

COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

DOMHCV 2001/0318

BETWEEN:

MARINA MARSHALL

Claimant

and

**[1] LENISHA AUGUSTINE
[2] CRESSIDA RAYMOND**

Defendants

Before:

The Hon. Mr. E. Anthony Ross, QC

High Court Judge [Ag.]

Appearances:

Mr. Lennox Lawrence for the Claimant

Mr. Alick Lawrence on record for the first named Defendant

Mrs. Heather Felix-Evans on record for the second named Defendant

DOMHCV 2001/0319

BETWEEN:

MARINA MARSHALL

Claimant

and

**[1] GEORGETTE GEORGE
[2] ANN MARIE JAMES**

Defendants

Before:

The Hon. Mr. E. Anthony Ross, QC

High Court Judge [Ag.]

Appearances:

Mr. Lennox Lawrence for the Claimant

Mr. Alick Lawrence on record for the Defendants

2009: September 23.

JUDGMENT

- [1] **ROSS, J. [AG.]:** This is an action for damages that is based upon the most disturbing and unfortunate set of facts. The claimant, Marina Marshall, was at the time of the circumstances leading to the complaint, an employee of the Dominica Electricity Services Limited ("**Domlec**") and a contestant in the Miss Dominica Carnival Pageant.
- [2] As a pageant contestant, a number of photographs were taken of her, which received wide circulation throughout, but not limited to Dominica. As a result, the claimant was easily identifiable and connected with these photographs.

Summary of Facts

- [3] On or about 18th November 2000, Georgette George, defendant in DOMHCV 2001/0319 published an email (originally to eight persons) entitled "Sallop (open and be surprised) what you always wanted". "Sallop" is a pejorative creole word loosely translated as "sexually degenerate or whore". The path of the email was as follows:

- (1) shyguy_124@hotmail.com (Georgette George) to eight persons inclusive of Ann Marie James;
- (2) Ann Marie James to several persons inclusive of "Teesha" and sugarlips@hotmail.com (Lenisha Augustine);
- (3) sugarlips@hotmail.com published to cherry138@hotmail.com (Cressida Raymond);
- (4) Cressida Raymond published to several persons inclusive of Lousane Greer.

- [4] In addition to the caption, the email contained an attachment depicting a woman in a sexually explicit pose engaging in sexual activity; the claimant's profile was superimposed or posted onto the original photograph. The email and attachment(s) were widely circulated over the World Wide Web and was the subject of comment on one of the radio stations in Dominica. As a result of this adverse publicity, the claimant withdrew from the Carnival Queen Pageant.
- [5] Further, the claimant received immediate notice from Dominica Electricity Services Limited (Domlec) that her "services were no longer required". She very soon after learned that the images had been drawn to the attention of her employers and that this was the reason for the termination of her employment. I pause here to comment that in my view, and not to promote litigation, I was not only surprised but quite disappointed that Domlec was not a defendant to these proceedings and the issue of unjust dismissal was not pleaded and properly brought to the attention of the Court. I am further shocked that those publications did not lead to a police investigation with a view toward prosecution.
- [6] Over and above losing her job at Domlec, the claimant was ridiculed on the streets of Roseau, the capital of Dominica, to the extent that she became reclusive. Her family, although embarrassed accepted that she was not in fact a participant in the activities depicted in the photographs.
- [7] Her efforts to gain employment were, for a substantial period of time, not successful.
- [8] The claimant has filed this action seeking damages for libel and/or injurious falsehood and asks this court to find that:
- (1) the email and attachment are defamatory to the claimant; and
 - (2) the dissemination on the Internet is a sufficient publication to ground the claimant's action in defamation.

Pleadings

[9] For reasons that remain unclear, two separate claims were filed by the claimant on 25th October 2001. Suit Number 2001/0318 naming Lenisha Augustine and Cressida Raymond as defendants and Suit Number 2001/0319 naming Georgette George and Ann Marie James as defendants. What is clear however is that counsel for all three defendants that this decision will impact, Lenisha Augustine, Georgette George and Ann Marie James, remained involved in these proceedings after the filing of Amended Statements of Claim on 30th May 2002. At trial, no reason was given to the Court for the non-attendance of Counsel of record in the person of Alick Lawrence for Lenisha Augustine in matter 2001/0318, and for Georgette George and Ann Marie James in matter 2001/0319. The following is a list of the pleadings and relevant documents that make up the trial Bundle:

| File | Date | Vol | Document | Counsel |
|------|-----------|-----|--|-------------------------|
| | 5-Dec-00 | 3 | Expert Report from Steve McCabe | |
| 318 | 25-Oct-01 | 1 | Claim Form | Lennox Lawrence |
| 319 | 25-Oct-01 | 1 | Claim Form | Lennox Lawrence |
| 318 | 13-Dec-01 | 1 | Defence of Cressida RAYMOND | Heather Felix-Evans |
| 319 | 25-Mar-02 | 1 | Defence of Georgette GEORGE and Ann Marie JAMES | Alick Lawrence Chambers |
| 318 | 28-Mar-02 | 1 | Defence of Lenisha AUGUSTINE | Alick Lawrence Chambers |
| 318 | 30-May-03 | 1 | Amended Statement of Claim | Lennox Lawrence |
| 319 | 30-May-03 | 1 | Amended Statement of Claim | Lennox Lawrence |
| 319 | 11-Jun-03 | 3 | List of Documents of Defendants GEORGE and JAMES | Dawn Yearwood-Stewart |
| | 29-Jul-03 | 3 | Claimant's List of Documents 0318 and 0319 - 1 to 17 | Lennox Lawrence |
| 318 | 8-Dec-03 | 2 | Amended Witness Statement of Marina Marshall | Lennox Lawrence |
| 318 | 8-Dec-03 | 2 | Witness Statement of McCarthy Marie | Lennox Lawrence |
| 319 | 8-Dec-03 | 2 | Amended Witness Statement of Marina Marshall | Lennox Lawrence |
| 319 | 8-Dec-03 | 2 | Witness Statement of Steve McCabe | Lennox Lawrence |
| 319 | 8-Dec-03 | 2 | Witness Statement of McCarthy Marie | Lennox Lawrence |
| | 5-Apr-04 | 3 | Letter to Alick Lawrence | Lennox Lawrence |
| 318 | 23-Apr-04 | 2 | Witness Statement of Jeff Pierre | Lennox Lawrence |
| 318 | 23-Apr-04 | 2 | Witness Statement of Jeff Pierre | Lennox Lawrence |
| | | 3 | History of Internet Incident | |

[10] I was advised by counsel for the claimant that as part of the pre-trial process, an order was granted for the consolidation of the two actions which were informed absolutely, by the same fact situation. However, not only was there no

documented Consolidation Order on file, but neither was there an order directing that the two matters be tried together. In spite of these unexplained procedural irregularities, both matters were set down for hearing on the same date and at the same time and the pre-trial material as well as the trial bundles were set up so as to deal with both actions (0318 and 0319) at the same time. Accordingly, as I conducted the hearing, and I heard the evidence of the witnesses with respect to both claims at the same time.

Liability

- [11] The defendants in Suit Number 2001/0318, Lenisha Augustine and Cressida Raymond, were the claimant's co-employees at Domlec. Augustine's email address is sugarylips@hotmail.com and Raymond's email address is cherrypie@hotmail.com.
- [12] The defendants in Suit Number 2001/0319, Georgette George and Ann Marie James, were employees of Worldwide Wagering, an internet gaming company doing business in Dominica at the material time. George's email address is, by his own admission, shyguy_124@hotmail.com.
- [13] Against this background and supported by the trial evidence, all supported by witness statements and the respective witnesses, it is now my duty to determine whether or not damages should be awarded to the claimant, and if so, to determine the quantum of such damages.
- [14] Although defences were filed by Lenisha Augustine and Cressida Raymond in Suit Number 2001/0318 and by Georgette George and Ann Marie James in Suit Number 2001/0319, the only defendant represented at trial was Cressida Raymond. To her credit and that of her legal counsel, Mr. Julian Prevost, Cressida Raymond admitted the claim and reached a negotiated settlement with the claimant.

- [15] The matter as it relates to the other defendants appeared to be properly set down for hearing and evidence was heard from the claimant, McCarthy Marie (her uncle), Jeff Pierre, and Steve McCabe.
- [16] This court accepts the evidence of the claimant and McCarthy Marie that the defendant, Lenisha Augustine, admitted to publishing and forwarding the email with the file attachment and that she had in fact used Domlec's computer, during working hours, to publish and forward the said email. The defendants, Lenisha Augustine, Georgette George and Ann Marie James, all failed to defend this suit at the trial although defences were filed on their behalf.
- [17] This court finds that the facts as set out above have been fully supported by the evidence and that the dissemination on the World Wide Web is a sufficient publication to ground the claimant's action in defamation. The court accordingly finds that the email and attachments are in fact and in law defamatory to the claimant and that the claimant has been outrageously defamed.
- [18] My findings on liability against all three remaining defendants were given at the conclusion of the trial, and at the request of counsel for the claimant, submissions were filed with respect to damages.

Quantum

- [19] In her Amended Statement of Claim filed 29th May 2003, the claimant is seeking from each defendant, damages inclusive of aggravated damages for libel and/or malicious falsehood.
- [20] The judgment of Mitchell J in **Murio Ducille v. Robert Hoffman et al.** ANUHCV 1998/0151 sets out the following guidelines in determining the quantum of damages to be awarded as compensation, namely:
- (1) the gravity of the allegation;
 - (2) the extent of the publication;
 - (3) the extent and nature of the claimant's reputation;

- (4) the effect of the publication; and
- (5) the conduct and behavior of the defendants.

- [21] **The gravity of the allegation:** The claimant was, at the material time, a prospective contestant in the 2001 Carnival Queen Pageant and was gainfully employed at Domlec.
- [22] **The extent of the publication:** The email and attachments were widely published by the defendants on the World Wide Web. This publication was so widespread that it received media attention by one of the local radio stations.
- [23] **The extent of and nature of the claimant's reputation:** The publication of the photographs on the World Wide Web cannot be retracted or recalled. The evidence of Steve McCabe and Jeff Pierre, experienced operators in this industry, is that it is not possible to recall or retract any defamation published on the internet. The defamation is available for viewing as long as the World Wide Web exists.
- [24] **The effect of the publication:** In consequence of the defamation the claimant's reputation was seriously damaged. The damage to the claimant's reputation was so severe that the claimant was forced to withdraw from the 2001 Carnival Queen Pageant because of the negative and adverse publicity that the email and attachment(s) had generated. Further, the claimant lost several modeling appointments. Additionally, several members of the public started referring to the claimant (in her presence) as "Nasty" and "Sallop". The claimant's evidence is that she was so affected by the experience that she became withdrawn and was afraid to be seen in public.
- [25] **The conduct and behavior of the defendants:** The defendants (other than Cressida Raymond who entered into an out of court settlement) have never offered an apology, they have not withdrawn the defamatory allegations nor expressed any remorse for the said defamation; in the circumstances, the defendants should be held or deemed to have persisted in the defamation.

- [26] As to the quantum of damages for internet defamation in this region, counsel for the claimant directed my attention to the decision of the Master Cheryl Mathurin in **Dr. Ralph Gonsalves v. Edwards Lynch and BDS Limited SVGHCV 2002/0406** as a good starting point. I find that decision particularly instructive for the purpose of determining the proper level of damages in this matter.
- [27] In her decision, Master Mathurin addressed all of the elements necessary to support damages for defamation and provided reasonable guidelines for determining damages against the facts of the claim. Counsel for the claimant in his written submissions provided a general comparative analysis of the complaints in the **Gonsalves** matter and in the matter before me. He also attempted to persuade me that the reputation of the claimant, Marina Marshall, should be protected to no less the degree than that of Dr. Ralph Gonsalves, Prime Minister of St. Vincent and the Grenadines. I admit that it did not take much to persuade me that the damages awarded in the **Gonsalves** matter should be the appropriate starting point for the determination of damages for the claimant, Marina Marshall. Whereas in the **Gonsalves** matter, one could ascribe a political motive to what was later determined to be sufficiently defamatory as to attract a damage award, in the case of Marina Marshall, the claimant herein, it does not appear to have a motive with any upside for anyone.
- [28] Counsel for the claimant has urged this court to not only follow the rationale of the decision in **Gonsalves** but further, to increase the award to reflect the aggravating and distinguishing features of this case.
- [29] In **Gonsalves** the court considered that the defamation did not impact the career of the claimant; in the instant case however the claimant's career was adversely affected in a most dramatic fashion.
- [30] A critical observation is that unlike **Gonsalves** where the claimant was a seasoned politician, longstanding attorney and Prime Minister and could more easily survive the impact of the defamation, the claimant was a spinster at the start of her career; she had her career as a model prematurely terminated while she suffered from

such grave public ridicule that she became introverted and feared appearing in public. The claimant's evidence is that for years later she could not find employment and that having later found employment, her employers were informed of the allegations. Essentially her suffering lasted for several years.

The Award - General and Aggravated Damages:

[31] The claimant is seeking compensatory damages and aggravated damages on the basis not only of entitlement but that the intentional and calculated conduct and or extreme recklessness with which the defendants caused the defamatory email and pornographic attachment to be published on the internet warrants a substantial award.

[32] In awarding damages the court is asked to apply the direction of the Privy Council in **The Gleaner & Dudley Stokes v. Anthony Abraham** that:

“...the damages must be sufficient to demonstrate to the public that the Plaintiff's reputation has been vindicated. Particularly if the Defendant has not apologized and withdrawn the defamatory allegations, the award must show that they have been publicly proclaimed and have inflicted a serious injury.”

[33] In **Broome v. Cassel & Co [1970] AC 1027 at 1071** Lord Hailsham addressed the award of aggravated damages and stated that in the event that the allegation should re-emerge, the damage must be large enough to proclaim the baselessness of the libel. Counsel for the claimant urges the court to follow this dicta in making an award in this instance.

[34] The following aggravating and distinguishing features may be noted. In **Gonsalves**, the publication was limited to a local radio station; in the instant case the publication was on the worldwide web. Unlike in **Gonsalves** where the publication was on local radio and there was no evidence of its storage (whether temporary or permanent), the defamatory material in this case is stored permanently on the World Wide Web and cannot be deleted or recalled. It is certain therefore, and at the very least it is highly probable, that the allegation

and/or publication will re-emerge. The injury to the claimant in this case is thus far more widespread.

[35] In **Gonsalves**, Master Mathurin ordered each defendant to pay to the claimant assessed damages in the sum of \$160,000.00. This Court is urged to follow **Gonsalves** and to order each defendant to pay to the claimant assessed damages in the sum of \$160,000.00 at the very minimum. Because of the peculiar circumstances of this case where the publication was on the World Wide Web, and is stored permanently in cyberspace and can be accessed at anytime by anyone anywhere on the globe, this Court is urged to find that an award of \$200,000.00 against each defendant is a more appropriate award. I am persuaded that per-defendant average damages of \$175,000.00 is appropriate, but considering the joint enterprise approach of Lenisha Augustine, Georgette George and Ann Marie James and their calculated harm to the claimant, I am of the view that a joint and several award of \$525,000.00 should be ordered against Lenisha Augustine, Georgette George and Ann Marie James, the three defendants subject to this decision. The amount is broken down as follows:


| | |
|--------------------|--------------|
| General Damages: | \$225,000.00 |
| Aggravated Damages | \$180,000.00 |
| Exemplary Damages | \$120,000.00 |

[36] In determining the amount for general damages, the **Gonsalves** decision is used as an appropriate benchmark, and is moderately increased to reflect the difference in the capacity of this claimant to recover from the pointless assault on her character and reputation and the world accessible medium employed, as compared with that of a Prime Minister attacked in a local newspaper. As to aggravated damages, I rely upon the witness statement of the claimant as expanded upon at trial and express the view that she suffered peculiar hurt and damage as a result of the internet publication. Her special circumstances, including but not limited to her age, limited employment opportunities and the smear in a close knit community cries out for recognition by the court. As to

exemplary damages, the circumstances of the case, in my view, demands that an appropriate message be sent to Lenisha Augustine, Georgette George and Ann Marie James, that such conduct will always be met with the controlled disgust of the Court as is demonstrated by the award under this head.

Interest and Cost

- [37] The Honourable Court is also urged to follow Gonsalves on the matter of interest and costs. In that decision the Master awarded pre-judgment interest on the award calculated from the date of the filing of the claim form to the date of judgment at the rate of a short term-investment of 3% and at the statutory rate of 5% after judgment. I adopt that reasoning and will so order in this decision.
- [38] With respect to costs, the claimant is awarded prescribed costs based on the total award plus interest as at the date of this decision.



E. Anthony Ross, QC
High Court Judge [Ag.]