

# DAVIS v WALL (No. 2)

Supreme Court (in chambers)

Spry, C.J.

3, 4 March 1977

*Defamation — libel — how far evidence of bad reputation is admissible in mitigation.*

*Damages — mitigation — evidence of reputation as mitigation.*

*Damages — reputation of plaintiff — only reputation immediately prior to libel relevant.*

In an action for libel, the defendant sought leave to amend the defence *inter alia* to allow evidence of bad reputation in mitigation of damages.

**Held:** (i) Evidence of bad reputation, if sufficiently relevant to the libel, may be given in mitigation.

(ii) The only evidence of reputation that is relevant is that of reputation immediately prior to the libel.

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<sup>1</sup> [1970] 2 All E.R. 754.

**Cases referred to in the order.**

*Scott v Sampson*, (1882) 8 Q.B.D. 491.

*Watt v Watt*, [1905] A.C. 115.

*Speidel v Plato Films Ltd.*, [1960] 2 All E.R. 521.

*Plato Films Ltd. v Speidel*, [1961] A.C. 1103.

*Dingle v Associated Newspapers Ltd.*, [1964] A.C. 371.

**Application**

This was an application for leave to amend the defence to allow evidence in mitigation.

E. Ellul for the applicant.

J.E. Triay for the respondent.

**7 March 1977: The following order was read—**

This is an application for leave to amend the defence in three respects. I have already indicated that I would allow the proposed new paras. 3 and 7, which were not opposed. The other paragraph which it is sought to introduce would allow the defendant to adduce evidence in mitigation of damages, that the plaintiff was commonly reputed to be a ruthless, unscrupulous and ambitious man and to be in the habit of consorting with various women, although himself married, and to have been involved in breaches of customs regulations while the frontier was open. In view of the order I made on 4 March 1977, Mr. Ellul felt constrained to ask leave to delete the third of these matters.

Certain general propositions of law are now, I think, clear. In an action for libel, a defendant may not, in mitigation of damages, adduce evidence of bad character, in the sense of an evil disposition. He may not give evidence of specific acts of misbehaviour by the plaintiff. He may not, in mitigation, adduce evidence which, if proved, would constitute justification. Evidence of rumours derogatory of the plaintiff is not admissible and, finally, evidence of injury to the plaintiff's good name by earlier spreading of the same libel is not allowed. But evidence of bad repute is admissible, subject to the limitations that it must be general, in the sense of not being related to specific acts, and it must be sufficiently relevant to the libel that a reasonable jury could properly take it into account as diminishing the damages which they would otherwise have awarded. The underlying philosophy is, of course, that a man should not recover full damages for injury to his good name if, in fact, before the libel, his name was already sullied.

For these propositions, it is sufficient to cite as authority *Scott v Sampson*<sup>1</sup>; *Watt v Watt*<sup>2</sup>; *Speidel v Plato Films Ltd.*<sup>3</sup>; *Plato Films Ltd. v Speidel*<sup>4</sup>; and *Dingle v Associated Newspapers Ltd.*<sup>5</sup>.

From these propositions, Mr. Triay, for the plaintiff, argues that if, as in this case, the libel is of an extremely general and wide-ranging nature, evidence cannot be given in mitigation, because it could only amount to a repetition of the libel. Thus if a man had been libelled by an allegation, which in the event could not be proved, that he had stolen a particular thing, evidence could be given in mitigation that he was generally believed by those who knew him to be dishonest. On the other hand, if the libel had been to the effect that he was a dishonest person, evidence of a reputation to that effect could not, in Mr. Triay's submission, be given in mitigation, because it was evidence that, if believed, would have justified the libel.

On the other hand, Mr. Ellul argued that a general libellous accusation can only be justified by proof of specific acts, and if, in the event, the defendant cannot prove those acts, he can still mitigate by proving a general bad reputation which pre-existed the libel. To pursue my previous example, a libellous allegation that a man was a thief could only be justified by proof of a specific theft, and if the defendant failed to prove any act of stealing, he should, according to Mr. Ellul, still be able to mitigate by proving that the plaintiff had been commonly regarded as a thief by those who knew him, such as his past employers.

I have not been referred to any authority on this question, nor have I been able to trace any.

I think Mr. Ellul's argument must prevail. In my opinion, the evidence that would establish the repute of the plaintiff when the offending words were published would be irrelevant and consequently inadmissible if adduced by way of justification. I do not think it would amount, as Mr. Triay suggested, to a second "bite at the cherry", because the evidence that a man has a reputation for certain behaviour will necessarily be quite different from that needed to prove that he has in fact so behaved. I think the amendment, with the concluding words omitted, should be allowed, and I so order.

In making this order, I wish to make three points quite clear. First, there must be no evidence of gossip or rumour; secondly, the evidence must be of general repute and not touch on or suggest any particular conduct or happenings; thirdly, the evidence must relate only to the reputation of the plaintiff immediately before the publication. The particulars furnished in support of the plea of justification relate largely to events that are alleged to have occurred something like twenty years ago. Whether the plaintiff's reputation at that time was good or bad is irrelevant to these proceedings and evidence of it will not be admitted. The plaintiff claims that his good name was injured by the publication and it is only the reputation he enjoyed at the moment of the alleged injury that concerns the court in these proceedings.

<sup>1</sup> (1882) 8 Q.B.D. 491.

<sup>2</sup> [1905] A.C. 115.

<sup>3</sup> [1960] 2 All E.R. 521.

<sup>4</sup> [1961] A.C. 1103.

<sup>5</sup> [1964] A.C. 371.