GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.22 OF 2003

BETWEEN:

KEITH MITCHELL

Appellant

and

[1] STEVE FASSIHI
[2] GEORGE WORME
[3] GRENADA TODAY LTD
[4] EXPRESS NEWSPAPER LTD

Respondents

Before:

The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon. Mr. Albert Redhead — Justice of Appeal [Ag.]
The Hon. Mr. Joseph Archibald, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Ronald Henriques, Q.C. and with him Ms. Winnifred Duncan Phillip for the Appellant
Mr. Arley Gill for the Respondents

2004: June 30;
November 22.

JUDGMENT

[1] GORDON, J.A.: This is an appeal which deals only with the question of damages. In an issue of the Newspaper "Grenada Today" dated 30th March 2001 the first named Respondent wrote an article of and concerning the Appellant. The second named Respondent is the editor and proprietor of the third named Respondent which latter entity is the publisher of the newspaper "Grenada Today". " Grenada Today" is printed by the fourth named Respondent in Trinidad and Tobago.

[2] The article was principally a reprint of a 'petition' sent by Fassihi to Her Majesty, the Queen, in which he accused the Appellant, who was Prime Minister of

Grenada at the time (and still is) of using his office to harbour criminals, assist in money laundering, of having his election campaign financed by criminals, of using public monies to set up private family businesses, of appointing known criminals as Honorary Councils [sic] and Ambassadors at large and other defamatory matters. The Appellant issued a Writ of Summons on 15th May 2001 and filed a Statement of Claim on June 5th 2001 claiming, inter alia, damages including aggravated and/or exemplary damages for libel.

[3] None of the Defendants to that suit, the Respondents in this appeal, filed a defence (nor was there ever any apology or retraction) and judgment in default of defence was entered in favour of the Appellant on 12th October 2001 with damages to be assessed. Damages came on for assessment before the learned Master and on September 25, 2003 he handed down a judgment in which he awarded the Appellant the sum of $100,000.00 as general damages including aggravated damages but refused any award of exemplary damages. The Appellant is dissatisfied both with the level of general damages awarded and with the failure of the learned Master to award exemplary damages and has appealed to this court.

[4] In his Grounds of Appeal learned Queens' Counsel for the Appellant advanced that the learned Master "failed to take into consideration the fact that the libel was repeated as there was a publication on the 30th day of March 2001 and on the 4th day of May 2001". (Concerning this see later)

[5] There is no doubt that the learned Master did direct his mind to the issue of Aggravated Damages. At paragraphs 22 and 23 of his judgment he states the following:

> "Aggravated Damages
> "[22] In considering whether to make an award under this head I will bear in mind the conduct of the defendants, their conduct of the case as well as their state of mind.

"[23] The first defendant has persisted in his allegations. He has made no attempt to retract his statements. None of the defendants has offered an apology. Defendants 2, 3 and 4 have failed to enter any defence to the claim. In my view, all of these factors tend to aggravate the injury to the claimant's feelings. There must consequently be an increased award to reflect these factors."

[6] In Alphonse v D. Ramnauth[1] a judgment of this Court it was said:

> "In appeals, comparable in nature to the present one, it must be recognized that the burden on the appellant who invites interference with an award of damages that has commended itself to the trial judge is indeed a heavy one. The assessment of those damages is peculiarly in the province of the judge. A Court of Appeal has not the advantage of seeing the witnesses especially the injured person, a matter which is of grave importance in drawing conclusions as to quantum of damages from the evidence they give…The mere fact that the Judge's award is for a larger or smaller sum that we would have given is not itself a sufficient reason for disturbing the award. But we are powered to interfere with the award if we are clearly of the opinion that, having regard to all of the circumstances of the case, we 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 award of damages is a matter for the trial judge's discretion and unless we can say that the judge's award exceeded the generous ambit within which reasonable disagreement is possible and was therefore clearly and blatantly wrong we will not interfere".

I accept that that case was dealing with damages for personal injury, but I hold that the principle enunciated in that case is applicable here.

[7] Learned Queens Counsel for the Appellant put before the Court two cases for such assistance as they might provide. The first such case was Gordon v Panday[2], and the second one was The Gleaner Company Limited v Abrahams[3]. I found neither case helpful in setting a range of damages in our jurisdiction. I am of the view that economic and social circumstance are valid and necessary considerations for a court in arriving at a figure for general damages in cases of defamation. Neither the economic nor the social conditions of Jamaica or

[1] Civil Appeal No. 1 of 1996, BVI
[2] Supreme Court, Trinidad, 1997
[3] [2003] 3 WLR 1038

Trinidad are, in my opinion sufficiently parallel as to provide any assistance. There is, however, another case from our jurisdiction which has many parallels and it is the case of France and another v Simmonds[4] deriving from the neighbouring State of St. Christopher and Nevis. In that case the injured party was the Prime Minister of that state, and he had been wrongly accused of corruption. The Privy Council affirmed the award of $75,000.00 made by the trial judge and confirmed by this Court.

[8] With the greatest of respect to learned Queens' Counsel, he has not persuaded me either that the Master applied a wrong principle, or that the award exceeds the generous ambit within which reasonable disagreement is possible. I say this in the full consciousness that a 1990 dollar is not the same as a 2004 dollar. I would dismiss the appeal against the quantum of General Damages.

[9] As stated above, the learned Master declined to award exemplary damages. In his judgment the Master dealt with this issue very shortly. I repeat what he said:

> "[24] Of the categories of instances which justify an award of exemplary damages as laid out in Rookes v Bernard (1964) AC 1129 only the third category is potentially applicable to this claim, that is where the defendant has acted 'with guilty knowledge, for the motive that the chances of economic advantage outweigh the chances of economic, or perhaps physical penalty' I am not convinced however that this claimant has established that this is the case in the instant claim. I decline to make any award of exemplary damages."

[10] In his argument before us, learned Counsel for the Respondents argued that there should be no interference with the Master's decision not to award exemplary damages because he found as a matter of fact that the claimants had failed on the evidentiary burden to satisfy the legal requirements as laid down in Rookes v Barnard[5].

[4] [1990] 38 WIR 172
[5] [1964] A.C. 1129

[11] There are a number of issues to be considered when reviewing the learned Master's decision. Firstly, in the Statement of Claim filed by the Appellant in this case, at paragraph 7 it is alleged that the Respondents, in another issue of "Grenada Today" of the 4th May 2001, reproduced the item complained of. This is a serious charge. Notwithstanding the judgment in default obtained by the Appellant, which was conclusive on liability, it was still open to the Respondents to adduce any evidence or argument not inconsistent with the judgment to ameliorate damages – Lunnun v Singh[6]. Indeed, the Respondents did file an affidavit denying the allegation by the Appellant that they owned or controlled a web site on which the offending article was being published so that clearly they, or their advisers, were aware of the law regarding the assessment of damages in default judgment cases. I infer that the Respondents admit that there was the second publication of the libel of which the Appellant complained in his Statement of Claim.

[12] At this point it is apposite to quote that well known passage from the judgment of Morton LJ in Benmax v Austin Motor Company Ltd[7]:

> "…in cases where there is no question of the credibility or reliability of any witnesses, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as a trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion."

What are the relevant facts in this case which one needs to consider when determining the issue of exemplary damages?

[13] Before dealing with the facts, however, I believe it will be helpful to set out the principles on which I think this court should act, then the facts can be assessed in that light. A good starting point is Rookes v Barnard[8]. In that case the House of Lords attempted to 'codify' the law relating to exemplary damages. The judgment

[6] The Times, July 19, 1999
[7] [1955] 1 All E.R. 326
[8] [1964] AC 1129

most often quoted is that of Lord Devlin. The Learned Law Lord suggested that there were two categories of cases "in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal". The first category, with which we are not concerned in this case, is "oppressive, arbitrary or unconstitutional action by the servants of government". "Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff." – Devlin LJ.

[14] Rookes v Barnard was followed (in time) by Cassell & Co Ltd v Broome and another[9]. In that latter case it was remarked by Hailsham L.C. that the mere fact that a tort is committed in the course of a business carried on for profit is not enough to bring the case within the second category. He went on:

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

[15] Cassel was followed, again in time, by A v Bottrill[10] a judgment from the Privy Council in a case deriving from New Zealand. I express the Court's gratitude to learned Queens' Counsel for brining this case to our attention. At paragraph 20 of the judgment of Lord Nicholls of Birkenhead he says the following:

> "20 The starting point for any discussion of the limits of the court's jurisdiction to award exemplary damages is to identify the rationale of the jurisdiction. This is not in doubt, although different forms of words have been used, each with its own shades of meaning. For present purposes the essence of the rationale can be sufficiently encapsulated as follows. In the ordinary course the appropriate response of a court to the commission of a tort is to require the wrongdoer to make good the

[9] [1972] AC 1027
[10] [2003] 3 WLR 1406

> wronged person's loss, so far as a payment of money can achieve this. In appropriate circumstances this may include aggravated damages. Exceptionally, a defendant's conduct in committing a civil wrong is so outrageous that an order for payment of compensation is not an adequate response. Something more is needed from the court, to demonstrate that such conduct is altogether unacceptable to society. Then the wrongdoer may be ordered to make a further payment, by way of condemnation and punishment."

It is to be noted that the learned Law Lord focuses on the word "outrageous". Subsequently in the judgment he continues:

> "22 In principle the limits of the Court's jurisdiction to award exemplary damages can be expected to be co-extensive with this broad-based rationale. The court's jurisdiction may be expected to extend to all cases of tortuous wrongdoing where the defendant's behaviour satisfies this criterion of outrageousness…
>
> "23 The next point to note is that, in the nature of things, cases satisfying the test of outrageousness will usually involve intentional wrongdoing with, additionally, an element of flagrancy or cynicism or oppression or the like: something additional, rendering the wrongdoing or the manner or circumstances in which it was committed particularly appalling. It is these features that make the defendant's conduct outrageous."

[16] What I derive from the above cases is that the narrow requirement that a defendant must contemplate a profit exceeding the likely damages to be assessed against him has been considerably widened. I believe that the law being applied, the Common Law, notwithstanding that the case derived from New Zealand, is the same law as applies in our jurisdiction and I so hold.

[17] I revert now to the facts in this case. If the statements in the complained of article are untrue, then without doubt this was a most egregious libel. The lack of any defence, or even an affidavit on the issue of damages, leads ineluctably not only to the conclusion that the Respondents had not a scintilla of proof, nor even a whiff of suspicion, of the truth of their statements, but also to the conclusion that they were contemptuous of the right and entitlement of every citizen to enjoy his reputation for rectitude, absent proof to the contrary. The Respondents have not only failed to offer any defence, because they had none, but they further failed to

offer any apology to the Appellant. By itself, I would conclude that such conduct came dangerously close to "outrageous". But the Defendants went further. They printed the same libel in a second and subsequent issue of the newspaper. I believe that a clear and proper inference is that the Respondents were contemptuous of any sanction that the law might provide. I am of the view that compensatory damages, even augmented by an element of aggravation, is an inadequate remedy in this case.

[18] I return again to A v Bottrill cited above where Nicholls L.J. said the following:

> "Thus, in distinguishing the essentially different roles of compensatory damages and exemplary damages Lord Devlin said a jury should be directed that if, but only if, the amount they have in mind to award as compensation is "inadequate to punish [the defendant] for his outrageous conduct, to make their disapproval of such conduct and to deter him from repeating it", then they might award exemplary damages: see Rookes v Barnard [1964] AC 1129, 1228. In Broome v Cassell & Co Ltd [1972] AC 1027, 1060, Lord Hailsham of St Marylebone LC approved this passage as a most valuable and important contribution to the law of exemplary damages."

[19] I have already expressed the view that compensatory damages are not an adequate remedy in this case and I am of the view that this is one of those exceptional cases where it is appropriate to make an award for exemplary damages which I do in the sum of $50,000.00. This sum is, in my discretion a sufficient sum to express the Court's "disapproval of such conduct and to deter [the respondents] from repeating it." whilst conforming to the principle as enunciated in John v M. G. N. Ltd[11] following Rookes v Barnard as follows:

> "Principle requires that an award of exemplary damages should never exceed the minimum sum necessary to meet the public purpose underlying such damages, that of punishing the defendant, showing that tort does not pay and deterring others…Freedom of speech should not be restricted by awards save to the extent shown to be strictly necessary for the protection of reputations"

[20] In the circumstances, I would dismiss the appeal against the award of $100,000.00 general damages and confirm the learned Master's order in that regard. I would

[11] [1997] Q.B. 586

further confirm the order for costs in the Court below made by the learned Master, as there has been no appeal therefrom, and I would allow the appeal against the Master's failure to award exemplary damages and award to the Appellant the sum of $50,000.00 exemplary damages. Costs in the sum of $21,000.00 based on two thirds of Prescribed Costs are awarded to the Appellant for this appeal.

Michael Gordon
Justice of Appeal

I concur.

Albert Redhead
Justice of Appeal [Ag.]

I concur.

Joseph Archibald, QC
Justice of Appeal [Ag.]