

GOH -v- YAM

High Court of Solomon Islands

(Muria ACJ)

Civil Case No. 154 of 1989

Hearing: 14 January 1993

Judgment: 8 February 1993

J. C. Corrin for the Plaintiff

A. H. Nori for the Defendant

MURIA ACJ: The Plaintiff, a Certified Public Accountant practising under the name of "Goh & Partners", brought an action against the Defendant who is also a Chartered Accountant by profession claiming damages for defamatory remarks contained in a letter dated the 27 April 1989 written by the defendant to one K.K. Loh. It was alleged that the defendant falsely and maliciously wrote and published the letter to Mr Loh about the Plaintiff with the following words:

"You are right. Goh has made many bad reports about you with Labour alleging you have broken the contract and damaged all the computers"

It was contended by the Plaintiff that the above words meant and were understood to mean that the Plaintiff was untruthful, dishonest and acting maliciously and unprofessionally and that he had made untrue reports to the Labour Division of the Ministry of Trade, Commerce and Immigration about Mr Loh. As a result of such publication, the Plaintiff claims he was seriously injured in his character credit and reputation and profession.

On 9th August 1991 Judgement in Default of Defence was signed against the defendant's application to set aside the Default Judgement was refused on 29 August 1991. An application for extension of time to apply for leave to appeal was granted on 31 January 1992. Leave to appeal was granted to the Defendant on 30 March 1992. Having been granted leave to appeal, the Defendant did not file his Notice of Appeal until 26 May 1992. Consequently the Notice of Appeal was held by the Court to be out of time on 19 October 1992.

Judgement in Default of Defence having been obtained against the Defendant, falsity and malice must be taken to have been admitted. The only matter now falls for the court to consider is the quantum of damages to be awarded to the Plaintiff.

In her submission, Ms Corrin argued that damages suffered by the Plaintiff, in this case, is at large and that the award should be substantial in view of the damages suffered by the Plaintiff. But she correctly pointed out that in Solomon Islands awards of damages in cases of defamation are very limited and so comparison of awards in such cases is at the present difficult. Counsel, nevertheless submitted that in assessing damages, the court should take into account matters such as circulation of the defamatory publication to other bodies with whom the Plaintiff has usually associated, distress caused to the Plaintiff and his wife, aggravation resulting from repeated publication of the letter containing the libellous remarks and that no apology had been made by the Defendant. In those circumstances substantial award of damages is merited here.

Mr Nori conceded that liability is a non-issue here. But Mr Nori submitted that any award of damages to the Plaintiff must be with a view to restoring the Plaintiff to his original position and that the amount must be proportionate to the seriousness of the remarks complained of.

Like Ms Corrin, Mr Nori also pointed out the Court's difficulty in determining comparatively the award of damages in cases such as this in this jurisdiction, particularly, in view of the limited number of cases that had come before the court. It is the contention of Mr Nori, however, that the award must be a fair compensation to the Plaintiff based on the context of Solomon Islands. Counsel further submitted that the main aim of the award should be at achieving reconciliation between the parties.

Apart from the relief of injunction which the court sometimes grant in appropriate cases, the Plaintiff is only awarded damages in an action for defamation. The purpose of such an award is to compensate the party to whom the wrong has been done and should not be used as punishment to the wrong-doer. That basic common law rule has been referred to in a number of cases including *Rookes -v- Barnard* [1964] 1 All E.R. 367; *McCarey -v- Associated Newspapers, Ltd* [1964] 3 All E.R. 947; *Broadway Approvals, Ltd -v- Odhams Press, Ltd* [1965] 2 All E.R. 954 and *Cassell & Co. Ltd -v- Broome* [1972] 1 All E.R. 801. The latter of those cases has also shown that exemplary damages can also be awarded in certain defamation actions.

As far back as the 17th Century, it had been recognised that the aim of compensatory award was to restore the plaintiff, as far as money could do so, to the position he would have been in before the tort had been committed. In *Livingstone -v- Rawyards Coal Co.* (1880) 5 App. Cas 25 at 39, Lord Blackburn stated as follows:-

"Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which would put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is getting his compensation or reparation."

The cases, however, have shown that while in many actions for tort the principle of *restitutio in integrum* provide an adequate guide to the assessment of damages, in many cases of defamation, the damage to a reputation cannot be easily converted into

monetary value. In such cases some subjective assessment will be required and not simply by some objective computation. For the compensation to be awarded to the plaintiff in such cases must account for the anxiety caused, his injured feelings and any public disrepute he may suffer. In addition the court needs to take into account other matters such as absence of apology or the malice of the defendant and conduct of both the plaintiff and defendant.

In the case of *Cassell & Co. Ltd -v- Broome* (supra) Lord Hailsham of St. Marylebone, L.C. considered the difficulty of fairly comparing the award of damages in defamation cases with awards in other types of action and said at page 823:-

"In almost all actions of breach of contract, and in many actions for tort, the principal of restitutio in integrum is an adequate and fairly easy guide to the estimation of damage, because the damage suffered can be estimated by relation to some material loss. It is true that where loss includes a pre-estimate of future losses, or an estimate of past losses which cannot in the nature of things be exactly computed, some subjective element must enter in. But the estimate is in things commensurable with one another, and convertible at least in principle to the English currency in which all sums of damages must ultimately be expressed."

He went on to add:-

"The principle of restitutio in integrum, which compels the use of money as its sole instrument for restoring the status quo, necessarily involves a factor larger than any pecuniary loss.

*In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitutio in integrum has necessarily an even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge. As Windeyer J well said in *Uren -v- John Fairfax & Sons Pty Ltd* -*

'It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways - as a vindication of the plaintiff to the public, and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.'

This is why it is not necessarily fair to compare awards of damages in this field with damages for personal injuries. Quite obviously, the award must include factors for injury to feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology, or the reaffirmation of the truth of the matters complained of, or the malice of the defendant. The bad conduct of the plaintiff himself may also enter into the matter, where he has provoked the libel, or where perhaps he has libelled the defendant in reply. What is awarded is thus a figure which cannot be arrived at by any purely objective

computation. This is what is meant when the damages in defamation are described as being 'at large'."

Thus although damages are said to be 'at large' when assessing an award of damages in a defamation case, the underlying principle of compensatory damages still remains very much an important factor, although punitive or exemplary damages may be awarded but only in a case where the defendant profited from his wrong-doing by publishing the defamation. There is no suggestion that the common principle as stated in *Rookes -v- Barnard* is inapplicable to the circumstances of Solomon Islands. In fact compensatory award is applicable as well as appropriate to the circumstances of Solomon Islands.

The argument that the compensation awarded must be proportionate to the injury suffered by the Plaintiff has also been discussed in a number of cases. In *McCarey -v- Associated Newspapers Ltd* (supra) the Plaintiff claimed damages for libel and the jury awarded him a total of £9,000 against the four defendant newspapers. However the plaintiff had not claimed special damages or alleged that he suffered pecuniary or actual damage of any kind or that the defendants had been deliberately insulting or high-handed. The Court of Appeal set aside the award made by the jury and order a new trial on the issue of damages. The Court held that no reasonable jury, correctly applying the true measure of damages in libel actions, could have arrived at such disproportionate figure. At page 957, Pearson LJ stated:

"The object of the award of damages in tort nowadays is not to punish the wrong-doer, but to compensate the person to whom the wrong has been done. In my view that distinction between compensatory and punitive damages has now been laid down by the House of Lords in Rookes -v- Barnard and ought to be permitted to have its full effect in the sphere of libel actions as well as in other branches of torts."

In the same case Lord Diplock after commenting on an earlier case in which the jury award £2,000 (an award the Court of Appeal did not disturb) to a woman whose leg had been amputated below the knee and her knee permanently immobilised, said at page 960:

"In that case it was the view of the Court of Appeal that a proper measure of damages, had the award been made by a judge, would have been in the neighbourhood of £4,000 to £6,000, a figure which is in scale with the damages which are commonly awarded (and have been approved by this court) in serious physical injury cases. If £2,000 is not appropriate, or if £4,000 to £6,000 is appropriate compensation for a life-long injury of that character which has its physical effect every day of the plaintiff's future life, and £9,000 is appropriate award for the injury to the plaintiff in this case, then I can only say that the scale of values is wrong, and if that is the law, so much the worse for the law. But I do not accept, however, that that higher scale of values in defamation cases is sanctioned by the law. It is, I think, legitimate as an aid to considering whether the award of damages by a jury is so large that no reasonable jury would have arrived at that figure if they had applied proper principles, to bear in mind the kind of figures which are proper, and have been held to be proper, in cases of disabling physical injury."

However, although the Court of Appeal appeared to be comparing awards in serious personal injuries with awards of damages in actions for defamation in the above case, Lord Hailsham stated in *Cassell & Co. Ltd -v- Broome* that it was not necessarily fair to compare awards of damages in the field of defamation with damages for personal injuries.

However despite that measure of differences of opinions it is nevertheless clear that all the cases have shown that an award of damages for a defamation action should not be out of proportion to the gravity of the libel. See *Theaker -v- Richardson [1962] 1 All E.R. 229*. In that case the defendant wrote the letter, sealed it in an envelope, addressed to the plaintiff and put it through her letter box. The plaintiff's husband opened and read the letter. It was highly defamatory of the plaintiff. The Court of Appeal held that although the award of £500.00 by way of damages was 'on the high side' the assessment was not wholly out of proportion to the gravity of the libel and the court could not interfere with it.

In the present case when assessing the award of damages, the court would have to bear in mind those matters that I have mentioned earlier, in particular, the basic principle that any damages to be awarded to the Plaintiff should be compensatory in nature and that punitive or exemplary damages should only be given if the evidence shows that the Defendant had gained by publishing the letter containing the defamatory remarks. The basis of punitive or exemplary damages is to teach the wrong-doer that tort does not pay. A person cannot be allowed to sell another man's reputation for gain. See Lord Devlin's remarks in *Rookes -v- Barnard, at p. 411*.

Before I come to assessing the quantum of damages in this case, I shall comment on some of the other matter raised by counsel for the Plaintiff in argument. That matter relates to the evidence which the Defendant now put before the Court by affidavits.

First, Ms Corrin objected to certain matters contained in the affidavits of the Defendant and of Debbie Bosoboe, Fred Seda and Collin Darcy. Those matters relate to liability and as judgment had already been entered in default in this case any matters touching on the issue of liability must be disregarded. Whilst I agree that liability is no longer in issue here, I cannot accept counsel's argument that because liability must be taken to have been admitted in this case, any evidence contained in the affidavits touching on the question of liability must be irrelevant and so should be struck out from the affidavits filed by and on behalf of the Defendant. In my judgment such evidence are relevant for the court's consideration even if only for purpose of determining what the appropriate award of damages should be. Such evidence is part and parcel of the circumstances giving rise to the action of defamation and in assessing the damages the court must be able to look at the whole conduct of the parties.

The comment of Lord Esher, MR in *Praed -v- Graham (1889) 24 QBD at p. 55* which was quoted by Lord Hailsham, LC in *Cassell & Co. Ltd -v- Broome at page 824* is worth noting where he said:-

"..... in actions of libel the jury in assessing damages are entitled to look at the whole conduct of the defendant [I would personally add 'and of the plaintiff'] from the time the libel was published down to the time they give their verdict. They may consider what his conduct has been before the action, after the action and in court during the trial"

The Court is therefore required to subjectively assess the damages taking into account *"a mixture of inextricable considerations"*, to use Lord Hailsham's word in *Cassell & Co. Ltd -v-Broome*. If there was evidence of the conduct of the plaintiff which led to the defendant defaming him that must also be accounted for when assessing the damages, for the figure to be awarded cannot be arrived at purely by objective computation.

I have considered the evidence of both parties to this action. It is obvious that the plaintiff cannot be said to be blameless in this case because he had clearly written a letter to the Commissioner of Labour on 21 March 1989 about Mr Loh ("AY-1" in the defendant's Supplementary Affidavit). In the circumstances of this case the defendant cannot use that letter now to free himself from liability but the court is nevertheless entitled to consider that letter ("AY-1") when assessing the quantum of damages to be awarded against the Defendant.

On the other hand, I have noted counsel's submission on the question of injury to the Plaintiff's feelings or the distress he might have suffered. I also note the Defendant had not made any apology to the Plaintiff. In some cases the failure to apologise, especially in serious defamatory remarks, is evidence of malice. However, it is worth to bear in mind Lord Diplock's comments in *Horrocks -v-Lowe* [1974] 1 All E.R. 662 at 671 where he stated:-

"A refusal to apologise is at best tenuous evidence of malice, for it is consistent with a continuing belief in the truth of what one has said."

The Plaintiff's reputation had been said to be seriously tarnished in this case. The only evidence on this came from the Plaintiff himself. He stated that he believed the statement made by the Defendant and the innuendo contained in the defamatory words will affect his public image. He further stated that the Manager of National Bank of Solomon Islands who was his personal friend and business associate stated that the letter had cast doubts on his reputation. The Plaintiff further stated he was not comfortable in attending his club and other social gatherings. The Plaintiff had also stated that one Yuen Tang contacted him about the letter. The letter containing the defamatory remarks was also circulated to the various people and bodies specified in paragraph 2 of the Plaintiff's affidavit of 27th August 1991. Those circumstances, the Plaintiff says, clearly and seriously affect his reputation.

Accepting the Plaintiff's evidence as they are as to the effect of the defamatory publication on his reputation, the court will still have to ascertain whether those other persons who were named by the Plaintiff have held adverse view of the Plaintiff's reputation as a result of the Defendant's letter. I feel the Plaintiff should bring evidence, apart from his own assertion, to show that what he asserted was supported.

Clearly those whom he should call are those who know him and have had dealings with him.

On the other hand the Defendant produced evidence in an attempt to show that the Plaintiff's reputation had not been adversely affected. It is for the Plaintiff to show that his reputation had been seriously affected by the defamatory publication. On balance, I am prepared to accept that the publication of the letter containing the defamatory remarks did have some adverse effect on the Plaintiff's reputation.

In this jurisdiction, there has not yet been any reported cases on damages in actions of defamation. However two cases have come before this Court in which damages had been assessed after default judgments were entered against the Defendants.

In *Soaki -v- Talasasa*, Civil Case No. 105 of 1984 (H.C.), the Defendant was sued for libel in respect of an extremely derogatory remarks (much more sinister than the remarks published by the defendant in the present case) against the Plaintiff who was and still is the Commissioner of Police. That letter was addressed to the Ombudsman and copied to the Honourable Minister of Police & Justice, the Director of Public Prosecutions and the Plaintiff. Damages had been assessed at \$750.00.

In another case *Eason -v- Talasasa*, Civil Case 72 of 1985 (H.C), the Defendant (same defendant as in Civil Case No. 105 of 1984) was sued for libel in respect of defamatory remarks contained in a letter written by the defendant to the Bishop of the United Church and copied to Permanent Secretary, Ministry of Health and Medical Services, the Superintendent Minister Roviana Circuit and the Plaintiff, charging the Plaintiff with incompetence, unprofessionalism and dangerously behaving towards patients at Helena Goldie Hospital and that he was unfit to hold the position of Medical Superintendent of that hospital. Damages was there assessed at \$500.00.

Those two cases were dealt with 9 and 8 years ago respectively. My task here is to assess damages to be awarded to the Plaintiff bearing in mind that the award must be adequate compensation to the Plaintiff, in the sense that it must be fair to him in the circumstances of this case and that such an award is appropriate in the context of Solomon Islands. It would be wrong in my view to pluck a standard of award from another jurisdiction and adopt it in this country without any rational comparison.

In this case on the evidence before the court and having considered and taking into account the factors I referred to in this judgment I come to the conclusion that the proper award of damages which the defendant should pay to the plaintiff is \$2,000.00

Judgment for the Plaintiff accordingly with costs.

(G.J.B. Muria)
ACTING CHIEF JUSTICE