

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO.380 OF 1990

BETWEEN:

FRANCIS GEORGE POLIDORE

Plaintiff

and

- (1) CRUSADER CARIBBEAN PUBLISHING COMPANY 1971
LIMITED
- (2) GEORGE ODLUM

Defendants

Appearances:

Mr. Peter I. Foster and Ms. Claire Greene-Malaykhan for the Plaintiff.

Mr. Michael B.G. Gordon for the Defendants.

1999: September 27, 29
October 07
March 13

JUDGMENT

[1] HARIPRASHAD-CHARLES J. [Ag.] The Plaintiff is a Welder and the father of Saskia Downes also called Sasha Downes.

[2] The First-named Defendant is a Newspaper Company, publishing the Crusader Newspaper with a wide circulation in Saint Lucia and elsewhere. The Second-named Defendant is the Editor, Owner and Publisher of the First-named Defendant.

- [3] On 22nd day of November 1990, the Plaintiff instituted the present action by issue of a writ of Summons endorsed with Statement of Claim against the Defendants for libel in respect of an article published in the Crusader Newspaper of 1st day of September 1990 at the front page captioned "THIS BEAUTIFUL 'SMILE ST. LUCIA' BABY DIED OF AIDS! See story on page 3."
- [4] On 2nd day of March 1993, the Plaintiff filed an amended Statement of Claim and added further and or in the alternative, the cause of action pertaining to "breach of confidence."

RELEVANT EVIDENCE OF PARTIES

- [5] The Plaintiff testified that prior to 1st day of September 1990, he enjoyed a normal existence with his common-law wife, Andrea Downes and daughter, Saskia, living in a small community in La Clery, near the City of Castries in Saint Lucia. In July of 1990 his daughter, Saskia fell ill and was referred to Victoria Hospital. Certain tests were taken but before the results were given, Saskia passed away on the 25th day of August 1990 at the tender age of four years. Prior to her death, Saskia had been used as a poster child by the Dental Health Association for her lovely teeth. She had posed for that picture to be used in good faith by that Association.
- [6] According to him, on 1st day of September 1990, he was in his backyard working when a friend came and showed him a copy of the Crusader Newspaper and he saw a large photograph of his deceased daughter, appearing on the front page. The captioned headline read: "THIS BEAUTIFUL 'SMILE ST. LUCIA' BABY DIED OF AIDS"- Exhibit FGP2. The Plaintiff asserted that he did not give the Crusader Newspaper or anyone working with that newspaper permission to use that photo.
- [7] The Plaintiff stated that the story written under the said headline contained a number of allegations to the following effect:
- (a) That Saskia Downes died showing all symptoms of clinical AIDS.

- (b) That Saskia Downes had recently been tested positive.
- (c) The results of the testing of blood samples that had been sent away for further confirmatory testing had not even returned when Saskia died.
- (d) The Crusader Newspaper opined that Saskia had acquired the infection at childbirth or through breast-feeding.
- (e) Saskia's mother had also tested HIV positive.

[8] He further testified that at the date of the publication of the said Crusader Newspaper on 1st day of September 1990, he had no idea what Saskia died of. He further stated that the sentence declaring that "she died showing all symptoms of clinical AIDS" was grossly incorrect.

[9] The Plaintiff declared that the Crusader Newspaper followed up on the "SMILE BABY" story with further stories appearing in their publications on the 8th and 15th day of September 1990. It was accepted that at no time in the issues of the newspaper was Saskia's name or that of her family mentioned.

[10] The evidence given by the Plaintiff was that since the publication of the article on 1st day of September 1990, he was ostracized by his community at the supermarket, bakery, on public transport and by dentists. According to him:

" Since 1st day of September 1990, I have been shunned by people in the community, relatives and personal friends and Saint Lucians at large. Sometime on 15th day of September 1990, I was at Central Bakery buying bread and the customers in there said, "here is the AIDS baby's father. I simply left the bakery with my head down because the embarrassment was so severe. I was not able to walk around town without being slandered by the public. Sometime in April 1991, I went to the dentist at the Health Centre for an extraction...I was the seventh person on the list...The dentist came in probably an hour or so late and names were called for the injection and my number came and gone and they didn't call me. I was the last patient left to be called...When I got to the dentist, I asked what was the reason for me being called last and she said to me that Ms. Sherry Ann Arlain had cautioned her towards me as being HIV positive as the father to the Deceased. There I left and went home to get a

few of the Certificates which I had and I returned to the Health Centre where I presented them to the dentist to show her that I am HIV negative. There she made an apology to me and said that she is very sorry for the embarrassment. I did not extract the tooth. I went to a second dentist and I was confronted with the same situation... Since this article my reputation has been tarnished. I have very little friends..."

- [11] The Plaintiff also testified that the flow of work to his welding shop ceased and he had to be supported by his father. He stated that when he went to job interviews "even though they don't know me by name but my appearance on job interviews throw me away because of the stigma; the AIDS stigma."
- [12] On the 8th day of September 1990, exactly one week after the publication of the article entitled "THIS BEAUTIFUL 'SMILE ST-LUCIA' BABY DIED OF AIDS", the Plaintiff was interviewed by the Star newspaper and his picture appeared on the front page and on page 3 of that issue. - Exhibit FGP8. In that issue of the Star Newspaper, the Plaintiff was called Rueben Hinds which he admitted was a name by which he was known. He accepted that the publication in the Star newspaper was done with his consent.
- [13] The Plaintiff alleged that instead of respecting the privacy and confidentiality of Saskia's medical condition, the Defendants and each of them broke that confidentiality and exposed this tragedy to the world, and in so doing for their own selfish and self-serving reasons to have "a scoop which the Star's scooping sources had miraculously missed," to have "the historic and controversial front page that catapulted 'The Crusader' into notoriety the paper sold."
- [14] The Defendants did not testify in court but called Dr. Stephen King as their sole witness. Dr. King testified that as part of his duties, he supervised the Laboratory at Victoria Hospital and the Laboratory is the place where blood tests are done. He stated that he did tests on Saskia Downes' blood in July/ August 1990. The first test that was done is called EIA - Enzyme Immuno-Assay Test. The test proved positive. Dr. King further stated under oath:

" That is not the only test I did. Because of the chance of false positive results on a single EIA test, we do confirmatory testing using a second method called the Western Blot Test. This was caused to be done so it was sent to Trinidad. *I received the result on 3rd day of October 1990 from CAREC - a laboratory in Trinidad.* The result of the test was positive. I also did tests on Andrea Downes. The EIA Test was positive. The Western Blot Test was also positive."

- [15] Dr. King further testified that in common parlance, Saskia Downes died of AIDS. Andrea Downes, the mother of Saskia passed away in 1992. She was also confirmed HIV positive and died of AIDS. Dr. King continued his evidence:

" The Plaintiff is HIV negative. The Plaintiff was the common-law husband of Andrea Downes. It is possible for the Plaintiff to be HIV negative even if he had a sexual relationship with someone who is HIV positive...I have only known four [4] cases or approximately 2% of reported cases in Saint Lucia where one partner is HIV positive and the other partner is HIV negative."

THE PLAINTIFF'S CLAIM

- [16] At paragraph 6 of his Statement of Claim, the Plaintiff alleged that on page 3 of the said Crusader Newspaper, the Defendants falsely and maliciously wrote and published the following article under the headline "THIS BEAUTIFUL 'SMILE ST. LUCIA' BABY DIED OF AIDS! See story on page 3:

" On Monday last this beautiful young child was buried at Choc Cemetery. Her face was well known to many St. Lucians since she featured on calendars as a prime model of healthy St. Lucian childhood. She will be specially remembered as the SMILE BABY in the dental advertisements which sought to encourage children to practise better dental care. Her smile and healthy teeth captivated many St. Lucians.

Today she is no more. She died showing all the symptoms of clinical Aids, that is, she suffered from pneumocystis pneumonia which is the end-stage of Aids at the age of four. In recent months she had gone to Victoria Hospital a few times and was recently tested HIV positive being reactive to EIA (Positive Enzyme-linked Immunoassay) and blood samples were

sent on for testing using the Western Blot method. The results had not even returned when the young child died.

It is generally felt that she acquired the infection at childbirth or through breast-feeding. The mother has also tested HIV positive.

The Crusader this week publishes the cover-picture on this beautiful young child to sensitive St. Lucians to the dangers of the dreaded AIDS virus."

[17] At paragraph 7 the Plaintiff averred that AIDS is the abbreviated name for the fatal disease known as Acquired Immune Deficiency Syndrome, contracted through sexual intercourse of infected persons, and through blood transfusions.

[18] The Plaintiff further alleged at paragraph 8 of the said Statement of Claim that the said headline, photograph and article contained in paragraphs 4, 5 and 6 in its natural and ordinary meaning alternatively by reason of the facts and matters hereinafter set out meant and were understood to mean that the Plaintiff is a carrier and/or infected with the disease known as Acquired Immune Deficiency Syndrome commonly known as AIDS.

[19] At paragraph 9 of his Statement of Claim, the Plaintiff averred that:

"[9] By reason of these premises the Plaintiff has been greatly injured in his character, credit and reputation, and has been brought into public scandal, odium and contempt and has suffered great distress and humiliation."

[20] The Plaintiff alleged that further and/or in the alternative, the Defendants were supplied with hospital information pertaining to the Plaintiff's daughter's medical condition, information of a confidential character and having obtained this information in their said newspaper communicated the said confidential information by publications therein.

[21] In breach of the said obligation of trust and confidence and without the consent of the Plaintiff, the Defendants have unlawfully made use of the said confidential

information, and have unlawfully made profits for themselves by the sale of their newspaper and otherwise by exploiting the said confidential information by stating that the publication thereof was in the public interest.

[22] In the prayer of his writ, the Plaintiff claims:

- (1) Damages;
- (2) An inquiry as to damages for breach of confidence;
- (3) Damages for breach of confidence;
- (4) Such further or other relief as to the Honourable Court may seem fit;
- (5) Costs.

[23] In order to succeed in his action for libel, the Plaintiff must prove:

- (a) Publication of the article complained of to a third person other than himself;
- (b) The article referred to him; and
- (c) The words complained of by him are defamatory.

(a) THE PUBLICATION

[24] No civil action can be maintained for libel unless the words complained of have been published. The material part of the cause of action in libel is not the writing, but the publication of the libel. Dixon J. in *Lee v Wilson* (1934) 51 C.L.R. 276 at page 287 stated thus:

"It is the publication not the composition of the libel which is the actionable wrong."

[25] In order to constitute publication, the matter must be published to (communicated to) a third party, that is to say, at least one person other than the Plaintiff.

[26] At paragraph 4 of their amended Defence the Defendants admitted the issue regarding publication of the article. At paragraph 2 of their Defence, the

Defendants admitted that the Crusader has a wide publication in Saint Lucia and elsewhere. Indeed, the Plaintiff testified that there he was aware that the newspaper was sold all over Saint Lucia and he was able to purchase a copy from Wintrades Supermarket in La Clery.

- [27] I therefore find that there has been publication of the article complained of to a third person other than the Plaintiff. Indeed, there was publication in the commercial sense.

(b) REFERENCE TO THE PLAINTIFF

- [28] Learned Counsel for the Defendants, Mr. Michael Gordon argued that the article of the 1st day of September 1990 did not mention any names and neither did subsequent publications of the Crusader newspaper which followed up on the "SMILE 'ST.LUCIA' BABY". Any reference to the Plaintiff could only be implied by an extended meaning or innuendo. The Plaintiff stated that the article referred to him because he was the common law husband of Saskia's mother and as a consequence, certain members of the community deemed him to be a carrier and or infected with the deadly AIDS virus.

- [29] According to Mr. Peter Foster, the Plaintiff must prove that he was the person identified in the article. It is an essential element of the cause of action for defamation that the words complained of should be published "of the Plaintiff." The question in all cases is whether the words might be understood by reasonable people to refer to the Plaintiff, subject to the qualification that where the words are published to persons who have special knowledge the issue will be decided by reference to what reasonable persons possessing that knowledge would understand by them. It is irrelevant in establishing that the Defendant is prima facie liable that he did not intend to refer to the Plaintiff and may never have heard of the Plaintiff.

- [30] The Plaintiff need not be referred to by name. The test is whether the Plaintiff may reasonably be understood to be referred to by the words. Thus, if the Plaintiff is not mentioned at all, like in the instant case, the law states that there need be no "peg or pointer" for his identification in the words complained of themselves: *Morgans v Odhams Press Ltd.* [1971] 1 W.L.R. 1239.
- [31] Mr. Foster submitted that the Plaintiff has established without contradiction that he was the common-law husband of Andrea Downes and that they were the parents of Saskia Downes. They live in a small community where everybody knew them as a family unit.
- [32] It was further submitted on behalf of the Plaintiff that he was referred to by his association with Saskia Downes and her mother, Andrea Downes. Dr. King in his evidence asserted that when he read the article it conveyed to him that the Plaintiff might be HIV positive and that meant that the article referred to the Plaintiff by association.
- [33] I agree entirely with Learned Counsel for the Defendants that the article complained of did not mention any names. Nor did any of the subsequent publications of the Crusader Newspaper. It is an essential element of the cause of action for defamation that the words complained of should be published "of the Plaintiff."
- [34] But, Counsel for the Plaintiff, Mr. Peter Foster rightly submitted that the test is whether the Plaintiff may reasonably be understood to be referred to by the words. I accept the submissions of Mr. Foster that the Plaintiff was referred to by his association with Saskia Downes and her mother, Andrea Downes.
- [35] The Learned Authors of *Gatley on Libel and Slander* (9th Edition) at Chapter 7 paragraph 7.12 (page 171) state that there are cases in which a statement which is directly defamatory of A may be regarded as also carrying a defamatory

reference to B because of B's connection with A. So to say that A is a brothel keeper is also defamatory of A's spouse, who lives on the premises. See: *Huckle v Reynolds* (1859) 7 C.B. (N.S.) 114.

- [36] In my opinion the Plaintiff has satisfied the Court in respect of this limb of the requirement in an action for libel.

(c) DEFAMATORY MEANING

- [37] The Plaintiff must prove that the words complained of by him are defamatory or capable of conveying a meaning defamatory of the Plaintiff. In determining the answer to this question, I am guided by the dictum of Camacho C.J. in *Woolford v Bishop* [1940] LRBG 93, in which the Learned Chief Justice at page 95 stated:

"On this aspect of the case, the single duty which devolves on this Court in its dual role (of Judge and Jury) is to determine whether the words are capable of a defamatory meaning and, given such capability, whether the words are in fact libellous of the Plaintiff. If the Court decides the first question in favour of the Plaintiff, the Court must then determine whether an ordinary, intelligent and unbiased person reading (or hearing) the words would understand them as terms of disparagement, and an allegation of dishonest and dishonourable conduct. The Court will not be astute to find subtle interpretations for plain words of obvious and invidious import."

- [38] Therefore, the Plaintiff has to prove that the Defendants published or caused to be published a statement that tended to harm the reputation of the Plaintiff so as to lower him in the estimation of the community or to deter third parties from associating or dealing with him.
- [39] Clearly to say that a person is HIV positive even though the statement made it plain that the condition had been acquired innocently is highly defamatory and in the words of Lord Atkin in *Sim v Stretch* [1936] 2 All E.R. 1237 at page 1240

would tend " to lower such a person in the estimation of right-thinking members of society generally."

- [40] At paragraph 2.6 of *Gatley on Libel and Slander* (9th ed.), the Learned Authors had this to say:

" And it is submitted that it would be defamatory to say that a person was HIV positive even though the statement made it plain that the condition had been acquired innocently, for example by a blood transfusion."

- [41] The Learned Authors referred to the treatise, *Clerk and Lindsell, Torts* (17th ed.) 21 - 30 in which it was pointed out that a person who was thought to be HIV positive might suffer adverse discrimination in employment, insurance. However, a person who was said to have a weak heart might suffer disadvantage in insurance and it is thought that this would be actionable, if at all, only as malicious falsehood or negligence. Possibly there is a distinction in the fact that being HIV positive is so closely associated in the public mind with promiscuity and drug-taking that the innocent explanation has little impact, but a better distinction lies in the fact that HIV is perceived as dangerous to others. In *Peters-Brown v Regina District Health Board* [1996] 1 W.W.R. 337 it was held defamatory to put the plaintiff on a list of persons with infectious blood conditions.

- [42] Mr. Foster rightly submitted that even if the Plaintiff had been tested HIV positive; that to have published this statement in a newspaper would be defamatory of him as it would hold him up to ridicule, odium, contempt and he would suffer adverse discrimination as was evident in the instant matter.

- [43] Counsel for the Plaintiff contended that the words published in the article of the 1st day of September 1990 tended to cause the Plaintiff to be hated and despised. It also caused him to be ridiculed.

[44] It was submitted on behalf of the Defendants that the article of 1st September 1990 in its natural and ordinary meaning is not capable of referring to the Plaintiff. Counsel for the Defendants argued that the allegation of the Plaintiff that the article meant and was understood to mean that the Plaintiff is a carrier of and or infected with AIDS is unfounded and unsubstantiated.

[45] There could be no denial that the article of 1st day of September 1990 referred to the Plaintiff and that it was published commercially.

[46] The article of 1st day of September 1990 speculated that Saskia Downes died of AIDS. The article stated that the mother has tested HIV positive. Undoubtedly, any person reading this article would naturally conclude that the Plaintiff was HIV positive.

[47] The subsequent publications in the Crusader Newspaper of 8th and 15th September 1990 respectively did not amend the damaged one; indeed they aggravated it. The article of 8th day of September 1990 highlighted the promiscuity and high incidence of infidelity in the society. It continued:

"Isn't it time we started to unveil some of the secrecy and conspiracy surrounding the AIDS issue? The public has a right to know who is an AIDS victim in order to preserve the health of the Island and this is where the Media must play its role. The public has a right to know if perchance any one of us has had a potential brush with death having slept with an AIDS candidate. We are too small to afford the luxury of confidentiality and professional ethics where AIDS is concerned."

[48] To say that someone has AIDS, as it is to say that someone has leprosy is defamatory of that person. To say that A is operating a brothel is defamatory of A's spouse. In similar vein, to say that Saskia Downes died of AIDS and that the mother of Saskia also died of AIDS is defamatory of the Plaintiff. This is defamation by association. It is trite law that it is not a defence to say that one did not know of the existence of the other person.

[49] So, the publication in its context, together with a huge photograph of Saskia underpinned with the "SMILE 'ST. LUCIA BABY" headline with the knowledge of the identity of Saskia Downes in Saint Lucia and especially with the knowledge of her relationship to the Plaintiff in the La Clery Community conveyed the meaning that there was every likelihood that the plaintiff had AIDS, and in that community and in all other communities, it would instill the reaction that the Plaintiff has a contagious disease and ought to be avoided and shunned.

[50] After considering the evidence and even though I must confess to have been very impressed by the ingenuous arguments of Learned Counsel for the Defendants, I am of the considered opinion that the article published in the Crusader Newspaper of 1st day of September 1990 within the whole context in which it was published, would in their natural and ordinary meaning have conveyed to the ordinary reasonable person, that the Plaintiff is a carrier of and or infected with the disease known as Acquired Immune Deficiency Syndrome commonly known as AIDS.

THE DEFENCE

[51] On 30th day of November 1990, the Defendants entered an appearance and filed an amended Defence on 7th day of June 1993. In paragraph 4 of their Defence, the Defendants admitted publishing the article captioned "THIS BEAUTIFUL SMILE 'ST. LUCIA BABY DIED OF AIDS" but they denied that it was false or written or published maliciously.

[52] The Defendants admitted paragraph 7 of the amended Statement of Claim in so far as it goes but denied that AIDS can be contracted only in the manner therein set out.

[53] The Defendants denied that the headline, photograph and article referred to in paragraph 8 of the Amended Statement of Claim had or were understood to have the meanings alleged or any other meaning defamatory of the Plaintiff. Thus:

- (a) To the extent to which the Plaintiff relies on the natural or ordinary meanings of the said headline, photograph and article, the Defendants state that the said headline, photograph and article did not bear and were incapable of bearing the natural or ordinary meaning as alleged.
- (b) To the extent to which the Plaintiff relies on the extended meaning of the said headline, photograph and article by reasons of the facts set out in the Particulars of the Statement of Claim, the Defendants deny the alleged facts and state that in any case those alleged facts are incapable of supporting the extended meaning alleged.

[54] In the alternative, the Defendants pleaded that the said words complained of consist of Statement of Fact in that they are true in substance and in fact and insofar as the said words complained of consist of expressions of opinion they are fair comment made without malice on the said facts which are a matter of public interest.

[55] The crucial issue which falls to be determined is whether the plea of justification and fair comment could in the circumstances of the case avail the Defendants? This will necessitate an analysis of the pleadings, the relevant evidence and the law of justification as well as fair comment.

JUSTIFICATION

[56] A Plaintiff establishes a prima facie cause of action as soon as he proves the publication of defamatory words. Since the law presumes that every man is of good repute until the contrary is proved, it is for the Defendant to plead and prove

affirmatively that the defamatory words are true and substantially true. If the Defendant pleads justification, where the words complained of consist of fact and comment, he must prove that the defamatory statements of fact are true or substantially true and that the defamatory inferences borne by the comments are true, as per Lord Findlay in *Sutherland v Stopes* [1925] A.C. 47 at pages 62 - 63.

[57] It is, however, a complete defence to the action of libel that the defamatory imputation is true. The defence of justification admits the substance of the publication of the whole or so much of the defamatory statement as is justified, and asserts that it is true in substance and in fact. The Defendant should only plead justification where there is clear and sufficient evidence that the allegation is true.

[58] The Defendants contended that paragraph 1 of the article of 1st day of September 1990 raised no issue.

[59] Paragraph 2 stated that the "SMILE BABY" died of AIDS, that she was recently tested HIV positive being reactive to EIA (Positive Enzyme-linked Immunoassay) and that blood samples were sent on for testing using the Western Blot method. Finally, the article went on to state that the results had not even returned when the young child died. The Defendants asserted that the entire paragraph is true and was confirmed by Dr. Stephen King.

[60] Learned Counsel for the Defendants submitted that paragraph 3 stated an opinion that it is generally felt that Saskia acquired the infection at child birth or through breast feeding and this was confirmed by Dr. King.

[61] In other words, according to Learned Counsel, each and every allegation of fact has been proven correct as has the comment made on the allegation of fact.

[62] In support of the Plaintiff's contention, I find that at the time of the publication of the article on 1st day of September 1990, it was incorrect to declare that Saskia Downes died showing all the symptoms of clinical AIDS. Dr. King confirmed this statement.

[63] I accept in its entirety the Plaintiff's submission that in any event, there can be no justification as it has been established that the Plaintiff is HIV negative. According to Learned Counsel, the Plaintiff is AIDS-free and consequently, no plea of justification can be entertained. And I so hold. The Defendants should only plead justification where there is clear and sufficient evidence that the allegation is true.

FAIR COMMENT

[64] The plea of fair comment only comes into play when the plea of justification fails. That plea failed because, as I have said above, the Defendants have failed to justify "the truth of every injurious imputation" contained in the article of 1st day of September 1990.

[65] The Defendants in paragraph 7 pleaded that insofar as the said words set out in paragraph 6 of the Statement of Claim consist of expressions of opinion they are fair comment made without malice upon a matter of public interest.

[66] In this regard, I bear in mind what Lord Denning said in *Slim v Daily Telegraph Ltd.* [1968] 1 All E.R. 497 at page 503: -

"In considering a plea of fair comment, it is not correct to canvass all the various imputations which different readers may put on the words. The important thing is to determine whether or not the writer was actuated by malice, if he was an honest man expressing a genuine opinion on a subject of public interest, then no matter that his words convey derogatory imputations, no matter that his opinion was wrong or exaggerated or prejudiced, and no matter that it was badly expressed so that other people read all sorts of innuendoes into, nevertheless, he has a good defence of

fair comment. His honesty is the cardinal test. He must honestly express his real view. As long as he does this, he has nothing to fear, even though other people may read into it..."

[67] Learned Counsel for the Plaintiff, Mr. Peter Foster trenchantly argued that this defence is not open to the Defence at all in that they have not established the facts they wished to rely upon by calling evidence to that effect, or on the basis of their comment and indeed, such have not been pleaded as required.

[68] In *Lord v Sunday Telegraph* [1971] 1 Q.B. 235, it was held that evidence to sustain the defence of fair comment will be largely, if not exclusively, directed to establishing the facts relied upon as to the basis of the comment. Such facts have to be pleaded. Clearly the evidence will be confined to those matters which have been pleaded.

[69] I agree entirely with the submissions by Mr. Foster that the Defendants cannot avail themselves of this defence. There are absolutely no facts upon which to base the defence of fair comment and I so hold.

CONFIDENTIALITY

[70] The only issue that arises here is whether or not the information given to the Defendants was confidential information.

[71] The Defendants contended that the confidential information did not come from the Plaintiff and that there was no evidence to show that the said confidential information belonged to him. According to Learned Counsel for the Defendants, "ownership, if there was any were in the two persons who are now deceased." He urged the Court to find that there was no legal nexus between the Plaintiff and the deceased persons.

[72] Learned Counsel, Mr. Foster unhesitatingly added that the information does not have to come from the Plaintiff. He relied on the evidence of Dr. King in respect of the assertion. Dr. King stated under cross-examination:

"The information contained in the article of 1st day of September 1990 was confidential information. I hold the information on trust for patients. The information belong to patient or caretaker."

[73] On re-examination, he confirmed that the information belonged to the patients and that he held it on trust for the patient.

[74] It has been established by the evidence of Dr. King that the information published in the Crusader Newspaper on 1st day of September 1990 relating to Saskia Downes and Andrea Downes and by association the Plaintiff were confidential information. He also confirmed that the said information belonged to the patient or caretaker. The Plaintiff testified that he was the father of Saskia Downes and common-law husband of Andrea Downes and thus the caretaker of both of them. He also stated that he did not give anyone permission to publish such information concerning his daughter and common-law wife. Learned Counsel for the Plaintiff referred to the cases of Attorney General v Guardian Newspapers (No.2) [1990] 1 A.C.109 and Petra Jeffrey Nelson v Attorney- General of Saint Lucia (unreported).

[75] At page 281 in Attorney General v Guardian Newspaper (No.2) [supra] , Lord Goff declared:

"A 'duty of confidence' arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others."

[76] In light of the evidence adduced in this matter, I find as a fact that the information published in the Crusader Newspaper of 1st day of September 1990 was indeed confidential information and by association, the property of the Plaintiff.

[77] As in the instant case, where the Defendants have already broken their obligation of confidence and released the information, an injunction against disclosure is pointless now but the Plaintiff will have a claim for damages for loss suffered.

QUANTUM OF DAMAGES

[78] I now have to consider what is an appropriate quantum of damages in this matter. In assessing the damages to which the Plaintiff should be entitled, I am mindful of the wide bracket within which damages in a defamatory action can fall. In *Cassell & Co. Ltd. v Broome & Another* [1972] 1 All E.R. 801 at page 836, Lord Reid had this to say:

"Damages for any tort are or ought to be fixed at a sum which will compensate the Plaintiff, so far as money can do it, for all the injury which he has suffered. Where the injury is material and has been ascertained it is generally possible to assess damages with some precision. But that is not so where his reputation has been attacked - where to use the traditional phrase, he has been held up to hatred, ridicule or contempt. Not only is it impossible to ascertain how far other people's minds have been affected, it is almost impossible to equate the damage to a sum of money. Any one person trying to fix a sum as compensation will probably find in his mind a wide bracket within which any sum could be regarded by him as not unreasonable - and different people will come to different conclusions. So in the end there will probably be a wide gap between the sum which an objective view could be regarded as the least and the sum which could be regarded as the most to which the Plaintiff is entitled as compensation."

[79] In an action for libel "the assessment of damages does not depend on any legal rule": *Bray v Ford* [1986] A.C. 44 at page 50. And is governed by all the circumstances of the particular case. Some of the factors to be taken into account in awarding damages in this case are:

- (1) the conduct of the Plaintiff;
- (2) his position and standing;
- (3) the nature of the libel;
- (4) the mode and extent of the publication;
- (5) injury to the Plaintiff's feeling including aggravating factors and
- (6) mitigating factors.

[80] I should like to mention firstly the issue of publication; extremely relevant as it is to the determination of the quantum of damages. There is proof that the newspaper circulation increased as a result of the article. The Defendants themselves in a subsequent issue of their newspaper on 8th day of September 1990, [Exhibit FGP 4] admitted that the newspaper sold. According to the Defendants, " suddenly everyone wanted to possess a souvenir of this tragic scoop."

[81] The nature of the libel is a serious one. In my view, the Defendants in the instant case published and continued to publish articles in reckless disregard of the truth. In the issue of 8th day of September, they recognized that "the poor victimized family...were supposedly traumatized by our story." [My emphasis] Having recognized this, they did not once visit the family to express their condolences or try to find out the truth. Instead, they continued "to feast on the headlines that rocked Saint Lucia."

[82] The Defendants were uncaring and insensitive. They ridiculed the memory of Saskia Downes by printing in the Crusader of 29th day of September 1990 [Exhibit FGP 7] under the column called Queek Quak, the following:

" Talk about Cosmetics! Insiders say that the Star did all the photography and graphics in producing the ' Smile St. Lucia' Poster and they did not notice all the tell-tale pock-marks on the face of the beautiful baby and provided professional aid in touching up the picture so that the truth would not be brought to light. Guess this only endorses the Star's claim that the product itself is not important. It is how people are made to see it! Eh bien..."

[83] In determining the quantum of damages, I wish to adopt the dictum of Adams J. in *Cilma A.M. Dupigny v Star Lestrade* [Civil Suit No. 256 of 1990] [unreported] emanating from the Commonwealth of Dominica. He had this to say at page 9 of his judgment:

"...Uncomfortably poised between the Scylla of making an award perhaps seen as being too low and the Charybdis of one considered to be excessive, I feel justified in so doing."

[84] I am also guided by the level of awards given in similar matters in our jurisdiction. See:

- (1) *Kennedy Simmonds v Joseph Nathaniel France et al* [Civil Appeal No.2 of 1985] - St. Christopher & Nevis;
- (2) *John Alfred Osbourne v The Montserrat Reporter Ltd. et al* [Civil Appeal No. 1 of 1991] - Montserrat;
- (3) *Spice Islands Printers Ltd. et al v Andrew Bierzynski* [Civil Appeal No. 5 of 1992] - Grenada;
- (4) *Learie Carasco et al v Neville Cenac* [Civil Appeal No. 4 of 1994] - Saint Lucia;
- (5) *Bernard Nicholas v Kertist Augustus* [Civil Appeal No. 3 of 1994] - Dominica.

[85] Accordingly, I would order that the Defendants do jointly and severally pay to the Plaintiff damages in the sum of \$30,000.00 for the libel contained in the article of 1st day of September 1990 and \$1 0,000.00 for breach of confidential information making an aggregate of \$40,000.00 with Costs to be taxed if not agreed.

Indra Hariprashad-Charles
High Court Judge [ag.]