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Case No: 02/TLQ(J)/0240

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION

Royal Courts of Justice
Strand, London WC2A 2LL

Date: 12 December 2002

Before:

THE HONOURABLE MR JUSTICE GRAY

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Between:

Mr Stewart BRINN and Mr Andrew JARVIS

Claimants

- and -

Russell Jones & Walker (a firm)

Defendants

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Mr Desmond BROWNE QC and Mr William BENNETT
(instructed by **Peter Carter Ruck**) for the Claimants
Mr Matthew NICKLIN
(instructed by **Reynolds Porter Chamberlain)** for the Defendants

Hearing dates : 2-5 December 2002

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

The Hon Mr Justice Gray

Mr Justice Gray:

Introduction

1. The claimants, Inspector Stewart Brinn and Police Constable Andrew Jarvis, have suffered a double misfortune. The first was that their former solicitors, Russell Jones & Walker ("RJW"), negligently failed to effect service of proceedings for libel against the publishers of *The Oldie* magazine. The second is that they have become embroiled in the present negligence action brought on their behalf against RJW to recover the loss and damage said to have flowed from that firm's negligence. This is a second misfortune because these proceedings, in which the allegations of negligence are largely admitted and the potential recovery is relatively small, has involved both sides in vast costs. There was evidence that the costs on the claimants' side, exclusive of mark-up, are in the region of £280,000.

The issue

2. The negligence which is alleged against RJW being for the most part admitted, the question which I have to decide is what legally recoverable loss and damage flowed from that negligence. It is accepted on behalf of the solicitors that one consequence of their negligence was that the claimants lost the chance to recover damages in the libel proceedings which had been commenced against the publishers of *The Oldie* in respect of an admittedly defamatory article published about the claimants.

3. My main task is to evaluate that lost chance in accordance with the well-known principles in such cases as *Kitchen v Royal Air Force Association* [1958] 1 WLR 563, 575. In that case it was said:

> "...Assuming that the plaintiff has established negligence, what the court must do in such a case is to determine what the plaintiff has lost by that negligence. The question is: has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can."

4. The exercise which I have to embark on is a purely hypothetical one, namely deciding, without benefit of hindsight, what would have been the outcome of the claimants' claim for damages for libel but for the negligence of their solicitors.

5. There is in addition a discrete issue on liability which arises out of a disputed allegation of negligence. It is asserted on behalf of the claimants that RJW was guilty of negligence in failing to investigate the ability of the defendant publishing company to meet an award of damages and/or in failing to join as co-defendants in the action the editor of the magazine and the journalist who wrote the article complained of. RJW deny that they were negligent in either respect and contend in the alternative that any such negligence was not causative of any damage.

The background to the present action

6. The issue of *The Oldie* for June 1999 included a diary piece by Mr Timothy Minogue which (as is common ground) libelled Mr Brinn, Mr Jarvis and another officer who in the event did not sue. The report was about the arrest of a lady named Ms Pauline Buffham after the officers stopped her car during the evening of 9 November 1999. With the financial backing of the Police Federation the claimants instructed RJW to advise on proceedings for libel. In due course, on 10 December 1999, Ms Theresa Ryan of that firm wrote a letter of advice to her clients. She instructed counsel, Ms Lorna Skinner, who provided an opinion dated 24 April 2000. Shortly before the expiry of the one-year limitation period, a claim form was issued. I shall call this "the first action". The sole defendant named was Oldie Publications Limited.

7. The magazine instructed solicitors, Davenport Lyons, who responded substantively to the complaint on 15 June 2000. The last paragraph of their letter put RJW on notice that a further article about their clients had been published in the December 1999 issue of *The Oldie.* This second article had not come to the knowledge of the claimants at the time. Having obtained a copy of the article and noted that it too libelled the claimants, RJW amended the claim form to claim aggravated damages in respect of the later article and sent it to Davenport Lyons. But Davenport Lyons wrote back that they did not have instructions from their clients to accept service. By that time the validity of the claim form had expired.

8. RJW applied to the court to disapply the limitation period under section 32A of the Limitation Act 1980 The master acceded to that application The magazine appealed. While the appeal was pending a Part 36 offer was made on behalf of each of the claimants to settle the case for £15,000 damages plus an apology. In its response to that offer, the magazine through its solicitors claimed that *The Oldie* did not have any money. Shortly after that, the appeal by *The Oldie* against the decision of the master came on for hearing before me. I allowed the appeal with the consequence that the first action was dismissed.

9. In the meantime Gouldens, the firm of solicitors instructed in place of RJW, in the nick of time on 22 March 2001 served a claim form in respect of the December 1999 article. I shall refer to this action as "the second action". The sole defendant was again the publishing company.

10. In the spring of 2001 negotiations took place for the settlement of the second action. In the course of those negotiations Mr Robin Shaw of Davenport Lyons told Mr Barton Taylor, formerly a partner in RJW but then a partner of Gouldens, that his clients' financial position was precarious. The negotiations resulted in a consent order dated 27 June 2001, whereby Oldie Publications Limited agreed to pay to the two claimants a total of £10,000 by way of damages and costs, and to join in making a statement in open court. The statement contained an unqualified public apology for the allegations about the claimants, not only in the December 1999 article but also the article which had been

published in the June 1999 issue of *The Oldie.*

11. It turned out that the £10,000 paid in settlement of the second action was insufficient to cover the costs said by Mr Barton Taylor to have been incurred by Gouldens in prosecuting the second action. He calculated those costs at £12,560, leaving a shortfall of £2,560. According to his second witness statement Mr Taylor credited the whole £10,000 to the costs of the second action and claimed the balance of £2,560 from the Police Federation. Later, however, on 28 May 2002 Mr Barton Taylor wrote to each of his clients enclosing a cheque for £5,000 and explaining:

> "I am instructed by the Police Federation that the cost of your claim against Oldie Publications Limited, in respect of the December 1999 publication will be paid by the Police Federation and that you should be the beneficiaries of a base sum on account of the damages which you may recover from RJW in respect of their failure to commence proceedings in respect of the June publication aggravated by the December publication and vice versa."

The claim in negligence

12. The claimants' claim against RJW for damages for negligence was commenced on 10 August 2001. The negligence alleged consisted principally in the failure of RJW to effect valid service of the claim form in the first action. That negligence is admitted by RJW.

13. As I have said, the Particulars of Claim contain another allegation of negligence, added by re-amendment in June 2002, to the effect that RJW failed to pay regard to assessing whether Oldie Publications Limited would be able to pay costs and damages and failed to advise that the editor and journalist concerned should be added as co-defendants. RJW deny that they were guilty of negligence in these respects. They argue further that it would have made no difference if these two individuals had been joined: the terms of settlement would have been the same.

14. The damage alleged by the claimants in the Particulars of Claim is made up of the following items:

    i) the loss of the opportunity of recovering damages for loss of reputation and hurt feelings arising from the article published in the issue of *The Oldie* for June 1999;

    ii) the costs incurred by RJW from 10 August 1999 (when they were first instructed) to 21 March 2001 (when they were replaced by Gouldens);

    iii) £6,340 being the costs ordered to be paid by the claimants to Oldie Publications Limited following the dismissal of the application to disapply the limitation period; and

    iv) £2,560 being the unrecovered costs incurred on behalf of the claimants in connection with the second action in respect of the December 1999 article.

15. As to these heads of damage, the defendants' case is as follows: as to (i), they accept that the chance was lost and that they are liable to pay whatever may be the true value of that loss (if any). As to (ii), Mr Matthew Nicklin on behalf of RJW has made clear that his clients are not charging for the work done in the first action (although he points out that a significant proportion of that work was of value to the claimants in connection with their complaint in respect of the December 1999 article). The position of RJW is similar in regard to (iii): they are not seeking to recover from the claimants the costs of the failed application to disapply the limitation period. As to (iv), RJW question how the figure of £2,560 is arrived at and contend that they are in any event entitled to set off or be credited with the cost of the work done by them which was of value to the claimants in connection with the second action. The real contest is therefore confined to (i) and (iv) above.

The failure to join the editor and the journalist

16. I shall start by considering whether, as the claimants allege, it was negligent on the part of RJW to fail to join Mr Ingrams and Mr Minogue as co-defendants in the first action. This allegation of negligence was added by re-amendment in response to the argument of RJW that the impecuniosity of Oldie Publications Limited would have impacted on the level at which the first action would have settled.

17. The claim form initially drafted by RJW did include Messrs Ingrams and Minogue as "proposed" defendants, as did the instructions to counsel. But Miss Skinner in her first Opinion advised that she did not see any reason to sue any entity other than the publisher of *The Oldie.* On 3 May 2000 Ms Ryan discussed the question who should be sued with her supervising partner, Mr Clarke-Williams (who was not called to give evidence). The decision was apparently taken at their meeting not to join the individuals. The claim form as issued included only Oldie Publications Limited as a defendant.

18. The evidence of Ms Ryan was that she had not carried out any financial investigation of Oldie Publications Limited. It was not a step which she took as a matter of routine; it all depended upon the circumstances of the case. The claimants' priority was to obtain an apology; compensation was desirable but a secondary consideration. It was accepted that compensation would not be large. She agreed with the view expressed by Miss Skinner that service of particulars of claim might well produce a settlement offer. For broadly the same reason she said that she had not joined the individuals as co-defendants. There had been no indication or reason to believe that the financial situation of *The Oldie* was such as to give cause for concern over its ability to pay damages and costs. Adding the individuals would or might have led to *The Oldie* refusing to settle on any basis that would have required its journalist and editor to pay damages or costs from their own pocket. Mr Browne submitted that it would have been an elementary precaution to carry out a search of the company. It could have been done quickly and cheaply. He points out that Ms Ryan knew little about *The Oldie* and says that her ignorance on that point was the very reason why it was her duty to check that the company was good for the claim. He points out that Ms Skinner was not provided with the information needed in order for

her to be able to advise as to the wisdom of adding the defendants. Mr Browne contends that to have joined the individuals as defendants would have added to pressure on the magazine to settle. With this Mr Ingrams, who was summoned to give evidence for the defence, was inclined to agree.

19. I consider that Mr Nicklin is right when he says that the issue whether a prudent solicitor should join individual defendants to a libel action against a publishing company depends on the circumstances of the particular case. There is no evidence that to do so is the routine or normal practice in this or other fields of practice. In respectful agreement with the approach approved by Oliver J in *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp* [1979] Ch 384, I am not assisted by the evidence of Mr Barton Taylor of the claimants' present solicitors on this point.

20. In my judgment the failure to join the editor and the journalist as defendants did not amount to negligence on the part of RJW in the circumstances of the present case. My reasons for arriving at that conclusion are these. The claimants are unable to point to anything which should have put RJW on notice that the company might have been in financial difficulties. The first indication of impecuniosity came in October 2000. As Megarry J observed in *Duchess of Argyll v Beuselinck* [1972] 2 Lloyd's Rep 172 at 185, "hindsight is not the touchstone of negligence".

21. Moreover, this was not a "big money" case. The hope and (in my view reasonable) expectation on the part of the claimants' legal advisers was that the claim would settle soon a for a relatively modest sum in damages. Besides Ms Ryan was in my view entitled to take into account the view expressed by counsel that there was no reason to join anyone other than the publishers. I am not impressed by the point that, nearly six months later and after RJW had failed to effect service in time, Mr Clarke-Williams made reference to suing Messrs Ingrams and Minogue "as belt and braces".

22. To hold that RJW were in these circumstances guilty of negligence would in my opinion be to set the standard too high. As Oliver J said in *Midland Bank:*

> "It may be that a particularly meticulous and conscientious practitioner would, in his client's general interest, take it upon himself to pursue a line of enquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession."

The loss of the chance to recover damages

23. As I have said, the principal component of the damage claimed is the loss of the chance to recover compensation for the June 1999 Libel. My task is to evaluate that chance, taking into account the various factors bearing on the question what, as a matter of probability, would have happened but for the negligence of RJW.

The objective facts

24. I will start by considering the objective facts which bear on the likely outcome of the first action. By "objective" I mean the facts which, irrespective of the parties' subjective wishes and intentions, are conventionally taken into account in assessing libel damages.

25. The first is the nature of the libel. The diary item alleged that the claimants behaved towards Mrs Buffham, an innocent and respectable middle-aged lady, in an inappropriate and unprofessional manner. It accused them of behaving in an aggressive, intimidating and heavy-handed manner; allowing her to be unlawfully arrested; using unnecessary force and deploying a "stinger" device in inappropriate circumstances.

26. I accept, as did Ms Ryan, that these were serious allegations against police officers, whose reputation is of great importance both to themselves and to their force.

27. It is necessary to take account also of the extent of the dissemination of the libel. The circulation of *The Oldie* at the time was, according to the evidence of Mr Ingrams, no more than 20,000 copies. I bear in mind, however, that there is evidence from both Mr Brinn and Mr Jarvis that copies of the article were quite widely circulated around police stations in Lincolnshire (even reaching the Chief Constable) and amongst their friends and acquaintances. Mr Brinn says he received considerable ribbing about it and that he became the object of humour. The evidence of Mr Jarvis was to the same effect. In relative terms, however, the circulation of the libel was limited.

28. I accept that there was some damage to the reputation of the two officers, although I would not think that the opinion of the claimants of most of the officers who read the libel who would have been greatly influenced by a diary item in *The Oldie*. Nevertheless I accept that both Mr Brinn and Mr Jarvis were embarrassed, annoyed and upset about the item.

The subjective factors

29. Next to be considered are the subjective factors bearing on the outcome of the action, that is, the wishes and perceptions of the parties in the light of the legal advice they were receiving. These appear to me to be more important than the objective facts of the case. I refer to legal advice because the officers agreed that, knowing little or nothing of the law or practice in the field of defamation, they had to be guided by their legal advisers.

30. I accept the submission of Mr Nicklin that I must avoid hindsight and that I should not, in the absence of good reason for doing so, second-guess the advice which RJW and counsel were giving their clients at the time. I mean no disrespect to Mr Barton Taylor when I say that his retrospective opinions cannot assist me.

31. I have no doubt that the overwhelming likelihood is that this claim would have been settled and would not have gone to trial. I believe that this is common ground. Both Mr Brinn and Mr Jarvis agreed that their principal concern and objective was to obtain an apology, which was of course achievable only by means of a settlement. *The Oldie* had

no reason to want to contest the claim. Ms Skinner was in my view right to say in her first Opinion that the magazine would wish to dispose of the matter fairly expeditiously. It follows that I must consider what, as a matter of probability, would have been the terms of settlement.

32. Mr Browne submitted that the Defence paints a wholly false picture of how the merits of the claim were perceived at the time. He suggests that the pleading grossly exaggerates the possibility that *The Oldie* would have been able to defend the claim or reduce the damages. I acknowledge that there is some force in that submission. It therefore seems to me to be all the more important to consider what advice was being tendered to the claimants at the time.

The parties' perception of the likelihood of a plea of justification

33. In fairness to the officers, I should make clear that no one in the course of these proceedings has suggested that a plea of justification would or could have succeeded in this case. But that is not the point. The question is how the parties perceived the position at the time.

34 I think Ms Skinner was plainly right that the only possible defence was justification She advised on 24 April 2000 that, whilst it was impossible at such an early stage to assess the merits of a defence of justification, it was clear that both sides faced some awkward hurdles Having reviewed the facts, she added that the path would not be smooth for either party. In her later Opinion dated 18 July 2000, she concluded that the merits of a potential defence of justification remained difficult to assess. She considered that a defence of justification could succeed in part but she anticipated that *The Oldie* would ultimately wish to settle.

35. Mr Browne suggested that Ms Skinner was being unnecessarily faint-hearted. He recited a large number of reasons why *The Oldie* would have been unlikely to run a defence of justification. He points out that, whilst Ms Skinner had not met her clients, Ms Ryan had done so and had formed a favourable view of their credibility The inconsistencies in the officers' accounts which troubled Ms Skinner could and would have been resolved. Reliance was also placed on the dismissal by the Police Complaints Authority of the disciplinary complaints made against the claimants.

36. Mr Browne further submitted that there was good reason for *The Oldie* to doubt the credibility of Mrs Buffham. Several officers were prepared to give evidence of her demeanour in the police station. She had made no mention in her interview of the claimants having sworn at her. Mr Browne sought also to pray in aid the offensive letters written by Mr Buffham as being likely to damage his wife's credibility. But Mrs Buffham denied having seen those letters and I do not accept that they would in practice have been damaging to her case. I do, however, bear in mind the evidence that Ms Ryan took the view that Mrs Buffham would face difficulties in establishing the credibility of her account.

37. These points made on behalf of the claimants are not to be ignored, but they do not persuade me that I should leave out of account the contemporaneous perception, particularly on the part of Ms Skinner, that *The Oldie* might raise and persist in a plea of justification.

38. Mrs Buffham was an apparently respectable middle-aged woman. She was sober. It takes some explaining how it came about that her car came to be stopped by means of a "stinger" device (puncturing her two front tyres) and that she was thereafter arrested, handcuffed and bundled into a police car. The inconsistencies in the officers' accounts, whilst not of major significance, cannot be ignored. That was the view of Ms Skinner at the time. The behaviour of Mrs Buffham at the scene and at the police station (and in the witness box in the present case) might have been thought to have been capable of being explained at least in part by her evident anger at what she says happened on the evening of 9 January 1999.

39. It is also necessary to take into account how *The Oldie* perceived Mrs Buffham as a potential witness. She was interviewed by Mr Shaw of Davenport Lyons and by Mr Minogue. As Mr Shaw wrote in his letter of 9 February 2001 and as Mr Ingrams confirmed, their view was that she appeared to be a credible witness. Mrs Buffham made abundantly clear in her evidence in this court that she had been ready and willing to give evidence for *The Oldie* at any libel trial. I do not think it is of any significance that no mention was made of a plea of justification when *The Oldie* sought an extension of time for serving their defence: no doubt they did not at that stage want to rock the boat.

40. Ms Ryan, who understandably deferred to the opinion of specialist counsel, also considered that it was on the cards that *The Oldie* would plead justification and that such a plea could cause difficulty for the officers. In my opinion the possibility of the magazine running a defence of justification was (rightly) perceived by the claimants' legal advisers to be a factor to be taken into account when seeking to settle their clients' claim. I reject the contention that a defence of justification was or even should have been perceived as a non-starter. It follows that I must reflect that factor when I come to decide what the terms of settlement would have been.

The parties' perception of the value of the claim

41. Before considering the impact of the alleged impecuniosity of Oldie Publications Limited on the terms of settlement of the first action, I should record the dispute which arose as to where the burden of proof lies on this issue. I will do so briefly because I do not think that anything turns on where the burden of proof lies.

42. Mr Browne accepted that the legal burden of proof is on his clients but he submitted, in reliance on *Mount v Barker Austin* (CA, 18.2.98, unreported) that the "evidential" burden of proof was on RJW to show that the true value of the claim was not "collectable". He also cited *Alberta (Workers Compensation Board) v Riggins* 95 DLR ($_4$th) 279 and *Redman v Instant Nominees Pty Ltd* [1987] WAR 277. Mr Nicklin drew attention to a passage in *Jackson* & *Powell* on Professional Negligence at paragraph 10-262. He

pointed out, in my view rightly, that the circumstances which obtained in *Mount* were very different from the facts in the present case. It appears to me that the most useful analysis of the position is to be found in the judgment of Brinsden J in *Redman* at 294:

> "It is no doubt true that Instant [the claimant] had the legal burden of proof to prove its damage and if there had been a scintilla of evidence to suggest that Brunswick may not have been capable of meeting the judgment, then clearly Instant would have run the risk of failing to establish its damage if it failed to call evidence to show Brunswick could meet the judgment. The matter was not specifically put in issue in the pleadings and indeed the way clause 6 of the defence was drawn (which I have already set out) Instant may well have been led into the belief that solvency was not an issue since by paragraph 6(c) it was put to strict proof that it would have had a reasonable prospect of having the judgment set aside had the appeal been heard by the Full Court. No evidence as I have already mentioned was led by either party as to solvency nor did counsel for the solicitors raise the issue before Burt CJ It is now only on appeal that the matter is first raised. It would seem to me in a case such as this the evidentiary burden lay on the solicitors if they wished to raise the issue of solvency then the overall burden of proof of damage rested upon Instant."

In the present case RJW raised the issue of the impecuniosity of *The Oldie* in the pleadings and were able to point towards evidence of such impecuniosity. In the circumstances, I consider that RJW discharged the evidential burden of proof which lay upon them.

43. Returning to the perceived value of the claim, I will start by summarising the evidence which the claimants themselves gave of their aspirations. The principal objective of both claimants was to secure the publication of an apology. Mr Brinn said that he wanted some compensation but that was a secondary consideration for both of them. I accept that when they learned of the December 1999 article, the attitude of both officers hardened. They were both angry at the repetition of the libel. But it is clear from the evidence of what the claimants later said and what Mr Barton Taylor said on their behalf that tempers cooled.

44. For the reasons already given, the views of the claimants' legal advisers on the value of the claim count for more than the claimants' wishes. Ms Ryan, who I thought gave her evidence in a manner which was both fair and accurate, testified that she had had views of her own as to the worth of the claims. She thought the claims were "low value". She said that, before *The Oldie* published the December 1999 article, she would have been happy to settle each officer's claim for £5-8,000 but that, after the second article, the figure increased to £8-11,000 for each officer. I do not accept that Ms Ryan told Mr Jarvis in May 2000 that the compensation which he would receive would amply cover any Open University course which he wished to take. It is clear that there was a reference to the intention of Mr Jarvis to take such a course. But I accept the evidence of Ms Ryan that it was not her practice to talk about figures for damages at such an early stage and that she would not have done so on this occasion. It was clear from her evidence that she

did not know what an Open University course would have cost.

45. Ms Ryan agreed that the views of Ms Skinner on quantum were of greater significance than her own. In her Opinion of 22 September 2000 Ms Skinner advised that she would expect a jury to award £15,000 to each claimant. It is clear from the terms of her advice that this figure was based on the assumption that there had been an unsuccessful plea of justification So it is clear that in her opinion a significantly lower figure should have been acceptable in the event of a settlement. It is also clear that Ms Skinner took into account the "inflammatory" December 1999 article. Mr Browne criticised Ms Skinner's figure as being surprisingly low. But it is the advice which she gave which is material rather than what, objectively speaking, may have been the correct advice.

46. That advice was the basis on which the Part 36 offer of £15,000 to each claimant was put forward on 22 December 2000. Mr Browne suggested that in terms of the valuation of the claim that figure should be regarded not only as the ceiling but also as the floor I cannot accept that Mr Jarvis said in his evidence that he expected the figure of £15,000 to be negotiated downwards. On this point I prefer his evidence to that of Mr Brinn. In litigation of this type it would have been unusual to make a Part 36 offer which was non-negotiable.

The impecuniosity of *The Oldie*

47. I come now to consider what impact, if any, the claimed impecuniosity of *The Oldie* would have had on the level of damages recoverable on settlement of the first action.

48. It is a commonplace of litigation that the means of the parties may affect to a considerable extent the terms of a settlement. The case for RJW is that the financial position of Oldie Publications Limited was parlous with the result that there would have been a substantial reduction in the amount recoverable on settlement. The claimants maintain, through the evidence of Mr Barton Taylor, that the claim of impecuniosity was a ploy and that there would have been no difficulty for the company to raise by one means or another at least £50,000.

49. On 30 January 2001 Davenport Lyons told RJW in the course of a telephone conversation that "*The Oldie* does not have any money". That was followed by a letter from Davenport Lyons dated 9 February 2001 which enclosed the accounts of Oldie Publications Limited for the year ended 30 June 1999 and draft accounts for the following year. The letter included the following passage:

> "*The Oldie* is the only magazine published by our client. It has very limited resources. The financial position of its main backer, on who it has been dependent in recent years for its viability, has recently worsened considerably and that support is being withdrawn You will see from the enclosed accounts that in the year ended June 2000 the defendant made a loss of £120,000. Such cash assets as then existed primarily represented yearly subscriptions, for which obviously the subscriber expects to receive, in the future, the magazine for a year. Due to recent

financial pressures cash assets have reduced and at 31 December 2000 stood at £10,896. The continued existence of *The Oldie* is dependent on new financing being achieved, a task that is unlikely to be assisted by the existence of an outstanding libel action."

50. Mr Barton Taylor was dismissive of that claim in his evidence and said that he is always suspicious of draft accounts. But it was the unchallenged evidence of Mr Ingrams that it was an honest assessment of the financial position of the magazine that it could not afford to defend libel proceedings and that, unless a settlement was achieved (at a figure they could afford), then all that would be achieved would be the bankruptcy of the magazine. I accept that evidence.

51. What the accounts showed was that the small profit achieved in 1999 of just under £8,000 had turned into a loss in 2000 of over £120,000. Of greater concern was the fact that the company had creditors totalling over £450,000 in 1999 and £660,000 in 2000. Liabilities greatly exceeded assets.

52. The question which I have to decide is whether the impecuniosity which to my mind is plainly demonstrated in the accounts of Oldie Publications Limited would have affected the settlement obtainable. Mr Browne suggested that one or other of the wealthy individuals who owned shares in the company at that time would have stepped in to assist. He argued that the principal shareholder, Mr Attallah, would not have risked *The Oldie* going under at a time when he was seeking to sell a major part of his shareholding. But this appears to me to amount to little more than speculation. Mr Browne was unable to obtain from Mr Ingrams in cross-examination answers which provided any confirmation for the speculation.

53. In my judgment, in the circumstances which I have outlined, the parlous financial position of *The Oldie* would have had a major impact on the terms of settlement which could have been achieved in the first action. I derive support for that conclusion from such evidence as is available (the claimants having claimed legal professional privilege) of the position adopted by Mr Barton Taylor in the negotiations for the settlement of the second action. It is clear that, notwithstanding his scepticism about the 2000 draft accounts, he accepted that the settlement would recognise the magazine's financial circumstances.

Conclusion as to the likely settlement figure in the first action

54. I now have to decide in the light of the various factors set out above what, as a matter of probability and without the benefit of hindsight, were the terms upon which settlement of the first action would have been agreed if the claim form had been served in time As I have already pointed out, this is an artificial and hypothetical exercise But it has to be carried out.

55. I have already indicated that there are several discounting factors with which I will deal

shortly. Before doing so, I make clear that I reject the contention of Mr Nicklin that one such factor is the apology for the June 1999 article which Mr Barton Taylor was able to achieve in settlement of the claim in respect of the December 1999 article. The reason that I do so is that I accept that one of the terms which would have been achieved in settlement of the first action would have been the making of a statement in open court which would have included an unqualified apology to the claimants for the June 1999 publication.

56. In arriving at a conclusion as to the likely terms of settlement, it appears to me to be important to bear in mind that the action was being funded by the Police Federation. The importance of that funding is that the solicitors acting for the claimants did not have to look to their clients for payment of their costs. I also think it likely, because of the involvement of the Federation, that the settlement which would have been concluded between RJW and Davenport Lyons would have been global, that is, a sum inclusive of both costs and damages would have been agreed.

57. What is that global figure likely to have been? I must take into account the various circumstances to which I have adverted, that is, the objective facts of the case as well, more importantly, as the subjective factors (the problems posed by the possibility of a plea of justification; the advice as to the value of the claim and above all the financial position of Oldie Publications Limited). Doing the best I can my conclusion is that the global settlement figure, inclusive of both damages and costs, would have been £30,000.

58. How would the sum of £30,000 been apportioned between damages and costs? The evidence suggests that, by the time when a settlement was likely to have been arrived at, the costs incurred by RJW would have been in the region of £20,000. It follows that the amount left over for the payment of damages to the claimants would have been £5,000 each. This falls short of the compensation which the officers were entitled to expect for the June 1999 libel. I have every sympathy with their inevitable disappointment. But in my judgment the modest sum left over for damages reflects the reality of the position which would have obtained at the time of settlement.

The shortfall of £2,560

59. I referred earlier to the fact that, as a result of the settlement of the second action, there was a shortfall of £2,560, being the difference between the global settlement figure of £10,000 and the costs incurred by Gouldens, which were calculated by Mr Barton Taylor as having amounted to £12,560. By an amendment to the Particulars of Claim the claimants have sought to add the difference to their claim for damages from RJW.

60. Mr Nicklin submitted that it is not open to the claimants to seek recovery of the shortfall because, according to the evidence of Mr Barton Taylor, it was his routine practice not to bill the Police Federation for unrecovered costs. I reject that submission. If the client had agreed to pay the full amount of the costs incurred, as was the position here, the fact that the solicitor would regularly waive payment of the shortfall, is in my judgment no barrier to that solicitor seeking to recover payment from a third party. No breach of the

indemnity principle is involved.

61. I also accept the submission of Mr Browne that, but for the negligence of RJW, it would have been unnecessary for the second action to have been brought So at first blush all the costs incurred in prosecuting the second action on behalf of the claimants should be recoverable from RJW in the present action

62. But Mr Nicklin suggests that, if RJW carried out work in connection with the first action, which had the effect of reducing the amount of the work which had later to be carried out by Gouldens in connection with the second action, then the amount of damages recoverable under this head should be reduced *pro tanto.* This submission is not reconcilable with the acceptance on behalf of RJW that no charge should be made for the work done in connection with the first action. It was unclear to me on what legal basis the right of set-off was asserted. Apart from that, it appears to me that, if Gouldens had had to carry out all the work which RJW carried out and which was of value in connection with the second action, then the unrecovered costs in the second action would have been greater than £2,560.

63. In principle therefore the unrecovered costs are recoverable. But this part of the case is bedevilled by problems of ascertaining what is the true amount of the unrecovered costs of the second action. It emerged in the cross-examination of Mr Barton Taylor that the figure of £2,560 included items which were not referable to the second action or at least not solely so referable. Mr Nicklin was hampered in pursuing this issue by the fact that, on grounds of legal professional privilege, the attendance notes of Gouldens were so heavily redacted that it was impossible to tell whether the work in question related to the second action or to the present negligence action or to a combination of both. In my view the inference to be drawn is that there were a significant number of further items which were not referable to the second action.

64. In this unsatisfactory state of affairs, and bearing in mind that the burden of proof lies on the claimants, I have concluded that the amount which is recoverable by the claimants from RJW under this head is £2,000.

Outcome

65. The total recovery is therefore £12,000. It may be that £2,000 of that sum should not, strictly speaking, go to the claimants. But in all the circumstances it may be thought appropriate that the claimants should receive that modest further sum as well.