

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO.: SLUHCV2011/0398

BETWEEN:

VICTORIA ALCIDE

Claimant

and

[1] HELEN TELEVISION SYSTEMS LIMITED

[2] RADIO ST. LUCIA COMPANY LIMITED

Defendants

APPEARANCES:

Peter Foster QC and Sahleem Charles for the Claimants
Dexter Theodore QC for the First-named Defendant

2017 : October 12;
October 25.

DECISION

[1] **SMITH J:** Victoria Alcide was the deputy director at the Bordelais Correctional Facility. Helen Television Systems (HTS) broadcast a vile story about her during its newscast on the evening of 23rd August 2010. It alleged that she was intimately involved with inmate, Ninja Dan, a popular soca artist in Saint Lucia, brought contraband items into the prison for him and encouraged the female prison officers to have sexual relations with the male inmates, a practice which had become widespread at Bordelais.

[2] Ms. Alcide's claim against HTS was not defended, judgment was entered and damages assessed. The Judge, Wilkinson J, felt that Ms. Alcide had "made out a

case for the maximum sums that can be awarded under the various heads of damages..." On the 26th October 2011, she awarded general damages of \$140,000.00, aggravated damages of \$50,000.00 and exemplary damages of \$50,000.00. On appeal against the assessment on 10th December 2012, the Court of Appeal remitted the matter to the High Court for HTS to be heard on the matter of damages. The second Defendant has since gone into liquidation so this assessment of damages was only in relation to the first Defendant.

[3] At the hearing of this assessment of damages on 12th October 2017, Mr. Foster QC naturally contended that the damages awarded by Wilkinson J were justified under the circumstances. Mr. Theodore QC argued that the damages should be reduced because (1) HTS honestly believed in the truth of the words; (2) HTS was not the original author; (3) HTS immediately issued a public apology; (4) HTS's conduct was not so outrageous or particularly appalling so as to justify exemplary damages; (5) having regard to awards in the region, this was not a case fit for either aggravated or exemplary damages.

[4] The Court accepts that **Keith Mitchell v Steve Fassihi**¹ and **Lunnun v Singh**² are good authority for the proposition that, where judgment in default of acknowledgment of service has been obtained which is conclusive on liability, it is still open to the HTS to adduce any evidence or argument not inconsistent with the judgment to lessen damages. Before turning to the respective arguments it is perhaps best to set out in full the letter that HTS received on the evening of 23rd August 2010 as well as the story it aired that same evening based on the letter.

[5] This was the letter that HTS received:

"To: All Media Houses
Ministry of Home Affairs, etc
Ministry of the Public Service

Date: 15th July 2010

¹ Court of Appeal of Grenada, Civil Appeal No. 22 of 2003

² [1999] CPLR 587.

During the last week of June, 2010, I heard Mr. Hilary Herman over the Media telling the nation how we Correctional Officers are involved in contraband. That is bringing of drugs and cell phone to prisoners. Let me congratulate Mr. Herman for letting the nation know about that, this is great, but my greatest astonishment is Mr. Herman is only reporting a portion of what is happening at Bordelais.

We correctional Officers are saying Mr. Herman is a hypocrite; he initiated a team called the SWAT team. This team is promised promotion by him, two of the members are promised grade 14. They cannot get the promotion because they don't have the academic qualification. What they are now promised is if they can prove that they can get contraband from prisoners the Public Service will accept the promotion. So now they are bringing the contraband, plant it in the Facility, later on conduct searches and retrieve it. That is corruption and Mr. HILARY HERMAN is aware and causing it. WE WANT HIM TO SAY THAT TO THE MEDIA.

He should also say the amount of face basins and toilets the SWAT team is damaging every time they conduct a search.

The other thing Mr. Herman should say is how his deputy is bringing things (biscuits, cigarettes, juice etc.) for inmate Jonathan St. Rose aka NINJA DAN. His Deputy is encouraging the female officers to get involved with the male inmates so the inmates will not harassed them. This is widespread at Bordelais. The female officer from Mon Repos and the seventh Day from Dennery reported this to us. According to them the Deputy is Ninja Dan's girlfriend and Mr. Herman is aware of it. WE WANT MR. HERMAN TO REPORT ALL THESE TO THE MEDIA.

He should further tell the media how his deputy and him are at logger heads because his deputy does not want neither the Accountant, Mr. Duplessis nor the Human Resource officer, Ms. Joseph to be promoted to the post of Asst. Director. This is causing a feud at Bordelais.

By the way what is the qualification of the Deputy, in what area does she have her degree. If others cannot be promoted with a degree, how did she get promoted without a six standard certificate?

Correctional officers"

[6] And this was the story aired by HTS on its evening news:

"The Bordelais letter

A letter alleged to have come from Correctional Officers has accused Prison Director Hilary Herman and his Bordelais staff of misconduct.

The Prison Welfare Association and the Director in question would not comment on the missive or its allegations.

It comes weeks after three inmates escaped from Bordelais and Herman maintained he has control of his facility.

The letter signed Correctional Officers is addressed to all media houses – the Ministries of Home Affairs and the Public Service.

Several allegations are contained within.

They are leveled against Prison Director Hilary Herman and members of his administration.

The Prison Director says he will not respond for fear it will give legitimacy to what he termed “nonsense.”

While commending Herman for statements against prison officers he alleges brings drugs, cell phones and other contraband to prisoners – the letter suggests Herman has not exposed enough to the media.

The letter suggests members of the SWAT team appointed by Herman are not qualified to be in that unit.

As a result they are destroying property to find drugs and contraband they have planted in an effort to be appointed to that team.

The letter also suggests there is an illicit relationship going on between the Deputy Director and soca star Jonathan “Ninja Dan” St Rose.

The writers suggest the Deputy is bringing “things [like] biscuits, cigarettes, juice” etc. to the inmate currently on remand for the Valentines day murder of Dwayne “Chubby” James.

Lastly – the letter states the Deputy is not qualified for her post and that she and Herman are at loggerheads over two employees vying for the position of Assistant Director.

Sources within the prison say the letter more than likely came from the PRO of the Prison Welfare Association.

We understand he was arrested and charged for bringing a cell phone to a Grenadian inmate.

A charge he was later cleared off leading to his subsequent reinstatement at Bordelais.

The gentleman in question has denied all knowledge of the letter and its contents.

The President of the Prison Welfare Association is currently out of state – his Deputy could not be reached for comment.

- [7] It would seem that the starting point in this assessment is to consider the gravity of the libel to determine a suitable compensatory award and then go on to consider and weigh up any aggravating and/or mitigating factors.

The Gravity of the Libel

- [8] In **John v MGM Ltd**,³ the English Court of Appeal stated that “in assessing damages for injury to reputation, the most important factor is the gravity of the libel; the more closely it touches the plaintiff’s personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be.”
- [9] It was said of Ms. Alcide that, while she was deputy director of the prison, she had intimate relations with an inmate, brought him contraband items and encouraged sexual misconduct between female prison officers and the inmates, which was widespread. This was not a minor incursion on her personality; it was a full-scale attack. It goes to the very foundation of her personality by ascribing immorality to her in her personal life and lack of professional integrity and ethics in her professional life. It accused her of grossly abusing her office and making the nation’s penitentiary into a den of iniquity. What remains of her reputation after that?
- [10] **John v MGM Ltd** also stated that, apart from the gravity of the libel, the extent of the publication was also relevant. It was not in dispute that HTS is a prominent television station in Saint Lucia, its news broadcast was widely available and on the internet and therefore was as extensive as any publication could be in Saint Lucia. As regards its impact, Ms. Alcide’s evidence was that she suffered public

³ [1996] 2 All ER 35.

opprobrium. She recounted a number of incidents where she was treated with scorn in public places and was even threatened to have the uniform stripped off of her (presumably for having disgraced it). She was obliged to stop wearing her uniform in public places to avoid being conspicuous. Her family, she said, was deeply affected. The defendant pointed out that she had not called a single witness to corroborate these incidents. That was so, but Ms. Alcide appeared to be a humble, honest, direct and straightforward witness who harbored no bitterness or resentment. The Court had not the slightest reason to doubt her credibility and honesty. The gravity of the allegation combined with the extent of its publication and the injury to Ms. Alcide register it at a high order of magnitude on the libel scale. What is the appropriate award to compensate her for the embarrassment, humiliation and damage to reputation?

Awards in the Region

- [11] While the O.E.C.S. is awash with assessments of damages for defamation of politicians, there appears to be a paucity of other kinds of cases. So, though this case falls outside the usual run of cases for which the Court is called upon to assess damages for libel, a comparative analysis must inevitably be done of awards in political cases.
- [12] In **Vaughan Lewis v Kenny Anthony**⁴, there was a pointed allegation of corruption against a Prime Minister: "*Kenny Anthony just take the money and put it behind his back and nobody knows where it is.*" In considering the award of damages, the trial judge took into account that an apology was tendered, the absence of malice, the defamatory remarks were heard by only about one hundred persons and the fact that Mr. Anthony went on to win the next general election. The Court of Appeal reduced the trial judge's award of \$60,000.00 to \$45,000.00. The notable difference with the case at bar is that HTS' broadcast was nationwide.

⁴ Saint Lucia Civil Appeal No. 2 of 2006.

- [13] In **David Bristol v Dr. Richardson St. Rose**⁵, the gravity of the libel was considered ("this doctor's profound arrogance and conceit ... has resulted in patient death and morbidity"), the extent and manner of the publication (a letter), the presence of malice and the defendant's refusal to apologize. The Court of Appeal awarded \$40,000.00. This was therefore a very serious attack on the professional integrity of the doctor but the letter was limited in circulation to President of the Saint Lucia Medical and Dental Association, the Minister of Health, the Permanent Secretary in the Ministry of Health, the Chief Medical Officer and the Administrator of the Saint Jude's Hospital.
- [14] **France and another v Simmonds**⁶ is a case from St. Christopher and Nevis in which the injured party was the Prime Minister who had been wrongly accused of corruption. The Privy Council affirmed the award of \$75,000.00 made by the trial judge and confirmed by the Court of Appeal.
- [15] In **Keith Mitchell v Steve Fassihi and Others**⁷, the defendants, in a "petition" to Her Majesty the Queen, had accused the prime minister of using his office to harbour criminals, assist in money laundering, of having his election campaign financed by criminals, of using public monies to set up private family businesses, of appointing known criminals as Honorary Consuls and Ambassadors at large and other defamatory matters. The Court of Appeal did not interfere with an award of \$100,000.00, which included aggravated damages.
- [16] In **Elwardo Lynch v Ralph Gonsalves**,⁸ a sitting prime minister was awarded \$140,000.00, which included general and aggravated damages, for the libel that he had allowed state funds to be used to purchase plane tickets for his mother and daughter to travel to Rome to see the Pope.

⁵ Saint Lucia Civil Appeal No. 16 of 2005.

⁶ [1990] 38 WIR 172.

⁷ Grenada, Civil Appeal No. 22 of 2003.

⁸ St. Vincent, HCVAP No. 2 of 2009.

[17] It appears that **Elwardo Lynch** (2011) might be among the highest award of damages in the region at \$140,000.00, although the sting of the libel in the **Keith Mitchell** case (2004) seemed more poisonous, for which \$100,000.00 was awarded. The award in each case included general and aggravated damages. In **Elwardo Lynch**, the defendants never publicly acknowledged that the slanderous statements were not true, defended the indefensible and attempted to explain their motive for publication in the litigation proceedings. In **Sutcliffe v Pressdram Ltd**⁹ the Court stated that "failure to make any or any sufficient apology and withdrawal; a repetition of the libel; conduct calculated to deter the plaintiff from proceeding" were factors that go to awarding aggravating damages. It would appear that, excluding the aggravating circumstances, the award for compensatory damages in **Elwardo Lynch** might have been somewhere in the region of \$100,000.00.

General Damages

[18] Ms. Alcide did not occupy the lofty position of prime minister, but that does not necessarily mean that the damage to her reputation and the public humiliation and distress she suffered was any less severe. The Court considers that the reality of West Indian society is that, historically, sharp and shocking accusations are regularly hurled at political figures; politicians have developed calloused political skins which, in a sense, better equip them to "*suffer the slings and arrows of outrageous fortune*" than an average citizen; and despite quite scurrilous allegations against them, many politicians go on to win elections time after time. Ms. Alcide was not a politician but a lady who served as the deputy director of corrections at Saint Lucia's penitentiary. The story on prime time news must have been as damaging to her reputation, if not more, as corruption leveled at a thick-skinned politician. Apart from being on the evening news, the story would have attracted more than the usual attention since it: (1) had the salacious element of female prison officers and male inmates; and, (2) featured the sensational element of Ms. Alcide being intimately involved with the popular soca artist, Ninja Dan.

⁹ [1990] 1 All ER 269

[19] Taking all of this into consideration, as well as the fact that an award of general damages should be reasonably adequate for the purpose of assuaging the injury to a claimant's reputation and to her hurt feelings, I consider that the appropriate award of compensatory damages should be \$100,000.00. Lord Hailsham's poignant observation in **Cassell & Co Ltd v Broome**¹⁰ echoes resoundingly: "*in case the libel driven underground emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge*". Even when prime ministers leave or are voted out of office, they are still treated with some deference and maintain residual heft of their former office. Retired and out of office, Ms. Alcide is denuded of the trappings of her former position. She must be able to point to her award of damages if, at any time in the future, the libel emerges from its lair.

Honest belief in the Truth of the Words

[20] HTS says the damages should be mitigated because it honestly believed, and had reasonable grounds for believing, the words to be true. Its reasonable grounds for believing the allegations to be true are that: (1) the contents of the letter were confirmed by two separate sources; (2) both of those sources were reliable because they were from Bordelais; (3) the letter on its face was copied to various government departments and ministries and appeared to be official; (4) the letter purported to have come from correctional officers at Bordelais; (5) Ms. Alcide did not return the persistent phone calls of HTS's news editor although the news editor left messages indicating what the calls were about.

[21] News Editor, Carmy Joseph, gave evidence on behalf of HTS. She said two persons from Bordelais confirmed the story, but there was not an atom of evidence to back up this up. She said they had given her accurate information in the past so she believed them. It certainly did not help that, as a witness, she did not inspire any confidence in the Court as to her honesty and credibility. Apart from being

¹⁰ 1972 AC 1027

truculent (which might be overlooked to some extent as an attribute of her journalistic instincts) she displayed an unhelpful, cavalier, devil-may-care attitude to the proceedings. I cannot see how simply saying that a story was confirmed by two reliable sources from Bordelais, without any further information or proof or detail that that was so, can be considered a reasonable ground.

[22] To assert that an unsigned letter, that was not on any letterhead and was addressed to "All media houses", "Ministry of Home Affairs, etc." and "Ministry of the Public Service", appeared to be official is quite simply a non-starter. The letter carried no signature but at the foot of it, where a signature normally appears, the words "correctional officers" appeared. This, as a ground for reasonable belief in the truth of the allegations contained in the letter, is similarly untenable.

[23] Ms. Joseph said that Ms. Alcide never returned any of the three calls she made to her on the evening of 23rd August 2010. Ms. Alcide stated that she never received any messages that Ms. Joseph had called for her. Mr. Hilary Herman, Director of Bordelais, testified that there was a main switchboard to which the calls would come. Ms. Alcide appeared to have truthfully answered questions put to her under cross-examination even when such answers would have appeared to be unfavourable to her. She did not attempt to prevaricate or hedge. On the other hand, Ms. Joseph's credibility disintegrated when she denied having spoken to Mr. Herman, stated that to her knowledge no one from HTS had spoken to him, but yet she admitted that she had written and broadcast the new story in which it was stated that "The Prison Director says he will not respond for fear it will give legitimacy to what he termed 'nonsense'". Either she had spoken to Mr. Herman and lied to the Court about it or she completely fabricated the story about what he said. Ms. Joseph was caught between Scylla and Charybdis, one of which shredded her credibility.

[24] The result is that the reasonable grounds cited by HTS for its honest belief in the truth of the letter, whether analyzed individually or assessed in the round, cannot

pass muster. The Court finds that there were no reasonable grounds to support an honest belief in the truth of the letter.

Not the Original Author

- [25] HTS points to the fact that it was not the original author of the letter to mitigate the damages. It appears to be settled law that it is somewhat less malicious to repeat than to originate a defamatory statement. **Gatley on Libel and Slander**¹¹ carries the following useful exposition of the learning where the defendant is not the original author:

“The fact that the defendant was not the original author of the libel or slander, but only published it by way of repetition, is no defence. It may, however, be regarded, albeit not invariably, as a less damaging act (and possibly less malicious) to repeat rather than to originate a defamatory statement... It is submitted, therefore, that unless it is apparent on the face of the libel that it was copied from, or was a repetition of, another publication, evidence of the source will not as a rule be admitted in mitigation of damages. Such evidence may become admissible to refute a claim for aggravated damages based on an allegation of express malice.”

- [26] From the transcript of the story read on the news, it is apparent on the face of the story that it was a repetition of another publication, namely, the letter purporting to come from correctional officers. However, what negates any mitigation that HTS could otherwise have derived from not being the original author is the fact that the news story could not conceivably be regarded as less damaging than the original publication. It was through HTS's broadcast that the story was given national prominence and attention since HTS was a leading news station. HTS's broadcast exacerbated the extent and impact of the publication. This cannot succeed as a ground for mitigating damages.

The Apology

- [27] On 25th August 2010, Chong & Co, then attorneys for Ms. Alcide, wrote to HTS as follows:

¹¹ 11th Edition

"We demand on my client's behalf an immediate apology in as generous terms as you can compose and in the same widely publicized manner as the offending articles were published. This may not deter us from filing suit herein, but may possibly contribute to the minimizing of any damages the Court may order."

- [28] That letter neither required that a draft of the apology be submitted for approval to the attorneys, nor did it state what the terms of apology should be. On the 26th August 2010, HTS broadcast the following apology and retraction on its evening newscast and repeated it the following day:

"Apology for Bordelais story

The management and staff of HTS and Helen FM extends its deepest and sincerest apologies to the Director and staff of Bordelais Correctional Facility regarding a story we carried during our evening newscast on Monday, August 23rd 2010.

We take the opportunity to retract the story in its entirety. The story about a letter signed by Correctional Officers made several allegations about the Prison Director and his staff – most especially about his Deputy Director. We have been unable to ascertain who wrote the missive – nor have we been able to corroborate any of the allegations contained within. These include a suggested "special relationship" between the Deputy Director and inmate and soca star Jonathan "Ninja Dan" St. Rose.

The letter alleged the Deputy Director was bringing contraband to the soca star and was at loggerheads with her boss over the promotion of administration staff. We repeat – none of the allegations have been proven and we are, there, retracting the story.

We reiterate our apology to anyone who was affected by us having carried the story and it is our hope that the said apology and retraction goes somehow in diminishing any injury suffered by those to whom reference was made."

- [29] Both counsel agreed that it is settled law that the making of a sufficient apology and withdrawal goes to mitigation of damages. But it is the apology that excited the most animated argument between counsel and consumed the most time in cross-examination. Mr. Foster invites the Court to conclude that the apology was not a genuine apology at all and in fact worsened the impact of the libel for Ms. Alcide. He contended that the apology was not genuine because: (1) it was extended "to

the Director and staff of the Bordelais... to anyone who was affected ..." and failed to address the main person affected, namely, Ms. Alcide; (2) it clearly stated "... none of the allegations have been proven and we are, therefore, retracting the story", which shows it was not a sincere apology and was only retracted because HTS could not prove the allegations; (3) the reference in the apology to "a suggested 'special relationship' between the deputy director and inmate and soca star Jonathan 'Ninja Dan' St. Rose" and to "contraband" only served to further sensationalize the story.

[30] Mr. Theodore responded that the apology was a true apology because it stated that it: (1) "extends its deepest and sincerest apologies to the Director and staff..."; (2) "We take the opportunity to retract the story in its entirety"; (3) "We reiterate our apology to anyone who was affected by us having carried the story and it is our hope that the said apology and retraction goes someway in diminishing any injury suffered by those to whom reference was made."

[31] How does the Court go about assessing whether there was a genuine and sufficient apology? The editors of **Gatley on Libel and Slander**¹² (citing Cockburn CJ in **Risk Allah Bey v Johnstone**¹³ and **Malcolm v Moore**¹⁴ write of an apology that: "...it should invariably include a full and frank withdrawal of the charges or suggestions conveyed." In **Cheese v Clark**,¹⁵ the judge described the apology as published without "*great enthusiasm or generosity of spirit*" and therefore had done little to mitigate the hurt to the Claimant's feelings. While in **Sheldon Adelson & Las Vegas Sands Corporation v Associated Newspapers**¹⁶, the Court stated that:

"The court expects an apology to be frank. It does not expect a claimant to accept an apology which is not full and frank, and which the defendant does not believe in. The court does not accept that a false apology gives vindication which is as good as that given by a true apology."

¹² 10th Edition, para 29.2.

¹³ (1868) 18 LT 620, 621

¹⁴ (1901) 4 F 23, 26)

¹⁵ [2003] EWHC 137 QBD.

¹⁶ [2008] EWHC 278 (QB).

[32] Guided by these principles, the Court finds that the apology was somewhat blunted by the unfortunate sentence: "We repeat – none of the allegations have been proven and we are, therefore, retracting the story." This certainly leaves an impression that the story was only retracted because it could not be proved. Mr. Theodore frankly stated to the Court that it would have been better had those words been left out. On the other hand, the letter from Ms. Alcide's first attorneys never required that they approve the terms of the apology; they only required that the apology be "generous". No complaint was made about the sufficiency or sincerity of the apology after it was broadcast. When Ms. Alcide's second set of attorneys wrote to HTS some five months later, they did not request an apology but demanded compensation in the sum of \$60,000.00. Under these circumstances, it is difficult for Ms. Alcide to complain now about the fullness and frankness of the apology. If that was where the matter rested, the Court could have regarded it as a sufficient apology. But that is not where the matter rested.

[33] At the assessment of damages, which is the stage where evidence and arguments to mitigate damages are put forward, the news editor Ms. Joseph stated plainly that she believed her sources but since they would not come forward the story had to be retracted. Her insistence that it was a wholehearted apology is inconsistent with her maintaining that she believed the truth of what her sources told her. If, even at the mitigation of damages stage, Ms. Joseph maintained belief in the truth of the story, it means the apology was pro forma.

[34] Her attitude was in stark contrast to that of Mr. Lindford Fevrier, the Managing Director of HTS, who appeared to be a deeply reflective and sincere witness. Under cross-examination he stated: "In hindsight it was irresponsible to publish this letter, but in the context of the country, what was going on at that time, concerns about security and Operation Restore Confidence, I can understand how it happened then, but I agree that it should not have gotten through our checks and balances." He had acted with dispatch in publishing the apology, which was given equal prominence as the offending story by being read in prime time news in the evening

and in the morning. The libel was never repeated. Mr. Fevrier's sincere, immediate steps to apologize, retract the libel and not repeat it, and to not attempt to defend the indefensible, therefore mitigated Ms. Joseph's defiant attitude. In the circumstances, Ms. Alcide is entitled to a modest award of aggravated damages.

Means of the Defendant

- [35] While the means of the defendant is a legitimate factor for the Court to take into consideration in deciding the award of damages, I am, regrettably, unable to consider it in this case since no evidence whatsoever was adduced as to the defendant's means. The Court would have welcomed this opportunity since the independent media fulfills a crucial role in democratic societies, particularly in small West Indian societies. Reliance on Article 989(D) of the **Civil Code of Saint Lucia** does not avail HTS since no separate claim for damages has been brought against another party, the second Defendant is in liquidation and Ms. Alcide has, to date, collected no damages.

Exemplary Damages

- [36] Two schools of thought or approaches have evolved in relation to the exercise of the jurisdiction to award exemplary damages. In its treatment of exemplary damages, the editors of **Gatley on Libel and Slander** state that **Rookes v Barnard**¹⁷ restricted exemplary damages to three situations: (1) where they are recognized by statute; (2) where the wrong involves oppressive, arbitrary or unconstitutional action by servants of the government; (3) where the act was done "with guilty knowledge, for the motive that the chances of economic advantage outweigh the chances of economic, or perhaps physical penalty". Clearly none of these three situations exist in the defamation at bar. This is the narrow approach.

- [37] However **Gatley** goes on to point out the broad approach:

"A majority of the Privy Council has gone so far as to accept that therefore, 'considered as a matter of legal principle, the arguments against restricting the jurisdiction to cases of intentional or consciously reckless conduct are

¹⁷ [1964] AC 1129

to be preferred'.... 'The publisher must have suspected that the words were untrue and have deliberately refrained from taking obvious steps which, if taken, would have turned suspicion into reality.' However mere negligence will not do... Conduct which shows a high degree of negligence is, of course, capable of being evidence of recklessness."

[38] The 2003 Privy Council decision of **A v Bottrill**,¹⁸ which both parties relied on, contains a useful analysis of the limits of the court's jurisdiction to award exemplary damages and the rationale of the jurisdiction, from which I distill the following principles:

- 1) Exceptionally, a defendant's conduct is so outrageous that an order for payment of compensation is not adequate and exemplary damages are awarded to demonstrate that such conduct is altogether unacceptable to society and to deter its being repeated.
- 2) The basic question is always whether the defendant's conduct satisfies the outrageous conduct criterion.
- 3) The test of outrageousness will usually involve intentional wrongdoing with, additionally, an element of flagrancy or cynicism or oppression or something, which makes it particularly appalling.
- 4) The absence of intentional wrongdoing and conscious recklessness will always point strongly away from the case being apt for an award of exemplary damages. But even where the case is not one of intentional wrongdoing or conscious recklessness, and the defendant's conduct satisfies the outrageous test and condemnation is called for, in principle the judge has the same power to award exemplary damages as in any other case satisfying this test.
- 5) Exemplary damages are associated primarily with intentional wrongdoing. But the ultimate touchstone is that of outrageous conduct by the defendant, which calls for punishment.

[39] Mr. Theodore urges the Court to adopt the restrictive approach of **Rookes v Barnard**, while Mr. Foster prefers that this Court follow the broad approach of Privy Council in **Bottrill**. As was pointed out in **Bottrill**, the rest of the common law world has adopted the broader approach while England still "toils under the chains of **Rookes v Barnard**."

[40] Was the conduct of HTS so consciously reckless as to call for punishment beyond an award of aggravated damages? The evidential picture that emerged is that HTS

¹⁸ [2002] UKPC 44

received an unsigned letter which contained particularly damaging allegations; it says it confirmed the story with two sources at Bordelais but those sources never materialized; the Director of Bordelais testified that he cautioned HTS's news editor that the story was not true; the news editor denied speaking to him, but she was not a credible witness; HTS ran the story that same evening without giving Ms. Alcide any real opportunity to respond to the allegations; HTS was unable to prove the allegations and never bothered to defend the claim. As a long-standing television news station it had to be conscious of the risk of publishing highly scandalous content. Yet it did so without securing the necessary proof. This makes its conduct consciously reckless as to the damage the story would have wreaked on Ms. Alcide. This kind of conduct, for a news agency no less, merits the description "outrageous" and "appalling" and is altogether unacceptable in small West Indian societies where reputations can be destroyed virtually overnight. It is a fit case for an award of exemplary damages in order to deter a repetition of this kind of conduct.

[41] I therefore make the following Orders;

- 1) General damages are awarded in the sum of \$100,000.00;
- 2) Aggravated damages are awarded in the sum of \$20,000.00;
- 3) Exemplary damages are awarded in the sum of \$15,000.00;
- 4) Interest is awarded at the rate of 6% from date of judgment until payment;
- 5) Prescribed costs are awarded in accordance with Part 65.5 of the CPR 2000.

JUSTICE GODFREY SMITH, SC
HIGH COURT JUDGE

BY THE COURT
REGISTRAR



