

SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.16 OF 2005

BETWEEN:

DAVID CAROL BRISTOL

Appellant

and

DR. RICHARDSON ST. ROSE

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC
The Hon. Mr. Denys Barrow, SC
The Hon. Mr. Hugh A. Rawlins

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal

Appearances:

Mr. James Bristol for the Appellant
Mr. Leonard Ogilvy, with him Mr. Alberton Richelieu for the Respondent

2005: October 25;
2006: February 20.

JUDGMENT

[1] **RAWLINS, J.A.:** This appeal is against a judgment in which the trial judge dismissed a claim for damages for defamation, which the appellant, Dr. Bristol, brought against the respondent, Dr. St. Rose. Dr. Bristol alleged that Dr. St. Rose libeled him in a letter dated 5th November 2002 that was addressed to the President of the St. Lucia Medical and Dental Association.¹ The letter was copied to the Minister of Health, the Permanent Secretary in the Ministry of Health, the Chief Medical Officer and the Administrator of the St. Jude's Hospital.

¹ Hereinafter referred to as "the Association".

- [2] In the judgment, the learned judge found that the letter was defamatory. He held, however, that it was published on an occasion of qualified privilege. He further held that the defence of qualified privilege was not lost, because Dr. St. Rose was not actuated by express malice in publishing the letter. He therefore dismissed the claim. In doing so, the learned judge opined that even if Dr. Bristol had prevailed on his claim, he would have been entitled to a maximum of about \$7,500.00 in damages. The judge ordered each party to pay his own costs, because, according to him, neither had covered himself in glory in the case.
- [3] Dr. Bristol appealed the judge's findings on qualified privilege, express malice and the maximum amount of damages to which he is entitled. He asked this Court to find in his favour and to award him damages in the sum of \$50,000.00 or such other sum as this Court thinks just. Dr. Bristol did not appeal against the judge's order that each party should bear his own costs. On the other hand, Dr. St. Rose cross-appealed on the sole ground of costs. He asked this Court to vary the judge's cost order and to direct that he should be awarded \$14,000.00 prescribed costs in the High Court proceedings. Dr. St. Rose also asked this Court to dismiss Dr. Bristol's appeal, allow his cross-appeal and award him costs in the appeal.
- [4] Dr. St. Rose did not appeal against the judge's finding that the letter defamed Dr. Bristol. It is also noteworthy that although Dr. St. Rose questioned the judge's finding that he ran a hopeless defence of justification; his cross-appeal does not specify a ground of appeal against this finding. Because of this, learned Counsel for Dr. Bristol submitted that there is no ground in the cross-appeal that challenges the finding on justification upon which Dr. St. Rose could rely in these appeal proceedings. He cited as authority rules 62.4(1)(c) and 62.4(8) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000.²
- [5] Compendiously, rules 62.4(1)(c) and 62.4(8) state that a notice of appeal must give details of the grounds of an appeal, and that an appellant may not rely on any

² Hereinafter referred to as "the Rules".

ground not mentioned in the notice of appeal without the permission of the court. I would additionally refer to rule 62.4(9). It states that although the court is not confined to the grounds set out in a notice of appeal, the court may not make its decision on any ground that is not set out in a notice of appeal, unless the respondent has sufficient opportunity to contest the ground. Solicitors for Dr. St. Rose did not apply for permission to rely on a ground of appeal that challenges the Judge's finding on justification. The matter was not raised in a sufficiently timely manner to provide Dr. Bristol with an opportunity to properly contest it as a ground of appeal. Accordingly, the judge's finding on the issue of justification does not arise as a contestable issue in this appeal.

The issues

- [6] Four issues arise on this appeal. The first is whether the learned trial judge erred when he upheld the defence of qualified privilege. If the appeal fails on this ground because the defence of qualified privilege is available to Dr. St. Rose, the second issue would be whether the trial judge erred when he found that Dr. Bristol failed to allege or prove that Dr. St. Rose was not actuated by express malice when he published the letter of 5th November 2002. The third issue would then be whether the judge erred in his opinion as to the amount of damages to which Dr. Bristol would have been entitled if he prevailed in his claim, and fourth, the issue of costs. First, however, I shall outline the brief facts.

The Brief Facts

- [7] The parties both worked as consultant surgeons at the St. Jude's Hospital in Vieux Fort. Dr. Bristol was employed there in November 1993. Dr. St. Rose was employed by the government of St. Lucia as an orthopedic surgeon in 1975 and he also worked at the St. Jude's Hospital as a general surgeon. In October 2002, Dr. Bristol received a letter from the Hospital Administrator, which informed him that his contract of employment to work at the Hospital would not be renewed. Dr.

Bristol contacted the St. Lucia Medical and Dental Association ("the Association"). He sought the assistance of the Association in an attempt to get his contract renewed. The Association is a voluntary professional organization and a registered Union which is recognized as a bargaining body for medical doctors in St. Lucia. It was in this regard that it sought to intervene in the matter. Both parties were members of the Association at the time.

[8] In his letter to the President of the Association, Dr. St. Rose expressed "utter dismay" at the enthusiasm with which the Association was trying to address the non-renewal of Dr. Bristol's contract. He set out reasons why he thought that Dr. Bristol's contract should never be renewed and why he should not be given privileges at St. Jude's or indeed at any government Hospital.

[9] Dr. Bristol complained that the following statements contained in Dr. St. Rose's letter defamed him:

"This doctor's profound arrogance and conceit have generated an unhealthy atmosphere at St. Jude's Hospital and has resulted in patient death and morbidity. ... Dr. Bristol has never been an asset to St. Jude Hospital. I see no merit in the support for renewal of contract from S.L.M.D.A. I strongly object to his reappointment in the Government Service and I do not think he deserves to be given privileges at any government hospital."

[10] Dr. Bristol alleged in his statement of claim that the foregoing defamatory words were written and published in the context of the following statements which the letter also contained:

"The volunteer doctors at St. Jude Hospital have ... given yeoman service. Dr. Bristol stopped many from coming to St. Jude's for reasons only known to him.

- He stopped plastic surgeon Dr. Goldstein, an outstanding one, was stopped because he was 'rude'.
- Dr. Dusan, Anaesthetist, was fired because he disagreed with Bristol's management of a head injury patient for surgery;
- The French Oncologist was stopped – patients have now to go to Martinique to be assessed, come back to St. Lucia, then return to Martinique for Radiotherapy.

I can go on and on at a discussion with you about the doctor's unconscionable practices. The specialist services given at St. Jude Hospital are no longer available on the scale like before – The plastic surgery, Hand Surgery, Paediatric Othopaedics, Sub Speciality Urology, etc. All this good work was discontinued by Dr. Bristol, supported by the clique in this S.L.M.D.A. Dr. Bristol was the Medical Director, Administrator and Accountant at St. Jude Hospital. He was all powerful and systematically rid St. Jude of the people he thought would take away some of his power. He was out of control and his worsening arrogance and impertinence may spell doom for St. Jude Hospital.”

- [11] The authorities did not revoke the decision to terminate Dr. Bristol's contract. Dr. Bristol instituted the claim in these proceedings against Dr. St. Rose. He complained in the claim that in their ordinary and natural meaning, the statements which Dr. St. Rose made in the letter, in their context mean, and would be understood by ordinary, reasonable and fair-minded readers to mean, that Dr. Bristol caused the death of patients at the Hospital by arrogantly, conceitedly, deliberately, selfishly, wrongfully, unconscionably and unprofessionally depriving patients of the specialist services of doctors who could have saved their lives. Dr. Bristol also claimed that the words would be understood by such readers to mean that he was not fit to be reappointed as a doctor in the government or public service or to be given any privileges of any kind therein, because he is the kind of doctor who would cause the death of patients at the Hospital by arrogantly, conceitedly, deliberately, selfishly, wrongfully, unconscionably and unprofessionally depriving patients of the specialist services of doctors who could save their lives, and for this he is a professional liability.
- [12] Dr. Bristol insisted that the statements complained of are false, except the statement that the volunteer doctors at the hospital had given yeoman service. He said that Dr. St. Rose knew or ought to have known of the falsity of the statements, or he was recklessly indifferent as to whether they were false. He alleged that the words seriously injured him in his character, credit and reputation and in his profession as a medical doctor and surgeon; brought him into public

scandal, odium, hatred, contempt and ridicule; lowered him in the estimation of right thinking persons, hurt his feelings and caused him to suffer damage.

- [13] The first question is whether the defence of qualified privilege was available to Dr. St. Rose. As a precursor, however, there are areas in which this appeal seeks to impeach the trial Judge's findings in relation to the circumstances or facts. It is settled principle, on the authority of the judgment of the House of Lords in **Benmax v Austin Motor Co., Ltd**³ and from decisions of this Court, including **Francis v Boriel**,⁴ **Grenada Electricity Services Ltd. v. Isaac Peters**,⁵ and **Asot A. Michael v Astra Holdings Limited, Robert Cleveland and Others v Astra Holdings Limited**,⁶ that an appellate court will not impeach the findings of facts by a first instance or trial court that saw and heard witnesses give evidence, except in certain very limited circumstances. An appellate court may, however, interfere in a case in which the reasons given by a trial judge are not satisfactory, or where it is clear from the evidence that the trial judge misdirected himself. Where a trial judge misdirects himself and draws erroneous inferences from the facts, an appeal court is in as good a position as the trial judge to evaluate the evidence and determine what inference should be drawn from the proved facts. Section 28(1)(b) of the Eastern Caribbean Supreme Court (Saint Lucia) Act,⁷ empowers this Court to draw factual inferences.

Qualified Privilege

- [14] This issue will be considered against the background of the judge's findings, which the appellant seeks to impeach, the stated grounds of appeal, the submissions of learned Counsel and the applicable law.

³ [1955] 1 All E.R. 326.

⁴ St. Lucia Civil Appeal No. 13 of 1995 (20th January 1997).

⁵ Grenada Civil Appeal No. 10 of 2002 (28th January 2002).

⁶ Antigua and Barbuda Civil Appeals Nos. 17 and 15 of 2004 (16th May 2005).

⁷ No. 17 of 1969.

The Judge's findings and submissions

[15] In his judgment,⁸ the learned judge correctly stated the basic principles that relate to qualified privilege in a case such as this, which derive from the seminal judgment of **Adam v Ward**⁹, and accepted and applied this statement of principle, for example, in **Bernard Nicholas v Kertist Augustus**¹⁰ and **Ulric Smith v Kathleen Huggins**.¹¹ The principle is that an occasion is privileged where the person who makes the impugned statements has an interest, or a social, moral or legal duty to make them to the person to whom they are made, while the person to whom they are made has a corresponding or reciprocal interest or duty to receive the communication. In determining whether the reciprocal duties or interests are present and, ultimately, whether the defence is available, the court must have regard to the relevant circumstances of the communication. The learned judge did not accept the submission by Counsel for Dr. Bristol that in determining this issue, he should have taken into account the list of matters adumbrated by Lord Nicholls in **Reynolds v Times Newspaper**.¹²

[16] Further, the learned judge accepted the uncontroverted evidence of Dr. St. Rose as to the reasons why he sent the letter to the persons to whom he addressed and copied it.¹³ Dr. St. Rose stated that as a senior and experienced medical practitioner in the island, he felt that it was his moral, ethical and social duty to state his concerns about the standard of medical care whether those concerns related to the administration of the hospital, a colleague doctor or to the interaction between administrative and medical persons within the institution. He said that, accordingly, it was his duty and legitimate interest in the interest of the public and of the patients who would be treated at the hospital to communicate his concerns to the persons to whom he sent the letter. The persons who received the letter,

⁸ At paragraph 9.

⁹ [1917] A.C. 309, at page 334.

¹⁰ [1996] E.C.S.C.J. No. 22; Dominica Civil Appeal No. 3 of 1994 (15th April 1996).

¹¹ [2000] E.C.S.C.J. No. 40; St. Vincent and the Grenadines Civil Appeal No. 6 of 2000 (25th September 2000).

¹² [1999] 4 All E.R. 609, per Lord Nicholls at page 629b-d.

¹³ Contained in paragraphs 36-39 and 49-51 of his witness statement.

also in the interest of the public, had a correlative interest and duty to receive the letter, with the concerns stated therein, in the interest of the good administration of the hospital and the health care services provided there. Dr. St. Rose stated that he believed that his letter was reasonable in the circumstances because his concerns were genuine and real. He believed that it was necessary for him to air his concerns, as he did, only to the Association and to the persons charged with the management and control of health care, because silence would redound to the danger of an unsuspecting public and would compromise the standard of health care at the hospital.

[17] Form this evidence, the learned judge found that there were 3 relevant circumstances in the present case, which led him to conclude that Dr. St. Rose wrote the letter on a privileged occasion. The first, he said, was that Dr. St. Rose, as a senior medical officer who worked at the hospital, had an interest in health care in St. Lucia. The second was that Dr. St. Rose had a view on the question whether Dr. Bristol's contract should have been renewed, and third, Dr. St. Rose communicated that view to the Association, the professional body of which they are both members, and which Dr. Bristol had asked to support the renewal of his contract. The judge also found that Dr. St. Rose had copied the letter only to 4 other persons who were directly concerned in that matter.¹⁴

[18] The appeal against this decision states 3 grounds, which are premised on the judge's expressed non-acceptance of *Reynolds privilege* as the basis to determine qualified privilege. The first is that the judge erred in law because in determining whether the defence of qualified privilege was available to Dr. St. Rose, he did not take into account the list of matters adumbrated by Lord Nicholls in **Reynolds**. The second ground is that the judge erred because he found that there were only the 3 relevant circumstances stated in the foregoing paragraph, which led him to conclude that Dr. St. Rose wrote the letter on a privileged occasion. The third ground was that in determining the issue of qualified privilege, the judge erred in

¹⁴ See paragraph 9 of the Judgment.

law when he failed to take into account the source and speculative or conjectural nature of the statements; did not take into account Dr. St. Rose's failure to take investigative steps to verify the statements, and did not take into account other relevant circumstances which militate against the inference of corresponding or reciprocal duties or interest which create the occasion of qualified privilege. Outside of **Reynolds**, these are factors which usually go to proof of express malice rather than to qualified privilege. Is **Reynolds** applicable?

Reynolds privilege

[19] In **Reynolds**, the House of Lords held that the circumstances that are to be taken into account when considering whether allegations that are made in a newspaper attract qualified privilege include the seriousness of the allegations; the nature of the information and the extent to which the subject matter was a matter of public concern; the source of the information; the steps taken to verify the information; the status of the information; the urgency of the matter; whether comment was sought from the claimant; whether the article contained the gist of the claimant's side of the story; the tone of the article; and the circumstances of the publication, including the timing. Their Lordships said that this was not an exhaustive list of the relevant factors, and the weight that is given to each relevant factor would vary from case to case. They admonished a court to have particular regard to the importance of freedom of expression, and to be slow to conclude that an article was not in the public interest, particularly when the information is in the field of political discussion.

[20] The learned judge stated that **Reynolds** was only applicable to cases in which a newspaper or other news media publishes a libel to the world at large and not in cases of limited publication.¹⁵ This was correct because in cases of limited circulation, this Court has consistently applied, as the test for privilege, the principles stated by Lord Atkins in **Adams v Ward**, which were crystallized in

¹⁵ See paragraph 10 of the Judgment.

London Association for the Protection of Trade v Greenlands Ltd.¹⁶ This is evidenced, for example, in **Bernard Nicholas**¹⁷ and **Ulric Smith**.¹⁸ In fact, in **Reynolds**, Lord Cooke noted¹⁹ the statement that Lord Buckmaster LC made in **London Association**, that for the purpose of determining whether qualified privilege was an available defence in defamation, it is essential to consider every circumstance associated with the origin and publication, but that in doing so, it is important to keep distinct the matters which would be solely evidence of malice, and matters which would show that the occasion itself is outside the area protected by the defence. **London Association** is important because, as Lord Cooke pointed out in **Reynolds**, it considers the availability of the privilege in the context of publication to a single potential customer.

[21] In effect, as Lord Cooke noted,²⁰ **Reynolds**, following cases such as **Blackshaw v Lord**,²¹ extended qualified privilege at common law from cases involving limited publication and fair and accurate reports of certain proceedings or findings to publication to the world at large in the news media. The rules of *Reynolds privilege* were thus made to meet the reasonable demands of freedom of speech in a modern democracy, by recognizing that there may be a wider privilege dependent on the particular circumstances. Lord Cooke therefore said that it was for this purpose that all the circumstances of the case, including the precautions taken by the defendant to ensure accuracy of fact, should be open to scrutiny.²² Lord Nicholls' list is peculiarly applicable to cases of publication to the world, and not to the present case.

¹⁶ [1916] 2 AC 15, at page 23, [1916-17] All E.R. 452, at page 456.

¹⁷ Supra, note 10.

¹⁸ Supra, note 11.

¹⁹ At page 645.

²⁰ In *Reynolds*, supra, at page 645f-j.

²¹ [1983] 2 All E.R. 311, [1984] QB 1..

²² At page 645j, Lord Cooke stated that in this inquiry onus is unimportant. Except in the sense that evidence of the circumstances surrounding the publication is necessary, and the contents of the publication in those circumstances become all-important.

The present case

- [22] In the present case in which there was limited circulation, the learned judge was correct when he found that *Reynolds privilege* does not apply. He was also correct when in determining the issue of privilege, he refused to take into account the source and speculative nature of the statement, the failure to investigate, which go to express malice. Was he correct, however, when he held that the persons to whom the letter was sent had a reciprocal duty or interest, in the interest of health care, to receive the views of Dr. St. Rose before they decided whether the decision to terminate Dr. Bristol's contract should have been revisited with a view to its renewal? It would be recalled that the judge decided that in the circumstances of the present case, Dr. St. Rose had a moral, ethical and social duty, in the interest of health care in St. Lucia, to communicate his views to the Association and to the other persons to whom the letter was sent.
- [23] There is no test to determine, precisely, the relevant criteria for moral, ethical or social duty or interest. The legal principle indicates that the determination is within the province of the trial judge, who must decide it objectively from the circumstances.²³ Lord Cooke's statements in **Reynolds** mean that in a typical case of limited publication, the nature of the publication would determine the extent of the matters that are to be considered, and further, that the enquiry would not normally extend beyond the identification of the occasion and of the subject matter. This was what the trial judge did when he set out the relevant circumstances at paragraph 9 of the judgment. His finding that, in those circumstances, Dr. St. Rose and the persons to whom he copied the letter had reciprocal legitimate interests to communicate and receive the statements therein is reasonably within his discretion. The appeal against the judgment on the issue of privilege is therefore dismissed. The question then is whether the privilege was lost because of express or actual malice.

²³ See, for example, the statements by Lindley LJ in *Stuart v Bell* [1891] 2 Q.B. 341, at page 350.

Express Malice

[24] First, I shall state the applicable principles, and set out the judge's findings and the particulars of the appeal on this ground. The findings will then follow.

Principles, findings and particulars

[25] Where words are published under circumstances which create qualified privilege, the claimant might still prevail on a claim for defamation if he proves that the person abused the privilege because of express or actual malice. The test of express malice requires the claimant to prove that the defendant did not honestly believe that the words were true because the defendant was either aware that they were not true or was indifferent to their truth or falsity. Express malice arises as a question of fact, which is to be drawn or inferred, *inter alia*, from the contents and source of the statements and the circumstances in which the statements were made. A defendant might be indifferent to their truth or falsity where he took no investigative steps to ensure their when he could have done so. Whether a defendant was indifferent to the truth of the defamatory statements is subjective to the defendant and depends, among other things, on his level of knowledge, education and intelligence. To a great extent, it is an enquiry as to the motive for the publication. Counsel for Dr. Bristol insisted that express malice should be inferred, *inter alia*, from the fact that the dominant motive which actuated the respondent to publish or communicate the defamatory statements was the improper motive of ensuring that the applicant's contract as Medical Director and General Surgeon at St. Jude's Hospital was not renewed.

[26] In the judgment,²⁴ the learned judge dismissed the plea of express malice on the ground that the allegation of malice was put on a very narrow basis in the pleadings. According to the judgment, the issue of malice revolved around the allegation in Dr. St. Rose's letter that Dr. Bristol fired or stopped volunteer doctors

²⁴ At paragraph 12.

from coming to the Hospital. The judge said that the evidence did not support the plea of express malice on that narrow ground. He also stated that he accepted the evidence of Dr. St. Rose as to the basis for his belief that Dr. Bristol had fired or stopped volunteer doctors from coming to the Hospital.

[27] The appeal on the ground of express malice states that the learned judge erred in law in failing to find that the defence of privilege was defeated by facts and circumstances from which malice may have been inferred. This is framed as an appeal on a point of law. However, it is essentially an appeal against the finding of fact by the judge. The ground invites this Court to find facts and draw inferences that are different from those which the trial judge drew.

[28] In the judgment,²⁵ the learned judge set out his perspective of the ambit of the plea of express malice from the pleadings as follows:

“It is said that the Defendant knew that it was false to say that the Claimant had fired or stopped volunteer doctors coming to St. Jude (or was reckless as to the truth of the allegation) because he knew the Claimant had no authority to hire and fire volunteer doctors or stop them coming to St. Jude because he was on a committee which had reported in September 1998 that there was provision for the Hospital Administrator to recruit such volunteers as were deemed necessary: see paras 8(d), 6(x), and 6(t), (u) and (v) of the Reply.”

Findings

[29] Although express malice was specifically pleaded in the reply, the plea was first set up in paragraph 10 of the statement of claim. In this paragraph, Dr. Bristol stated that the words contained in the letter were all false and that Dr. St. Rose knew or ought to have known of the falsity of the words or was recklessly indifferent as to their truth or falsity. The judge could have taken the evidence on all of the allegations in the letter to decide whether there was express malice. There was ample evidence that many of the statements are false and do not

²⁵ At paragraph 12.

present a balanced or complete story, particularly those allegations that relate to the death of patients. Dr. St. Rose did not seek to verify the truth or falsity of those allegations before he made them when as a surgeon attached to the Hospital he was in a position to have done so.

[30] If, however, the trial judge is correct and express malice could only be determined on the specifics pleaded in the reply,²⁶ there was no evidence that Dr. Bristol had any authority to stop volunteers, including specialists, from coming to the Hospital. Mr. Roy White, the Hospital Administrator at the time when the services of Dr. Dusan Milenkovic came to an end at the Hospital, stated that the employment and termination of the services of volunteer doctors is within the purview of the Hospital Administrator. Dr. St. Rose gave evidence that the hiring and firing functions of the Hospital Administrator are subjected to established government procedures and staff orders, and that the responsibilities are under the supervision and final control of government. Dr. St. Rose also stated that one of the duties of the Medical Director of the Hospital is to consult with the Administrator on medical staff applications and scheduling.

[31] Dr. St. Rose said in his evidence that Dr. Bristol could have stopped volunteers from coming by either writing to the volunteer as he did in the case of Dr. Lendor, by making recommendations to the Administrator or by failing to invite them to continue their services. In his decision,²⁷ the learned judge stated that the fact that the Hospital Administrator had the power to recruit volunteers did not necessarily mean that Dr. Bristol had no power to fire them or to stop them from coming. He stated, further, that "... the fact that Dr. Bristol had no formal authority to fire or to stop them from coming does not mean that he might not have done so

²⁶ It is noteworthy that paragraph 9 of the reply, by repeating paragraph 9 of the statement of claim and denying paragraph 9 of the defence, states that the defamatory words would be understood to mean that he was not fit to be reappointed as a doctor in the government or public service or to be given any privileges of any kind therein, because he is the kind of doctor who would cause the death of patients at the Hospital by arrogantly, conceitedly, deliberately, selfishly, wrongfully, unconscionably and unprofessionally depriving patients of the specialist services of doctors who could save their lives, and for this he is a professional liability.

²⁷ At paragraph 13.

in fact". These findings were based on conjecture rather than on any facts proved from the evidence.

- [32] It is even more noteworthy that the trial judge further stated that, in any event, he was satisfied that, even if Dr. St. Rose was wrong in his allegations that Dr. Bristol stopped volunteer doctors from coming or dismissed them, there was no express malice because Dr. St. Rose honestly believed that Dr. Bristol stopped them from coming and/or fired them. The learned judge did not consider whether Dr. St. Rose was reckless or indifferent to the truth of the defamatory statements.
- [33] There was no evidence that Dr. Bristol fired or stopped volunteers or specialists from coming to St. Jude's Hospital. A number of communications flowed between Dr. Bristol, Dr. Lendor and the Ministry of Health. Although they highlight difficult relations and differences between these two doctors there is no evidence that Dr. Bristol terminated the services of Dr. Lendor.
- [34] The evidence is that the services of Dr. Dusan Milenkovic were terminated after there were complaints from doctors, including Dr. Bristol, and from nurses. According to Mr. White, Dr. Bristol and others complained about the services of volunteer doctors. He did not always listen to them or take their advice. Mr. White's evidence is not controverted.
- [35] There is no evidence, as distinct from conjecture, that Dr. Bristol discontinued the services of Dr. Proctor, urologists, the services of Dr. Azaloux, oncologist, or the services of Dr. Goldstein. Dr. Goldstein left the Hospital before Dr. Bristol's tenure began there. Dr. Bristol's evidence, which was not controverted during cross-examination, is that he was informed in a letter from the Permanent Secretary in the Ministry of Health that visits by the French oncologists were under review. He has still held discussions with Dr. Azaloux and others regarding the ways in which Martinique could continue to assist with the care of cancer patients.

[36] Dr. St. Rose is a very highly qualified and experienced surgeon and medical practitioner. His allegations were written on the occasion when the Association was considering Dr. Bristol's request to make representations on his behalf to urge the authorities to reverse the decision to terminate Dr. Bristol's appointment as Medical Director at the Hospital. In the circumstances, as a person who worked at the Hospital and who purported to provide first hand knowledge of Dr. Bristol's work there, Dr. St. Rose should have and could have taken such steps as were necessary to present full and accurate information regarding the part which Dr. Bristol played with respect to the services of the volunteer doctors. He failed to do so, and, accordingly, lost the defence of qualified privilege. He was indifferent as to the truth or falsity of those defamatory statements. The appeal therefore succeeds on this ground.

Damages

[37] Although the award of damages for libel is not based on a precise methodology, the factors that are to be considered are fairly settled. A court should consider the gravity of the libel; the extent and manner of its publication; the relationship between the claimant and the persons who received the libel; the presence of express or actual malice; the defendant's refusal to apologise; the defendant's persistence with the libel or with the defence of justification which he fails to prove; and the conduct of the defence, and the probability of loss of earnings by the claimant.²⁸ The award of damages is at the discretion of the trial judge. An appellate court would only reverse the award if the trial Judge acted on a wrong principle or if the award is so high or low that it must be a wholly erroneous estimate. The award of general damages should be reasonably adequate for the purpose of assuaging the injury to the claimant's reputation and hurt to his feelings. The court often considers comparable awards within the jurisdiction.

²⁸ See, for example, *Gleaner Co. Ltd and Another v Abrahams* [2003] UKPC 55; (2003) 63 WIR 197.

[38] In this case, the trial judge did not award damages. He merely stated an opinion that Dr. Bristol would have been entitled to a maximum of \$7,500.00 damages. He justified this opinion on the ground that although Dr. Bristol did not keep his job as Medical Director of the Hospital, he made no claim for loss of earnings or other financial loss, and is therefore confined to general damages for injury to his reputation and his feelings. The judge found that two very aggravating factors were that the letter was seriously defamatory and Dr. St. Rose failed to acknowledge this and ran a hopeless defence of justification. He said that a mitigating factor was that the letter was published to a small number of persons who had an interest in the subject matter and were in a position to determine the truth of the allegations for themselves.

[39] For the purpose of comparative awards, Counsel for Dr. Bristol referred to **Bernard Nicholas** and **Ulric Smith**, in each of which this Court awarded ECC\$20,000.00. **Bernard Nicholas** is helpful for the purpose of a comparable award. In that case, in 1996, this Court made an award to a Trade Unionist, who was the Secretary/Treasurer of the Caribbean Congress of Labour, against a colleague. The colleague had written a letter, which seriously defamed the Secretary/Treasurer to the President of the Caribbean Congress of Labour and copied it to eight other regional and international labour organizations, many of which were not even allowed to attend meetings of the Caribbean Congress of Labour. **Ulric Smith** is less helpful because in this case this Court refused to disturb the award that the High Court made against a member of the Clergy for slander in a defamatory sermon to a congregation.

[40] At the hearing of this appeal, however, Counsel for Dr. Bristol further sought to rely on various cases involving the publication of defamatory statements in newspapers to the public at large, which are not applicable to the present case or in this jurisdiction. These included the recent decision of the Privy Council in **Basdeo Pandey v Kenneth Gordon**,²⁹ in which the Privy Council confirmed an

²⁹ [2005] UKPC 36, delivered on 5th October 2005.

award of TT\$300,000.00. It is my view that the learned judge correctly identified the aggravating and mitigating factors in the present case. Based on these factors, the presence of express malice, the time that has elapsed since the decision in **Bernard Nicholas**, and the professional standing of the parties, it is my view that an award of EC\$40,000.00 is adequate to compensate Dr. Bristol.

Costs and Order

[41] The decision by the trial judge to make no award as to costs in the High Court was reasonable in the circumstances for the reason which he gave. Dr. Bristol has now prevailed in this Court. Dr. St. Rose's appeal on the issue of costs is therefore dismissed. Dr. Bristol will be awarded \$7,666.66 prescribed costs on this appeal.

[42] The appeal is therefore allowed, the cross-appeal in relation to costs is dismissed, and the respondent shall pay \$40,000.00 damages and \$7,666.66 costs on this appeal to the appellant.

Hugh A. Rawlins
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

[43] **BARROW, J.A.:** It may be helpful to add, in concurring with the judgment delivered by Rawlins J.A., my reasons for thinking that this libel called for an award of general damages in the amount of \$40,000.00 when the trial judge thought that an award of \$7,500.00 would have been fair. The trial judge, it will be recalled, did not consider that the defence of qualified privilege was defeated by malice on the part of the defendant. We have taken a contrary view and have concluded that, by recklessly making the defamatory statements without troubling

to verify their accuracy, and in light of his motive for making the defamatory statements, Dr. St. Rose was actuated by malice.

[44] The damage that Dr. St. Rose had caused, in the language and content of his libelous communication to the persons to whom he wrote, was greatly aggravated by the accusations that he made against Dr. Bristol in purporting to justify the libel. The impact of the original libel should not be minimized by reference to the fact that the letter was sent to only 4 persons. The evidence is that the letter that was sent to the President of the Medical and Dental Association was discussed by both the executive of the Association as well as by the general membership.³⁰ As regards the efforts to justify the libel, it is impossible for me to imagine greater hurt to a doctor of medicine than to be condemned as a killer of patients for whose care he was responsible. This is expressly the accusation that Dr. St. Rose made against Dr. Bristol in running the defence of justification or truth. The original libel was bad. The attempt to justify it, persisted in at the trial, was egregious. Dr. St. Rose made direct accusations in his witness statement about Dr. Bristol causing the deaths of specific, named patients by incompetence, improper treatment and lack of care that were nothing short of allegations of criminal misconduct.

[45] What pushed the damage from worse to worst was that the accusations were made not by any ignoramus but by as eminent a medical specialist as Dr. St. Rose. Frankly, it is astonishing that Dr. St. Rose chose to run the defence that he did; that he alleged to be true reports and allegations of which he had no first hand knowledge and which he obviously did not take any, or any sufficient, steps to verify. The finding of the trial judge is pivotal: the judge found it was a hopeless defence of justification.

³⁰ See paragraphs 6 to 9 of the witness statement of Dr. Stephen King,, at p. 317 of the record of appeal, as well as the witness statements of the other doctors who gave witness statements.

[46] In considering the effect of Dr. St. Rose's hopeless defence of justification I draw a distinction between the effect of these accusations in aggravating the damage caused by the original libel and their effect, if any, in constituting a further defamation of the appellant. It is the former alone that affects the compensation that is to be awarded and no element of compensation for the latter must creep into our award. It is also important to distinguish between compensating for the aggravation of the injury to the feeling of the victim as opposed to the aggravation (if any) to the injury to reputation. Again, it is the former alone for which compensation is to be awarded.

[47] While an award of damages in this case must not punish the wrongdoer it must fairly compensate the victim. Compensation is awarded to console the claimant for the distress he suffers from the publication of the statement; to repair the injury to his reputation; and as a vindication of his reputation.³¹ In this case the solace for injury to feeling needs to be significant. **Fielding v Variety Incorporated**³² was a case in which the plaintiff had suffered no injury to his reputation because it was the fact that a play that the defendant had described as a disastrous flop continued to play to packed houses so that no one³³ could have believed the defamatory statement. However, it was accepted that the conduct of the defendant had greatly injured the plaintiff's feeling and it was for that element alone that he was compensated. That case shows how distinct an element in compensation is the matter of injury to feeling.

[48] In the instant case the claimant could not have had the comfort, which was available to the plaintiff in **Fielding v Variety**, of thinking that nobody believed what Dr. St. Rose had written in the original libel or in his witness statement. Dr. Bristol needed to defend himself against the false accusations. He called two other medical specialists as witnesses on his behalf, including a pathologist who stated

³¹ See the discussion in *Gatley On Libel And slander*, 9th ed., at 9.2

³² [1967] 2 Q.B. 841

³³ In England, where the action was brought, as opposed to the United States of America, where the plaintiff feared the negative impact on the prospect of subsequently staging the play, may have occurred.

that it was not his experience that Dr. Bristol's practice contributed to death and morbidity at the hospital. This was not simply a case of a defendant refusing to apologize or even persisting in a plea of justification; this was a case of the defendant greatly expanding on the original libel in purporting to justify it. It is this conduct that I find that greatly aggravated the damage so as to make the amount that the trial judge would have awarded a wholly erroneous estimate of the damages.

Denys Barrow, SC
Justice of Appeal