THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF ANGUILLA
(CIVIL)
AD 2006

CLAIM NO. AXAHCV/1998/0108

BETWEEN:

DOREEN HODGE

Claimant

AND

CABLE & WIRELESS (West Indies) LTD.
GEORGE KENTISH

Defendants

APPEARANCES:

Mr. Patrick Patterson and Ms. Eustella Fontaine instructed by Caribbean Associated Attorneys for the Claimant
Ms. Joyce Kentish and Mrs. Navine Fleming Kisob instructed by Messrs. Lake & Kentish for the 1st and 2nd Defendants.

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Date: 24th 25th 26th January 2005
18th April, 13th May, 2005
6th February, 2006

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JUDGMENT

[1] GEORGE-CREQUE, J.: This action is brought by the Claimant against the Defendants for damages for the tort of defamation in respect of a memorandum dated 28th February, 1995, written by the 2nd Defendant and placed on a notice board at the 1st Defendant's( "the Company") premises at The Valley, Anguilla. The Defendants contend that the statements contained in the memorandum are not defamatory and that in any event same was published on an occasion of qualified privilege. The Claimant also claims damages

for the tort of intimidation arising, it is asserted, from threats and coercion by the Defendants resulting in the cessation of dealing with or using the Claimant's medical services.

## Background

[2] The following facts which set out the background to this matter are not in dispute:

(a) The Claimant was at the material time a registered medical practitioner practicing at The Quarter, Anguilla, general medicine, obstetrics and gynecology.

(b) The Company is an international telecommunications company with a branch office located at The Valley Anguilla and employs a number of persons. Up to 1995 it was the largest single employer in Anguilla with between 75-80 employees. The 2nd Defendant at the material time was the personnel Manager of 1st Defendant.

(c) At the material time the Company operated a medical scheme called the West Indies Medical Scheme ("the Scheme") in which most, if not all, its employees participated. The scheme operated on mutual contributions of the Company, as employer, with the employee contributing 1% of his/ her salary.

(d) Employees were free to choose any registered medical practitioner practicing in Anguilla for rendering medical services. The Company would issue refunds for medical expenses incurred by an employee participant normally upon production of receipts by the employee. The Company would also act upon medical certificates issued by such medical practitioner for the purposes of sick or other leave.

(e) The 'conditions of service' of staff of the Company[1] provided inter alia for the Company to pay the balance of 40% of an employee's pay up to a six-month period of illness with Social Security meeting the first 60% thereof in respect of an employee who qualified for social security benefits.

[1] See: pg. (Trial Bundle) 149-160 (para. 2.4)

(f) The Claimant rendered medical services to various employees of the Company from time to time and these services included the issuance from time to time of medical certificates for the purposes of sick leave.

(g) One such employee to whom the Claimant rendered medical services was Melissa Hodge ("MH") who was also a participant in the Scheme operated by the Company. On each of 10th December, 1994, and 10th January, 1995, the Claimant issued medical certificates ("The Medical Certificates") in respect of MH which were submitted to the Company. The medical certificate issued on 10th December, 1994, was in the following terms:

*"I hereby certify that on 10th December 1994 I examined (my emphasis) Melissa Hodge of the Cable & Wireless Department and that in my opinion she is by reason of illness incapable of discharging the duties of his/her office and in my opinion will be incapacitated until 10th January, 1995 inclusive."* The medical certificate issued on 10th January, 1995 was in similar terms save that the examination was said to be on 10th January, 1995 and the opinion expressed was that MH would be incapacitated until 23rd January, 1995.

(h) MH, in fact, from in and around end of November, 1994, to early February, 1995 was not on the island of Anguilla, having traveled to the United States, which fact she confirmed to the 2nd Defendant on her return to Anguilla in February 1995.

(i) In light of this, 2nd Defendant, as Personnel Manager of the Company, wrote to the Claimant on 28th February, 1995 ("The Letter") seeking clarification in respect of the Medical Certificates which stated that she had 'examined' MH on the dates mentioned therein and had found her incapable of performing her duties.

(j) On the same date as The Letter, 2nd Defendant issued an Internal Group Communication memorandum ("The Memo") to "ALL STAFF". The Memo which Claimant says is defamatory of her forms the gravamen of this action and states as follows:

"*Ref:* *AXA/MAP/GLK/PM13*
*To:* *ALL STAFF*
*From:* *Manager Admin/ Personnel*
*Date:* *February, 28, 1995*
*Subject:* *Medical Services – Dr. Doreen Hodge, The Quarter*

*CC: GENERAL MANAGER (ag)*

*The company is presently investigating an issue regarding the medical services provided by Dr. Doreen Hodge of the Quarter and until this is satisfactorily resolved, no medical receipts or certificates will be accepted from her effective, Tuesday, 28th February, 1995.*

*Sgd: George Kentish*

*Manager Admin/ Personnel."*

(k) The Memo was placed on a notice board on a wall forming part of the passage way along the inner offices of the premises of the Company outside the door of the office occupied by the 2nd Defendant. The Claimant pointed out on a floor plan of the premises of the Company ( Exhibit 3) where she saw The Memo.

(l) The Claimant on leaving the office of the 2nd Defendant (also shown on Exhibit 3) after visiting with him in connection with The Letter, saw on the notice board (which displayed various notices and announcements to staff of the Company), The Memo. She read it and took it. She said she felt badly and The Memo and The Letter annoyed her. She also said she believed that The Memo was read by many people and came to the knowledge and attention of numerous persons in Anguilla.

(m) The Claimant says that by reason of the publication of The Memo she has been injured in her profession and has been brought into public scandal, odium and contempt and has suffered loss and damage. She asserts that as a result, her business dropped off by approximately 70% and claims in excess of US 1million dollars in damages. The Defendants ceased accepting receipts or medical certificates issued by the Claimant as from the date of The Memo.

(n) The Claimant requested from the Defendants an apology and compensation. They failed or refused to do so.

(o) The Claimant launched this action 28th October, 1998.

## The Issues

[3] The issues for determination by the court are:

(a) Whether the words complained of in The Memo are or bear a defamatory meaning;

(b) If so, whether the said words were published on an occasion of qualified privilege;

(c) If so, whether the defendants were actuated my malice;

(d) Whether the Defendants coerced or threatened their employees not to use the services of the Claimant;

(e) If so, whether the Claimant suffered damage as a result thereof;

(f) If the Claims have been established the measure of damages to which the Claimant is entitled.

The Claimant's evidence

[4] The Claimant and three other witnesses namely, Shirley Maynard, Claris Carty and MH, all former employees of the Company, made witness statements and gave evidence on behalf of the Claimant. Marva Thompson, a chartered accountant, also gave evidence on behalf of the Claimant specifically relating to the issue of the quantum of damages as claimed by the Claimant. The issue of quantum and the evidence in relation thereto will be addressed, if necessary, later in this judgment.

[5] The Claimant after setting out her medical qualifications as a medical doctor said that she provided medical services to a large number of the Company's employees for a fee. MH, an employee of the Company, was a patient of hers and around November was about 6 months into her second pregnancy with complications attendant thereon for which she says no facilitates in Anguilla existed. She referred her to a hospital in the United States and gave her sick leave until the baby was born. When MH left for USA she had a current medical certificate covering sick leave until 10th December, 1994 and then, she said, based on her knowledge coupled with information received from MH's husband, she issued medical certificates to MH until the end of her leave. She says it was not necessary to see the patient in order to issue a medical certificate for the patient where the doctor referred the patient overseas.

[6] When MH returned to Anguilla she examined her and on 28th February she received 2nd Defendant's letter seeking clarification on the sick leave, maternity leave, and The Medical Certificates. She met with the 2nd Defendant in his offices at the premises of the Company on or about 2nd March1995, but says she was not given a chance to explain or clarify the issues raised by the 2nd Defendant and was told by the 2nd Defendant that the Company will no longer accept medical certificates or receipts from her and the Company's employees had or were being so informed. She said 2nd Defendant threatened that the matter was being taken further and that the Company's employees would not be permitted to return to her for medical treatment. On leaving 2nd Defendant's office she saw The Memo on the notice board inside the premises of the Company. She said she felt badly and that the 2nd Defendant was rude to her during their meeting on March 2nd.

[7] The Claimant went on to say that as a result of The Memo, people in the Anguilla community stopped coming to her for treatment, would make snide remarks, questioning her qualifications and would talk about her in a laughing manner in her presence. She says that since the publication of The Memo, her business dropped some 70% and that about 40% of the Company's employees stopped using her services. No witnesses were produced verifying remarks or statements made as members of the public save for those persons who, at the relevant time, were members of staff of the Company.

[8] After publishing The Memo, the Claimant says the 1st and 2nd Defendant with intent to injure her, threatened and by other unlawful means intimidated and coerced members of staff of the 1st Defendant to cease and no longer use her for medical services or for issuance of certificates for sick leave or maternity leave and further told members of staff of the Company that they would not be refunded in respect of medical receipts given to them for medical services provided by her.

[9] In further amplification at trial she said that The Memo and The Letter was annoying and The Letter disrespectful. She said it was a nagging situation and she found it offensive that 2nd Defendant didn't call her and ask her personally about the matter. She received a letter from Dr. Brett Hodge as chairman of the Medical Board. This letter dated 24th May

1995 requested of the Claimant confirmation and an explanation as to the issuance of The Medical Certificates to which she did not respond. She said no medical board proceedings were ever taken against her.

[10] In cross examination the Claimant said that an examination of a patient can be physical or non-physical and that the Medical Certificate issued on 10th January, 1995, was in respect of a non-physical examination based on information received from the husband of MH in Anguilla. She did not refer MH to any particular doctor in the US. MH selected her doctor in the US. She said MH received information from her US doctor, which MH then gave her husband in Anguilla and MH's husband in turn then relayed this information to her.

[11] She said when she attended the offices of the Company someone opened the door and indicated where to turn to get to the Company's office. This door is locked. She disputed being met and escorted by 2nd Defendant either into or out of his office and said The Memo was on the notice board in the corridor outside of 2nd Defendant's office door. She conceded that The Memo does not say that employees of the Company cannot go to her for medical services. She agreed that The Memo stated only what it actually states therein. She never tried to put her response to The Letter in writing. She said she had had a prior problem with the 2nd Defendant as personnel manager of the Company regarding MH in 1993 in relation to MH's first pregnancy, which had not been resolved. She accepted that under the Social Security Regulations, in the normal scheme of things, MH would have been illegible for maternity leave at least by 10th December, 1994.

[12] MH, in her witness statement, said she participated in the Scheme operated by the Company. The Claimant was her doctor in respect of both her pregnancies and she travelled to the US in connection with both also. She initially financed both occasions but in relation to the first pregnancy, she claimed against the Scheme for a refund of the expenses. She was reimbursed by the Company under the Scheme but only to the extent of the cost of obtaining similar treatment in Anguilla which Dr. Brett Hodge opined could have been so obtained. In relation to the 2nd pregnancy, she said Claimant referred her to a hospital in the US. Her 2nd child was born on 22nd January, 1995 and it is from

this date that she took maternity leave. The Claimant issued medical certificates to the Company during the period she was in the US. The 2nd Defendant wrote to her in January 1995 requesting a meeting. This meeting took place in the latter part of February where 2nd Defendant asked her about her medical condition, absence from work and her medical certificates. She had not and has never made a claim to the Company for a refund under the Scheme in respect of the 2nd pregnancy and in essence says she considered 2nd Defendant's inquiries as inappropriate. After refusing to comply with the Company's request for her medical records relating to her 2nd pregnancy to be submitted for review by Dr. Brett Hodge, her employment was eventually terminated on or about June 1995. The fairness of her dismissal was heard by an Industrial Tribunal sometime in 1997, where the Claimant testified on behalf of MH. The Tribunal found that MH had been unfairly dismissed.

[13] In cross examination she accepted that as a contributor to the Scheme she had an interest in and wished to see the Scheme work properly and effectively. She conceded that the Claimant referred her to the US for treatment but not to any specific hospital in the USA. She said she was not sure if she was paid a full salary by the 1st Defendant whilst in the USA on sick leave. She confirmed that at no time whilst she was in the USA that she and the Claimant communicated with each other. When she submitted bills to the Company for refund on her first pregnancy, a dispute arose as to her entitlement to a refund. This dispute, she said, was resolved by payment by the Company of the sum of EC$2,000. She also accepted that 2nd Defendant was not at any time angry with her.

[14] Shirley Maynard, a former employee of the Company and a participant in the Scheme, in her witness statement, said she also used the medical services of the Claimant. In March 1995 she ceased using the services of the Claimant, she says, because the Company told her she could no longer go to the Claimant as the Company was not accepting medical certificates and receipts from the Claimant. She says she obtained this information from The Memo placed on the notice board in the corridor of the office premises and also received a copy of The Memo in her mail. She said that all employees could see The Memo on the notice board and other persons such as maintenance workers who came in

the back entrance of the premises could also see it. She said she was upset and depressed by The Memo and also felt that it was a threat to her as a staff member requiring her to change doctors if she was to be refunded. As a result she stopped seeing the Claimant. She says she was not refunded in respect of prior receipts submitted in respect of medical services rendered to her by the Claimant. She went on to say that when she read The Memo she thought The Memo was marring the Claimant and suggested that something was wrong with her. She said other members of staff including Claris Carty felt the same way. She said it became the talk of the office that The Memo was saying that the Claimant was not a doctor.

[15] In cross examination she conceded that she had an interest as a contributor to the Scheme which she would have liked to have protected as much as possible. She accepted that she could still go and see the Claimant but that receipts from her would not be accepted. She said the notice board was in the corridor near the back entrance used only by certain people such as maintenance workers of the Company. The prior medical receipts she spoke of were not presented to the Company for a refund. She maintained, however, that 2nd Defendant stated she would not be refunded.

[16] Claris Carty, another former employee of the Company, in her witness statement says she was also a patient of the Claimant and a contributor to the Scheme. She also saw and read The Memo on the staff notice board. She also received a letter to the same effect. She says when she saw The Memo she thought it was very bad because it seemed to be saying that there was something wrong with the Claimant as a doctor. She said she understood that something happened with the Claimant and an employee and thus the Company sent around a memo saying that she was no longer recognised as a doctor. After The Memo she visited the Claimant on three (3) occasions and submitted receipts for payment but was not refunded. As a result, she said she stopped going to the Claimant. She ended by saying that the reason she ceased going to the Claimant is because the Company denied them the right to so do.

[17] In cross examination, she said if you pay into a scheme then you would have an interest and would want to know that the scheme is operating properly. She conceded that The Memo did not say that Claimant is not a doctor and that she could not go to the Claimant as she was not refunded.

The Defendants' evidence

[18] Evidence was led on behalf of the Defendants by the 2nd Defendant, Dr. Brett Hodge, Ms Sharon Hunte, and Mr. Malcolm Hope-Ross, a chartered accountant, as an expert in respect of the damages claimed by the Claimant.

[19] Second Defendant, in his witness statement said in essence that during MH's first pregnancy in 1992, no less than 6 medical certificates were received by the Company from the Claimant in respect of MH. When MH sought a refund from the Company in respect of her overseas medical expenses MH's medical condition for justifying a refund was investigated. The Company relied on a medical opinion from Dr. Brett Hodge to the effect that MH's condition could have been treated on island or on a neighbouring island if intensive care was required. This matter was eventually settled.

[20] In 1994, he said, a similar pattern of issuance of medical certificates emerged spanning over a period from 19th July, 1994, to 10th January, 1995. In Late November 2nd Defendant, in seeking a meeting to discuss the medical certificates, learned that MH was off island. During the latter part of February 1995, having learned that MH was on island, he set up and had a meeting with her where she acknowledged that she was off island from around the end of November, 1994 to 9th February, 1995.

[21] This caused him to question the Medical Certificates certifying that the Claimant had "examined" MH and found her to be unable to perform her duties due to illness. This resulted in the issuance of The Memo and the Letter by 2nd Defendant. A meeting was conducted between Claimant and 2nd Defendant at his office in the presence of Sharon Hunte (formerly Carty), Personnel Officer. He says Claimant was asked to explain her

declarations made in the Medical Certificates in light of the absence of MH from the island at the relevant times and that Claimant's explanation was that it was the system which allowed for medical certificates to be issued only a month at a time. The Claimant, he says, became upset at his efforts to address the Medical Certificates and she left his office about some ten minutes later. He says he was at no time hostile or insulting to the Claimant.

[22] An exchange of correspondence followed between Claimant's solicitors and solicitors for the Defendants concerning the content of The Memo. The Defendants then referred the matter regarding the Medical Certificates to the Medical Board, by letter dated 4th April, 1995, addressed to Dr. Brett Hodge as chairman of the Medical Board. Save for communication from Dr. Brett Hodge and from the Attorney General's Chambers stating that the matter was under investigation a bit later, nothing further was heard by the Defendants from the Medical Board or from the Attorney General's Chambers. It does not appear that this investigation went any further. It is reasonable to infer that it was, in any event, never concluded.

[23] In cross examination 2nd Defendant said that The Memo was posted on the Notice Board and couldn't say how long it remained so posted. He said copies were not sent to individual staff members or to the public nor to any other offices within the Company's group as it pertained only to the business unit in Anguilla. He said the secrecy agreement would prohibit any member of staff from taking matters to the public domain. Non staff persons may be allowed entry into non–public areas of the premises such as maintenance workers or accounts personnel. He could not say how many such persons were allowed entry.

[24] The concern, he said, was to explain how it was possible for certificates to be issued to an individual who was off island and that when he wrote to Dr. Brett Hodge it was to seek assistance in resolving the issue with the Medical Certificates. He said the reason for the Memo was to ensure that the Scheme was properly managed and operated and not in respect of the sick leave pay made to MH. This he maintained notwithstanding:

(i) the content of his letter dated 25th May 1995 to his solicitors wherein he stated inter alia, " ... *I wish to confirm that our main concern surrounds Melissa Hodge being on certified sick leave and being paid by the Company for that time when in fact she was off island on the dates on which those sick certificates were submitted to the Company;* and

(ii) the fact that MH had made no application for assistance under the Scheme prior to going overseas, nor had she sought upon her return any re-imbursement thus not triggering the operation of the Scheme at all.

He said that the Company was not aware whether MH was going to submit medical claims and so they wanted to ensure what would happen in the event a claim was made. The situation, he said, was not resolved and remained inconclusive, as the legal proceedings brought by the Claimant, in his view, brought an end to the matter and an end to the investigation. He was aware that the Claimant sought an apology but not aware that any was given. He accepted that no notice of the termination of the investigation was ever given to the Claimant.

[25] Sharon Hunte ( formerly Carty) said in her witness statement that she was employed by the Company in January, 1995 as Personnel Officer. Ms. Hunte at the time shared an office with the 2nd Defendant who was her immediate superior. She recalled a meeting in the office of 2nd Defendant between the Claimant and 2nd Defendant about the Medical Certificates where 2nd Defendant asked the Claimant to explain the same given the fact that MH at the relevant times was off island. The Claimant, she said, stated repeatedly that this was how 'the system' worked and when they failed to understand what she meant by 'the system' that the Claimant became frustrated and defensive and left the meeting. She described 2nd defendant as being pleasant throughout the meeting. She said he was not rude or offensive to the Claimant and that when the meeting ended he escorted the Claimant back out into the lobby. She typed the Letter and 2nd Defendant typed The Memo. She couldn't recall in what order these acts were done. She said no copies of the Memo were sent to any individuals, and that it was an internal group communication posted to the staff and would not have been sent to other members outside Anguilla or outside of the business.

[26] Dr. Brett Hodge, in his witness statement, said that he worked as a Medical Officer, Obstetrics and gynecology and Senior Medical Officer at various times in Anguilla since 1991. He was registered as a medical practitioner in Anguilla since 1993 and opened his private practice since January 2001. He stated that it is not his practice to submit medical certificates for patients out of the jurisdiction and for any period that he has not examined the patient. He said in essence that he would not, in any circumstances, submit a medical certificate for any patient out of the jurisdiction whom he had not examined during the period to which the certificate related or send a medical note on behalf of such patient unless it was supported by the medical certificate of the doctor who examined the patient in that jurisdiction in respect of the corresponding period to which the certificate related. He accepted that only persons nominated by the Board is qualified to give medical certificates under the Social Security Regulations and that the certificate triggers the payments under Social Security Scheme. Regulation 4 of the Schedule to the Regulations expressly forbids a certificate being issued on the basis of a prior examination in respect of which a certificate was already issued. He said that an examination is to determine the symptoms of a patient and should be a physical examination and that this, in essence, is what is contemplated by the printed form of the certificate.

Is The Memo in the circumstances defamatory of the Claimant?

[27] Counsel on both sides submit on the authority of Sim -v- Stretch[2] that a defamatory statement or words which in their ordinary signification impute a defamatory meaning is, or are words which tend to lower a person in the estimation of right thinking members of society generally. This definition, in my view, embraces not only words or statements which expose a person to hatred, contempt or ridicule, but would also encompass the situation where the words or statements cause people to shun, avoid or lose confidence in that person. I say this because, in my view, all of these reactions would involve, or tend to engender in some respect, an adverse perception of that person either on a personal or a professional level. It is also well settled law that if the words only tend to bring the

[2] [1936] AER 1237

Claimant into odium, ridicule or contempt with a particular class or section of society then such words would not, per se, be defamatory.[3]

[28] The Claimant relies on the natural and ordinary meaning of the words in proof of her claim. She asserts in her Statement of Claim that the words in their natural and ordinary meaning meant and were understood to mean inter alia:

(a) That there was something questionable about the qualification and/or competence and /or ability of the Claimant to provide medical services;

(b) For reasons not stated the Claimant was not to be considered as a qualified medical practitioner;

(c) That the Claimant had provided medical services which did not meet the standard expected of a qualified medical practitioner or were sub standard.

It is for the judge being the arbiter of law and fact in this case (same being a trial without a jury) to say whether or not the words or statement contained in The Memo are or is defamatory of the Claimant.[4] Diplock L.J in Slim –v- Daily Telegraph Ltd[5]. stated the principle thus: *"Everyone outside a court of law recognises that words are imprecise instruments for communicating the thoughts of one man to another. The same words may be understood by one man in a different meaning from that in which they are understood by another and both meanings may be different from that which the author of the words intended to convey. ....the argument between lawyers as to the meaning of words start with the unexpressed major premise that any particular combination of words has one meaning which is not necessarily the same as that intended by him who published them or understood by any of those who read them but is capable of ascertainment as being the 'right' meaning by the adjudicator to whom the law confides the responsibility of determining it."* What matters is "*what the adjudicator at the trial thinks is the one and only meaning that the readers as reasonable men should have collectively understood the words to bear. That is 'the natural and ordinary meaning' of words in an action for libel."* In arriving at this determination regard must be had, firstly, to the words themselves, taking

[3] See: Byrne –v- Deane [1937] 1KB 818
[4] See: Yousoupoff -v- Metro Goldwyn Mayer Pictures ( 1934) 50 TLR 581
[5] [1968] 2 QB 157 @ pg. 171-174

the statement as a whole, according them their ordinary and natural meaning, and secondly, to the circumstances under which or the context in which they were published.[6]

[29] It is well established on authority, that it is defamatory to impute to a trader, businessman or professional person a lack of qualification[7] or to impute to a man lack of qualifications, knowledge, skill, capability, judgment or efficiency in the conduct of his trade, business or professional activity. This may be so even though they do not impute any moral fault or defect of personal character[8]. An imputation of inefficiency or incompetence in a man's professional calling is defamatory even though it may not lower him in the estimation of others[9].

[30] It is clear on the evidence that there is a difference of opinion as to what is meant by examination of a patient for the purpose of issuing a medical certificate. Dr. Brett Hodge is of the view that this involves a physical examination. The 2nd Defendant also was of the view that a physical examination was involved given the tenor of The Letter seeking clarification from the Claimant. The Claimant says that such examination may be physical or non-physical and that her examinations of MH for the purposes of The Medical Certificates were non-physical.

[31] It is reasonable to infer from the evidence of Claris Carty and Shirley Maynard both of whom are ex-employees of the Company, that their cessation in obtaining the medical services of the Claimant was not due to the fact that they thought any less of her as a doctor and was thus shunning or avoiding her for that reason, but rather, due to the fact that they were not being refunded in respect of their medical expenses incurred from such visits. Claris Carty visited the Claimant on three more occasions after The Memo. In cross examination, after reading The Memo, she accepted that it did not say that the Company no longer recognised the Claimant as a doctor. Ms. Maynard on being asked in essence whether The Memo could be said to be a threat to her against using the medical services

[6] See: Charleston &Anr. –v- News Group Newspapers Ltd, & Anr. [1995] 2 WLR 450.
[7] Southee -v- Denny 1847 1 Exch. 196 (154 ER) 83
[8] See: Drummond- Jackson –v- BMA [1970] 1 All ER 1094 @ pg. 1104
[9] Pratten –v- The Labour Mail Ltd. 1926 VLR 115

of the Claimant responded in this way: "*in light that I had receipts in my possession at the time to be given in to be refunded I felt that it was a hindrance of some sort. … I don't know what you would call it."*

[32] Whether or not the statement is defamatory depends not upon the intention of the Defendant but upon the probabilities of the case and upon the natural tendency of the publication having regard to the surrounding circumstances.[10] If the words published have a defamatory tendency it will suffice even though the imputation is not believed by the person to whom they were published[11].

[33] Counsel for the Defendants submit that consideration must be given to the acts on the Claimant's part which brought about The Memo given the Defendants' right and duty to protect the Scheme and their practice of paying sick and maternity leave to employees against any perceived or apparent abuse and not consider the Memo in isolation to these factors. It is reasonable to infer, however, that the member of staff to whom the Memo was published was not aware of the circumstances leading up to the publishing of the Memo. I also bear in mind that the Defendants have not pleaded justification in answer to the Claim.

[34] Applying the test as formulated by Lord Atkin in Sim –v- Stretch, and having pondered this matter at length I am satisfied that to an ordinary right thinking member of society The Memo as a whole, in light of the surrounding circumstances as known to them to whom it was published, could only be understood to mean that there was something questionable or not right about the medical services being provided by the Claimant and as a professional medical doctor such a statement would be defamatory of her in her profession.

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10 Lewis –v- Daily Telegraph Ltd. [1964] AC 234

11 Hough –v- London Express Newspaper Ltd. [1940] 2 KB 507

Qualified Privilege

[35] The Defendants contend that even if the statement contained in The memo is capable of a defamatory meaning, it was published on an occasion of qualified privilege which, if so, would provide a defence. However, such a defence is not absolute and may be defeated if it is shown that the Defendants were actuated by malice. In this regard, the motive of the defendants in making the publication becomes relevant. Qualified privilege has been defined by Lord Atkinson in Adam-v- Ward[12] as "*an occasion 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"* The interest or duty in making the communication must be shown to have existed. An honest and reasonable belief that such a duty existed is not enough.[13]

[36] Qualified privilege may be pleaded in cases falling within the following categories and also in relation to privileged reports which is not applicable to the case at bar:

(a) Statements made in furtherance of a duty – be it moral, social or legal;

(b) Common interest; and

(c) Protection of an interest.

The Defendants contend that their position fit the last 3 of these categories in that:

(a) The 2nd Defendant as agent, and personnel manager of the Company charged with the responsibilities of administering the Scheme, and other personnel matters on behalf of the Company, was under a duty to communicate to the staff on the investigation regarding the Medical Certificates issued by the Claimant which were in question, given the circumstances as presented themselves to him. Counsel on both sides are ad idem in submitting that the test in determining whether such a duty existed is as stated in Stuart –v- Bell[14] thus: "*would the great mass of right minded men in the position of the Defendant have considered it their duty under the circumstances to make the communication?*

[12] [1917] A.C. 309 - pg. 334
[13] See: Hedditch –v- Macilwaine and others [1894] 2QB 54
[14] [1891] 2QB 341 per Lindley L.J. – Pg. 350

(b) The statement was made pursuant to a common interest between the Defendants and the members of staff in ensuring the protection and proper functioning of the Scheme as co contributors thereto; and

(c) That the statement was made for the purpose of protecting Defendants' interest.

[37] In order to establish a defence of qualified privilege, these elements must be satisfied:

(i) the occasion must be fit;

(ii) the matter must have reference to the occasion; and

(iii) it must be published from right and honest motives or as usually referred, without actual or "express malice" or "malice in fact" (the burden of disproving which rests on the Claimant)[15]

[38] The Defendants contend that they have met all three requirements by reason of the following:

(a) The 2nd Defendant as agent of the Company operating and administering the Scheme on behalf of the employees and the Company had an interest and /or a duty to make the staff aware of steps taken to protect the Scheme which was of concern to the Company and its staff.

(b) The 2nd Defendant having discovered from MH in February, 1995, that the Claimant issued the Medical Certificates stating that MH was examined and found to be incapable of discharging the duties of her office over the time span as set out therein, at times when MH was in fact off the island, gave cause for investigation of this issue by the Company in respect of the issuance of The Certificates by the Claimant and thus his actions in publishing the internal memo addressed to "All Staff" of the Company in Anguilla as interested parties being contributors to the Scheme, thereby putting them on notice.

(c) That by reason of the Claimant issuing The Medical Certificates she assisted MH in abusing the Company's policy of payment whilst on sick leave and the provisions of the Social Security Regulations in relation to maternity leave, in that instead of MH being placed on maternity leave six weeks prior to her confinement

[15] See: Horrocks-v-Lowe [1975] A.C. 135

date in accordance with the provisions of the said Regulations[16] MH in fact commenced maternity leave only as from the date of birth of her child[17] thus facilitating MH in obtaining the benefit of an additional twelve (12)weeks as sick leave. The 2nd Defendant, counsel contend, was also under a duty to protect the Company's interest as the employer from such conduct. The Defendants pleaded that 2nd Defendant was under a duty to investigate the circumstances surrounding the issuance of the Medical Certificates and was also under a duty to ensure that the services of the Claimant were not used by its employees until the issue was resolved, and thus it was the duty of the Defendants to advise its employees of the investigation and their decision not to continue to accept receipts or medical certificates from her pro tempore.

(d) That publication of The Memo by 2nd Defendant was motivated solely by his duty and interest in ensuring the protection of the Scheme as well as the protection of the business of the Company in which both the Company and its staff would have been interested.

(e) The Claimant's witnesses all said in effect that they had an interest in protecting the Scheme and seeing to its proper operation. The Defendants have maintained this to be their only interest.

(f) That the Claimant has failed to produce any evidence showing the Defendants to be motivated by malice in that she referred merely to the first pregnancy of MH where the 2nd Defendant had sought information, she said, without MH's authorization and that he was again asking questions regarding the 2nd pregnancy. She conceded that no questions had arisen in respect of other employees of the Company in respect of their pregnancies and the medical services rendered by her. She said the issue of the MH's first pregnancy had remained unresolved as 2nd Defendant in essence had not made an apology.

[39] Counsel for the Claimant on the other hand; contend that the publication was not on an occasion of qualified privilege because they say:

[16] See: Reg.19 Benefits Regulations , RRA S45-1
[17] Stated as being on 22nd Jan.1995 as per the birth certificate exhibited in the Trial Core Bundle.

(a) MH at no time made a claim or sought a refund in relation to her 2nd pregnancy. This evidence is unchallenged by the Defendants. Thus, they say, the protection of the Scheme in the circumstances did not arise as nothing was done which triggered the application or operation of the Scheme;

(b) The stage at which the communication was made was at a preliminary stage of an investigation and more so was an investigation by the 2nd defendant acting so to speak on his own in that it was not dealt with by the General Manager as required under the "Conditions of Service" and the Scheme;

(c) The Memo did not spell out what was the issue being investigated thus leaving the employees in the dark as to the circumstances;

(d) Second Defendant had asked no other member of staff to participate in the investigation, save for Ms. Sharon Carty with earlier data collection;

(e) The investigation had not yet begun at the time of the publication of the Memo;

(f) That the bar placed upon recovery of refunds based upon medical certificates issued by the Claimant was contrary to the provisions of the Scheme, The Social Security Act, and in essence in breach of the employees' contractual rights and thus was inimical to the interest of the employees in receiving refunds and thus could not be said to be a corresponding interest, and was tantamount to a breach of the contractual obligations of the the Company to their employees.

(g) That in as much as the matter was said to be under investigation, nothing had as yet been discovered as to form the basis of information which may have been properly communicated to the employees at that stage.

[40] Reliance was placed on the case of De Buse-v-McCarthy[18] as support for the propositions. In De Buse's case, the town clerk of a borough council had sent out a notice of a meeting of the borough council being called to consider the report of a committee of the council regarding the loss of petrol from one of its depots. A complete report of the committee was included in the notice containing the agenda of business, which notice was not only affixed near the door of the town hall where

[18] [1942] 1KB 136

the meeting was being convened but also sent to the public libraries where they were available to rate payers as well as members of the public who frequented the libraries. The committee's report stated that employees of the council who had been convicted of stealing petrol had made statements tending to implicate other employees of the council in the stealing of the petrol and listed by names those employees who had been so implicated. The Council, in the action for defamation brought by some employees so listed, contended that the council and the ratepayers had a common interest in the subject matter of the words and it was the duty of the council to publish the words by all reasonable and convenient means (as was their practice) to the ratepayers and thus the occasion was therefore privileged. Lord Greene M.R after adopting the test for the success of such a plea as set out in Adam –v- Ward at page 164 of his judgment had this to say: *"I cannot see that it can possibly be said that the council, was under any duty to make that communication to the rate payers. At that stage the matter was in a sense sub judice because the committee's report by itself could have no practical value unless and until it had been considered by the council and the council had come to some decision on it. ……. There may well have been a duty or if not a duty at any rate an interest of the council to inform the ratepayers of the result of its own deliberations."*

He went on to differentiate De Buse's case from the case of Hunt –v- Great Northern Railway[19] where the Defendant Company had published the Claimant's name in a circular to all their servants stating that the claimant had been dismissed and therein gave the grounds for his dismissal. It was held that the communication was privileged because it was in the interest of the company to bring home to its employees the type of action which was regarded by it as a proper subject for punishment and it was also to the interest of the employees to know that. Lord Greene also made the point that in Hunt's case action had definitely been taken.

[41] In the case at bar, the following matters bear reference:

[19] [1892] 2QB 189

(a) Provision is made for the submission of medical certificates issued by a registered medical practitioner recognized by the Company in instances where an employee is absent due to sickness. *(my emphasis).*

(b) Paragraph 7.1.2 specifically empowers the Company to require a member of staff concerned to undergo a medical examination by a doctor selected by 1st Defendant. On my interpretation of these provisions, it would seem to me that they give to the Defendants the ability to determine the medical practitioners who may be recognized for their own purposes, notwithstanding the fact such practitioner may be duly registered as such.

(c) Paragraph 7.2 makes membership in the Scheme compulsory for all staff entering the service of the Company after 1st January, 1963, and states the object of the Scheme as that of assisting staff in meeting medical expenses.

(d) Paragraph 9 of the Terms & Conditions of Service provides for maternity leave. 9.1(e) states in essence that maternity leave will start at least one month prior to the date of confinement. (*my emphasis)*

(e) The Rules and Operational Guidelines of the Scheme itself, provide in paragraph 8.10 that members of the Scheme and their families should be attended by the Company's Medical Officers and further provides that claims for medical attention given by other doctors will only be admitted provided the company is satisfied that bills and receipts are from bona fide medical practitioners. It has been shown on the evidence, that this provision was not enforced as employees were free to choose their own medical practitioners.

[42] It is clear on the evidence that MH submitted or had submitted on her behalf the Medical Certificates issued by the Claimant stating that she was examined on the mentioned dates and found to be unfit to perform her duties when in fact MH was not on island. The Claimant said that the examination of MH was non-physical but on her own evidence acknowledges that information was not being provided to her from another medical source but in reality second hand by way of MH's husband in Anguilla relating what MH, his wife, told him. I accept the evidence given by Dr. Brett Hodge on this aspect as, on any view,

this approach to the issuance of a medical certificate to my mind, raises serious questions as to its accuracy and reliability. Furthermore, if, as to be inferred that the Claimant was keeping in close contact with MH as her patient, it would seem strange that the medical certificate in support of maternity leave issued by the Claimant gave her estimated date of confinement as 11th February, 1995, and certifying maternity leave as from 23rd January, when in fact MH was delivered of her baby the day before maternity leave was stated to commence in the said certificate. This would have been contrary to the Terms and Conditions of Service and the Social Security Regulations.

[43] The 2nd defendant as personnel manager and administrator of the Scheme having discovered that MH was off island on the dates she was said to be examined and having learned that she was off island from late November 1994 continuously until the birth of her baby on 22nd January, 1995, and faced with the Medical Certificates which appeared to convey a different impression, would reasonably be expected to investigate and seek clarification regarding the same. I consider that in the circumstances 2nd Defendant, given his office, was under a duty to the Company based on the information which he had acquired, and notwithstanding the fact that no claims had been made against the Scheme, to investigate on behalf of the Company the circumstances surrounding the issuance of the Medical Certificates and MH's sick and maternity leave from the Company based thereon in seeking to ensure that the business interest of the Company was protected as well as ensuring that the Scheme in which the Company and its staff had a common interest, was not being laid open to abuse.

[44] It is also clear that as in the case of Hunt, the Company, through the 2nd Defendant, took a decision (albeit an interim decision) to suspend the acceptance of Medical Certificates issued by the Claimant until there was a satisfactory resolution. Having taken this decision:

(a) were the Defendants under a duty or was there an interest in communicating to the employees the fact that they were investigating an issue regarding the medical services of the Claimant and the decision taken not to accept medical receipts and certificates issued by the Claimant as from the date stated in the Memo?, and

(b) did the employees have a corresponding interest or duty to receive it?

Applying the test as laid down in Stuart-v- Bell, I answer both questions in the affirmative. Clearly, the Company having taken the decision not to accept receipts and medical certificates issued by the Claimant would have been duty bound to inform their employees of that fact, as it would affect any of the employees who sought medical services from the Claimant in respect of their claims for re-imbursement of medical expenses under the Scheme or justification of sick or similar leave being sought by an employee. It cannot be doubted in the circumstances that they would have a corresponding interest or a duty to receive it. The fact that the specific issue being investigated was not disclosed does not in the circumstances of this case change the character of the communication. It seems to me given the stage of the investigation being undertaken that the Defendants were seeking to be careful in saying as little as possible in respect of the issue raised on which their decision was based at that stage. I am also satisfied that the communication was not to the public at large, but rather addressed to and communicated to the staff of the Company, The Memo having being affixed to a notice board in an area not accessible by the general public save with the permission of the Company for specific purposes. I accordingly, have no hesitation in holding in respect of the communication that the occasion was fit and it bore reference to the occasion. I would accordingly be minded to hold that the occasion was privileged. This, however, is not the end of the matter.

[45] I turn now to consider the third element required for succeeding in the defence of qualified privilege. The Claimant must prove that the communication by the Defendants was not made from right and honest motives. This is a question of fact. If it is shown that the Defendants under the pretence of doing their duty or protecting their lawful interest have, through the 2nd Defendant, been pursuing some by-end or gratifying his ill will, then the communication, even if made on a privileged occasion, would not be a privileged communication as the Defendants would have in effect abused the occasion[20]. Counsel for the Claimant has very helpfully assisted the court with authorities detailing examples which the courts have held capable of establishing express malice. In Simpson –v

[20] See: Clerk & Lindsell on Torts 17th Ed. Para. 21-108, 21-111
Royal Aquarian –v- Parkinson[1892] 1 QB 454

Robinson[21] it was stated that any matter which showed the parties to live on bad terms or the defendant's conduct after the communication right down to and including the trial may bear upon malice.

[46] Counsel for the Claimant contend that clear evidence of express malice is to be found based in essence on the following matters:

(a) that the Defendants restricted its employees from using the medical services of the Claimant in breach of the contract of employment, the Fair Labour Standards Act and the Social Security Act ;

(b) seeking to obtain confidential information from MH in the face of her objections and have another doctor appraise her condition thus second guessing her primary physician, the Claimant;

(c) unfairly dismissing MH as found by the Labour Tribunal at which the Claimant testified on behalf of MH;

(d) Defendants' refusal to retract the statement or apologise;

(e) that publication was wide – to the whole of Anguilla given the method of publication

(f) Failing to give any result of the investigation (if any was in fact undertaken)

(g) Failing to give the Claimant a proper or adequate opportunity to address the matter with the Defendants.

[47] Having heard all the evidence and observed the witnesses and in particular the Claimant and the 2nd Defendant, I must say that the Claimant in giving her evidence did not impress me as being a patient or particularly understanding person. She appeared quick to anger and was sometimes quarrelsome in the witness box. She testified that the matter of The Memo and the Letter was annoying her. She found them offensive and said it was a nagging situation. I believe that the Claimant became defensive during the meeting with the 2nd Defendant and did not take kindly to her actions being questioned by 2nd Defendant. An opportunity was afforded her for addressing the matter. Further, I do not find that publication of the Memo was wide as asserted by the Claimant but merely to the

[21] (1848)12 QB 515

employees of the Defendant affected thereby. The investigation, in my view, may be said to have started upon the 2nd Defendant discovering that the facts stated in the Medical Certificates were contrary to what he understood an examination to mean in the circumstances. Efforts were made to have the matter fully investigated by the Medical Board. The failure by them to conclude their investigation, one way or the other, cannot be laid at the feet of the Defendants. I am not persuaded on a consideration of the evidence and the manner in which the matter unfolded that the Defendants were acting from any motives other than right and honest motives in seeking to protect the interest of the Company and its employees. The facts which came to light pertaining to MH's leave from her employment with the Company to my mind, clearly warranted an investigation by the Defendants. The Defendants' defence of qualified privilege accordingly succeeds.

[48] The Tort of Intimidation

If person "A" threatens person "B" that he ("A") will commit an act or use means unlawful as against "B" as a result of which "B" does or refrains from doing some act which he is entitled to do thereby causing damage to himself or to person "C" then "A" will have committed the tort of intimidation. The Claimant contends that the Defendants, in refusing to honour medical certificates issued by the Claimant when the employees were free under their contract of employment with the Company to choose their own medical practitioner, was in breach of the contract of employment with the said employees who contributed to the Scheme with the result that the said employees ceased using the services of the Claimant thereby causing her substantial loss. The Claimant also contends that such refusal was in breach of section 57 of the Fair Labour Standards Act and section 65(b) of the Social Security Act.

[49] I do not accept these contentions. I have already referred to various provisions in the Terms and Conditions of Service at paragraph 41 above. Suffice it to say further, that if an employer operating a medical scheme coupled with policies regarding sick leave pay, was forced to continue accepting medical certificates from a medical practitioner notwithstanding that questions as to their accuracy are raised on their face until that practitioner is no longer registered or licensed would, in my view, give rise to an

undesirable avenue for abuse. It is also clear on the evidence that the employees were free to use the medical services of the Claimant if they so wished. Accordingly, I do not find that the employees of the Company were in any way threatened or coerced into not using the medical services of the Claimant or that there existed any intent on the part of the Defendants to injure the employees or the Claimant but was action necessitated by the circumstances which arose.

Damages

[50] In the premises, the Claimant has failed in her claims herein and this is an end to the matter. However, in the event that I am wrong in my conclusions, I think it useful to set out my findings in respect of the damages claimed. Special damages were claimed in the sum of US$1, 215, 485.50 in respect of loss of profits for the years, 1995 to 1998. Her evidence in this regard was woefully inadequate. Three bundles were produced in evidence labelled as follows:

(i) Bundle 2 – receipts for purchase of medication and Lab work completed. These contained receipts from various entities issued to various persons including the Claimant, ranging from the year 1990 to 2003.

(ii) Bundle 3- receipts issued to patients in support of Auditor's schedule also ranging between 1991 to 2003; and

(iii) Bundle 4- Auditor's schedule detailing names of patients and payments made as from 1990 to 1996 as well as listings for various medications, and tests.

The Claimant was unable to show or point to any bundle showing her income and conceded that the figures did not include her overheads. She accepted that she lived at the premises from which she also worked. Even when pressed in re–examination for a figure for overheads not accounted for, her response was unhelpful. When asked whether she had any evidence such as banking accounts showing amounts being earned she said that her monies had been invested in businesses in Santo Domingo (in houses) and also on expenditures on the children's universities. No proof of these was submitted. She said she was seeking damages for three years of her practice from 1995 to 1998.

[51] Marva Audain Thompson, a certified chartered accountant, the Claimant's expert in respect of the damages stated quite candidly in her report that she had been engaged to compile the receipts and available documents of the Claimant to arrive at her total income received for the period 1991 to 1998 as well as a summary of expired items for the period 1995- 1998. She summarised her findings in Appendices A and B attached to her report. She found that the Claimant's income fluctuated during the eight year period. She noted that there was a drastic drop in income in 1995 but concluded that she was unable to opine as to the reason for the falls in income due to lack of information. She further stated that her assignment was not that of auditing the books of the Claimant but merely a compilation of information provided to her. She was unable to say what amounts represented costs of purchases or overheads as there was no segregation of expenses attributable to the household from those attributable to the medical practice.

[52] Malcolm Hope Ross, a chartered accountant and expert witness called on behalf of the Defendants who examined the three bundles of documents provided by the Claimant opined that the said documents did not substantiate the Claimant's claim. He said that it would first have to be shown the date when the injury was said to have occurred, and this was not borne out in the documents. The receipts, less expenses before the alleged defamation and after the same would have to be shown. This was not done and no bank deposits produced showing intake of income during the period.

[53] I am in agreement with the opinions expressed by Mr. Hope Ross as this is the only sensible and proper approach to establishing in the true sense, loss being claimed as loss of profits. Only one side of the picture has been presented. Nothing has been produced in terms of the costs and expenses or what is called in accounting parlance the "costs of sales." This is therefore totally inadequate in my view for the purpose of proof of loss of profits or loss of income. The principle that special damages must not only be specially pleaded but also strictly proved is still good law. The Claimant has not discharged this burden. Any damages due to the Claimant then would fall to be awarded under the principles governing a general award of damages.

## Conclusion

[54] For the reasons given above the Claimant's claim as against the Defendants is dismissed. With respect to costs, the general rule is that the unsuccessful party is to pay the costs of the successful party.[22] Quantification of costs is addressed in Part 65 CPR 2000. Costs in these proceedings fall to be determined under Part. 65.5[23] and Appendix B. The Claim was for a sum of at least US $1,215,485.00. Accordingly, the Defendants are awarded costs in the sum of US $ 102, 964.00. Finally, I am grateful to counsel on both sides for the assistance given in their expositions of the legal principles applicable to this area of the law.

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Janice M. George-Creque
High Court Judge

[22] CPR 2000 Part 64.6 (1)
[23] 'prescribed costs'