then proceeded.]

The proved loss in 1950 was 147.5 million. The gross profit which would have been earned was 7s. 0.4 d. per thousand. The loss of gross profit was £51,870. The 1951 figures are 315.8 million, 7s. 2.6d., £114,051. In 1952 the figures are 361.8 million, 7s. 8.3d., £179,521. From these figures there has to be deducted additional non-factory expenses which I shall deal with later. Apart from this the total figure is £345,442.

Mr. *Ettlinger's* submission generally in regard to the damages claimed is that the proper measure of damages is not the sum of the loss of profits over a period of years, but the loss of goodwill. Evidence was given by Mr. K. L. Smith as to the fall in value of the goodwill of the Max brand between 30th June, 1950, and 30th June, 1952. The calculations are based on the capital employed, the amount of super profits, profits in excess of 121/2 per cent, gained on that capital, and the value of the goodwill of the brand based on the expectation of the earning of super profits over a certain period of years. Without going into the figures it is enough to say that they show a maximum fall in value of goodwill from 1950 to 1952 of £72,000. As an indication of the practical accuracy of Mr. Smith's figures Mr. *Ettlinger* referred to the fact that the figures given by Mr. Smith for the value of the goodwill came very close to the value of Max trade marks in the accounts of the plaintiff. The seller of those trade marks was interested in the I.T.C., and the figure in the accounts is based on the sale price. But the main legal enquiry does not concern the figures, but the method of the computation as a basis for

fixing damages.

Mr. *Ettlinger* relies on *Owners of the Dredger Liesbosch v Owners of Steamship Edison*, 1933 A.C. 449. LORD WRIGHT in his speech at pp. 463 - 4 said:

> 'In these cases the dominant rule of law is the principle of *restitutio in integrum*, and subsidiary rules can only be justified if they give effect to that rule. . . . The true rule seems to be that the measure of damages in such cases is the value of the ship to her owner as a going concern at the time and place of the loss. In assessing that value regard must naturally be had to her pending engagements. The rule however requires some care in its application; the figure of damages is to represent the capitalized value of the vessel as a profit-earning machine, not in the abstract but in view of the actual circumstances. The value of the prospective freights cannot simply be added to the market value but ought to be taken into account in order to ascertain the total value for the purposes of assessing the damage, since if it is merely added to the market value of a free ship, the owner will be getting *pro tanto* his damages twice over. . . . But different considerations apply to the simple case of a ship sunk by collision when free of all engagements. . . . In such a case the fair measure of damage will be simply the market value, on which will be calculated interest at and from the date of loss, to compensate for delay in paying for the loss.'

These principles, Mr. *Ettlinger* argues, are in accordance with the principles applied to give compensation in our law, and show that the true measure of damage is the diminished value of the profit-earning machine, the loss in goodwill.

In the present case the Max brand was not destroyed: but the acts of the defendant have interfered with the ability of the I.T.C. to earn profits by selling that brand. In the *Restatement, Torts*, vol. 4, para.

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912, to which I have already referred, deals generally with the need to prove with reasonable certainty the amount of money representing adequate compensation. Sub-sec. *(d)* of the Comment deals with loss of earnings and profits. Illustration 9 to this seems to me to apply in this case.

> 'While A is operating a boarding-house B makes defamatory statements concerning the edibility of the food, as a result of which many of A's boarders leave. The profits for the six months immediately preceding these statements were $50 per week. After the statements there were no profits for a period of thirty weeks. In an action for the loss caused by the statements, A is entitled to recover the amounts of the profits thus lost, unless B proves that there has been a change of conditions, such as a change in the character of the neighbourhood or of the food offered to the boarders, or unless it was unreasonable for A to continue to operate the boarding-house during this period, in which latter event the damages would include an amount equal to the value of the business.'

Once there is a position where the injured party has not lost the whole of the asset but has had the profit-earning capacity of his asset interfered with, to assess damage on the diminished value of the asset is to ignore the fact that he must continue to operate the affected asset. If it is not reasonable, to take the present case, to require the I.T.C. in mitigation of its loss to cease to manufacture cigarettes, for it manufactures not only Max but other brands, the decreased value of its business as a whole is no guide; and this is recognised in the suggested basis for damages by separating the goodwill of Max from that of the other brands manufactured. And if it is not reasonable to require the I.T.C. in mitigation of its loss to cease to manufacture Max cigarettes, and it is not suggested that that course should have been adopted, then the I.T.C. had to continue to operate its business on a less profitable basis than it did before. To apply to such a

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position a case such as *The Edison*, a case of total loss where the damages awarded enabled the injured party to put himself in the position in which he had been by the purchase of an equivalent profit-earning asset, is to ignore that the I.T.C. is left with an asset capable only of earning lesser profits. If the evidence had indicated that an award of the loss in value of the goodwill of the Max brand should have enabled the I.T.C. to market another brand to take the place of Max, and to restore the profit-earning capacity of the business, that award might have compensated the I.T.C. for its loss, but that is not the evidence. The I.T.C. was left with a brand of cigarettes which it was reasonable to continue to manufacture, but which, because of the action of the defendant, could not be manufactured as profitably as it had been before. In such a case loss of profit seems to me to afford a proper guide to the damage suffered.

Practically too the position can be tested. On the figures I have reached for the years 1950 to 1952 the I.T.C. has shown that it made some £350,000 less than it would have made but for the acts of the U.T.C. It is not suggested that in losing that amount the I.T.C. has behaved unreasonably in the conduct of its business, or in the continued manufacture of Max. Figures show that the loss in the value of the goodwill of the Max brand over those years is £72,000. If that figure only were awarded then the I.T.C. would be some £280,000 worse off than it would have been if the U.T.C. had not wrongfully interfered with its business. The law cannot I think be so incapable of righting a wrong.

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I am of the opinion that the plaintiff is in law entitled to recover damages based on its loss of profits.

Mr. *Ettlinger* also argued that because in this case the plaintiff has not put before the Court the most important evidence on the question of damages, namely the profit actually earned in any year by the I.T.C. from the sale of Max, no damages should be awarded. He relies on *Klopper v Mazoko*, 1930 T.P.D. 860, in which case at pp. 865 - 6 TINDALL, J., said:

> 'This seems to me a case, therefore, where, though the plaintiff suffered some actual damage, he failed to give the evidence which he could have given to enable the Court to place a figure on such damage. That being so, in my opinion the magistrate ought not to have awarded any damages at all.'

He also relies on *Lazarus v Dondorp's Bakery (Pty.) Ltd.*, (T.P.D. 1st May 1952: unreported) in which DE WET, J., said:

> 'On the evidence which I have summarised the magistrate, applying *Turkstra Ltd v Richards*, 1926 T.P.D. 276, held that it was clear that the respondent had suffered damages and that he had to assess damages as best he could even though an estimate of damages was little more than a guess. But the principle of *Turkstra's* case only applies where the plaintiff put all the relevant evidence before the Court which he is able to to enable the Court to assess damages. See *Lazarus v Rand Steam Laundries*, (1946) (*Pty.) Ltd.*, 1952 (3) SA 49 (T).'

The figures of annual profit of the I.T.C. are before the Court, but they do not show profit on the sales of Max because the I.T.C. also manufactured du Maurier and Peter Jackson cigarettes. It does not seem to me that evidence breaking up those figures would have helped in the assessment of damages. They would probably have shown that when the I.T.C. was selling much larger quantities of Max than it did from 1950 onwards its profits on the sale of Max did not reach figures as high as those shown to be the profit to be expected from the lost sales. But I do not see how that fact would have helped in fixing

the damages. The gross profit per thousand cigarettes is not in dispute. The additional non-factory expenses are in dispute, and they have to be determined to arrive at the nett profit, the damages sustained. But there is no suggestion that they would run into tens of thousands, and still the nett profit on the shortfall could be proved to be higher than might have been expected judging by profits in earlier years. It also seems to me that if an attempt had been made to show the profits attributable to the sales of Max in earlier years I should have been faced with another dispute, for a different period admittedly, as to the proper amount of non-factory expenses to allocate to the one brand against the others.

Since the plaintiff has put forward evidence on which damages can be assessed it should not fail in its claim in my view because there might have been still more evidence which might or might not have assisted. The cases cited do not I consider apply where as much relevant evidence as is here to be found on damages is before the Court.

I need not consider the evidence on the ability of the I.T.C. to manufacture the shortfall. On the figures of loss which I have fixed, and will fix for the years after 1952, no figure such as the 1,000 million shortfall in a year of the claim will be reached.

As regards non-factory expenses all I am concerned with is an increase in selling charges, other than delivery charges which are allowed for in the figure of gross profit per thousand, and advertising charges.

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Mr. Pollock's evidence is to the effect that with the short-falls involved in the claim there would be no increase in selling costs, or advertising costs, and that sufficient allowance has been made.

Mr. Morgan's evidence is that selling costs were rising, and after he had opportunity to work it out he estimated that the I.T.C. should have spent in 1950 at least £13,500 more than it did to have increased its sales above the 1949 figure to the extent claimed, that is to say to sell just over 1,000 million cigarettes.

In fact, on the figures I have fixed for the loss, the sales in Max in 1950 but for the rumour would have been 92 million less than the sales in 1949 and the sales in 1951 another 15 million lower excluding Max Filter, or 60 million below the 1949 figure with Max Filter. If the actual sales of 1952 are added to the shortfall due to the rumour and the sales of Max Filter the sales in 1952 should have been 180 million above the 1949 figure. On these figures there does not seem to me to be any need to add to the advertising costs for 1950 and 1951 to allow for the plaintiff selling the shortfall determined. In 1952 just over 800 million of Max of all kinds was sold. If a further 360 million, the shortfall, had been sold there probably in fact would have been more advertising although it might not have been necessary. In that year there was probably heavy advertising for Max Filter. And the increased advertising would not have been proportional to the extra sales, for a lot of the advertising cost would not be affected. Mr. Morgan's suggested addition to the 1949 figures was about 18 per cent for additional sales in 1950 of 260 million. If I take an additional 10 per cent for additional advertising in 1952, if the shortfalls had been sold it would seem to be about the correct figure; that is £7,600. Having regard to the figures and Mr. Pollock's evidence as to the sales organisation in the I.T.C. it is not probable that extra selling costs would have been incurred in these years if the short-fall fixed had been sold, and there is no need to make adjustment for these.

In regard to the figures given by Mr. Pollock for additional nonfactory expenses the short-falls I have determined are less than those on which his figures are based. I cannot work out what these figures would be on smaller sales, so I shall provisionally take a somewhat lower figure, and the proper figures can be given to me when argument on costs is heard.

The damages I award are therefore:

For 1950: £51,870 less non-factory expenses, provisional, of £1,870; a figure of £50,000.

For 1951: £114,051 less non-factory expenses, provisional, of £2,251; a figure of £111,800.

For 1952: £179,521, less £7,600 for advertising, and less non-factory expenses, provisional, of £2,921; a figure of £169,000.

The total is £330,800.

Damages for the ten years 1953 to 1962 are claimed on the basis that the total sales which should have been made of Max plain and cork-tipped in 1952 would have increased annually by 2.21 per cent, the average annual increase in Union consumption over the years 1950 to 1952, that Max sales would not fall below a figure of double the

sales for the first half of 1953, and that the profitability in the 1s. 2d. class will not alter.

As I have held that the total sales of Max are not the guide to the loss caused by the rumour, and that the increase in Union consumption is not the guide to what the sales might have been in the 1s. 2d. class or in the non-European market in the Transvaal I cannot adopt this basis in estimating future loss.

Mr. *Ettlinger's* answers to the claim for damages beyond 1952 are two. He submits that where damage is the gist of the action prospective damage cannot be recovered at 'all. And secondly he submits that this claim is based on mere conjecture and optimistic speculation. I shall deal first with the legal submission.

> 'The wrong of injurious falsehood consists in the malicious publication of a false statement concerning another which is not defamatory, but which causes that other pecuniary loss.'

McKerron *Law of Delict* (4th ed.) p. 250.

Mr. *Ettlinger's* argument is that that loss must, not even in part, be future loss. He relies on the following authorities. In *Hailsham*, vol 10 para. 114:'Similarly, where the damage consequent on an act or omission rather than the act or omission itself provides the cause of action (d) then, as the action is only maintainable in respect of the damage, or is not maintainable until the damage is sustained, a fresh action will lie every time damage accrues from the act. In this case, prospective damages are not recoverable; for the cause of action is not the act, but the damage arising therefrom.'

Note *(d)* refers back to para. 103 which, amongst others, sets out the tort of injurious falsehood as one where damage done is the gist of the action on the authority of *Ratcliffe v Evans*, 1892 (2) Q.B. 524. Mayne on *Damages*, 11th ed. p. 511 says:

> 'Special damage must be laid and proved, where the words are not actionable without it. In this

case the special damage is the gist of the action. The jury must, therefore, only take into consideration the special damage proved. They cannot consider loss which may arise in the future, as such damage when it occurs will give rise to a fresh cause of action.'

Both *Hailsham* and *Mayne* rely on the case *West Leigh Colliery Co. Ltd v Tunnicliffe & Hampson Ltd.*, 1908 A.C. 27. LORD MACNAUGHTEN at p. 29 said:

'It is undoubted law that a surface owner has no cause of action against the owner of a subjacent stratum who removes every atom of the mineral contained in that stratum, unless and until actual damage results from the removal. If damage is caused, then the surface owner 'may recover for that damage' as LORD HALSBURY says in the *Darley Main Colliery* case, 'as and when it occurs'. The damage, not the withdrawal of the support, is the cause of action. . . . If this be so, it seems to follow that depreciation in the value of the surface owner's property brought about by the apprehension of future damage gives no cause of action by itself.'

This decision was considered in *Oslo Land Co. Ltd v Union Government,* 1938 AD 584, in which WATERMEYER, C.J., said at p. 592:

'But the distinction between that class of case and an action for damages for negligence is quite clear. In negligence cases the cause of action is an unlawful act plus damage, and as soon as damage has occurred all the damage flowing from the unlawful act can be recovered, including prospective damage and depreciation in market value. In these subsidence cases there is no unlawful act: the cause of action is damage and damage only.'

When damages are claimed for an injurious falsehood in our law, whether they are claimed by the *actio injuriarum* as was said to be the case in *Fichardt v The Friend Newspapers Ltd.*, 1916 AD 1, or are claimed by an action under the *Lex Aquilia* based upon *dolus*, see McKerron *Law of Delict*, 4th ed. p. 250 note 30 and at p. 256 note 60 and cases there cited, there is a wrongful act. Damages are an essential

part of the claim in the sense that without proof of damage the plaintiff cannot succeed. But in the sense of the English authorities referred to they are not 'the gist of the action'; that is the wrongful act. I consider therefore that the principles laid down in the *Oslo Land Co. Ltd.* case for the action for damages for negligence are the ones which here apply, and that prospective damages can be recovered.

In regard to the approach to the evidence as to damages in the future Mr. *Ettlinger* refers to Sutherland on *Damages*, 3rd ed. vol. I para. 121. Under the heading 'Certainty of proof of future damage' the author says:

'The conservatism pervading the law is opposed to allowing compensation for probable loss. . . . The decided cases which relate to prospective damages warrant the statement that the injured party is entitled to recover compensation for such elements of damage as are likely to occur; the jury may proceed upon reasonable probabilities, and accept as sufficiently proved those results which, under like circumstances generally come to pass. It is not, however, to be hence inferred that prospective damages may be recovered on every plausible anticipation, nor that no allowance is to be made for the uncertainties which affect all conclusions depending on future events; it is only intended that such uncertainties, where the damages are shown by evidence reasonably certain, do not exclude them wholly from consideration. . . . The injured party is entitled to recover in one action compensation for all the damages resulting from the injury, whether present or prospective. And in respect of the latter, the rule is that he can recover for such as it is shown with reasonable certainty will result from the wrongful act complained of.'

This passage seems to swing from being favourable to the defendant to being not so

favourable.

Spencer Bower on *Actionable Defamation* 2nd. ed. pp. 154 - 155 in note *(y)* says:

> 'But there must be some probability, not a mere possibility, of future damage.'

The tests I propose to apply are that if the plaintiff proves damages from 1953 onwards to be probable he is entitled to be awarded some amount; the damages need not be proved with accuracy because in the nature of the enquiry as to the future they cannot be; I must do the best that I can to determine them 'in some way or other' because all that can guide me is before me; but the determination must be based on probabilities, and must make some allowance for uncertainties in those probabilities.

The main factors which I have to guide me in the assessment of future loss are I consider the following.

1. Although the Union consumption of cigarettes rose by 1 per cent in 1952, and by 2.45 per cent in the first eleven months of 1953 as against the corresponding period of 1952, the consumption of cigarettes in the 1s. 2d. class has been falling since 1949. The main drop was in 1950 and there was a recovery in 1951, but again there was a slight drop in 1952. If the filter-tipped figures are excluded the drop in plain and cork-tipped cigarettes was over 1,000 million on the figure of 6,506 million in 1952, a drop of over 15 per cent in 1952.

2. There has been a swing in recent years to more expensive cigarettes, and a decided swing to filter-tipped cigarettes.

3. At the beginning of 1950 Max was in a position, due to the rumour, in which it was selling 360 million cigarettes less per year than it should have sold.

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4. Filter-tipped cigarettes are becoming increasingly popular with the non-European smoker. On the figures for Kliptown Wholesalers (Pty.), Ltd. 11 per cent of purchases in 1952 were filter tipped when Max Filter were on the market for only half the year and Commando Round Filter had hardly started. Cavalla, which had been rising rapidly, had only a small rise in cork-tipped cigarettes in the first half of 1953 as compared with the first half of 1952 in the Transvaal.

5. Cigarettes other than filter-tipped were not sold to the non-European as much in 1952 as they had been in 1951. The figures for Kliptown Wholesalers (Pty.) Ltd. show a drop in purchases, excluding filter-tipped cigarettes, of 8 per cent in 1952.

6. Max Filter has had great success, and there are indications of popularity amongst non-Europeans in the Kliptown figures.

7. Max total sales of all sorts have been as follows. Financial years are taken in order to include the figures up to June 1953: 1949 - 975 million; 1950 - 870 million; 1951 - 676 million; 1952 - 674 million; 1953 - 823 million.

8. The total sales of Max plain and cork-tipped in the Transvaal in 1952 were 187 million, of which, based on the cork-tipped tens, some 64 million were in the non-European market.

9. It is proper to take into consideration Max Filter. The I.T.C. having suffered injury

could not do nothing to retrieve its position. What it has done has been to introduce Max Filter and that has retrieved the position to a large extent. Its effect has been greater in restoring loss in the European market, not due to the rumour, than it has been in recovering loss in the non-European market, due to the rumour. But even there it is beginning to have effect. Taking the two financial years from its introduction Max Filter reached sales of 191 million in the year ended June 30th 1952 and sales of 521 million in the next year. These figures are greater, that for 1953 much greater, than any rise at any time in Max plain and cork-tipped.

10. Figures of sales in the first and second half of the year when Max was rising show that the sales in the second half of the year are substantially greater than those in the first half. Taking the Max Filter sales for the first half of 1953 it would seem that the rise in Max Filter which could be expected in 1953 calendar year would be about 100 million. But this is affected by the fact that there were not full sales in the first half of 1952. It appears that the sales in the Transvaal for 1953 will be about 240 million.

From these factors I reach the following conclusions:

(a) That the drop in non-European sales due to the rumour is more than the loss which will have to be recovered before the damage ceases. All the indications point to a falling of the non-European demand for cork-tipped cigarettes in the 1s. 2d. class. In 1952 there was a drop of 15 per cent in the plain and cork-tipped market for 1s. 2d. cigarettes. I shall take that percentage as being applicable.

(b) If Max Filter had been introduced with the native market unaffected by the rumour, and 360 million higher than it was in fact, the sales of Max Filter would probably have been greater, but the increased amount would largely have come from existing Max smokers in that

market. Some allowance though must be made for native smokers who have not been attracted to Max Filter from other brands because of the slur on the name of Max.

(c) There is at the most another 64 million in cork-tipped Max to be lost in the Transvaal on the 1952 figures and it seems probable that the smokers of those if they have ignored the rumour for three years will continue to do so. All therefore that needs to be recovered is the 360 million extra which there should have been.

(d) About half the sales of Max Filter will probably be in the Transvaal and the probable rise per year in the Transvaal in Max Filter over the next few years will be 50 million per year. Of that I shall allocate 30 million to the non-European market.

(e) The 360 million would then disappear as follows:

1953 360 less 15%, 54, less 30	76 million
1954 276 less 15%, 41, less 30	205 million
1955 205 less 15%, 30, less 30	45 million
956 145 less 15%, 21, less 30	94 million
1957 94 less 15%, 14, less 30	50 million

1958 50 less 15%, 7, less 30	13 million
Total	683 million

(f) I see no reason not to apply the suggested figure of gross profit of 7s. 101/2d. per thousand to these losses. And with the smaller figures involved I shall not make any further allowance for advertising or extra sales costs. The gross profit on 683 million would be £250,589. From this must be deducted a figure for additional non-factory expenses. The total loss in millions is somewhat like the plaintiff's figure for 1952 of 676 million, but it seems probable that with some of the smaller losses in the later years the management remuneration which makes up the bulk of the additional expenses would not be involved. Since I have made many assumptions against the plaintiff in arriving at these figures, and since what I am trying to arrive at is a fair estimate of the probable loss after 1952, not with mathematical accuracy, I think the proper order to make is that the damages after 1952 be fixed at £250,000. As over two-thirds of this loss is for 1953 and 1954 it does not seem necessary to make any allowance for the present value of the remaining portion of the sum; the reduction which there might have been by taking the present value of some £80,000 for the years after 1954 is again compensated for by other matters which have been taken against the plaintiff.

By letter dated 4th December, 1953, the plaintiff gave notice of an amendment to the summons and declaration to add a claim for interest on the damages awarded at the rate of 6 per cent per annum from the date of judgment. This amendment was granted.

It is common cause that unless an order for interest is made at the time of judgment interest cannot be awarded at a later stage, even if an appeal is noted and leave to execute is applied for. For the plaintiff it is argued that when there is a claim for interest from the date of judgment, if a judgment is given in favour of the plaintiff, the judgment for interest must also be given, and it is not at all a question of discretion. The argument for the defendant is that it is a discretionary

award, and reasons are advanced why the discretion should not be exercised in favour of the plaintiff.

It is, I think, implicit in the judgments in *V.F.P. Co. Ltd v Consolidated Langlaagte Mines Ltd.*, 1915 AD 1 and *Fouché v Corporation of London Assurance*, 1931 W.L.D. 145, that when damages have been awarded by judgment the plaintiff, if interest from that time is claimed, is entitled to such interest. No question of discretion arises. It was argued that to avoid having to pay interest the defendant might want to pay damages pending an appeal, and would by the payment perempt the appeal. But I think it should not be beyond the ingenuity of legal advisers to make it clear that no such thing was done by the payment. It was also argued that if the plaintiff applied for leave to execute when an appeal was noted, the defendant, under the security *de restituendo*, would get no interest on its money if the appeal succeeded. That question can, I think, be left for decision by the Court which might have to deal with the question of leave to execute.

As the plaintiff has claimed interest on the damages awarded it is in my view entitled to it.

Subject to any necessary minor adjustment in the sums awarded for 1950, 1951, 1952 in respect of additional non-factory expenses, as indicated at p. 23 of this judgment, which adjustment will be made when the question of costs is argued, the plaintiff is

entitled to damages in the following amounts:

for 1950 ..... £50,000

for 1951 ..... £111,800

for 1952 ..... £169,000

for the period after 1952 ..... £250,000

The total amount awarded is £580,800, and the plaintiff is entitled to interest at the rate of 6 per cent *per annum* from the date of judgment as to costs up to the date of payment.

The question of costs is left over for decision after argument on 28th May 1954.

Plaintiff's Attorneys: *Edward Nathan, Friedland, Mansell & Lewis.* Defendant's Attorneys: *Hayman, Godfrey & Sanderson.*

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* The appeal which had been noted was withdrawn - Eds.

INTERNATIONAL TOBACCO CO (SA) LTD v UNITED TOBACCO CO (SOUTH) LTD (2) 1955 (2) SA 29 (W)

Citation	1955 (2) SA 29 (W)
Court	Witwatersrand Local Division
Judge	Clayden J
Heard	May 28, 1954; June 4, 1954;
Judgment	June 15, 1954;
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Practice - Judgments and orders - Correction of - Obvious error in calculating damages - Court has power to correct error - Attorney - Attorney and client costs - When awarded - Costs - Apportionment of refused - Various pleaded incidents not separate issues - Witnesses testifying generally as to case - Court not prepared to fetter litigant's discretion.

Headnote : Kopnota
