

EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL

FEDERATION OF SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2014/0023

BETWEEN

MYRNA LIBURD

Appellant

and

LORNA HUNKINS

Respondent

**Before:**

The Hon. Dame Janice M. Pereira, DBE  
The Hon. Mde. Louise Esther Blenman  
The Hon. Mr. Paul Webster

Chief Justice  
Justice of Appeal  
Justice of Appeal

**Appearances:**

Mrs. Emily Prentice-Blackett for the Appellant  
Mr. Brian Barnes for the Respondent

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2019: May 22;  
July 19.

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*Civil appeal — Slander — Whether respondent's claim for slander in relation to her profession actionable even though special damages were not pleaded nor proven — Whether slander in relation to one's profession has been overtaken by section 10 of the Libel and Slander Act of Saint Christopher and Nevis — Fair comment — Justification — Whether appellant could rely on defences of justification and fair comment — Damages — Whether learned judge ought to have granted respondent aggravated damages*

The respondent, Ms. Lorna Hunkins, was an employee of the Bank of Nevis (the "bank") and a member of skn@yahoogroups.com, a blog site whose members debated current events, many of them political in nature. Ms. Hunkins joined in the debate with others on the issue of whether citizens holding dual citizenship should be allowed to run for political office in the Federation. Ms. Hunkins spoke of the appellant's, Ms. Liburd's, daughter and used her as an example in the dual citizenship debate. Ms. Liburd complained to the manager of the bank that Ms. Hunkins had used her daughter's confidential information which was kept at the Bank. The bank investigated Ms. Liburd's complaint and concluded that Ms. Hunkins did not acquire knowledge of the statements made by her during her

capacity as an officer of the bank, and that information relating to Ms. Liburd's daughter's citizenship was available in the public domain. Subsequently, Ms. Liburd appeared on a programme which aired on the Choice FM Limited radio station and alleged that Ms. Hunkins, as an officer of the bank, breached her daughter's confidentiality by utilising information that she, Ms. Hunkins, obtained from the bank's records.

Shortly after these words were published, Ms. Hunkins complained that the statements made Ms. Liburd and published by Choice FM Limited were false and constituted a malicious attack on her reputation, which she stated was critical to her as a career banker. In response to her complaint, Ms. Liburd appeared on Choice FM Limited's radio station and again alleged that Ms. Hunkins, as an officer of the bank, breached her daughter's confidentiality. As a consequence, Ms. Hunkins sued Ms. Liburd and Choice FM Limited for slander. Choice FM Limited did not defend the claim and is not a party to this appeal.

The learned acting Justice Ramdhani allowed Ms. Hunkins' claim holding that the words used by Ms. Liburd were defamatory of Ms. Hunkins in relation to her profession. He found that Ms. Hunkins did not breach the bank's confidentiality with regards to Ms. Liburd's daughter's information held by the bank, as that information was available in the public domain and Ms. Hunkins had personal knowledge of it. The learned judge also held that section 10 of the Libel and Slander Act did not replace the common law rules relating to the law of slander, and therefore Ms. Liburd's statements fell within the common law exception that allows a claim for slander in relation to one's profession to be brought without proof of special damages. Further, he held that Ms. Liburd could not rely on the defences of fair comment and justification. In the circumstances, the learned judge awarded Ms. Hunkins damages including aggravated damages, and restrained the further publication of the offending words.

Ms. Liburd is dissatisfied with the learned judge's decision and has appealed to this Court on a number of grounds. Four issues arise for this Court's determination, namely: (i) whether the learned judge erred in holding that the claim for slander in one's profession was actionable, even though special damages were not pleaded nor proven; (ii) whether the learned judge erred in holding that section 10 of the Libel and Slander Act did not replace the common law in its entirety; (iii) whether the learned judge erred in concluding that Ms. Liburd could not rely on the defences of justification and fair comment; and (iv) whether in the circumstances the learned judge erred in granting Ms. Hunkins aggravated damages.

**Held:** dismissing Ms. Liburd's appeal and affirming the learned judge's decision; and awarding costs in the appeal of two thirds of the prescribed costs in the court below to Ms. Hunkins, that:

1. At common law, there are four categories of slander that can be sued upon without proof of special damages. These are where there is an: (a) imputation of a crime; (b) imputation of certain diseases; (c) imputation of unchastity or adultery; or (d) imputation affecting professional or business reputation. These categories of slander are deep rooted in the common law, and if they are to be overturned or restricted, this must be done by Parliament by clear, definite and positive

enactment. In the absence of any clear indication to the contrary, Parliament is presumed not to have altered the common law. Therefore, there is no doubt that section 10 of the **Libel and Slander Act** of Saint Christopher and Nevis did not alter the common law exception of slander in relation to one's profession. It simply does not address it. Accordingly, Ms. Hunkins' claim for slander in relation to her profession was actionable even though special damages were not pleaded nor proven. The learned judge did not err in so holding.

**R v Morris** (1867) LR1 CCR90 applied; **Henry Boot Construction (UK) v Malmaison Hotel (Manchester) Ltd** [2001] 1 QB 388 applied; **National Assistance Board v Wilkinson** (1952) 2 QB 648 applied.

2. To establish the defence of fair comment, a defendant must prove that the facts on which the comment is founded are true and that the comments on these facts are fair. In addition, the defendant must also prove that the words complained of are comments and not facts. It is settled law that the defence of fair comment does not cover misstatements of fact. If the words complained of contain allegations of fact, then the defendant must prove that those allegations of facts are true; it is insufficient for the defendant to merely plead that he or she honestly believed them to be true. In the present case, the learned judge quite properly held that the statements that Ms. Liburd made were statements of fact and therefore she could not have relied on the defence of fair comment.

**Reynolds v Times Newspaper** [2001] 2 AC 127 applied; **British Guiana Rice Marketing Board v Peter Taylor and Co. Ltd** (1967) 11 WIR 208 applied; **Vaughn Lewis v Kenny Anthony** SLUHCVAP2006/0002 (delivered 14<sup>th</sup> May 2007, unreported) followed.

3. In relation to the defence of justification, a defendant is required to prove the truth of every defamatory fact or statement made or that it is substantially true. Against the learned judge's findings, including his finding that Ms. Hunkins, as an employee of the bank had not breached Ms. Liburd's daughter's confidentiality, and in view of the fact that Ms. Liburd has not appealed against those findings, the learned judge's conclusion that Ms. Liburd could not rely on the defence of justification cannot be assailed.

**Convery v The Irish News Limited** [2008] NICA 14 applied.

4. There is no basis for this Court to interfere with the learned judge's award of aggravated damages to Ms. Hunkins. On the evidence before the learned judge, it was clearly open to him to have found that Ms. Liburd was actuated by malice, sufficient to justify an award of aggravated damages. In any event, there is another basis upon which the learned judge could have awarded aggravated damages; that is, on the basis of the defence of justification that was relied on by Ms. Liburd, even up to this appeal. It is settled law that a failure to establish the defence of justification will usually inflate any damages awarded, the court treating it as an aggravation of the original injury.

**Elwardo G. Lynch v Ralph Gonsalves** SVGHCVAP2005/0018 (delivered 18<sup>th</sup> September 2006, unreported) followed; **David Carol Bristol v Dr. Richardson St. Rose** SLUHCVAP2005/0016 (delivered 20<sup>th</sup> February 2006, unreported) followed.

## JUDGMENT

### Introduction

- [1] **BLENMAN JA:** This appeal brings into sharp focus the question whether the common law exception to slander in relation to one's profession, which is actionable without proof of damage, has been overtaken by the **Libel and Slander Act**<sup>1</sup> of Saint Christopher and Nevis. It principally interrogates the question whether without specifically pleading and proving special damages, a litigant can succeed on a claim for slander in relation to his/her profession. The appeal also examines the circumstances in which the defence of fair comment and/or justification can prevail against a claim for slander and whether the learned judge erred in concluding that they were not available to Ms. Myrna Liburd ("Ms. Liburd"). In addition, it seeks to determine whether the learned judge erred in awarding Ms. Lorna Hunkins ("Ms. Hunkins") aggravated damages.
- [2] In a nutshell, the appeal is against the judgment of the learned acting Justice Darshan Ramdhani in which he awarded damages to Ms. Hunkins for slander committed by Ms. Liburd. The learned judge held that Ms. Hunkins' claim that was based on slander by words used in relation to her profession was maintainable, even though she did not plead nor prove special damages. The learned judge also held that section 10 of the **Libel and Slander Act** did not override the common law exceptions in which slander was actionable without proof of specific damages. The judge therefore allowed Ms. Hunkins' claim for slander against Ms. Liburd, even though special damages were not pleaded nor proved.
- [3] In addition, the learned judge held that Ms. Liburd could not avail herself of either of the defences of fair comment or justification. Further, the judge held that

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<sup>1</sup> Cap. 4.18, Revised Laws of the Federation of Saint Christopher and Nevis 2002.

Ms. Liburd acted with malice in slandering Ms. Hunkins and therefore Ms. Hunkins was entitled to aggravated damages. The judge also awarded Ms. Hunkins interest on the damages together with prescribed costs. In addition, the judge restrained Ms. Liburd, her servants or agents or employees from publishing or causing to publish the words complained of.

- [4] Ms. Liburd is dissatisfied with the judge's decision and has appealed. Ms. Hunkins maintains that the learned judge did not err in arriving at the decisions to which he came, and she vigorously defends the decision.

### **Issues on appeal**

- [5] The issues that arise for this Court to resolve on the appeal are as follows:
- (a) Whether the learned judge erred in holding that the claim for slander in relation to one's profession was actionable even though special damages were not pleaded nor proven;
  - (b) Whether the learned judge erred in holding that section 10 of the **Libel and Slander Act** did not replace the common law in its entirety;
  - (c) Whether the learned judge erred in concluding that Ms. Liburd could not rely on the defences of justification and fair comment; and
  - (d) Whether in the circumstances the learned judge erred in granting Ms. Hunkins aggravated damages.

### **Background**

- [6] I will recite the facts from the very helpful narration in the judgment of Ramdhani J [Ag.], since they are at the heart of the issues that arise on this appeal. At paragraphs 8-10 of the judgment, the learned judge stated:

"[8] In 2009 [Ms. Lorna Hunkins was employed at the Bank of Nevis and] was a member of skn@yahoogroups.com, a blog site whose members debated current events, many of them political in nature. [Ms. Hunkins'] group name was 'Foxyloxy68'. On 4 July 2009, [Ms. Hunkins] joined in the debate with others on the issue

of whether citizens holding dual citizenship should be allowed to run for political office in the Federation. From the agreed transcript of the discussions on the 4<sup>th</sup> July 2009, it is clear that [Ms. Hunkins] spoke of [Ms. Liburd's] daughter and used her as an example in the dual citizenship debate...

[9] ...[Ms. Liburd] wrote a letter addressed to Mr. Everette Martin, the Manager of the Bank of Nevis, complaining that [Ms. Hunkins] had used her daughter's confidential information which was kept at the Bank. It was apparent from her letter that she believed that it was significant that [Ms. Hunkins] had made the comment regarding her daughter only one week after a sum of money had been deposited into her daughter's bank account, and that she believed that [Ms. Hunkins] was speaking to that deposit in her posting.

[10] The bank manager, Mr. Martin conducted an investigation which entailed speaking with some of the employees at the bank about their knowledge of the place of birth of [Ms. Liburd's] daughter and he formed the view that this information was in the public domain and that there had been no breach of the bank's confidentiality in relation to [Ms. Liburd's] daughter's banking information. He accordingly wrote a letter dated 29 October 2009, in response to [Ms. Liburd] answering her complaint in the following terms:

'We advise that these matters have been investigated and duly considered. The Bank is of the view that the information contained in the statements made by Ms. Hunkins may be available in the public domain, and does not necessarily constitute confidential information. Furthermore investigations reveal that Ms. Hunkins asserts that she became acquainted with the said information as a result of her familiarity with the Liburd family and not by virtue of her position with the Bank. Based on the aforesaid, the Bank is of the view that Ms. Hunkins did not acquire knowledge of the statements made in her capacity as an officer of the Bank.'

[7] Events took a turn nearly two years later. On 8<sup>th</sup> August 2011, an article written by one, Halstead 'Sooty' Byron entitled 'Right the Wrong' was published on the 'blog' site, skn@yahoogroups.com. In that article, the author described himself as the campaign manager to the Nevis Reformation Party (NRP) Candidate, Hensley Daniel, for the July 2011 elections. Mr. Byron in this article stated that he had objected to the registration of several names that had appeared on the voters' list

for the St. John Constituency on the basis that those persons did not reside in that constituency.

- [8] On 9<sup>th</sup> August 2011, Ms. Liburd appeared on 'Breakfast Menu with Chef Waltie', a radio programme which aired locally on the Choice FM Limited radio station, Choice 105.3 FM and was also transmitted locally, regionally and internationally via the world wide web at [www.choicefm105.3.com](http://www.choicefm105.3.com). She spoke the following words:

"Foxyloxy supposed to be Lorna Hunkins, a senior person at the Bank of Nevis, I have had many correspondence come to me from the bank which would have me going there with my personal information in front of Lorna Hunkins ...[They] have both been in First Caribbean Bank, and I don't know that these people should be involved in these kind of things when you dealing. It is showing blatant dishonesty and ignorance trying to mislead people. Now why should Sooty an NRP supporter go into the office and object to NRP people. Sooty article stated that Collin Tyrell also was objecting. Everybody know Collin to be CCM. Now why is she deciding that Sooty should also go in there and object to these 'supposedly' NRP people who she know went to the Polls and voted and they're in the same position as Denrick. Now my question to Lorna is, is Denrick voting in the constituency that he is living in? Because this is what we need to tell people. If Denrick lives in Constituency No. 9 he should be registered to vote in Constituency No. 9. Is he living in constituency No.9 at this present moment, right? And if he doesn't live there, how long ago he moved into the other Constituency? Uhm, February passed, you mean to tell me a senior officer in the Bank of Nevis, right, who deal with loan and kind of thing, people personal business ... Now how could we trust these people to handle our money? I have a problem with these kind of people ... And you know what? If they gonna continue to get on the internet and castigate people like this, she works in the bank ... She went on the internet already and tried to castigate my daughter using personal information from inside the bank, my daughter personal information and Lorna need to get off the internet or else she will get herself in serious trouble or Bank of Nevis will be looked at in a very bad light ... I think it is time for Bank of Nevis to look seriously at the people who they have dealing with people confidential and personal information not when they gonna show that they so blatantly dishonest. That mean that they gonna go in there and be dishonest with our banking information and go out there to mislead people as she did on the internet already with my daughter..."

- [9] Shortly after these words were published, Ms. Hunkins caused her solicitors to

serve on both Ms. Liburd and Choice FM Limited a letter, in which she stated that the statements made by Ms. Liburd and published by Choice FM Limited were false and constituted a malicious attack on her reputation, which she stated was critical to her as a career banker. Through this letter she demanded an apology. There was no response to this letter, but following the receipt of this letter, Ms. Liburd on the 15<sup>th</sup> September 2011, appeared on Choice FM Limited's radio station and spoke the following words, namely:

"I understand in my absence, it seems as if people were looking for me. I don't know and I understand there was something with Choice and some letter about whatever I called in and I said right and I'm telling the people who are listening this morning when I called into Choice I had my information that I read and when I read it from the paper I did tell you where to go and find it, right?"

Now, the Bank of Nevis Ltd. sent me a letter recently and on that letter I see, "You may contact Ms. Lorna Hunkins, Operations Manager", they gave the telephone number, the extension if you have any request, Lorna Hunkins ... My daughter went to work at the Bank of Nevis in 2000 and ... 2006? When she was, ...after her first year in 6<sup>th</sup> Form College she applied to Rawlinson Isaac, who was the General Manager then or the Managing Director. He asked her to go into the Bank. She spoke to Spencer Hanley and they attached her to Lorna Hunkins. Lorna Hunkins had her file asked her to bring her passport which she brought to her. She told her that she had to apply for a social security card for her and she had to set up a bank account for her. That was done. My daughter got it, through, the Social Security Card through the Bank of Nevis. The people at the Social Security could check their record. The Bank of Nevis could check their record and the account was set up for her salary to be lodged to that account any other payments that came into the Bank for my daughter went into that account which was set up by Lorna Hunkins.

Now, I have again, I have here foxyloxy went on the internet and am gonna give you the name of the article. It's from Foxyloxy to Nevis, 'We Sacrifice', 2009 7 -04 2009 and in that Foxyloxy made a statement am gonna tell you, I am gonna tell you why I know she referred to my daughter.

My daughter received a press release from de St. Kitts stating that she was the 2007 State Scholar. "Kendra M. Liburd, Charlestown Secondary 6<sup>th</sup> Form, 7 Grade -1" right, Kendra is therefore the 2007 State Scholar for 2007. Am reading, am reading it from the paper she received from St. Kitts. Lorna ...



On 4<sup>th</sup> July Foxyloxy wrote, "Our 2007 State Scholar was born in the U.S., but she is studying on a scholarship from our Government. I am not belittling her effort, she did well and she should be rewarded. But what we are now faced with is that she cannot return to the Federation and run for elective politics, because of the ...yet we have trained her."

Now you gonna tell me, if Lorna work in the Bank of Nevis as a senior officer, writing people letters, asking them for their personal information and Lorna took my daughter's information. You think Lorna got any right to go on the internet with her personal information that she put in the Bank, right. Somebody responded to the letter Lorna on the internet and say, 'How do you know Government is paying the tuition for the 2007 State Scholar tertiary education and did the 2007 State Scholar told you she had an interest in public office in Nevis? Also why do you choose to use the 2007 State Scholar as your example? All of this I have printed from the internet, right.

In 2009 July 15, my letter to Mr. Everette martin, General Manager of the Bank of Nevis, 'Possible Breach of client confidential information by the Bank of Nevis' and I stated on July 5<sup>th</sup> Ms. Lorna V. Hunkins, Operatons Manager of the Bank of Nevis wrote the following under the name Foxyloxy on the popular political forum known as sknyahoogroup.com. I stated what she wrote, 'Mrs. Hunkins raised a number of issues relating to the possible breach of confidential information for my daughter and I who are both customers of the Bank. It is well known fact that my daughter is the 2007 State Scholar for St. Kitts and Nevis. Mrs. Hunkins statement which was published for an audience of over 10,000 subscribers be interpreted to mean that Ms. Hunkins knows that our Government, ostensibly the NIA is paying the tuition for my daughter. That Mrs. Hunkins knows that my daughter was born in the USA and that Mrs. Hunkins knows that my daughter again ostensibly because she was born in the US cannot return to the Federation to run for Federal politics.

Now you gonna tell me, did I tell lie on Lorna? What Lorna say she contacting anybody for? And you know what, she gonna come back here and she gonna present herself because she need to have this straightened out. This is breach of client confidentiality ... If anybody gets any letter from Lorna and whoever she put to write them I have all my information here and whoever want a copy to deal with Lorna and who she put to write them because you know what? The 2007 State Scholar and her mother will deal with her situation and Lorna and I gone say it again: The Bank of Nevis needs to watch what their employees are doing like Lorna Hunkins who writing under Foxyloxy is putting on the internet. She's taking information out of the Bank of Nevis. She took my daughter's information out of the Bank of Nevis and she put it on the internet. My daughter gave her passport. She set up the account with her. She went

on the internet and she put it there after she see some transaction going into my daughter's account..."

[10] As a consequence, Ms. Hunkins sued Ms. Liburd and Choice FM Limited.

#### **Issues before the High Court**

[11] The following issues arose for determination in the High Court:

- (a) Whether Ms. Hunkins can succeed on a claim of slander without proof of slander; and
- (b) If the court were to find that the claim for slander is maintainable, whether Ms. Liburd can rely on the defences of fair comment or justification.

#### **Defendant's case in the High Court**

[12] In the High Court, Ms. Liburd did not deny that she had spoken the alleged offending words and Choice FM Limited did not defend the claim.

[13] Ms. Liburd took the position that Ms. Hunkins had neither pleaded nor proven special damages and that section 10 of the **Libel and Slander Act** prevents Ms. Hunkins from maintaining her claim for slander. Alternatively, she argued that the defences of fair comment and justification were available to her.

#### **Claimant's case in the High Court**

[14] For her part, Ms. Hunkins argued that section 10 of the **Libel and Slander Act** did not amend nor replace the common law rules on slander. She further argued that the learned acting judge was entitled to award her damages for slander even though she did not plead nor prove special damages. Also, she said that Ms. Liburd could not rely on the defences of fair comment and justification.

#### **Judgment in the court below**

[15] The learned judge, in a careful and closely reasoned comprehensive judgment,

analysed the relevant legal principles and assessed the evidence that was adduced. He faithfully applied the legal principles to the evidence that was led and came to his conclusions. It is appropriate to quote extensively the relevant paragraphs of the judgment below for reasons which are obvious.

[16] At paragraphs 24-27 of the judgment the learned judge stated:

[24] This Act only provides for certain matters relating to the law of libel and slander. It does not treat with any of the known defences to civil defamation. Nowhere is it mentioned in the Act that the defence of justification is allowed or that fair comment is also available. Notwithstanding, these are obviously still available to any defendant to a claim for defamation.

[25] There is a presumption of law that an Act of Parliament is to be construed in 'conformity with the common law rather than against it, except where and so far as the statute plainly intended the course of the common law. As has been accepted:

'It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion'.

[26] I have examined the literal words of this Act. I note that nowhere in the Act does it express itself to be a comprehensive code to govern the law of libel and slander. It is also obvious to this court that section 10 only speaks to one matter, which is the slander of women, and then too, only in relation to words imputing unchastity or adulterous conduct. Nowhere expressed in this section is there any statement that all other forms of slander against any person (male or female) require proof of special damages. One train of logic could lead to the conclusion that if [Ms. Liburd] is right, it would have the effect to allow only men to maintain common law actions for slander without proof of special damages in the categories of the common law i.e. where the statements allege a crime, or a contagious disease; this would be a ridiculous and absurd result.

[27] I do not consider that this Act has replaced the common law rules relating to the law of slander. I can find no intention either in section 10 or the Act as a whole, which points me to that conclusion."

[17] The learned judge then expressed in the succeeding paragraph of the judgment

thus:

"In the circumstances, a proper construction of the **Libel and Slander Act** requires me to find that the common law rules relating to defamation are alive and well in St. Kitts and Nevis with the only qualification that they must now be read subject to the Act. That being the case, I will dismiss the preliminary objection raised by [Ms. Liburd]."

[18] Further, the learned judge said that in their ordinary and natural meaning, the words used by Ms. Liburd are clearly defamatory. Ms. Liburd herself complained to the bank that Ms. Hunkins had breached the bank's confidentiality. There is no ambiguity there. She was making statements to the effect that Ms. Hunkins had committed an act of misconduct on her job. She had asked for an investigation. That not having satisfied her, she was continuing to express her obvious and sincere belief. She was making herself very clear. In the circumstances of this case, I do not believe that anyone listening to these publications could have any doubts as to what she was saying. She was saying that Ms. Hunkins is an unfit person for the job she holds and that she was very expressly saying that Ms. Hunkins was dishonest. The judge stated that these statements fall within the common law exception that allows a claim for slander to be brought and maintained without any proof of special damages. The only question for the judge was whether Ms. Liburd could rely on the defences of justification or fair comment.

[19] The learned judge said at paragraph 38 of the judgment that:

"I believe [Ms. Hunkins] when she states that she became aware of [Ms. Liburd's] daughter's place of birth because of the close relationship between the families. I find support for this finding also, from the evidence of [Ms. Hunkins'] aunt, Clara Bridget Hunkins ('Bridget'), when she spoke of the relationship generally. She said that [Ms. Liburd] was 'like a sister to us'. She stated that she knew [Ms. Liburd's] daughter since 1989 and her daughter called her 'Aunty Bridget'. She knew that [Ms. Liburd's] daughter was born in the United States of America, and she states that a lot of personal things were discussed at family gatherings. She also recalls an incident in 1996 when she was traveling to the USA and [Ms. Liburd] asked her to 'take care' of her daughter who was traveling on the same flight to Detroit for onwards journey to Canada. Bridget also describes another Anguilla trip when [Ms. Liburd's] daughter was part of a girls' guide group traveling and [Ms. Hunkins], whose own daughter was going on same trip, was present at the airport and assisting [Ms. Liburd's]

daughter - that's how close the families were."

[20] The learned judge stated at paragraphs 39 and 40 of the judgment:

"[39] I am satisfied that [Ms. Hunkins] did not breach the bank's confidentiality with regards to Ms. Liburd's daughter held at the bank. In the circumstances, I am unable to find that Ms. Liburd was justified in making any of these statements about [Ms. Hunkins].

[40] In the circumstances, I find that [Ms. Liburd] did in fact commit slander against [Ms. Hunkins]. This finding would mean logically that [Choice FM Limited] is also liable for the slander published."

[21] At paragraph 44 of the judgment the learned judge stated the following:

"[Ms. Hunkins] in closing arguments has asked me to consider the circumstances of [Ms. Liburd's] conduct in treating with this issue of malice. I have been asked to look at the fact that in 2009 [Ms. Liburd], first made the allegation that [Ms. Hunkins] had breached her daughter's confidentiality, and that this was investigated by the Bank... Having regard to the discussion in the blog, this was an unnecessary personal attack on [Ms. Hunkins], and was tangential to the topic being discussed. These types of unnecessary personal attacks in the public domain occur too frequently, and it is time that sensible people have some care in the things they say. I agree that [Ms. Hunkins'] statement about [Ms. Liburd's] daughter was relevant to the political discussions about persons born overseas, and that [Ms. Hunkins] was not offering any gratuitous comment about [Ms. Liburd's] daughter for any other reason. I also note that [Ms. Hunkins] had her solicitors write to [Ms. Liburd] but instead of either seeking to proffer a response or apologize, [Ms. Liburd] actually returned to the public domain and spoke very disparagingly about this letter. I also note that [Ms. Liburd] never made any mention in any of the publications that the Bank had done an investigation and that they were saying that [Ms. Hunkins] had not, in their view, breached any confidentiality. I consider it relevant that [Ms. Liburd] continued doing business with the Bank and that she has referred clients to the Bank. This clearly points me to a finding that she was not really concerned about the breach of the bank's confidentiality but more interested in making these highly charged defamatory statements in the public domain. I note in the trial that [Ms. Liburd] really attempted to down play the nature of the close relationship that had existed between the parties. Bridget's evidence was credible and instructive on my findings in this regard. I also note that during this trial, it was made clear that [Ms. Liburd], even after this claim was filed made further publications, referring to the matter and to [Ms. Hunkins]. I have noted that this is a very serious allegation against a career banker, accusing her of dishonesty. I have also noted that these

publications have been aired both locally, regionally and were disseminated on the 'world wide web'.

[22] Also, the learned judge said at paragraph 45 of the judgment as follows:

"All of the circumstances outlined above indicate that [Ms. Liburd] acted with malice in this matter. This to my mind justifies aggravated damages. The facts as I have found them, also leads me to the irresistible inference that [Ms. Liburd] may likely continue to make these statements unless she is restrained."

[23] In entering judgment in favour of Ms. Hunkins, the learned judge at paragraph 50 of the judgment stated:

"I have taken into account all the circumstances of this case and I have noted the position and status of [Ms. Hunkins] in this case. On the publications themselves I considered that the sum of \$25,000.00 would be a fitting and proper award. I have in addition, considered that for the aggravating features in this case I will grant the sum of \$5,000.00 making a total sum of \$30,000.00 as compensation to be paid to [Ms. Hunkins]..."

#### **Appellant's Submissions on Appeal**

[24] Learned counsel, Mrs. Emily Prentice-Blackett, asked the Court to set aside the judgment due to the alleged errors that were made by the learned judge. Firstly, she said that in so far as Ms. Hunkins' claim was in slander in relation to her profession the **Libel and Slander Act** applied. Mrs. Prentice-Blackett complained that the learned judge erred in holding that Ms. Hunkins had established her claim, even though she had neither pleaded nor proved that she had suffered special damages. Mrs. Prentice-Blackett stated that, in Saint Christopher and Nevis, the only types of slander that are actionable without proof of special damages are those where the words impute unchastity or adultery to a woman or girl. She said that these were not the circumstances in the case at bar. Mrs. Prentice-Blackett conceded that the **Libel and Slander Act** was silent on the other common law actions of slander. However, she argued that the **Libel and Slander Act** had overtaken the common law exceptions to slander which do not require special proof of damages.

[25] Mrs. Prentice-Blackett argued that Ms. Hunkins had a duty to prove special

damages in order to succeed on her claim. Having failed to prove special damages Ms. Hunkins was bound by the laws of the Federation of Saint Christopher and Nevis and should not have succeeded in her claim.

### **Fair Comment**

- [26] Mrs. Prentice-Blackett said that it is clear that Ms. Liburd called into the radio station to address a matter which she felt strongly about. Her daughter, a State scholar of the Federation of Saint Christopher and Nevis, had been given an interim job at a local bank, the Bank of Nevis (the “bank”), in Charlestown, Nevis. Ms. Liburd’s daughter was a citizen of the Federation of Saint Christopher and Nevis but born in the United States of America and therefore had that fact stated in her Federation of Saint Christopher and Nevis passport. Ms. Hunkins was the operations manager of the bank and the supervisor under whom her daughter worked as an employee of the bank. Ms. Hunkins would have received her daughter’s passport when she became an employee in order for Ms. Hunkins to run due diligence checks for Ms. Liburd’s daughter’s employment.
- [27] Mrs. Prentice-Blackett emphasised that Ms. Hunkins as operations manager was also aware of the deposit made into Ms. Liburd’s daughter’s account a week before Ms. Hunkins wrote the statements above on skn@yahooogroups.com. She said that Ms. Liburd therefore made her comments on facts that are justified, on a balance of probabilities, and can avail herself of the defence of fair comment. Mrs. Prentice-Blackett said that the learned judge was therefore “blatantly wrong in law” to find that the defence of fair comment could not apply in this case because Ms. Liburd had made statements of fact rather than comments.
- [28] Mrs. Prentice-Blackett said that it is also clear from the evidence that Ms. Liburd stated facts which she honestly believed and are capable of the protection of fair comment. She said that Ms. Liburd made comments that may have been emotional but they were comments on the said justifiable facts. On these bases, she said that the judge ought to have found that the defence of fair comment was

made out.

### **Justification**

[29] Alternatively, Mrs. Prentice-Blackett said that even if this Court is of the view that Ms. Hunkins has made out her claim in slander, Ms. Hunkins' claim should in any case be dismissed on the ground that Ms. Liburd's statements, of which Ms. Hunkins complains, are justified. She reminded this Court that justification is a complete defence to an action for defamation and it is sufficient for a defendant to prove that the defamatory statement is substantially true. In this regard, she indicated that Ms. Liburd, on a plea of justification, is not required to plead that the comments complained of are completely true in every respect. Mrs. Prentice-Blackett relied on **Convery v The Irish News Limited**<sup>2</sup> in which Girvan LJ said as follows:

“Justification is a defence to any imputation contained in the words complained of whether of comment or of fact. It is for the publisher of the words to prove that the statements of fact are true and that the statements of opinion are correct. It is the imputation contained in the words which has to be justified, not the literal truth of the words. An appellant may succeed in a plea of justification even though what he has said may be inaccurate in a number of respects. As much must be justified as meets the sting of the charge and anything contained in a charge which does not add to the sting need not be justified.”

[30] Mrs. Prentice-Blackett said that once the plea of justification is raised, it is not necessary to show that there was a public interest in publication, and it does not matter whether Ms. Liburd acted maliciously or not, what is required is that the defence is proven on a balance of probabilities. Mrs. Prentice-Blackett said in the premises since Ms. Liburd honestly believed that her daughter's confidentiality was breached by Ms. Hunkins when she called into the radio station and made the comments now complained of, she ought to have been able to rely on the defence of justification. In the circumstances, therefore, Mrs. Prentice-Blackett submitted that Ms. Liburd had proven the defence of justification, on a balance of probabilities, and that Ms. Hunkins' claim should have been dismissed with costs.

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<sup>2</sup> [2008] NICA 14 at para.51.



### **Aggravated Damages**

[31] Turning next to the judge's award of aggravated damages, Mrs. Prentice-Blackett said if the judge had attached the proper weight to be given to the defences of justification and fair comment, and the facts surrounding the defences, he would have found that there was no malice on the part of Ms. Liburd, and in fact that there was no malice proven. She therefore said that the judge erred in awarding aggravated damages to Ms. Hunkins.

[32] Learned counsel, Mrs. Blackett-Prentice, urged this Court to allow Ms. Liburd's appeal and set aside the judgment in its entirety and award Ms. Liburd costs.

### **Respondent's Submissions on Appeal**

[33] Learned counsel, Mr. Brian Barnes, urged this Court to uphold the decision of the judge. He said that the judge's decision was correct and well-reasoned. In a word, he stated that the judge properly analysed the relevant statute and determined that slander in relation to one's profession still exists as a common law exception which does not require the proof of damages. He maintained that the judge was right to hold that section 10 of the **Libel and Slander Act** did not abolish the common law exception.

[34] Also, Mr. Barnes stated that the judgment was clear and comprehensive and given the findings of the learned judge, he was correct in concluding that Ms. Liburd could not rely on the defences of fair comment and justification.

[35] Quite interestingly, even though Ms. Hunkins did not cross appeal against the judge's decision, Mr. Barnes in his oral arguments complained that the learned judge should have made a more generous award of damages to Ms. Hunkins. He highlighted facts that were found by the judge and said that they underscored Ms. Liburd's malice towards Ms. Hunkins and maintained that a larger sum as aggravated damages ought to have been awarded. He sought to suggest that this Court should increase the damages that the judge awarded.

[36] Finally, Mr. Barnes urged this Court to dismiss Ms. Liburd's appeal on the basis that it is unmeritorious. He also suggested that the learned judge was very generous to Ms. Liburd who should have been ordered to pay more substantial damages for the disparaging statements that she made about Ms. Hunkins in relation to the latter's profession.

## **Discussion**

### **Issues No. 1 and No. 2**

#### **Whether the claim for slander was actionable even though special damages were not pleaded nor proven and whether section 10 of the Libel and Slander Act replaces the common law in its entirety**

[37] For the sake of convenience, I will address the first and second issues together since they are inextricably linked.

[38] This case underscores the convention that appellate courts should not be in the business of creating work and where the judge has reasoned well and come to a correct conclusion, the appellate court should say so. I therefore have no hesitation in recognising and accepting that the learned judge correctly applied the relevant principles in his determination that the Parliament of Saint Christopher and Nevis did not abrogate the common law exceptions which enable slander in relation to one's profession to be actionable without proof of special damages. Should there be the need for any authority to support this position, in addition to the authority on which the learned judge relied, it can be found in the principles of the well-known case of **Henry Boot Construction (UK) v Malmaison Hotel (Manchester) Ltd**,<sup>3</sup> which does not need to be recited.

[39] It is settled law that there are two types of defamatory statements namely: libel and slander. Libel is a defamatory statement in a permanent form. Most usually consisting of written words in a newspaper, book or pamphlet. Slander on the other hand is a defamatory statement in a transient form. The law in relation to

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<sup>3</sup> [2001] 1 QB 388.

slander and libel protects a person's general reputation. The main distinction between the two is that libel is actionable without any proof of special damages since the law presumes that damage had been caused to the claimant's reputation and he will be awarded general damages in any event. For the publication of a slander to be actionable, on the other hand, some special damages must be proved to flow from it, unless it falls within the specified exceptions. Any other imputation which may tend to lower the claimant in the estimation of right-thinking members of society generally or to expose him or her to hatred, contempt or ridicule is defamatory of him or her.

[40] As a general rule, in slander, the claimant has no cause of action, unless he can show he has suffered actual damage. However, there are exceptions to the general rule that, at common law, where slander is actionable without proof of damage. These are where there is an:

- (a) imputation of a crime;
- (b) imputation of certain diseases;
- (c) imputation of unchastity or adultery; or
- (d) imputation affecting professional or business reputation.

[41] Acknowledging that it is settled law that the common law recognises four categories of slander that are actionable without proof of special damages, one of these is slander by way of one's profession. It therefore falls now for this Court to consider whether there is any merit in Ms. Liburd's argument that the Saint Christopher and Nevis Parliament has, through the enactment of section 10 of the **Libel and Slander Act**, circumscribed the categories of slander that are actionable without proof of special damages. In so doing, it has to be ascertained whether Ms. Liburd is correct in asserting that slander in relation to one's profession is not actionable per se and that the learned judge erred in so holding.

[42] I have reviewed the very comprehensive judgment and it is clear that the learned judge devoted a considerable amount of time to the relevant principles of statutory

interpretation, as he should. The main issue which he had to grapple with was whether section 10 of the **Libel and Slander Act** altered the common law exceptions so as to require proof of special damages in order for a claimant to succeed on a claim for slander in relation to one's profession.

[43] The exceptions to slander which are actionable without proof of damage are deep rooted in the common law, and if they are to be overturned or restricted, this must be done by clear, definite and positive enactment. Section 10 of the **Libel and Slander Act** does not in any way address slander in one's profession nor the imputation of crime. I am in total agreement with the learned judge that section 10 of the **Libel and Slander Act** does not alter the common law exception of slander in relation to one's profession. It simply does not address it. If Parliament had intended to do away with the other exceptions to slander that are actionable without proof of damage, it ought to have done so by clear words. It is settled law, that in the absence of any clear indication to the contrary, Parliament is presumed not to have altered the common law. Accordingly, I agree with the learned judge's pronouncements in this regard.

[44] In addition, there is a presumption that Parliament does not intend an implied repeal or an implied revocation of the common law.<sup>4</sup> This principle was given judicial recognition in **Henry Boot Construction (UK) v Malmaison Hotel (Manchester) Ltd** where the court stated that 'first the courts presume that Parliament does not intend an implied repeal'.<sup>5</sup>

[45] As indicated earlier, in the appeal at bar, the common law exceptions to slander which require no proof of special damages include slander in relation to one's profession. The learned judge quite correctly found that the words used by Ms. Liburd slandered Ms. Hunkins in relation to her profession. The crux of the appeal lies in this Court's determination of whether the learned judge erred in holding that

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<sup>4</sup> Bennion *Statutory Interpretation*, 3<sup>rd</sup> Edn., (1997) p.225.

<sup>5</sup> *Supra*, n.3 at p. 405.

section 10 of the **Libel and Slander Act** did not have the effect of abolishing the other common law exceptions that are not stated in section 10.

[46] The learned judge quite rightly held that there is a presumption that an Act of Parliament conforms with the common law. This presumption was judicially recognised in **R v Morris**.<sup>6</sup> In that case, Byles J stated that:

“It must be remembered that it is a sound rule to construe a statute in conformity with the common law, rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law. An additional reason in this case for following the common law is the mischief which would result from a different construction.”

[47] Applying the above principles, I am not persuaded by learned counsel Mrs. Prentice-Blackett’s argument that section 10 of the **Libel and Slander Act** only allows claims for slander in relation to statements imputing unchastity or adultery to be actionable without proof of special damages. There is no discernible error of law by the judge. To the contrary, the learned judge quite properly examined the wording of the statute in its entirety and recognised that it was not a comprehensive statutory framework that addressed defamation. More significantly, the learned judge was correct to acknowledge the well-established principle of construction that a statute is not to be taken as affecting a fundamental alteration in the general law unless it used words which point unmistakably to that conclusion. If any authority for this proposition is required, it can be found in **National Assistance Board v Wilkinson**<sup>7</sup> in the judgment of Delvin J.

[48] For the sake of completeness, there is no doubt that the learned judge was correct to hold that the **Libel and Slander Act** is not an Act that seeks to restrict or limit the categories of slander that are actionable without proof of damage. Critically, that section 10 of the **Libel and Slander Act** did not purport to do so. It is evident based on what I have foreshadowed that I am of the clear view that the other types of common law slander which are actionable without proof of damage are alive

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<sup>6</sup> (1867) LR1 CCR90 at p. 95.

<sup>7</sup> (1952) 2 QB 648. I will refrain from repeating the relevant pronouncements so as to avoid the lengthening of this judgment.

and well in Saint Christopher and Nevis. Accordingly, the learned judge's decision on that issue cannot be impugned. Ms. Liburd's appeal in relation to the first and second issues therefore fails.

#### **Fair Comment and Justification**

- [49] In my view, the issues in this appeal relating to fair comment and justification are underpinned by findings that were made by the learned judge. The learned judge concluded among other things that the ordinary person listening to the statements that were made by Ms. Liburd would conclude that Ms. Hunkins, in her capacity as an employee of the bank, obtained personal and confidential information about Ms. Liburd's daughter and dishonestly used the information to make a statement about Ms. Liburd's daughter. The judge also found that the second publication was clear and only capable of meaning that Ms. Hunkins had breached the confidentiality of the bank. All of this must be juxtaposed against important findings of the judge that Ms. Hunkins did not obtain the information from the bank's records but rather that she had that information due to the close relationship that the two families previously held over several years. In addition, the information was otherwise available to the public.
- [50] By way of emphasis, the appeal at bar brings into sharp focus the applicability of several aspects of the law as it relates to slander vis a vis the defences of fair comment and justification. As a general rule, where a slanderous statement is made, the claimant does not have to prove that it is false for the law presumes this in his favour. However, if the defendant can prove its truth, he will defeat the claimant's claim. This is so whether or not the defendant knew that the words were true when he published them.
- [51] The learned judge comprehensively dealt with the issue of slander, the defences of justification and fair comment. He also made specific findings of fact. As stated earlier, viewed in light of the facts that he found, the judge correctly held, in my view, that the words that Ms. Liburd used about Ms. Hunkins were disparaging of

her in her profession and therefore slanderous.

[52] It is noteworthy that the learned acting Justice Ramdhani made several important findings of fact which have not been challenged in this appeal by Ms. Liburd. These findings undergird the judge's analysis and conclusion that the defences of justification and fair comment cannot avail Ms. Liburd. In the face of compelling findings of fact by the judge that Ms. Hunkins did not obtain the information about Ms. Liburd's daughter from the bank's record, Ms. Liburd had an uphill if not impossible task in prevailing based on the defences that she relied upon. Also, the judge found that the statements that Ms. Liburd used were not merely comments but statements of fact. Let me say straight away that the judge's findings that Ms. Hunkins did not obtain the information about Ms. Liburd's daughter during the former's employment at the bank is sufficient to dispose of the other issues of justification and/or fair comment. However, in light of the submissions made by learned counsel, it is appropriate to give some consideration to the arguments in relation to the judge's treatment of the defences.

[53] It is significant that the judge made important findings of fact at paragraphs 35-40 of the judgment. The essential reasoning of the judge is to be found at paragraphs 38 and 39. I will refrain from reproducing in full, but it suffices to state that the judge found as a fact that Ms. Hunkins did not breach the bank's confidentiality with regards to Ms. Liburd's daughter's information held by the bank. This finding was arrived at after the careful and balanced assessment of the evidence that was presented at trial.

[54] In this appeal, the task now is to ascertain whether there is any merit in Ms. Hunkins' complaint that the learned judge erred in rejecting the defences of justification and fair comment in view of the clear and concise findings that he made. To put it another way, the relevant question in the present appeal is whether there is any scope for these defences to be relied upon and whether the judge was wrong to reject them.

[55] There is no need for extensive reference to the reported authorities relating to the defence of justification or fair comment. The essence of the principles of fair comment and justification is sufficiently stated in the well-known case of **Reynolds v Times Newspaper**.<sup>8</sup>

[56] Nevertheless, I will briefly examine the defence of fair comment, in view of the totality of circumstances. In relation to the defence of fair comment, the defendant must prove that the facts on which the comment is founded are true and that the comments on these facts are fair. In contrast, in relation to the defence of justification, the defendant is required to prove the truth of every defamatory fact or statement made or that it is substantially true.

[57] In relation to fair comment, the learned authors of **Gatley on Libel and Slander** state that:

“It is a defence to an action of libel or slander that the words complained of are fair comment on a matter of public interest.” ..... There are matters on which the public has a legitimate interest or with which it is legitimately concerned and on such matters it is desirable that all should be able freely, and even harshly, so long as they do so honestly and without ‘malice’

...

To succeed in the defence the defendant must show that the words are a comment and not a statement of fact. However, an inference of fact from other facts referred to may amount to a comment. He must also show that there is a basis for the comment, contained or referred to in the matter complained of, at least to the extent of indicating that what is being stated is comment. Finally, he must show that the comment is on a matter of public interest, one which has been expressly or implicitly put before the public for judgment or is otherwise a matter with which the public has a legitimate concern”<sup>9</sup>

[58] It is clear that in order for a defendant to be able to rely on that defence, the matter commented on must be one of public interest. Though no exhaustive list of matters have been judicially recognised as falling within the category of public

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<sup>8</sup> [2001] 2 AC 127.

<sup>9</sup> *Gatley on Libel and Slander*, 10<sup>th</sup> Edn., paras. 12.1-12.2.



interest, it includes: the offences of government both national and local; the management of affairs of public conduct of those who hold or seek public office or positions of public trust; the conduct of private businesses which affect the community at large; and church matters.

[59] The matters which are at the heart of this appeal can properly be considered as matters which fall into one or two of the categories above in relation to Ms. Hunkins' profession. In order to be able to rely on the defence of fair comment, it is imperative that the statements must be a comment or opinion and not statements of fact. Authority for this principle is the well-known case of **British Guiana Rice Marketing Board v Peter Taylor and Co. Ltd**<sup>10</sup> in which the following was stated:

"In *Hunt v Star Newspaper Co Ltd* ([1908-10] All ER Rep 513, [1908] 2 KB 309, 77 LJKB 732, 98 LT 629, 24 TLR 452, 52 Sol Jo 376, CA, 32 Digest (Repl) 165, 1803), Fletcher Moulton LJ, made this classic statement on the law of fair comment ([1908] All ERRep 513, at p 513):

'Comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment. The justice of this rule is obvious. If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice it might do will be to some extent negated by the reader seeing the grounds upon which the unfavourable comment is based. But if the fact and comment be intermingled so that it is not reasonably clear what portion purports to be reference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses. Any matter, therefore, which does not indicate with reasonable clearness that it purports to be comment and not statement of fact cannot be protected by the plea of fair comment.'

Thus to enable alleged defamatory matter to be treated as comment and not as an allegation of fact the facts on which it is based must be stated or indicated with sufficient clarity to make it clear that it is comment on those

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<sup>10</sup> (1967) 11 WIR 208 at p.214.

facts. There must be a sufficient substratum of fact stated or indicated in the words which are the subject matter of the action.”

[60] Of similar effect is the pronouncement of Barrow JA in **Vaughn Lewis v Kenny Anthony**.<sup>11</sup> He stated that ‘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’.

[61] Since the learned judge found that the statements that Ms. Liburd used were statements of fact, then the defence of fair comment cannot be relied upon. It is significant to note that the comment or opinion is not protected if it is based upon untruths and seek to take refuge in the defence. The learned judge quite properly held that the statements that Ms. Liburd made were statements of fact and therefore she could not have relied on the defence of fair comment. It is settled law that the defence of fair comment does not cover misstatements of fact. If the words complained of contain allegations of fact, then the defendant must prove that those allegations of facts are to be true; it is insufficient for the defendant to merely plead that he honestly believed them to be true. If the facts upon which the comment purports to be made do not exist, the defence of fair comment must fail.

[62] Applying those principles to the case at bar, it therefore follows that to misrepresent the conduct of Ms. Hunkins and then to hold her up to execration for alleged wrongdoing, the defence of fair comment will not avail Ms. Liburd. Accordingly, I am not at all persuaded that the judge’s reasoning and conclusion were in any way objectionable. In my view, the judge was correct in the conclusion to which he reached when he stated that Ms. Liburd did not make statements of opinions but rather facts and therefore could not avail herself of the defence of fair comment. It is apparent that the judge was right to do so in view of his essential reasoning with which I am in full agreement based on all that I have stated above.

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<sup>11</sup> SLUHCVP2006/0002 (delivered 14<sup>th</sup> May 2007, unreported) at para.31.

[63] Turning now specifically to the defence of justification, I can state without hesitation the judge was right to reject for reasons which I will provide shortly.

[64] In a nutshell, it is clear that learned counsel Mrs. Prentice-Blackett's primary submission was that Ms. Liburd honestly believed the disparaging statements that she had made about Ms. Hunkins and therefore the judge erred in refusing to allow her to rely on defence. I am not aware of any authority for the proposition advanced by Mrs. Prentice-Blackett, namely, that if Ms. Liburd honestly believed in the truth of the disparaging statements that she made about Ms. Hunkins, that her honest belief was sufficient to accord her a defence in justification. This simply does not represent the common law defence of justification.

[65] I do not propose to recite the judge's findings of fact that were reproduced at paragraphs 35-40 of the judgment and which were recited earlier in this judgment, so as not to lengthen this judgment. It is sufficient to state however that against those findings, it seems to me that the force of criticism of the judge's treatment of the defence of justification is substantially reduced, if not rendered baseless. I am unconvinced that the learned judge committed any errors of which Ms. Liburd complains. In fact, to the contrary, Ms. Liburd has failed to even come close to the threshold to establish the defence of justification. Mrs. Prentice-Blackett did not neutralise or disarm the judge's findings of fact. In any event, Ms. Liburd not having appealed against those findings, it was impossible to assail the judge's ultimate conclusion that the defence of justification could not be relied upon.

[66] For the sake of completeness, it must be stated that at the heart of the defence of justification is the assertion that the words complained of were true in substance. It is an appropriate reminder that a defendant should not plead justification unless he has good reason to believe that it will succeed, for failure to establish the defence will usually inflate any damages awarded against him, the court treating it

as an aggravation of the original injury.<sup>12</sup> Judicial recognition of this principle is found in **Elwardo G. Lynch v Ralph Gonsalves**<sup>13</sup> and **David Carol Bristol v Dr. Richardson St. Rose**<sup>14</sup> where this Court acknowledged that aggravated damages could be awarded where a defendant relied on a hopeless defence of justification. However, in so far as Ms. Hunkins has not cross appealed, I will refrain from making any further comment on whether aggravated damages ought to have been awarded on this basis.

[67] It is apparent from everything that I have stated that in any event, Ms. Liburd's appeal in relation to the defence of justification also fails.

#### **Aggravated Damages**

[68] Turning now to Ms. Liburd's appeal against the judge's award of aggravated damages I have no hesitation in rejecting the submission of learned counsel, Mrs. Prentice-Blackett, that the learned judge erred in his determination that Ms. Hunkins was entitled to aggravated damages since he found as a fact that Ms. Liburd was actuated by malice. At the very least by the time of the second publication, Ms. Liburd could have conducted herself differently and refrain from any such further publication. On the evidence presented to the court, it was clearly open to the judge to have found that she was actuated by malice.

[69] Applying well known principles which need not be stated here, there is no basis upon which this Court could interfere with the learned judge's findings of malice.

[70] Perhaps most cogently in relation to the issue of aggravated damages, the learned judge did find as a fact that Ms. Liburd was actuated by malice and he awarded \$5,000.00 in damages. In any event, there is another basis upon which the learned judge could have awarded aggravated damages, that is on the basis of the defence of justification that was relied on by Ms. Liburd, and to which I have

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<sup>12</sup> See: *Associated Leisure v Associated Newspapers* [1970] 2 All ER 754, per Denning LJ.

<sup>13</sup> SVGHCVP2005/0018 (delivered 18<sup>th</sup> September 2006, unreported) at para.47.

<sup>14</sup> SLUHCVP2005/0016 (delivered 20<sup>th</sup> February 2006, unreported) at para.38.

already alluded.

- [71] Given the totality of circumstances, I remain of the clear view that there are no grounds for overturning the learned judge's award of aggravated damages.

### **Conclusion**

- [72] In conclusion and for the reasons which owe much to the comprehensive and balanced judgment of the learned judge, I would dismiss this appeal with costs to Ms. Hunkins which is two thirds of the prescribed costs in the court below.

### **Disposition**

- [73] In view of the above reasons, I would make the following orders:
- (a) Ms. Liburd's appeal against the judgment of the learned acting Justice Ramdhani is dismissed in its entirety and the decision is affirmed; and
  - (b) Ms. Liburd shall pay Ms. Hunkins two thirds of the prescribed costs in the court below.
- [74] I gratefully acknowledge the assistance of all learned counsel.

I concur.  
**Dame Janice M. Pereira, DBE**  
Chief Justice

I concur.  
**Paul Webster**  
Justice of Appeal [Ag.]



**By the Court**

  
**Chief Registrar**