PARTIES:	Ian Lindsay Tuxworth and Australian Broadcasting Corporation and Anor
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	INTERLOCUTORY APPLICATION exercising Territory jurisdiction
FILE NO:	641/87
DELIVERED:	Delivered at Darwin 25 March 1993
HEARING DATE:	Heard at Darwin 4 March 1993
REASONS OF:	Master Lefevre

CATCHWORDS:

Practice & Procedure - interrogatories - defamation - application for order for plaintiff to answer questions relating to whether plaintiff saw publications of similar defamations - whether relating to question in issue or to fact relevant to question in issue - whether permissible as directed to mitigation or quantification of claim for damages - whether otherwise allowable - guidelines and principles considered - r30.07(1) Supreme Court Rules.

Cases applied:
Dingle v Associated Newspapers Ltd (1964) A.C.371
Jensen v Clark (1982) 2 NZLR 268

Cases considered:
Causeley v John Fairfax & Sons Ltd (unreported, Hunt J, 6/9/91)
Chappell v Mirror Newspapers Ltd (unreported, Hunt J, 24/7/81)
Herald & Weekly Times Ltd v Hawke (1984) VR 587

REPRESENTATION:

Counsel:

Plaintiff:	Mr Bradley
Defendant:	Mr Berner

Solicitors:

Plaintiff:	Ward Keller
Defendant:	Cridlands

Judgment category classification: CAT A
Court Computer Code:
Judgment ID Number: lef93005
Number of Pages: 18

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

641 of 1987

BETWEEN:
IAN LINDSAY TUXWORTH
Plaintiff
and
AUSTRALIAN BROADCASTING CORPORATION
Defendant
and
ROBERT LINDSAY COLLINS
Third Party

MASTER LEFEVRE: REASONS FOR DECISION

(Delivered 25 March 1993)

On 20 November 1992, the plaintiff swore answers to interrogatories administered by the defendant. In a letter to the plaintiff's solicitors of 9 December 1992, the defendant's solicitors said of these answers:

> **"In our opinion, answers 5, 13, 14, 15, 16 and 17 are unsatisfactory.".**

The defendant did not however pursue the matter of interrogatory 5. In a reply to the defendant's solicitors dated 17 December 1992, the plaintiff's solicitors said:

> **"2. Interrogatories 13 to 17**
>
> **"These interrogatories refer to two press releases, a radio transcript and newspaper article, and enquire whether the Plaintiff saw those documents. We fail to see what possible relevance it has to the case against your client whether our client saw (or heard with respect to annexure "C") these documents prior to the defamation complained of. There also seems to be no relevance to the Defendant's case as pleaded."**

On 18 January 1993, the defendant's solicitors answered as follows:

> **"(ii) Answers to Interrogatories 13 - 17: In our view, the relevance of the annexures goes to the issue of damages and in particular the plaintiff's claims to have been brought into hatred ridicule and contempt, that he has been greatly injured in his character and that he has suffered considerable distress.**
>
> **"All the annexures relate to somewhat similar comments made by the third party at or before the matters alleged in the Statement of Claim and pertain to the same general issue.**
>
> **"The question arises as to why the plaintiff apparently made no complaint in respect of any of the annexures.**
>
> **"Clearly, these interrogatories are relevant to the general head of 'hurt to feelings' and accordingly the issue of damages.**

The plaintiff's solicitors, having maintained their client's right not to answer the interrogatories, the defendant filed, on 24 February 1993, an application seeking further and better answers.

The application, which came before me on 4 March 1993, is supported by the affidavit of Gordon Munro Berner sworn 23 February 1993 to which he annexes **inter alia** the letters to which I have referred. After hearing the submissions of counsel for the plaintiff and for the defendant, I reserved my decision.

I believe that I should at this stage set out in full the relevant interrogatories.

> **"Q13. Look at the document annexed hereto and marked "A". Did the Plaintiff see the said document on or about 21 March 1986 and when?**
>
> **"Q14. Look at the document annexed hereto and marked "B". Did the Plaintiff see the said document on or about 8 May, 1986 and when?**

"Q15. Look at the document annexed hereto and marked "C". Did the Plaintiff hear the said radio broadcast on or about 24 April 1986 and when?

"Q16. If the answer to the preceding interrogatory is "No", was the Plaintiff informed of the substance of the said radio broadcast on or about 24 April 1986 and by whom?

"Q17. Look at the document marked "D". Did the Plaintiff see the said newspaper report on or about 20 March 1986 and when"

To each of these questions the plaintiff has replied that he objects to answer on the grounds that the interrogatory was irrelevant and vexatious.

These terms were formerly used as grounds for refusal to answer interrogatories. Under the present rules (r30.07(1)), the grounds are more clearly made out. Those grounds, five in number, are more precisely stated and are separate and distinct. Rule 30.07(1) reads:

"A party interrogated shall answer each interrogatory except to the extent that it may be objected to -

(a) because it does not relate to a question between him and the interrogating party;
(b) because it is unclear or vague or is too wide;
(c) because it is oppressive;
(d) because it requires him to express an opinion which he is not qualified to give;
(e) on the grounds privilege (sic); or
(f) on any other ground on which objection may be taken."

It seems to me that objection to answer on the ground of irrelevance comes under sub-paragraph (a) above. The ground stated in that sub-paragraph reflects the need for an interrogatory to relate to a question between the parties to the proceeding.

Document "A" referred to in the interrogatories is a copy of a press release dated 21 March 1986 issued by the then Leader of the Opposition in Northern Territory Parliament; document "B" is a copy of another press release dated 8 May 1986 from the same source; document "C" purports to be a copy of a transcript of a radio "talkback" programme of 8DN Radio on 24 April 1986 and document "D" is a photocopy of an article purportedly appearing in the "Northern Territory News" on 20 March 1986.

The defendant's counsel drew my attention to what he says is the similarity in what is said in parts of those documents and the alleged defamatory statement set out in par3(i) of the statement of claim. He also drew my attention to the plaintiff's claim for damages in par7 of the statement of claim.

The relevant part of par3(1) of the statement of claim reads -

> **"... on or about the 8th May 1986 the Defendant published of and concerning the Plaintiff:**
>
> > **'It is clear that Mr. Tuxworth has got as much dirt on his colleagues as they've got on him. Unfortunately what we've got in the Northern Territory now is we've got a government with a self confessed thief as its head supported by a pack of liars and hypocrites. Unfortunately, we've got a government that's declared itself publicly corrupt.'**
>
> **PARTICULARS OF IDENTIFICATION**
>
> **The Plaintiff was identified by name in the same matter."**

Par7 of the statement of claim reads:

> **"By means of the publication of the matter complained of, the Plaintiff has been brought into hated, ridicule and contempt, and has been held up to public scandal, and has been greatly injured in his character, reputation, office and employment, and has suffered considerable distress, and has suffered and will continue to suffer considerable loss and damage."**

The particulars of special damages are set out as follows:

> **"At all times material to the said defamations, the Plaintiff held the office of Chief Minister of the Northern Territory of Australia and was entitled thereby to all the salary allowances, benefits and perquisites appertaining to such office. By reason of the defamations complained of the Plaintiff lost the position of Chief Minister and thereby lost the said salary allowances, benefits and perquisites."**

Then follows particulars of what the statement of claim calls aggravated and punitive damage.

In short, the plaintiff's submission is that, as damages are in issue in this proceeding, in dispute, **inter alia**, are:

(a) the plaintiff's claim to have suffered considerable distress; and
(b) his claim to have suffered damage flowing from his loss of office as Chief Minister.

These aspects of the issue of damages, the defendant has collectively called the plaintiff's **"hurt to feelings"** or **"hurt feelings"**, with both expressions having the same meaning. I shall adopt that meaning in using either expression.

In support of the plaintiff's application, the plaintiff's counsel cited a number of authorities. The first is **Erwin v Southdown Press (1976) VR 353,**

which he cited as authority for the principle that a party is entitled to interrogate on the question of damages. There can be no dispute that that statement is correct. The right to interrogate on damages, however, is not the issue in the application. The question is whether the interrogatories as framed are relevant. The plaintiff's contention is that an answer either in the affirmative or in the negative takes the defendant nowhere. I shall however return to that later.

The defendant's counsel next referred to **Herald & Weekly Times Ltd v Hawke (1984) VR 587.** At pp590-591, the Full Court said:

> **"It appears correct, as was submitted, that the plaintiff could lead evidence at the trial from persons who did in fact believe that the libel of the plaintiff was true. This would go to show 'the gravity of the damage done to the plaintiff's reputation': Readers Digest Services Pty. Ltd. v. Lamb (1981) 56 A.L.J.R. 214, at p.216, per Brennan J.; 38 A.L.R. 417; Herald & Weekly Times Ltd. v. McGregor (1928) 41 C.L.R. 254, at p.262.**
>
> **"It may also be correct that, in order to bolster a claim for hurt feelings as part of the claim for general damages, the plaintiff could give evidence of the hurt to his feelings caused by persons informing him that they believed that the libel was true. In McCarey v. Associated Newspapers Ltd. [1965] 2 Q.B. 86, at p.108; [1964] 3 All E.R. 947, at p.959, it seems that Diplock L.J. assumed that evidence could be 'led that the attitude shown to the plaintiff by any persons with whom he came into social or professional contact was any different as a result of the libel.'**
>
> **"It may be that interrogatories proper in form could be directed to a plaintiff on these subject matters. There is, no doubt, force in the consideration that interrogatories, the answers to which would enable a defendant to assess the case and to be in a position to make a payment into court and so to bring the litigation to a speedy conclusion, are to be encouraged: Sutherland v. British Dominions Land Settlement Corpn. Ltd. [1926] Ch. 746, at**

p. 753; Frost v. Brook (1875) 23 W.R. 260; Bray on Discovery, 1885, p. 468."

"Nor do we accept that, merely because a defendant's interrogatories seek to ascertain what case the interrogating party has to meet or to limit the generality of pleadings, they are not proper interrogatories. Interrogatories may properly be directed to these very ends: Saunders v. Jones (1877) 7 Ch. D. 435."

The defendant emphasises his Honour's remarks on the subject of **"hurt feelings"** and argues that here it is open to the plaintiff to lead evidence that his hurt feelings were exacerbated by what people had said to him after they had read the publications or heard the broadcast. For that reason, goes the argument, the defendant is entitled to ask the questions he has.

In further support of this contention, counsel referred to another passage in **Herald and Weekly Times** (p592) where the Full Court said:

"However, when the issue of general damages in a libel action is considered, the plaintiff may seek to lead evidence and to establish facts which will, if accepted, increase those damages. Although the existence of those facts is supportive only of the plaintiff's case, they may be facts as to the existence of which the defendant is entitled to interrogate.

"If the material to be led by the plaintiff in support of his case for general damages could be calculated to take the defendant by surprise, there is strong support for the view that this is one of the very situations which interrogatories are designed to avoid: Saunders v. Jones (1877) 7 Ch.D. 435, at pp.444-5 and 449.

"In any case where general damages are at large, but are to be awarded only following a consideration of recognized heads of damage, the very purpose of interrogatories may dictate that the defendant be permitted to interrogate as to facts which would go to increase damages, as well as to facts which would go in

mitigation of damages: see Erwin v. Southdown Press [1976] V.R. 353, at p.357; Daily Telegraph Newspaper v. Berry (1879) 5 V.L.R. (L) 343, at p.352."

Counsel addressed me on this question, as follows:

"... in a nutshell, then, ... the purposes of interrogatories are to allow the defendant to assess and appreciate the plaintiff's case. Now, in terms of the actual interrogatories asked this morning, I say that the interrogatories are relevant to a fact in issue. The fact in issue is the plaintiff's hurt feelings. It would be perfectly permissible in a court to put to the plaintiff whether or not he'd seen these annexures and that's all we're asking at this stage. We're not asking whether or not he - what his reaction was to them, whether or not he sued in respect of them, but the submission would be that if he did see those annexures and other evidence that came before the court that pertained to that particular point, it might go significantly to the quantum of damages insofar as you could perhaps show that the plaintiff was not as outraged or not as distressed as he maintains in the writ."

The next authority cited is an unreported decision of Hunt J in the New South Wales Supreme Court in Chappell v Mirror Newspapers Ltd. In the judgment, (published on 24 July 1981), his Honour says:

"The next basis upon which the defendant seeks to support these interrogatories is in mitigation of damages, in order to show that, as the findings were already in the public domain, the plaintiff cannot complain of hurt feelings by reason of their public repetition. Once again, no relevant particulars have been pleaded as to the circumstances in which the publication was made as required by Rule 18(2)(a). (The particular already pleaded is restricted to reliance upon those circumstances which the plaintiff may prove: see Reiter v. Publishing & Broadcasting Ltd., 29.5.1981, unreported). The defendant, however, seeks to amend those particulars to add references to these events as relevant circumstances in mitigation of damages. Some dicta in Judd v. Sun Newspapers Ltd. (1930) 30 S.R. 294 tend to

> **suggest that matters which go to disprove hurt to the plaintiff's feelings are not admissible in an action for defamation, but the Full Court in that case appears to have proceeded upon the basis that a plaintiff in such an action does not claim a solatium for injury to his feelings: see page 313. That is no longer the law: see Rigby v. Mirror Newspapers Ltd. (1963) 64 S.R. 34; McCarey v. Associated Newspapers Ltd. (No. 2) (1965) 2 Q.B. 86, at 104-105, 107-109, 113; followed in Uren v. John Fairfax & Sons Ltd. (1965) 66 S.R. 223, at 244-246; ...**
>
> **"I grant leave to the defendant to amend its particulars as sought and, upon the basis that such particulars are amended, hold that the interrogatories in question relate to the issue of mitigation of damages. I stress, however, that the final decision as to the admissibility of those interrogatories in evidence must be made by the trial Judge, not by me."**

The argument is again that the questions put could be relevant to the plaintiff's allegation of hurt feelings. If that is so, then, insofar as this goes to the question of damages, it is, says the defendant, a proper matter for interrogatories.

Another argument is that the answers could shorten the trial, for example, if they were in the negative. I am not convinced that this is so. In any event, that reason alone does not make the interrogatories admissible. They must relate to a question in issue.

The interrogatories, if answered, will, it is submitted, also enable the defendant to assess whether an offer of compromise should be made and the quantum of that offer. Accordingly, the defendant submits, the interrogatories are proper and should be answered.

Finally, counsel for the defendant referred to another unreported decision of Hunt J, published on 6 September 1991 in **Causley v John Fairfax & Sons Ltd.** This case does not deal with the question of interrogatories, but with the issue of admissibility of evidence. Counsel relies however on the following observations of his Honour:

> **"All of these matters raised issues other than the plaintiff's credit. They are raised in the case by the plaintiff as consequences flowing from the publication of the matters complained of. They relate to reactions to that publication by persons other than the plaintiff. His evidence is merely that the reactions occurred. He asks the jury to infer that they were caused by the publication of the matters complained of. Evidence of an alternative cause for those reactions does not amount to an attack upon the plaintiff's credit as a witness."**

> **"In my opinion, those of the newspaper articles tendered by the defendants which are capable of showing the plaintiff in a bad light - to the extent that they may have been the cause (or a cause) of the reaction by others of which he has given evidence - are admissible, if only to provide evidence of an alternative causation for the continuing reduction in the number of interviews with the plaintiff in his electoral office. It was argued on behalf of the plaintiff that, as they do not impute corruption on his part and do not convey any imputation similar to that for which he contends in relation to the matters complained of, they are irrelevant. In my view, although some of them are capable of conveying such imputations, it is not necessary that they do so. It is sufficient that they are capable of providing some evidence of an alternative cause for the reaction by the plaintiff's constituents of which he has given evidence."**

His Honour's views, say the defendant's counsel, support the defendant's argument in that they indicate that courts will allow other matters as evidence to show that the consequences asserted by a plaintiff as flowing from the defamation may have

arisen from other causes. For that reason, he argues, I should, in my discretion, allow the interrogatories sought to be administered here. I shall return to that matter later.

The plaintiff's submission, as I have said, is that the questions are irrelevant and vexatious and that the answers sought from the interrogatories lead the defendant nowhere.

The plaintiff's counsel points out that in **Causley's** case (supra), the defendants had tendered a number of newspaper articles on the issue of causation in relation to evidence given by the plaintiff. Hunt J said:

> **"It was conceded on behalf of the defendants (correctly) that they would not be entitled to suggest to the jury that these newspaper articles could be used in any way in mitigation of damages. In particular, it was conceded that the defendants would not be entitled to suggest to the jury that the plaintiff would in any event (and quite apart from the publication of the matters complained of) have had his reputation destroyed by those articles. They were tendered upon the issue of causation, and it was conceded that they could be used only upon that issue."** (emphasis added).

His Honour's remarks in **Causley** on the question of mitigation are, says the plaintiff's counsel, in effect a restatement of what was said in **Dingle v Associated Newspapers Ltd (1964) A.C. 371.** What was said there was approved by Pritchard J in a passage in his judgment in **Jensen v Clark (1982) 2 NZLR 268** which sets out the principle clearly. At pp278-279, his Honour said:

> **"It was submitted by Mr O'Sullivan that when the 1976 publication was made, the Professor's reputation had already been tarnished by earlier publications - in Nexus and elsewhere. Although general evidence of bad reputation is admissible in mitigation of damages, Mr O'Sullivan's argument is really a submission of**

the same kind as was considered by the House of Lords in Dingle v Associated Newspapers Ltd [1964] AC 371 when it was held that the publication of the same libel by other persons on other occasions is irrelevant in mitigation of general damages. In the course of his speech, Lord Denning said at pp410-411:

> 'At one time in our law it was permissible for a defendant to prove, in mitigation of damages, that, previously to his publication, there were reports and rumours in circulation to the same effect as the libel. That has long since ceased to be allowed, and for a good reason. Our English law does not love tale-bearers. If the report or rumour was true, let him justify it. If it was not true, he ought not to have repeated it or aided its circulation. He must answer for it just as if he had started it himself. Newspapers in particular must not speak ill about people for the spice it gives their readers. It does a newspaper no good to say that other newspapers did the same. They must answer for the effect of their own circulation without reference to the damage done by others. They may not even refer to other newspapers in mitigation of damages. Such has been the law ever since 1829 ... and it cannot be called in question now.'

"To the same effect, Lord Morris of Borth-y-Gest said:

> 'A publisher of defamatory matters acts at his peril .... it cannot avail a newspaper to urge in mitigation of damages that other newspapers have published similar or comparable defamatory matter .... the defendant could not seek to mitigate damages, by a plea that he had only published what others had also published.

"And at pp418-419:

> 'It ought not, however, to avail a defendant to prove that a plaintiff has been under a temporary cloud of suspicion when the success of the plaintiff in libel proceedings demonstrates that there need never have been any such suspicion. ... The position may have been, as it was expressed at the trial, that he was "a man

with a good reputation under a cloud". His very purpose in his litigation was to disperse the cloud. He succeeded in doing so. It would be singular if the damages awarded to him were measured on the basis that the cloud was still there.' "

The defendant suggested, without pressing it strongly, that **Dingle's** case (supra) is **"somewhat at odds"** with two of the authorities he has cited. The cases to which the defendant refers are Hunt J's decision in **Chappell's** case (supra) and the other the **obiter dicta** in **Herald & Weekly Times** (supra). It seems to me that the approach of Pritchard J in **Jensen v Clark** (supra) in applying **Dingle's** case is the logical direction in which I should go and I therefore accept what is said in **Dingle's** case as binding on me. What is said there is more than just a persuasive guideline; it lays down the principle to be followed. If the earlier publications are inadmissible as evidence in mitigation of damages, interrogatories directed to that same end are likewise inadmissible as being irrelevant.

If the publications to which the interrogatories refer cannot be used to mitigate a defendant's liability for damages, then for what purpose can they be used? The defendant's answer is that it seeks the answers **"in quantification and not in mitigation"** of damages. By **"quantification"** I take the defendant's counsel to mean the overall assessment of the plaintiff's case on this issue so as to put the defendant in a position to evaluate the plaintiff's claim and enable it to consider the appropriate course it should take.

The scope and function of interrogatories, in the modern context, has moved away from adherence to

what has been termed **"the formalism of subject categorisation."** The move is towards **"flexible reliance on relevance"**: see Simpson, Bailey & Evans, "Discovery and Interrogatories" p80. The learned authors cite there the following passage from the judgment of Helsham J in **Fisher v City Hotels Pty Ltd (1970) 92 W.N. (N.S.W.) 322 at 326:**

> **"Questions fairly seeking, in truth and substance, information so as to enable appreciation of the opponent's case, or so as to throw up and confine the real issues and matters that must be proved by evidence, should be allowed, whether or not they can be said to fall into one of the now familiar categories, categories which seem to be in danger of becoming accepted more as principles than as useful guidelines for the use of this adjunct of litigation. In expressing this view I believe that it will not really alter the present approach of practitioners to the manner of administering interrogatories, and further that it is merely expressing approval of the practice that has been current for some time and which should be encouraged to continue. Reasons of substance for not answering interrogatories will always be upheld by the court; one such reason will not arise merely because a question asked does not appear to fall into one of the familiar categories."**

The Court's power to order a party to answer interrogatories is discretionary (r30.09) and that discretion is wide and unfettered, but must be exercised judicially. The sole principle governing interrogatories is that the questions asked be **"relevant to the existence or non-existence of the facts directly in issue" : Marriott v Chamberlain (1886) 17 QBD 154** per Esher MR at p163; see also r30.07(1)(a). In **Sharpe v Smail (1975) 49 ALJR 130**, Gibbs J (as he then was) said **"... interrogatories may be directed not only to matters directly in issue but also to facts which are relevant to some question in issue".**

It is on this basis that I believe the defendant

argues it is entitled to pose the questions and to get the answers it seeks. It is not, says the defendant, for any purpose other than to quantify and evaluate the plaintiff's claim for damages on the issue of hurt feelings. It does not matter, it submits, whether the answers are in the affirmative or in the negative; either way they serve a purpose relevant to the issue of damages.

As I understand the defendant's submission on the point of quantification, it is that, whether the answers to the interrogatories were to be in the positive or in the negative, it would enable it to assess and react to the case it has to meet on the question of damages. A positive answer, for example, would allow the defendant to question the plaintiff's claim of hurt feelings consequent on the publication the subject matter of this proceeding. What the questions are directed at is why no complaints were made by the plaintiff as to what was contained in those earlier publications. But, as I have already held, this line of interrogation is not permissible. Also, the fact that the questions may have been put so as to lay the foundation for later questions does not, for that reason alone, make them admissible.

The defendant's counsel submits that a party is free to determine the extent to which he will interrogate. As long, he says, as the interrogatories relate to a material fact, a party is free to ask as much or as little as he sees fit. That may be so, but the crux of admissibility is that the interrogatories be directed to material facts.

The plaintiff says that the interrogatories ask only whether the plaintiff himself sighted the

publications; they do not ask whether others saw them. Inasmuch, argues the plaintiff, as the question is directed in this way, it cannot have any relevance to the claims for hurt feelings. With this submission I agree.

I do not accept that interrogatories that do no more than seek to know whether the plaintiff saw or did not see the publications, or heard or did not hear the broadcast or was told or not told about it are interrogatories directed to subject matters of the kind referred to in **Herald & Weekly Times** (supra) (see passage [previously cited] at p590-591 of the report). Further, what the Full Court thought, in **Herald & Weekly Times**, could be allowed were **"interrogatories proper in form".** I do not consider that, framed as they are, the interrogatories put by the plaintiff in this case are in a form proper to make them allowable as interrogations going to the question of the plaintiff's hurt to feelings. Whatever might be got from obliging the plaintiff to provide answers, I cannot see how such answers can produce anything to enable the defendant to quantify the claim against it.

The plaintiff further submits that the right to interrogate in the way that the defendant has does not arise from the pleadings even on the issue of damages. The answers sought to be elicited, whether yea or nay, cannot advance the defendant's case, nor can it be said that they can have the effect of destroying or tending to destroy the plaintiff's case. Such answers as may be elicited do not go **"anywhere far enough to do any real benefit to one or damage to the other".** In any event, argues the plaintiff, the questions seek to introduce matters which cannot be made the subject of evidence and therefore of interrogataries.

The plaintiff argues that the defendant's defence has done no more than generally traverse the issue of damages. To that extent only are damages in issue, he says. The defendant has not pleaded, or provided particulars of, specific facts in mitigation of the damages claimed for hurt feelings. Accordingly, the defendant must seek leave to amend its defence to include such facts and only if such leave is granted can it seek to interrogate on the subject: see passage cited in **Chappell's** case (supra). With this I agree, but, of course, whether the interrogatories would be made admissible thereby would depend on the new facts pleaded.

The defendant's argument depends, it seems to me, on the admissibility in evidence of the publications to which reference is made in the interrogatories. Undoubtedly the material will arise in the third party proceeding. In the primary action, that between plaintiff and defendant, they are clearly inadmissible as evidence in mitigation of the defendant's damages. They may however be allowed on the question of an alternative cause for the hurt feelings. No facts however have been pleaded in the defence so as to raise causation as an issue. The argument therefore that this is a matter which arises from the pleadings cannot be substantiated. In any event, I find it hard to accept that the fact that the plaintiff saw or did not see, heard or did not hear or was told or not told of, the publications is germane to the question of causation even were it pleaded. Of course, the admissibility of interrogatories directed to causation would depend on how the pleading and interrogatories were framed.

On the principle in **Dingle's** case, evidence of the earlier defamations is inadmissible, if that evidence is directed to mitigating the plaintiff's

damages. Thus, as I have said, interrogatories directed to that purpose cannot be allowed. Inasmuch as the interrogatories can be said to be directed at showing that, because of the earlier publications, the plaintiff was not as outraged as he maintains, then they fall within the principle. So too, if they were directed at showing that the plaintiff's loss of reputation was already in the **"public domain"** because of the earlier publications. Inasmuch as the argument is that the interrogatories are to be directed towards **"quantifying"** the plaintiff's claim to damages for hurt feelings, it cannot serve any purpose for the defendant to know no more than whether the plaintiff saw, or did not see, the publications, heard, or did not hear, the broadcast, or was or was not told of it. In the form in which the interrogatories are framed, they do not relate to any question between the parties. They are irrelevant and the plaintiff cannot be compelled to answer them. The application is refused with costs.