

IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT
IN THE HIGH COURT OF JUSTICE

NEVHCV2021/0061

BETWEEN:	ANSELM CAINES	Claimant
	v	
	JANETTE NISBETT-MELONEY	Defendant

Appearances:

Mr. Perry Joseph for the Claimant
Mr. Patrice Nisbett for the Defendant

2023: December 8
2024: February 9

JUDGMENT

THOMPSON JR J:

[1] *"IAGO:
Good name in man and woman, dear my lord,
Is the immediate jewel of their souls.
Who steals my purse steals trash. 'Tis something, nothing;
'Twas mine, 'tis his, and has been slave to
thousands.
But he that filches from me my good name
Robs me of that which not enriches him
And makes me poor indeed.¹"*

[2] Mr. Caines, the Claimant says that Mrs. Nisbett, Meloney, the Defendant has 'filched' from him his good name by publishing a post on Facebook that is defamatory of him.

[3] There is no dispute about the date or time or content of the Facebook post which was alleged to be defamatory of the Claimant. On May 15th, 2020, an unknown person styled as 'Simi Yah' posted the offending post. The Defendant accepts that on May 18th, 2020, she shared or reposted the offending words to the following persons. Henena Francis, Andrew Advizor Prentice, Sherina Chapman, Polius

¹ Othello, Scene III, Act III

Matthew, Halstead Byron, Shaquana Williams, Anesta Nisbett, Iona Dore, Daniel Da Costa, Sistah C Griffin, David Griffin, Edwin Meloney and Hazel Brandy-Williams.

- [4] There was some debate about how long the post subsisted for, but the Defendant does not dispute sharing or reposting the offending post to the foregoing persons in the jurisdiction. Publication within the meaning of the Court of Appeal's analysis in DOMHCV2011/0017 – Lennox Linton and others v Keiron Pinard Byrne was thus made out. In this court's view, the question of how long the post subsisted for is critical on the question of damages (if the post is found to be defamatory) but there is no dispute that the Defendant republished the alleged offending post.
- [5] This court has carefully considered the matter and does not propose to set out the post in this judgment since this judgment is likely to attract considerable public attention thus inadvertently leading to a republication of what was characterized in the case of Simon Blake and Colin Seymour v Laurence Fox and Nicola Thorp [2024] EWHC 146 as 'inherently grave allegations'. Allegations of that nature, whether proved or unproven should not be lightly repeated and should be properly ventilated in their appropriate forums. Even if there is some common law exemption for inadvertent defamation via a judgment, analogous to that found in the United Kingdom, reciting the details of allegations for the purpose of saying that they were made is unlikely to be helpful to anyone.
- [6] In her defence, the Defendant asserted that the post is substantially true and thus relied on the defence of justification.
- [7] In fairness to the Defendant, the defence of fair comment was also pleaded but no real argument was advanced to this Court on how fair comment was a viable defence. In SLUHCVP2015/0003 – Deldrige Flavius v Dr. Ernest Hilaire, the Court of Appeal confirmed that in order to succeed on a defence of fair comment, a defendant is required to show that: (i) the comment is on a matter of public interest; (ii) the comment, though it can consist of or include inferences of fact, must be recognized as comment, distinct from an imputation of fact – to this end, it is generally necessary that the words complained of should explicitly indicate, at least in general terms, the factual basis for the comment; (iii) the comment must be based on facts which are true or protected by privilege; and (iv) the comment must be one which an honest person could have made on the proved facts.
- [8] The inner workings of the Nevis Debating Club at the Sixth Form College and/or Charlestown Secondary School, though a subject of some local interest, could not rise to the requisite threshold for matters of public interest.
- [9] Additionally, the Facebook post did not qualify as commentary and the Defendant liked and tagged the post of Simi Yah as opposed to offering any commentary herself on the said post. This Court does not have to resolve this point but had the Defendant offered some fair comment within the meaning of the authority cited above then it may have been arguable that fair comment applied.
- [10] Moreover, at common law, the defence of fair comment does not allow the Defendant to argue that he or she was simply regurgitating the opinions of others without any knowledge of or reference to underlying facts. See Lowe v Associated Newspapers [2007] QB 580 and Galloway v Telegraph Group Ltd [2006] EWCA Civ 17.

[11] In any event, if justification is established there is no need to consider whether fair comment applies. See Dakhyl v Labouchere [1908] 2 KB 325.

[12] In those circumstances, the Defendant's case was an all or nothing position. Either the Defendant would establish that the post was substantially true or not. The Facebook post when broken down alleged that the Defendant's son was unjustly removed from the Debating Society team in 2018 as retaliation for speaking up about a fellow student who had complained about the Claimant's inappropriate behavior towards her. The Facebook post also suggested that the Claimant was indulging in sexually inappropriate conversations and/or behaviors with female students.

[13] On any analysis both foregoing imputations in the Facebook post are prima facie defamatory, more so the latter than the former. All the same, the combined effect of the entire post was defamatory of the Claimant, unless of course the Defendant established that the post was substantially true in fact. To his credit, counsel for the Defendant did not seek to argue that the post was not at first blush defamatory (it was difficult to see how he could say otherwise) but sought to argue that the post was true in substance.

[14] For reasons that do not require extensive treatment in this judgment, the Defendant failed to file her witness statements in time and pursuant to the order of Master Gill dated November 21, 2022 (as she then was) was not allowed to remedy this failure. The absence of any witness statement from the defendant or her proposed witnesses meant that the task of establishing justification became more difficult since there was no counter narrative from the Defendant or any witnesses she may have been minded to call.

[15] Therefore, the Defendant's only tool for making good her case was in cross examination of the Claimant. Mr. Nisbett's cross examination of the Claimant did not bear fruit. Put another way, Mr. Nisbett's task was to demonstrate a clear factual matrix, established by the evidence that supported his client's case. This Court can do no better than to quote Collins Rice J in Simon Blake and Colin Seymour v Laurence Fox and Nicola Thorp [2024] EWHC 146 that:

"The drawing of inferences is not a process of speculative guesswork. It is a process whereby a court concludes that the evidence adduced enables a further inference of fact to be drawn"

[16] Mr. Nisbett's cross examination of the Claimant occupied 10 typed pages of evidence, at 1 ½ line spacing with each answer occupying a separate line. The first page confirmed the Claimant's familiarity with the Defendant and the fact that he was a staff sponsor of the Literary and Debating Society at the Nevis Sixth Form College in 2018.

[17] On page 2 of his cross examination of the Claimant, Mr. Nisbett got Mr. Caines to confirm the nature of his duties as staff sponsor. Mr. Caines confirmed to Mr. Nisbett that as staff sponsor, he did not have any unilateral selection powers and that selection of the team was by consensus.

[18] It would have been extremely helpful for Mr. Nisbett to have either called evidence from other selectors of the Debating Society or applied for witness summonses for such persons on this issue. He was unable to do the former and did not appear to address his mind to the latter. This meant that there was no real challenge to Mr. Caines' evidence that selection to the team was not an imperial decision taken by him.

- [19] On page 3, Mr. Nisbett got Mr. Caines to admit that he (Caines) might have told the Defendant that her son had made a complaint against him, and Mr. Caines admitted that the complaint might have been made to Ms. Jones but more on that later.
- [20] In cross-examination, Mr. Caines admitted that the complaint alleged that he had inappropriately touched a young lady. Curiously, on page 4, Mr. Nisbett suggested that the Defendant had threatened the Claimant about this complaint, and it was put to Mr. Caines that the Defendant said that if the Defendant's son were not selected to the team, she would escalate the complaint and the allegations about the Claimant. This line of questioning seemed to suggest discreditable conduct, to put it mildly, on the part of the Defendant but could not prove the circumstances of the non-selection of the Defendant's son.
- [21] On page 4, Mr. Caines admitted saying to the Defendant that her son had potential as a debater. On page 5 Mr. Caines confirmed that he left Nevis in March 2019 and denied being spoken to by the relevant minister, Premier and Director of the Nevis Sixth Form College about the allegations of inappropriate behavior.
- [22] It is a trite point of evidence that if a suggestion is put to a witness and the suggestion is rejected it is the rejection that is the evidence of the witness. Therefore, as matters stood without any attempt by Mr. Nisbett to contradict Mr. Caines with the evidence of any of the foregoing persons, Mr. Caines' evidence was that those conversations never happened.
- [23] If, for instance, it were proved that those conversations had taken place, then the Defendant's case would have been on a different footing. If it had been proved that the foregoing officials had in fact spoken with the Claimant about these matters, then that would have been powerful evidence that at the very least there was something worthy of investigation vis a vis the Claimant.
- [24] This Court cannot indulge in a process of speculative guesswork. Inferences are proved by the linking of various strands to make a rope. If as in this case there are no strands, much less threads, there can be no rope.
- [25] On pages 6-7 of his cross examination, Mr. Nisbett got Mr. Caines to expound on the word 'ordeal' in paragraph 72 of his witness statement. Mr. Caines confirmed that the ordeal he was undergoing referred to the allegations of inappropriate behavior against him. It is difficult to understand why the Claimant's cross examination did not include pointed and detailed questions of the allegations and what exactly had the Claimant been told about those allegations.
- [26] Any cross examination on the substance and/or specifics of the allegedly inappropriate WhatsApp conversations was perfunctory and was underscored by the fact that the actual WhatsApp conversations were not expressly put to the Claimant in cross examination. This was surprising since the Jamaican Court of Appeal had established in *R v Peter Blake (1977) 16 JLR 61* that it was 'a rule of evidence at common law of some antiquity' that any document could be put into the hands of a witness in cross examination so that if the document or its contents are accepted by the witness it would become evidence against him. In this case it would have been difficult, if not impossible, for the Claimant to reject the WhatsApp conversations since it was alleged that he was on the other side of those conversations. The fact that counsel for the Defendant did not adopt this approach meant that the task of establishing justification was difficult, if not impossible.

[27]The Claimant also called a witness, Ms. Quando Jones. In short, it was her unchallenged evidence that the Defendant's son wasn't selected because of behavioral issues and because there were better debaters than the Defendant's son.

[28]At paragraph 10 of her witness statement she outlined, 6 separate detailed instances of behavioral issues on the part of the Defendant's son. In her view, those matters played a critical role in his non-selection. Additionally, in paragraphs 6-10 of her witness statement she outlined the selection process and confirmed that the Claimant, as staff sponsor, would not have authority to rescind his selection. Finally, Ms. Jones confirmed that the primary reason why the Defendant's son was not selected was because there were several other debaters who possessed better elocution and presentation skills than the Defendant's son.

[29]None of these matters were challenged in Mr. Nisbett's cross examination of Ms. Jones. The fact that these matters were not challenged meant that the defendant was taken to have accepted Ms. Jones's evidence of the reasons why the Defendant's son was not selected.

[30]During her cross-examination by Mr. Nisbett, Ms. Jones gave evidence that the Defendant's son did not complain to her about the Claimant and one of the girls in the Debating Society. This evidence was clearly at odds with the Claimant's evidence that the Claimant's son might have made a complaint to Ms. Jones. This material inconsistency could not suffice to turn the tide of the case in the Defendant's favour.

[31]It was Ms. Jones' evidence that she overheard a conversation where the allegation against the Defendant was being discussed by other students. The Claimant's evidence was that it was possible that a complaint had been made to Ms. Jones, but this singular inconsistency could not suffice to substantially prove the truth of Defendant's case. Grave allegations of this nature could not reasonably be established on a balance of probabilities simply because Ms. Jones and the Claimant appeared to be at variance on this minor issue of how and when any allegations of misconduct came to their attention.

[32]All the same, this one inconsistency could not suffice to prove the Defendant's case for justification. As stated above, large parts of Ms. Jones's evidence in chief on the issue of the debating society were not challenged. Even without Ms. Jones's evidence, justification was difficult to establish. In passing, it is curious that Ms. Jones, as an educator, would overhear a student complain about alleged misconduct by a person who would have stood in loco parentis to students but not take any steps to report or fully investigate and determine the facts of the complaint, but any criticisms levied at Ms. Jones is ancillary to these proceedings.

[33]Even without the ability to call his client as a witness, it was arguable that counsel for the Defendant could have applied for witness summonses for the witnesses who were either not his client or from whom he had not obtained witness statements. The issue of whether a summons could have been granted in view of the orders of the Master and the issue of whether a summons would have circumvented these orders was an open question for the following reason.

[34]Rule 33.2 of the Civil Procedure Rules provides that a witness summons is a document issued by the court, whether on its own motion or at the request of a party requiring a witness to attend court

to give evidence. The Rules therefore contemplate that a court may of its own motion or at the instance of a party issue a summons for a party to give evidence. A court issuing a witness summons is thus required to consider the necessity of receiving that evidence. Put another way, what is the proposed witness likely to say and is that evidence relevant to the proceedings? There was no bar to the Defendant's counsel seeking a witness summons for other members of the Debating Society to be summoned for this court to receive their evidence on, for example the selection of the 2018 debating team.

[35] In the absence of such an application from counsel, a court's power to call witnesses of its own motion is carefully prescribed by the following common law principles. In **Coulson v Disborough [1894] 2 Q.B. 316** Lord Esher, Master of the Rolls stated that:

"If there be a person whom neither party to an action chooses to call as a witness and the judge thinks that the person is able to elucidate the truth, the judge, in my opinion is entitled to call him.....when a witness is called in this way by the judge, the counsel of neither party has a right to cross-examine him without the permission of the judge."

[36] 15 years later the Court of Appeal in **Re Enoch and Zaretsky [1910] 1 K.B. 327** clarified the reasoning of Lord Esher M.R. and were of the view that:

"I think therefore that the dictum refers only to cases where a judge has called a witness with the acquiescence of both parties and has done so in order to get over the difficulty that if either party calls a witness he is supposed to be responsible for his personal credibility...."

[37] In a Commonwealth Caribbean context, the Guyanese Court of Appeal in **Rambeharry v Ressouvenir Estates Ltd (1970) 18 WIR 5** and the Jamaican Court of Appeal in **Whitelock v Campbell (1970) 15 WIR 481** confirmed that a judge could only call a witness if both parties agree². Additionally, the evidence must demonstrate that there is a need for the testimony of that particular witness and that either both parties' consent or do not object to the judge calling the witness. Ultimately, a judge should not descend into the arena and simply call witnesses of his own motion unless it is necessary to do so, and the parties agree.

[38] The Claimant did not agree to such a course and as such this court could not hear from TP (a female member of the Debating Society with whom the disputed WhatsApp conversations had been had) and other students and adults who were involved in the Debating Society. There was thus no avenue for this court to hear from any of the foregoing persons to determine for itself the exact nature of the alleged inappropriate but unparticularized conduct of the Claimant.

[39] At the close of the trial on December 8th, 2023, this court ordered the Defendant to file any further submissions on or before December 15th, 2023³ with the Claimant at liberty to file any further

² In the context of a criminal appeal, the Australian High Court in *Whitehorn v R* [1985] LRC (Crim) 249 was of the view that the role of the judge was to 'hold the balance between the contending parties without himself taking part in their disputations'.

³ The usual order for the Claimant to file with the Defendant to reply was reversed since the Defendant failed to file any skeleton arguments in advance of the trial despite an order for him to do so.

submissions on or before December 22, 2023. The Defendant declined to file any further submissions while the Claimant filed further submissions on December 22, 2023.

[40] Therefore, for all the foregoing reasons, this court is satisfied that the said Facebook post is defamatory of the Claimant and orders that judgment is entered for the Claimant with damages to be assessed. The provisions of Part 16 of the Civil Procedure Rules apply to the assessment of damages hearing which will be fixed for case management on Friday March 1st, 2024, via Zoom. It follows that the Claimant is entitled to his prescribed costs of these proceedings.

**Patrick Thompson Jr
Resident High Court Judge**

BY THE COURT

REGISTRAR