

Commonwealth of The Bahamas

In the Supreme Court

CLE/gen/1701 of 2010

NAUTRELL KEMP

Plaintiff

And

COMMISSIONER OF POLICE

1st Defendant

And

LEON BETHEL

O/C Central Detective Unit

Royal Bahamas Police Force

2nd Defendant

Before: Mrs. Camille Darville Gomez, Deputy Registrar

Appearances: Miss Christina Galanos for the Plaintiff
Mrs. Kenrah Francis-Newry for the Defendant

Date of Hearing: August 15, 2016

RULING

1. This is an application by the Plaintiff for an assessment of damages arising from a claim in defamation. The action was commenced by writ and a defence was filed by the Defendants. Judgment was entered by consent with damages to be assessed.
2. The Plaintiff has sought damages for financial and emotional loss and for the severe damage to her character.
3. The court must also decide the effect of the apology on the quantum of damages and in particular, the percentage that ought to be deducted from the award. The Plaintiff submitted that

it ought not to exceed 20% and the Defendants submitted that it ought to be reduced by about 40% to 50%.

4. The facts are relevant for determining the issue of quantum and despite the slight differences between those of the Plaintiff and the Defendants they were immaterial. I recite the Plaintiff's version below.

"1. On 23rd March, 2010 the Plaintiff went to the Central Detective Unit ("CDU") along with one Jamal Woodside and made a complaint of house breaking.

2. Subsequent to the Plaintiff's visit at CDU the Defendants caused a wanted poster of the Plaintiff to be published by way of electronic media and/or by way of posters.

3. On 25th March, 2010, the Defendants caused to be published in The Punch newspaper the following words: COPS are asking for the public's help in finding four wanted suspects... also wanted is Nautrell Kemp, 36 of Millars Heights. Kemp is 5ft 6 in and 150 lbs. They are considered armed and dangerous."

4. The said wanted poster and publication in The Punch newspaper were released to the entire Bahamian public by way of news papers and/or electronic media and/or by way of distribution to various business establishments.

5. In or about March of 2010, the Plaintiff went to the Central Detective Unit along with Gina Morley, Counsel & Attorney-at-law, Marjorie Wallace and Shemon Wallace where they saw and spoke with the Second Defendant in the presence of A.S.P. Fernander and a team of officers about the said publications. Both the Second Defendant and A.S.P. Fernander apologized to the Plaintiff on behalf of the First Defendant for the inconvenience and stress caused by the said publications in the presence of the said Gina Morley, Marjorie Wallace and Shemon Wallace.

6. In or about March of 2010, the Second Defendant released a Minute Paper to all divisional commanders confirming therein that "This poster was released in error and is incorrect. In fact, Miss Kemp is not a suspect, but was one of the complainants in the breaking which was reported to the police on 12th February, 2010 at the Carmichael Police Station."

7. In or about March 2010, Superintendent Stephen Dean of the Royal Bahamas Police Force made the following statement by way of national television:

"She (the Plaintiff) was inadvertently put out there on the news and we want to publicly apologize on behalf of the Commissioner of Police and all the officers here at the RBPF for the inconvenience and the distress that have been caused by the publication. But once again we want to apologize. She was at CDU her and her family they have met with our detectives. They have apologized and something in writing is being forwarded to her now and they have accepted it and we have leave on even terms. It was an honest mistake made by our officers and we wish to rectify that and we wish to publicly say that she is not wanted by us for any outstanding matters."

5. For the reasons hereinafter set out, I have awarded damages of \$30,000. I also award reasonable costs of the action to the Plaintiff, to be taxed, if not agreed.
6. The Plaintiff's evidence contained in her affidavit filed on 28th October, 2014 at paragraphs nine through eleven demonstrate how the said publications have caused injury to her reputation and distress. I set them out below:

"(9) That as a result of the negligence of the 1st and 2nd Defendants and its officers and/or servants I have suffered financially, emotionally and my character has been severely damaged.

- (a) I was refused work at Atlantis Resort due to its management and staff seeing the Wanted Poster and thereafter classing me as a criminal who did "housebreaking". At the material time, the Police never forwarded an apology letter or the Minute Paper to Atlantis, the media or to me to send to Atlantis. With almost 8,000 management and staff, many workers at Atlantis only remembered the Wanted Poster and were not made aware of the negligent mistake of sending it out. As a result, Atlantis refused me and considered that I was a "housebreaker" who would harm its resort (management, staff and guests).*
- (b) There was another situation with my aunt who is a Director at Atlantis. She indicated to me that after the Police apologized on National Television (ZNS), the Punch still had the Wanted Poster in its paper. On that day (a Thursday) management and staff from all over Atlantis were commenting on the Wanted Poster in the Punch to my aunt and other friends about my appearance as a criminal.*
- (c) Almost everywhere I went to seek employment, I faced the ugly question of whether I was involved in a string of "housebreaking". This immediately placed me at a disadvantage and led to me being unemployed up to this very day. I had to struggle with my two daughters by way of self-employment and little help from family and friends. The Wanted Poster really destroyed my life.*
- (d) The Police did not do enough to clarify to the general public the fact that I was not wanted and was a complainant rather than a suspect. Their failure left many persons with the Wanted Poster in their minds, not knowing that it was all a negligent mistake. This affected me financially as no one wanted to hire or do business with me. I was rejected time after time and this made me a discouraged unemployed worker in the Bahamian economy.*
- (e) I faced many phone calls and conversations from family, friends and even strangers who questioned, teased and taunted me concerning the Wanted poster, I became emotionally depressed and my life felt like a dark room full of sadness. I often cried out in pain and on many occasions never wanted to leave my house. On one occasion my eldest daughter came home to me crying that she was teased and taunted by her classmate who knew me and said: "your mother is a thief". This is an experience I, or no one should ever face when they are complainants and innocent in a criminal matter.*

- (f) *As a result of the emotional and financial disaster, my life changed socially. I did not want to go out and be around friends as I often felt like they were scorning me. I felt left out and as though, even strangers, did not want me around. This caused me not to be able to promote my party rental or clothing business. Even my relationship suffered. It was hard and I knew it was all because of the Wanted Poster as my life was always peaceful and persons knew me to be an upstanding citizen.*
- (g) *I was always uncomfortable travelling due to the Wanted Poster which reached the eyes of the US Customs and Embassy. It was embarrassing to travel and be questioned. I had to travel often for my eleven year old youngest daughter who had to regularly attend doctors in the United States after multiple surgeries from the time she was born. Her medical expenses continue to sky rocket and the fact that I have suffered this character assassination has not helped. I had to be strong for my daughter and to keep her alive while facing her many medical problems. This ordeal with the Police caused grief and weakened me.*
- (10) *That I am not seeking a favour but I feel as though the offer made to me by the Defendants was an insult and added further damage to my injuries. The fact that they have delayed in concluding this matter has made matters even worst.*
- (11) *That I am trying my best to survive this ordeal but it remains hard and depressing. I do not feel as though I should have to go to court on a matter that the Police has admitted to. This would only cause further time, expense and stress."*
7. The Defendants have made the following submissions on the evidence:
1. *Any award should take into consideration that there has not been proven that the publication was a direct cause to the Plaintiff's inability to find a job.*
 2. *There is no factual evidence to suggest that the applications for employment with Atlantis Resort, the Royal Bahamas Defence Force and Bahamar did not go beyond the interview process were directly attributable to the publication; and*
 3. *The fact that the Plaintiff has alleged that comments made by Atlantis staff regarding the publication of the notice did not lead to her being rehired is doubtful as being the reason nor sole reason why she was not hired. We contend that the real reason for her not being selected was due to the fact that the Plaintiff had a physical altercation, sometime in 2009, with a former employee at Atlantis and that was more likely the reason why there were "comments" made by Atlantis staff. The Plaintiff was subsequently charged and brought before the Magistrate court twice relative to two separate incidents involving a coworker, while she was employed with Atlantis.*
 4. *It should be noted that the Plaintiff admitted and conceded that reasons for any alleged refusal of employment were never expressed to her by the alleged refusing entity.*
 5. *The Plaintiff's assertion that an incorrect publication that was immediately withdrawn was the purpose of her being questioned by USA customs would have placed more consideration*

on the Plaintiff's public charged and trials before the magistrate's court, than a public publication and withdrawal and apology of the incorrect publication.

8. I accept the Defendant's submissions that despite the Plaintiff's allegation that she was denied work due to the publication it was not supported by the evidence. However, I do not accept the Defendants' submissions that Atlantis most likely did not hire the Plaintiff because of the physical altercation which occurred while she was employed there. Again, that was not proven and to suggest that as the reason would be speculative.
9. Additionally, the Plaintiff referred in her evidence to having suffered financial difficulties due to the publication. However, she did not proffer any evidence of the loss.
10. The objective of a claim in defamation is to compensate the plaintiff for the injury to his reputation. The Defendants cited in their submissions the dicta of Lord Diplock in **McCary v Associated Newspapers Ltd. [1965] 2 K.B 86** in which he said that the injury to reputation would include the following:

"The natural injury to his feelings, the natural grief and distress which he may have felt at having been spoken of in defamatory terms and, if there has been any kind of high handed, oppressive insulting or contumelious behaviour by the defendant which increases the mental pain and suffering caused by the defamation and constitute injury to the plaintiff's pride and self confidence, these are the proper elements to be taken into account"

11. Further, Sir Thomas Bingham MR in **John v MGN Ltd. [1997] QB 586, 607E-F** stated that an award of damages in a defamation action is to compensate the plaintiff for the injury to his reputation and *"such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused."*
12. In view of the apology offered by the Defendants, the dicta of Lord Newberger CJ in **Cairns v Modi [2012] EWCA Civ 182**, page 5 at paragraphs 24 has relevance:

"The process of assessing damages is not quasi-scientific, and there is rarely a single "right" answer. Nevertheless, it is virtually self-evident that in most cases publication to the world at large and that publication on a single occasion is likely to cause less damage than repeated publication and consequent publicity on social media. By the same token, rapid publication of the withdrawal of a defamatory statement, accompanied by an apology, together with an admission of its falsity given as wide publicity as the original libel diminishes its impact more effectively than an apology extracted after endless vacillation while the libel remains in the public domain, unregretted and insidiously achieving greater credibility."

13. The Plaintiff proffered Cairns v Modi: KC v MGN Ltd. [2012] All ER (D) 01(Nov) as helpful in assessing quantum in the instant case. In that case, the newspaper had incorrectly published that the plaintiff had a conviction for raping a young girl. His identity remained anonymous and the judge fixed the starting point of £150,000 which he then reduced by 50% to reflect mitigating factors including the willingness of the defendant to use of the offer of amends procedure. The Defendant appealed the starting point figure and the Court of Appeal reduced it to £100,000 and described that figure as a level which, consistently with the limited publication and the early apology nevertheless adequately reflected the abhorrent nature of the crime falsely alleged against KC and the damage done to, and its impact on him.
14. However, the Plaintiff sought to distinguish Cairns (supra) from the instant case on the basis that the plaintiff's identity remained anonymous whereas in the instant case, the Plaintiff's name, age, address and description were all made available to the public at large and further the said publications were not limited but were extremely wide.
15. I also found the case of Cairns supra distinguishable from the instant case. The Plaintiff in that case was incorrectly charged with a serious offence. In the instant case there was a single publication of the Wanted Poster in "The Punch" and release of the same to various business establishments. The retraction though not published in "The Punch" was made via national television very shortly after the mistake had been brought to the attention of the Second Defendant. While the court accepted that the retraction ought properly to have been published in the same manner as the defamatory statement, that is to say, in The Punch, there was an apology made which would have diminished the impact of the defamatory statement.
16. The Plaintiff also submitted the case of Cruddas v Adams [2013] EWHC 145 (QB) where the defendant was an active blogger and tweeter with several hundred followers. Cruddas, the plaintiff was the founder and Executive Chairman of CMC Markets UK plc which is an online trading company. He was a well known philanthropist who had set himself the goal of donating £100 to charity. The defendant published nine blogs and twelve tweets between 26th March and 3rd July, 2012 alleging that the plaintiff was a criminal, that he was liable to arrest at any time, that he had breached the provisions of the Political Elections and Referendums Act, 2000. The court awarded the plaintiff the sum of £45,000 (US\$64,800). The case of Cairns (supra) was referred to in this case and at paragraph 45 stated the following:
- "... It is generally acknowledged that there are three overlapping objectives to be taken into account; that is to say, (i) compensation for injury to reputation, (ii) the need to convince bystanders of the baselessness of the charge (ie vindication), and (iii) to provide an element of solatium to the claimant for distress and hurt feelings: see, most recently, Cairns v Modi, cited above at page 21. In the present case all three of these factors come into play."*

17. The Plaintiff contended that in assessing quantum in the instant case, that the court ought to take into consideration the three overlapping objectives referred to in paragraph 45 and further, that the evidence of the Plaintiff contained in her affidavit filed on 28th October, 2014 at paragraphs nine through eleven demonstrate how the said publications have caused injury to her reputation and distress.
18. On that basis the Plaintiff submitted that she ought to be awarded triple the amount awarded the claimant in **Cruddas** (supra) for the several reasons. I do not agree. The plaintiff in that case was a public figure and the defamatory statements were made over the course of many months. It was only during closing submissions at the assessment hearing that the defendant apologized and withdrew certain allegations that he had made against the plaintiff. The court in that case noted that the effect of such a last minute apology was limited "*in view of the long campaign and the truculence with which the litigation had been conducted up to that point.*"
19. That differs from the instant case where there was one publication of the defamatory statement and while the court accepted that the apology was not published in the same manner as the statement, it was nonetheless withdrawn promptly by the Defendants.
20. The Plaintiff sought also to place reliance on **Rantzen v Mirror Group Newspapers (1986) Ltd. and Others [1994] Q.B. 670** where the plaintiff was a successful television presenter and the founder and chairman of the "Childline" charitable service for sexually abused children. The defendant published four articles which made various allegations. I am of the view that this case bears little to no resemblance to the instant case therefore I will not consider it.
21. The Plaintiff contend that based on the authorities, that the starting point for damages ought to be within B\$200,000 to B\$300,000.
22. I do not agree with the Plaintiff in her contention as to the level of damages to which she is entitled. I find it too high given the single publication and the early apology by the Defendants. Further, I did not find any of the authorities particularly useful in determining quantum because they were clearly distinguishable from the instant case.
23. The Defendants referred to the noted Bahamian cases of **Merson v Cartwright**[1994] BHS J No. 54 and **Tynes v Barr** [1994] BHS J No. 1029 the latter case was appealed on the issue of quantum in the matter of **Barr v Tynes** [2001] BHS J No. 37. These cases can be easily distinguished from the instant case as the plaintiffs were both arrested and charged with criminal offences; damages were awarded for assault, battery, false imprisonment, malicious prosecution, breach of constitutional rights inter alia. Therefore, these cases were not helpful on the issue of quantum in the instant case which is solely based on defamation, therefore, I will not consider them.

24. The Defendants have suggested that the range of the award for the Plaintiff is between USD\$41,467.78 and USD\$16,587.11. The higher range is based upon Nail v News Group Newspapers Ltd.(supra) starting point for the newspaper publication of £45,000 reduced due to the mitigating factor by 50% and then converted to today's rate. The lower range is based upon the Turner v News Group Newspaper Ltd. [2005] EWHC (QB) assessment of compensation where the starting point was £15,000 discounted by 40% for the apology and converted to today's rate.
25. Similarly, the Defendants' cases did not assist with the quantum of damages. However, they were helpful in reaching a determination on the discount with respect to the apology.
26. I found the Trinidadian case of Ellis v Daily News Limited, Mills and Banwarie TT 2015 HC 290 similar to the instant case based on the facts and evidence of the Plaintiff. I refer to the summary of the case as set out by Justice Alexander:

“This is an assessment against the first defendant only (“Newsday”), as the matter was withdrawn against the other two defendants, seeking compensation for damage done consequent on an article that was published on 17th June, 2011 (“the article”). The article was headed “Ex-soldier pleads guilty” and stated that the claimant (“Brian”) had pleaded guilty to the charges of breaking into Japs Fast Food outlet, with intent to steal items, and was remanded into custody and scheduled to re-appear in court on the date of its publication. The article turned out to be false in the sense that Brian had not in fact pleaded guilty to the stated offences and was not remanded in custody. Newsday admitted liability in this matter.”

27. Justice Alexander referred to the Plaintiff's evidence where he said **“several people were calling and insulting me including one Jeffrey Samuel [who] said ‘didn’t know you was a big thief’. This was not too long after the article came out. When he said this I felt mashed down and degraded like my whole status gone through and my integrity gone. The article made me lock away myself from society’.**
28. Similarly in the instant case, the Plaintiff's evidence (contained in paragraphs 9(e) and (f)) was: *“I faced many phone calls and conversations from family, friends and even strangers who questioned, teased and taunted me concerning the Wanted Poster. I became emotionally depressed and my life felt like a dark room full of sadness. I often cried out in pain and on many occasions never wanted to leave my house. On one occasion my eldest daughter came home to me crying that she was teased and taunted by her classmate who knew me and said: “your mother is a thief”.*
As a result of the emotional and financial disaster, my life changed socially. I did not want to go out and be around friends as I often felt like they were scorning me. I felt left out and as though,

even strangers, did not want me around. This caused me not to be able to promote my party rental or clothing business. Even my relationship suffered.”

29. I accept the observation of Justice Alexander that **“the public embarrassment he faced would have been a source of turmoil and stress for him”** and as it would have been to the Plaintiff in the instant case. I too have concluded as did Justice Alexander that it can be reasonably inferred that some form of injury to reputation had been suffered both personally and socially.
30. I adopt the dicta of Justice Alexander in applying the law to the facts of the instant case where he said that:
- “12. It is accepted that Brian starts with a presumption of damage and to secure a substantial award must provide evidence of his damage [Hayward v Hayward [1897] 1Ch D 905 where as a result of vague and imprecise evidence of injury to the reputation of a business on the publication of a disparaging article, nominal damages were awarded]. In this case, damage to Brian’s character or personal reputation in the eyes of the ordinary members of the public was presented in a limited way. Based on the evidence, the injury to Brian’s business reputation was at best negligible, as there was no evidence of seriously lasting damage presented. What obtained were Brian’s claims of distress and embarrassment and the clear frustration of having to explain the article to family members and social acquaintances. He is entitled to be compensated for his injured feelings and humiliation albeit there is no incontrovertible evidence that his social reputation was permanently injured. There was no evidence that prior to the article being published he was held in high esteem and that its publication caused a permanent lowering or dipping of how he was viewed in the eyes of the public or family members. There is no evidence of Brian having a regional or global reputation of esteem or of the article being a vicious attack on his public self. Thus, the major element considered by this court in assessing his compensation was the impact of the publication on Brian’s feelings as well as any injury caused in how he was perceived socially.*
31. The Plaintiff in the instant case shared similar feelings of alienation and isolation from friends, family, acquaintances and the public at large. However, there was no evidence tendered as to the length of time that this obtained and certainly none to suggest that it is permanent.
32. There is a final point regarding the Ellis case worth noting and again I quote Justice Alexander:
- “16. Reputation is a central part of the dignity of a person but the evidence presented by Brian is imprecise and lacking specificity as to damage to his professional standing consequent on the publication of this article. It was clear, however, that there was some dimming of his reputation among friends. It was also borne in mind that there was the mitigating factor of the apology issued by the Newsday to Brian who admitted under cross examination that the damage to his reputation was lessened by the apology. It was considered that Brian is entitled to an award that would compensate him for the injury to his feelings and the distress caused;*

an award that is reasonable as between the wrong done and damages given; [Knuppfer v London Express Newspapers Limited [1943]KB per Goddard LJ at page 91] an award that is neither too much nor too little. It is not in dispute that the Newsday is a newspaper of global reach and that the article was not removed in a timely fashion or even that Brian's feelings were injured by the publication. Having regard to all the circumstances of this case including: the extent of the publication; the fact that the article remained on the website for a year before being removed; Brian's feelings of humiliation, distress and emotional turmoil; Brian having to treat with the concerns of Tamara and her acting out as well as having constantly to field calls from friends and to explain the article. I considered it reasonable to award him general damages in the sum of \$150,000."

33. The sum of \$150,000 converted from Trinidadian currency to US currency would be about \$23,000. This sum was awarded to the plaintiff in 2015 and there was no reduction made as it took into account the admission of the defendant's liability.
34. The Defendants have submitted that the following criteria would mitigate an award of damages as follows:
- (i) The plaintiff's general bad reputation;
 - (ii) Whether the plaintiff had already recovered damages or brought actions for the same or similar libel;
 - (iii) Whether an apology had already been published or offered by the defendant.
35. The Defendants submitted that in the instant case once the mistake was discovered an apology was offered both in person and within the media by the officers, to the Plaintiff. The apology was published on national television. The Defendants submitted that this apology is an essential component for mitigating the damages to be awarded.
36. The Defendants submit that the assessed damages should be reduced by as much as 50% as was the case in **Nail v News Group Newspapers Ltd. and Others** or 40% as was the case in **Turner v News Group Newspaper Ltd. [2005] EWHC(QB)**. Further, they have recommended that the assessment of compensation would be in the context of **s.3(5) of the Defamation Act, 1996** where the starting point was £15,000. If this figure is discounted by 40% it would amount to £9,000.
37. I agree with the Plaintiff that the first two factors do not apply in the instant case.
38. The Plaintiff distinguished the instant case from **Turner v News Group Newspaper Ltd. [2006] 1 W.L.R** where the court reduced the starting figure by 40% as a result of the apology. She thought the reduction too high for the following reasons:

- (a) *In the case of **Turner** evidence of the Claimant's bad character and evidence of the Claimant's acts of misconduct providing directly relevant background to the case were also taken into consideration; whereas in the instant case, there is no evidence of the Plaintiff's bad character or misconduct;*

The court has accepted that there was no evidence proving the bad character of the Plaintiff. Therefore, the court will assume her to be of good character.

- (b) *When the Plaintiff commenced this action, even though an apology was offered, rather than admitting guilt and moving to an assessment of damages, the Defendants sought to defend the action by way of Defence which was filed on 7th February, 2011 and therein they adopted the defence of qualified privilege and fair comment and they brought up the fact that the Plaintiff was charged with the offences of grievous harm in 2007 and causing harm in 2009. It is also noteworthy to mention that nowhere in its Defence, did the Defendants acknowledge that an apology was made to the Plaintiff on behalf of the Defendants. It is our submission that in this regard, the Defendants' subsequent conduct in its drafting and filing of the said Defence diluted whatever apology was offered on an earlier occasion.;*

In the instant case, the Defendants continued to pursue the action after the apology had been rendered by claiming a defence of privilege and fair comment. In those circumstances the apology appeared disingenuous and was undermined by the tendering of a defence. Therefore, the Plaintiff was left with no other option than to pursue her action even after the apology had been given. The Defendants would ultimately be penalized on a taxation for the additional costs incurred by the Plaintiff for this most egregious act. The Defendants through the filing of the Defence suggested that the Plaintiff did not suffer any loss due to the wanted poster and that they had done nothing wrong.

I accept the authorities and would have reduced the starting figure by 50% for an apology which would have been published in the same manner as the libel and was unequivocal in its terms. In the instant case however, the apology was not published in the same manner as the defamatory statement that is, it was not published in The Punch which arguably has a wider circulation and audience than the apology which was effected by the Defendants on national television. Further, given the Defendants continuation of the matter by the filing of a Defence, the apology was clearly not unequivocal. I find that there was in essence, no apology for a discount to be applied.

39. However, I have considered the award in Ellis supra and am of the view that given the similarity of the evidence, the effect of the defamatory statement on the plaintiff and the fact that the neither of the plaintiffs were public figures that the award is within the range of an award

applicable to the instant case. The case is of recent vintage having been decided in 2015 however, I have increased the award from \$23,000 to \$30,000 given the circumstances of this case which include the actions of the Defendants.

40. Accordingly, I hereby assess the Plaintiff's damages in the sum of \$30,000. However, for the reasons I have already given, I am unable to reduce the award any further.
41. The Defendant is to pay interest on the sum of \$30,000 at 3% per annum from the 7th day of February, 2011 until the date hereof and thereafter in accordance with the Civil Procedure (Rate of Interest) Act which is now 6.25%. Further, I order that the Defendants are to pay the Plaintiff's reasonable costs of this action such costs, to be taxed, if not agreed.

Dated this 26th day of May, 2017


Camille Darville Gomez
Deputy Registrar
Supreme Court