COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL No. 3 of 1994

BETWEEN:

BERNARD NICHOLAS

Appellant

and

KERTIST AUGUSTUS

Respondent

Before:	The Rt.Hon. Sir Vincent F. Floissac	Chief Justice
	The Hon. Mr. Justice C.M. Dennis Byron	Justice of Appeal
	The Hon. Mr. Justice Satrohan Singh	Justice of Appeal

Appearances: Mr. Alick Lawrence for the Appellant
Mr. Brian Alleyne, S.C. for the Respondent

1996: March 11 12;
April 15.

JUDGMENT

SATROHAN SINGH, J.A.

On October 8, 1990, the appellant, a tailor by profession and Trade unionist, was the General Secretary of the Dominica Trade Union (DTU). The respondent, a full time trade unionist since 1970 was on October 8, 1990 and still is the Secretary/Treasurer of the Caribbean Congress of Labour (CCL) based in Barbados. The DTU is an affiliate of the C.C.L. The C.C.L. is an umbrella organisation that affiliate unions and their members such as the appellant would approach in search of redress for a grievance.

On the said October 8, 1990, the appellant wrote a letter addressed to the President of the C.C.L. and copied same to some eight other labour organisations among which at least six of them inclusive of the I.C.F.T.U. (International Confederation of Free Trade Unions), A.I.F.L.D (American

Institution for Free Labour Developnient), I.F.P.A.A.W. (International Federation of Plantation, Agriculture and Allied Workers), C.T.U.C. (Commonwealth Trade Union Council) the GT.U.C. (Guyana Trade Union Council) were not affiliate unions of the C.C.L. and were not even allowed to attend meetings of the C.C.L. In that typewritten letter, the appellant, inter alia, spoke of the respondent as follows:

> "(a) "As General Secretary die W.A.W.U. and Secretary/Treasurer of C.C.L. Kertist Augustus is making sure that his dreams come true by systematically denying the D.T.U. of its entitlements as a legitimate affiliate of the C.C.L.".
>
> (b) "It is no open secret among the general membership of the W.A.W.U. and the Dominican public that Kertist Augustus is a fully paid General Secretary of the W.A.W.U. He is paid off the records."
>
> (c) "When Kertist Augustus conies to Dominica lie sees himself as the General Secretary of W.A.W.U. and not Secretary/Treasurer of C.C.L. until lie could implement all the wicked and malicious plans lie and his President concoct against the D.T.U.".
>
> (d) "That Kertist Augustus is paid by the W.A.W.U. as that Union's General Secretary off die record while at the same time is paid by the I.C.F.T.U./C.C.L. to serve the Regional Trade Union affiliated to the C.C.L.".
>
> (e) "That the Secretary/Treasurer Kertist Augustus fraudulently provided money from the A.1.F.L.D. In the name of the D.T.U. sometime last year for a purported meeting which the duly elected and authorised officers of the D.T.U. neither requested or had any knowledge of and which we later got to know was held at the W.A.W.U.'s Headquarters and attended by W.A.W.U. members with Kertist Augustus being the General Secretary of W.A.W.U. as Coordinator On the Sunday preceding their 25th Anniversary celebration activities".
>
> (f) "Enough is enough, Kertist Augustus is not fit to be the Secretary/Treasurer of the C.C.L.."

It is accepted that this letter was received by and as consequence published to the C.C.L. and all the addresses mentioned therein.

On January 7, 1 994, in a Suit brought by the respondent against the appellant alleging libel as a consequence of the publication of the aforementioned letter, Adanis J found the letter to be defamatory. The learned Judge rejected the appellant's sole defence of qualified privilege, found malice in the appellant when lie wrote and published the letter and awarded the respondent damages in the sum of $20,000 with costs. This appeal challenges the Judge's adjudication on both liability and quantum of damages. There Is no dispute that the letter is prima facie defamatory of the respondent. The issues for determination by this Court relate to (1) Qualified privilege, (2) Malice and (3) Quantum of damages. There is a peripheral issue that surrounded the question whether the letter was written on authority from the DTU or personally by the appellant without such authority. This was a factual Issue before the Judge who ruled that the letter- was not authorised by the DTU. I can see no reason in law to interfere with this factual determination of the trial Judge. I would therefore proceed to deliberate on the three other issues raised in this appeal.

(I) QUALIFIED PRIVILEGE

The law as it relates to the concept of qualified privilege is accepted by both sides and therefore not in dispute in this appeal. Consequently I propose merely to state it, and I can do no better than adopt what Lord Atkinson said in **Adam v. Ward (19 1 7) A.C. 309 at page 334** that "An occasion is privileged where the person who makes the communication has an Interest, or a duty, legal, social or moral to make it to the person to whom it is made and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential". Support for this dicta can be seen in **Pullman v. Hill Ltd. (1891) 1 Q.B. 528 and Stuart v. Bell (1891) 2 Q.B. 354.** In

Gatley on Libel and Slander 8th Edition para. 442; the learned authors identify nine categories of situations which invite the defence of qualified privilege. The appellant herein relied on the following three of those categories: (I) Statements made in the discharge of a public or private duty.

(2) Statements made on a subject matter in which both the defendant and the person to whom the statements are made have a legitimate common Interest.

(3) Statements made by the defendant to obtain redress for a grievance. The evidence of the appellant was that lie wrote the letter for the purpose of seeking redress from the C.C.L.

With respect to the first category abovementioned, for the privilege to be effective, the addressees must have a legitimate interest or duty in the subject matter of the offending communication. In **Gatley 7th Edition at paragraph 520**, the learned author states the position thus:

> "The defendant must be careful to make his communication only to those persons who have a legitimate interest or duty in relation to the subject matter. The fact that a communication between A and B is privileged does not justify A in making the communication in a manner or at a time which would necessarily involve Its publication to other persons who have no such interest or duty and no privilege will prima facie attach to any such publication."

The letter in this matter made serious allegations against the respondent that could have been understood to mean that the respondent was a deceitful and dishonest person, a person not fit to be the Secretary/Treasurer of the C.C.L., and that lie had committed a criminal offence punishable with imprisonment. According to the appellant's evidence, the purpose of the letter was to seek redress from the C.C.L. and that it would be the C.C.L.'s secretariat that must decide who should consider the allegations. The matter wastherefore in a sense sub judice until the C.C.L. would have come to a decision on the allegations therein made.

In my considered opinion, the offending contents of the letter, being mere allegations at the time of the several publications, the publication of the statements therein to the addressees other than the C.C.L., could not have been made by the appellant in the honest discharge of a public or private duty. I consider the publication of the letter to the addressees other than the C.C.L. to be a premature act on the part of the appellant for no apparent useful or justifiable reason. At that stage of allegations only, there could have been no legitimate interest or duty in the addressees other than the C.C.L. in the subject matter of the communication. The allegations therein could have had no practical value unless and until it had been taken into consideration by the C.C.L. and the C.C.L. had come to a decision upon it. To hold otherwise would be to encourage success in such a plea with respect to mere idle gossip.

A case on point **is De Buse, and others v. Mc Arty and Stephen Borough Council (1 942) 1 A.ER. 1 9.** In that case the defendant Borough Council was being asked to consider a report of a Committee which alleged that the Plaintiffs were parties to the stealing of petrol. The first defendant, the Town Clerk published a notice for the benefit of ratepayers convening a meeting for the consideration by the Borough Council of the report. In doing so he also published the complete report of the committee with the allegation that the Plaintiffs were parties to the stealing of petrol. In the action for libel the defendant set up as one of his defences that the ratepayers had a common interest in the subject matter of the words complained of and that it was the duty of the defendant Council to publish the words by all reasonable and convenient means to the said ratepayers. The Judge at first instance upheld the plea of qualified privilege. This finding was reversed on appeal. At p.23 Lord Green MR said:-

"I cannot myself see that it can possibly be said that the council was under any duty to make that communication to the ratepayers. The matter was at that stage, in a sense, sub judice, because the committee's report by itself was a thing which could have no practical value unless arid until it had been taken into consideration by the council and the council had come to some decision upon it.

That decision might have been that the report be adopted, or it might have been that the report be not adopted, or it might have been that the report be referred back to the committee. The appointment of committees of that kind is part of the internal management and administration of a body of this description, and, whatever the duty or the interest of the council might have been after it had dealt with the report and come to some decision upon it, I cannot myself see that at that stage in the operation of the machinery of the borough's administration there was any duty whatsoever to tell the ratepayers how the wheels were going round.

There may well have been a duty of the council, or, if not a duty, at any rate an interest in the council, to inform the ratepayers of the result of its own deliberations. If I am right in thinking that there was no duty to make the communication to the ratepayers at that stage, was there an interest in the council to do so? There, again, I cannot see how it can be said that the Council had, at that stage of the inquiries, an interest to communicate to its ratepayers the circumstance that the committee had reported in those terms.

It is perfectly true and, indeed, obvious that the committee itself had both an interest and a duty to make a report to the council, but there could be no common interest, as far as I can see, between the council and the ratepayers to have what, in the circumstances, was only a preliminary stage in the investigation communicated to the ratepayers in the form in which it was communicated. In my judgment, it would be insufferable if the council, which must be expected to act on reasonable lines, should be in a position to say that a communication of that kind of a matter which is going to be examined and is on the face of it clearly defamatory is a thing which it has an interest or a duty to publish or broadcast to its ratepayers."

De Buse's case is not dissimilar to the instant matter arid I would conclude this issue by agreeing with and adopting the thoughts of the Master of the Rolls in De Buse and of Adams J in his well-reasoned judgment in the instant matter:

"It is my view that the circumstances in the case before me are somewhat analogous to those in **De Buse v. Mc Arthy**. In the case before me the defendant was making allegations of misconduct against the plaintiff. Those allegations lie sent to the C.C.L. which organisation was according to the evidence the one which was entitled to put in place some group of persons to determine the truth or otherwise of the allegations. There was no investigation into the allegations. From then to now they have remained mere allegations. How could it be right for the defendant to have circulated this letter of mere allegations to the

> international organisations such as those to which it was addressed. The offending letter was dealing with a domestic matter; the concern of the C.C.L., and its affiliates at the earliest stage it could properly be said that international bodies may have had some real interest would have been when investigations had indicated or condemned the plaintiff, and even about that there might be some doubt. When I transport the reasoning of the Court of Appeal in the case of **De Buse v Mc Arthy** to the one before me as I think I should I have no difficulty in holding that the defence of qualified privilege under the heading of corresponding duty and interest does not avail the defendant."

I so hold.

Regarding the second category of qualified privilege relied on by the appellant, that the statements made in the letter were on a subject matter in which both the appellant and the addressees have a legitimate common Interest, my view is that this plea also could only have availed the appellant with respect to the publications to the other addressees other than the C.C.L., if the statements were not mere allegations but were findings of the C.C.L. The evidence does not disclose any legitimate interest in these addressees in receiving mere allegations. Again I say that to hold otherwise would be to encourage success in such a plea with respect to mere idle gossip. The cases of **Neville v. Fine Art and General Insurance Co. (1 897) A.C. 68, Hunt v. Great Northern Rhy. (1891) *2* Q.B. 189** and **Boston v. W.A. Bagshaw & Sons (1966) 1 WLR 1 26**, which all show success in such a plea, were all cases where what was published were not mere allegations and where there was an obvious common interest to make the disclosure on one hand and to receive it on the other. In the instant matter, this privilege would only apply to the communication made to the C.C.L. for reasons already mentioned.

The third category relied on by the appellant was that the statements were made by the appellant to obtain redress for a grievance. The general principle as stated in Gatley, is that where a man believes that he has suffered a grievance at the hands of another he is entitled to bring his grievance to the notice of the person or body whose power or duty it is to grant redress or to

punish or reprimand the offender or to enquire into the subject matter of the complaint and any statement so made is privileged if made in good faith and not for the purpose of slandering. I would limit the application of this privilege to the publication to the C.C.L. The evidence is clear that only the C.C.L. had the power or duty to redress the alleged grievance of the appellant and that the other addressees had no such power or duty.

Having regard to the above observations, I would conclude on this issue that the plea of qualified privilege fails in all its aspects except in so far as It related to the publication to the C.C.L. I would go on to say that it would also fail with respect to the publication to the C.C.L. if this Court were of the view that the finding of the learned Judge on the issue of malice is sustainable. I therefore now proceed to that issue.

(2) MALICE

There is a presumption of malice where words are published which are both false and defamatory. This presumption is rebutted where the publication happened under circumstances which create a qualified privilege. When this happens the plaintiff has to prove express malice on the part of the person responsible for the publication. **Gatley at para 325** says:-

> "The principle upon which the law of qualified privilege rests is this: that where words are published which are both false and defamatory the law presumes malice on the part of the person who publishes them. The publication may however take place under circumstances which create a qualified privilege. If so the presumption of malice is rebutted by the privilege ... and the plaintiff Ins to prove express malice on the part of the person responsible for the publication."

The learned Judge on this issue of malice was "unable to resist the conclusion that the defendant in this case was ill-motivated towards the plaintiff". He gave as his reasons therefor that (1) he did not believe the

appellant's evidence when he swore he was authorised by the executive of D.T.U. to write the offensive letter (2) because he was not so authorised he was "venting his spleen and abusing the occasion which his counsel contends was privileged" (3) the letter was written in scurrilous terms. In arriving at these findings, the learned Judge properly advised himself of the warning of **Lord Diplock in Horrocks v Lowe (1974) 1 All E.R. H.L. 662** that juries must be very show to draw the inference of improper motives.

The malice relevant to this privilege does not necessarily mean or is not limited to spite or ill-will towards the plaintiff **[Pratt v. B.M.A. (1919) K.B. 27].** It includes any indirect or improper motive in the mind of the defendant at the time of the publication. A Court should be very slow in drawing the inference that a defendant was actuated by improper motives thereby depriving him of the protection of the privilege unless it is satisfied that the defendant did riot believe that what lie said or wrote was true or that he was indifferent to its truth or falsity. A defendant is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. In **Horrocks v Lowe (1974) 1 All E.R. 662 Lord Diplock at p. 669** defines this motive thus:

> "So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that lie was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So lie is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. Express malice is the term of art descriptive of such a motive. Broadly speaking, It means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests. The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published

> was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person. Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what lie published or, as It is generally thought tautologously termed, honest belief. If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, lie is in this, as in other branches of the law, treated as if lie knew it to be false."

The learned Law Lord then continues thus on the said subject:

> "Even a positive belief in the truth of what is published on a privileged occasion - which is presumed unless the contrary is proved - may not be sufficient to negative express malice if it can be proved that the defendant misused the occasion for some purpose other than that for which the privilege is accorded by the law. The commonest case is where the dominant motive which actuates the defendant is riot a desire to perform the relevant duty or to protect the relevant interest, but to give vent to his personal spite or ill-will towards the person lie defames. Qualified privilege would be illusory, arid the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what lie believed to be that person's conduct and welcomed the opportunity of exposing it. It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what lie believes to be true that 'express malice' can properly be found. But where, as in the instant case, conduct extraneous to the privileged occasion itself is riot relied on, and the only evidence of improper motive is the content of the defamatory matter itself or the steps taken by the defendant to verify its accuracy, there is only one exception to the rule that in order to succeed the plaintiff must show affirmatively that the defendant did not believe it to be true or was indifferent to its truth or falsity. Juries should be instructed arid judges should remind themselves that this burden of affirmative proof is not one that is lightly satisfied."

In the instant matter, the appellant, having published the letter of October 8, 1 990, was informed of the falsity of the allegations therein by the Solicitors for the respondent in a letter (dated January 29, 1991. In response thereto, the appellant on February 25, 1991, asserted that he was "willing and ready to produce concrete evidence in support of those allegations." It is accepted that to date no enquiry has been held into the allegations by anyone.

In his written defence before the High Court, the appellant pleaded that the words in the letter were "true in substance and in fact". A plea of justification. At the trial, this plea was abandoned. At the said trial, the respondent testified as to the falsity of the allegations and the appellant relied on honest belief. The learned Judge did not believe the appellant. It is accepted by learned Counsel for the appellant that the language used by the appellant was robust.

On the issue of robust language in a defamatory publication, **Lord Atkinson in Adam v. Ward (1917) AC III. 309** said at **p.339.**

> "These authorities, in my view, clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege; but that, on the contrary, lie will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, lie might have honestly and on reasonable grounds believed that what lie wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so."

Given these facts and circumstances, the excessively strong language used, the fact of the several publications to labour institutions other than the C.C.L., it is my considered opinion that the learned Judge was justified in his finding of express malice in the appellant. The appellant's alleged state of mind, according to his evidence was his quest for redress from the C.C.L. If that is to be accepted, why the publication to the other institutions when he knew that only the C.C.L. could have given the required redress? In my view, the malice in the appellant evidenced itself not only from the scandalous language in the letter but from the appellant's deliberate publication of same to Institutions other than the C.C.L. Also, the only reasonable inference to be drawn from the abandonment by the appellant of his plea of justification after his assertion in his letter of February 25, 1991 that he had concrete evidence in support of his allegations, is that the allegations were false and that as a result he could not have had any honest belief in them.

The inevitable conclusion from this is that the appellant's dominant motive in publishing the letter was the improper motive of giving vent to his own personal spite against the respondent and not the mere desire to perform the relevant duty to protect a relevant legitimate interest. On the issue of liability therefore this appeal fails.

(3) DAMAGES

Learned counsel for the appellant challenges the Judge's award of $20,000 damages as being inordinately high having regard to the limited publication of the letter. Mr. Brian Alleyne, Q.C. for the respondent sees no reason to interfere.

Damages in defamation are essentially a matter of impression and commonsense. Precisely because it is impossible to trace the scandal and to know what quarters the poison may have reached, the real damage cannot be ascertained and established. The damages therefore to be awarded are at large. The assessment of these damages is peculiarly the province of the judge.

A Court of Appeal has not the advantage of seeing the witnesses, a matter which is of grave importance in drawing conclusions as to the quantum of damage from the evidence that they give. If the Judge had taken all the proper elements of damage into consideration and have awarded what he deemed to be fair and reasonable compensation under all the circumstances of the case, a court ought not, unless under very exceptional circumstances, to disturb his award. The mere fact that the judge's award is for a larger or smaller sum than the Judges of the Court of Appeal would have given is not of itself a sufficient reason for disturbing the award. But, the Court will interfere with the award if it is clearly of the opinion that, having regard to all the

circumstances of the case, it cannot find any reasonable proportion between the amount awarded and the loss sustained or if the damages are out of all proportion to the circumstances of the case. The Court will also interfere if the Judge misapprehended the facts, took irrelevant factors into consideration or applied a wrong principle of law, or applied a wrong measure of damages which made his award a wholly erroneous estimate of the damage suffered. [See Gatley 8th edition paras. **1 5 1 5 - 1 5 1 8** and the cases referred to therein].

It is my considered opinion that these principles upon which a Court of Appeal is empowered to interfere with a Judge's Award of damages in matters of this nature are not dissimilar to the principles tInt guide a Court of appeal in disturbing a Judge's exercise of his judicial discretion. These principles were recently considered and restated in **Michael Dufour et al v. Helenair Corporation et al Civil Appeal No. No. 4 of 1995** St. Lucia in a judgment delivered on February 1 2, 1 996, by **Sir Vincent Floissac, Chief Justice**. **At p.3,** Sir Vincent said:-

> "We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied **(I)** that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

The learned Judge reasoned in his judgment before he made the award. Given the circumstances of this matter, I cannot say that his award exceeded the generous ambit within which reasonable disagreement is possible and was therefore clearly or blatantly wrong or could be said to be wholly erroneous estimate, or as being out of all proportion to the

circumstances of the case. The offending letter was published to nine labour institutions. These institutions presumably represent the work force in their respective countries. I will not presume that when the letter was received by the bosses of these institutions that publication of same was limited to their eyes only. The seeds of these serious accusations would as a result have been implanted by the appellant in the minds of the addressees and whoever else would have read the letter. This cannot and will not be easily erased.

The law recognises in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit.

The learned judge found and I agree with him that "no right minded person will deny the importance of the office held by the plaintiff and the necessity for the populace in our developing islands to remain assured of the integrity of its leaders. Unjustified attacks on character, such as the one of which I find the defendant guilty can serve only to undermine confidence in those very persons in whom it should be found to be abidingly reposed". I consider the award of $20,000 generous to the appellant. There is no cross-appeal on the Issue. I will not interfere.

The appeal is accordingly dismissed with costs to the respondent to be taxed if not agreed.

SATROHAN SINGH
Justice of Appeal

I Concur.

SIR VINCENT FLOISSAC
Chief Justice

I Concur.

DENNIS BYRON
Justice of Appeal