

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV 2003/0538

BETWEEN:

NATALIA QUERARD

Claimant

And

LIONEL MAX HURST

Defendant

Appearances:

Ms. E. Ann Henry for the Claimant

Mr. Hugh Marshall & Mrs. Cherissa Roberts-Thomas for the Defendant

.....
2007: 5th October; 19th November
2008: 6th November
.....

JUDGMENT

[1] **Harris J:** This is an action in common law slander in the jurisdiction of Antigua and Barbuda.

INTRODUCTION

[2] It was October of 2003 in Antigua and Barbuda. A live broadcast of a national debate on a popular radio station took place between Lionel Hurst, the Defendant and one Mr. H. Lovell. Mr. Lovell is not a party to this action. The country was in the throes of a national election campaign. The Defendant was contesting a parliamentary seat along with the said Mr. Lovell. The Claimant, a U.S. and an Antiguan citizen, who was the director of a company, HMB Holdings

Ltd. which owned a defunct premier Hotel in Antigua and Barbuda (Half Moon Bay Hotel or "HMB"), was not a political candidate. However, her lawful resistance to the compulsory acquisition of the Hotel by the Crown and, other issues surrounding the continued closure of the Hotel after its destruction by a hurricane some 8 yrs before, was a political issue joined between the two opposing political parties, one of which the Defendant belonged to. Prior to the radio debate, general public debate had taken place concerning the issues surrounding the continued closure of the hotel. A live broadcast of a parliamentary session on an earlier date, was said to have published a reference to the Claimant by another person, as an "*enemy of the state*". At the time of the radio debate, the subject of this action, the issues raised therein were known to the ordinary and reasonable person. In the debate that concerns us here, the Defendant published of the Claimant, that she was an "*enemy of the state*". The words, in their natural and ordinary meaning as well as their inferential meaning were capable of a defamatory meaning tending to the injury of her reputation of a general character and standing. The literal meaning of the words and the inferences which a reasonable person would draw from them in their context is :

(i) That the Claimant is an individual who in relation to the defunct Half Moon Bay Hotel is not acting in the interest of the past Half Moon Bay workers and is not acting in the interest people of Antigua and Barbuda, by resisting the attempts by the Government to cause the reinstatement of HMB the hotel, and **(ii)** That the Claimant is an individual who has lawfully resisted and frustrated the compulsory acquisition of the Half Moon Bay Hotel by the State of Antigua and Barbuda by legal action in the local courts and by soliciting the assistance of U.S. Senators, Congress and the US State Department and as a consequence is not acting in the interest of Antigua and Barbuda.

- [3] The Claimant contends in effect, that the offending word were calculated to disparage her in the way of her profession and business carried on by her at the time of the publication and as a consequence it is actionable without alleging or proving special damages. She alleges that she has been seriously damaged and suffered considerable distress and embarrassment. She claims for exemplary damages on the ground that the publication was motivated by malevolence and malice toward the claimant.

[4] The Defendant on the other hand contended that the words spoken were fair comment on a matter of public interest.

[5] **HELD;** that the words spoken, although capable of a Defamatory meaning in relation to the Claimants general character and standing, did not disparage her in the way of her business or profession. Therefore in the absence of proof of special damage the claimant cannot maintain the action and the action fails.

BACKGROUND

[6] The background to this matter is that the Claimant was a Director in the Company HMB Holdings Ltd which owned a premier hotel in Antigua – Half Moon Bay Hotel - employing between 160 to over 300 people depending on whose version of this you accept¹. The uncontested evidence of the Claimant is that two years prior to 1995 the Company contracted out the management and operation of the hotel to a management company “C.H.M.S”. At the time of doing so HMB Holdings terminated its workers and paid them their terminal benefits.

[7] In 1995, Antigua and Barbuda suffered a devastating blow from hurricane Louis, which effected extreme damage to the hotel rendering it inoperable. To date the hotel has not been reconstructed or reopened for business.

[8] Insurance monies payable on the damage to the hotel were paid out and substantially absorbed by the Hotel's creditor, Barclays Bank PLC. The employees at the hotel were neither re-engaged at the hotel nor paid their terminal benefits². The legal obligation it appears, to pay the workers their terminal benefits, rested with the management company C.H.M.S.³

¹ Nothing turns on this statistic. In the context of Antigua, either number is significant.

² The uncontested evidence of the claimant is that the management company “CHMS” also managed another hotel on the island and absorbed an unspecified number of Half Moon Bay workers in its other operations.

³ The court makes no finding on this point.

[9] In October of 2003, the Defendant, who prior to this period was the Antigua and Barbuda Ambassador to Washington, U.S.A. was a candidate for a seat in Parliament in the upcoming national elections and participated in a live broadcast of a debate on issues of concern to the public. The Claimant was not concerned with that debate as a contributor or participant and was not involved in the national politics of the day, save that the issue of the continued closure of the hotel, the outstanding terminal benefits to the workers and subsequently her lawful efforts to contest a compulsory acquisition of the subject property by the Government of Antigua and Barbuda, was in the public domain well prior to the debate. In fact, it was alleged and stands uncontested, that a Senator in the local Parliament, one Mr. Michael, first used the offending words, "*enemy of the state*" in reference to the Claimant and did so in an earlier and in the privileged circumstances of a Parliamentary debate which was broadcast live.

[10] The Claimant, accepts that she took legal action in Antigua to challenge the legality of the compulsory acquisition; that she solicited the assistance of U.S. Senators and U.S.A. Congress to assist her in preserving the status of the Hotel. The Defendant testified that he was spoken and written to by members of the U.S.A. Congress with a view to discouraging the acquisition of property belonging to an American citizen in Antigua and Barbuda.

[11] During the live broadcasted debate, the Defendant sought to describe the circumstances surrounding the continued closure of the subject Hotel. He referred to the fact that the workers remain without the benefit of their severance pay. He spoke of the Insurance monies being paid, some \$14,000,000.00(\$14m)¹ and not being applied to the reconstruction of the Hotel or payment of the

¹ The claimant's evidence is that it was \$3m and not \$14m. The court accepts the evidence of the claimant on this point. The opposing debater, Mr. Lovell, in defence of the claimant, disputed the Defendants characterization of the claimant's role with respect to the insurance monies and in relation to the liability for payment of the workers severance pay.

workers¹. He spoke of Government's attempt to compulsory acquire the Hotel, of his concern for such a premier property not being operational. He spoke of the attempts by the Claimant to resist the compulsory acquisition by soliciting the assistance of U.S. Senators and the U.S. Congress. Ultimately said the Defendant, the U.S. State Department *"...itself wrote us a letter indicating that the compulsory acquisitions of American property anywhere in the world is cause for concern and puts you on a kind of a special list ... so forth ... and all she has done in the past eight years is to fight the Government."*

[12] The Defendant went on to say *"But what is amazing ... she wants to fight with us that is her problem ... but to get the opposition fellas to join her in her fight ... That is that part of it that we don't understand. That is what we keep stressing. Its ok if Mrs. Querard wants to use all those strategies and so on to delay and to ah ...frustrate the other directors but we ... ah ... would not anticipate that the Antigua and Barbuda opposition, the loyal servants of the people of Antigua, would do what they have done and that is the point we object to."*

[13] It appears the thrust of his sojourn into the closed Half moon Bay hotel issue was part of his assault on his political opposition. However, the intention of the defendant is not relevant, it is the defamatory character of his statement that concerns us here

[14] The Defendant had earlier in the debate, said of the opposition joining with the Claimant to oppose the acquisition process, that it was unforgivable to join with the Claimant and continued *"... but to join with an Enemy of the State – now that is close to being treasonous" (emphasis mine)*. Here he is clearly referring to his political opposition as being treasonous.

¹ The opposing debater, Mr. Lovell, countered, citing several examples of similar closures of hotels which have not reopened or workers paid their terminal benefits. Further, the claimant's evidence is that the workers were not that of HMB Holdings at the time of the hurricane. The court accepts the evidence of the claimant on the latter point.

ISSUES

[15] Several issues are raised initially, that is:

- (i) Whether the words used – “enemy of the state” – are capable of a Defamatory meaning and if so;
- (ii) Was it in fact Defamatory of the Claimant?
- (iii) Were the words used in fact defamatory in the way of the claimant profession or business and/or otherwise actionable per se?
- (iv) Were the words complained of, a fair comment on a matter of public interest?
- (v) Were the words spoken actuated by malice?
- (vi) Whether the Claimant is entitled to damage for slander including aggravated and exemplary damages?

ISSUE “i” and “ii”

WERE THE WORDS ‘ENEMY OF THE STATE’ CAPABLE OF DEFAMATORY MEANING AND IN FACT DEFAMATORY

[16] A statement is Defamatory “*of the person whom it is published if it tends to lower him in the estimation of right thinking members of society generally or if it exposes him to public hatred, contempt or ridicule or if it causes him to be shunned or avoided*”¹. The process for determining this starts with considering what meaning the words would convey to the ordinary person² - are the words capable of a defamatory meaning and what meaning would they convey. Having determined the meaning, the test is whether, under the circumstances in which the words were published, the reasonable person would be likely to understand them in a defamatory sense. It is an objective test. Now, the ordinary person it is said, reads between the lines in light of his general knowledge and experience in worldly

¹ Halsbury’s 4th edit Vol. 28 para 42

² Halsbury’s 4th edit, Vol. 28 para.43.

affairs¹. At common Law, in determining the meaning ascribed to words – such as, ‘*enemy of the state*’ – the intention and knowledge of the publisher of the statement is immaterial². So the meaning that the Defendant ascribed to the words and set out in para 5 of his Defence at pp 8 of the CORE TRIAL BUNDLE and in his testimony in court is not definitive of the meaning of the words published, but merely an expression of his opinion of what the “reasonable person” would have understood the words to mean. This is also true of course, of the claimant’s opinion on the same issue. Both parties have provided their respective opinions on either the intention of the publisher or the meaning of the offending words. The court has given them due regard.

[17] The meanings conveyed by the words as ascribed by the Claimant in her pleadings are in my view for the most part “strained or unlikely”³. Taken literally the words are capable of being defamatory. However, I think it would be clear to a reasonable radio listener in the context of: **(i)** the forum in which it was said – national political debate **(ii)** the other words and explanations given by the defendant/publisher for the use of the words published **(iii)** the words used and issues raised having already been in the public domain **(iv)** the opposing debater refuting the defendants claims with facts of his own tending to neutralize the “sting” of the defendants words; that the words were perhaps more in the nature of ‘words of heat’, ‘abuse’ and sarcasm⁴ even, and the natural and ordinary meaning conveyed is not necessarily a defamatory one. But even if they were capable of being Defamatory, they are not so of the claimants reputation in her business and profession. Following closely, lord Pearson in *Morgan v Oldam press Ltd* [1971]1 WLR 1239 at 1269; I also do not think the reasonable man – who can also be described as an ordinary sensible man – should be envisaged as [listening to] this [live radio debate] carefully. Regard should be had to the [political campaign] character of the [live radio debate]; it is vague [sensational, allusive and inventive]; it is evidently designed for [political parrying, gamesmanship and [entertainment]], rather than instruction or accurate

¹ Ibid. para 46

² See para 3.12 of *Gatley; Berkoff v Churchill* [1996] 4 ALL ER 1008 at 1018, C.A., per Neil L.J.

³ *Stubbs Ltd v Russel* [1913] A.C. 386 at 398 H.L per Lord Dunfermline ; See also Douglas C.J. in *Maxwell v Forde* 22 WIR 12 (16-18) C.A. Barbados.

⁴ Halsbury’s 4th edit. para. 49

information. The ordinary sensible man, if he listened to the [live debate] at all, would be likely to [listen to it with the periphery of his conscious mind or in any event] casually and not give it concentrated attention. It is no part of his work [or education to listen to this debate], nor does he have to base any practical decision [- including voting -] [solely on what he hears there]. The relevant impression is that which would be conveyed to an ordinary sensible man [listening to the debate] casually and not expecting a high degree of [information and] accuracy.

[18] Even if the words were intended to be defamatory, the meaning ascribed to these words by the Claimant in her pleadings is strained and unlikely. Further, the context and circumstances of the publication must be taken into account and the claimant cannot pick and choose parts of the publication which, standing alone, would be defamatory¹. The editors of **Gatley**, make the point that “*This or that sentence may be considered defamatory, but there may be other passages which take away their sting*”. In the live broadcast of the debate, the Defendant sought to explain why he made the offending statement and laid out the facts, albeit as it turns out, substantially incorrect. At the same time, the opposing debater sought to correct the factual inaccuracies of the defendant's statements².

[19] In this case, the Court in all the circumstances, finds that the words convey the following to a ‘reasonable man’:

- (i) That the Claimant is an individual who in relation to the defunct Half Moon Bay Hotel is not acting in the interest of the past Half Moon Bay workers and further, is not acting in the interest people of Antigua and Barbuda by resisting the attempts by the Government to cause the reinstatement of HMB the hotel, and
- (ii) That the Claimant is an individual who has lawfully resisted and frustrated the compulsory acquisition of the Half Moon Bay Hotel by the State of

¹ See Gatley at para 3.28 for the quote and learning. The Defendant in this case sought to explain during the live debate, how he arrived his at his characterization of the claimant. The opposing debater, in defence of the claimant, provided a counter explanation to each of the “factual” assertions of the defendant. See also Georges JAA in **Laurence v Lightburn** (1981) 31 WIR 107(110) C.A Belize.

² See **Charleston v News Group Newspapers Ltd.** 2 A.C 65.

Antigua and Barbuda by legal action in the local courts and by soliciting the assistance of U.S. Senators, Congress and the US State Department and as a consequence not acting in the interest of Antigua and Barbuda.

- [20] The other meanings ascribed to the offending words, by the Claimant, or the Defendant (in part) in their statements of case, I find to be a strained and/or an unlikely conclusion of the reasonable man.
- [21] The 2nd limb of the test of what is Defamatory, is whether the words are likely to be understood in a Defamatory sense. That is, whether the imputations I have ascribed above to the words – *Enemy of the state* – are likely to be understood in a defamatory sense¹.
- [22] The editors of **Gatley** on libel and slander, 9th edit, provide that “words are normally construed in their natural and ordinary meaning, i.e. in the meaning in which reasonable person of ordinary intelligence, with the ordinary person’s knowledge and experience of worldly affairs, would be likely to understand them. The question is what would the words convey to the mind of the ordinary reasonable, fair minded reader? The natural and ordinary meaning may also include implications or inferences”.
- [23] In Antigua and Barbuda, reasonable people of ordinary intelligence with the ordinary person’s general knowledge and experience of worldly affairs does not comprise, the international investment community or the World Bank.² The words, I believe, would be understood by the people of reasonable people of ordinary intelligence as I set out above in para 19. Antigua is a small island with a population of approx. 75,000.00. Matters concerning Half Moon Bay Hotel and most other substantial Hotels - including information that would in a larger society not spread to the wider populace - will be of interest and within the knowledge and understanding of people of ordinary intelligence in Antigua and Barbuda. The evidence suggests that the issues concerning HMB were already in the public domain. Indeed even the claimant acknowledged in cross examination that she was “...regularly on the Observer radio speaking of the acquisition of the hotel

¹ See Lord Devlin in Lewis v Daily Telegraph (1964) AC 234 at 285 and Lord Reid at pp 258-260 for the ‘natural and ordinary meaning’ test.

² The Claimant suggests that she has been diminished in the estimation of this class of persons..

and responding to other matters". This understanding at best defames the claimant in the way of her general character and standing. I come now to the question of whether the words spoken are actionable per se.

ISSUE "iii"

WERE THE WORDS USED IN FACT DEFAMATORY OF THE PLAINTIFF IN THE WAY OF HER PROFESSION OR BUSINESS AND/OR ACTIONABLE PER SE?

[24] I note that the defendant has not taken this point in its submissions or elsewhere in its statement of case. The law stands, that when an individual brings a slander action they must show:

- (1) That the words are Defamatory of her (resulting in actual damage).
- (2) That the words would be understood to refer to her.
- (3) That the words have been published to a 3rd party.

[27] Now, this need to prove actual damage is so, "*no matter how malicious the publication, how disgraceful the imputation and however likely it is to cause damage to the plaintiff*"¹.

[28] The Claimant, by her pleadings² and evidence³ alleges that the words were calculated to disparage her reputation in her profession (which has not been specifically defined but presumably is limited to or includes that of a managing Director of a Company – see para 11 of Mrs. Querard's witness statement) and her business (presumably that of the hotel business); the hotel business in the circumstances that it found itself in at the time. The word spoken will be Defamatory beyond her *reputation of her general character and standing* if the words impute lack of qualification, knowledge, skill, capacity, Judgment or efficiency in the conduct of her business or professional activity.⁴

¹ See para 4.1 Gatley on libel and slander 9th edit

² See para. 3 and 4 of Claimants Particular of Damage at pp 47 of the Core Trial Bundle

³ See para. 11, 15, 16, 19 of the Claimants Witness Statement at pp 20 of the Core Trial Bundle

⁴ See the celebrated Trinidad and Tobago case of Basdeo Panday v Kenneth Gordon Civ App 175/2000 per Warner JA and /or R. Hamel-Smith JA.

- [29] This rule providing for slander to be actionable per se, in the instant case applied only if the words were spoken "*in the way of the profession or business*". The editors of '**Gatley**' refer to the case of **Jones v Jones [1916] 2 AC 481 (495)** where the Defendant had stated that the plaintiff school master had committed adultery with the caretaker's wife. It was held that the words were spoken without reference to his profession. The words must be spoken "*of and concerning the plaintiff in his profession or calling of ...*" Similarly in **Weidberz v La Guardia** also referred to by **Gatley** at para 4.17 it was held not be "*of and concerning*" the plaintiff in his profession or calling when in a political meeting the Mayor referred to an Attorney as a "*bum in a gin mill*".
- [30] Halsbury's Laws 4th edit vol. 28 at para. 51 cites the following example; that it is defamatory to state of a person, in time of war, that he is an alien enemy. Although cited as an imputation of antisocial behaviour, I find it very instructive. In the instant case, it cannot be said that the offending words were published of the Claimant in a climate of war or hostilities between the State of Antigua and Barbuda and the U.S.A (including Diplomatic hostilities) such that it would engender or tend to engender "bad "feelings between the populace and the defendant. Indeed the relationship between Antigua and the USA would have been very cordial and strong with the usual stream of Antiguans migrating to the USA and Americans visiting Antigua and Barbuda. The claimant, in answer to a question put to her in cross examination did acknowledge that if the Government was acting wrongfully in relation the HMB, her "solicitations" from the USA would put the government of Antigua in a "bad light". She said that she did what was necessary to protect her property including taking action in the local court¹. The Defendant testified at trial that the most "compelling reason" for calling the claimant an enemy of the state, is her resort to the assistance of US senators and Congress in her resistance to the acquisition. The defendant maintained at trial that, for the several reasons he provided - both at the live debate and buttressed in his testimony - he was of the view that the claimant was an enemy of the state.
- [31] It appears in the two (2) cases cited in para 29 above ,that the words spoken were more in the way of insult to the person and in the circumstances prevailing

¹ The claimant acknowledged that she instituted Judicial Review Proceedings.

at the time would not have been seen to attach to the profession or calling of the respective plaintiffs (as they were then referred to).

[32] The thread that runs through both cases is clear. In the instant case the words spoken and its natural and ordinary meaning - including the inferential meaning - were **not made of and concerning** the plaintiff in her profession as a Managing Director of a Company (Which on the evidence merely owned the hotel) or of the company's hotel business. Mrs. Querard's evidence was that at the material time the hotel was managed and operated by the management company CHMS and presumably not by herself. No imputation was made of her capacity as a Managing Director or even of her ability to operate a hotel.¹ There is no imputation that calls into question her qualification, knowledge, skill capacity, judgment or efficiency with respect to being a managing director or hotel owner. Indeed the hotel was referred to in glowing terms by the Defendant and presumably extends to the capacity of the persons behind its success prior to the hurricane damage. In **Gatley's**², it is said that *"to be actionable, words must impute to the claimant some quality which would be detrimental, or the absence of some quality which is essential, to the successful carrying on of his office, profession, or trade."* The offending words and its ascribed meaning³ in the instant case, do not impute that the claimant possesses a quality or lacks one that is essential to being the Managing Director of HMB Holding or the Managing Director of the company that owns the defunct HMB Hotel or a managing Director of a company period, or a company that owns and or operates a hotel, operational or not. The claimant has not established that her case falls within one of the four (4) exceptions that would render the slander action, actionable per se.

[32] The Claimant will need to plead and prove special damages to sustain this action. Proof of special Damage is necessary to maintain this action in Slander. **Gatley** makes the notable point at para 5.1 , that *"This is so however disgraceful the imputation may be, however certain it is that it will injure the reputation of the plaintiff and however malicious be the motive of the Defendant"*.

¹ Certainly, after the hurricane in 1996 there was no hotel to operate and manage.

² See Gatley's on Libel and Slander, 9th edit. Para. 2.26 and 2.27.

³ Even using the meaning ascribed to the words by the claimant (with the exception of 6(ii)), this test may not be satisfied.

[33] Special Damage is defined as some “actual temporal loss”¹, a loss of some “material or “temporal advantage” which is “pecuniary” or “capable of being estimated in money”². Mrs. J Kentish, witness for the claimant and at the time of the ‘publication’, lawyer for HMB Holdings, said in cross examination that as the company’s lawyer she could not point to specific dollars and cents loss resulting to Mrs. Querard or HMB Holdings resulting from the statement by Mr. Hurst and that by Asot Micheal³. It bears pointing out that the mere loss of the consortium of friends or associates is insufficient loss to amount to special damage.⁴ **The claimant has neither adequately pleaded nor proved special damages. The claimant has predicated her case on it being actionable per se. Having regard to the Court’s finding that the words are not actionable per se, the claim, as a consequence fails.** In the circumstances it would not be necessary to move on to consider in detail the last three (3) issues, which includes the Defendant’s Defence of ‘fair comment’. I do need however, to briefly make a timely observation.

[34] The evidence and facts as the court finds them to be, establish that much of the ‘facts’ that the Defendant relied on to predicate his statement - “*enemy of the state*” - were simply untrue. The hall mark of the cross examination of the Defendant was an expose of the erroneous factual basis for the defendant’s statement. The cross examination disclosed what can only be described, taken at its highest, as the Defendants reckless reliance on information received from the several third party sources he referred to. This included the issue of receiving \$14m in Insurance monies⁵. The evidence discloses that insurance monies, although paid, was paid in a vastly smaller quantity and then received substantially by the company creditor, Barclays Bank P.L.C.; that it was the Management Company ‘CHMS’ that bore the responsibility of making the terminal benefits of the workers; that HMB Holdings had ‘settled’ with its employees at the earlier time of entering into the management agreement with ‘CHMS’; that HMB Hotel or Holdings did not utilize any incentive benefits from the

¹ Ratcliffe v Evans [1892] 2QB 524 at 532, C.A.

² Gatley on Libel and Slander 9th edit. Para 5.2

³ See para 2 and para 9 for further particulars on this.

⁴ See Kodiline on Commonwealth Caribbean Tort Law 3rd edit. Pp228 on proof of damage in Slander.

⁵ The claimants evidence is that it was \$3m. The court prefers the evidence of the claimant on this fact.

Government during its subsistence and that the creation of new parcels of land and identification of those parcel over the Company property was known to the Government and in any event was created for an innocent purpose. Further or alternatively, considering the apparent presence of ‘malice’ on the part of the Defendant ¹, as defined by the law of Defamation – which means publication without lawful excuse ² - the Defence of ‘fair comment’ would have failed had the words been actionable per se.

[35] For the reasons provided above it is hereby ordered:

- (i) That the claim against the Defendant is Dismissed.

- (ii) That success on the issues being divided; the Claimant having proved that the words spoken were capable of a defamatory meaning of her general character and standing only, but failing to prove special damages or actual defamation of her in the way of her business and profession ; the Defendant not having raised the issue that ultimately worked against the claimant’s case and in any event failing to establish its pleaded defence, I direct that each party shall bear its own costs.

DAVID C. HARRIS
JUDGE
HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

¹ ‘Malice’ is not relevant in an action for slander that is not actionable per se. See also Georges JAA in *Laurence v Lightburn* (1981)31 WIR 107 at 119-126 for application of malice.

² See para 149 of Halsbury’s Laws 4th edit vol. 28 for the learning on ‘Malice’ as it is peculiarly defined and applied to Defamation only.