

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SAINT VINCENT AND THE GRENADINES

CLAIM NO. SVGHCV2002/0406

BETWEEN:

DR RALPH GONSALVES

Claimant

AND

**EDUARDO LYNCH
BDS LIMITED**

Defendants

Before:

Master Cheryl Mathurin

Appearances:

Mr. Anthony Astaphan SC and Mr. G Grahame Bollers for the Claimant

Mr. Stanley K John for the First Defendant

Mr. Bertram Commissiong QC and Ms Mira Commissiong for the Second Defendant

2008: October 24th; November 26th

ASSESSMENT OF DAMAGES

- [1] **MATHURIN, M:** This is an assessment of damages in a defamation case. The proceedings in respect of liability were disposed of in the judgment of Thom J. on the 25th May 2005 when she struck out the defences relied on by the Defendants of publication, words not capable of bearing the meanings alleged, fair comment and qualified privilege.
- [2] The Claimant (Mr. Gonsalves) is seeking from each Defendant, compensatory damages including aggravated and exemplary damages on the basis not only of entitlement but that the intentional and calculated conduct and/or extreme recklessness with which the Defendants caused defamatory comments to be published on live radio warrants a substantial award.
- [3] The offending words suggested that Mr. Gonsalves caused money from the consolidated fund of St. Vincent and the Grenadines to be used to purchase airline tickets for his mother and daughter to travel to Rome, Italy.
- [4] On the 31st October 2002 Alleyne J (as he then was) ruled that the words used were capable of meaning that Mr. Gonsalves was corrupt and that in his capacity as Prime Minister and Minister of Finance caused public funds to be used to pay for airline tickets to Rome for his mother and daughter and also that he was guilty of misconduct in public office. On 7th October 2007, Thom J found as a fact that;

“an ordinary reasonable listener who heard the first Defendant speak the words complained of would understand the first Defendant to mean that the Claimant as Prime Minister and Minister of Finance caused the Treasury of St Vincent and the Grenadines to pay for the tickets for his mother and daughter, that the cost of the tickets for the Claimant’s mother and daughter was included in the \$41,000.00 paid by the Treasury to IRIE Investment Ltd. The conduct of the Claimant in causing the Treasury to pay for the

airline tickets for his mother and daughter to accompany him to Rome was misconduct in public office and that the Claimant was corrupt.”

General Damages

- [5] That the Claimant is entitled to compensatory damages can not be in dispute. The words of Robotham CJ quoting from **Clerk and Lindsell on Torts** in the case of **Joseph Nathaniel France and Fitzroy Bryant v Kennedy Alphonso Simmonds** Civil Appeal No; 2 of 1985 from St Kitts and Nevis clearly to my mind encapsulates that right.

“The right of each man during his lifetime to the unimpaired possession of his reputation and good name is recognized by law. Reputation depends on opinion and opinion in the main on the communication of thought and information from one man to another. He therefore who directly communicates to the mind of another, matters untrue and likely in the material course of things substantially to disparage the reputation of a third person is, on the face of it, guilty of a legal wrong for which the remedy is an action for defamation.”

The damages in defamation cases serve not only as compensation but also as an effective and necessary deterrent. Lord Hoffman in **The Gleaner and Dudley Stokes v Eric Anthony Abrahams** Privy Council Appeal No. 86 of 2001 stated as follows;

“The damages must be sufficient to demonstrate to the public that the plaintiff’s reputation has been vindicated. Particularly if the defendant has not apologized and withdrawn the defamatory allegations, the award must show that they have been publicly proclaimed to have inflicted a serious injury”

- [6] Counsel for the Claimant has referred to the judgment of Mitchell J in the case of **Murio Ducille v Robert Hoffman et al** ANUHCv1998/0151 as offering guidelines to the court as to factors to be taken into consideration in determining the quantum of damages to be

awarded as compensation. These guidelines are clearly accepted by Counsel for the Defendants in their submissions;

- i the gravity of the allegation
- ii the extent of the publication
- iii the extent and nature of the Claimant's reputation
- iv the effect of the publication and
- v the conduct and behavior of the Defendants

[7] Mr. Gonsalves was at the material time, the Prime Minister and Minister of Finance of St Vincent and the Grenadines. He is the Caricom Heads of Government spokesman on Air Transportation and Bananas, a member of the Caricom Bureau and the immediate past chairman of Caricom. He is a member of the Eastern Caribbean Central Monetary Council. He has also served as a lecturer at the University of the West Indies. Mr. Gonsalves is an Attorney at law in St Vincent and several other jurisdictions. He has been the recipient of several awards not only regionally but also internationally.

[8] The extent and nature of Dr Gonsalves' reputation is clearly widespread and outstanding. It is clearly moot that in such a position of responsibility an allegation of abuse of Government funds for his personal gain would have a negative impact which could go to the root not only of his governance but also to his reputation as regional stalwart. The words would have led all who heard about them to believe that Dr Gonsalves used the consolidated fund of St Vincent and the Grenadines to sponsor his daughter's and mother's trip to Rome.

[9] The allegations were broadcast live on radio. There is a certain amount of disparity as to the extent to which the program was received and in that regard the Court will accept that it would have been accessible to the majority of persons in St Vincent who incidentally live in Kingstown and its immediate environs. This is evidenced by Mr. Leroy Brewster who is an Inspector in The Royal Saint Vincent and the Grenadines Police Force who swears in

his witness statement that he heard the statements on the radio. The issue of whether or not the article was broadcast on the internet was withdrawn by Counsel for the Claimant.

[10] It is more than likely however that this allegation would have been circulated not only throughout the State but beyond. Mr. Hans King in his witness statement of the 3rd October 2007 tells of receiving telephone calls from his mother in the United States and his brother in Barbados both of whom had heard the allegations. In addition to this, Dr Gonsalves states that he was approached by Dr Kenny Anthony, then Prime Minister of Saint Lucia who asked whether or not the allegations were true. It is not difficult to accept this given the nature of the communication and travel between the islands.

[11] Dr Gonsalves suffered injury to his reputation and his feelings. He states that he was extremely upset and distressed when he heard the allegations. He also states that his family was also deeply emotional and disturbed at the allegations, a situation clearly that would add to his own distress. The effect of the publication on his reputation amongst his colleagues and the organizations that he serves would also increase any distress that he would have felt.

The conduct and behavior of the Defendants

[12] The behavior of the Defendants since the filing of this claim is noteworthy. It is settled law that a proper apology or the offer of such an apology can significantly mitigate damages. There has been no apology. The issue of an apology was canvassed briefly at the suggestion of the court with the approval of Counsel for the Claimant however Counsel for the Defendants' had some difficulty in the form in which an apology should take. I must express difficulty and disappointment in accepting that Counsel for the Defendants' in the face of that olive branch that would ensue to their clients benefit, could not have constructed and obviously did not construct, a suitable apology at that time or at all.

[13] It is also necessary to bear in mind the conduct of the defendants, their conduct of the case as well as their states of mind. In my humble opinion, the defendants have persisted in the allegations despite the rulings of Alleyne J (as he then was) in 2002, of Thom J in 2005 and Barrow J in 2006. That these rulings were founded on the witness statements before the trial judge can no longer be disputed. Mr. Kenneth Bibby, Manager of Irie travel services stated that he received a personal check from the Claimant to pay for the tickets. Ms Angela Mercury, the Prime Minister's secretary stated that the invoice from the treasury was not in relation to Dr Gonsalves's mother or daughter. Ms Ingrid Fitzpatrick; Accountant General and Ms Gayle Friday; Account Supervisor in Treasury Department ... both further reiterated that the State of Saint Vincent and the Grenadines did not pay for the Prime Minister's mother or daughter to travel to Rome.

[14] The First Defendant (Mr. Lynch) despite the evidence and these rulings, contends in submissions for this assessment at paragraph 14 that he "*sought consistently to show that to the extent the words were published by him, his motive was not **to** (sic) impugn the Claimant's character as being corrupt but rather that he was attempting to criticize the Claimant's priorities in the management of public finances.*" Apart from the intent being irrelevant at this point, it is to be noted that this argument has consistently failed before the court and it does not address the actual words used which were determined as being defamatory of the Claimant. I note also that in Mr. Lynch's witness statement filed on the 31st October 2003, he exhibits a copy of an article from the Searchlight newspaper dated the 23rd August 2002 in which the Dr Gonsalves not only denies the allegations but printed copies of the government vouchers which show payment of the tickets for travel of himself and Mrs. Eloise Gonsalves only.

[15] Counsel for the Second Defendant despite the judgments of the Alleyne J, Thom J and Barrow JA also persists in defending the allegations at paragraph 14 of his submissions where he states as follows;

“The Claimant repeatedly contends without more that the Defendants persisted in making serious allegations of corruption and criminality against him. Nothing could be further from the truth. Although the defences have been struck out the Court may take judicial notice of the fact that both Defendants were at pains to ensure that it was made clear, in the pleadings and at all times before the Court and right up to the First Defendant’s appearance before the Court of Appeal, that they never intended to imply that the Claimant was corrupt.”

- [16] This line of submission is at the very least, unacceptable. It is the same line that the Defendants have pursued all along and which has failed to persuade any Court hearing the matter before this assessment. It would therefore be completely inappropriate at this stage to take judicial notice of the Defendants apparent refusal to accept that the High Court and the Court of Appeal have determined conclusively that the words used by them are defamatory and without any factual basis.

Aggravated Damages

- [17] Counsel for the First Defendant in his submissions in opposition to an award of aggravated damages denies that the Defendants persisted in the allegations up to and during arguments before the Court of Appeal and repeats in submissions at paragraphs 13 the defence on which he relied of fair comment and qualified privilege which was struck out by the court. Paragraph 14 of his submissions states the first Defendant *“sought consistently to show that to the extent the words were published by him, his motive was not to impugn the Claimant’s character as being corrupt but rather that he was attempting to criticize the Claimant’s priorities in the management of the public finances”*
- [18] Counsel further repeats in paragraph 14 and 15 of his submissions, arguments raised in opposition to the application to strike out the defences which were determined in the Claimant’s favor by Thom J, as upheld by Barrow JA. Counsel states *“Granted that the Court did not agree that the reasonable fair-minded listener would have given the words*

complained of the meaning contended for by the first Defendant, it is clear that the manner by which his case was conducted he was at pains to avoid any aggravation of the wrong which he committed against the Claimant in publishing the offending words”

- [19] Counsel for the second Defendant also submits that this is not an instance in which an award of aggravated damages ought to be made as there was no repetition of the offending statement before or after the Defendants were told that they were false and there was none of the malevolence displayed by the Defendants in cases referred to and cited by Counsel for the Claimant as supporting aggravated damages. Counsel also reiterates the stance of the first Defendant at paragraph 14 of his submissions in which he states that

“The Claimant repeatedly contends without more that the Defendants persisted in making serious allegations of corruption and criminality against him. Nothing could be further from the truth. Although the defences have been struck out, the Court may take judicial notice of the fact that both Defendants were at pains to ensure that it was clear, in the pleadings and at all times before the Court and right up to the First Defendant’s appearance before the Court of Appeal, that they never intended to imply that the Claimant was corrupt.”

- [20] I reiterate that Alleyne J (as he then was) held in 2002 that the words used were capable of meaning that Dr Gonsalves was corrupt and that in his capacity as Prime Minister and Minister of Finance caused public funds to be used to pay for airline tickets to Rome for his mother and daughter and also that he was guilty of misconduct in public office.

- [21] Aggravated damages are payable because of the way in which the defendant has behaved to the claimant. In this instance it is clear that the Defendants even after they knew of the falsity of the def

amatory statements, persisted in maintaining that the statements made were not defamatory but out of concern for the economy. Whilst it is arguable that it is open to every person to pursue their matter to the end that they wish to achieve, whether successful or not, the Defendants for six years have not addressed the fact that the allegations that the State paid for the tickets for the Claimant’s mother and daughter are simply untrue.

[22] While it is clear that the words of the Defendants caused Mr. Gonsalves to go through a distressing ordeal, it is equally clear that he still has successfully resumed another term as the Prime Minister of Saint Vincent and the Grenadines and remains very influential in the bodies he serves regionally. Lord Hoffman in **The Gleaner Company Limited and Dudley Stokes v Eric Anthony Abrahams** Privy Council No; 86 of 2001 made reference to the fact that in both the **Rantzen case** (1994) QB 670 at 692 and the **John case** (1997) QB 586 at 621, the damaging words did not impact on the careers of those Claimants and agreed with the respective Court of Appeal decisions to reduce an award as excessive. In the case of **Vaughn Lewis v Kenny Anthony** Civil Appeal No 2 of 2006, Barrow JA considered *“the lack of impact of the slander on the political fortunes and reputation of the respondent who went on to win the general elections that were held some time after”* to be part of the entirely rational footing on which the trial judge arrived at her award.

[23] Their Lordships however did go further and distinguish the **Abrahams case** from the **Rantzen and John cases** on the basis of the fact that the Defendants in the **Abrahams case** for sixteen years maintained their allegations beyond the point when it became obvious that they had no evidence to support them. In that case, the appellants printed case before the Board read as follows;

“Because of the way in which the Court of Appeal struck out the defences, the Appellants were deprived of the opportunity to prove the relevant facts, for example, by calling Mr. Gentles as a witness, cross-examining the Respondent, seeking discovery of the Respondent’s bank statements and cheque books and copies of public relations and advertising contracts which he had signed, administering interrogatories, seeking to subpoena copies of the relevant contractual documents from the Ministry of Tourism and giving notice to the Respondent to admit relevant facts.”

In commenting in clear disapproval of this approach, Lord Hoffman stated as follows;

“Their Lordships regard this passage as nothing more than a repetition of the libel under the cover of absolute privilege and cannot understand how it could have been thought likely to induce their Lordships to reduce the damages. On the contrary, it underlines the importance of Lord Hailsham of St Marylebone’s observation in Broome v Cassel & Co Ltd (1972) AC 1027,1071, that in case the allegations should re-emerge, the damages must be large enough to proclaim the baselessness of the libel.”

- [24] It is my humble opinion that the behavior of the Defendants entitles the Claimant to an award of aggravated damages. It is clear that a repetition of the defamatory statements even before another court after determination and a refusal to accept the judgment of the court as to the meaning of the actual words used to the extent that both Defendants still seek to justify their behavior is an aggravating factor.
- [25] Counsel have relied on several authorities from this jurisdiction and outside in support of the assessment of which I have taken note.

Vaughn Lewis v Kenny D Anthony Civil Appeal No 2 of 2006; Saint Lucia

Murio Ducille v Robert Hoffman et al ANUHCv1998/0151

Joseph France and Fitzroy Bryant v Kennedy Simmonds Civil Appeal No 2 of 1985;
Saint Christopher and Nevis

Keith Mitchell v Steve Fassihi et al Civil Appeal No 22 of 2003; Grenada

Vance Amory v Hastings Daniel Claim No 19 of 1999 Nevis

The Gleaner Company Limited and Dudley Stokes v Eric Anthony Abrahams Privy
Council Appeal No 86 of 2001

Basdeo Panday v Kenneth Gordon Privy Council No 35 of 2004

John v MGN Ltd (1996) 2 AER 35

While each authority is distinguishable on its facts, there are some parallels which can be drawn on not only as to what constitutes aggravation in an award of general damages but also instances in which exemplary damages should be awarded. In the circumstances, I find an aggravated award in the sum of \$160,000.00 to be reasonable compensation.

Exemplary Damages

[26] The basis upon which the Claimant relies to establish an award of exemplary damages is the limb established in **Rookes v Barnard** (1964) 1 AER 367 where a wrongdoer calculated that the profit to be made from his actions would exceed the compensation he will have to pay to his victim.

[27] In the **Keith Mitchell case**, Gordon JA referred to the remarks of Hallsham LC in **Cassell & Co v Broome and another** (1972) AC 1027 where he stated that a tort committed in the course of a business carried on for profit is not enough to bring the case within the category of case upon which the Claimant relies for an award of exemplary damages

“What is necessary in addition is (i) knowledge that what is proposed to be done is against the law or a reckless disregard of whether what is proposed to be done is illegal or legal, and (ii) a decision to carry on doing it because the prospects of material advantage outweigh the prospects of material loss.”

[28] Gordon JA also made reference to the judgment of Lord Nicholls of Birkenhead in **A v Bottrill** (2003) 3 WLR 1027 following **Cassell v Broome** in which he stated;

“20. Exceptionally, a defendant’s conduct in committing a civil wrong is so outrageous that an order for payment of compensation is not an adequate response. Something more is needed from the court, to demonstrate that such conduct is altogether unacceptable to society. Then the wrongdoer may be ordered to make a further payment, by way of condemnation and punishment.

...

23. The next point to note is that, in the nature of things, cases satisfying the test of outrageousness will usually involve intentional wrongdoing with, additionally, an element of

flagrancy or cynicism or oppression or the like; something additional, rendering the wrongdoing or the manner or circumstances in which it was committed particularly appalling. It is these features that make the defendant's conduct outrageous"

- [29] After consideration of that matter Gordon JA stated that he derived that *"the narrow requirement that a defendant must contemplate a profit exceeding the likely damages to be assessed against him has been considerably widened"*. He further stated in that case that;

"The lack of a defence, or even an affidavit on the issue of damages, leads ineluctably not only to the conclusion that the Respondents had not a scintilla of proof, nor even a whiff of suspicion, of the truth of their statements, but also to the conclusion that they were contemptuous of the right of entitlement of every citizen to enjoy his reputation for rectitude, absent proof to the contrary. The Respondents have not only failed to offer any defence, because they had none, but they further failed to offer any apology to the Appellant. By itself, I would conclude that such conduct came dangerously close to "outrageous". But the Defendants went further. They printed the same libel in a second and subsequent issue of the newspaper. I believe that a clear and proper inference is that the Respondents were contemptuous of any sanction that the law might provide. I am of the view that compensatory damages even augmented by an element of aggravation, is an inadequate remedy in this case."

- [30] In this case, the Defendants did file defences. In 2002, it was determined that the meaning of the words were capable of supporting the meanings attached to them by the Claimant. In 2005, the defences were deemed incapable of succeeding by Thom J, a decision upheld by Barrow JA in 2006. The Defendants clearly knew that the allegations were without any basis and were untrue but Defendants did not offer an apology although the possibility was raised in Chambers at this assessment.

- [31] Counsel for the Claimant asserts that the behavior of the Defendants merits more than aggravated damages as their initial and continuing conduct passed the outrageous. He

also asserts that the program on which the statements were broadcast is motivated by monetary consideration and if the show loses ratings, persons and business houses will not advertise and it is against this background that “*scandal and rumor mongering have become and are tools to keep ratings and therefore sponsorship and advertisements going regardless of the consequences.*”

[32] Dr Gonsalves states in his affidavit at paragraph 11 that the program is a paid political program which is paid for by the opposition New Democratic Party and is used by the First Defendant Lynch to consistently defame him and broadcast misinformation about his government. He says he has heard the first Defendant say that his life or livelihood depends on his radio call in program and he has heard several advertisements broadcast during the program by the second Defendant.

[33] I am not persuaded that this suffices as evidence which merits exemplary damages. In addition to the sparsity of evidence to support the consistent defamation and misinformation to which Dr Gonsalves alludes, it occurs to me that most people depend on their jobs for their livelihood and one would hear several advertisements on any radio station. This to my mind does not distinguish the behavior of the Defendants in the way which was clearly set out in the **Keith Mitchell case** referred to above and as such I will decline to make an award of exemplary damages on this basis.

Interest and costs

[34] Interest on the award is calculated from the date of the filing of the claim form to the date of judgment at the rate of a short-term investment at 3%. After judgment, the claimant is entitled to the full amount awarded at the statutory rate of 5%.

[35] Costs in this claim are to be assessed as prescribed under Part 65.5(1) of the Civil Procedure Rules 2000. The damages to be awarded are EC\$160,000.00. In

keeping with Appendix B, costs are calculated in the sum of EC\$33,000 as the claim concluded after the defence.

[36] In accordance with the order of Barrow JA in 2006, costs in the Court of Appeal are calculated in the sum of \$22,000.00

Summary of Order;

[37] It is hereby ordered that;

- (a) each Defendant do pay the Claimant assessed damages in the sum of \$160,000.00
- (b) each Defendant do pay the Claimant costs in the High Court in the sum of \$33,000.00
- (c) each Defendant do pay the Claimant costs in the Court of Appeal assessed in the sum of \$22,000.00
- (d) interest of 3% be paid on the total sum of \$160,000.00 from the service of the writ to the 25th May 2005 when judgment was delivered and thereafter interest be paid on the total judgment sum of \$215,000.00 at the statutory rate of 5% until liquidated.

CHERYL MATHURIN
MASTER