SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.2 OF 2006

BETWEEN:

VAUGHN LEWIS

Appellant

and

KENNY D. ANTHONY

Respondents

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Sir Richard Cheltenham, QC and Mr. Kenneth Monplaisir, QC for the Appellant
Mr. Anthony Astaphan, SC and Mr. Dexter Theodore for the Respondent

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2007: February 28;
May 14.

JUDGMENT

[1] BARROW, J.A.: Both the appellant and the respondent, holders of doctoral degrees both, are former Prime Ministers of St. Lucia. On 20th February 2000 when the appellant spoke the words for which the judge awarded $60,000.00 damages for slander they were leaders of opposing political parties and the respondent's party was in government.

[2] It was in the course of a political meeting in Micoud village that the appellant spoke the words. It had been a rainy afternoon so, at dusk when the appellant began to speak, not more than 100 persons were present at the meeting on the playing field. As Sir Richard, leading counsel for the appellant submitted, this impacts the

quantum of the award. In the course of his address to the audience the appellant said:

> "When your country becomes corrupt, and investors know that you have to hand the dollars before they can sign the contract, there will be no investment except by the mafia and money launderers, and bobolists and so on. We have enough examples in our country. I want to warn you about what is happening in the financial services business. The government of this country gave contracts to those people to set up financial business and in no time the people are handing over two hundred and fifty thousand U.S. dollars to them. They have not told you what side they put that money. If somebody gives you a gift you take it to build a new hospital, to build a new school, to buy some new things for the school. Kenny Anthony just take the money and put it behind his back and nobody knows where it is."

The meanings found by the judge

[3] The judge upheld the natural and ordinary meanings of the words pleaded by the respondent. These were that the respondent was guilty of (a) taking a bribe, (b) fraudulently diverting public funds for his personal benefit contrary to law; (c) corruption; (d) serious criminal offence punishable by imprisonment; and (d) dishonesty in the discharge of his office as Prime Minister and Minister of Finance. It probably made little difference to the sting of the words that the judge found, when considering the false innuendo that the respondent also pleaded, "that committing the criminal act of bribery, cannot be attributed to Dr. Anthony as the natural and ordinary meaning of the offending speech."[1]

[4] The judge's findings were expressed in paragraphs [64] and [65] of the judgment as follows:

> "64. There is no evidence that the persons who heard the words – "Kenny Anthony just take the money and put it behind his back and nobody knows where it is" – understood those words as colourful expressions not to be interpreted literally. Though the words may have been used by Dr. Lewis as a metaphor and colourful expression, I am of the view that in the context in which they were used they could reasonably

[1] St. Lucia Claim No. SLUHCV 2000/0411 Kenny D. Anthony v Vaughn Lewis, judgment delivered 11th January 2006 at paragraph 66.

> be interpreted literally by the ordinary fair minded listeners who heard the speech, as conveying the truth. **"The tendency and effect of the language, not its form is the criterion and a defendant cannot defame and escape the consequences by dexterity of style."** (Gatley) (supra) para. 3.16. page 83). (Emphasis as in the original).
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> "65. Having put myself in the place of the reasonable fair-minded ordinary listener, in my opinion the words speak for themselves. The cumulative effect of the statement has created defamatory imputations of Dr. Anthony. The manner in which the whole offending speech was structured and presented, the use of the words "mafia", "money launderers" and "bobolists" in the context in which these words were used, and the last sentence of the offending speech, convey inferentially all of the meanings pleaded at paragraph 5 of the Amended Statement of Claim. These meanings represent the natural and ordinary meanings of the offending speech."

[5] Sir Richard criticised the judge for not proceeding by the proper two-step method in considering the meaning of the words. That approach requires a judge first to consider the questions whether the words were capable of bearing any defamatory meaning and, if so, what was the permissible range of meanings; see **Jameel v The Wall Street Journal Europe SPRL**.[2] That is treated as a question of law because in jury trials it was for the judge and not the jury to decide. The object of requiring the judge to first decide that question was to eliminate the possibility of a perverse verdict from the jury.[3] If the judge decides the words are not capable of bearing any defamatory meaning the judge halts the case. If the judge decides the words bear a defamatory meaning or meanings within a permitted range, the judge directs the jury as to the range of available meanings.

[6] When the trial is by a judge sitting without a jury the judge is still required to first decide the question what, if any, defamatory meanings the words were capable of bearing. Rule 69.4 of the **Civil Procedure Rules 2000** puts on statutory footing the procedure of applying to a judge in chambers, at any time after the service of the statement of claim, for an order determining whether or not the words complained of are capable of bearing a meaning or meanings attributed to them in

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[2] [2004] E.M.L.R. 89

[3] See Jameel v The Wall Street Journal Europe SPRL [2004] E.M.L.R. 6 at paragraph 9

the statement of claim. It is only if the judge is so satisfied (whether she makes the ruling in chambers or at the trial) that she can then go on to consider the second question, whether in fact the words bore the alleged or any defamatory meanings.

[7] Although the judge considered the matter of the defamatory meanings in two steps, she covered ground in those steps in a different order than the authorities[4] indicate. The judge relied on a passage from Volume 28 Halsbury's Laws of England, 4th edition, (1979) paragraph 43 to direct herself as follows: "The law is quite clear that in deciding whether or not this speech of Dr. Lewis is defamatory, I must first consider what meaning the words convey to the ordinary person. Having determined that meaning, the test is whether under the circumstances under which the words were published, a reasonable man to whom the publication was made would be likely to understand it in a defamatory sense: (Halsbury's (supra) para. 43)."[5]

[8] The exercise that the judge later conducted followed the approach she outlined. In the first section of the judgment on meaning, and therefore as the first step, the judge considered the unstrained and likely interpretations of the words,[6] that the words could be interpreted literally as conveying the truth[7], that they created defamatory imputations of the respondent[8], and that they conveyed "inferentially all of the meanings pleaded … [in] the Amended Statement of Claim. These meanings represent the natural and ordinary meanings of the offending speech."[9] In the following section of the judgment, and therefore as the second step, the judge went on to consider whether the words were defamatory of Dr. Anthony and concluded that they were. In fact she had already decided this.

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[4] Jameel v The Wall Street Journal (supra), Slim v Daily Telegraph Ltd. [1968] 1 All ER 497 at 505 E to I and CPR 2000, r 69.4
[5] Paragraph 19.
[6] At paragraph 60
[7] Paragraph 64
[8] Paragraph 65
[9] ibid

[9] The passage in Halsbury's by which the judge should have guided herself at that stage in her judgment was at paragraph 48. Omitting footnote references it reads:

> "It is for the judge to rule whether or not the words are reasonably capable of bearing a meaning defamatory of the plaintiff. If he rules that they are so capable, it is for the jury, or the judge if he is sitting without a jury, to decide whether the words did in fact bear a meaning defamatory of the plaintiff."

[10] Sir Richard submitted that the judge's failure to approach the matter in the required fashion was "symptomatic of a flaw in the reasoning process" that was seen throughout the judgment. However, he did not suggest that the approach the judge took was in itself a ground for interfering with the decision. The submission that the decision needed to be reversed was founded on the submission that the judge misdirected herself as to the meaning of the words.

Appeals on meaning

[11] Mr. Astaphan, leading counsel for the respondent, reminded this court that the fundamental principle by which it must be guided on an appeal against a judge's finding as to meaning is that stated by Lord Nicholls of Birkenhead in the Privy Council's decision in Bonnick v Morris[10]:

> "An appellate court should not disturb the trial judge's conclusion unless satisfied that he was wrong."

This court must, therefore, be careful not to substitute its own view of the meaning of the words for that of the judge, if this court were inclined to a different view.

[12] In that case Lord Nicholls restated the approach to be adopted by the court in determining the meaning:

> "In short, the court should give the article the natural and ordinary meaning it would have conveyed to the ordinary reasonable reader …, reading the article once. The ordinary, reasonable reader is not naïve; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other, non-

[10] (2002) 61 WIR 358 at [9]

> defamatory meanings are available. The court must read the article as a whole, and eschew over-elaborate analysis and, also, too literal an approach. The intention of the publisher is not relevant. …"[11]

[13] The starting point of Sir Richard's attack was that the judge gave no reason for preferring the meaning for which the respondent contended over that for which the appellant contended. I do not accept that as accurate. The judge specifically adverted[12] to the fact that the appellant had pleaded a meaning. In paragraph 7 of the Amended Defence the appellant pleaded as the meaning

> "that the objectives of transparency and accountability to which the Government was committed were not met when the money was received by the Government for the Public Treasury and no purpose or use to which it would be put was indicated."

This, the defence stated, was what was meant by the words "Kenny Anthony just take the money and put it behind his back and nobody knows where it is."

[14] The judge then set out the contents of the appellant's witness statement that sought to explain the purpose, context and meaning of his words and what his words were not meant to convey.[13] Next the judge considered[14] the observations of Byron J.A. (later Byron C.J.) in Learie Carasco (aka) Rick Wayne v Neville Cenac (St. Lucia Civil Appeal No. 6 of 1994 at p 10, judgment delivered 30th October 1995) that the defendant's explanations as to the meanings he intended to communicate by the offending words "were legally irrelevant to that issue because the intention of the publisher is not material in determining whether the words are defamatory."

[15] In consequence of that rule, the judge stated, she would ignore the appellant's explanations as to what he intended to convey in determining the issue as to the meaning of the words. It was, therefore, only after disposing of the appellant's meaning as not tenable that the judge went on to consider the meanings asserted

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[11] ibid
[12] Paragraph 46
[13] Paragraph 48
[14] Paragraph 49

by the respondent. In conducting that analysis the judge further considered the meaning for which the appellant contended before reaching the conclusion that the words meant what the respondent pleaded. I do not know that after reasoning to the conclusion that the words meant one thing there was any further reasoning that the judge could give as to why the words did not mean another thing. It is worth remembering in this regard the statement by Diplock LJ in Slim v Daily Telegraph Ltd[15] that in deciding what meanings the words are capable of bearing, there is an acknowledgment that words are reasonably capable of bearing different meanings, but that after deciding what are the possible meanings the decision maker must decide "on *one* of those meanings as being *the only* "natural and ordinary meaning" of the words." (Emphasis added).

Extrinsic evidence

[16] A significant component of Sir Richard's attempt to persuade the court that the judge got the meaning wrong was his reliance on the fact of a television broadcast earlier in the month in which the speech was made. That broadcast showed a representative of a company with which the Government had entered into an agreement handing over a cheque for the sum of US$240,517.57, drawn in the name of the Accountant General, to the respondent who was then Prime Minister and Minister of Finance. Sir Richard used this information to argue that it was ridiculous to suppose the appellant could have been suggesting that the respondent took a cheque made out to the Accountant General and made off with the proceeds. It would be a matter of common knowledge, counsel submitted, that such a cheque would have to be paid in to the Treasury and no one but the Accountant General could have accessed that money. The presumption that everyone knows the law applied here, counsel argued.

[17] In fact it was the respondent, in the statement of claim, who provided the information about the television coverage of the handing over of the cheque. The

[15] [1968] 1 All ER 497 at 505 H

object of giving that information was to establish that the appellant had full knowledge of the purpose and details of the payment (including the fact that the Accountant General was payee) and could therefore have had no honest belief in the truth or fairness of what he stated at the political meeting. Mr. Astaphan submitted that while the respondent could use the information to show malice to defeat a defence of fair comment or qualified privilege, the appellant could not use the information to establish the state of mind with which the audience received the appellant's utterances or to affect the meaning of the words.

[18] Gatley on Libel and Slander[16] contains the following statement of the law on the matter of external evidence as to the meaning of words:

> "Where the Claimant is relying on the natural and ordinary meaning of the words complained of, no evidence of their meaning is admissible or of the sense in which they were understood, or of any facts giving rise to inferences to be drawn from the words used. It is for the jury to determine the sense in which the words would reasonably have been understood by an ordinary man in the light of generally known facts and meanings of words. Thus evidence of the meaning of a slang expression which has passed into common use would not be admissible." (Emphasis added)

This proposition is equally applicable to a defendant. He cannot be permitted to give evidence of how people understood the words. Were it otherwise a trial such as this would descend into a survey of which persons in the audience saw the television broadcast and an inquiry as to the impact it had on their understanding of the words used. The appellant may therefore not rely on evidence of the information conveyed by the television broadcast to modify or inform the meaning of the offending words.

[19] I digress to observe there is a suggestion that the appellant himself, in an earlier portion of his address to the gathering, may have established the context that the appellant wished to establish. In the third sentence of the extract from the speech the appellant spoke of the Government giving contracts to "those people" and to "the people" handing over the cheque. There is a distinct suggestion that the

[16] 10th edition, p 970 at paragraph 32.23

appellant in the speech had earlier introduced "those people". It is settled law that other portions of an article or a speech that contains defamatory words are admissible to establish the context in which the offending words were published, because context affects meaning. However, the burden is on a defendant, who seeks to rely on other words spoken by him to show the context in which he spoke the words in issue, of stating those other words in his statement of case and of stating his reliance on them; Elwardo Lynch v Ralph Gonsalves.[17] One can only wonder what the appellant said earlier in the speech.

[20] The judge directed herself that the law allowed her to assume that the ordinary hearers of the offending speech had "general knowledge and ordinary knowledge and experience of the affairs in St. Lucia and worldly affairs".[18] Knowledge of the televised information about the handing over of the cheque to the Prime Minister could not, of course, be treated as general knowledge: that was specific knowledge. General knowledge would include information such as who was the prime minister of the country, that St. Lucia is an island, its capital is Castries and that sort of thing.

Triumph of literalism

[21] Sir Richard argued that the judge's finding, that the fair-minded listener would have interpreted literally the words "Kenny Anthony just take the money and put it behind his back and nobody knows where it is", represents the triumph of literalism. The conclusion that the words could be interpreted literally, counsel submitted, was nonsense because what was stated was incapable of being construed literally.

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[17] St. Vincent and the Grenadines Civil Appeal No. 18 of 2005, judgment delivered 18 September 2006, at [16]

[18] At paragraph 55 of the judgment in Kenny D. Anthony v Vaughn Lewis St. Lucia High Court Claim No. SLUHCV 2000/0411 judgment delivered January 11th, 2006 (the judgment).

[22] To be fair, the judge's conclusion needs to be seen in context. Beginning at paragraph 57 of the judgment the judge set out the arguments of Sir Richard on the meaning of the words and how the ordinary man would understand the words. The judge stated that counsel argued the words in the sentence quoted above

> "could only mean an indifference to his obligation of accountability to which the administration of the Government was publicly committed. The words "put behind his back" simply meant no indication was given as to its use or disposition, Counsel argued. It was metaphorically colourful language he said, meaning that Dr. Anthony was silent about the use of the money. It could not mean to the ordinary intelligent fair-minded person that Dr. Anthony had stolen the money, since it was properly paid to the Government, in the usual manner, through the Accountant General."

[23] The judge then summarized the further arguments of counsel and began her analysis of meaning. The judge next made the observation, at paragraph 64, that there was no evidence that the listeners would have "understood those words as colourful expressions not to be interpreted literally." She stated that though the words may have been used as a metaphor and colourful expression the listener could interpret them "literally … as conveying the truth."

[24] It was an inexact way of expressing the thought that the listener could have taken the metaphorical expression as conveying the truth that it expressed. But the nonsense of which Sir Richard spoke was a matter of colloquialism rather than flawed reasoning. In an older edition of *The Concise Oxford Dictionary*[19] the meanings given of the word *literal* include its colloquial use by way of exaggeration or metaphor. It is interesting that the word "literal" can be used metaphorically. The example of this use that the dictionary gives is the phrase "a literal avalanche of mail". I dare say the judge's use of the word "literally" should not be taken literally, lest it lead to the triumph of literalism.

[25] In an earlier passage the judge had stated that the ordinary hearers of the offending speech "will be assumed to know the meaning of the words in Dr. Lewis's speech, including any widely known slang expressions, allusive terms, and

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[19] 8th edition (1990)

catch phrases in common current use in Saint Lucia … (Gatley … at para. 3.24)"[20] The judge found the quoted words imputed the commission of a fraudulent or dishonest act.[21] It was that meaning she was saying – the imputation of fraud or dishonesty - that "could reasonably be interpreted literally". So understood, I see no difficulty in accepting the judge's conclusion as one that was reasonably open to a decision maker.

Slander by omission?

[26] Sir Richard condemned the judge for the "extraordinary mode of analysis that informed her approach" in finding the speech defamatory "not so much on the basis of what was said but what was not said". In his skeleton argument counsel argued: "The judge found that the words meant that the Respondent took a bribe and was dishonest and corrupt because of the matter which the Appellant did not mention in his speech." There is no authority whereby words that were not used by a speaker can be taken into account to determine the meaning of what was said in the context in which the words were used, counsel submitted.

[27] Counsel is quite correct that the judge identified the things that the appellant did not say. The judge stated[22] that the appellant failed to make it clear to his listeners that Dr. Anthony's receipt of the money was perfectly legal and not a gift but was the receipt of money that an investor was contractually obliged to pay. The judge stated the appellant failed to inform his audience the cheque was payable to the accountant general and had to be deposited in the Consolidated Fund. And the judge stated the appellant failed to inform his audience that there was no legal requirement that the respondent as Minister of Finance disclose to the public how he intended to use this money.

[20] At paragraph 55 of the judgment.
[21] Paragraph 66
[22] At paragraphs 61 to 63

[28] However counsel is not correct, in my view, that the judge found the meanings were made out because of what the appellant did not mention. The judge found "the words speak for themselves."[23] As I understand it, the judge found the meanings were made out because the appellant failed to say any of those things that could have served "to delimit or extend the meaning of the words." The appellant said nothing to make the words mean something different from what, unmodified, they meant. The words last quoted are from the judge's summary of Mr. Astaphan's submission to the effect that the appellant's assumptions that St. Lucians knew what he, the appellant, knew was irrelevant and the audience would have had no knowledge to produce a different understanding from what the words themselves conveyed.

[29] In effect, the judge was recognising that had the appellant's assumption of his audience's knowledge been valid that could have altered the judge's view as to how the audience would have understood the words. Similarly, the judge was saying that if Dr. Lewis had told the audience the things the judge identified then the offending words could not have conveyed the defamatory meanings they did. This is how I take the judge's opening statement of her findings on meaning, that: "There is no evidence that the persons who heard the words - "Kenny Anthony just take the money and put it behind his back and nobody knows where it is" – understood these words as colourful expressions not to be interpreted literally."[24] If there had been evidence that the audience knew the things the appellant failed to tell them then it would have been open to the judge to find that the audience understood the words as colourful expressions not to be interpreted literally. As the judge said, there was no such evidence. So the audience was left to interpret the words "literally".

[30] In my view none of the appellant's contentions as to meaning succeeds and I would dismiss the appeal against the finding as to the meanings of the words.

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[23] At paragraph 65
[24] At paragraph 64

Fair comment

[31] A cardinal requirement that must be met for the defence of fair comment to succeed is that the words complained of must be comment and not fact. If they are statements of fact and not comment the defence fails. The appellant's case therefore depended heavily on the meaning of the words. A plethora of authority was cited before the judge and the judge dutifully considered, in considerable detail over 44 paragraphs,[25] the law and argument presented. In the end the judge concluded[26] that the words did not consist only of comments but contained four statements of fact, which were not deductions or conclusions arrived at by the appellant.[27] Among the statements of fact that the judge identified was the statement that "Kenny Anthony just take the money and put it behind his back and nobody knows where it is." As the judge noted, she had previously determined the natural and ordinary meaning of those words. These were the meanings pleaded in the statement of claim, set out in paragraph [3] of this judgment. On the basis of that finding the judge held the defence of fair comment could not succeed.

[32] Much less time was spent on this defence on appeal. The big issue on appeal, as counsel for the appellant put it, was whether the particular words, that the respondent just took the money and put it behind his back, was fact or comment. It seems to me that in the context of this case, having decided that the particular meanings found by the judge should not be interfered with, those meanings – guilt of fraudulently diverting public funds for personal benefit, corruption, serious criminal offence and dishonesty – settled the issue. They were clear statements of fact. This inescapably means failure for the contention on appeal that the defence of fair comment should have succeeded.

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[25] Paragraphs 74 to 118
[26] At paragraph 108
[27] Paragraph 109

Damages

[33] The judge awarded $60,000.00 as aggravated and exemplary damages. The judge reasoned, from the nature of the speech and other surrounding political circumstances, that the appellant "made the slanderous speech calculatedly, to make a profit." It is well known to lawyers that exemplary damages may only be awarded in very limited types of cases, according to the policy laid down in the case of Rookes v Barnard.[28] One such type is where a wrongdoer calculated that the profit to be made from his actions would exceed the compensation he will have to pay to his victim.

[34] Mr. Monplaisir who argued the matter of damages for the appellant responded to the court's inquiry whether profit included non-monetary gain by stating that it did. When asked if he had authority for that proposition counsel told the court that McGregor on Damages said so. It is fortunate for his client that counsel's answer inspired no confidence.

[35] When asked Mr. Astaphan, in the highest tradition of the profession, responded to the court that he had not researched the particular issue but would undertake to do so by the following day. Mr. Astaphan very helpfully submitted the following day the case of John v MGM Limited[29] and very properly and commendably conceded that profit was confined to money gain. The pertinent passage in that decision, in which the English Court of Appeal reduced the quantum of exemplary damages that a jury had awarded to the singer Elton John, is in these terms:

> "Secondly, the publisher must have acted in the hope or expectation of material gain. It is well established that a publisher need not be shown to have made any precise or arithmetical calculation. But his unlawful conduct must have been motivated by mercenary considerations, the belief that he would be better off financially if he violated the plaintiff's rights than if he did not, and mere publication of a newspaper for profit is not enough."[30]

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[28] [1964] 1 All ER 367
[29] [1997] Q.B. 586
[30] p 618 H to 619 A.

[36] Mr. Astaphan maintained, however, that aggravated damages were nonetheless available and properly due to the respondent. The judge did consider the factors relevant to an award of aggravated damages that were undoubtedly present in this case. These factors required the judge to include in her award compensation for the aggravation beyond the normal injury caused by the slander itself. Mr. Monplaisir did not suggest otherwise. In fact he offered no basis for interfering with the award the judge made. Whatever hopes the appellant could have had of reducing the award were lost by the failure to refer to even a single award of damages by which to compare the award the judge made.

[37] Lord Donaldson M.R. summarised in Sutcliffe v Pressdram[31] the proper approach to the question of interfering with a jury's award in a libel case. In my view this approach is applicable, no doubt with some qualifications, to an award by a judge sitting alone. His Lordship said:

> "[A] jury's award will only be interfered with on appeal if it is so large or so small as to be irrational; that is to say, incapable of having been arrived at by a process of reason and necessarily arrived at through emotion, prejudice, caprice or stupidity or simply on a wrong basis."

[38] In this case the judge considered the factors that should inform an award, including those that told in favour of the appellant. She considered the apology that the appellant tendered (which was not accepted), the absence of any malice after the publication, that the audience comprised a small crowd of about 100 persons, and the lack of impact of the slander on the political fortunes and reputation of the respondent who went on to win the general elections that were held some time after. The judge stated that in the absence of submissions from counsel for the parties on the question of quantum of damages she had taken into account comparable awards in defamation cases in this and other jurisdictions. It was therefore on an entirely rational footing that the judge arrived at her award. I would therefore uphold the award of compensatory damages.

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[31] [1991] 1 Q.B. 153 at 184 H

[39] That leaves to decide the extent by which to reduce the global award as a result of setting aside the award of exemplary damages. It seems to me that assistance in making an appropriate reduction is gained from considering, from the scope of the treatment, the importance the judge seemed to accord to the factors that went to aggravation compared to the very minor treatment the judge gave to the conduct of the appellant on which she based the award of exemplary damages. On that approach I consider the award of exemplary damages would not have increased the award by more than $15,000.00. I would accordingly reduce the award by that figure.

[40] The result is I would substitute a global award of damages to the respondent of $45,000.00. I would award prescribed costs in the court below in the sum of $12,750.00 and in this court in the sum of $8,415.00.

Denys Barrow, SC
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice

I concur.

Hugh A. Rawlins
Justice of Appeal