CA 723/74

Ha'aretz Daily Newspaper Ltd. and Others
v.
The Israel Electric Corporation Ltd. and Another
In the Supreme Court Sitting as a Court of Appeals

The Supreme Court sitting as the Court for Civil Appeal

Before Berinson J., Shamgar J. and Ben-Porat J.

Editor's synopsis -

This is an appeal from a judgment for the Respondents, the Plaintiffs in the lower court, in a civil action for defamation, based on an article published in the Defendant newspaper. During a period of national recession, the Plaintiff company, a public government corporation, purchased an expensive luxurious car for the use of its Director General, the second Plaintiff-Respondent, who was close to retirement. After considerable public criticism of the purchase, the Plaintiffs announced that the Director General would continue to use the old car he had previously used and that they would put the new car up for sale.

The article published by the Appellants, the Defendants below, charged that the sale was a sham and that the Plaintiffs did not really intend to sell the car. It stated that the Plaintiffs did not make any serious effort to sell the car, that they turned down offers to purchase the car at a reasonable price and that they actually placed impediments in the way of its sale. The article alleged that the Plaintiffs really sought to gain time so as to weather the storm of public protest until the public furor will have passed, after which the car would be returned to the Director General's use.

Having failed to establish their defense that the allegations contained in the article were true (under Israeli law, the burden of proof in this matter rests on the defense), the Defendants sought to defend the article as an expression of opinion in good faith concerning the injured party's conduct in

a public function or in connection with a public matter. The lower court rejected this defense as well, on the ground, among others, that the defamatory contents of the article were primarily statements of fact rather than opinions.

In a divided decision, the Supreme Court reversed the lower court's judgment. Justice Shamgar wrote the majority opinion in which he held:

I. Freedom of expression is a fundamental right recognized as such in Israeli law. The Law Forbidding Defamation, 5725-1965, which is intended to protect persons' reputations from being besmirched, should be interpreted and applied in a manner that does not infringe upon or unduly limit the proper exercise of this right.

2. This point is all the more significant when what is at issue concerns the criticism of a public official or of a public body in connection with its official conduct. Aggressive, even strident criticism should be encouraged in such matters, in the public interest. The law's provisions concerning the defense that the defamatory publication was the expression of an opinion concerning a public matter, made in good faith, should not be whittled down by narrow interpretation and application.

3. Just as the defense of truth is not lost when the defamatory matter contains inaccuracies that are minor in nature and not themselves injurious, so too the defense of good faith expression of opinion in a public matter will not be lost even if some of the factual grounds on which the opinion expressed was based turn out to be erroneous.

4. It is not correct to require that the opinion be correct as a condition of this defense, else it would be unnecessary to relie on this defense, which applies even when the defense of truth fails.

5. The author's criticism of the plaintiffs' conduct need not be the only reasonable conclusion that can be drawn from the underlying facts, in order for this defense to prevail. It certainly should not be required that the author's conclusion comport with that which the judge would have concluded in the circumstances. All that is required by the condition of reasonableness is that there should be a logical connection between the facts and the author's conclusion so that he could have concluded as he did in good faith.

Justice Ben-Porat filed a dissenting opinion. She would have denied the appeal on the grounds, among others, that the factual inaccuracies in the article, on which the author based his conclusions, were not incidental and that the article did not separate clearly facts from conclusions. The broad defense allowed for expressions of opinion in public matters, in her opinion, is conditioned upon the author making such a separation clearly, so that the reader can distinguish between them, can discern how the author reached his conclusion and can reach his own independent conclusions in the matter.

Note - The instant case was reconsidered by a panel of five Justices in Further Hearing 9/77, in which Justice Ben-Porat's dissenting opinion prevailed and the District Court's verdict for the Plaintiffs was reinstated. The opinions in Further Hearing 9/77 are published in this volume, immediately following this case.

Supreme Court Cases Cited:

[1] C.A. 68/6 *Rabinowitz v. Mirlin,* 11 P.D. 1224; 30 P. E. 66.

[2] C.A. 534/65 *Diab v. Diab,* 20(2) P.D. 269.

[3] H.C.73/53, 87/53 *Kol Ha'am Co. v. The Minister of the Interior,* 7 P.D. 87; 13 P.E. 422.

[4] H.C. 7/76 *"Hilron" Agricultural Products Export-Import Company, Ltd. v. The Fruit Production and Marketing Board,* 30 (3) P.D. 645.

[5] Cr.A. 24/50 *Gorali v. The Attorney General,* 5 P.D. 1145; 6 P.E. 3.

[6] H.C. 206/61 *The Israel Communist Party v. The Mayor of Jerusalem,* 15 P.D. 1723.

[7] C.A. 90/49 *Bentov v. Kutik,* 5 P.D. 594; 4 P.E. 190.

[8] C.A. 160/70 *Hubayshi v. Disenchik,* 24(2) P.D. 394.

[9] C.A. 326/68 *Assa v. Livneh,* 23(2) P.D. 23.

[10] C.A. 382/58 *Tax Assessor v. Ziso-Brantel,* 12 P.D. 1732; 36 P.E. 384.

[11] H.C. 14/51 *The Attorney General v. Rotem, 5* P.D. 1017; 5 P.E. 304.

[12] C.A. 36/62, 92/62 *Ozri v. Gilad,* 16 P.D. 1553.

[13] C.A. 34/71 *Friedman v. Chen,* 26(1) P.D. 524.

[14] C.A. 250/69 *Modi'in Ltd. v. Chatouka,* 23(2) P.D. 135.

[15] C.A. 134/67 *Eban v. Disenchik,* 21(1) P.D. 527.

[16] Cr.A. 215/58 *Ben Avraham v. The Attorney General,* 13 P.D. 393; 38 P.E. 349.

English Cases Cited:

[17] *Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.* (1934) 50 T.L.R. 581; sub nom. *Princess Alexandrova v. Metro- Goldwyn-Mayer picturwes, Ltd.* 78 Sol. Jo. 617 (C.A).

[18] *Scott v. Sampson* (1882) 8 Q.B.D. 491; 46 L.T. 412; 46 J.P. 408; 30 W.R. 41 (D.C.).

[19] *London Artists, Ltd. v. Littler* (1969) 2 W.L.R. 409; (1969) 2 Q.B. 375; sub nom. *London Artists v. Littler (and Associated Actions)* (1969) 2 All E.R. 193 (C.A.).

[20] *Lewis v. Daily Telegraph, Ltd.* (1963) 2 All E.R. 151; sub nom. *Rubber Improvement Ltd. v. Daily Telegraph, Ltd.* (1964) A.C. 234; (1963) 2 W.L.R. 1063; 107 Sol. Jo. 356 (H.L.).

[21] *Slim v. Daily Telegraph, Ltd.* (1968) 2 Q.B. 157; (1968) 2 W.L.R. 599; 112 Sol. Jo. 97; (1968) 1 All E.R. 497 (C.A.).

[22] *Plato Films v. Speidell* (1961) A.C. 1090; (1961) 2 W.L.R. 470; 105 Sol. Jo. 230; (1961) 1 All E.R. 876 (H.L.).

[23] *Grech v. Odhams Press, Ltd.* (1958) 2 Q.B. 275; (1958) 3 W.L.R. 16; 102 Sol. Jo. 453; (1958) 2 All E.R. 462 (C.A.).

[24] *Merivale v. Carson* (1887) 20 Q.B.D. 275; 58 L.T. 331; 2 J.P. 261; 36 W.R. 231; 4 T.L.R. 124 (C.A.).

[25] *Campbell v. Spottiswoode* (1863) 3 B. & S. 769; 3 F. & F. 421; 2 New Rep. 20; 32 L.J.Q.B. 185; 8 L.T. 201; 27 J.P. 501; 9 Jur. N.S. 1069; 11 W.R. 569; 122 E.R. 288.

[26] *Peter Walker & Son, Ltd. v. Hodgson* (1909) 1 K.B. 239; 78 L.J.K.B. 193; 99 L.T. 902; 53 Sol Jo. 81 (C.A.).

[27] *Hunt v. Star Newspaper Co., Ltd.* (1908) 2 K.B. 309; 77 L.J.K.B. 732; 98 L.T. 629; 24 T.L.R. 452; 52 Sol. Jo. 376; (1908-10) All E.R. Rep. 513 (C.A.).

[28] *Turner v. Metro-Goldwyn-Mayer Pictures* (1950) 1 All E.R. 449; (1950) W.N. 83; 66 T.L.R. (Pt.1) 342; 94 Sol. Jo. 145 (H.L.).

[29] *Thomas v. Bradbury, Agnew & Co., Ltd.* (1906) 2 K.B. 627; 75 L.J.K.B. 726; 95 L.T. 23; 54 W.R. 608; 22 T.L.R. 656 (C.A.).

[30] *Carr v. Hood* (1808) 170 E.R. 983; (1808) 1 Camp. 33.

[31]*Popham v. Pickburrn* (1862) 18 E.R. 730.

[32] *Kemsley v. Foot* (1952) 1 All E.R. 501; (1952) A.C. 345; (1952) 1 T.L.R. 532; 96 Sol. Jo. 165 (H.L.).

[33] *Watkin v. Hall* (1868) L.R. 3 Q.B.D. 396; 9 B. & S. 279; 37 L.J.Q.B. 125; 18 L.T. 561; 32 J.P. 485; 16 W.R. 857.

[34] *McQuire v. Western Morning News Co., Ltd.* (1903) 2 K.B. 100; 72 L.J.K.B. 612; 88 L.T. 757; 51 W.R. 689; 19 T.L.R. 471; (1900-03) All E.R. Rep. 673 (C.A.).

New Zealand Cases Cited:

[35] *Gooch v. N.Z. Financial Times* (No. 2) (1933) N.Z.L.R. 257.

American Cases Cited:

[36] *Chaplinsky v. New Hampshire* 315 U.S. 568; 62 S.Ct. 766 (1942).

[37] *Beauharnais v. Illinois* 343 U.S. 250; 72 S.Ct. 725 (1952).

[38] *New York Times v. Sullivan* 376 U.S. 24; 84 S.Ct. 710 (1964).

[39] *Gertz v. Welch Inc.* 418 U.S. 323; 94 S.Ct. 2997 (1974).

[40] *Roth v. United States* 34 U.S. 476; 77 S.Ct. 1304; 1 L.Ed.2d 1498.

[41] *Stromberg v. California* 283 U.S. 39; 51 S.Ct. 532; 75 L.Ed. 1117.

[42] *Sweeney v. Patterson 76* U.S. App. D.C. 23; 128 F.2d 457 (1942).

JUDGMENT

Shamgar J: 1**.** We have before us an appeal against the judgment of the Tel Aviv District Court in an action for defamation in which the Appellants were ordered to pay compensation in the amount of 10,000 Israeli pounds to the second Respondent and one pound to the first Respondent.

2. The following are the main facts:

(a) On 14.3.67 the following article was published in the Ha'aretz newspaper:

> "The Electric Corporation Director General's Car, by the 'Ha'aretz' Transport Correspondent.
>
> On 26.10.1966, a news item appeared in Ha'aretz to the effect that the Electric Corporation had acquired a 1966 Chevrolet Impala for its Director General, Mr. Yaacov Peled. The price - 33,500 Israeli pounds.
>
> After there appeared in the press letters from readers and articles criticizing this 'wasteful practice' by a State company that suffers from deficits, raises prices and is unable to distribute dividends, Mr. Peled reacted as follows, in Ha'aretz of 8.11.66: '... [A]lthough I do not agree with the opinions that relate the replacement of the car to the policy concerning the recession, I have decided to sell the new car and to

continue to use the old one – so as to remove any and all cause for criticism, even if it is unjustified.' Mr. Yaacov Peled (70), who is due to retire in October, resumed using his old car, a 1963 Chevrolet Impala.

The new car, in which Mr. Peled had already driven about 6000 kilometers, was returned to the agent in Tel Aviv, Mr. Leo Goldberg, so that he should sell it and return the proceeds to the Corporation.

More than four months have passed since the car was returned to the Goldberg agency, supposedly for sale, but actually. the Electric Corporation is not really interested to get rid of the car. It hopes that after some time, when the public will have forgotten the incident, the car will be returned to serve the retiring Director General, for it will then be a 'used' 1966 model, since the end of the 1967 model year is approaching.

The Goldberg agency was instructed to sell the car, subject to the Corporation's prior approval. After considerable effort, the agency's staff found a purchaser who offered 24,000-25,000 pounds for the car. The Electric Corporation's transport officer refused to approve the sale. He advised the agency that even if it found a buyer for 28,000

pounds (which will never happen) they would have to receive his approval of the sale.

From this, the Goldberg agency's clerks concluded that the Electric Corporation was not interested in selling the car and was only interested in gaining time until the public furor would die down, since, if they had decided to sell the car for reasons of public hygiene, what difference would it make what price they received for it? All that had to be ensured was that the car should fetch the proper price in the used car market.

It is not so easy to sell a luxury Impala such as that ordered by the Corporation for its Director General, Mr. Peled: with an automatic gear, an imported radio, an electric antenna and other luxury items which raise its price several thousand pounds above the standard price.

The Ministry of Development should instruct the Electric Corporation management to sell the car without any further manoeuvering".

Passages from this article served as the basis for the claim, which is the subject of this appeal, in which each of the Respondents sued the newspaper Ha'aretz, its editor, its owner and the correspondent who wrote the article for 50,000 Israeli pounds damages.

(b) The evidence produced before the District Court established the following:

The episode began, as claimed in the article, in 1966, during the period of the recession, when the second Respondent ordered the car described in the article from the Chevrolet agent in Israel, the Leo Goldberg Company (hereinafter the Goldberg agency) for 33,500 Israeli pounds. At that time, the Respondent had at its disposal a car of the same make, which was a 1963 model, and which had already been driven 150,000 kilometers and was beginning to cause problems. Hence the decision to exchange it. This decision was not presented before the Corporation's management institutions for consideration and decision. To the car which was ordered - which was one of the biggest and most luxurious cars on the Israeli roads during that period there were added an electronic antenna, white wheels and power steering, all of which were novel appurtenances at that time.

News of this acquisition, which was published first in the Maariv newspaper, apparently following upon the overture of an employee of the Corporation, aroused public criticism which was expressed in letters to the newspapers and the complaints of at least one of the members of the Corporation's Board, who had not been consulted in advance. As a result, the second Respondent decided to return the car to the Goldberg agency, after he had it for about two months and had driven about 5000 kilometers. The Goldberg agency refused to cancel the sale and return the payment made, but it agreed to handle the sale of the car as a used model. The second Respondent thought,

according to his testimony in court, that he was not obliged to call for tenders for the car. On 8.11.1966, the Respondent published a notice in the press announcing its intention to sell the car. It was transferred to the Goldberg agency on 29. 11. 1966 and the article, which is the subject of this action, was published on 14.3.1967.

When the car was brought to the Goldberg agency, the Corporation's representatives did not fix a price for which the Corporation would be prepared to sell the vehicle and did not empower the agency to act within a particular price range as a basis for negotiating the sale to a potential buyer. Instead, the agency was asked to present every offer, without exception, for the Corporation's prior approval. Save for the second Respondent's notice in the press, mentioned above, there was no other public announcement concerning the offer to sell the car. At first, the car was placed in the agency's sales lot, but when time passed and it was not sold, it was decided to keep it in a nearby closed storage place belonging to the agency, for its protection. Naturally, as a result, it was not exposed to the view of potential buyers who visited the agency.

Several offers ranging between 22,000 and 25,000 Israeli pounds were made for the car, but they were all turned down after the person in charge of sales at the agency ascertained the first Respondent's position. The crux of the matter was that because of the cumulative weight of various circumstances - such as the failure to fix a price, the rejection of offers to purchase the car at a price which appeared reasonable in the light of the economic situation and the car's nature, the passage of time and the advanced process of aging of the model in consequence thereof, the Corporation's apathetic and

even discouraging attitude whenever a potential buyer contacted it by telephone and the absence of any urgency in the effort to find a buyer the person in charge of sales at the Goldberg agency, Mr. Ben-Ami Amir, received the impression that the Corporation did not really intend to sell the car. According to him, he usually succeeded in selling a used vehicle within several weeks. Mr. Amir said in his testimony in court that:

> "I received offers. I asked Shagal. He replied in the negative. The offers which I received were 24,0000 Israeli pounds and again 24,000 pounds and 25,000 pounds.... After several offers from agencies and private individuals the reply was that even if there were an offer of 28,000 pounds I should ask again. At that time, the price of 28,000 pounds appeared to me to be a dream and I therefore concluded that the car was not for sale. This was the first time that I was unable to sell a car.... The main basis for my conclusion that the Corporation did not want to sell the car was that I received no reply at first. I have been a sales manager for many years.... Here, for the first time, I did not receive a single satisfactory reply concerning a sale for a certain price. I concluded that they did not intend to sell because no price was fixed for the sale of the car, not at the beginning and not during the course of the weeks that followed ... until I went to Goldberg and told him I would no longer handle the matter...."

According to Mr. Shraga Kantor, who was in charge of the first Respondent's service department and a member of the management, he too had heard the opinions quoted above "which were widespread amongst the Electric Corporation employees who thought that it was all a bluff”. Mr. Amir passed on his impression, as described above, to the fourth Appellant who was, at the time, the first appellant's transport correspondent. He maintained close contact with Mr. Amir who was, as already stated, the sales manager of the Goldberg agency, as well as with those who perform parallel functions in other agencies. Through them he was able to keep up to date with respect to the state of the market for used vehicles. Mr. Amir's statements appeared reliable to him and were corroborated later by one of the potential buyers. After receiving the information and before publishing his article, the first Appellant approached the first Respondent's spokesman, told him what he had heard and asked for his reaction. The spokesman refused to react because, as it appears, of a general directive given him by the second Respondent not to give any information to the Ha'aretz newspaper.

On 21.3.1967, after publication of the article, the late Mr. Leo Goldberg wrote to Ha'aretz seeking to describe the sequence of events and pointing out, among other things, that "we received no offer of 24,000-25,000 pounds" save from several second-hand car dealers. It appeared that what was said in the letter was not consistent with the facts known to Mr. Ben-Ami Amir or with those known to the Corporation: that a certain fruit wholesaler had offered Amir 25,500 pounds for the car and that he had repeated his offer by telephone directly to the Corporation. The Corporation did not

propose, as is customary, any counterprice which appeared to it to be more reasonable, and did not even reply to the offer.

In May, 1967, after publication of the article and after the action, which is the subject of the appeal, had been brought, the second Respondent contacted the manager of the Hadera Paper Mills and the Chairman of its Board of Directors and persuaded them to buy the car for 28,000 pounds. The deal was closed.

3. The Respondents' claim was brought on 20.3.1967. It was based on a part of the article, beginning with the words, "More than four months have passed since the car was returned to the Goldberg agency, supposedly for sale ..." (the fifth, sixth and seventh paragraphs quoted above), and on the article's concluding sentence: "The Ministry of Development should instruct the Electric Corporation management to sell the car without any further manoeuvering." The full text of the article was attached to the statement of claim. The Respondents claimed that the above extracts implied that the first Respondent had been guilty of -

> "corruption, deceiving the public, mismanagement of its affairs and its business, management by way of manoeuvering, bothering the Leo Goldberg agency and its employees in vain and misleading them."

According to the statement of claim, the article charged the second Respondent with -

"corruption, deceiving the public, lack of integrity in his office, mismanagement of the affairs of the Corporation and conducting the affairs and business of the Corporation by way of manoeuvering."

These matters come within the definition of defamation for which the Respondents claimed the damages referred to above.

The appellants, in their statement of defense, took exception to the Respondents' interpretation of their article, denied that it contained anything defamatory and pointed out that "what was said in the article is true and the publication was in the public interest" (section 14 of the Law Forbidding Defamation, 5725-1965 (hereinafter the Law)), and, that they will further contend that the publication is protected by sections 15(2) of the Law (the defense of good faith because of a legal, moral or social duty to publish the matter), 15(4) (expression of an opinion concerning the injured party's conduct in an official or public capacity or in connection with a public matter) and 15(6) (criticism of an act which the injured party performed in public).

In a motion brought before the court of first instance, the Respondents asked that the defense under section 15(2) of the Law be struck out in limine. This application was dismissed by the Registrar and suffered the same fate in their appeal to the District Court. However, the further appeal to the Supreme Court was allowed and this defense was stricken (C.A. 213/69, *The Israel Electric Corporation v. Ha'aretz,* 23(2) P.D. 87).

There remained, therefore, at the opening of the original action, only the defenses under sections 14, 15(4) and 15(6) of the Law.

4. The main issue before the court of first instance was whether to classify the article's contents as being matters in the nature of facts or as expressions of opinions, and this continued to be an issue before us. The Appellants were of the opinion that most of the published matter was of the nature of conclusions and therefore constituted opinions. This matter could not, therefore, be examined under the aegis of section 14 of the Law, and was subject only to the defenses laid down in sections 15 and 16 of the Law.

In its judgment, the District Court broke down the publication into its substantive elements and its drafting and concluded that it consisted entirely of matters of fact, save for the following two short items, which are in the nature of expressions of opinion:

> "which will never happen" (i.e. - finding a buyer for 28,000 pounds).

and -

> "The Ministry of Development should instruct the Electric Corporation management to sell the car without any further maneouvering."

The District Court found signs of both opinion and fact in two other extracts. It stated in this regard:

> "The statement: 'If they had decided to sell the car for reasons of public hygiene what difference would it make what price they received for it? All that had to be ensured was that the car should fetch the proper price in the used car market', could be seen to be a continuation of the matters quoted above concerning the Goldberg agency's clerks' conclusions that the Electric Corporation was not interested in selling the car. It could also be seen as the journalist's statement, to give strength and foundation to the employees' conclusion. If we view these words as those of the employees themselves, that is to say, this is their logic and the reason for their conclusion, then it would be an argument of fact, whereas, according to the other alternative, it is an expression of the author's opinion. The same applies to the following paragraph, concerning the question whether it is easy or difficult to sell a luxury Impala. It could be seen as an expression of the author's opinion concerning the state of the car market and it could be said - and I tend toward this view - that the general state of the market is a matter of fact."

The District Court rejected the Appellant's defense that the article constitutes a "matter of opinion". In its view, expressions of opinion, too, must be grounded in truth.

Just as presentation of data which is not true does not benefit from the defense provided in section 14 of the Law, so too, the expression of an opinion not grounded in truth does not benefit from the defense of good faith. According to the court:

> "Good faith and truth, although not synonymous, are bound together for purposes of the defense against defamation."

Furthermore, expressions of opinion, which may be understood by a reasonable reader to be assertions of fact, will be seen to be and will be classified by the court as factual claims and not as expressions of opinion.

In applying the above principles to the issue under consideration, the District Court noted that in its opinion the Appellants had no factual basis for imputing the serious allegations contained in the article to the Respondents. Only three and a half months had expired from the time that the car was returned, not four, as stated in the article. The incident occurred during a period of recession and for this reason there were no eager buyers of the car. The criticism of the original acquisition of the car was not at all relevant.

The assertion that the car was "supposedly" for sale, implied an intention to mislead from the very beginning. This was without foundation, just as the imputation to the second Respondent of an intent to acquire the car after his retirement was nothing more than speculation by the Appellants. The argument that the end of the model year

was imminent was also proved to be incorrect, since the article was written in March of the particular year, and the model year of American cars, unlike that of European cars, is determined by the Gregorian year. The Goldberg agency did not make any effort to sell the car and the conclusion attributed to its clerks was clearly baseless. The Appellants' reliance on Ben-Ami Amir's words does not relieve them of liability because -

> "by publishing Mr. Ben-Ami's statements, they took defamatory matter conveyed to them privately by Mr. Ben-Ami Amir and multiplied it many thousands of times, as the number of their readers, and gave it credence among all those persons whom the paper reaches, so as to bring the Plaintiffs into disrepute and to sully their names."

There was also no basis for the suspicion that the Respondents had hidden the car, since it was the Goldberg agency that decided to store it in the closed warehouse.

It is true that the Electric Corporation refused to react when asked to do so by the fourth Respondent before publication of the article, but since this refusal was prompted by the bad relations which existed between the newspaper and the Corporation, he should have known that the Corporation's silence was not connected to the merits of the issue but to their relations with the article's author. The writer was not released, therefore, from his duty to check the facts in some other way.

The Appellants' statement that -

> "if they had decided to sell the car for reasons of public hygiene what difference would it make what price they received for it? All that had to be ensured was that the car should fetch the proper price in the used car market",

does not meet the test of reasonableness and, therefore, bears directly on the claim of good faith. Furthermore, the use of the word "maneouvering" was without foundation.

The District Court analysed the events at length to explain that, in its opinion, a completely different conclusion should have been drawn from the facts instead of that which the Appellants drew, and noted that the article contained an element of -

> "stigmatizing the Appellants [the Plaintiffs] as liars and not serious people".

This constitutes defamation, as the Supreme Court had already concluded when it allowed the motion to strike out the defense under section 15(2) of the Law (C.A. 213/69, supra).

After the District Court announced its decision that there was defamation and that it dismisses the defense claims, the parties agreed that the court should fix the amount of damages and costs at its discretion, as well as the form which an apology should take, without hearing any further evidence and arguments. The court awarded the second Respondent 10,000 Israeli pounds compensation, since he had suffered the main injury. The Corporation was awarded compensation in the amount of 1 Israeli pound, primarily in consideration of the fact that it had refused to respond to the fourth Appellant's question when he turned to it before the article was published. The court ordered publication of an apology and determined its wording.

5. The appeal before us covers a wide expanse, from minor arguments concerning matters of procedure and evidence to major issues concerning the principles of the law of defamation. We will not fulfil our duty if we do not make special mention of the comprehensive and clear arguments made by both parties who appeared before us, which were of great assistance to us in fixing the bounds of the dispute and determining its essence.

And now to discuss the rules of law which apply to the matter before us and their application to the facts of the case.

6. A. The Respondents' argument was that the article in question imputed to them "dishonesty and hypocrisy" and stigmatized them as "liars and not serious people". Imputing such characteristics, if in fact this was done, would constitute defamation

within the meaning of section 1 of the Law. The test applicable to the existence of defamation according to section 1 is not confined to the subjective insult suffered by the individual against whom the verbal or written injurious matter is aimed, but has an objective basis: that is, what is the influence or relationship of the defamatory matter on the specific plaintiff's estimation in the eyes of others (C.A. 68/56, *Rabinowitz v. Mirlin* [1], at p. 1226; C.A. 534/65, *Diab v. Diab* [2], at p. 274). The prohibition against defamation is intended to fix firmly in enacted law the right of every person that his reputation not be demeaned or injured by false statements that denigrate him (Justice Scrutton, in *Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.* (1934) [17], 50 T.L.R. 581, 584, referring to *Scott v. Sampson* (1882) [18], 8 Q.B.D. 491, 503.

But the issue before us cannot be resolved by merely applying the definition of defamation in section 1 of the Law to a particular expression. The Law frames rules, whose purpose it is to create effective protection of the individual against being injured by the publication of defamatory matter, so that this area resembles the laws of privacy which seek to prevent unlicensed or uncontrolled intrusion into the private domain (see Thomas I. Emerson, The System of Freedom of Expression, 1970, p. 517). The problem that arises in this field of the law is not confined to the need to define the nature of the act in question or of the injury resulting from it, but that both the law forbidding defamation and that protecting privacy, raise the question where should the line be drawn between them and the right of freedom of expression.

B. The relationship between defamation and freedom of expression has been defined in various ways and approaches. The difference between these approaches is expressed principally in fixing the status of the two subjects in relation to each other, that is, whether they are treated as two separate fields with equal status, or whether they are regarded as values, one of which deserves preferential treatment and whose importance therefore outweighs the other, either in general or in particular circumstances. There were those who regarded the laws of defamation as an exception to the right of freedom of expression and defined them as prohibitions which impinge on this right and limit its absoluteness (see the words of Justice Murphy in *Chaplinsky v. New Hampshire* 315 U.S. 568, 571-572 (1942) [36], and of Justice Frankfurter in *Beauharnais v. Illinois* 343 U.S. 250 (1952) p. 266 [37], according to whom defamatory matter is not protected by the right of freedom of speech).

But the attitude giving exceptional preference to the prohibition against publishing defamatory matter over and above the right to freedom of expression has been abandoned in the United States, for example, with regard to defamatory matter concerning holders of official or public office, and the principle which gives superior status to freedom of expression concerning subjects of public interest connected with holders of official or public office has been entrenched there (see *New York Times v. Sullivan* (1964) [38] and the subsequent judgments based thereon). The tendency to add constantly to the types of office holders to which this principle applies was restrained lately by the judgment in *Gertz v. Welch Inc.* (1974) [39], but there was no erosion of

the basic approach described above with respect to the mutual relationship between defamation of office holders and freedom of expression.

There is no need to try our hand at describing the tendencies and considerations that lie at the basis of any decision which is required to be made, in the varying circumstances, to resolve the conflict between one party's right to an unsullied name and another party's right, in a free society, to give expression at will to his opinions and ideas. The issue before us is more limited as it concerns a publication about the holder of a public office and relates to a public matter. We can, therefore, confine ourselves to this subject only. The first Respondent is one of the largest government companies with respect to the scope of its operations and the number of its employees; it provides a vital service to the general public, and it has a meaningful and daily relationship with every citizen. The second Respondent is the Director General of the corporation which, as a Government company, is responsible to a Government Ministry (at the time, the Ministry of Development), and because of the nature of its objectives and its economic and public standing, he must be deemed to be the holder of an office in the public service. There is also no disputing the fact that the issue before us, in light of its nature, is also a matter of public interest, for, in Lord Denning's words in *London Artists, Ltd. v. Littler* (1969) 2 W.L.R. 409, 418 [19]:

> "... Whenever a matter is such as to affect people at large so that they may be legitimately interested in or concerned at what is going on ...

then it is a matter of public interest on which every one is entitled to make fair comment...."

In light of the nature of the matter before us, as described above, it is therefore sufficient that we direct our discussion only to the leading conceptions and approaches that govern the examination of the question of publications concerning holders of public or official office and the relationship between them and freedom of expression. Afterwards we will examine whether and how these rules have been applied in our enacted law.

7. The absence in Israel of a unitary piece of legislation of preferential legal status that embodies its constitutional principles does not mean that we have no statutes with constitutional content or that constitutional legal principles defining the basic rights of man and the citizen are absent from our system of law. The law in Israel embraces, according to our understanding and concepts, basic rules concerning the existence and protection of the freedoms of the individual, even before the bill Basic Law: Rights of Man and Citizen has become enacted law.

The new draft Basic Law is intended to crystallize principles and to designate their boundary lines; its central task is to fix them firmly in enacted law so as to ensure their protection against the ravages of time. Its purpose is to give expression to values according to which the ordinary citizen should be educated and to block in advance the progress of those who seek to trespass on his rights. But even now basic rights are

protected and first and foremost among these, in our basic legal conception, is the freedom of expression, and they are a substantive part of the law of Israel. The integration of these rights into our law is, as is well known, the consequence of the system of government which we so coveted (H.C. 73/53, 87/53, *Kol Ha'Am Co. v. The Minister of the Interior* [3], at p. 876), but the obligation to honor them is not merely a political or social-moral one; it also has legal status.

Thus far as concerns the existence of the right. Now with regard to its standing in the system of law that applies in the State.

The basic right of freedom of expression is of decisive importance for establishing the nature of the regime that rules in a given political or social framework. Furthermore, it is the fundamental basis of, and a condition precedent for, the existence and faithful preservation of most other basic rights. Without freedom of expression the stability of other basic rights, such as, for example, freedom of religion, is threatened and the danger that they will not be fulfilled increases. In addition, the previously described character of freedom of expression as one of the fundamental constitutional rights gives it superior legal status. The obligation to maintain this right serves as a guideline to fashion and shape laws and to test the legality of acts of the authorities. This also has consequences for the legal interpretation of every written law. Any limitation of the boundaries of this right and of its extent, which arises from legislation, will be narrowly construed so as to give the aforesaid right maximum scope and not to restrict it in the slightest beyond what is clearly and expressly required by the legislature's words (H.C.

75/76, *"Hilron" v. The Council for the Production and Marketing of Fruits*, [4], at p. 653). Freedom of expression and a provision of law that limits it do not have equal and identical standing, but rather, to the extent consistent with the written law, one should always prefer the maintenance of the right over a provision of law that tends to limit it. In sum, the standard of judgment that establishes the protection of freedom of expression as the primary consideration when it clashes with another right should be given full expression, not only when the legislature enacts the law's provisions, but also in the interpretation of the law and the application of its provisions to circumstances in which its actual essence and performance are tested in practice.

The above-described approach is generally accepted by all when one is considering the relationship between freedom of expression and the totality of governmental powers, but the maximal restriction of the powers of official authorities in the fields of criminal and administrative law is but a fraction of the measures whose object is the protection of this foundation of a democratic regime. Despite this, it does happen that the said understanding of the mutual relationship is accepted to a lesser degree when in the circumstances of the case there is a clash between the right of the individual to give expression to his opinions and ideas and the right of an office holder who may feel injured by this expression of opinion. It would be superfluous to emphasize the importance of applying the yardstick described above correctly in these latter circumstances as well, since the right to freedom of expression can easily be diminished if, while direct administrative intervention is stymied, the individual is exposed at the same time to litigation within the framework of the laws forbidding defamation for any

critical or negative expression of opinion against a public servant in connection with his official conduct, which hurts his standing in the public eye (section 1(3) of the Law) (see in this matter the words of Justice Brennan (p. 724) and Justice Goldberg (p. 737), with which Justice Douglas concurred in the said *Sullivan* case [38]). It was to such circumstances that Justice Agranat referred in Cr. A. 24/50, *Gorali v. The Attorney General*, [5], at p. 1160, when he said:

> "The law recognizes that in known circumstances and under certain conditions the general good demands - so that the said basic right not be emptied of its content – that a person not be punished for publishing slanderous matters, since the harm which would be caused to the public by excessive restriction of freedom of speech and freedom of writing is preferred in the eyes of the law to the causing of any private injury."

B. As said, we deal here with matters alleged against a Government company and its employee, concerning matters connected with the use of its funds, the observance of its required pactices and the granting of privileges to its employees.

The possibility and opportunity for political, social and other criticism of the functioning of the government, its institutions, companies, representatives and employees is a sine qua non for the existence of a properly functioning democratic

regime, as stated by Justice Sussman in H.C. 206/61, *The Israel Communist Party v. The Mayor of Jerusalem*, [6], at p. 1728:

> "True democracy will be judged by whether criticism is published and heard, without which the democratic-parliamentary regime will descend to nothingness."

In this context Justice Brennan commented, in the said *Sullivan* case [38], which dealt with a libel claim centering on an advertisement which contained incorrect factual data:

> "... freedom of expression ... 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth v. United States 354 U.S. 476, 484, 77 S.Ct. 1304, 1308 [40]. 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means ... is a fundamental principle of our constitutional system', Stromberg v. California 283 U.S. 359, 369, 51 S.Ct. 532, 536, [41] ... and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion'.... We consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited,

> robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials...." (Id. at p. 721).

Factual error may enter a critical statement, as happened in the *Sullivan* case [38], as to which Justice Brennan asks:

> "The question is whether it forfeits that protection [of the right to free expression of opinion - M.S.] by the falsity of some of its **factual** statements and by its alleged defamation of respondent...." (My emphasis - M.S.)

And he refers in this matter to the words of Judge Edgerton in *Sweeney v. Patterson 76* U.S. App. D.C. 23, 24; 128 F.2d 457, 458 (1942) [42] that -

> "... errors of fact, particularly in regard to a man's mental state and processes are inevitable.... Whatever is added to the field of libel is taken from the field of free debate."

Justice Brennan sums up, one cannot condition the defenses provided by law on the absence of factual errors or inaccuracies. According to him:

> "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions - and to do so on pain of libel judgments virtually unlimited in amount - leads to a comparable 'self-censorship'. Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars.... The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

C. Freedom of the press is only one of the specific forms of the right of free expression. Furthermore, this is the central area in which the extent and actual existence of the said right are tested.

I will not enter here into the special question of whether the press has a special duty and status with respect to the provisions of the Law, since this question was already answered with regard to the publication before us in the above C.A. 213/69, when the defense under section 15(2) of the Law was struck out in limine. There is no doubt that this is a very important question, and any further study of it will contribute to

its additional clarification (see also in this connection C.A. 90/49, *Bentov v. Kutik*, [7], at pp. 601, 603). As a tentative thought only, it might perhaps be regrettable that these proceedings were fragmented at the Respondents' initiative on the basis of rule 96 of the Civil Procedure Regulations, 5723-1963, so that there was no opportunity to examine all the defenses simultaneously, that is, after hearing the testimony (cf. C.A. 160/70, *Hubaishi v. Disenchik*, [8], at p. 395).

There is no room for doubt that adoption of the rules granting special standing to the right of criticism in matters of public interest that concern holders of public office does not permit the media to indulge in unbridled writing or release them from all restraints. Later on, we will discuss the provisions of both parts of section 16 of the Law, which contain the rules that create the necessary balance between that which is permitted and what is prohibited, and that the media will not be able to avail itself of any plea of justification when a publication goes beyond the permitted. But any tendency to add to or further limit this balance creates many hazards: the rules concerning freedom of expression are tested in accordance with their long term general advantage and meaning and they should not be evaluated under the influence of events of the moment. The maintenance of basic rights is not disputed when affairs are conducted peacably and when the various authorities earn only compliments. But the real test of freedom of expression comes when there is confrontation accompanied by decisive and unpleasant criticism. Furthermore, the standing and function of the media in a free society are not measured according to how each of their elements and entities meets the expectations of the balanced and moderate citizen, but mainly in light of the

media's mission and general importance in the complex network of factors which contribute to the formation of the citizen's opinion and enable him to exercise free evaluation and choice, with knowledge of what is happening and the ability to evaluate the quality and nature of every event, proposal and criticism.

8. Within the framework of the proceedings before us our attention was drawn by both parties to English precedents in defamation cases. Uncontrolled reliance on such precedents could lead to erroneous conclusions. Even in the Civil Wrongs Ordinance, 1944 - which to a considerable extent adopted the law existent at the time in England - there are differences of terminology from that in the English source: in section 20 of the Ordinance, for example, under the heading of "conditional privilege" are included the defenses of "qualified privilege" and "fair comment", although in the country of origin of these rules there are differences between the two. Since then, not only have sections 16 and 22 of the said Mandatory Ordinance disappeared, but the provisions of section 2 of the Ordinance, which tied interpretation of the Ordinance to the rules of legal interpretation prevailing in England, have also been abrogated (Law Amending the Administration and Law Ordinance (No. 14), 5732-1971). In Britain the Defamation Act was enacted in 1952. The Law which we apply here was enacted in 1965 and these two laws differ in many aspects from each other and from the Mandatory Ordinance (compare, for example, section 20(1)(a) of the Mandatory Ordinance with sections 15(2) and 16(a) of the Law.)

One must, therefore, classify and examine the matter very carefully before relying on quotations from English judgments or

having recourse to English legal literature, some of which is already out of date in England (see, for example, Odgers, A Digest of the Law of Libel & Slander, (191l) 6th ed., p. 161, on which the Respondents relied, in comparison with section 6 of the Defamation Act, 1952). It is superfluous to add that equal care must be taken with regard to reliance on those Israeli precedents that are still anchored in the provisions of the Mandatory Ordinance.

9. A. I am of the opinion that the provisions of our law with respect to defamation and the approach on which they are based are consistent with the principles and the values referred to above.

The protection of the individual's good name is realized in the definition of defamation (section 1 of the Law) and in the provisions laying down that defamation is, depending on the circumstances, a criminal offense or a civil wrong. Protection of freedom of expression is formulated in the provisions of chapter 3 of the Law, which contains a list of permitted publications (section 13) and lays down the scope of the defenses of "truth" (section 14) and "good faith" (section 15). The special defense for criticism in connection with public matters appears in section 15(4) of the Law.

B. When the defense of truth is pleaded, the defendant seeking to make this defense successfully is entitled to try to prove that the matter published was true and that the publication was in the public interest. This defense consists, therefore, of two cumulative components and the presence of one of them without the other will not avail the defendant (incidentally, in Britain the cumulative condition that the publication was in the public interest applies only in criminal actions).

The burden of proof in a plea of "truth" is on the person making it (C.A. 326/68, *Assa v. Livneh* [9], at p. 25; C.A. 382/58, *Tax Assessor v. Ziso-Berenthal*, [10], at p. 1735).

C. When the defense of good faith is pleaded, the defendant is entitled to argue that he published the matter concerned in one of the circumstances set out in section 15 of the Law and that the publication did not exceed what was reasonable in those circumstances. In the case of this defense, too, there are two interconnected cumulative components and the defense cannot succeed in the absence of either one.

10. A. Clearly, the heart of any dispute in a defamation case is the meaning of the words which it is claimed are defamatory. When examining the meaning of such words they must be interpreted in accordance with what the reasonable reader or listener would understand from them, and recourse must not be had to the legal interpretations by which a legal document would be examined and its content analyzed. Lord Reid said in this context (in *Lewis v. Daily Telegraph* (1964) A.C. 234, p. 258 [20]:

> "... There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of wordly affairs....
>
> What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning."

That is to say, the natural and ordinary meaning of the words will sometimes be found in their simple literal meaning and sometimes by reading between the lines. The natural and ordinary meaning of the words cannot be gleaned by isolating and severing them from their context. On the contrary, they must be seen against their general background and within the context of the publication in which they appear. So that, for example, when the court examines matters published in a newspaper and attempts to apply the test of the ordinary reasonable person, it must evaluate the significance and

meaning of the words in the eyes of the ordinary reader and judge how he would have understood them. There is an additional aspect to this rule that directs us to the ordinary meaning of words: the words must be interpreted within the context of the publication in which they appear, without reference to additional extraneous factors which could change or broaden their meaning, unless it can be proved that these additional factors, as well, are within the ordinary knowledge of those who heard or read the words.

B. When examining the significance of matters in the eyes of the ordinary reasonable reader, the publisher's intention is generally of no importance. That is, subject to the provisions of section 16(b)(3) of the Law, this question is altogether irrelevant (H.C. 14/51, *The Attorney General v. "Davar"*, [11], at p. 1053). No evidence is to be brought in connection with the question of what meaning the ordinary reader, or one or another type of reader, would ascribe to the publication, and there is no need to hear testimony about how the published matters were understood, since it is the court itself which must judge the matter (C.A. 36/62, 92/62, *Ozri v. Gilad*, [12], at p. 1559). According to Lord Diplock in *Slim v. Daily Telegraph* (1968) 2 Q.B. 157, 165, 173 [21]:

> "What does matter is what the adjudicator at the trial thinks is the one and only meaning that the readers as reasonable men should have collectively understood the words to bear. That is 'the natural and ordinary meaning' of words in an action for libel."

11. A. The meaning and the sense of the article in question is clear on its face: from its wording it appears that the author concluded from the Respondents' actions and omissions that they intended to misrepresent and to deceive the public: that is, at the same time that the second Respondent declared publicly his desire to sell the vehicle, that had been purchased for what was at that time a great deal of money, the hidden intention that is discerned from the circumstances is the opposite.

This comes within the definition of defamation in section 1 of the Law.

On the other hand, I did not find in the article any explicit or implied allegation that the second Respondent intended to retain the car in the corporation's possession in order to acquire it upon his retirement, as the Respondents contend. This contention was raised in the course of a heated argument in court concerning why the second Respondent's imminent retirement was mentioned in the article, but the reasonable reader could not have learned about these matters from the article itself. In the eyes of one who is not familiar with the hidden ways of public authorities, the reference to the imminent retirement only stressed the absence of any justification for acquiring the car in the first place, that is, as a comment to the effect that if the matter concerns a person who is about to retire, why should he not be patient and complete his final year of service with the car he had. That explains the reference to the Respondent's retirement in connection with the story about the acquisition of the car, and that in any event is how it should be understood. Therefore, the dispute before the lower court, which was repeated before us, whether it was permissible to adduce evidence of precedents

concerning acquisition of cars by employees of the corporation who retired on pension, had no relevance to the matter of the publication which is the subject of the proceedings before us.

B. Once we have determined that the article contains defamatory matter, the question arises whether the Appellants can benefit from one of the defenses provided by the Law. The relevant defenses are two:

(a) that the matter published is true;

(b) that the publication was made in good faith.

One plea does not obviate the other and it might be that one would suffice without the other. In this connection the question whether we are talking about facts or expressions of opinion, or both, is significant. We must therefore first classify the published matter according to whether it was factual or an expression of opinion and then decide whether the defenses referred to above apply in the circumstances.

C. When an injured party complains about a certain publication because of its contents, one may not restrict the defendant, in presenting his defense to the particular words in the relevant publication on which the plaintiff bases his claim. The defendant is entitled to have recourse to the entire publication, including those parts not referred to by the plaintiff, in order to justify his defense, whether it be based on "truth" or on one

of the alternatives in the plea of good faith. The essence of defamation is injury suffered by a person in the eyes of others and the published writings which were brought to the attention of other persons constitute a single entity. There is no justification to dissect them arbitrarily in order to stress a part of the publication which contains defamatory matter and to prevent the publisher from presenting the entire publication, since it is his right that the court view the matters in their natural light as, it may be assumed, they were seen and read by the ordinary reasonable reader (cf. C.A. 34/71, *Friedman v. Chen*, [13], at p. 529). This does not mean that the part of the publication containing defamatory matter is purified and cleansed of all contamination by the fact that the rest of the publication contains only truthful statements. The other parts of the publication are relevant for the purpose of presenting a complete picture and to reach a conclusion concerning the author's good faith.

The defendant's said right is especially important when the publication contains several facts, some of which are proved, established and true, and do not constitute a ground for the claim, while a small number, concerning which the plaintiff complains, are not true. The relevancy of the other parts of the publication as providing the basis for the expression of the opinion increases, naturally, in proportion to the measure and extent of the truthful statements contained in the publication and is conditioned on these facts being interwoven and integrated into the expression of opinion which is the subject of the action. The approach common in England, which differs to some extent from ours (see *Plato Films v. Speidel* (1961), [22]), is substantively unreasonable, and recommendations were recently made aimed at changes in the legal position in England

(cf. Report of the Committee on Defamation, H.M. Stationery Office, 1975, Cmnd. 5909, p. 34).

D. The publication at issue before us presents a list of facts, alongside of which, or following upon which, are conclusions and evaluations of the author, that are in the nature of expressions of opinion. In order to judge its nature the publication must be read as a whole, because its factual beginning constitutes the basis for understanding the expressions of opinion contained therein. Furthermore, prima facie, any doubts or disputes concerning the classification of any part or selection of the defamatory matter quoted in the complaint can be dispelled by examining the publication as a whole and in context. This method makes eminently clear the stages of the fourth Appellant's evaluation of the situation, beginning with the factual data and ending in his conclusion that the active intervention of the Ministry of Development was called for.

The court of first instance was therefore correct in considering the article as a whole and the Appellants' complaint in connection therewith is unfounded. On the other hand, I do not accept the lower court's ignoring of the influence which the inception of the incident had on the fourth Appellant's considerations and conclusions, but since this subject comes within the ambit of the defense of good faith, I will return to it when I deal with this distinct problem.

E. I am not satisfied with the conclusions drawn by the lower court concerning the division of the article's contents into facts and opinions. Everyone agrees that the following were of the nature of facts:

(a) the acquisition of the car.

(b) the text of the Director General's reply to the criticism leveled against him.

(c) the impending retirement in October 1967 of Mr. Peled, who was 70 years old, and his resumption of the use of his previous car.

(d) the return of the new car to the Goldberg agency.

(e) the instructions with regard to the price and the sale of the car that were given to the Goldberg agency, except the words "which will never happen".

(f) the selection noting that "it is not easy to sell a luxury Impala" up to the words "above the standard price".

From the evidence brought before the court of first instance, as detailed at the beginning of this judgment, it can be concluded that all the above facts, without exception, were satisfactorily proved and that no one disputes that their publication was in the public interest, as required by section 14 of the Law.

It follows, therefore, that insofar as these facts are concerned, the appellants can enjoy the defense of "truth" based on section 14, even if the facts were defamatory.

12. The remaining parts of the publication whose meaning demands our attention, are the following:

> "More than four months have passed since the car was returned to the Goldberg agency, supposedly for sale, but actually, the Electric Corporation is not really interested to get rid of the car. It hopes that after some time, when the public will have forgotten the incident, the car will be returned to serve the retiring Director General, for it will then be a 'used' 1966 model, since the end of the 1967 model year is approaching."

> [finding a buyer at the price of 28,000 Israeli pounds] "... will never happen."

> "From this, the Goldberg agency's clerks concluded that the Electric Corporation was not interested in selling the car and was only interested in gaining time until the public furor would die down, since, if they had decided to sell the car for reasons of public hygiene, what difference would it make what price they received for

it? All that had to be ensured was that the car should fetch the proper price in the used car market."

"The Ministry of Development should instruct the Electric Corporation management to sell the car without any further maneouvering."

Before expressing our opinion concerning the nature of these selections and their legal classification, I will make several preliminary observations about the meaning of section 15 of the Law in general and of section 15(4) in particular, and its relationship to the presumptions in section 16.

13. A. With regard to the mutual relationship between section 15 and section 16: In their arguments before us, the Respondents sought to set forth the provisions of the Law as creating an absolute divide

between facts, on the one hand, and expressions of opinion, on the other hand. While section 14 of the Law deals exclusively with matters of fact, which must be examined solely according to the yardsticks fixed therein, section 15, according to them, deals exclusively with expressions of opinion. However, if we examine the provisions of sections 15 and 16, which are inter-connected, we will see that this is, in fact, not so. Section 15 does not consist solely, as one solid piece, of subjects that are in the nature of opinions (see, for example, the circumstances described in sections 15(1), 15(2) and

15(10)). It follows, therefore, that the presumptions set forth in section 16, which are linked with all the variegated provisions of section 15, do not apply to expressions of opinion alone.

The issue at stake in every case is whether the defendant made the publication in one of the circumstances provided for in section 15. If so, then, the presumption in section 16(a), that he made the publication in good faith, applies, whether the publication contained facts or matters of opinion (see C.A. 250/69, *Modi'in Press v. Chatouka*, [14], at p. 137, in which the question of good faith, for purposes of section 16(a), was considered in connection with a publication in a newspaper stating that a certain woman was committed to a hospital because of mental disease and the author of the publication sought the protection of the defense contained in section 15(2) of the Law). A similar approach was adopted in *Grech v. Odhams Press, Ltd.* (1958), [23] in which a publication containing factual inaccuracies was allowed the defense of fair comment by the court after it was shown that the publication was made in circumstances deemed to be privileged.

B. With regard to the unique nature of section 15(4): The defense provided in section 15(4) refers to a publication in the nature of an expression of opinion on the conduct of the injured party in an official or public capacity, in the public service or in connection with a public matter. That is to say, while some of the subsections of section 15 do, indeed, describe circumstances which create a basis for the defense of section 16(a) with respect to the publication of facts, this does not teach us anything about the

remaining elements and paragraphs of section 15, as can be seen from the fact that section 15(4), like section 15(5), deals expressly with expressions of opinion only and cannot be stretched beyond that.

The question may be asked, what is the law when a factual assertion is intermingled with the expression of an opinion in respect of which the defense of good faith contained in section 15(4) is sought. The answer is that the circumstances set out in the various sections of section 15 classify the publication according to its dominant character. In other words, the type and category of the publication as establishing a fact or expressing an opinion will be determined by its essential nature that is divined from its general import in the eyes of a reasonable reader, and it will not lose its character as a publication expressing an opinion merely because some fact was included, if that does not change its essential feature as described. The integration of all the subsections of section 15 with section 16, with the two types of presumptions contained therein, teaches us that it was not the legislature's intention that the courts should examine the wording of the publication as if with a magnifying glass in order to separate out every fragment of fact and deny it the protection afforded by section 16(a) of the Law.

The approach of the Israeli legislature to this matter can be learned also from section 14: in order to decide whether the matter published was true, regard is had to the fundamental facts which reflect the essence of the publication and not to incidental details as to which any injury caused is secondary (see the last sentence of section 14).

Incidentally, it would be difficult to learn anything for the purposes of the issue before us, as the Respondents sought to do, from the above cited *London Artists* case [19], in which it was held that the words, "... on the face of it appears to be a plan..." were, in their special context, the determination of a fact rather than an expression of the writer's opinion. I doubt very much if this court would have so understood them. But the main point is that the argument concerning the classification of the publication as an expression of opinion was dismissed in that case, first and foremost, because it was raised for the first time in the midst of the proceedings. In any event, there, too, Judge Denning reached his conclusion about the classification of the publication as a totality of facts on the basis of "... a fair reading of the whole letter ...", that is, on the basis of an examination of the document as a whole.

A similar approach, stamping a publication with its dominant hallmark and deciding its fate in accordance with its classification as an expression of opinion even when it contained some facts, found expression in Justice Brennan's opinion in the *Sullivan* case [38].

C. With regard to the element of truth in an expression of opinion: Criticism of the functioning of a public authority may be aggressive and determined, uncompromising and overtly expressive of the writer's feelings, and it will be protected even if the writer drew wrong conclusions and made a mistaken evaluation, so long as the circumstances laid down in section 16(b) do not exist, that is:

"(l) the matter published is not true and he did not believe it to be true;

(2) the matter is not true and he had not, prior to publishing it, taken reasonable steps to ascertain whether it was true or not;

(3) he intended to inflict greater injury by the publication than was reasonable in defending the values protected by section 15."

The burden of proof concerning section 16(b) is on the Plaintiff (C.A. 134/67, *Eban v. Disenchik* [15]; C.A. 250/69, [14]), and if the circumstances set forth in section 15 have been proved and the publication did not go beyond what was reasonable, it would not be sufficient for the Plaintiff to show that the publication was not true in order to overcome the presumption of good faith. In other words, it is not enough that the Plaintiff show, for example, that the expression of opinion concerning the conduct of a director general of a public company was not true, but he must also prove additional elements, collected in subsections (1) to (3) of section 16(b), in order to rebut the presumption of good faith. Therefore, there is no basis for the lower court's opinion that:

"the concepts of good faith and truth ... are bound together for purposes of the defense against defamation."

With regard to the connection between expressions of opinion and the truth, we have nothing other than the provisions of section 16(b), according to which the absence of truth per se does not negate the defense of good faith, unless additional elements are present as enumerated in this subsection. The lower court's decision would have the effect of emptying section 16(b) of all meaning.

As indicated in subparagraph B above, publications are classified according to their dominant character, so that even if incidental factual details of minor importance become interwoven with expressions of opinion, this would not affect the classification of the publication for purposes of applying section 15(4) of the Law, even if it transpires that some of the factual details are untrue, so long as there are other truthful elements in the publication upon which the expression of opinion was based.

A similar idea appears in the provisions of section 6 of the English Defamation Act, 1952, which states that when the words about which the plaintiff complains are composed -

> "... Partly of allegation of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained as are proved."

D. With regard to the matter of reasonableness: A substantial part of the lower court's judgment is devoted to the dispute about the reasonableness of the Appellants' assertions. This, for example, is how the lower court reacted to the Appellants' assertion -

> "if they [the Respondents] had decided to sell the car for reasons of public hygiene, what difference would it make what price they received for it? All that had to be ensured was that the car would fetch the proper price in the used car market."

The court said:

> "As stated above, this assertion could be construed as the continuation of the above conclusions of the Goldberg agency employees or it could be construed as an expression of opinion on the part of the author of the article. It is irrelevant which of these is chosen since in any case it does not satisfy the test of reasonableness **and reasonableness is a basic element of good faith"** (My emphasis - M.S.).

Following upon these words, the lower court set out in detail why it thought the appellants had erred in their conclusion concerning the price of the car and why it was

preferable in the circumstances of the case not to have rushed to sell the car but to have continued to search for a buyer who would offer a higher price.

It follows clearly that the lower court was mistaken about the nature of the good faith defense and the element of reasonableness included in it. Section 16(a) provides that the defendant will be presumed to have made the publication in good faith if the following two conditions are met: (a) the publication was made in one of the circumstances referred to in section 15 and (b) it did not exceed what was reasonable in such circumstances. The reasonableness demanded here does not mean that the opinion expressed in the publication must be the only, single and exclusive conclusion which can be drawn from the circumstances by pure logical reasoning. The condition not to exceed what was reasonable in the circumstances does not mean that in order for the publication to be protected it must contain only that one interpretation of the events, among several, which the court selects as the most reasonable. The element of reasonableness dealt with by Section 16(a) means that the publication should not diverge, in its wording and its relationship with the events upon which it is based, from every possible logical connection with the facts, such as if someone is called a robber and thief only because he was one day late in settling a debt. There is no attempt in the Law, even indirectly, to coerce any single uniform line of thought and it should not be interpreted as doing so.

The defense of expression of opinion also does not fail because of the derogatory criticism or absence of objectivity in the publication and that does not derogate from its

reasonableness. The fact that the publication's wording may not be to the taste of a moderate balanced person does not make it unreasonable. The court may not impose its taste and its logic on the publisher. It must leave room for the strong expression of opinions. The test is as laid down by Lord Esher:

> "Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that...." *(Merivale v. Carson* 1887, 20 Q.B.D. 275, 291, [24]).

Lord Denning commented in similar vein:

> "These comments are capable of various meanings.... One person may read into them imputations of dishonesty, insincerity and hypocrisy.... Another person may only read into them imputations of inconsistency and want of candour.... In considering a plea of fair comment, it is not correct to canvass all the various imputations which different readers may put on the words. The important thing is to determine whether or not the writer was educated by malice. If he was an honest man expressing his genuine opinion on a subject of public interest, then no matter that his words contained derogatory imputations: no matter that his opinion was wrong or exaggerated or prejudiced; and no matter that it was badly expressed so that other people read all sorts of innuendoes into it; nevertheless, he has a

> good defence of fair comment. His honesty is the cardinal test. He must honestly express his real view. So long as he does this, he has nothing to fear, even though other people may read more into it.... I stress this because the right of fair comment is one of the essential elements which go to make our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements. When a citizen is troubled by things going wrong, he should be free to 'write to the newspaper': and the newspaper should be free to publish his letter. It is often the only way to get things put right...." *(Slim v. Daily Telegraph, Ltd. (1968),* 1 All E.R. 497, 503, [21]).

14. In the matter before us - that is, the failure to prove the truth of a defamatory publication containing imputations of dishonorable and corrupt motives - the English precedents are noteworthy for their lack of uniformity and even contradictions. Contrary to the strict approach toward such publications and the tendency to grant a defense only to such publications which are founded in truth (as laid down by Justice Cockburn in *Campbell v. Spottiswoode,* 3 B. & S. 769, 776, 777, [25] on which my learned colleague, Justice Ben-Porat relied) the view of the law expounded by Justice Buckley in *Peter Walker, Ltd. v. Hodgson (1909),* [26], which differs to no small extent with the former opinion, is now the more accepted one. According to Justice Buckley:

> "The defendant may nevertheless succeed upon his defence of fair comment, if he shows that that imputation of political bias, although defamatory, and - although not proved to have been founded in truth -, yet was an imputation in a matter of public interest made fairly and bona fide as the honest expression of the opinion of the defendant held upon the facts truly stated and was in the opinion of the jury warranted by the facts, in the sense that a fair minded man might upon those facts bona fide hold that opinion." (My emphasis - M.S.).

That is to say, for this purpose, it is sufficient that a reasonable person could have reached the defamatory conclusion from the facts contained in the publication and that the facts on which he relied appeared in the body of the publication. In the opinion of the authors of the British Report on Defamation mentioned above, this approach clashes also with what was held in another judgment on which my esteemed colleague Justice Ben-Porat relied, that in *Hunt v. Star Newspaper* (1908) [27]. The opinion contained in the *Walker* case [26] was approved by the Commission and was also adopted by Gatley (7th edition, paragraph 728) and apparently is the accepted one today in England (paragraphs 164 and 166 of the Report and the judgments referred to therein).

In light of the lack of uniformity in the judicial precedents, it is not surprising that the British jurists are displeased by the state of unclarity in the law of defamation in

their country and that, for example, Lord Diplock (in the *Slim* case [21] referred to above) should conclude that

> "... the law of defamation ... has passed beyond redemption by the courts."

These words should give us cause for extra thought before we draw upon the English precedents for the purpose of interpreting our own enacted law, whose principles are perfectly clear.

All the less, therefore, is it important that we resolve the dispute between the parties before us whether the said *Hunt* precedent [27] is still valid and binding. In any event, the said English Commission expressed some doubt about this (paragraph 164 of the Report) and we need not re-examine its opinion.

15. A. As can be gathered from the lower court's judgment, it set true cumulative conditions for allowing the defense contained in section 15 of the Law:

(a) the published matter, both facts and opinions, must be true and

(b) the expression of opinion must be reasonable in the eyes of the court sitting in judgment, with regard both to the considerations on which it is founded and to its logic.

The court thus whittled down the defense under section 15 so critically as to empty it of all content: because, in any event, if the truth of the publication can be proved, then there is no longer any need to resort to the defense under section 15, and the lower court's interpretation of the Law would make this section superfluous. As was said in the above *Grech* case [23], (at p. 281):

> "otherwise, it seems to me that the defence of fair comment would be almost valueless; for if the jury found that the words were not defamatory or - being defamatory - were true, then the defence of fair comment would not be needed."

But the legislature did not commit the sin of tautology, as would follow by implication from acceptance of the lower court's theory. The function of the defense under sections 15 and 16 is substantially different from that described by the District Court: as explained above, the purpose is to open the door to criticisms and to protect them against defamation actions, even if it transpires that the opinions expressed are not founded on truth and even if the thinking expressed therein is not consistent with what the court considers logical. The provisions of sections 15 and 16 do not invest the courts with the power of judicial censorship of truth and logic. They are a set of cumulative conditions whose aim is to deny the defense of good faith only to malicious publications, that is, those made in the knowledge that they were false or in reckless disregard of whether they were false or not.

B. The clear nature and content of the extracts from the publication, quoted above in paragraph 12, which were the subject of the complaint, render them obviously expressions of opinion - that is, they are the author's conclusions founded on a set of factual particulars. This is their dominant characteristic, even if here and there certain factual assertions of secondary importance may have been attached to them. Hence, we must examine these extracts in the light of sections 15(4) and 16.

Even if these ancillary facts contain inaccuracies, these are so secondary in their meaning and their importance that there is nothing in them to change the writer's conclusion. Similarly, I fail to grasp the importance of the claim that since the car was returned to the Goldberg agency on 29.11.1966 (not immediately after the Respondent's public statement of 8.11.1966) it was in the agency's custody only for three and a half months instead of "more than four months" as said in the article. So, too, it is of no importance that it was not "the agency's clerks" who drew the conclusion described in the article, but only one clerk, since this particular clerk was the one directly responsible for carrying out the assignment to sell the car, who dealt with the matter directly until he concluded what he concluded and reported that his assignment was finished. Who was more familiar with the matter than he and more competent to convey his impressions of the matter? The court concluded that his statements were not merely some malicious irrational personal speculation when it learned that many of the Electric Corporation's employees also thought that the offer to sell the car was a bluff. The factual description of the offers for sale which preceded the publication of the article is

well founded and the lower court made no finding rejecting Mr. Sapir's testimony on this point. Moreover, Mr. Goldberg's letter of 15.3.1967, on which the Respondents relied, also shows that there were offers from car dealers "who thought they could get the car at this price," and the price set forth in the letter is "24,000-25,000 Israeli pounds".

C. As stated, these extracts teach us that, save for the factual assertions to which we alluded above, we deal here with the expression of opinion, that is, conclusions drawn from a set of factual particulars, some of which were mentioned in the article and some not. The reasonable reader could not have mistakenly understood that these extracts conveyed factual information about a particular, express decision of the corporation not to sell the car, but it is evidently clear that the author drew conclusions, which seemed reasonable to him, from the facts of the case. If there remains any doubt whatsoever about whether this is anything more than an expression of opinion, then the words

> "if they had decided to sell the car for reasons of public hygiene, what difference would it make what price they received for it"

emphasize that this was a conclusion and an analogy, even argumentative in style, according to the author's logic, which sought to pinpoint the inconsistency in the acts and omissions of the corporation and its representatives.

D. The claim that the author's conclusion is incorrect does not deprive it of the defense provided in section 16, since once the presumption of good faith arises, the Respondents must prove the existence of one of the circumstances set out in section 16(b), if they wish to rebut this presumption, and in this they did not succeed at all.

With regard to section 16(b)(1): In the light of Mr. Amir's testimony, there is no basis to attribute to the fourth Appellant the lack of faith in the publication's truthfulness. On the contrary, Mr. Amir apparently believed sincerely in the truth of his impression and conclusions and conveyed them to the fourth Appellant. The lower court was of the opinion that this did not add an aura of veracity to the author's conclusion, but that is not so. The circumstances as a whole gave Mr. Amir's story the image of truth and reason, since the corporation had shown no initiative and outstanding passivity in everything related to the sale: no offers of sale were published in the press and no notice of tenders was announced, no price was fixed for the car by the Respondents, the offers made received no attention and no attempt was made to negotiate with the bidders in order to persuade them to raise their offers. Instead of cleaning the car, which was covered by dust, to impress potential purchasers, it was confined, to the Respondents' knowledge, in a warehouse in which it disappeared completely from view and the passing of time reduced the prospects of selling it. In this last connection, it was immaterial whether the beginning of the 1968 model year had already arrived, or whether it was a few months off, as, in any event, the natural passage of time, if not halted, brought the former event closer every day, and the aging process of the car, which was a 1966 model, continued to progress. All of these facts, which were

mentioned in part in the article, gave Amir's words the appearance of authenticity, and this had direct implications concerning the conclusion as to the author's good faith.

Nor can one charge the fourth Appellant with failing to take reasonable measures to discover whether the publication was true, since he approached the first Respondent whose spokesman refused to speak to him. The lower court was of the opinion that since the fourth Appellant was well aware of the reasons for this refusal, he should have sought alternative sources of information in order to fulfil the obligation set forth in section 16(b)(2). I do not see any basis for this opinion. The corporation's refusal, whatever its real reason may have been, could only have added to the suspicions in the circumstances, and that is a considered risk which anyone who refuses to react must take. Whoever approaches a public authority with a request to react is not obliged to interpret silence on the part of the authority to its advantage, but is entitled to suspect that there is something behind it. In any event, anyone who refuses to react cannot complain afterwards that the publisher did not find an alternative source of information in order to circumvent the barrier he himself created by his refusal.

The court is not one of the contesting parties but must examine whether the presumption of good faith arises or whether the Plaintiff has succeeded to rebut it, and to this end it has at its disposal the criteria laid down by Law. From the wording of section 16(b)(2) it follows, inter alia, that the plaintiff may try to prove the absence of good faith by producing evidence that the publisher "had not, prior to publishing it [the matter published], taken reasonable steps to ascertain whether it was true or not". But

this provision of the Law does not merely provide a way to rebut the presumption. It also provides ground to infer that if the Defendant took steps in advance to ascertain whether the matter published was true or not, that is a sign that he has passed one of the good faith tests, and the defense remains valid as long as it is not rebutted in one of the other ways laid down in section 16(b).

I would like to note, incidentally, that I very much doubt whether the spokesman for a public authority may take it upon himself within the scope of his duties to apply sanctions against any section of the media. When an employee of a public authority is entrusted with the task of conducting public relations with the authority's clientele, he cannot behave, in the course of his duties, as though he is in his, or his employer's, own private domain. The justification for establishing such a function lies in the existence of the public's right to receive information about what is happening and it is only proper for the spokesman to behave accordingly.

E. The District Court excluded from its considerations the criticism aimed against the very acquisition of the car. In this, too, I take issue with it. The description of this episode at the beginning of the article was not alleged to be defamatory, but when examining whether facts were presented which furnish a basis for the expression of the doubt and suspicion in the article, these matters should not be taken out of their general context. It is reasonable to assume that it was this very event which first and foremost triggered the doubts about the Respondents' judgments: when office holders in a government company have seen fit to provide themselves with a luxury, eye-gouging

car in a period of recession, or before or after one, instead of meticulously observing the rules of modesty, which obligate them, and when they have persisted in denying the justice of criticism, then doubts and even scepticism may arise whether they had any proper sense, in this context, about what is proper and what is not, and about what is permissible and what should not be done. When all the events are links in one chain, it would be artificial if one did not recognize this element, too, as a possible factual basis for the criticism in the article. As already noted above more than once, the author does not have to convince the court of the justice of his evaluation but has only to show a factual foundation for his opinions and suspicions; and even if we might have come to a different conclusion, that is not sufficient in itself to undermine any conclusion about the author's good faith.

F. Finally, the Respondents did not succeed in founding the argument based on section 16(b)(3).

16. The Respondents could have put the Appellants' good faith to an immediate test had they taken action according to the provisions of section 17 of the Law which provides:

> "(a) Where defamatory matter has been published in a newspaper, the plea of good faith shall not avail the editor of the newspaper, the person responsible for the publication of the defamatory matter or the publisher of the newspaper if, having been asked by the injured party

or by one of the injured parties to publish a correction or denial on behalf of the injured party, he has not published the correction or denial in a manner as similar as possible to the publication of the defamatory matter and within a reasonable time from the receipt of the demand, provided that the demand was signed by the injured party, that the correction or denial contained no defamatory or other illegal matter and that the length of the correction or denial was not greater than was reasonable in the circumstances of the case.

(b) If the newspaper appeared less frequently than once a week, the correction or denial should also be published, upon demand of the injured person, in a daily newspaper."

It is superfluous to add that section 17 is of the nature of a counter-measure against the burden of proof created by section 16(b) and is an efficient instrument for the immediate correction of the injury caused by a defamatory publication. Action in accord with section 17 in the case under consideration could have led to the immediate presentation of the matter in a true light, without waiting for the completion of legal proceedings, ten years later.

17. The article expressed the author's beliefs and those of his sources of information and imputed to the Respondents an intention which they apparently did not

have. But that in itself was not sufficient to deny them the defense of good faith anchored in sections 15(4) and 16(a) of the Law.

These provisions of the Law are expressly designed to protect, also, those expressions of opinion which it transpires afterwards were not the truth, as long as the defense of good faith, bolstered by the presumptions in the Law, is available to the publisher of the defamatory matter. It is our task to maintain this defense, in practice and according to the letter of the Law and its intention and the tendencies that lie at its base. I would, therefore, allow the appeal and dismiss the judgment of the District Court.

Berinson J.:

I concur with Justice Shamgar's opinion that the appeal should be allowed. Without entering into the details of his reasons and my own for justifying this result, I would like to clarify, in a few remarks only, my general stand in this matter.

My first remark concerns the supreme value that must be accorded to the freedom of expression of the individual with respect to criticism of the conduct of a public functionary in a matter of public interest. In this matter, I understand there is no difference of opinion between my distinguished colleagues, and I join them. Nonetheless, I must repeat and emphasize what was expressly held by this court in the previous proceeding before it (C.A. 213/69, *Electric Corporation v. Ha'aretz),* that the

press as such has no special standing and privilege vis-a-vis anyone else and it must take equal care not to violate the rules of the game laid down in the Law Forbidding Defamation, In Justice Witkon's words:

> "Where the ordinary citizen is entitled to regard himself as obliged to speak in criticism of another, a newspaper is also entitled to do so. Like the one so the other, no more and no less."

My second remark is that one should attach special importance to the fact that the journalist, Mr. Kotler, drew both the information and the conclusion that he presented in his article, from a source which was more competent than any other to judge the Respondents' behavior in connection with the sale of the car - none other than the sales manager of the agency to which the car was given for sale - and the principal matters were given in his name. It is true that repetition of a libel is not forgivable and, on the contrary, repetition of a libel in a newspaper can greatly exacerbate matters. But in the case before us, account should be taken of the fact that the publication was based on information received from a competent person who was well-acquainted with the matter and the author himself, who was the Transport Correspondent for the newspaper, was not a "lightweight" and he had asked for the Corporation's comments on the matter before publication and was snubbed. There is no room for doubt that the publication was made in absolute good faith and without malicious intent, and good faith is the main basis for the defense under section 15 of the Law. Great support for the opinion expressed in the article and for the criticism can be found in the Corporation's

employees. According to Mr. Kantor, senior employees of the Electric Corporation also thought that the car was returned for sale in order to deceive the public because of the criticism that had been leveled against its purchase. It is true that Mr. Kotler did not know about this at the time his article was published, but it does strengthen the reasonableness of the publication greatly, so that it may benefit from the presumption contained in section 16(a) of the Law to the effect that it was made in good faith. As Justice Shamgar explained in his judgment, the Respondents did not succeed in rebutting this presumption on the strength of one of the grounds contained in section 16(b) of the Law, and the appellants were accordingly entitled to the defense under sections 15(4) and 16(a) of the Law.

Finally, I agree that from a legal point of view the author would have done better to have separated facts from opinions, to have commenced with facts and ended with an opinion; and he did not do that. In one part of the article he also mixed and joined together facts and opinions. To my mind this is not significant. What is important is whether the article established an adequate factual foundation for the conclusions expressed and the criticism contained in it. The criticism itself could be exaggerated and unjustified, and this would not render the publication unreasonable. I agree with Justice Shamgar's analysis of the facts and his finding that basically they are correct, and that any inaccuracies are of secondary importance. In this conection I concur with the words of Lord Denning in *Slim v. Daily Telegraph, Ltd.* (1968) 1 All E.R. 497, 503, [21] quoted by my colleague, which also reflect my general approach in this matter of

expression of opinion in good faith about the conduct, acts or omissions of a public functionary in a matter which, according to all opinions, is of public importance.

I therefore agree that the appeal should be allowed.

Ben-Porat J.:

On 20.9.1966, the Israel Electric Corporation (the first Respondent) and its ex-Director General, Mr. Y. Peled (the second Respondent) bought a Chevrolet Impala car, model 1966, from the Leo Goldberg Company (the Goldberg agency) for Mr. Peled's use, to replace a similar model 1963 car, which had been in use until then. The price of the car, after a 500 Israeli pound reduction, was 33,500 Israeli pounds.

On 22.10.1966, there appeared an article in the Ha'aretz newspaper which leveled severe criticism against the acquisition of a luxury car with public money during the period of recession which reigned in the country at the time. In light of the public criticism - which is not the subject at issue before us - the Respondent published a notice in the Ha'aretz and Maariv newspapers, on 8.11.1966, in which he sought to justify the purchase on economic grounds because of the condition of the old car, but stated, nevertheless, that:

"I have decided to sell the new car and to continue to use the old one - so as to remove any and all cause for criticism, even if it is unjustified."

On 17. 11. 1966, at a meeting of the Electric Corporation Board of Directors, a majority of the members approved of the Respondent's decision to sell the car and of his notice to the public to that effect. The Chairman even praised the Respondent "for the courage of his decision and the good example he had given which will have a positive response and will improve the Corporation's public image."

On 29.11.1966, the car was transferred to the Goldberg agency to be sold. Before it was transferred, the Corporation offered to return the car to the Goldberg agency at a loss of several thousand pounds, but the agency refused to accept it. Nevertheless, they did agree to accept it for resale, promising to find a suitable buyer. An agreement was reached between Mr. Goldberg and Mr. Shagal, the Corporation's national transport manager, according to which Goldberg would inform Shagal about the price offered by any potential buyer so as to receive his approval.

While the car was at the Goldberg agency, Mr. Yair Kotler, a journalist, published an article in Ha'aretz under the headline "The Electric Corporation Director General's Car". The Respondents had no complaints about the first part of the article, which we will skip over. But they found defamatory matter in the second part of the article (which will be quoted later) on which they based their action in the Tel Aviv District Court

against the Ha'aretz newspaper, Messrs. Gershon Schocken and Eliahu Salpeter, and against the journalist, Mr. Yair Kotler (the first three hereinafter "Ha'aretz" and the fourth - Kotler). The action was allowed and hence the appeal before us, which concerns the allowing of the action and not the amount of the damages.

2. At the beginning of the article it was pointed out that the price paid by the Corporation for the car was 33,500 Israeli pounds. After discussing the public criticism of the acquisition of the car and the Respondent's notice of his intention to sell it, the article goes on to say:

> "Mr. Yaacov Peled (70), who is due to retire in October, resumed using his old car, a 1963 Chevrolet Impala.
>
> The new car, in which Mr. Peled had already driven about 6000 kilometers, was returned to the agent in Tel Aviv, Mr. Leo Goldberg, so that he should sell it and return the proceeds to the Corporation."

After this begins the part which the District Court thought condemned the Respondents as liars, not serious and cheaters (paragraph 28 of the judgment):

> "More than four months have passed since the car was returned to the Goldberg agency, supposedly for sale, but the Electric Corporation is not really interested to get rid of the car. It hopes that after some time,

when the public will have forgotten about the incident, the car will be returned to serve the retiring Director General, for it will then be a "used" 1966 model, since the end of the 1967 model year is approaching.

The Goldberg agency was instructed to sell the car, subject to the Corporation's prior approval. After considerable effort, the agency's staff found a purchaser who offered 24,000-25,000 Israeli pounds for the car. An official in the Electric Corporation's Transport Department refused to approve the sale. He advised the agency that even if it found a buyer for 28,000 pounds (which will never happen) they would have to receive his approval of the sale.

From this, the Goldberg agency's clerks concluded that the Electric Corporation was not interested in selling the car and was only interested in gaining time until the public furor would die down, since, if they had decided to sell the car for reasons of public hygiene, what difference would it make what price they received for it? All that had to be ensured was that the car should fetch the proper price in the used car market.

…

> The Ministry of Development should instruct the Electric Corporation management to sell the car without any further maneouvering."

The paragraph which was omitted (indicated by the three dots), in which the Respondents found nothing wrong, says:

> "It is not so easy to sell a luxury Impala such as that ordered by the Corporation for its Director General, Mr. Peled: with an automatic gear, an imported radio, an electric antenna and other luxury items which raise its price several thousand pounds above the standard price."

3. The Appellants' learned counsel, Advocate Lieblich, argued before us that the District Court erred in several respects and that it should have accepted one of the two pleas which had been argued in defense: "truth" or "an expression of opinion in good faith". His arguments will be analysed, to the extent required, later. At this stage, I will deal with only one of them:

At a certain stage in the proceedings, the Respondents petitioned the court to strike out one of the Appellants' defense pleas in limine. The issue went as far as the Supreme Court, which in fact ordered it stricken out (in C.A. 213/69). In the judgment the Supreme Court quoted, amongst other things, the following statement by the lower court judge in his judgment (paragraph 8):

> "The insult which is the subject of the action is the condemning of the Appellants as liars and not serious people. The Appellants did not sue with regard to the first article which criticized the acquisition of an expensive new car during the period of recession. They sued with regard to the second article which imputed to them dishonesty and deceit."

Later on in his judgment, which is the subject of the appeal before us, when discussing the question whether "the publication was 'defamatory' within the meaning of the Law", the District Court judge says (paragraph 27):

> "After the Supreme Court held as it did in its judgment quoted above and said that the article 'condemned the Appellants [the Plaintiffs] as liars and not serious people', it would appear that I need not say anything further and am not required to decide anything in this matter."

Advocate Lieblich argues that the learned judge was mistaken in regarding himself as bound by some supposed holding of the Supreme Court when in fact that court had merely set forth the Plaintiffs' arguments and nothing more.

There is no doubt that the language of the paragraph quoted above supports this argument. However, not only did the learned judge later interpret the article independently and arrive at the same conclusion, but the Plaintiffs (the Respondents) made it clear in the lower court that they were not claiming that the writing had any special meaning, but were relying on its ordinary, natural meaning. I also have no doubt that if the Director General of a public institution announces publicly that he has decided to sell the car at his disposal, while handing it over for sale only in theory, with the intention of taking it back as soon as the incident will be forgotten, this would be improper, irresponsible conduct, tainted with prevarication and deceit. This would, to the best of my understanding, also be every reasonable reader's interpretation of what was written. As Lord Diplock said in the case of *Slim v. Daily Telegraph* (1968) 1 All E.R. 497, 501, 507, [21]:

> "This court is in as good a position as the judge to determine what is the natural and ordinary meaning of the words."

The question is not, therefore, whether what was written imputes to the Respondents the conduct described above, but whether it was permissible for the Appellants to impute such conduct to them, because it is true or because it is an expression of opinion in good faith on a public matter.

4. As is well known, the difference between these true defenses is considerable. As to the defense of truth, section 14 of the Law Forbidding Defamation, 5725-1965

(hereinafter the Law) puts the onus on the Defendant to prove that the expressions he used, which besmirch the Plaintiff s good name, reflect reality. The Defendant "established" a fact and he must show that it is true (save in the case of an incidental detail, as provided in the last part of section 14).

On the other hand, the legislature's approach to the expression of opinion in good faith in a matter of public interest is very liberal, since freedom of expression and discussion concerning public matters constitutes one of the basic principles of every advanced society. Every unjustified limitation on freedom of expression necessarily prejudices this sacred principle which must be protected against any infringement.

This defense is similar to the well-known English defense of "fair comment", although we must remember that we have before us an original Israeli law which must be interpreted according to its contents. We can, therefore, have recourse to an English precedent only to the extent that what it says is consistent with the provisions of our law and is acceptable to us as an interpretion of those provisions.

As to the extent of liberality of the "fair comment" defense, I agree with Lord Esher in the well-known case of *Merivale v. Carson* (1887) 20 Q.B.D. 275, 191, [24]:

> "Every latitude must be given to opinion and to prejudice and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment.... Mere exaggeration, or even

> gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit."

The determining question according to him is:

> "Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work [I would add, or conduct] which he criticized?"

This test appeals to me, but subject to Lord Porter's comment in *Turner v. Metro-Goldwyn-mayer Pictures* (1950) 1 All E.R. 449, 461. [228] that one should exchange the word "fair" to "honest". The exaggeration, the obstinacy and the prejudice of the publisher, which do not necessarily deny the defense to the criticism, are inconsistent with the concept of "fairness", but are not inconsistent with the concept of "good faith", which is nothing other than honesty.

I find support for the test laid down by Lord Esher, on the one hand, with the change suggested by him, on the other hand, on page 38 of the Report of the Committee on Defamation, of March 1975. See also *Thomas v. Bradbury, Agnew & Co.* (1906) [29], and Lord Attenborough in *Carr v. Hood* (1808) 170 E.R. 983, 985, [30].

This approach accords with the wording of section 15(4) of the Law, but at the same time attention must be paid to the presumptions concerning the presence or absence of good faith in section 16 - that is, that the publication "did not exceed what was reasonable under such circumstances".

What justifies the great difference between the stringent demand that truth be proved, in section 14 of the Law, and so liberal an attitude toward expressions of opinion in good faith? Why, for example, should a prejudiced critic be protected, even if his criticism be exaggerated and his language biting, only because he honestly believed in the opinion he expressed, whereas someone who made a factual assertion (as opposed to an opinion) will suffer the consequences, even though his error is honest, and even reasonable?

The explanation can be found in very old English judgments to the effect that a person who relies on "the expression of opinion in good faith" must bring the factual basis for his opinion to the reader's attention - and those facts must be true. In this way he enables the reasonable reader to judge for himself whether the opinion is well-founded or not. In the words of Judge Wilde in *Popham v. Pickburn* (1862) 158 E.R. 730, 733, [31]:

> "To charge a man incorrectly with a disgraceful act is very different from commenting on a fact relating to him truly stated, - there, the

> writer may, by his opinion, libel himself rather than the subject of his remarks."

A second, logically necessary, demand is that it be made sufficiently clear in the publication what is claimed as fact and what constitutes an expression of opinion. Therefore, if the subject matter of the criticism is a book, an artistic creation, a newspaper and the like - then, since they are available to the interested reader, it is sufficient if the publication refers to that source and it is not expected that it actually produce the creation. As Lord Porter commented in *Kemsley v. Foot and Others* (1952) 1 All E.R. 501, 505, [32]:

> "Accordingly, its contents and conduct are open to comment on the ground that the public have - at least - [my emphasis] the opportunity of ascertaining for themselves the subject-matter on which the comment is founded."

The distinguished judge later refers approvingly to Odgers on libel and Slander (5th ed. 1911). Since the passage which he quotes in his judgment is appropriate, in my opinion, to our case, I shall reproduce it here, while emphasizing those words which appear to me of particular importance:

> "Sometimes, however, it is difficult to distinguish an allegation of fact from an expression of opinion. It often depends on what is stated

in the rest of the article. If the defendant accurately states what some public man has really done, and then asserts that 'such conduct is disgraceful,' this is merely the expression of his opinion, his comment on the plaintiff's conduct. So, if without setting it out, he identifies the conduct on which he comments by a clear reference. In either case, the defendant enables his readers to judge for themselves how far his opinion is well-founded; and therefore, what would otherwise have been an allegation of fact - becomes merely a comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what that conduct was, this is an allegation of fact for which there is no defence but privilege of truth. The same considerations apply where a defendant has drawn from certain facts an inference derogatory to the plaintiff. If he states the bare inference - without the facts on which it is based, such inference will be treated as an allegation of fact. But if he sets out the facts correctly, and then gives his inference, stating it as his inference from those facts, such inference will, as a rule, be deemed a comment.

But even in this case the writer must be careful to state the inference as an inference, and not to assert it as a new and independent fact; otherwise, his inference will become something more than a comment, and he may be driven to justify it as an allegation of fact."

I see no need to take a stand in this case on the question of whether it is necessary to detail all the facts on which the critic's opinion is founded. At least from Lord Oaksey's judgment in the above *Kemsley* case it follows that there is no such obligation and the same has been understood to be Lord Denning's opinion in *London Artists, Ltd. v. Littler* (1969) 2 All E.R. 193, 198, [19]. In the absence of any such express demand in the provisions of our Law, I am prepared to assume (without reaching any final decision on the matter) that here, too, there is no obligation to publish all the facts which led the publisher to form the opinion he expressed. However, at the same time, one must always remember the idea that lies at the basis of the substantial difference between the defense of "truth" and that of "expression of opinion in good faith". As explained above, the justification for the broad scope of the latter defense lies in the reasonable possibility afforded the reading public - and the subject is after all of interest to it - to judge for itself if what appears in the facts detailed in the article leads to the opinion founded on those facts. Hence, the double obligation imposed on the person seeking the protection of this defense: first, to reveal at least the main facts on which his opinion is founded; and, second, to make it clear, to a sufficient degree, to the ordinary reading public that what is derogatory to the person's good name is purely an expression of opinion. Therefore, if the general impression made by the publication is that the derogatory part is a determination of fact, or that it is an expression of opinion founded on extrinsic facts within the publisher's knowledge, then the defense of "expression of opinion in good faith" will not be available to the publisher, and only the defense of "truth" (or "permitted publication" within the meaning of section 13 of the Law) will be

at his disposal. Concerning an opinion ostensibly founded on extrinsic facts I refer to Judge Fletcher Moulton's judgment in *Hunt* v. *Star Newspaper Corp.* (1908), [27] , which is still valid.

The question arises whether the publisher of defamatory matter can resort to the argument that he received his information from a reliable source, or that he relied on rumors whose credibility he believed. The answer is in the negative, although when the court fixes the damages, it may take into consideration, in the defendant's favor, the fact that this was a repetition of something said before and the publisher had indicated the source on which he relied (section 19(1) of the Law).

I emphasized the word "may" because sometimes the very repetition exacerbates the injury. In this connection, I am in accord with the words of Judge Morris in *Lewis v. Daily Telegraph Ltd.* (1963) 2 All E.R. 11, 161-167, [20]:

> "To say that something is rumoured to be the fact is, if the words are defamatory, a republication of the libel. One cannot defend an action for libel by saying that one has been told the libel by someone else, for this might be only to make the libel worse.... Blackburn J. in Watkin v. Hall (1868) L.R. 3 Q.B.D. 396, 401 [33] ."

Further on he said:

> "If one repeats a rumour one adds one's own authority to it, and implies that it is well founded, that is to say that it is true."

At any rate, if the publisher does not make it absolutely clear that he is only repeating what someone else said then it will not even be a consideration for reducing the compensation to be awarded.

Finally, before I analyse the article which is the subject matter of the issue before us, I wish to concur with those who distinguish between expressions of opinion on matters of taste, such as the quality of a work of music, a literary work or some known policy, and an expression of opinion concerning motives or intentions. Although a public functionary exposes himself to the criticism of the public by virtue of his functions, unfounded defamation of him should not be permitted. The classical form of this rule can be found in the words of Cockburn C.J. in the well-known case of *Campbell v. Spottiswoode* (1863) 122 E.R. 288, 290 [25]:

> "But then a line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid or wicked motives - unless there is so much ground - - for the imputation that a jury shall find, not only that he had an

honest belief in the truth of his statements but that his belief was not without foundation. -"

This approach is consistent with the language of section 15(4) of the Law: "the publication was an expression of opinion on the conduct of the injured party ... in connection with a public matter ... as revealed by such conduct". If the motive or intention of the injured party are not "revealed" by such conduct, the publisher's good faith will not avail him (here, too, save with respect to the amount of compensation to be awarded - section 19(2)).

5. I have examined the article as a whole, based on the above legal analysis, and have reached the conclusion that the Appellants' plea based on the defense of "expression of opinion in good faith" is not acceptable for several reasons:

A. The Respondents' intention to deceive the public was presented in the article as an existing fact and not as the expression of the author's opinion based on facts presented. The words "supposedly" and "actually," which are not qualified in any manner whatsoever, appear in the first paragraph of that part of the article on which the action is based, as part and parcel of the other facts which precede and follow them.

I have no cause for assuming, as a real possibility, that the newspaper's reading public, for whom the article was intended, understood, or could have understood, from

a perusal of the whole article that there was any room for doubt about the Respondents' bad intentions. The article in this case is completely different from the letter published by a person lacking any legal education in *Slim v. Daily Telegraph, Ltd.* (1968) [21]. There, a lawyer who was the legal adviser of a local authority, signed an order prohibiting the passage of vehicles, including motorcycles, on a certain road, and then, after joining a certain company, changed his position and argued that the company was entitled to use the road for its lorries. The Respondent wrote in his letter that in light of the lawyer's conflicting opinions, which varied according to the interests of his clients, one could not disagree with those who view such conduct with a measure of cynicism. The lawyer argued that the readers could interpret these words as referring to conduct unbecoming to his profession. The court held, rightly with all due respect, that the deciding factor was not the interpretation of one particular reader or another but the fact that this was an expression of opinion in good faith in a matter of public interest. Each reader was given the opportunity, on the strength of the conduct described, to judge for himself whether the comment was well-founded or not and the critic could not be held responsible for others' opinions. Furthermore, even if the writer expressed himself in a rough and unsuccessful manner and even if he were prejudiced against lawyers as such, that would still not remove the matter from the defense of criticism in good faith.

The present case is not similar. Rather, it resembles to some extent, despite many differences, the subject matter of the above *London Artists* case [19]. Four leading actors announced, separately but at the same time and in the same language, that they

were resigning their posts. Such an occurrence was unprecedented at that time in the theatrical world and could have led to the termination of the production which the defendant had been presenting very successfully for two years in a prestigious theater. Some time before the letters of resignation were received, the defendant was asked by the management to move the production to another, more modest, theatre, but he refused to do so unless he were offered attractive consideration. The defendant was convinced that the "combined" resignation after his refusal was nothing more than a conspiracy against him in order to effect his departure from the theater. He was so convinced of this that he organized a press conference at which he read his reply to the actors who had resigned. In his letter to one of the actresses (that was quoted in the judgment) he complained that she had not seen fit to come to him

> "before being a party to what, on the face of it, appears to be a plan to close the run of 'The Right Honourable Gentleman'...."

Despite the guarded language (at the beginning of the letter), the court decided, upon a reading of the whole letter, that the allegation of a plot was a statement of fact. In the words of Lord Denning:

> "... on a fair reading of the whole letter, I think the allegation of a plot was a statement of fact. The first paragraph runs in guarded language 'it appears' and the fourth paragraph says 'in other words', but the last paragraph speaks of 'the combined effort'. Reading the

> letter as a whole, I have no doubt that it stated as a fact that there was a plot ...."

Edmund Davies L.J., as well, regarded the plot as a statement of fact, the fruit of the defendant's invention, and quoted from the above *Hunt* case [27], as a rule with which he concurred, that an expression of opinion must appear as an expression of opinion and must not be so entangled with facts that the reader cannot distinguish between them.

Incidentally, the very reliance on the *Hunt* judgment [27] in 1969 undermines the Appellants' counsel's argument that its ruling no longer holds.

In our case, the impression made by the first paragraph described above is not weakened, and is certainly not negated, by a reading of the continuation. On the contrary, even the few facts in the second paragraph (on which I shall tarry later) are connected mainly, if not only, with the paragraph after it:

> "From this, the Goldberg agency's clerks concluded that the Electric Corporation was not interested in selling the car and was only interested in gaining time until the public furor would die down ...."

The words "from this" indicate that the facts in the previous paragraph are what moved those same employees to reach their conclusion.

It follows that the first paragraph - in which there is no hint of reliance on someone else's conclusions - appears as the correspondent's factual finding and, in my opinion, it must therefore be regarded as such despite the fact that he actually relied (as appeared from his testimony) both on the information from, and the conclusion of, the Goldberg agency's sales manager. The repeated reference (later in the article) to the conclusion of the "employees" (in the plural) does not (as should be recalled) relieve Mr. Kotler of his responsibility.

B. Even if I should assume, contrary to my view, that Mr. Kotler's imputation that the Respondents intended to deceive the public is an expression of opinion in good faith, this would not change the conclusion which I reached. The reason is that there must always be some mutual relationship between the facts and the opinion expressed. True, it is not necessary that the court's opinion be more lenient than that contained in the publication. Nor does it matter that different readers could draw different conclusions from a reading of the article. But as was stated in the interesting article, Van Vechten Vieder, Freedom of Public Discussion, (1909) 23 Harv. L. Rev. 412, 424:

> "... it must not introduce new and independent defamatory matter, or draw inferences or conclusions wholly irrelevant or out of all proportion to the given facts which supply the basis of comment."

(And see also *McQuire v. Western Morning News Co., Ltd.* (1903), [34].)

The absence of any such minimal connection converts what is assumed to be an expression of opinion into a fact whose truth has to be proved.

In *London Artists* [19], there was a fortuitous combination of several unusual events which led the respondent to believe in all honesty that the plaintiffs had plotted against him. If he had been required to prove the truth of his allegation (as he attempted to do initially) his defense would very soon have foundered as, in fact, there was no connection between the events. But when presenting these facts to the reasonable reader, before the circumstances were clarified, some persons might - perhaps - have argued that some of the readers could have suspected a plot, as the respondent did. It should be remembered that in the case of an expression of opinion, the defense will not fail merely because in fact it was not true: *Merivale v. Carson* (1887) 20 Q.B.D. 275, 281, [24]. Lord Denning held, in the said judgment, that there was not a sufficient mutual relationship between the events and the conclusion concerning a plot, so that the defense of criticism in good faith was not applicable to the case.

All the more is this so in our case. Even if the Respondent erred by conditioning the sale upon its own prior approval and by not accepting the buyer's (singular) offer of 24,000-25,000 Israeli pounds, and by declaring that even an offer of 28,000 pounds would require its approval, this did not provide sufficient grounds for the conclusion that the whole affair was bluff and deception. It is most certainly permissible to criticize the manner in which an institution chooses to sell its vehicle and the fact that it sought

an unrealistic price (on the assumption that the price of 28,000 pounds at a time of recession was such), but from this to the conclusion contained in the article is a far cry. Incidentally, the testimony of the experts concerning a realistic price at the time was contradictory (see Orbach at page 237 and Gonen at page 220). It should not be forgotten that the article stated that the car had cost the Respondent 33,500 pounds and that the Respondent had used it for only a very short time and had driven only 6000 kilometers. In the circumstances, since the car was almost new, is the reluctance to lose more than 5,000 or 5,500 pounds, so extraordinary as to justify an imputation of deceit and prevarication? It should also not be forgotten, as was mentioned in the article, that the Respondent had published his decision to sell the car in two newspapers (Ha'aretz and Maariv). Very strong evidence was required in order to refute the sincerity of the Respondent's intention, as appears prima facie from such a notice, to adhere to his public promise. As said in Odgers, 6th ed., at p. 162:

> "... the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticize, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct."

C. It may be noted that there are inaccuracies in the facts detailed in the article whose accumulated weight is not negligible, some of which even raise prima facie doubt as to the author's good faith.

It is well-known that minor inaccuracies do not cause the plea to fail: *Gooch v. N.Z. Financial Times* (1933), [35], although there is a contrary opinion with which, with all due respect, I do not concur: see Lord Porter in the *Kemsley* case, [32], at p. 506:

> "In a case where the facts are fully set out in the alleged libel, each fact must be justified and if the defendant fails to justify one, even if it be comparatively unimportant, he fails in his defence."

It appears to me that just as section 14 of the Law provides that the defense of "truth" shall not be denied by reason only that an incidental detail which is not actually injurious has not been proved, so too should the same rule apply to the defense of "expression of opinion in good faith". Nevertheless, I emphasized the word "only" as it hints at the possibility that inaccuracies might carry some weight which might be combined with other considerations, if there be such, to the disadvantage of that defense. This can be understood also from the judgment in *Gooch* [35], in which the applicability of the defense of "fair comment" was recognized in circumstances in which

"the errors of fact were of minor importance and the article, which was written in good faith, deserved no condemnation but commendation."

It is apparent from the content of the article referred to there that the minor inaccuracies in that case stood alone.

I shall now consider the inaccuracies (in the article in our case), skipping, naturally, those matters which directly impute to the Respondents the intention to deceive (and which according to my assumption at this stage, in contrast to my opinion, constitute "an expression of opinion"):

(a) "More than four months have passed since the car was returned to the Goldberg Agency ... for sale."

As will be recalled, the car was not transferred to the Goldberg agency until 29.11.1966 and from then until the article was published (14.3.67) only three and a half months passed. Mr. Kotler testified that the sole source of his information was Mr. Ben-Ami Amir, the Goldberg agency's sales manager. The latter testified that he had been in charge of the sale of the car from the beginning. It could be thought that Mr. Amir, by virtue of his duties in general and this special mission in particular, knew or at least could have found out, what the real passage of time was. In these circumstances, the

very fact of the inaccuracy calls for further explanation, even though, in and of itself, it is of little weight.

> (b) ("but actually, the Electric Corporation is not really interested to get rid of the car. It hopes that after some time, when the public will have forgotten the incident, the car will returned to serve the retiring Director General,) for it will then be a 'used' 1966 model, since the end of the 1967 model year is approaching." (I quoted in parenthesis the portion referring to the Corporation's intention for purposes of continuity.)

The District Court found in its judgment, on the strength of testimony which the learned judge found credible, that the model year of an American car, as distinguished from a European one, starts at the beginning of the Gregorian year, although a new model car can already be obtained toward the end of the previous year. For example, a l 967 model can be acquired in December (and in exceptional cases even in November) 1966. This finding contradicts Mr. Kotler's argument that the 1967 model was already being sold in September 1966, when the Respondents received the car. The Goldberg agency deals mainly with the sale of Chevrolets and it is difficult to believe that their sales manager of many years was not aware of this detail. It follows that by the middle of March 1967, less than a quarter of the model year had passed. In light of this fact, the words "since the end of the 1967 model year is approaching" do not, in my view,

constitute an incidental detail of little importance, and they even cast additional doubt on Mr. Kotler's good faith, or that of his source of information - Mr. Amir.

(c) The next paragraph states:

> "After considerable effort, the agency's staff found a purchaser who offered 24,000-25,000 pounds for the car. The Electric Corporation's transport officer refused to approve the sale."

If we had had to depend on the Appellants' witnesses I would have held without any hesitation - although I did not have the advantage of seeing and hearing the witnesses - that there was no evidentiary basis even for this claim. My reasons for reaching this conclusion are as follows:

The witness Shlomo Yaacobi said that he had been at the time the only bidder (and this actually fits in with the word "buyer" in the singular in the article) and added that at first he offered Goldberg 25,000 Israeli pounds but afterwards raised the price to 25,500 pounds, which he claimed was comparatively higher than the market rate at that time. But he said in his testimony that during the course of negotiations he had telephoned Ha'aretz and told Mr. Kotler that he (Mr. Kotler) was correct in alleging that the car was not for sale. It is clear that the article had already been written at the time of that conversation, and (it must be assumed) that the witness gathered from its contents what the opinion of the author was. And when he was cross-examined on this he said: "it is

possible that my **first** (my emphasis) contact was after 25.3.1967" (p. 11) and that "it is possible that in the light of the fact that the publication concerning the presence of the car with Goldberg was on 14.3.1967, my contact was after that date" (p. 12). It is clear that what is determinative is the state of affairs at the time the article was published and this testimony therefore becomes valueless, particularly since the burden of proof rests on the Defendants.

The witness Yaacov Beckerman related that he was in the habit of getting in touch several times a week with all of the companies dealing with cars, including the Goldberg agency. That way he learned from Mr. Amir that there was an "almost completely new" car. According to him, he had to take the trouble to come no less than three times before he was able to see it, since this required special permission from Mr. Goldberg. He went with Mr. Amir to the warehouse where the car was. "It looked nice, but very dusty." When he asked what the price was he was told that he had to make an offer and this appeared unusual to him. He offered 22,000 pounds and Mr. Amir promised to give him an answer. After this visit, three months passed before he met Mr. Goldberg (p. 51). He again started with an offer of 22,000 pounds and raised it to 24,000 pounds, but he was informed that the Electric Corporation's approval had to be obtained. Up to this point the testimony appears reasonable, but elsewhere (p. 57) he declares, surprisingly, "I told Ben-Ami my offer to buy the car for 22,000 pounds **without seeing** it, and I saw it **for the first time after the article"** (my emphases). This did not prevent him from saying in another place (p. 83): "After I saw it I thought to myself that it was worth 22,000 pounds."

The lapse of time of three months between his first visit, when Mr. Amir showed him the car, and his meeting with Mr. Goldberg, also goes up in smoke, as he says later (p. 62), "When I came to Goldberg it was already, as far as I can remember, after I had seen the car on that same day. It seems to me that all this happened at the same time. When I went in to examine the car and had just seen it Ben-Ami told me that it had done 6000 kilometers."

Furthermore: Mr. Amir said in his testimony that the location of the car did not disturb his efforts to sell it, a matter I shall discuss more fully later. In any event, it is clear that Mr. Amir's testimony is not consistent with the great difficulty Mr. Beckerman had when he sought to see the car.

But the Appellants' work was done for them in this matter by Mr. Shagal, the Respondent's transport manager, who said (at p. 273):

> "From time to time there were offers. I received notice about them from Ben-Ami. There were three offers that I remember: 22,000, 24,000 and, lastly, 25,000-26,000. I do not remember if the **last** offer (my emphasis) was before or after the article. I remember that I reported it to Mr. Peled in April 1967. I do not remember when the second article appeared."

Since it is known that the article was published on 14.3.1967, it follows that Mr. Shagal received two offers before then, the higher of which was 24,000 pounds. It was therefore not correct to write in the article that there was an offer from a buyer of 24,000-25,000 poounds.

The correct facts alongside those detailed in the article are, therefore, as follows:

a. The car was at the Goldberg agency for three and a half months and not for more than four months, as written;

b. By then, the end of the first quarter of the 1967 model year was approaching and not the end of the model year itself.

c. The offer that was rejected by the Respondent was for 24,000 pounds and not 24,000-25,000 pounds, as was published.

In my opinion these are not inaccuracies whose cumulative weight amounts to "an incidental detail which is not actually injurious" within the meaning of section 14 of the Law which deals with the defense of truth, especially since they do not stand alone, but are in addition to the other considerations because of which the defense of "expression of opinion in good faith" is not available to the Appellants.

For this reason, too, my conclusion is that this plea should be dismissed.

6. But I am prepared to proceed on the assumption (contrary to my opinion) that there is no need to include within the body of the article even a minimal factual foundation so as to enable the reader to decide, for himself, if the opinion expressed has grounds, and that it is possible to content oneself with the facts published, so long the defendant (in our case the Appellants) produces in the course of the proceedings supplementary facts which together provide a proper factual basis. likewise I proceed on the assumption (again contrary to my opinion) that the imputation of an intention to deceive was an expression of opinion and not the establishment of a fact.

On the basis of these assumptions, I will examine what facts, of which Kotler was aware when he published his article, were proved in the course of the action. I have limited myself as emphasized, since the facts of which he had no knowledge could in any case have had no part in the formation of his opinion. See Gatley on Libel and Slander, 7th ed., p. 293, near line 6.

As already noted, Mr. Kotler testified that his information was based on one source only: Mr. Ben-Ami Amir, the Goldberg Company's sales manager (p. 209). According to him, Mr. Amir concluded that the Electric Corporation only wished to gain time based on the consideration "that otherwise it was not possible that they would place a car intended for sale in a warehouse, where it would become covered with dust for four months" (p. 214). During the course of his testimony he returned to the concealment of the car as the central consideration for his conclusion. For example, the following

statements made by him appear in the protocol (at the end of p. 210 and the beginning of p. 21l):

> "He [Ben-Ami Amir] explained to me that the car was brought to the company's warehouse but they hid it from the eyes of the public, that is, they did not want to sell it, because if you want to sell you display it. Ben-Ami Amir told me that in fact they did not wish to sell the car and that is what I wrote.
>
> The car was hidden by Goldberg, apparently upon the instructions of the Electric Corporation and that is why I wrote that the car was supposedly put up for sale".

It follows that even in the first paragraph of the part of the article upon which the action was based, Mr. Kotler was not other than Mr. Amir's mouthpiece, but this was not made clear to the readers.

With regard to the importance that Mr. Amir attaches to the concealment of the car, as appears clearly from the above quotation, it is worth noting that this fact is not at all mentioned in the article, and what is still more important - it is not consistent with Mr. Amir's own testimony, in which he said:

"It is two that when they brought the car for sale to the Goldberg garage they told me to try and sell it and I really tried to sell it.... I did everything to find a buyer. I don't know why I didn't move the car and place it amongst the used cars that were for sale. I am mostly interested in selling new cars, not old ones.... I don't think that I said that the fact that it stood there was an obstacle. I did not emphasize this. True, it was not visible to people. But this was not an obstacle. The location of the car did not impede its sale".

Incidentally, Mr. Shagal testified as follows (pp. 273- 274):

"I gave the car to an agent and it was placed in a garage which was in fact a yard. Afterwards, Mr. Peled's driver, who happened to be there in the course of attending to another car and who saw that the car was very neglected, got in touch with me. I then phoned Mr. Ben-Ami and as a result the car was stored in a place where new cars were stored. I was there. Ben-Ami complied with my request unreservedly. The car was in a closed warehouse which served as a place for storing Chevrolets. It is not a basement. It was not deep down. I saw new cars there. The choice was between an open area and this place, because I did not presume to ask him to put the car in the display window since there was room there for only two cars and I saw two new cars there."

In any event, Mr. Amir's testimony is sufficient to refute the main consideration which moved Mr. Kotler to write "supposedly", that is to impute to the Respondent the intention described above. Furthermore, according to him, this was the explanation which he received from Mr. Amir, and if that is the case then they contradict each other.

It should be noted that even the significance of the fact that the Respondent conditioned the sale of the car on its prior approval is lessened, to a not inconsiderable extent, by Mr. Amir's testimony, since he said (p. 37):

> "Although this is not usual, in any event there is nothing wrong in someone saying that I should receive his approval before I sell a car. The purchase of a used car is sometimes concluded in a minute. There should be a ceiling price. If there is not - then one must call for approval. There is nothing improper in this."

I am aware of the fact that in another part of his testimony he converted this into almost the main consideration for the conclusion concerning the absence of any real intention to sell the car, but, after all, the burden of proof rests on the Defendants.

On this point, too, it is worth turning to Mr. Shagal's testimony, who told Mr. Amir more than once that he was not prepared to lose more than 5,000 pounds. This testimony accords with the figure of 28,000 pounds that appears in the article. And in

fact Mr. Shagal added in his testimony that he advised Mr. Peled to accept an offer of this sum if tendered.

The fact that the Corporation did not ask for an assessment of the car by an assessor is not particularly surprising. After all the Respondent had paid 33,500 pounds for the car a short time earlier, after receiving a rebate of 500 pounds. The car had been driven 5,000 kilometers, according to the learned judge (and not 6,000 as written in the article - an inaccuracy with which I do not deal). It was suggested that Mr. Goldberg take it back for 30,000 pounds, but he refused to do so and recommended that the car be left with him to be sold. We speak about a transport manager of a large company with a lot of experience, both in sales and in general, as well as the owner of an agency for selling cars of the same kind. Is it possible that in such circumstances it was not clear what the approximate value of the car was and what price the seller could expect to get for it? So when the offers failed to come in, Mr. Shagal "descended" from 30,000 to a minimum of 28,000 pounds, and according to his testimony (it will be recalled) he informed Mr. Amir that he was not prepared to lose more than 5,000 pounds, and hence, apparently, came the need to receive the Corporation's approval if an offer of 28,000 pounds was made, that is if the loss should amount to a little more than the ceiling he laid down.

The fact that a practically new car was not sold by means of a public tender could, as stated above, perhaps be a subject for public debate and criticism, although this could be seen as an exceptional case requiring unusual treatment. The Respondent's

version of events in his testimony, to the effect that in this special case in particular he wished to insist on as small a loss as possible, seems reasonable and I do not intend taking a stand on whether calling for tenders - as the witness Kantor thought should have been done - would have been a more effective way to achieve the desired end.

In any event the judge was correct, in my opinion, in holding that there was no connection between these matters and the subject at issue. Furthermore, I did not find in the testimonies of Messrs. Kotler and Amir any hint that they knew of, or even considered, the standard practices of the corporation, in general, and with regard to sales by tender in particular. There is no need to state once again that a fact which was not considered by the publisher is not available to him on which to base the opinion he expressed.

7. Notwithstanding several doubts arising from the detailed factual inaccuracies, I am prepared to conclude that Mr. Kotler published his article in good faith based on the fact that before doing so he contacted the Respondent in order to get his reactions, but was informed that the latter would have nothing to do with him.

But good faith is not sufficient. The conditions which I enumerated above must be met before the defense of "expression of opinion" becomes available to the publisher: compare the *London Artists* case above [191. There, too, the defendant's good faith was not in doubt.

8. Mr. Lieblich argued that the judge should not have relied on the letter from Mr. Leo Goldberg, as it was admitted at the time on condition that it would not serve as proof of the truth of its content.

I do not think that this error - if indeed it is an error - is sufficient to change in any way the considerations from which I drew my conclusions. I said "if indeed it is an error" because Mr. Shagal in his testimony said that "what Leo Goldberg says in his letter is right" - an answer which prima facie makes the content of his letter acceptable as evidence.

9. At this stage I had the opportunity to examine Justice Shamgar's opinion and I would like to comment that the judgment in the *Campbell* case [25], (at the end of paragraph 4 in his judgment) is, to the best of my knowledge, still recognized in England, and is referred to without any reservations in the House of Lords' judgment in *Kemsley* [32]. With all due respect, I do not think that the judgment in *Walker,* [26], changes anything, but only adds a further dimension to the existing situation. It is referred to, inter alia, in the *London Artists* case, [19] on which I in any event relied, and the conditions enumerated there are not present, in my opinion, in our case.

Similarly, I regret to have to dissent from my distinguished colleague Justice Shamgar's description of the facts, which is based on a completely different evaluation of the testimony from that of the District Court judge. I examined very carefully both the evidence and the judgment of the District Court, which is the subject of this appeal,

and I could not find any cause for interfering with the judge's factual findings based on his personal impressions of the witnesses who appeared before him.

10. The plea of "truth" was also unfounded - a conclusion which derives directly from an analysis of the evidence and of the facts proved during the course of the action.

There remains for me to consider, in this context, the argument of the Appellants' counsel that the judge should have permitted him to prove the Electric Corporation's practice that a retiring director general receives the car which had been in his use, as part of his retirement conditions.

If they sought to prove an improper practice, then the answer depends on the interpretation of section 22 of the Law, which is intended, in general, to prevent the presentation of evidence, and the examination of witnesses, concerning past objectionable acts on the part of the injured party, save in so far as these particulars are directly relevant to the defamation which is the subject of the action. It is clear that "... one cannot prove intent - which is a matter of the heart - save by drawing conclusions from a complex of facts" (Cr.A. 215/58, [16], at p. 394). The "intent" therefore touches directly on the subject of the action. But what intent? That is to say - the intent to abide by the promise that was announced in the press to sell the particular car, in light of the public criticism of its acquisition. It appears to me that we would breach the dam which the legislator sought to impose in the said section 22 if we were to permit the alleged

objectionable promise to be proved as evidence of an intent to break a promise to the public.

In any event, even if we assume - in complete contradiction of the witnesses' answers to the questions of the Appellants' counsel, as noted in the court protocols - that there was such a practice and that evidence of it was admissible, there still would not be a factual basis for the intention imputed to the Respondents. I already pointed out above that the fact that a solemn promise is made publicly constitutes strong prima facie evidence of its sincerity, and this evidence is not rebutted by proof of past sins of the Corporation which employs the maker of the promise, if in fact there were such sins. It is also not conceivable that the Respondents would have dared to use that same car again, as long as the eyes of the media were focussed on their actions.

In so far as the defense of "expression of opinion in good faith" is concerned, this promise has no importance ab initio, as there is no evidence (it will be recalled) that Messrs. Kotler and Amir knew about it and took it into account amongst their other considerations.

11. In light of the above considerations I would dismiss the appeal.

The appeal is allowed, by majority decision, and the judgment of the District Court is dismissed.

The Respondents will bear the Appellants' costs in this Court and in the District Court, including advocates' fees, in the amount of 5,000 Israeli pounds.

Judgment given today, 6 Adar 5737 (24.2.1977).