

**BETWEEN: BOB HESTON**

**Plaintiff**

**AND: KALFAU MOLI**

**Defendant**

Date Law Office

Received

18 JULY 2002

by hand

**Mr. John Malcolm for the plaintiff**  
**Defendant in person**

## **JUDGMENT**

Nasara is a newspaper published and distributed in Vanuatu. On 23<sup>rd</sup> February 2000 it carried on its front page an article. The plaintiff, in his Statement of Claim, at paragraph 9 alleged that the article together with the photograph in their natural and ordinary meaning in the context of the article were intended to mean and / or conveyed the intention and meaning: -

- (a) The plaintiff sexually abuses female employees
- (b) The plaintiff is a pervert,
- (c) The plaintiff forces the women employees to have sex with him to keep their jobs
- (d) The plaintiff destroys marriages
- (e) The plaintiff sends the women to Australia to hide his offending

Further the plaintiff alleged, at paragraph 13 that “ the Defamatory Article was published by the Defendant out of ill-will toward the plaintiff and/or for the economic advantage of the defendant”.

At paragraph 14 the plaintiff alleged the defendant had acted “in a calculating manner”... to conceal his true motive and reasons, namely: -

- i) to ridicule the defendant before the Government of Vanuatu and the public of Vanuatu;
- ii) to sell more newspapers.

The Writ was served on the second defendant, Kalfau Moli, editor of Nasara, on 1<sup>st</sup> March 2000. No appearance or defence was filed. Judgment in default was entered on 11 April. I must now assess the damages in this case.

The plaintiff is not specifically named in the article. However, the plaintiff says it clearly refers to him, and the reaction of his friends and acquaintances \* shew that that is the case.

I have before me the following affidavits: -

Bob Heston	-	22 June 2000
Rusa Namel	-	22 June 2000
Thomas M. Bayer	-	22 June 2000
Peter Wilson	-	29 June 2000

and affidavits of service.

I also have the written submissions upon damages from the plaintiff.

It would appear there are no previous decisions as to quantum of damages in defamation cases in Vanuatu. The plaintiff claims general or compensatory damages, aggravated damages and exemplary damages, and costs and interest.

I have been referred to Gillaly on "The Law of Defamation in Australia and New Zealand". I also have "Street on Torts", which covers in broad terms the English position. For the purposes of this judgment the principles appear consistent. They are primarily derived from common law and not statute.

The main function of the tort of defamation is to compensate the plaintiff for his loss of reputation, that is the extent to which he is held in less esteem and respect and suffers loss of goodwill and association.

Damages are at large in respect of libel and slander actionable per se. The principles ordinarily applicable to damages at large apply. Compensation may be given for insult or injury to feelings. Circumstances of aggravation and mitigation are important. Damages may be aggravated by such matters as the mode, circumstances and extent of publication. Exemplary damages may be awarded.

Aggravated damages do not constitute a distinct category of damages but an increase in the size of the overall award to take into account the presence of certain aggravating factors. Also, there is a fundamental distinction between compensatory and exemplary damages; separate awards of each are not made, but one lump sum encompassing both elements.

In general damages should be awarded in "a single lump sum in respect of each separate cause of action". Since an award is made once and for all, both losses occurring and likely to occur after assessment, must be taken into account in determining the appropriate figure. In order to recover damages for particular harm, the plaintiff must prove that it was caused by, and was not too remote from, the defamatory publication sued upon.

The law generally presumes in favour of the plaintiff that some damage will necessarily flow from the publication of defamatory matter, unless the action is for a slander not actionable per se.

The defendant only attended hearings very late on and did not seek to argue on quantum.

He has chosen not to enter an appearance. It would have benefited the court greatly to hear any contrary arguments to those of the plaintiffs. However, an award must be made. An offer to publish an apology and retraction has been made and accepted. I take that into account albeit late in the day.

The plaintiff is the managing director of Toa Enterprises Ltd. He is a substantial shareholder and is the person referred to as "master" in the article. He employs 45 staff of whom 7 are women.

I consider the factors bearing upon the compensatory damages.

The plaintiff cannot quantify in specific terms the pecuniary loss to him. He does not need to do so. He says, at paragraph 11, "My main income is from my dividends receivable from Toa Enterprises and Toa is now not in a position to pay a dividend".

Further, in my judgment, it is a relevant factor that in small communities, such as those in Vanuatu, an attack upon the reputation of the managing director of a small business will have a greater effect upon its business than would be the case in larger communities. I include this in the assessment of damages.

The defendant is entitled to damages for non-pecuniary harm. This may be considered under two heads, (i) reputational damage (ii) emotional and physical distress. The purposes of an award of damages for defamation are

- (i) consolation for the distress,
- (ii) reparation for the harm done to reputation
- (iii) vindication of the plaintiff's reputation.

The total award must achieve all these purposes.

The reputational damage in this particular case must be high. The defamatory statements themselves must necessarily come near the top end of the scale. I can and do take into account the fact that the plaintiff lives in a small community where such suggestions are of great effect.

I accept the plaintiff has been caused considerable emotional distress. He has been ostracised or at the least treated with suspicion at the Golf Club where, until the publication of this article, he spent a large portion of his recreational time.

The affidavit of Peter Wilson is illustrative of the effect of such an article to the plaintiff's business and personal reputation. Mr. Wilson, also a shareholder in and director of Toa Enterprises is concerned about the effect on the business. He states his "faith in Bob Heston remains tenuous... I am still concerned as there has been no retraction or apology which is the norm in Vanuatu when any article is published wrongfully."

He states that Bob has become something of a pariah at the golf club "but there is the stench of suspicion remaining. I have spoken to many people who believe it to be true". He says it is hard to get past "there is no smoke without fire". He also refers to the effect on Toa's business

Thomas Bayer is the chairman of the Board of Director of Toa Enterprises. When he read the article he immediately wrote to the plaintiff demanding a full explanation. He was clearly very concerned about the effect on the business. The tenor of the letter is such that if the allegations were true he would regard the plaintiff with disgust. The article put in his mind the possibility there might be truth in it.

There is not one shred of evidence before me to shew that the suggestions made in the article are true, in the slightest detail.

This illustrates the fact that it is easy to make allegations but difficult to refute them. Expressions such as "no smoke without fire" only serve to enhance the effect of a defamatory statement. There has been no attempt to defend this action, or to justify the suggestions in any way. The offer of retraction and apology has come late in the day. It was a bald publication of a series of libels.

I take into account the fact that the article was on the front page, it was highlighted by shading and when the paper lay on a shop counter, to shew the newspaper's name, this article would be visible to anyone, even if they didn't buy the paper. I do not have evidence of the circulation or distribution figures for the newspaper, Nasara. It is one of the three main newspapers in the country, circulates widely in Vila and is sold at other main centres.

When a libel is published in a newspaper its circulation figures are of great importance when assessing damages. I cannot go further than what is noted above.

The affidavit of Rosa Namel is important. Whether by the reading of Nasara or word of mouth the contents of the article quickly came to her attention and that of the other six female employees. By letter, dated the next day, to the defendant and signed by all of them, they refuted the suggestions. Rosa Namel says at paragraph 6 that this was done "without prompt or request from Bob Heston". The letter was never printed nor did they receive a reply.

The article itself necessarily reflected adversely upon those women as well as this plaintiff.

At paragraph 5 she says the article is "untrue and has caused myself and fellow employees considerable embarrassment and trouble". I am only concerned in this case with assessing the damages in respect of this plaintiff.

Rosa Namel states " I have never been sexually threatened, harassed or otherwise interfered with. I am not aware of any of the other ladies Mr. Heston employed being so treated".

These are all matters I take into account when assessing the compensatory damages. Many of them also form the basis of aggravating damages.

I now turn to that question. An award of aggravated damages is well founded in this case.

The manner of the publication – front page, highlighted by shading and in a position where it could be seen without purchasing the paper – is the first feature. Second, there is no evidence to suggest that the slightest effort was made to check the story, or ask for information from those involved, before publication. Further, no retraction or apology has been offered till now. The second defendant was sent a letter by the plaintiff's solicitor within two days of publication pointing out the defamation and the action being taken. It is clear from the deponents that a speedy and fulsome retraction and apology would have gone a substantial way to mitigating the damage.

There is no evidence to suggest that any of the suggestions were other than outright lies. These factors also demonstrate at the least gross negligence or reckless disregard in the way the article was published. The plaintiff is presumed to be a person of good repute; there is nothing before me to suggest otherwise.

The plaintiff's advocate argued that the second defendant was out to sensationalise the story. The purposes behind that were to sell more papers and outdo the only two opposition papers. There is no direct evidence of this. Can it be said that publishing of this article went beyond gross negligence and was in fact deliberate and done with the intent of increasing sales and out doing the opposition.

The defamations here are not a question of innuendo or inference which might be overlooked. They are clear and specific. They could not have made their way into print without that realisation. There was no attempt to check them. In those circumstances there is a strong inference they were published with the intention suggested by the plaintiff's advocate. There is no evidence pointing against this conclusion. I accept the argument.

I have considered if there are any mitigating factors. I can see none. The most that can be said is that the second defendant has not sought to defend the action on any false basis or run up extra legal costs. This is scant mitigation.

I now turn to the question of exemplary or punitive damages. These are awarded to punish the defendant for particularly reprehensible conduct, to "teach a wrongdoer that tort does not pay". The sum to be awarded by way of compensation must be insufficient to adequately punish the defendant for such conduct. There does not necessarily have to be actual malice.

One situation in which exemplary damages will be awarded is where a media organisation or commercial publisher knowingly or recklessly publishes false defamatory matter with a view to increasing sales or ratings. There was a publication of false defamatory matter in this case, and it was done knowingly or recklessly. Was it done with a view to increasing sales or ratings? The same argument applies here as it did under the heading of aggravated damages. Accordingly I find that for these reasons an award of exemplary damages should be made.

The most difficult part of this case is to fix an actual figure. I remind myself of the care that must be taken to avoid a doubling or trebling of damages.

There is no figure in a case in Vanuatu which I can use as a starting point. In my judgment it would be wrong to look at the sums awarded in comparable

cases in New Zealand, Australia, England or elsewhere and then convert them into Vatu, with or without any adjustment.

The tort of defamation is peculiar in that it is the very nature of a community, its standards and beliefs which will make serious a libel or slander which in another place might be treated lightly. The nature of a community can elevate a defamation which elsewhere would be considered serious into one that touches the top of the scale.

There has been some criticism in England, Australia and New Zealand that the levels of damages awarded have been too high, especially when compared with sums awarded for quite serious physical injury. On the other hand the plaintiff "must be able to point to a sum awarded.....sufficient to convince a bystander of the baselessness of the charge."

In assessing the damages I look to the community in which the defamatory article was published and the plaintiff lives. I am conscious that, if not plucking a figure from the air, I can only fix one with the broadest regard to the norms, beliefs, financial standards and nature of Vanuatu.

An element of bracketing is useful. A figure of Vt1 million is clearly inadequate. The figure of VT 10 million is probably excessive. A figure for each of the heads of damages can be narrowed by this method.

In my judgment the figures for damages should be as follow

Compensatory damages	VT5 million
Aggravating damages	VT7 million
Punitive damages	VT8 million

These figures are not to be totaled. I therefore award the sum of VT 8 million by way of damages in this case.

**DATED at Port Vila, this 27<sup>th</sup> Day of September 2000.**

BY THE COURT OF VANUATU  
REPUBLIC OF VANUATU  
COUR SUPREME  
COLETTI  
LEX  
R. J. COVENTRY  
Judge  
REPUBLIQUE DE VANUATU

