ST. CHRISTOPHER/NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 2 of 1985

JOSEPH NATHANIEL FRANCE
FITZROY BRYANT — Defendants/Appellants

and

KENNEDY ALPHONSO SIMMONDS — Plaintiff/Respondent

Before: The Honourable Mr. Justice Robotham - Chief Justice
The Honourable Mr. Justice Moe
The Honourable Miss Justice Joseph (Acting)

Appearances: Lee Moore and Henry Browne for the Appellants
Terrence Byron and Constance Mitchum for the Respondent

1986: March 11, 12
Oct. 6.

JUDGMENT

ROBOTHAM, C.J.

"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." These are the opening sentences of the learned author of Clerk and Lindsell on Torts in his chapter on defamation to be found in any edition.

It was in quest of the vindication of his reputation and good name that Kennedy Simmonds, the plaintiff/respondent herein, a registered medical practitioner, Consultant Anaesthesist, and Prime Minister of the Federation of St. Christopher and Nevis, brought an action for defamation against the first-named defendant/appellant Joseph Nathaniel France, editor of a newspaper published in the

/Federation.....

Federation and known as the "Labour Spokesman", and the second-named defendant/appellant Fitzroy Bryant, a Barrister-at-Law and Solicitor, and author of a regular column in the said newspaper, entitled "Frankly Speaking by Fitzroy Bryant". The date of appearance of this offending column was May 23, 1981. The Labour Spokesman is alleged to be the official organ of the political party to which both appellants owe their allegience, a party which is in opposition to that of the plaintiff.

The article was boldly captioned "Simmonds you better talk fast. Where the 1½ million gone"? and the offending portions will be reproduced in full shortly. For the moment it is sufficient to say that the article centered around the purchase by the plaintiff of a ferry boat on behalf of the Federation to operate between St. Kitts, (the name by which St. Christopher is more universally known) and Nevis. The name of the boat was the "M.V. Caribe Queen" and the purchase price in 1980 when the transaction was concluded was $377,000 U.S. plus $20,000 U.S. broker's commission. The equivalent in E.C. currency was 1.2 million dollars and the purchase was effected in Louisana, U.S.A. This boat was to replace the "Liamuiga" which was severely damaged and rendered unserviceable by the hurricane of 1979. The money to pay for the M.V. Caribe Queen was duly approved by the Parliament of the Federation, and it was sent direct from the Treasury in St. Kitts to the escrow agent in the United States in 2 payments of $19,000 U.S. and $378,000 U.S.

The purchase of the Caribe Queen having been concluded the damaged "Liamuiga" was sold by private treaty to one Vernon Flemming a member of the plaintiff's political party for $10,000 E.C.

At the time of the sale the "Liamuiga" was lying disabled in the Harbour in Barbados, and port expenses there had been incurred by the Government of St. Kitts totalling ½ million dollars. The scrap value was assessed by experts at $10,000 U.S. but those experts were also of the opinion that to get the boat to the scrap yard in Columbia U.S.A.

/would.....

would have cost considerably more than its scrap value. To repair it would have cost the experts said, in the region of $1,572,400. Their advice to the Government of St. Kitts was to sell it "as is" in Barbados or sink it. It was thus sold to Flemming. Subsequently an ex gratia payment of $156,000 E.C., was made by the Insurance Company to the Government of the Federation.

The matter came for trial on April 22, 1985 before Singh J and after 10 trial days, on May 7, 1985, he awarded the plaintiff $75,000 by way of aggravated damages with costs to be taxed. There was no further award under the head of exemplary damages. I now set out the offending portions of the article as pleaded in paragraph 2 of the statement of claim.

THE ARTICLE

Saturday, 23rd May, 1981:

> "SIMMONDS, YOU BETTER TALK FAST: WHERE THE $1½ MILLION GONE?
>
> "In my column of 20 December 1980 I warned Premier Kennedy Simmonds that the sale of the M.V. LIAMUIGA and the purchase of the M.V. CARIBE QUEEN would turn out to be two of the most costly mistakes of his political life. Events since then have shown that Kittitians will never forgive Simmonds for giving away the LIAMUIGA to his party activist and no amount of explanation will be able to help him.
>
> "The CARIBE QUEEN has proved an even greater embarrassment.
>
> "CARIBE QUEEN RIP-OFF
>
> "Maybe my information is wrong, but I don't think so. There are Kittitians in Tortola, the U.S. Virgin Islands and United States of America who are very disgusted at this LIAMUIGA give-away and CARIBE QUEEN rip-off business and who are watching the fate of both boats with the utmost interest.
>
> " For example, when LIAMUIGA went to St. Thomas, U.S. Virgin Islands, after the give-away, some Kittitians there were violently angry about the corruption surrounding the boat's change of hands and nearly got themselves into trouble.
>
> "SIMMONDS MUST COME CLEAN

/At public.....

"At public meetings the length and breadth of St. Kitts since December last year, Labour's elected representatives of the people and others have warned Simmonds that he should come clean about that $1½ million and the CARIBE QUEEN.

"Lord, have mercy. So what about the $400,000.00 (United States Currency) which the St. Kitts Treasury gave to Simmonds? Where that none gone? "Donated" means that the boat was a gift.

"Simmonds, boy, you better talk fast bout that $1½ million. I hope it is a mistake the magazine mek when it say "donated" because, if it ain't a mistake, look at trouble in this little island of St. Kitts."

THE PLEADINGS - STATEMENT OF CLAIM:

Paragraph 3 alleged that the words were falsely and maliciously written and published of the plaintiff by way of his office as Premier of the State (as he was in 1981) and in relation to his conduct therein. Paragraph 4 alleged that the words in their natural and ordinary meaning meant and were understood to mean that the plaintiff was guilty of corruption, incompetence and dishonesty.

Paragraph 5 pleaded in the alternative to (4) that the words meant and were understood to mean that the plaintiff had committed some fraudulent or dishonest act in connection with the purchase of the Caribe Queen. Particulars by way of an innuendo were given ascribing defamatory meanings to the use of the slang words "rip-off" and (Simmonds must) "come clean" and the rhetorical question "where the money gone".

Paragraph 7 stated that the words were published out of malevolence and spite, and aggravated damages were claimed. In support thereof it alleged the repeated repetition of the said or a similar libel and the continued use of disparaging words of the plaintiff.

Paragraph 8 claimed exemplary damages but no additional award was made under this head. The particulars in support thereof however included details of the repetition of the libel and other disparaging words in subsequent issues of the same newspaper. In particular it spoke of the fact that the defendants on being informed by letter by the appropriate authorities through Peter Johnson, that the Caribe Queen was

/not a.....

not a gift, and that any statement to that effect was incorrect, they none-the-less failed to publish the letter or make any retraction of the incorrect statement. Indeed, they repeated it and continued to refer to the plaintiff as being a liar, a hypocrite, corrupt, dishonest and depraved, amongst other things.

THE DEFENCE AND REPLY:

The defence filed jointly on behalf of both defendants denied (a) that the Labour Spokesman had as alleged a wide circulation at home and abroad; (b) that the words were written and published of the plaintiff in the way of his office; (c) that they bear, or are capable of bearing the meaning ascribed to them. They entered a plea of fair comment on a matter of public interest.

In an amended defence put in during the course of the trial, they added a plea of qualified privilege. Particulars were given in support of their allegation that the boat was a gift and these were:

(1) A Press release by Morris Silver and Associates Inc. of New York, U.S.A., a public relations firm retained by the St. Kitts/Nevis Tourist Board which was carried in a May 1981 issue of the Caribbean Reporter stating in relation to the Caribe Queen that the Caribbean Central American Agency Action (CCAA) purchased the ship, refurbished it and then donated it to the State.

The plaintiff in his reply denied that Morris Silver and Associates Inc. is or was, at any material time his servant or agent or that the boat was a gift. I pause here to emphasize that the letter written by Peter Johnson the Executive Director of the CCAA dated May 27, 1981, advising the Editor of the Labour Spokesman that their published statement that the Caribe Queen was purchased by them and then donated to the Government of St. Kitts/Nevis was incorrect, is the letter which the plaintiff in paragraph 8 of his statement of claim stated was never published by way of retraction.

/(2) A statement.....

(2) A statement in the "Advocate" Newspaper of Barbados on November 20, 1980 that the people of New Orleans "will tomorrow present a big ferry boat to the small Caribbean State of St. Kitts/Nevis".

(3) A Cave Hill University of the West Indies publication "The Bulletin of Eastern Caribbean Affairs" Vol. 6 No. 5 Nov/Dec 1980 at page 20, that an 85 ft diesel ferryboat was a gift of the people of New Orleans.

(4) Statements over the Radio and T.V. by the Public Relations Officer of the Government of St. Kitts in December 1980 that the boat was a gift.

In his reply the plaintiff stated that on December 10, 1980, at the christening ceremony of the boat, he spoke at length giving details of the transaction, and again to the same effect in the House of Assembly on February 10, 1981.

Finally, in the reply the plaintiff alleged that in publishing the words complained of the defendants were actuated by express malice.

THE TRIAL:

The plaintiff led evidence of the papers wide circulation from Leslie Richardson a resident of the U.S. Virgin Island of St. Thomas. He testified that he bought there a copy of the issue of May 23, 1981, from the distributor a Mr. Ramsey and read it. The plaintiff himself gave evidence giving full details of the circumstances surrounding the transaction involving the two boats and generally with a view to establishing that at all times he acted with propriety. Witnesses were called who spoke in effect of the unsavoury light in which they held the plaintiff after reading the article and of the meaning they attributed to words used therein such as "rip-off" and "come clean".

The defendant/appellant France did not give evidence but Mitmoy Bryant did and was cross-examined at length. He called witnesses. The

/plaintiff.....

plaintiff was himself cross-examined at great length by the defendant Fitzroy Bryant in his capacity as Counsel for the first-named defendant France. Bryant remained alone in the role of Counsel for France, up to the conclusion of his cross-examination of Dr. Simmonds, on the fourth day of the trial.

On this fourth day, Bryant speaking as Counsel for France advised the trial Judge that as the case developed he had come to the conclusion that he should "assist the Court in this matter by going into the witness box". When pressed by the Court, Bryant admitted knowledge of the ruling (which had previously been brought to his attention) that Counsel should not appear as advocate and witness in the same case. (See R v Secretary of State for India v Ex parte Ezekiel (1941) 2 All E.R. 546 at 556). I find it inexplicable how, if he had objectively applied his legal and professional mind to all aspects of the case, he could have come to the conclusion before the case started that he need not give evidence in the matter when he was one of the two protagonists in the case. Be that as it may, at this stage with leave of the Judge, the appearances were re-arranged and Dr. Browne who up to then was associated with Mr. Moore for the defendant Bryant, sought and obtained leave to withdraw from the defence of Bryant, and he thereupon entered appearance for defendant France. I mention this because the Judge made more than a passing reference to it in the course of his Judgment.

The political background revealed by the evidence was that both France and Bryant were members of the St. Kitts/Nevis Labour Party, which formed the Government in 1979. France was a Minister without portfolio and Bryant was Attorney General and Minister of Education, Health and Social Affairs. The plaintiff was then in private practice in St. Kitts and was not a member of the House. It was during this Labour Party administration that the Liamuiga was damaged by the hurricane.

The plaintiff's party, the Peoples Action Movement won the Elections

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in 1980. Bryant lost his seat in the House, but France retained his. The plaintiff was made Premier (Prime Minister after Independence in 1983) and early steps were taken by him and his new Government to restore the St. Kitts/Nevis ferry service and to do something about the disabled Liamuiga. To achieve these ends he sought expert advice.

Amongst those contacted was the witness Peter Johnson of Columbia, U.S.A., Executive Director of the Caribbean Central American Agency known as the CCAA, with a view to procuring a suitable vessel. Having made certain contacts in Louisiana, he contacted the Government of St. Kitts and put them in touch with each other. He said he did not know the Caribe Queen, although in November 1980 he organized along with the International Trade Mart of New Orleans the launching of the vessel. On the day set for the launching there was flooding and traffic problems and it did not take place.

In May 1981, having spoken to Dr. Simmonds he became aware of the publication in the Labour Spokesman, the text of which was read to him by Dr. Simmonds. He thereupon wrote a letter on May 27, 1981 to the Editor of that newspaper, the first paragraph of which reads:-

> "I am aware that you published an article recently in the Labour Spokesman claiming that the "Caribe Queen" ferry boat was purchased by Caribbean Central American ~~Action~~ Agency and donated by us to the Government of St. Kitts/Nevis. That statement is not correct. Moreover it is important to my organization, and I presume to the Government of St. Kitts/Nevis that the record be set straight with respect to the Caribe Queen purchase."

It then proceeded to set out the details of the part played by the CCAA. There is no dispute that this letter was received at the office of the Labour Spokesman on June 9, 1981. A photocopy was produced at the trial by none other than Mr. Bryant himself. It is therefore indubitably clear that on June 9, 1981, Bryant knew that the boat was not donated by the CCAA. He nevertheless took no steps to correct the erroneous publication on May 23, 1981, of the fact that the boat was a

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gift of the CCAA. To compound the matter he repeated in several publications thereafter the same incorrect statement that the boat was DONATED. More will be said on this when dealing with express malice and damages.

FINDINGS OF FACT

The Judge made several findings of fact in the course of a careful 70 page judgment. Before proceeding to deal with these findings however, I must make reference to the crucial issue of his findings on the credibility of the two protaganists Simonds and Bryant. After advising himself of the need for caution in approaching the evidence of the plaintiff and his witnesses most of whom were members of the plaintiff's political party or were under his supervision and control, he found that there was nothing by way of cross-examination or otherwise to tarnish the sincerity and truth of their testimony, or to affect their credibility. He therefore accepted their evidence as being true. It was most emphatically otherwise on the credibility of Fitzroy Bryant.

The Judge found him to be a most unimpressive witness, who hedged, hesitated and prevaricated before answering questions in cross-examination. He categorized him as a compulsive liar and said of him "Never in the Caribbean jurisprudence have I seen one witness tell so many lies at any one hearing", and again at a later stage, he said "I find that this Solicitor of the Supreme Court demonstrated utter contempt for the oath he took in the witness box". There was much more. The learned trial Judge at one point devoted 12 pages of the Judgment exclusively to Mr. Bryant. The language used was strong and maybe harsh. It was perhaps harsher language than I myself would have used, but the end result of it all was that Bryant as a witness was totally discredited in the eyes of the Judge, who saw and heard him give his evidence along with others. Mr. Moore at the hearing of this appeal made reference to and made submissions on the use of what he termed the Judge's "intemperate language".

?The Judge.....

The Judge on the basis of the evidence made the following findings of fact:

(1) That the decision to sell the Liamuiga as it was in Barbados was taken on the advice of Burnett Corliss and Partners an organization employed by the British Development Division to advise the Government of St. Kitts on the subject.

(2) In the light of the ¼ million dollars in expenses already incurred by the boat in Barbados, it was agreed to sell it. The sale was duly made to Vernon Flemming for $10,000 E.C., in the face of the alternative recommendation by the experts to sink it.

(3) In procuring the M.V. Caribe Queen, USAID placed the Government of St. Kitts in contact with the Caribbean Central American Action (CCAA). Of two boats put forward by the CCAA, a boat called the Stephanie C was selected and bought out of Bankruptcy proceedings in Louisana. It was renamed the M.V. Caribe Queen. The plaintiff did the negotiations on behalf of the Government and a bill of sale was executed for $377,000 U.S. plus $20,000 U.S. brokerage fee.

(4) The House of Assembly for the Federation having approved the total sum of $397,000 U.S. the monies were remitted by the Treasury in St. Kitts to the Citizens and Southern Bank in Louisana, to be held in escrow, by two payments of $19,000 U.S. and $378,000 U.S.

(5) That at no time did the plaintiff personally sign any cheque, or withdraw any monies from the escrow account.

(6) That the total sum incurred in purchasing and refurbishing the boat was 1.2 million E.C. and that at no time did the plaintiff make use of any part of this money for his own personal use - rather the entire sum was expended on purchasing and refurbishing the boat.

In this respect he found that "Bryant lied" when he said in evidence that he had at one time in his possession a photocopy of a cheque signed by the plaintiff for $4[illegible] but that it had been stolen, the more so because in the 6 hours of cross-examination of the plaintiff by Bryant this was not put to him.

/(7) He.....

(7) He found that the Caribe Queen was not donated by anyone, nor was it a gift to the State of St. Kitts by the people of New Orleans.

To support the finding there was in evidence the agreement to purchase executed on August 29, 1980, the bill of sale dated October 27, 1980, and the evidence of Peter Johnson to the effect that it was not true to say that his organization the CCAA donated the boat to St. Kitts/Nevis. I have already referred to Johnson's letter and will only add that he testified that there was no acknowledgement of this letter, and we now know that the retraction was never published in the Labour Spokesman.

(8) That there was no dishonesty or corruption on the part of the plaintiff in the entire transaction and no evidence to justify the criticism that too much was paid for the Caribe Queen.

(9) That although the Liamuiga was sold to a member of the plaintiff's political party, there was no ulterior motive or dishonest practice involved and it was done in the interest of the State. It was in fact sold by private treaty, but the only other offer which the Government had was one for $3,000.

Bryant in his evidence had suggested that the price was too low and gave as one of his reasons that he knew the boat had a good engine, was equipped with radar and had a good radio.

This knowledge however turned out to be what he knew of it before it was damaged by the hurricane in 1979. Against this, the Judge had the report of Burnett Corliss the surveyor who spoke of the extremely bad condition of the boat after the hurricane.

Having made these findings in particular that the boat was not "donated" he found the statement to that effect in the Caribbean Reporter to be defamatory. That Bryant chose to repeat it and the Labour Spokesman to publish it, does not in the law of defamation absolve them. He further

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found on an examination of that article that when it spoke of "giving away the Liamuiga" to his party activist, and no amount of explanation will be able to help him", it imported a corrupt and dishonest motive on the part of the plaintiff.

He found in the use of the words "rip-off" and "come clean" that right thinking members of the public must have read those words to mean that the plaintiff stole the 1.2 million dollars which the Treasury sent to the Bank in the U.S.A. for purchasing and refurbishing the Caribbe Queen. Speaking for myself, one does not need to stretch ones imagination to conclude that in a Caribbean context the meaning of the words "rip-off" in any combination of words denotes dishonesty. As for the words "come clean" how often do those of us who are engaged in the practice of the Criminal Law hear of Police officers exhorting prisoners to "come clean" when it is thought that they are lying and being entrapped therein by the Judges' Rules. In the 7th edition (1984) of the Pocket Oxford Dictionary Rip-off (slang) means - fraud - theft. Come clean means - confess.

He also found the question "where the money gone" was an indication that Dr. Simmonds had converted to his own use the 1.2 million and that the headline "Simmonds you better talk fast - where the 1½ million gone' in the context of the article was tantamount to an indictment for larceny.

Taken and read as a whole he found the article to be highly defamatory of the plaintiff and by way of his office as Premier of the State of St. Christopher and Nevis.

THE DEFENCES - FAIR COMMENT

Turning to the defence of fair comment, we have already seen that the report carried by the Caribbean Reporter that the boat was donated by the CCAA was an incorrect statement which neither the Editor of the Labour Spokesman nor Bryant took the trouble to retract when advised that it was in fact incorrect. Bryant in his evidence said that he did not

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see the publication in the Barbados Advocate, nor that in the Bulletin of Eastern Caribbean Affairs but only heard of them. He was unable to produce transcripts of Government controlled radio and T.V. service that the boat was a gift.

The Judge then referred to the cases of Hunte v Starr (1906) 2 K.B. pp 319-320; Peter Walker v Hodson (1909) 1 K.B. 239 at 253 and In South Newspapers Ltd. v Becker (1932) 47 CLR 279 at 303 and then said

> "My view on the offending article inthis case is that the defendants were seeking to achieve sensation by this banner headline and the other headings but they found themselves caught in the impossible situation where they could not have achieved such sensation and still effect a clear separation of facts from expressions of opinion and that they threw caution to the winds.
>
> Having regard to these findings I hold as a matter of law that the offending article cannot be protected by a plea of fair comment and that plea fails."

EXPRESS MALICE

Ex abundante, the Judge then went on to consider whether [illegible] that the plea of fair comment had been established, it was defeated by the existence of express malice on the part of the defendants. The existence of express malice was expressly pleaded by the plaintiff and the burden was on himto prove it.

The Judge in finding that it had been established by the plaintiff said:

> "I find as a fact that the defendants after the publication, received confimation from the CO... that the Caribe Queen was not a gift and they recklessly disregarded this confirmation and continued the repetition of the libel on some twenty (20) occasions until November 1983..... I can therefore find no honest belief inthe defendants. I find that they were actuated by express malice at the time of the publication of the offending article and that that was their sole and dominant motive."

In coming to these findings the Judge carefully went through the cases, and recorded his full findings of fact. It is not necessary for

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me to go any further into this however, because Mr. Lee Moore for the appellants at the hearing of this appeal, conceded that once this Court finds, if it should so find, that the article was defamatory of the plaintiff, he could not dispute that the repetition of the libel with knowledge on the part of the appellants of its inaccuracy, could be regarded as evidence of express malice.

The Court wishes to record its appreciation of the propriety of Mr. Moore's conduct in making this concession. Such conduct is one which this Court is entitled to expect from the Bar, but alas, it is so often found to be lacking.

The plea of fair comment therefore failed entirely, once it was found that the article was defamatory.

QUALIFIED PRIVILEGE

The finding of express malice also disposed of this plea, and nothing more need be said on this.

THE APPEAL

On the basis of Mr. Moore's concession, only two issues were left for the Court to decide: (1) Is the article read as a whole defamatory of the plaintiff. (2) Is the award of $75,000 unreasonable and excessive. In the course of dealing with these two points, I will deal with Mr. Moore's complaint about the effect of what he termed the Judge's intemperate language.

IS THE ARTICLE DEFAMATORY

I start out with the proposition laid down in Manitoba Press v Martin, 8 Manitoba Reports, p. 70 that a man who undertakes to fill a public office offers himself to public attack and criticism, and that the public interest requires that a man's public conduct should be open to searching criticism.

At the relevant time, Dr. Simmonds was the Premier of the Federation

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of St. Christopher/Nevis. After Indepnedence in 1983, he was styled as the Prime Minister. No one can dispute the fact that as Premier, he is constantly in the public eye, and that he is required to conduct himself and the affairs of State in an honourable and upright manner, devoid of all taint or suspicion. Public accountability should be observed in so far as the funds of the State go. Indeed in a democratic society where there are two predominantly operating political parties, the behaviour of the Premier is constantly under the microscope of his opponents. After all, it is said by the exponents of Consittutional Law, that it is a lean and hungry opposition which keeps the Government on its toes.

In fulfilling their role in opposition, which role may be achieved not only by the making of political speeches, but by resorting to the media, robust and intemperate language in dealing with their political adversaries may be used (Douglas C.J. in - Barrow v Caribbean Publishing Co. Ltd. (1971) 11 W.I.R. 182). However, there are limitations.

An editor or writer has only the general right which belongs to the public to comment upon public matters. In such a case he is entitled to make a fair and proper comment, and so long as it is within that limit, it is no libel.

> Campbell v Spottiswoode (1863) 3 B & S 769 at 780-781.
> Merivale v Carson (1887) 20 Q.B.D. 275.

It often proves a difficult and hazardous task to draw the line but if the language robust though it may be goes beyond the limits of fair criticism, the law of defamation takes over. It becomes even more difficult to justify, if it descends into personalities, and the use of derogatory terms or expressions. The fact that slang words are used, does not make the situation any different if they are derogatory in their natural and ordinary meaning. It is true that the article must be read as a whole, but when within that article words are used which are capable

/of having....

of having a defamatory meaning, the objective test must be applied and that is "what would the words reasonably be understood to mean in the light of the surrounding circumstances as known to the ordinary person reading them? See Evans v Jones (1962) 4 W.I.R. 502.

In Clerk & Lindsell on Torts (Fifteenth edition) in Chapter 20 at 20-23 Defamation under the sub-head "Construction of Language Used" it is said:-

> "A more liberal view is taken than formally of the extent of judicial knowledge of general facts and usages, and Judges do not now consider it necessary when on the bench to be ignorant of the various matters which as men of the world they in fact know."

I venture to say that no Judge sitting in any Court in any part of the Commonwealth would interpret the use of the words "rip-off" as being complementary of anyone.

The decision as to whether the words are capable of a defamatory meaning is a question of law for the Judge. What is the particular defamatory meaning is a question of fact, and the words alleged to be defamatory must be read in their context.

The Judge in his Judgment made a critical examination of the article and found the very foundation of the article, namely, that the Caribe Queen was "donated" was non-existent. He examined the words "giving away the Lianuiga to his party activist and no amount of explanation will be able to help him". He found that they would have been read by right-thinking members of the public to mean that it was a gift to his party activists; "rip-off" that the plaintiff stole the 1.2 million dollars sent by the Treasury to the U.S.A. to purchase the Caribe Queen "corruption surrounding the boat's change of hands" meant just what it said; "come clean", a dishonest concealment or deliberate falsification by the plaintiff of facts relating to the expenditure of 1.2 million dollars for the purchase of the boat; "Simmonds you better talk fast", in the context of the article, a clear indictment of larceny; and the imprecation "Lord have mercy.....

/where....

where the money gone?" imputed that the plaintiff improperly converted the 1½ million to his own use.

Mr. Moore attempted to suggest alternative meanings in the case of each of the expressions and words used, none of which I am prepared to accept in view of their clear meaning in their ~~material~~ natural and ordinary sense. He submitted that the method of approach adopted by the Judge was wrong in that instead of construing the article as a whole, he dissected it phrase by phrase, interpreted the meaning of those words and phrases, and then reconstructed it. I find this submission to be artificial. The average reader when reading the article, would stop and ask himself "what does "rip-off" mean in the context in which I am reading it or what does "come clean" mean? One must I hold, determine the meaning of the words which is complained of and then say what is their effect within the context of the entire article.

This is exactly what the Judge did. He said after examining the various words and phrases:

> "Putting these dissections of the article back together and then reading it as a whole with the reprint of the Caribbean Reporter headlining it, I hold as a matter of law that it is highly defamatory of the plaintiff and in his office and that it was skillfully structured to impose credibility on the part of the writer with the reprint of the Caribbean Reporter giving it authority, an authority that gave it erroneous information."

I do not entertain the slightest doubt of the correctness of the learned Judge's finding that the article was highly defamatory of the plaintiff.

Mr. Moore submitted at the commencement of the hearing of this appeal that the findings of fact by the Judge were coloured by his excessive and intemperate language of a personal kind. This he said tended to indicate that his findings were not objective, dispassionate and/or judicial. As I have indicated, the language used was strong, but it was used mainly in

/respect.....

respect of his finding on the credibility of Mr. Bryant. [illegible] a crucial issue in the case.

The complaint might have had some semblance of validity, (and I put it no higher than that) if I found myself in an examination of the Judgment at variance with any of his material findings on fact. I do not find myself in this position and therefore do not see any merit in Mr. Moore's complaint.

I will therefore turn to a consideration of the final point - Damages.

DAMAGES

The plaintiff claimed aggravated damages as well as exemplary damages. The basis of the claim under the head of aggravated damages was in the main the malevolence and spite displayed towards the plaintiff in the publication of the words, the vitriolic and disparaging nature of the words used in reference to the plaintiff and the continuous repetition of the defamatory statements, particularly after they had knowledge of the basic inaccuracy in their stated facts, namely, that the Caribe Queen had been donated, or was a gift. The evidence is clear that it was neither.

Exemplary damages were also claimed on the basis that the defendants/appellants deliberately calculated that the money and/or advantage to be gained out of the said publication and the repetition thereof would probably exceed and outweigh the compensation payable to the plaintiff. In short they acted in the belief that the material advantage accruing in any form would exceed any likely monetary loss.

The trial Judge found this case to be a fit and proper one for an award under both heads. However, he awarded damages under the head of aggravated damages in the sum of $75,000. When he came to consider the award under the head of exemplary damages, he stated that although it was a fit and proper case to attract an award of punitive or exemplary damages, he would not make any further award as that of $75,000 under the head of

/aggravated.....

aggravated damages was in his opinion sufficient in the circumstances of the case.

It was the contention of Counsel for the appellants that this award was excessive. Further he said there were two defendants in the case and if it was found when considering the question of exemplary damages as it affected them individually (presumably as Editor and Author) that there were two levels of liability then the lower of the two awards being contemplated should have been recorded. Instead of doing this, he made a joint award under the head of aggravated damages. This must have included he submitted a figure which represented exemplary damages judging from his approach and that could only have been awarded on the basis of the second principle enunciated by Lord Devlin in Rookes v Barnard 1964 A.C. 1129 at 1226, namely, that the material gain to themselves far outweighed the risks they ran in publishing the articles.

I see nothing wrong in the approach of the Judge. It must be borne in mind as pointed out by Counsel for the respondent that this action was brought against the defendants jointly. They filed one joint defence. At no time did the appellant France enter any plea that the article was published without his knowledge or without negligence. At the trial he did not even give evidence nor did he call any witnesses. There was therefore in my opinion no basis or necessity for the Judge to have differentiated between them on the degree of liability or quantum.

Having considered the award of $75,000 sufficient under the head of aggravated damages, he was also correct in his approach towards exemplary or punitive damages as such damages are no longer recoverable in defamation unless the compensatory or aggravated damages remain an insufficient punishment of the defendant. (Broome v Cassell & Co. Ltd. 1972, A.C. 1027, H.L. 1972, 1 All E.R. 801).

In this case, I would go as far as to say that the compensatory damages were at large. A host of factors therefore fell to be considered

/such as.....

such as the motive and conduct of the defendants, the circumstances surrounding the publication, the nature of the language used, and the effect it was likely to have on the ordinary reader. Such further factors as the injury to the plaintiff's feelings, the grief and distress experienced, aggravated by the high-handed, insulting and contumelious behaviour of the defendants causing thereby injury to his pride and self-confidence, also fall for consideration. Lastly and by no means least, he was the Premier and Head of State for the Federation of St. Christopher and Nevis and a professional man with a wife and children.

The starting point in considering the adequacy or otherwise of the awards is the fact that the Judge found evidence of express malice on the part of the defendants. This finding could not be disputed as Mr. Moore conceded, once it was found that the defendants made repeated publication of the inaccurate statement that the boat was donated, after they had actual knowledge of its inaccuracy.

I quote from Clerk and Lindsell on Torts (Fifteenth edition) 20-170:

> "The spirit and intention of the party publishing a libel are fit to be considered by a jury in estimating the injury done to the plaintiff..... It is more grievous to be defamed out of personal spite and ill will than through mere lack of proper care and consideration. The malice which aggravates damages is not merely the absence of right motive as in the case of privilege but the presence of some bad motive. The jury may even take into consideration the whole conduct of the defendant subsequent to the publication - "from the time of publication down to the time the verdict is given" - as evidence of "the spirit in which the publication was made. (See Praed v Graham 1890, 24 Q.B.D. 53).
> It will be a matter of aggravation if the defendant has on other occasions disparaged or assailed the plaintiff's reputation, or if in the conduct of the litigation he has shown a spirit of determined hostility or has persisted in unfounded imputations and introduced new ones....."

This statement by the learned author covers the conduct of appellant Bryant like an umbrella. We know the offending publication was on May 23, 1981. The letter of Peter Johnson of the CCAA that the boat was

/not a.....

not a gift came to the knowledge of the defendants on June 9, 1981. Bryant produced the copy letter at the trial. On July 11, 1981, Bryant wrote in his same column "Frankly speaking":

> "For several months now Premier Kennedy Simmonds has been ducking questions about the acquisition of the M.V. Caribe Queen. What he do with the $40,000 U.S. he collect from the Treasury? How much the boat cost? Who all get the commissions and how much they got? How was the taxpayer 1½ million spent? The "Caribbean Reporter" say the boat was donated. The University of the West Indies say it was a gift. The Barbados Advocate say it was presented. How the thing really go..... He get a white man up in America to write a letter saying that he Simmonds buy the boat, but interestingly enough, the white man ain't say for how much Simmonds buy it....."

The "white man" would have been Peter Johnson of the CCNI.

This is but one instance of a subsequent repetition of the libel. It is unnecessary for me to recount other instances as prolixity must be avoided. I will only add that as found by the Judge it was repeated at least 20 times over two years.

The Judge found, and there was no challenge of this finding before us, that in publications before May 23, 1981 thedate of the libel, and after, as well as on public platforms, words such as dumb jackass, hypocrite, liar, wicked, vindictive, corrupt, depraved, incompetent goat, idiot, incompetent gangster, historic ass, first ever jackass, three piece suit racketeer were used of the plaintiff whilst he was holding the office of Premier of St. Christopher and Nevis.

The recklessness and persistence of the appellant Bryant in forwarding his relentless attack on the plaintiff, was further exhibited when having been served with the Writ in this case at 3 p.m. on July 29, 1981 he wrote another column on August 8, 1981 entitled "Writ or no Writ I refuse to hush".

On the conduct of the defendant, the Judge said:-

/"I find....

> "I find as a fact that the defendants have acted with malevolence or spite and have behaved in a high-handed, insulting gross and aggressive manner. Even at the trial the conduct of the defence was one of persistence by way of cross-examination of the plaintiff in order to prove him guilty of dishonesty and corruption....."

It will be remembered that Bryant in the conduct of the defence of France at the start of the trial before Singh J, cross-examined the plaintiff for 6 hours, and then withdrew in favour of Dr. Browne. It was Lord Esher M.R. in Praed v Graham (Supra) who said that the conduct of the defendant in Court during the trial is one of the factors to be considered in assessing the defendant's culpability. The practical effect of all this is that the damages awarded will fluctuate up or down, with the degree of culpability of the defendant's over-all behaviour.

Another factor which cannot be over-looked in my opinion, is that Bryant was not just a columinist in a partisan newspaper. He is a member of one of the Inns of Court, and as such a Barrister and Solicitor of our Eastern Caribbean Supreme Court. He was at one stage, the Attorney General for the Federation of St. Christopher and Nevis, and is still actively engaged in a busy law practice. As one therefore versed in the knowledge of the law, he must have been fully aware that his conduct was wrongful, and that the remedy for such conduct was an action for defamation. The evidence is there to show that he nevertheless pressed on in his villification of the plaintiff regardless of the possible consequences. Is the award of $75,000 therefore manifestly excessive as submitted by Counsel?

Two cases were referred to by way of comparison to the award of $75,000

(1) Compton v Crusader Caribbean Publishing Co. (1971) Ltd and George Odlum

C.A. 9/1977 - Eastern Caribbean Supreme Court - (unreported)

(2) Editor Evening Post and Post Newspaper Ltd v Singh- 26 W.I.R. 75.

/Dealing.....

Dealing first with Singh's case, he was awarded in Guyana in 1978, the sum of $3,000 for a libel published of him in the way of his office as a Magistrate. I do not regard this as a suitable comparison case. In any event, it was in respect of one publication only.

In Compton's case, the trial Judge awarded $60,000, and the Court of Appeal reduced it to $35,000. In so doing the Court said that the damages were so excessive that no jury could reasonably have given them. This however appears to be the approach when the jury is involved and Compton's case was not tried by a jury. In cases where the damages are assessed by a Judge alone, a Court of Appeal will not interfere unless it is shown that the Judge has acted upon a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered.

> Davies v Powell Duffryn Associated Collieries Ltd. (1942) A.C. 601 at 616.
>
> Cassell & Co. Ltd. v Broome (1972) - 1 All E.R. 801.

It was the submission of Counsel for the respondent that the Judge had properly assessed the damages and he pointed out that in Compton's case, it was only one publication. I have read this Judgment and in fact there were two publications of the defamatory matter. One common feature of Compton's case and this case is that at the relevant times both plaintiffs were Premiers, Compton being Premier for the State of St. Lucia. That is as far as the comparison goes. There was no sustained attack on Compton by the defendant Odlum in the Crusader Newspaper, and the words written of Compton were based on the factual sale of land to him; hence the defence that they were true in substance and in fact, and were fair comment on a matter of public interest.

There was no factual basis for Bryant's repetitious commentary in this case.

/Taking.....

Taking into account inflation over a period of years, it could be said in any event that an award of $35,000 in 1978, compares with an award today of $75,000.

I am firmly of the opinion that the damages awarded are not excessive. In the end result, I would dismiss the appeal and confirm the award of the learned trial Judge, with costs to the respondent to be taxed.

L.L. RODOTHAM,
Chief Justice

I agree.

G.C.R. MOE,
Justice of Appeal

I Also agree.

MONICA JOSEPH,
Justice of Appeal (Retired)