ANTIGUA & BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 3 of 1986

BETWEEN:

LEE C. WESTCOTT - Appellant

and

TRUEHART SMITH - Respondent

Before: The Honourable Mr. Justice Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr. Justice Moe

Appearances: Mr. S. Christian for the Appellant
Mr. G. Watt for the Respondent

1987: Feb. 26
June 22

JUDGMENT

MOE, J.A.

This is an appeal against a Judgment awarding the respondent/plaintiff $45,000 damages against the appellant/defendant for an article which appeared on page 3 of the issue of the newspaper "Workers Voice" for the 8th January, 1983, under the heading "Callous Injustice of Police".

The respondent based his action for damages on the following words which were contained in the article and set out in paragraph 3 of the Statement of Claim:-

"(a) Instead both A.S.P. Tony Smith and Sergeant John deliberately lied, conspired and collaborated with Denson to bring two bogus Mercury Mechanics who they claimed Denson brought in from the U.S.A.

(b) Meanwhile the boat which was bought from Miguel Tonge and repaired and outfitted by my son at his expense was vandalised by the Police and the seats destroyed. All the diving equipment, tools, anchor etc. were stolen.

(C) It is understood that the Police intimidated a third party (who has a drinking problem) to take his boat. This will also be dealt with in due course.

(d) The fact that my son's business has been ruined, his character smeared is of no intrest to them. The fact that both Sgt. John and A.S.P. Smith have themselves broken the law is of no interest to them.

/(e) This.....

(e) This entire matter makes a mockery of our constitutional rights and is an insult to Antiguans as a whole. The fabrication of evidence by the police and their obstruction of justice could simply be a conspiracy for reward. I hasten to add. Thank heavens all the Police Force are not mercenaries but some will do anything for money even to the extent of treating their own as second class citizens. Regrettably some will never be free of their inferiority complex and for those MASSA DAY WILL NEVER DONE. In the U.K. this issue would be termed a travesty while in the U.S. it would be called "a frame".

(f) The time is coming when our sons will be forced to take their talents elsewhere and leave their birthrights to the "Rich" foreign frauds, crooked politicians and mercenary policemen."

The Statement of Claim averred in paragraph 4 that:-

"By the said words and article the defendant meant and was understood to mean that the plaintiff was an inefficient Senior Police Officer who deliberately lied and conspired with one Dr. Kenneth Denson to fabricate evidence to bring charges against his son. That his son's boat was vandalised by the police while it was in custody and that the plaintiff and one Sergeant Winston John are responsible. That Assistant Superintendent of Police Truehart Smith the plaintiff had broken the law, had amongst other things fabricated evidence against the defendant's son, obstructed justice for reward and had "framed" an innocent citizen for reward. That the plaintiff was simply a mercenary policeman."

The appellant admitted the publication but denied that the words complained of bore any of the meanings set out in the Statement of Claim. He also denied that the words set out in sub-paragraphs (b), (c), (e) and (f) referred to the respondent. Further, he relied on "the rolled-up plea of fair comment."

The learned trial Judge held that the words set out in the Statement of Claim in paragraph 3(b), (c), (e) and (f) referred to the respondent/plaintiff. He then found that the whole allegation contained in the article was false and therefore held that the defence of fair comment failed. He further found that the appellant was malicious. The trial Judge considered the article complained of to be highly defamatory containing imputations of the utmost gravity against the character and conduct of the respondent as a senior police officer and assessed damages at $45,000.

Five grounds of appeal were filed but the appeal was argued under one head which complained that the damages awarded were unreasonable and excessive.

/The first.....

The first contention was that the learned Judge wrongly assessed evidence in coming to his conclusions on four matters which incorrect findings it was argued must have influenced his award of damages. I find it unnecessary to detail two of these matters. Suffice it to say that in my view these two matters were not matters which would have been relevant as to the amount of damages but went merely to credibility of certain witnesses. The other two matters were as to two of the meanings which the respondent alleged that the article bore and which the Judge found the article to bear. The appellant complained that the learned Judge could not find that the plaintiff had not broken the law when he, as a police officer,permitted Gantert and Dymock to carry on work as mechanics in violation of the legislation relating to work permits. There was no merit in this complaint. In analysing the evidence what the learned Judge concluded was "the most the defendant/ appellant could have said was that he (the respondent) permitted them (the experts) to break the law but to say that the plaintiff had broken the law is another matter. The evidence was that the plaintiff asked two men, who had permits to work as diving instructors, to do certain examinatioins on an outboard engine which they did. That is not evidence of any breach of any law. The examination of the engine by the diving instructors was not work in violation of the work permit. As it turned out there was no evidence whatever that the plaintiff had broken the law.

The appellant also complained about the trial Judge's finding that the appellant was alleging that the plaintiff was responsible for the alleged damage and/or vandalism of the boat in question. This the plaintiff/respondent alleged in paragraph (4) of his Statement of Claim where he set out what he claimed the article meant. The Judge in determining the meaning of the words complained of quite properly looked at the article as a whole. It must be observed that what the appellant/ defendant stated as set out in paragraph 3(b) of the Statement of Claim was "Meanwhile the boat which was bought from Miguel Tongue and repaired and outfitted by my son at his expense was vandalised by the Police and the seats destroyed." There are other paragraphs of the article in which the term "police" is used and on those occasions when the term is used, the appellant/defendant was referring to the police generally. When he was hitting at the respondent/plaintiff he called his name and clearly was not reluctant to do so. There are many authorities which show that a writer should not be taken to mean something other than what he clearly said unless it is plain that he is not being frank in the use of words, e.g. Lewis v Daily Telegraph (1964) A.C. 234. There was no indication that this was the situation here, and I would agree that the finding of the trial Judge read more into the article than was required.

/Turning.....

Turning specifically to the matter of quantum, the appellant has challenged the amount on two bases.Firstly that he the Judge must have taken into consideration matters which he ought not to have taken into account and secondly that he applied a wrong measure of damages. The trial Judge having considered the article concerned as a whole found that the whole allegation contained therein was false. He took the view that "it is a very serious allegation to make against a senior police officer that he fabricated evidence, obstructed justice and conspired with Denson for reward and framed the defendant's appellant's son....." and held that the article read as a whole was a vicious and unmitigated attack on the plaintiff's professional integrity, conveying imputations of the utmost gravity against the conduct of the plaintiff/respondent as a senior police officer. The learned trial Judge considered the extent of the effect the article would have had on the other members of the police force, the reaction of his superior officers and subordinate officers, in particular in what light junior members of the police saw the respondent/ plaintiff, and also the reaction of members of the general public. That the appellant had no defence to the libel, i.e., he could neither justify nor succeed in a plea of fair comment, that he refused to offer an apology when requested to do so but maintained the truth of his allegations uintil the date of Judgment. That the article was addressed to the citizens of Antigua. I can find no fault with the Judge's consideratioin of those factors in his assessment of damages. The appellant complained that the Judge took into account the evidence that the defendant said that the article was published in the "Outlet" newspaper. There was (in the Judgment) such a sentence referring to that evidence but this was stated in the paragraph where the Judge considered that the article was addressed to the citizens of Antigua. As I see it the defendant's evidence was used as confirming the inference drawn from other evidence that the libel was addressed to the people of Antigua, I do not regard that bit of evidence as having had any significant weight in the determination of the amount awarded.

There was a further complaint that there was no basis on which the learned Judge could find express malice and take it into account in assessing damages. It was contended firstly it was not pleaded and secondly there was no evidence on which the Judge could have found it or any other improper motive on the part of the appellant/defendant. The learned trial Judge at page 136 of the record expresssed himself in this way:

> "I have already decided that the defence of fair comment cannot avail the defendant and having regard to the fact that the defendant was in my
>
> /view,.....

> view, in writing the article, trying to bring pressure to bear upon the plaintiff for him to release the engine and also having regard to the language used, I hold that the defendant was malicious."

The passage quoted came at the end of his consideration of a submission by Counsel for the respondent/plaintiff that the Court should find express malice on the part of the appellant/defendant. Having shown the distinction between Presumed Malice (or Malice in Law) and Express Malice (or Malice in fact), the trial Judge referred to paragraph 3 of the Statement of Claim in which the plaintiff alleged that "the defendant falsely and maliciously wrote". Now having found the libel published without lawful excuse the Malice pleaded in paragraph 3 is presumed at Law. He however went on to consider Turner v M.G.M. Pictures Ltd (1950) 1 All E.R. at p. 449 which dealt with circumstances where it was necessary for the plaintiff to establish Malice in fact or Express Malice and concluded with the passage quoted.

I am inclined to agree with Counsel for the appellant that the learned trial Judge made a specific finding of express malice on the part of the appellant. This finding against which there is the complaint, was unnecessary since as the matter had proceeded it was already conclusive that the appellant was actuated by that malice.

The final complaint was that the trial Judge applied a wrong measure of damages. The learned Judge said:

> "In assessing the damages in this case I am mindful of what Lord Reid said in Cassell Co. Ltd v Broome (1972) 1 All E.R. p. 801 and p. 838 letter (h)
>
> > "An ill disposed person could not infrequently deliberately commit a tort in contumelious disregard of another's rights in order to obtain an advantage which would outweigh any compensatory damages likely to be obtained by his victim. Such a case is within this category."

The statement is taken from that portion of Lord Reid's speech where he was illustrating the second of the categories set out by Lord Devlin in Rookes v Barnard (1964) 1 All E.R. 367 in which an award of exemplary damages can be made. It seems clear to me that the learned Judge considered an award on an exemplary basis.

It will be seen from what has been said that the learned Judge properly directed himself as to the highly defamatory nature of the article concerned, its effect particularly on subordinates of the respondent/plaintiff, the refusal of the appellant/defendant to apologise

/and his.....

amd his maintaining of the defamatory allegations up to end of trial, that the appellant was actuated by malice, and the extent of the publication of the article. As it turns out, the words pleaded have proved not to have had one of the meanings attributed to them and evidently taken into account in the making of the award. Further it must be observed that the claim for damages was not on an exemplary basis which claim by virtue of Order 18 r. 8(3)of the Rules of the Supreme Court is required to be specifically pleaded. The above considerations should be reflected in the award. I would therefore in all the circumstances reduce the award to $30,000. As to costs, I would allow the appellant 1/3 of his costs. The respondent to have 2/3 of his costs.

G.C.R. MOE,
Justice of Appeal

I agree that the damages awarded should be reduced by 1/3.

L.L. ROBOTHAM,
Chief Justice

I also agree.

E.H.A. BISHOP,
Justice of Appeal.