

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS**

CLAIM NO. BVIHCV2012/0038

BETWEEN:

HUBERT O'NEAL

Claimant

AND

**JULIAN WILLOCK D.B.A ADVANCED MARKETING AND PROFESSIONAL
SERVICES LTD.**

First Defendant

CARMELITA JAMIESON

Second Defendant

Appearances:

Mr. Terrence Neale for the Claimant

Mr. Jamal Smith for the Defendants

2014: October 31st

2014: November 13th

Decision on Assessment

Introduction

- [1] These proceedings come on for the determination of damages for defamation. Judgment was entered in default on the 24th September 2012. A later application to set aside the default judgment was rejected and the application dismissed. The appropriate quantum of damages to be awarded to the claimant consequent upon the default judgment, must now be assessed.

[2] Hubert O'Neal, the claimant, an orthopaedic surgeon and a politician who was the 9th District Representative for the National Democratic Party in 2011, has sought damages and costs for libel by the defendants who printed the following words defamatory of him on the front page of the Virgin News Online dated the 15th December 2011 and in relation to words encouraged to be published on the blog section of the article. He asks that damages are assessed in relation to the following words:—

- a. *"News reaching Virgin Islands News Online is that a family feud involving 9th District National Democratic Party Candidate in 2011 General Elections Dr. Hubert O' Neal, along with his siblings, and his niece has spilled over into the High Court. According to sources, the matter is a long standing issue that has spanned more than a decade and which has set the family apart since then.*
- b. *Sources have further stated that Dr. O' Neal and his siblings are claiming that the late Amos Jerome O' Neal owed them more than \$70,000 as rent for a restaurant he ran prior to his death. Amos O' Neal had reportedly claimed that he was owed more than that for his part in setting up the restaurant and maintaining his mother.*
- c. *Dr. Cassander Titley-O Neal the lone heir to the estate left behind by Amos O' Neal, her father, is now being taken to court over the matter, which will be called today, Thursday December 15, 2011 in the High Court.*
- d. *Our sources further indicated that the daughter had allegedly tried to settle the matter out of court but to no avail.*
- e. *Dr. Hubert O' Neal contested the last General Elections in the Virgin Islands as a candidate for the 9th District but was beaten by Hon. Ralph T. O' Neal, a result that he has publicly questioned."*

[3] The words had wide circulation nationally and within the wider Caribbean.

[4] The claimant alleges that the words in their natural and ordinary meaning meant and were understood to mean that the claimant was unsuitable and unfit to run for political office in the 9th District as a member of the National Democratic Party; was lacking in virtue and not an honourable person; that he was obsessed with material

things; had dictatorship tendencies; is a nasty dirty pirate; is a person without compassion.

- [5] The claimant avers that he suffered considerable distress and embarrassment from the publication. He also claims exemplary damages on the basis that the article was published recklessly for public gain and that no efforts were made to ascertain the true facts of the matter by contact with him, his siblings, or even the High Court.
- [6] The defendants although being aware that the facts published were incorrect did not offer an apology to the claimant or make immediate attempts to remove the defamatory comments. This would have resulted in some mitigation of any award of damages.

Assessment in cases of Libel

- [7] A man commits the tort of defamation when he publishes to a third person words containing an untrue imputation against the reputation of another. If the publication is made in a permanent form or is broadcast, the matter published, is libel. The definition provided by **Clerk & Lindsell on Torts** does not exclude a libel extending to a web page and a blog. It provides that "*Libel generally indicates something printed or written, but it includes also anything in a more or less permanent form*" I find no basis to treat a web publishers differently from print publishers.
- [8] Once libel is proved, the law presumes that some damage will flow from the publication. It is actionable per se. Judgment in default had been entered by my brother. My task is to address only the assessment damages. The claimant requests that he be awarded the sum of \$45,000.00 as an appropriate figure in compensation for the injury suffered.

Consideration of the law and authorities

- [9] In **KC v MGN Ltd** [2012] EWHC 483 (QB) Mr. Justice Bean reminded that damages are assessed under a two stage consideration which first identifies the figure that should be awarded at the conclusion of a hypothetical trial in which the defendant had done nothing to aggravate or to hurt the claimant's feelings and nothing to mitigate and

thereafter, to consider increasing or decreasing the award to the extent of any aggravating as well as the mitigating factors.

- [10] In identifying a figure to be awarded without consideration of mitigating or aggravating circumstances, I am guided by the dicta of Lord Herschell in **Bray v Ford** [1896] AC 44 referred to by the claimant, that "*.... damages cannot be measured by any standard known to the law; they must be determined by a consideration of all the circumstances of the case, viewed in the light of the law applicable to them*".

And Sir Thomas Bingham MR in **John v MGN Ltd** [1997] QB 586 "*in each case involving the assessment of compensation following a libel, the essential question to determine is how much loss and damage did the publication cause to its victim, and how is that to be reflected in monetary terms*".

- [11] In **John v MGN Ltd**, reference to previous libel awards approved by the Court of Appeal was included as a factor of guidance. The damages are uplifted in the same way as personal injury cases are to bring the awards up to date.

- [12] The authorities including **John v MGM**, offer guidance on the court's consideration. An award must compensate the claimant for damage to his reputation, vindicate his good name and take account of the stress, hurt and humiliation which the defamatory publications caused. The most important factor is the gravity of the libel, the more closely it touches the claimant's personal integrity and professional reputation, honour, courage, loyalty and attributes of his personality, the more than serious it is likely to be. The extent of the publication is also important, a libel published with wider reach has a greater potential to cause damage than a libel published to a handful of people.

Application of the principles to this case

- [13] The claim was not defended and the assumption is that the statements made were true. The defendant's application to set aside the defence was dismissed. The defendant participated in the assessment by the cross examination of the claimant and himself filing an affidavit on which he was cross examined.

- [14] The claimant's evidence is that the article appeared on 15th December 2011 at 10:30 am, and he immediately showed it to his Attorney who was present with him. The claimant states that the article was factually incorrect. The blog to the website is the forum where persons were able to comment on the article. The claimant states that the Blog too contained material defamatory to the claimant. The article was subsequently removed or factually corrected after it had been up until after 4:30 on the 15th December 2011. Although the claimant did not know the usual readership numbers of the web page and the blog, he rightly formed the assumption that it was locally and internationally, and that it therefore had wide circulation. The claimant says the comments from the bloggers prove that he was lowered in the minds of the ordinary right thinking members of the society. In this case, the article was untrue and was published with the intention of causing damage to the character of the claimant and to attack his personal integrity. The claimant states that he wrote the defendants early, to inform them of the libellous content of the article, although it is disputed how early the claimant did in fact write. It is also disputed whether the claimant wrote to the defendants about the statements on the blog. The defendants it seems recklessly made the defamatory statement without troubling to verify its accuracy.
- [15] There was no published offer of an apology. The letter of apology prepared by the defendants was unsatisfactory, despite attempts and communication between the parties to negotiate a satisfactory apology that should have been likewise published. But in any event, any genuine attempt at an apology was thwarted by a later article appearing in the Virgin Islands Newspaper by the first defendant who sought to stand by his original article.
- [16] The claimant is an Orthopaedic Surgeon and at the time was also a politician. The statements made were injurious and invited negative commentary, although, I question whether the statements had the extent of the damage to his reputation as alleged by the claimant. No doubt, I agree that the publication has the capability of very wide reach, to millions as it were, but I temper that potential damage with the sobering question of whether millions cared, such that, despite the potential of the web page to reach the whole world, the site would only be accessed by those who had a particular interest in

the local affairs of the island. From that number is to be discounted the right thinking members of the society who had no interest in that type of social commentary, and those who despite reading it, and who know the claimant, would seek to verify the accuracy of the statement. At the time of the publication the claimant had been in the political foray, and an election had just ended. I do not discount the ability of right thinking members of the society to weigh the comments made in view of the climate under which it was made. There was seemingly little impact to his political career at that time, as the publication followed immediately after an election. The claimant did not ascend to political office. I am also doubtful as to the number of his medical clients who he had acquired over the years who would have turned away from him because of what they would have assumed were his pirate tactics or treatment of his family members. That is not to undermine the fact of the publication and its presumption of damage. I imagine that those statements were hurtful and left the claimant with little to no recourse after it had been published except to demand an apology and a retraction in the same way the article had been published, hoping that it would reach the same readership so as to correct the negative impressions formed by those persons. The defendants did not even provide the claimant with the dignity of that, which goes directly to the question of his reckless disregard for the truth.

- [17] The claimant is entitled to compensation. I have considered the authorities provided by the claimant and those of my own research. I am satisfied that the awards made in every instance considered the impact of the statement made in view of the lifestyle, career, job, social standing of the person, and how the comments made sought directly to undermine the person in that regard. I pause to examine the authorities: —

In **Edward Seaga v Leslie Harper**, Privy Council Appeal No. 90/2008, the statements made by the defendant were of imputation or allegiance or bias to the PNP. The words were widely reported in the media and would have attracted national attention in Jamaica, a country with a population of approximately 3,000,000.00 people. The claimant was at the time the Commissioner of Police and the statements were made by Edward Seaga. There was no apology or retraction. The statements were in fact egregious and suggested a particular bias by a man who in his job ought to show

impartiality. In this case the publication was limited in a sense, there were no aggravating factors. The Privy Council reaffirmed the Court of Appeal's award of \$1,500,000.00. The updated award is in the region of three million Jamaican dollars (\$3,000,000.00). US\$ 26,679.00.

Bristol v St. Rose Civil Appeal No. 16 of 2005, judgement was delivered in July 2006, the Court of Appeal awarded ECC\$40,000.00 to a medical doctor who was defamed when words were published that he had caused the death of persons and there were other imputations of incompetence, improper treatment and lack of care in those circumstances.

John v MGN Ltd, [1997] QB 586 at 621 concerns the defamation of the world renowned and infamous Elton John, a singer, a socialite, whose career is dependent on a wide cross section of the public who support his music, and of business person with whom he would contract and who may have been turned away by negative reporting in a national newspaper. A photograph of the claimant appeared on the front page together with the words, "World Exclusive" and 'Elton's "diet of death"'. The article itself located inside, alleged that the claimant was on a bizarre diet which involved him chewing food then spitting it out without swallowing, and that he had been observed at a party in Los Angeles spitting chewed food into a napkin. The article quoted opinions of medical practitioners who regarded such behaviours as a form of bulimia, a potentially fatal eating disorder. There was no apology. The Court of Appeal set aside the jury's award and, substituting its own figure, awarded the claimant the total sum of sterling £75,000, comprising £25,000 compensatory damages and £50,000 exemplary damages, where the Court considered the article to be false, offensive and distressing.

Gleaner Co. Ltd and Anr v Abrahams 63 WIR 2003 the Privy Council upheld the decision of the Court of Appeal to award the Respondent/Claimant JAM\$35,000,000 which was at the time equivalent to sterling £533,000.00. The first defendant owned two daily newspapers in Jamaica. The second defendant was the editor-in-chief. In September 1987, both papers published libellous articles about the claimant who had

been minister of tourism for Jamaica between 1980 and 1984 stating that he had taken bribes.

Gur v Avrupa Newspaper, [2008] EWCA Civ 594, there was an appeal against the assessment of damages in the sum of £85,000.00 in respect of libels published in Turkey in three newspaper articles in a publication called Avrupa. Judgment in default of defence was entered and an order made for the assessment of damages. The Court of Appeal upheld the trial judge's award of sterling £85,000.00

Kenny Anthony v Vaughn Lewis Civil Appeal 2 of 2006

The Court of Appeal awarded ECC\$45,000.00 as compensatory damages. For statements made by the defendant that imputed that the claimant the Prime Minister of St. Lucia has diverted funds meant for the consolidated fund for his own use.

I have considered the pleadings and the submissions and the evidence taken during the proceedings, and the case law provided. I have considered that the statements made were not directed at the profession of the claimant, although directed to undermine his social standing. I have arrived at an award of US\$20,000.00, which in my view adequately compensates the claimant for the injury suffered and what he may continue to suffer.

Exemplary Damages.

- [18] Exemplary damages may only be awarded in very limited types of cases, where the conduct of the defendant in publishing the defamatory statement was calculated to make a profit which may well exceed the compensation. **Rookes v Barnard [1964] 1 All ER367**. These limited circumstances identified by Lord Devlin have now been extended by **Kuddus v. Chief Constable of Leicestershire Constabulary [2002] 2 AC 122**. There is no evidence on which I can conclude that in publishing the words the defendants calculated to make a profit which would exceed the likely compensation against them. Accordingly, I have no basis in law for awarding exemplary damages.

Summary

[18] The claimant is awarded the sum of US\$20,000.00 and prescribed costs of \$1800.00.

A handwritten signature in black ink, appearing to read 'V. GEORGIS TAYLOR-ALEXANDER', is written over a circular stamp or seal.

V. GEORGIS TAYLOR-ALEXANDER

HIGH COURT MASTER