

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

Civil Division

COMMONWEALTH OF DOMINICA

Claim No. DOMHCV2019/0280

BETWEEN:

DALE DANGLEBEN

Claimant

-and-

[1] **ANTHONY ASTAPHAN**

[2] **DARYL TITRE**

[3] **NATURE ISLAND COMMUNICATIONS
CORPORATION (KAIRI FM)**

Defendants

Before Master Alvin S. Pariagsingh

Appearances: Cara Shillingford – Marsh and Wayne Marsh for the Claimant; and
Peter I. Foster QC leading Lennox Lawrence and Jodie Luke instructed by
Rénee T. St. Rose for the First Defendant.

2022: May 25;
June 27;
July 25

DECISION

**First Defendant's application to strike out Statement of Claim/
to determine if the words are capable of having the defamatory
meaning pleaded and to strike out paragraphs of the Statement of Claim.**

[1] **PARIAGSINGH, M:** - Before the Court is the Defendant's application to strike out the Claimant's claim on the basis that the words complained of do not refer to the Claimant and are not capable of bearing the defamatory meaning attributed to them¹. In the alternative, the Claimant seeks an order that paragraphs 8 and 10 of the Statement of Claim be struck out. The First Defendant contends that paragraph 5 fails to give

¹ Filed on December 13, 2021 and amended on May 24, 2022.

particulars, facts or matters which give rise to a cause of action in innuendo. It is further contended that paragraph 10 inadequately pleads particulars of malice. The First Defendant also seeks the costs of this application.

THE CLAIMANT'S CASE:

[2] The Claimant is a Dominican doctor who lives in the United States of America. The First Defendant is a member of the inner bar of this jurisdiction. At the time of the alleged defamatory statements, the First Defendant was a caller on a radio talk show "The Heng". The words complained of by the Claimant are as follows:

Anthony Astaphan: This gang of evil men, this is a cabal of destructive pirates of dangerous men. Men in 19 years have done nothing for the people of this country and in the four and a half years in Government did everything to enrich themselves and in opposition Eddison James negotiated 3 million dollars to put in his party's pocket and his pocket for the election. How much of that went to the people of Marigot? In 2009 FCL was paid 1.5 million dollars no doubt by the same people that Chris Kalin knows of or Chris Kalin himself. How much of that went to the people of this country? Lennox Linton has right now that doctor in the States, what's his name? help me out Daryl?

Daryl Titre - Dangleben or what is his name

Anthony Astaphan - Dangleben and others boss man, I find out today has three GoFundMe accounts for Maris relief supplies, for Maria relief. How much of that money has come to Dominica 18, 19 months almost two years after hurricane Maria? Was the Government informed that there's a GoFundMe for relief for the country? Over a hundred probably close to two hundred thousand US Dollars, sitting in an account since Maria, without a cent being sent to a single constituency held by the United Workers Party for them to assist a single person. Since Maria not only have they done nothing, they have not even gone to the Government for assistance for people in this constituency."

THE DEFENCE:

- [3] In this Re-Amended Defence filed on December 22, 2020 the First Defendant admits that he attended the interview pleaded. He denies the words pleaded by the Claimant. He disputes the words in the transcript provided by the Claimant and in any event says the words pleaded when taken in the context of the entire interview are not defamatory.
- [4] The First Defendant contends that the statements which he made on the interview were his honest belief on matters of public interest. He contends that the mention of the Claimant was a small fleeting section of a longer interview which concerned the local political opposition in Dominica.

THE REPLY:

- [5] The Claimant filed a reply to the amended defence. In it the Claimant maintained that the words were defamatory and did refer to him.
- [6] The issues which arise for determination are as follows:
1. What were the statements made?
 2. Whether the words complained of are capable of having the defamatory meanings attributed to them in the Statement of Claim?
 3. Did they refer to the Claimant or can they be understood to refer to the Claimant?
 4. Is the pleading of innuendo sufficient or deficient?
 5. Is the pleading of malice sufficient or deficient?

Issue 1- What were the statements made?

[7] There is a dispute as to the actual words said. The First Defendant relies on a transcript attached to his amended defence². The Claimant relies on the words pleaded in his Statement of Case. I asked the parties for the audio recording of the interview to be provided so that I could listen to the interview to determine which version of the words used is correct³. I made this request as the transcript of the interview by both parties are slightly different.

[8] Having listened to the audio recording provided⁴, I find that the words pleaded by the Claimant in his Statement of Claim accurately reflects what was said by the First Defendant in the interview.

[9] The transcript relied on and annexed to the First Defendant's re-amended defence from the last paragraph on page 5 to the first paragraph on page 6 do not accurately reflect what was said by the First Defendant. There are typographical errors and words are missing.

[10] For the purpose of resolving whether the words complained of are capable of being defamatory, I have relied on the actual recording of the interview.

[11] For the purposes of this application, the alleged defamatory words that are considered are those set out in paragraph 2 above⁵:

² Annex 2 to the Re-Amended Defence of the First Defendant filed on December 22, 2020.

³ At a hearing on July 20, 2022 at the request of the Court.

⁴ Relevant part of the recording is between 42.09 to 44.11

⁵ These words are taken from the actual audio recording provided not from the transcript of either party, although they are the same as pleaded by the Claimant in his Statement of Claim.

Issue 2 - Whether the words complained of are capable of having the defamatory meanings attributed to them in the statement of claim?

[12] The scope of the determination of this issue at this stage is circumscribed. The Court is only concerned with answering the legal question of whether the words complained of are capable of having the defamatory meanings pleaded. The Court is not concerned with finding the meaning of the words.

[13] **Part 69 Rule 69.4 of the Civil Proceedings Rules 2000 as amended (CPR)**. This rule provides that:

‘69.4 (1) At any time after the service of the statement of claim, either party may apply to a judge in chambers for an order determining whether or not the words complained of are capable of bearing a meaning or meanings attributed to them in the statement of case.

(2) If it appears to the judge on the hearing of an application under paragraph (1) that none of the words complained of are capable of bearing the meaning or meanings attributed to them in the statement of case, the judge may dismiss the claim or make such other order or give such judgment in the proceedings as may be just.’

[14] The recommended approach to dealing with this question was set out in **Skuse v Granada Television Limited (1996) EMLR 278** at 285 as applied by Alleyne J in **Gonsalves v Gibson & Ors, SVGHCV2006/0405 and 0406**. The Court has to consider the following in answering the legal question:

1. The court should give to the material complained of the natural and ordinary meaning which it would have conveyed to the ordinary reasonable viewer.
2. The hypothetical reasonable reader [or viewer] is not naive but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer, and may indulge in a certain amount

of loose thinking. But he must be treated as being a man who is not averse to scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.

3. While limiting its attention to what the defendant has actually said or written, the court should be cautious of an over-elaborate analysis of the material in issue.
4. The court should not be too literal in its approach.
5. A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally.
6. In determining the meaning of the material complained of the court is not limited by the meanings which either the plaintiff or the defendant seeks to place upon the words.
7. The defamatory meaning pleaded by a plaintiff is to be treated as the most injurious meaning the words are capable of bearing and the questions a judge sitting alone has to ask himself are, first, is the natural and ordinary meaning of the words that which is alleged in the statement of claim and, secondly, if not, what (if any) less injurious defamatory meaning do they bear?
8. The court is not at this stage concerned with the merits or demerits of any possible defence.

[15] The First Defendant submitted the authorities of **Jones v Skelton**⁶, **David Carty v Hubert Hughes**⁷, **Phillip J. Pierre v Guy Ellis et al**⁸, **Gaston Browne v Issac Newton**⁹ and **Lewis v Daily Telegraph Ltd**¹⁰ to support his submission that having regard to the entirety of the broadcast, the context in which the statements about the Claimant were made are not capable of bearing the meanings ascribed to them and the approach Court has to take.

⁶ [1963] 3 ALL ER 952

⁷ AXAHCV2015/0040

⁸ SLUHCV2011/0667

⁹ ANUHCVP2020/0028

¹⁰ [1964] AC 234

[16] The Claimant accepts in his written submissions that context is important.¹¹ He further places reliance on the decision of Alleyne J in **Dr. Ralph Gonsalves v Kelvin Gibson et al**¹² in which the learned judge referred to the decision of Lanns M in **Edison James v Claudius Letang**¹³, **Claudia Henry v Albert Thomas**¹⁴ and **Vaughn Lewis v Kenny Anthony**¹⁵. The Claimant submits that the Court ought to consider; “what is the sense in which any ordinary reasonable man would understand the words of communication so as to expose the plaintiff to hatred, or contempt or ridicule... it is not enough to say that by some person or another the words might be understood in a defamatory sense.”

[17] In my view the answer to the legal question of whether the words complained of are capable of bearing the defamatory meanings attributed to them is an objective exercise. It is what the ordinary reasonable man would think hearing the words. Would that ordinary reasonable man who is not prone to scandal or unduly suspicious lower his estimation of the person who is being referenced.

[18] No doubt the entire interview of the First Defendant was not targeted at the Claimant. The entire interview was in the nature of a comparison of the way the Leader of the Opposition of the Bahamas operated after a natural disaster as opposed to how the Leader of the Opposition of the Dominica operated after hurricane Maria. The tone and tenure of the interview is very scathing of the Leader of the Opposition. In the very short reference to the Claimant, he is not singled out. He is referred to as part of a ‘gang of evil men’. At minimum one meaning which is not strained is that the Claimant was part of this gang of men.

[19] Further, the direct reference to the Claimant by his surname, his profession and his domicile, being one of the persons who ‘Linton has right now that doctor in the States’

¹¹ Paragraph 11 of submissions of the Claimant filed on March 14, 2022.

¹² SVGHCV2002/0405

¹³ DOMHCV2008/0321

¹⁴ DOMHCV2006/0009

¹⁵ Civil Appeal No 2 of 2006

can be seen as connecting the Claimant to the gang of men associated with the Leader of the Opposition.

[20] The words referenced by the Claimant refers to: a gang of evil men, a cabal of destructive pirates of dangerous men, men who did nothing for the country but did everything for themselves, men who put money in their own pockets, men who did nothing to help the people of their country, men who are associated with Lennox Linton, men who set up GoFundMe accounts for Maria relief and collected money and men who kept the money collected for at least 18 to 19 months without anyone benefiting from the money collected. These all carry negative connotations of a person.

[21] Having regard to the above, I find that the words used in the context of the entire interview as well as taken separately by itself, are all capable on an objective standard, of being defamatory and the meanings attributed to them in the Statement of Claim are within the range of meanings that the words are capable of having.

[22] This ground is accordingly refused.

Issue 3- Did they refer to the Claimant or can they be understood to refer to the Claimant?

[23] The First Defendant raised in his application, as one of the grounds for striking out that the words did not refer to the Claimant. This is an issue of fact to be determined at trial. This is not an issue for this stage.

[24] It is part of the First Defendant's defence that the words did not refer to the Claimant. That is a disputed fact that cannot be resolved at this stage.

[25] I do not regard reference to the Claimant to be an appropriate ground for striking out. That issue simply cannot be determined summarily in his case as it is not plainly obvious. This ground is accordingly refused.

Issue 4- Is the pleading of innuendo sufficient or deficient (paragraph 8)?

[26] The First Defendant seeks an order that paragraph 8 of the Statement of Claim be struck out. Paragraph 8 of the Statement of Claim states as follows:

- '8. The above words by innuendo and/ or directly meant and were intended and understood to mean the following:
- (a) That the Claimant was part of a gang of evil men.
 - (b) That the claimant was part of a cabal of destructive pirates and dangerous men.
 - (c) That the Claimant dishonestly established three Go Fund Me accounts purporting to collect donations for Hurricane Maria relief.
 - (d) That the Claimant never used the funds raised in the Go Fund Me accounts for the benefit of the Commonwealth of Dominica.
 - (e) That the Claimant used the Go Fund Me accounts to deceive donors.
 - (f) That the Claimant misappropriated and embezzled monies which were collected in the Go Fund Me accounts.
 - (g) That the Claimant is a criminal guilty of fraud and obtaining monies by deception contrary to the common law and the Theft Act Chapter 10:33 of the Laws of the Commonwealth of Dominica.
 - (h) That the Claimant has almost USD \$200,000.00 (Two Hundred Thousand United States Dollars) in his possession or access to an account with h the said monies, which were donated by persons to Go Fund Me accounts for Hurricane Maria relief to Dominica and that the Claimant has not sent one cent to the Commonwealth of Dominica or to any constituency held by the United Workers Party in the Commonwealth of Dominica.

[27] Thom JA in **Agnes Danzie et al V Cecil Anthony SLUHCVAP2015/0009** at paragraph 13 stated the Court's approach to applications to strike out. It is stated:

“It is a well-established principle that the court’s power to strike out a statement of case should only be used sparingly (*Real Time Systems Limited v Renraw Investments Limited and Others* [2014] UKPC 6). Also, in *Salfray Hussain v Birmingham City Council and Others* the English Court of Appeal, in considering the exercise of discretion to grant relief from sanctions where judgment was entered in default, stated: ‘it must be kept in mind that discretionary powers are not to be exercised in order to punish a party for incompetence—they must be exercised in order to further the overriding objective’. In exercising his discretion, the learned judge was required to consider what was the appropriate response having regard to all of the circumstances, including whether there were other alternatives available that would be just in the circumstances.”

[28] The Court will not exercise the nuclear option of striking out unless it is plainly obvious that there is no means to rectify the breach.

[29] The First Defendant submits that innuendo and natural ordinary meaning must be pleaded separately (in different paragraphs) and particulars of each must be given. Reliance is placed on the authorities of ***Slim v Daily Telegraph Limited***¹⁶, ***Deans Jones v James Rose***¹⁷ and ***Gatley and Libel and Slander at paragraph 3.17***.

[30] The Claimant has relied on the authorities of ***Elwardo Lynch v Ralph Gonzalves***¹⁸ and ***Vaughn Lewis v Kenny Anthony***¹⁹ in support of his submission that the Claimant is relying on both innuendo and the ordinary meaning. The Claimant further submits that it is common practice to set up pleadings in the alternative in this matter and it has never led to a striking out of both the ordinary and innuendo pleaded meanings.

[31] The Claimant submits that it is open to the Court to strike out the words “innuendo and/or” from paragraph 8 or to permit an amendment. In this case, there is no direct reference to the Claimant by his full name. The references to the Claimant are pleaded to be to his surname, his profession and his place of abode. This is specially pleaded in

¹⁶ [1968] 2 QB 157

¹⁷ ANUHCv2009/0221

¹⁸ Civil Appeal No. 18 of 2005

¹⁹ Civil appeal No. 2 of 2006

paragraph 7 of the Statement of Claim under the heading “Particulars of Reference to the Claimant”.

[32] In my view, if the Claimant has not pleaded any extrinsic facts or materials being relied on to establish a meaning, then that puts an end to the alternative case in innuendo. The Claimant is bound by his pleadings. **Gatley on Libel and Slander 12th Edition- at page 1001** states:

‘26.24 Borderline cases. There may be cases in which the claimant is not certain whether he should rely on the natural and ordinary meaning of the words complained of or on a true or legal innuendo. For example, it may not always be easy to decide whether an extrinsic fact relied on is a matter of special knowledge, or whether it is just general knowledge in the light of which the ordinary, though indirect, meaning of the words has to be ascertained.(Difficulty will only usually arise where there is doubt as to whether the facts relied on are matters of general knowledge. If the facts relied on are a matter of general knowledge, an innuendo will not be required: *O’Brien v Wilson & Horton* [1971] N.Z.L.R. 386: “general knowledge is not an extrinsic fact for the purpose of [this rule] but is matter not requiring to be proved, in the light of which the jury can interpret the publication”. Where a claimant relies upon extrinsic facts alternatively as being within the general knowledge of the community and as supporting an innuendo, he will not be ordered to supply particulars of the persons having knowledge of those facts unless it is obvious that the first alternative must fail: *Hughes v Mirror Newspapers* (1985) 3 N.S.W.L.R. 504. On the meaning of “general knowledge”, see Bean J. in *Fox v Boulter* [2013] EWHC 1435 (QB) at [16]. In such cases, the best course is to plead in the alternative. *Lewis v Daily Telegraph* [1964] A.C. 234 at 281, per Lord Devlin: “I do not think that this should present any difficulty in practice. The pleader must ask himself whether he contemplates that evidence will be called in support of the allegation: if he does, it is a legal innuendo, and if he does not, it is not. If he is in doubt, he can plead in two paragraphs; and then if at the trial his opponent agrees or the judge rules that it is a matter of general knowledge, the legal innuendo can be dropped.” This approach was approved of by the Court of Appeal of Hong Kong in *Oriental Press Group Ltd v Next Magazine Publishing Ltd* (No.2) [2000] H.K.L.R.D. L15.’

[33] A failure to plead particulars of innuendo does not always result in striking out. It is open to the Court to accept the ordinary natural meaning of the words without reference at all to any innuendo meaning. The ordinary and natural meaning of the words is not confined to the literal meaning. Lord Morris in **Jones v Skelton [1963] 1 W.L.R 1363, 1370-1371** stated:

"The ordinary and natural meaning of words may be either the literal meaning or it may be implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words ...

The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not filtered by any strict legal rules of construction would draw from the words." (emphasis added)

[34] In my view, if the Claimant attempts to lead evidence at the trial in respect of which no material facts were pleaded, the First Defendant's objection can still be properly advanced. To strike out the plea of innuendo at this stage is to assume that the Claimant is relying on extrinsic facts or material not already referenced in his pleading when he has not said so. As it is the allegation has been answered by the First Defendant.

[35] I am therefore of the view that the objection to the manner of pleading of innuendo in the alternative ought to properly be taken if any evidence outside of what is within the parameters of the pleadings is sought to be introduced.

[36] To strike out the pleading at this stage at this point is premature. This relief is accordingly refused.

Issue 5- Is the pleading of malice (paragraph 10) sufficient or deficient?

[37] The First Defendant's objection to the pleading of malice is not that malice was not particularized but that the particulars of malice pleaded are insufficient to give rise to what is necessary to prove malice. The First Defendant outlined in his submissions why he submits that particulars of malice pleaded are insufficient. Reference is made to **Halsbury's Laws of England, 4th Edition Vol 28 p 76, Dorset Flint & Stone Blocks**

Ltd v Moir ²⁰, **Gatley on Libel and Slander** at paragraph 30.5 and **Blackwell v News Group Newspapers Ltd & Ors** [2007] EWHC 3098 (QB).

[38] The Claimant on the other hand submits that the pleading of malice is sufficient. The Claimant submits that at the stage of striking out it is not the function of the Court to determine the strength of the averment of malice. The Claimant relies on the authorities of **Deldridge Flavius v Dr. Ernest Hillaire** ²¹, **Hill v Church of Scientology of Toronto** ²² and **Claudia Henry –v- Albert Thomas**²³.

[39] In my view, like the issue of innuendo, the Claimant is bound by his pleaded case. It is not the function of the Court to order the Claimant to set up his case in a particular way. It is also not the function of the Court to direct the Claimant to amend his case on malice as the First Defendant contends that the particulars pleaded do not amount to malice.

[40] Again, if the Claimant seeks to introduce evidence outside the parameters of his pleadings, objection can be taken to that evidence being introduced. At this stage, to strike out the allegation of malice because it is allegedly insufficiently pleaded, according to the First Defendant, would not be proper. This objection can be properly taken at the end of the trial.

[41] This relief is accordingly refused.

COSTS:

[42] The general rule is costs follow the event. This is of course to the discretion of the Court. On this application, I have decided that the fairest approach is to adopt an issue by issue approach. On the issue of the actual meaning of the words, there shall be no order as

²⁰ [2004] All ER 441

²¹ SLUHCVP2015/0003

²² CanL1159 (SCC) [1995]

²³ DOMHCV2006/0009

to costs. The audio was provided and Court listened to it and resolved the discrepancy between the Claimant's version and the First Defendant's version.

[43] On the second issue of whether the words are capable of having the defamatory meanings complained of, the First Defendant shall pay the Claimant's costs.

[44] On the third issue of reference to the Claimant, this issue is subsumed in the second issue. On the issue of striking out paragraphs 8 and 10 (fourth and fifth issues), each party will bear their own costs as the objections may not be unmeritorious but are premature at this stage.

[45] In summary there were four (4) main issues. The Claimant will recover his costs of one of these four main issues.

ORDER:

[46] It is hereby ordered that:

1. The Court holds that the words complained of by the Claimant are capable of bearing the defamatory meanings attributed to them in the Statement of Claim;
2. The First Defendant's application to strike out the Statement of Claim is refused;
3. The First Defendant's application to strike out paragraphs 8 and 10 of the Statement of Claim is refused;

4. The First Defendant shall pay the Claimant 25% of his costs of this application to be assessed by this Court in default of agreement within 28 days on the application of either party.

**Alvin Shiva Pariagsingh
High Court Master**

By the Court,

Registrar