

**SUPREME COURT OF NIGERIA**  
13TH JULY, 2001. SC. 139/1996  
**CORAM:- E. O. OGWUEGBU, A. I. IGUH, A. I. KATSINA-ALU,**  
**U. A. KALGO, E. O. AYOOLA, JJSC**

DR. MATHIAS OFFOBOCHE ..... APPELLANT  
AND  
1. OGOJA LOCAL GOVERNMENT ..... RESPONDENTS  
2. JOSEPH OKO AGABI

---

**ADMINISTRATIVE LAW** - Abuse of office - Public Officers Protection Law s. 2(a) - Abuse of office and bad faith - Will deprive a party of the protection of that provision - And burden of proof is on plaintiff (H7)

**APPEALS** - Damages - General principle - Approach of the appellate court to award of damages by the trial court - When the appellate court should exercise the power of review (H13)

**COURTS** - Judgments - Pleadings - It is not for a court to speculate what defences - May have been available to a defendant (H11)

**DEFAMATION** - Libel - Continuous publication - There is no concept of continuous publication in the law of defamation - Every publication and republication is complete in itself - In founding a cause of action (H1)

**DEFAMATION** - Libel or slander - Defamatory materials - Reading it out to an audience - That know it was written - Such publication is libel and not slander (H9)

**DEFAMATION** - Limitation - Qualified privilege - A person who claims that the action is statute-barred - Does not need to establish a defence of qualified privilege - In order to succeed in his plea (H7)

**DEFAMATION** - Qualified privilege - Pleading - Where a defendant

*raises a defence of privilege - He should as a matter of pleadings aver the facts on which the defence is based (H8)*

**DEFAMATION** - Single publication - Cause of action - Pleading - A party who makes one single publication the foundation of his cause of action - Cannot extend the period of accrual of cause of action - Merely by pleading further publications (H2)

**LIBEL** - Damages - Assessment - Claim for non-pecuniary loss - Elements to be taken into account (H15)

**LIBEL** - Damages - Claim for non-pecuniary loss - Rationale for the award of damages for injured reputation (H14)

**LIBEL** - Damages - Claim of a single award - For several causes of action - Where the respondents were liable for only a few of the libels proved - And not entirely for the same instances of libel - Separate awards are called for (H12)

**LIBEL** - Damages - Success of the action before the Supreme Court - When erroneous excessive award of ten million naira - Will be reduced to N100,000.00 (17)

**LIBEL** - Express malice - Consideration of - An inquiry whether there is express malice is not necessary - Where the occasion is not privileged (6)

**LIBEL** - Official duty - Exonerating factor - That a party had committed libel in the course of performing his official duty - May not exonerate him from liability for libel - Unless the occasion of the publication was privileged (H16)

**STATUTES** - Applicability - Libel - Public Officers Protection Law s. 2(a) - Artificial persons - The protection of that law is available to artificial persons (H10)

**STATUTES** - *Limitation - Public Officers Protection law s. 2(a) - Defamation - Action commenced within 3 months - Of the publication of the offending materials - Is not barred by that provision (H3)*

**WORDS & PHRASES** - *Abuse of office - What it means (H5)*

### **FACTS**

By a writ of summons issued on 4th October, 1989 the plaintiff/appellant commenced on action against the Ogoja Local Government and Mr. Joseph Oko Agabi 1st defendant/respondent and 2nd defendant/respondent respectively, claiming N50 million being damages for libel and injunction. Sometime in or about 1974, the Federal Military Government through the Ministry of Defence acquired a substantial parcel of land along Okuku-Ogoja road in Ogoja for the purpose of Ogoja Army Cantonment. The appellant, Dr. Mathias Offoboche who owned a part of the land acquired, was given a power of attorney by persons who, on the face of it were representatives of some communities which owned another portion of the land acquired. By a letter dated 13th September, 1988 the Ministry of Defence ("the Ministry") wrote to the chairman of the Ogoja Local Government Area asking for confirmation of competence of donors of power of attorney to the appellant in respect of the acquired land. The 2nd respondent was the chairman of the 1st respondent Local Government at the material time. By his letter of 21st September, 1988, the 2nd respondent as the chairman of the Local Government in reply to the request, wrote to the Ministry confirming that the donors of power of attorney represented the interest they assumed to represent.

However, by a letter dated 26th September, 1988, written by I.B. Yakubu & Co., (Legal Practitioners) and headed "Misrepresentation and Fraud in the matter of Grant of Power of Attorney in Respect of Compensation due Ukamusha Community", among other things, the legal practitioners conveyed to the Chairman of the Council their clients' demand of an urgent retraction by the Chairman of the letter of confir-

B
C
D
 mation written by the Chairman on the basis of the earlier misrepresentation of facts to him". Apparently, they attached to the letter a resolution of the people of Ukamusha Community made on 16th September, 1988. By his letter of 27th September, 1988 the chairman of the Council recalled his letter of 21st September 1988 confirming the due grant of power of attorney to the appellant. To the letter he attached various libelous documents. Hence, the appellant took out the writ of summons claiming as aforesaid. His statement of claim as showed that the libel in respect of which he sued was alleged to be contained in three documents, published to the Minister of Defence and others. Defences were raised by the respondents to the action, inter alia, that the publications were made on occasions of qualified privilege and that, in any event, the action was barred by section 2(a) of the Public Officers Protection Law (Laws of Cross River State).

E
F
G
 After due trial, the learned trial judge found for the appellant, adjudged the respondents liable in libel, awarded damages of N10 million to the appellant and ordered injunction. The respondents' appeal to the Court of Appeal was allowed. The Court of Appeal, held; that the defence of qualified privilege was open to the appellants. And that the action was barred by section 2(a) of the Public Officers Protection Law and section 175 of the Local government Law (Cap. 68) Laws of the Cross River State. That court reduced the amount of damages it would have awarded had the appellant succeeded to N50,000 and dismissed the claim. The appellant has now appealed to the Supreme Court raising several issues, (3) of which were considered relevant in resolving the appeal.

#### G **ISSUES FOR DETERMINATION**

1. *Whether the defence of qualified privilege availed the respondents.*
2. *Whether the suit was barred by section 2(a) of the Public Officers Protection Law and section 175 of the Local Government Law of Cross River State.*
3. *Whether the court below was right in interfering with and reducing damages awarded by the trial judge.*

**HELD** (Unanimously allowing the appeal per lead judgment of **AYOOLA JSC**)

***Libel - Continuous publication***

1. The essence of libel is that the libellous material exists in permanent form. It is thus essentially continuous in existence. However, its publication is a different matter. What exists in a permanent form is not 'published' until it is made known. Every time it is made known to another, publication takes place. Although a person who has knowledge of the contents of a matter continues in that knowledge, for the purpose of the law of defamation it is the initial knowledge that the law takes account of as publication. Each time he reads and re-reads a libellous material to himself does not amount to a fresh publication. There is not concept of "*continuous publication*" in the law of defamation. Every publication and republication is complete in itself in founding a cause of action. (p. 2857 H)

***Defamation - Single publication***

2. A party who alleges one single publication and makes that the foundation of his cause of action cannot extend the period of accrual of cause of action merely by pleading further publications in respect of which he had not sued. (p. 2858 C)

***Statutes - Limitation***

3. The action having been commenced on 4th October 1989, any publication of the offending material within 3 months of that date is not barred by section 2(a) of the Public Officers Protection Law. (p. 2859 B)

***Administrative law - Abuse of office***

4. Abuse of office and bad faith are factors that deprive a party who would otherwise have been entitled to the protection of section 2(a) of the Public Officers Protection Law, of such protection. The burden is on the plaintiff to establish that the defendant had abused his position or that he has acted with no semblance of legal justification. Evidence that he may have been overzealous in carrying out his duties or, that he had

acted in error of judgment or, in honest excess of his responsibility, will not amount to bad faith or abuse of office. (p. 2860 B)

***Words & Phrases - Abuse of office***

B 5. Abuse of office is use of power to achieve ends other than those for which power was granted, for example, for personal gain, to show undue favour to another or to wreak vengeance on an opponent, to mention but a few. (p. 2860 D)

C ***Lbel - Express malice***

6. It is expedient to note that where the occasion is not privileged, an inquiry whether or not there is express malice is not necessary. It is where the occasion is privileged, in the first place, that the court should  
D venture to consider the question of express malice if such is raised by the reply of the plaintiff in answer to a defence of qualified privilege. There will be confusion of issues where, as the trial court and the court below tended to do in this case, the question of malice has been confused in  
E places with the question whether the occasions of the publications were privileged. (p. 2860 H)

***Limitation - Qualified privilege***

F 7. A person who claims the protection of section 2(a) of the Law does not need to establish a defence of qualified privilege in order to succeed in his plea that the action is statute-barred. (p. 2861 B)

***Qualified Privilege - Pleadings***

G 8. Where in an action for defamation the defendant raises a defence of privilege, he should as a matter of pleadings aver the facts on which the defence is based. Gately (op. Cit.) para 27.18, stated the law thus:

H *"If it is clear, on the face of the statement of claim, that the occasion was absolutely privileged, it is sufficient to plead that the statement of claim discloses no cause of action. But otherwise the defendant must plead the facts on which he relies as given rise to the privilege, whether absolute or qualified. In the absence of such plea the defendant*

*cannot adduce any evidence at the trial to establish such a defence, nor cross-examine the plaintiffs' witnesses with a view to a submission that the occasion was privileged."*

It is not sufficient merely to aver that the defendant pleads the defence of qualified privilege, or to aver that the publication was made on a privileged occasion. (p. 2862 D)

### ***Libel or slander - Defamatory materials***

9. We still cling to the distinction between slander and libel, which in my view should long have been discarded with. Be that as it may, the Australian perspective is preferable, in my opinion. Where the defamatory material in writing is published by reading it to the audience and the audience perceived that what was being said was read from a document that should be libel as much as where the document was passed round to be read by each member of the audience. Considerations of justice should not permit a distinction to be drawn for the purpose of formulation of a cause of action between a document being passed round to be read by each and one being read to the hearing of all. If any distinction is to be drawn it should, in my opinion be limited to the question of damages, since a person to whom a libellous material has been given has an opportunity to read and re-read it which someone to whom it was merely read has not got.

The evidence accepted by the trial judge in this case shows that the witnesses to whom the defamatory materials were read knew that they were read from what was written. Such publication was in my opinion libel and not slander. (p. 2863 F)

### ***Public Officers Protection Law - Artificial persons***

10. *Ibrahim v. Judicial Service Committee Kaduna State* (supra) is a clear pronouncement on the point raised by counsel to the appellant on the applicability of section 2(a) of the Public Officers Protection Law to the 1st respondent. Notwithstanding the powerful dissent of Ogundare, JSC in that case, it remains authority which this court is enjoined to follow. I hold that the protection of the Law is available to the 1st respon-

dent, notwithstanding that it is an artificial person. In the circumstances, I hold that the action is barred against the 1st respondent except in regard to the publications of 20th July 1989 and 4th September 1989. (p. 2865 F/H)

B

***Courts - Judgment***

11. There was no real defence to the publications of the libellous materials on 20th July and 4th September, 1989. It is not for a court to speculate what defences may have been available to a defendant upon a diligent presentation of his case. The publications in this case were admittedly libellous of the appellant. Circumstances of privilege were not pleaded. In the result, the 1st respondent too should have been held liable to the appellant for the two publications. It has not been denied that the Local Government was a joint tortfeasor with the 1st respondent. In the result, I hold the two respondents liable for the publication of the 20th July, 1989; and, the 2nd respondent alone liable for that of the 4th September, 1989. (p. 2866 B)

E

***Libel - Damages***

12. The appellant had claimed a single award of damages for several causes of action. In this case in which the respondents were liable for only a few of the libels proved and not entirely for the same instances of libel, separate awards are called for. (p. 2866 E)

***Appeals - Damages***

13. The general principle in relation to the approach of the appellate court to award of damages by the trial court is that the appellate court should be reluctant to exercise the power of review of such award and attempt to re-assess the amount which the trial judge has given unless the award was made on wrong principles or is inordinately low or excessive. See Zik's Press Ltd v. Ikoku (1951) 13 WACA 188 at 189. (p. 2866 H)

***Claims - Non-pecuniary loss***

14. The general theory that damages are compensatory and are awarded



on the basis of restitution breaks down when faced with the truth that it is almost a fiction that money can be used to restore a man's injured reputation, or dignity to its former condition. I venture to think that a more realistic rationale for the award of damages for injured reputation, where the claim is for non-pecuniary loss, is as said by Windayer J. Uren v. John Fairfax (1967) 117 CLR 118, at p 150 that:

*".....a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation....."*

To the extent that the person who has injured him in his reputation must pay for the injury that the plaintiff has suffered, there is an element of compensation in the award of damages made, but that is usually not on the basis that such would restore the plaintiff to the position he was before he was defamed, as if he had not been defamed, where the injury he has suffered did not lead to pecuniary loss. (p. 2867 F)

### ***Damages - Assessment***

15. That the appellant in this case has acquired a good reputation and dignity and that he had by the libels been injured in his reputation, dignity and feelings, there can be no doubt. His claim for damages are for non-pecuniary loss consequent on the injury to his reputation. No doubt the appellant has suffered some degree of loss of social esteem by being associated with alleged forged document, although there was no allegation that he was accessory to any such forgery. The injury to his feelings is manifested by his efforts to clear his name by the protest letters that he wrote and his general psychological reaction to the entire incident. The natural grief and distress to which he may have been put by libellous publications are elements that fall to be taken into account. See Mc Caray Associated Newspapers (1995) 2 QB 86, 104 - 105.

The only mitigating factor, as I see it, is that the respondents genuinely believed that they were mediating a dispute. Even though that fact did not come out clearly in evidence sufficient to make the occasion of the several publications (not statute barred) privileged, yet it is a proper factor to take into account. (p. 2868 C)

***Libel - Official duty***

16. It needs to be stated that, that a party had committed libel in the course of performing his official duty may not exonerate him from liability for libel unless the occasion of the publication was privileged. In this wise, the submission by counsel for the respondent that: "*No man should be held liable for libel just because he performed his official duty, even if in doing so, he was guilty of an error of judgment*", is an appeal to sentiment rather than to law. What may be acceptable is that an error of judgment in such circumstances may be a mitigating factor. (p. 2868 G)

***Libel - Damages - When excessive award will be reduced***

17. In the result, I allow this appeal and set aside the judgment of the Court of Appeal whereby the judgment of the High Court was set aside and a judgment dismissing the appellant's claim in its entirety was entered against the appellant. The appellant's claim succeeds in respect of libel based on publications made on 20th July, 1989 and 4th September, 1989. The award of damages of N10,000,000 being for more than these two publications is erroneous and is in any event excessive in the circumstances. The award of damages is accordingly varied as follows:

N50,000 is awarded against the 1st respondent alone being damages for libel published of and concerning the appellant on 4th September, 1989 and N50,000 against both respondents jointly and severally being damages for libel published on 20th July, 1989. (p. 2869 B)

**REPRESENTATION**

Chief Assam E. Assam for the Appellant.

Paul Erokoro (with him Charles Ogon, Miss Ifuse Onigu-Okiti and C.B. Oboi) for the Respondent.

**CASES REFERRED TO**

Duke of Brunswick v. Harmer (1849) 14 QB 185

Uthi v. Egorr (1990) 5 NWLR (Pt.153) 771.

Bendel Newspaper Corporation v. Okafor (1993) 4 NWLR (Pt 289) 617

Nwankwere v Adewunmi (1966) 1 ALL NLR 129

Yace v. Nunku (1995) 5 NWLR (Pt 349) 129, 151

T. Tilling Limited v. Dick Kerr and Co. Ltd. (1905) 1 KB 562

Attorney-General v Company or Proprietors of Margate Pier & Harbour  
(1990) KB 749

B

Parker v London Country Council (1904) 2 KB 501

Zik's Press Ltd v. Ikoku (1951) 13 WACA 188 at 189.

### **STATUTES REFERRED TO**

Public Officers Protection Law (Laws of Cross River State); S.2(a)

C

Local Government Law (Cap. 68) Laws of Cross river State, S. 175.

### **BOOKS REFERRED TO**

Gatley on Libel and Slander (9th Ed.) Paras. 3.8; 16-4; 18.21 and 27.18

D

Salmon and Heuston, Law of Torts, (20th Ed.) P. 159.

### **LEAD JUDGMENT BY AYOOLA JSC**

Sometime in or about 1974, the Federal Military Government through the Ministry of Defence acquired a substantial parcel of land along Okuku-Ogoja Road in Ogoja for the purpose of Ogoja Army Cantonment. The appellant, Dr. Mathias Offoboche, who owned a part of the land acquired, was given a power of attorney by persons who, on the face of it, were representatives of some communities which owned another portion of the land acquired. By a letter dated 13th September, 1988 the Ministry of Defence ("*the Ministry*") wrote to the Chairman of the Ogoja Local Government Area, Ogoja asking for confirmation of competence of donors of power of attorney to the appellant in respect of the acquired land. The 2nd respondent, Mr. Joseph Oko Agabi, was the Chairman of the Local Government at the material time. By his letter of 21st September, 1988, he as the Chairman of Ogoja Local Government, in reply to the request, wrote to the Ministry confirming that the donors of power of attorney represented the interest they assumed to represent. What followed thereafter is the cause of the action that led to this appeal.

F

G

By a letter dated 26th September, 1988 written by I.B. Yakubu &

Co., (Legal Practitioners) and headed "*Misrepresentation and Fraud in the matter of Grant of Power of Attorney in Respect of Compensation due Ukamusha Community.*", among other things, the legal practitioners conveyed to the Chairman of the Council their clients' demand of "an  
B *urgent retraction by the Chairman of the letter of confirmation written by the Chairman on the basis of the earlier misrepresentation of facts to him.*" Apparently, they attached to the letter a resolution of the people of Ukamusha Community made on 16th September, 1988. By his letter of  
C 27th September, 1988 the Chairman of the Council recalled his letter of 21st September 1988 confirming the due grant of power of attorney to the appellant. To the letter he attached:

- (i) *Power of Attorney granted Barrister Idi Baba Yakubu by the Ukamusha Community;*
- D (ii) *A resolution of the Ukamusha Community in the matter of Power of Attorney and payment of compensation;*
- (iii) *Power of Attorney granted by Ukuku Community to Bar-*  
*rister Gregory Ngaji; and,*
- E (iv) *The resolution of Ukuku Community in the matter of Power of Attorney and payment of compensation.*

By writ of summons issued on 4th October 1989 the appellant commenced an action against the Ogoja Local government and Mr. Jo-  
F seph Uko Agabi, who are now the respondents in this appeal claiming N50 million being damages for libel and injunction. His statement of claim as amended showed that the libel in respect of which he sued was alleged to be contained in three documents, namely:

- (i) *Resolution dated 26th September, 1988.*
- G (ii) *Letter dated 26th September, 1988 addressed by I.B. Yakubu to the Chairman Ogoja Local Government Council.*
- (iii) *The respondents letter dated 27th September, 1988.*

It was said that all these documents were published by the respondents  
H to the Minister of Defence; to one Mr. C. N. C. Nwaya; and to numerous other persons at various time and places between September, 1988 and September, 1989 concerning the plaintiffs". In the amended statement of claim particulars of what was described as "*continuous publications*"

were given as being on (i) 8th June, 1989; (ii) 20th June, 1989, (iii) 20th July 1989 and 4th September, 1989. The re-publication on 4th September, 1989 was said to be by the Sole Administrator of the Council who was not an original party to this suit and whose joinder was refused by the trial judge in her ruling of 23rd January, 1995. B

Several defences were raised by the respondents to the action. However, only two of them are pertinent to this appeal. They are that the publications were made on occasions of qualified privilege and that, in any event, the action was barred by section 2(a) of the Public Officers Protection Law (Laws of Cross River State) ("*the Law*"). C

The learned judge held that while the defence of limitation could avail the 2nd respondent, it could not avail the first which was not a natural person; and that, even as regards the 2nd respondent as he was not acting in course of duty because the publications were actuated by malice which destroyed both the defence of qualified privilege and limitations, he, too, could not claim the protection of the Law. On limitation, the judge said: D

"..... *the action for defamation was taken on 4th October, 1989 while the Defendants published the offensive document on 20th July, 1989 and the sole Administrator Sam Inyang published in September, 1989 bringing the action within the 3 three months.*" E

On privilege, she found that there was no corresponding interest between the 2nd respondent and the persons to whom he published the offending documents at the public meetings mentioned in the amended statement of claim. F

Being of the view that the appellant's claim had been established against both respondents, the trial judge adjudged them liable in libel, awarded damages of N10 million to the appellant and ordered injunction. G

On the respondents' appeal to the Court of Appeal, the three issues raised that are of any significance in this appeal related to the limitation question, qualified privilege and quantum of damages. The respondents' appeal was allowed. Ejiwunmi, JCA, (as he then was), who delivered the leading judgment of the Court of Appeal held that the defence of qualified privilege was open to the appellants. He held, as the H

trial judge did, that duty demanded that the 2nd respondent should forward the offending document to the Ministry of Defence. However, he disagreed with the trial judge on whether the privilege of the occasion of publication was destroyed by express malice, he not being of the same  
B view as the trial judge that failure of the 2nd respondent to investigate the matter further as the Ministry had requested amounted to express malice or that any circumstance of actual malice had been proved. In the event, he held that the defence of qualified privilege was open to the 2nd respondent.

C Turning to the limitation question, the Court of Appeal held that the action was barred by section 2(a) of the Public Officers Protection law and section 175 of the Local Government Law (cap 68) Laws of the Cross River State. Ejiwunmi, JCA, (as he then was), observed that in the  
D writ of summons it was stated that the action was as a result of the letter forwarded to the Ministry of Defence on the 27th September, 1988 but that the action was not commenced until 4th October, 1989 which was a period of about a year from the date of the accrual of the action.

E In regard to damages awarded. The Court of Appeal held that the trial court fell into error when it treated the damage claimed as one to be classified as aggravated damages merely because the appellant as plaintiff had claimed a huge sum of N50 million. The court below reduced the  
F amount of damages it would have awarded had the appellant succeeded to N50,000.00. At the end of the day, the Court of Appeal dismissed the claim. This is an appeal from that decision.

In this appeal, several issues were taken by the counsel on behalf of the appellant. However, the foremost issues which need to be  
G resolved to determine the appeal are whether the defence of qualified privilege availed the respondents; whether the suit was barred by section 2(a) of the Public Officers Protection Law and section 175 of the Local Government Law of Cross River State; and, whether the court below  
H was right in interfering with and reducing damages awarded by the trial judge. In view of the admission in the respondents' defence that a pre-action notice was served on the 1st respondent, I do not think that any issue of pre-trial notice should be of any significance in this appeal

It is expedient to start with the question of limitation since if the respondents succeed on that issue that will help to delimit the scope of the rest of appeal. Section 2(a) of the Public Officers Protection Law provides as follows:

"2 Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such law duty or authority, the following provisions shall have effect-

(a) that action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of, or in case of a continuance of damage or injury, within three months next after the ceasing thereof."

In the case of libel and slander actionable *per se* the cause of action accrues from the date of publication. Every publication and republication is a cause of action. The first publication of the libellous materials in this case was made to the Ministry of Defence on 27th September, 1988. In regard to that publication, as rightly held by the Court of Appeal, that was when the cause of action accrued. The appellant alleged, and the trial court found, that the respondents published the offending documents subsequent to that first publication, at public meetings held on several occasions, on 8th June, 1989, 20th June, 1989, 20th July and 4th September, 1989. Each of these republications constituted a fresh cause of action. For the purpose of establishing the time when a cause of action accrued in regard to those republications the time of each publication is the determining factor.

Learned counsel for the appellant argued that "a single publication of libellous materials by a Public Officer, could be statute barred but an action commenced against a continuous publication of the same libellous materials is not statute barred if the last publication was within three months of the commencement of action." This is a confusing and erroneous way of stating the applicable principles. **The essence of libel is that the libellous material exists in permanent form. It is thus essentially continuous in existence. However, its publication is a**

different matter. What exists in a permanent form is not 'published' until it is made known. Every time it is made known to another, publication takes place. Although a person who has knowledge of the contents of a matter continues in that knowledge, for the purpose of the law of defamation it is the initial knowledge that the law takes account of as publication. Each time he reads and re-reads a libellous material to himself does not amount to a fresh publication. There is not concept of "*continuous publication*" in the law of defamation. Every publication and republication is complete in itself in founding a cause of action. A party who alleges one single publication and makes that the foundation of his cause of action cannot extend the period of accrual of cause of action merely by pleading further publications in respect of which he had not sued.

The law is well stated in Gatley on Libel and Slander (9th Ed) thus at para 18 .21:

*"Each and every publication of a libel gives a distinct and separate cause of action, and an action may be brought against the publisher within the limitation period thereafter, although by reason of the lapse of time no action would lie for the original publication."*

The learned authors of Gatley (op.cit) illustrated this point with the case of Duke of Brunswick v. Harmer (1849) 14 QB 185 which was the case cited by learned counsel for the appellant. In that case it was held that time began to run from the date the issue of the paper containing a libellous material was purchased, notwithstanding that the original publication was made 17 years earlier.

The Court of Appeal proceeded, in error, on the footing that the cause of action in this case was founded solely on the publication made to the Ministry of Defence on 27th September, 1988. That error was because it overlooked the amendment to the statement of claim whereby the appellant had claimed the same single lump sum as damages for several publications of the same libellous materials. And, consequently, for several causes of action. The propriety of claiming a single sum is not in issue. It is right and, not subject to any reasonable controversy that a statement of claim supersedes the writ of summons: Lahan v. Lajoyetan



(1972) 6 SC 190. The Court of Appeal having overlooked the amendment to the claim as endorsed on the writ of summons, effected by the amended statement of claim proceeded on an erroneous footing in determining the accrual of the cause of action with reference to only one of several causes of action involved in the case.

**The action having been commenced on 4th October 1989, any publication of the offending material within 3 months of that date is not barred by section 2(a) of the Public Officers Protection Law.** Thus, while the causes of action in regard to publications made on 27th September 1988, 8th June 1989 and 20th June 1989 did not arise within the limitation period prescribed by the Public Officers Protection Law, the causes of action founded on the publications made on 20th July 1989 and 4th September 1989 arose within the limitation period. Of these two, the 2nd respondent was only concerned with the former.

In so far as the claim related to the causes of action founded on the publications made other than on 20th July, 1989 and 4th September 1989, it is statute-barred. In this wise, as far as the 2nd respondent is concerned what needed be considered was his liability for the materials published on 20th July, 1989. The liability of the 1st respondent deserves a slightly different consideration.

Before I consider the liability of the 2nd respondent in regard to the publication made on 20th July, 1989, I dispose of the argument that since the 2nd respondent was actuated by express malice, he was not entitled to the protection of the Public Officers Protection Law because he would then not have been acting in good faith. The Court of Appeal did not find express malice established. I agree with them. In Nwakwere v. Adewunmi (1966) 1 ALL NLNR 129 at 133-134 Brett, JSC, said:

*"The law is designed to protect the officer who acts in good faith and does not apply to act done in abuse of office and with no semblance of legal publication."*

In Lagos City Council v. Ogunbiyi (1969) 1 ALL NLR 297, 299 this H court, per Ademola, CJN. Said:

*".....the Act necessarily will not apply if it is established that the defendant had abused his position for purpose of acting maliciously."*

*In that case he has not been acting within the terms of the statutory or other legal authority. He has not been bona fide endeavouring to carry it out. In such a state of facts he has abused his position for the purpose of doing wrong, and the protection of this Act, of course, never could apply to such a case."*

**Abuse of office and bad faith are factors that deprive a party who would otherwise have been entitled to the protection of section 2(a) of the Public Officers Protection Law, of such protection. The burden is on the plaintiff to establish that the defendant had abused his position or that he has acted with no semblance of legal justification. Evidence that he may have been overzealous in carrying out his duties or, that he had acted in error of judgment or, in honest excess of his responsibility, will not amount to bad faith or abuse of office. Abuse of office is use of power to achieve ends other than those for which power was granted, for example, for personal gain, to show undue favour to another or to wreak vengeance on an opponent, to mention but a few.**

Malice, that, on the other hand, would defeat the defence of qualified privilege relates to the use of the occasion of publication of libel for some indirect purpose. The law has been put thus:

*"If the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion not for the reason which makes the occasion privileged, but for an indirect or wrong motive."*

See, generally, for this proposition and others described in like terms, Gateley on Libel and Slander (op cit) para 16-4 and cases cited therein. An inquiry whether there is express malice as would defeat a defence of qualified privilege proceeds on an assumption that the occasion was privileged. The misuse of the occasion is malice that destroyed the privilege.

**It is expedient to note that where the occasion is not privileged, an inquiry whether or not there is express malice is not necessary. It is where the occasion is privileged, in the first place, that the court should venture to consider the question of express malice**

**if such is raised by the reply of the plaintiff in answer to a defence of qualified privilege. There will be confusion of issues where, as the trial court and the court below tended to do in this case, the question of malice has been confused in places with the question whether the occasions of the publications were privileged.** B

The issue to which I now revert, whether in this case there was malice such as deprived the 2nd respondent of the protection of section 2(a) of the Law, is a different question from a question whether actual malice had cancelled the privilege of the occasion. **A person who claims the protection of section 2(a) of the Law does not need to establish a defence of qualified privilege in order to succeed in his plea that the action is statute-barred.** The authorities of Uthi v. Egorr (1990) 5 NWLR (Pt.153) 771, Bendel Newspaper Corporation v. Okafor (1993) 4 NWLR (Pt 289) 617 and Nwankwere v Adewunmi (1966) 1 ALL NLR 129 relied on by the appellant's counsel are not apt. In Bendel Newspaper Corporation v. Okafor (supra) the majority of the Court of Appeal, Uwaifo JCA (as he then was dissenting) implied in the leading judgment of the Court of Appeal, delivered by Akintan, JCA, that once a defendant did not deny the standard averment in an action for libel that the defendant falsely and maliciously published or caused to be published falsehood about him, that amounted to admission of malice which would remove the protection of the Public Officers Protection Act. In that case the defendant claimed the protection of the Act *in limine* before defence was filled. If that case can in any way be said to have decided that once a publication of libelous material is admitted protection of the Act is withdrawn. I would differ from such a conclusion. It would have been arrived at in disregard of the distinction between implied malice and express malice. I am of the view that the dissenting judgment of Uwaifo, JCA, (as he then was) explained the proper position better. G

The facts of Nwankwere's Case (supra) showed that what was in issue in that case was a clear abuse of power such as had not been found in this case. H

In my judgment, the 2nd respondent is entitled to the protection of the Public Officers Protection Law for publications made outside the

limitation period specified in that enactment. He had neither abused his office nor acted in bad faith in performance of what he perceived to be the duties of his office. That his successor in office, the Administrator of the Local Government, carried on from where he stopped, leads to the reasonable inference that both of them reasonably believed that the steps they took in the matter were justified by the responsibilities of the office.

In regard to the publication made on 20th July, 1989 the averment is clear in para 25A (iii) of the Amended Statement of Claim that the 2nd Defendant recklessly published the libel to the persons therein mentioned. The respondents did not respond to this averment other than by the general traverse in the original and only statement of defence. They did not claim any privilege for this publication and if the defence of qualified privilege raised in the unamended original statement of defence could have been relied upon, it was lacking in particulars as to facts and circumstances on which such privilege was claimed. **Where in an action for defamation the defendant raises a defence of privilege, he should as a matter of pleadings aver the facts on which the defence is based.** *Gateley (op. Cit.)* para 27.18, stated the law thus:

"If it is clear, on the face of the statement of claim, that the occasion was absolutely privileged, it is sufficient to plead that the statement of claim discloses no cause of action. But otherwise the defendant must plead the facts on which he relies as given rise to the privilege, whether absolute or qualified. In the absence of such plea the defendant cannot adduce any evidence at the trial to establish such a defence, nor cross-examine the plaintiffs' witnesses with a view to a submission that the occasion was privileged."

It is not sufficient merely to aver that the defendant pleads the defence of qualified privilege, or to aver that the publication was made on a privileged occasion. The respondents did not give evidence and were thus unable to supply the deficiency by their evidence. In the result, the question put by the trial judge was left unanswered when she asked:

*"what corresponding interest or duty did 2nd defendant owe to this various groups to who he repeatedly published these offensive docu-*

ments."

For his part, Ejinwunmi, JCA (as he then was) delivering the leading judgment of the court below said:

*".....the appellants had not sought to defend their conduct with regard to the publications of the offensive documents to several other persons at a public meeting."* B

I hold that he was right in this conclusion. The error in the judgment of the court below was in not holding that, in those circumstances the trial court rightly held that the 2nd respondent was liable for the publications of the libellous materials on 20th July, 1989, barring other viable defence. C

In this appeal, learned counsel for the respondents attempted an alternative defence when he argued that to read out a libellous material to another is slander and not libel. He relied on a passage in Law of Torts by Salmon and Heuston (20th Ed) p. 159. However, in Gatley (op cit) at para 3.8,p [72] it is stated that: D

*".....the current English view is that to read out a defamatory letter or script to an audience is libel, and that is so regardless of whether the audience realises that the defamatory matter is being read, though in Australia it has been said the perception of the audience is decisive. Either view might perhaps be justified on the basis that the document was a potential libel and any method of disseminating it should carry the same liability but this seems inconsistent with the fact that the gist of defamation is publication. It can hardly be the law that if one learns a defamatory passage by heart from a document and repeats it, one commits libel."* F

**We still cling to the distinction between slander and libel, which in my view should long have been discarded with. Be that as it may, the Australian perspective is preferable, in my opinion. Where the defamatory material in writing is published by reading it to the audience and the audience perceived that what was being said was read from a document that should be libel as much as where the document was passed round to be read by each member of the audience. Considerations of justice should not permit a distinction to be drawn for the purpose of formulation of a cause of action be** G H

tween a document being passed round to be read by each and one being read to the hearing of all. If any distinction is to be drawn it should, in my opinion be limited to the question of damages, since a person to whom a libellous material has been given has an opportunity to read and re-read it which someone to whom it was merely read has not got.

The evidence accepted by the trial judge in this case shows that the witnesses to whom the defamatory materials were read knew that they were read from what was written. Such publication was in my opinion libel and not slander.

I turn to the liability, if any, of the 1st respondent. Learned counsel for the appellant has argued that contrary to the view held by the court below, the 1st respondent, an institution, could not rely on the defence of limitation under the Public Officers Protection Law.

The question whether the Public Officers Protection Law applies to institutions is not being raised for the first time in this court. In the recent case of 1 this court held that "any person" in section 2(a) admits and include artificial persons. Iguh JSC, at p 36 in that case said:

*".....it seems to me plain that the definition of the word 'person' in the legal sense under the Nigerian Law is not limited to natural persons or human beings only as the appellant now vigorously appears to contend. It clearly admits and includes artificial persons such a corporation sole, company or any body of person corporate or incorporate."* In his own opinion Wali JSC, said at p 49:

*"The provision did not use the word 'officer', but instead the word 'person'. In my view, the purpose of using the word 'person' is obviously to widen the scope of the law to cover both human being and legal or artificial person such as corporate and unincorporated. Without referring to any foreign decision, the intention of the legislature is to provide protection for public officers, corporate and unincorporated bodies in the discharge of their public assignment..... Used in the wide sense, the term 'any person' will cover both human being and other bodies, corporate and unincorporated....."*

Kutigi and Onu JJ.S.C. were of the same view. However, there was a

considered dissent by Ogundare, JSC, he being of the view that person in section 2(a) must be read in its plain ordinary meaning as 'a human being as an individual'.

There was an earlier decision of this court in Momoh v. Okewale And Anor [1977] NSCC 365, sometimes claimed to have decided the contrary to the majority view in Ibrahim's case. However, the ratio in Momoh's Case was limited to whether or not a Lagos City Council bus driver was a 'public officer' in the context of the Public Officer's Protection Act, Cap 108. Udo Udoma, JSC who delivered the leading judgment of the court in that case after referring to the English cases of T. Tilling Limited v. Dick Kerr and Co. Ltd. (1905) 1 KB 562; Attorney-General v Company or Proprietors of Margate Pier & Harbour (1990) KB 749 and Parker v London Country Council (1904) 2 KB 501 did not actually come to the conclusion urged by the appellant in this case. In the earlier case of Permanent Secretary Ministry of Works etc. Kwara State v. Balogun (1975) NSCC 292 this court seemed to have decided that person in section 2(a) included artificial persons. There was a statement by Iguh JSC in Yace v. Nunku (1995) 5 NWLR (Pt 349) 129, 151 that the Public Officers Protection Law Cap 111 Law of Northern Nigeria 1963, as its name implies, is a law to protect public officers as individuals in the discharge of their public duties, but that was a passing remark and was an *obiter dictum*, even though reliance for the remark was placed on Momoh's Case (supra).

***Ibrahim v. Judicial Service Committee Kaduna State* (supra) is a clear pronouncement on the point raised by counsel to the appellant on the applicability of section 2(a) of the Public Officers Protection Law to the 1st respondent. Notwithstanding the powerful dissent of Ogundare, JSC in that case, it remains authority which this court is enjoined to follow.** We have not been invited to depart from it. This court will not depart from its previous decision merely on the basis of a powerful dissent. In any event, the appellant's argument in relation to the particular issue had been token and perfunctory and hardly deserves the consideration that has been given to it in this judgment. **I hold that the protection of the Law is available to the**

**1st respondent, notwithstanding that it is an artificial person. In the circumstances, I hold that the action is barred against the 1st respondent except in regard to the publications of 20th July 1989 and 4th September 1989.**

B I add, merely as post-script, that the cases referred to in this judgment concerning the limitation question related to statutes with provisions couched in identical terms as section 2(a) of the law.

**There was no real defence to the publications of the libellous materials on 20th July and 4th September, 1989. It is not for a court to speculate what defences may have been available to a defendant upon a diligent presentation of his case. The publications in this case were admittedly libellous of the appellant. Circumstances of privilege were not pleaded. In the result, the 1st respondent too should have been held liable to the appellant for the two publications. It has not been denied that the Local Government was a joint tortfeasor with the 1st respondent. In the result, I hold the two respondents liable for the publication of the 20th July, 1989; and, the 2nd respondent alone liable for that of the 4th September, 1989.**

**The appellant had claimed a single award of damages for several causes of action In this case in which the respondents were liable for only a few of the libels proved and not entirely for the same instances of libel, separate awards are called for.** There is no doubt that damages to be awarded have now become at large. The Court of Appeal had rightly interfered with the award of damages of N10,000,000 made by the trial judge which in all the circumstances of the case was so palpably outrageous and excessive as to be unreasonable. The Court of Appeal reduced the damages to N50,000. But it, too, proceeded on the footing that there was only one libel and that was the one constituted by the publication made to the Minister of Defence.

H In these circumstances, this court is entitled to consider the issue of damages afresh. **The general principle in relation to the approach of the appellate court to award of damages by the trial court is that the appellate court should be reluctant to exercise the power**



of review of such award and attempt to re-assess the amount which the trial judge has given unless the award was made on wrong principles or is inordinately low or excessive. See **Zik's Press Ltd v. Ikoku (1951) 13 WACA 188 at 189**. However, this case is not merely one of re-assessing the damages made by the trial judge or the Court of Appeal since those several awards were based, in the case of the trial court, on libels which included those for which the respondents should not have been found liable, and in the case of the court below, on an assumption that the claim related to only one libel.

This court is left to be guided in determining what damages to award by the general principles for award of damages in an action for libel. A succinct statement of those principles is in the judgment of this court in His Highness Uyo 1 v. Nigerian National Press Ltd & Ors, In re Felix Egware (1974) NSCC 304, where Coker JSC said at P 307:

*"Whatever method of assessment is employed, a great part of the exercise of assessment must be arbitrary but the entire exercise must at all stages have reference to the evidence in the case and the subject-matter of the action. Such an award must be adequate to repair the injury to the plaintiff's reputation which was damaged; the award must be such as would atone for the assault on the plaintiff's character and pride which were unjustifiably invaded; and it must reflect the reaction of the law to the imprudent and illegal exercise in the course of which the libel was unleashed by the defendant."*

These are broad guidelines. Nothing can be more intangible than a man's reputation, dignity or feelings, injury to which forms the essence of the tort of defamation. **The general theory that damages are compensatory and are awarded on the basis of restitution breaks down when faced with the truth that it is almost a fiction that money can be used to restore a man's injured reputation, or dignity to its former condition. I venture to think that a more realistic rationale for the award of damages for injured reputation, where the claim is for non-pecuniary loss, is as said by Windayer J. Uren v. John Fairfax (1967) 117 CLR 118, at p 150 that:**

*".....a man defamed does not get compensation for his dam-*

*aged reputation. He gets damages because he was injured in his reputation....."*

To the extent that the person who has injured him in his reputation must pay for the injury that the plaintiff has suffered, there is an element of compensation in the award of damages made, but that is usually not on the basis that such would restore the plaintiff to the position he was before he was defamed, as if he had not been defamed, where the injury he has suffered did not lead to pecuniary loss.

That the appellant in this case has acquired a good reputation and dignity and that he had by the libels been injured in his reputation, dignity and feelings, there can be no doubt. His claim for damages are for non-pecuniary loss consequent on the injury to his reputation. No doubt the appellant has suffered some degree of loss of social esteem by being associated with alleged forged document, although there was no allegation that he was accessory to any such forgery. The injury to his feelings is manifested by his efforts to clear his name by the protest letters that he wrote and his general psychological reaction to the entire incident. The natural grief and distress to which he may have been put by libellous publications are elements that fall to be taken into account. See Mc Caray Associated Newspapers (1995) 2 QB 86, 104 - 105.

The only mitigating factor, as I see it, is that the respondents genuinely believed that they were mediating a dispute. Even though that fact did not come out clearly in evidence sufficient to make the occasion of the several publications (not statute barred) privileged, yet it is a proper factor to take into account. It needs to be stated that, that a party had committed libel in the course of performing his official duty may not exonerate him from liability for libel unless the occasion of the publication was privileged. In this wise, the submission by counsel for the respondent that: "*No man should be held liable for libel just because he performed his official duty, even if in doing so, he was guilty of an error of judgment*", is an appeal to sentiment rather than to law. What may be acceptable

**is that an error of judgment in such circumstances may be a mitigating factor.**

In the final analysis, it is for the court, guided by established principles, after taking into consideration all the circumstances of the case, to award what is proper and just. Doing so, I think awards of N50,000 being damages against the 1st defendant alone for libel published on 4th September, 1989 and N50,000 against both respondents jointly and severally for libel published on 20th July 1989 are appropriate. B

**In the result, I allow this appeal and set aside the judgment of the Court of Appeal whereby the judgment of the High Court was set aside and a judgment dismissing the appellant's claim in its entirety was entered against the appellant. The appellant's claim succeeds in respect of libel based on publications made on 20th July, 1989 and 4th September, 1989. The award of damages of N10,000,000 being for more than these two publications is erroneous and is in any event excessive in the circumstances. The award of damages is accordingly varied as follows:** C D

**N50,000 is awarded against the 1st respondent alone being damages for libel published of and concerning the appellant on 4th September, 1989 and N50,000 against both respondents jointly and severally being damages for libel published on 20th July, 1989.** E

The appellant is entitled to costs of the appeal which I assess at N10,000. F

---

### OGWUEGBU JSC

I have had the privilege of a preview of the judgment just delivered by my learned brother Ayoola JSC. I agree with the reasoning and the conclusions reached in the said judgment. G

Accordingly, I will allow the appeal and abide by all the orders contained in the said judgment of my learned brother Ayoola, JSC including the order as to costs H

**IGUH JSC**

I have had the privilege of reading in draft the judgment just delivered by my learned brother. Ayoola JSC and I agree with his reasoning and conclusions.

B For the same reasons he has lucidly given, I too, will allow this appeal and abide by all the consequential orders, including those as to costs, therein made.

---

C

**KATSINA-ALU JSC**

I have had the advantage of reading in draft the judgment of my learned brother Ayoola JSC, I agree with it and for the reasons which he gives I, too, would allow the appeal and make the awards of N50,000.00  
D being damages against the 1st respondent alone for libel published on 4th September, 1989 and N50,00.00 against both respondents jointly and severally for libel published on 20th July, 1989. I also award N10,000.00 costs to the appellant.

E

---

**KALGO JSC**

I have read in advance the judgment of my learned brother Ayoola  
F JSC just delivered and I entirely agree with his reasoning and conclusions in the appeal which I adopt as mine. He has also fully dealt with the issues which arose in the appeal and I have nothing useful to add thereon. In the circumstance, I also allow the appeal to the extent set out in the  
G leading judgment and abide by the consequential orders made in the judgment including the order of costs.

H