

ST. VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

HCVAP 2009/002

BETWEEN:

ELWARDO G. LYNCH

Appellant/1st Defendant

and

RALPH GONSALVES

Respondent/Claimant

CONSOLIDATED WITH

HCVAP 2009/004

BETWEEN:

BDS LIMITED

Appellant/2nd Defendant

and

RALPH GONSALVES

Respondent/Claimant

Before:

The Hon. Mde. Ola Mae Edwards
The Hon. Mde. Janice M. Pereira
The Hon. Mr. Frederick Bruce-Lyle

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Stanley K. John with Mr. R. Akim John and Mr. J. Julien
for Appellant Edwardo Lynch
Mr. B. Commissiong, QC, with Ms. Myra E. Commissiong for
Appellant BDS Limited
Mr. Anthony Astaphan SC with Mr. Grahame Bollers for the Respondent

2010: January 27;
2011: June 21.

Civil Appeal – Slander and Defamation – Assessment of Damages – Proving general damages and aggravated damages – Legal considerations in awarding damages - Mitigating damages - Adducing evidence to disprove malicious motive – Admissibility of evidence concerning context in which defamatory publication was made – Relevance of comparative awards of damages within OECS jurisdiction - Extent of publication – Effect of slander on reputation of claimant – Reduction of global award – Nature of liability for joint tortfeasors – Court of Appeal award of costs apportioned incorrectly - Error in awarding interest on interest

On 14th August 2002, the 1st appellant Mr. Elwardo Lynch, hosted the political radio programme “New Times” which is sponsored by the opposition New Democratic Party on Nice Radio 96.7 FM radio station owned by the 2nd appellant BDS Limited. Mr. Lynch published certain defamatory words about the respondent Dr. Ralph Gonsalves, who was then and still is the Prime Minister and Minister of Finance of St. Vincent and the Grenadines. The defamatory statements alleged that the respondent allowed money from the State’s consolidated fund to be used in the purchasing of tickets for his mother and daughter to travel to Rome to see the Pope. The respondent filed a claim against the appellants alleging among other things that the appellants’ slanderous statements meant that the respondent was corrupt and that in his capacity as Prime Minister and Minister of Finance he caused public funds to be used to pay the tickets and thereby had committed the criminal offences of misconduct in public office, obtaining services by deception, obtaining a pecuniary advantage by deception and false accounting.

The appellants by their defences, sought to put the respondent to prove publication of the defamatory statements and pleaded that the statements lacked the alleged defamatory meanings and that it was fair comment on a matter of public interest and qualified privilege. Thom J held that the appellants had no prospect of succeeding on any of the defences and struck them out. Summary judgment was entered against the appellants with damages to be assessed. Mr. Lynch appealed Thom J’s ruling and on the 18th September 2006 it was dismissed by the Court of Appeal with prescribed costs to await the assessment of damages to be quantified. The master assessed the damages for slander and on 26th November 2008 ordered:

- (a) each Defendant do pay the Claimant assessed damages in the sum of \$160,000.00
- (b) each Defendant do pay the Claimant costs in the High Court in the sum of \$33,000.00
- (c) each Defendant do pay the Claimant costs in the Court of Appeal assessed in the sum of \$22,000.00
- (d) interest of 3% be paid on the total sum of \$160,000.00 from the service of the writ to the 25th May 2005 when judgment was delivered and thereafter interest be paid on the total judgment sum of \$215,000.00 at the statutory rate of 5% until liquidated.

The appellants challenged this decision of the learned master on several grounds; contending that the master had mischaracterized the mitigation evidence adduced by the appellants for the assessment, erroneously treated it as inadmissible, awarded unreasonable and excessive damages to the respondent; and had erred in apportioning costs, and awarding interest.

Held: allowing the appeals to the extent that the order of the master is set aside and the following order is substituted:

- (a) The appellants jointly and severally do pay the respondent assessed damages in the sum of \$140,000.00 and prescribed costs of \$30,000.00 on the claim.
- (b) The appellant Elwardo Lynch do pay the respondent Ralph E. Gonsalves costs in the Court of Appeal pursuant to the order on the 18th September 2006 in the sum of \$20,000.00
- (c) The appellants do pay interest on the judgment debt at the statutory rate of 5% from the date of assessment 26th November 2008 until full and final payment.
- (d) There be no order made as to costs in these appeals.

1. The learned master failed to consider whether the appellants by their witness statements and submissions had mitigated the damages; and should have at least acknowledged that the damages could be mitigated by the appellants, and then pronounce on whether the evidence before her was of persuasive value for the purposes of mitigating the damages to be awarded. In considering whether the evidence and submissions of the appellants' counsel demonstrate that the appellants published the statement without deliberate malice the master would be entitled to draw inferences from the language of the slanderous statement itself and the circumstances surrounding the publication of the comment.
2. None of the evidence in the witness statements of Mr. Elwardo Lynch and the Chief Executive Officer of BDS Limited Mr. Douglas De Freitas, disproves actual malice, or negatives the existence of any malicious motive on their part. The marginal relevance of the contextual background evidence strongly confirms the true political basis for the slanderous statements that were falsely and maliciously published by the appellants. Had the master considered the mitigation value of the appellants' evidence and submissions she would have been entitled to find that the appellants had not disproved that they acted with actual malice which resulted in increased mental distress to the respondent.

Simpson v Robinson (1841) 12 Q.B.D. 541; **Pearson v Lemaitre** (1843) 5 M&G 700 at page 19; **Gatley on Libel and Slander (10th Edition)** at pages 1014 to 1015; and **Keith Burnstein v Imes Newspaper Ltd.** Case No. A2/2002/0510 Royal Courts of Justice (Unreported Judgment) 20/12/2000 applied.

3. The errors that were made by the master concerning the extent of the publication and the effect of the slander on the reputation of the respondent must register in a reduction of the amount awarded for injury to the respondent's reputation. Though the sum awarded for injury to reputation was not stated, allowing 30% of the global award as the sum for injury to reputation, the court will reduce that sum by \$20,000.00. There is no reason to interfere with the rest of the master's award even where it may appear that she has lifted the bar. The global award is therefore reduced to \$140,000.00.
4. The master erred in awarding interest upon interest at paragraph (d) of her order; and in making separate awards for each of the appellants at paragraphs (a) and (b) of her order. The respondent is entitled to receive a sum representing the damage that he has suffered from a single wrong inflicted by both appellants as joint tortfeasors. The award of \$140,000.00 for general damages including aggravated damages to the respondent is to be paid by both appellants.

Greenlands v Wilhurst [1913] 3 K.B. 531: Per Lord Hamilton applied.

5. That although the appellants were successful in their appeals no order as to costs would be made because of the conduct of the appellants both before and during the litigation proceedings. The appellants were unreasonable in raising the defences that were struck out and the respondent has succeeded on the claim though not succeeding in this appeal.

JUDGMENT

[1] **EDWARDS J.A.:** These two consolidated appeals challenge the decision of the learned master delivered on 26th November 2008 in which she assessed the damages arising from the respondent's claim for slander as follows:

- “... It is hereby ordered that
- (a) each Defendant do pay the Claimant assessed damages in the sum of \$160,000.00
 - (b) each Defendant do pay the Claimant costs in the High Court in the sum of \$33,000.00
 - (c) each Defendant do pay the Claimant costs in the Court of Appeal in the sum of \$22,000.00
 - (d) interest of 3% be paid on the total sum of \$160,000.00 from the service of the writ to the 25th May 2005 when judgment was delivered and thereafter interest be paid on the total judgment sum of \$215,000 at the statutory rate of 5% until liquidated.”

The Facts Leading to the Assessment

- [2] On 14th August 2002, the appellant Mr. Lynch, hosted a political radio programme "New Times" sponsored by the opposition New Democratic Party on Nice Radio 96.7 FM radio station owned by the appellant BDS Limited. During the broadcast, Mr. Lynch published false and malicious statements about the respondent Dr. Gonsalves who was then (and still is) the Prime Minister and Minister of Finance for St. Vincent and the Grenadines. The slanderous/defamatory statements in their natural and ordinary meaning alleged in essence that the respondent caused money from the State's consolidated fund to be used to purchase airline tickets for his mother and daughter to travel to Rome to see the Pope. Two claims for slander were brought against both appellants and another person as joint tortfeasors. The claims alleged among other things that the slanderous words meant that the respondent was corrupt and that in his capacity as Prime Minister and Minister of Finance he caused public funds to be used to pay the airline tickets and thereby had committed the criminal offences of misconduct in public office, obtaining services by deception, obtaining a pecuniary advantage by deception and false accounting which were offences punishable by imprisonment under the Criminal Code.
- [3] On 31st October 2002 Alleyne J (as he then was) ruled that except for two of the meanings alleged in each statement of claim, the words in their ordinary and natural meaning were capable of bearing the meanings pleaded by Dr. Gonsalves in both claims. Alleyne J ordered costs to be in the substantive cause.
- [4] Only one claim thereafter, i.e. claim No. 406 of 2002 proceeded for trial, as the appellants had by their defences sought to put the respondent to prove publication of the defamatory statements; and pleaded that the statements lacked the alleged defamatory meanings; and was fair comment on a matter of public interest and qualified privilege. On 7th October 2005 which was the trial date, Thom J heard arguments on a preliminary point raised by the application of Dr. Gonsalves, that the appellants' pleaded defences could not succeed and should be struck out.

- [5] Thom J ruled that the appellants had no prospect of succeeding on any of the defences. She struck out the defences of the appellants; and awarded costs to the respondent to be assessed on the outcome of the substantive claims. Summary judgment was entered against the appellants with damages to be assessed. One of the appellants, Mr. Lynch appealed Thom J's ruling. The Court of Appeal dismissed this appeal with prescribed costs to await the assessment of damages to be quantified. This then was the factual background for the assessment of damages for slander in the action brought by the respondent.
- [6] There were five other witness statements filed in support of Dr. Gonsalves' case for the trial which formed part of the assessment proceedings before the master. Four of these witness statements were filed on 18th November 2003 while one was filed on 26th February 2004. These were made by Ms. Angela Mercury, Ms. Gayle Friday, Ms. Ingrid Fitz-Patrick, Mr. Kenneth Bibby, and Inspector Lenroy Brewster.

The Legal Considerations in Awarding Damages

- [7] It is helpful at this stage to identify the general principles of the law of damages for actions of slander/defamation, which should have guided this assessment of damages, before considering how the learned master actually carried out the assessment and the grounds of appeal.
- [8] Dr. Gonsalves' pleadings indicated the nature of the damages he was requesting by reason of the publication of the slanderous statements. In his statement of claim he pleaded at paragraph 4 that:

"During the broadcast of New Times" on 14th August 2002, the first Defendant [Mr. Lynch] falsely and maliciously said and caused to be published of and concerning the Claimant [Dr. Gonsalves] over the second Defendant's [BDS Limited] airwaves the ... defamatory words."

- [9] It must be noted here that "malice" means ill-will or spite or any indirect or improper motive in the mind of the defendant at the time of publication.¹ Apart from affecting the appellants' struck out defences of qualified privilege and fair

¹ Halsbury's Laws of England 4th edition Vol. 28 (1979) p. 76.

comment, this pleading of malice along with Thom J's ruling, would also have established that the appellants had an improper motive in broadcasting the defamatory statement about Dr. Gonsalves. One of the consequences of malice being established is that it becomes irrelevant that the publisher of the slanderous statements may not have intended to harm the claimant's reputation. The existence of malice generally serves to inflate the damages that may be awarded.

[10] It was further pleaded that because of the publication of the said words Dr. Gonsalves was gravely injured in reputation as a Barrister-at-Law and Solicitor of the Eastern Caribbean Supreme Court as well as his office as Prime Minister and Minister of Finance; has been brought into public scandal, contempt and ridicule, and has suffered loss and damage. He claimed general damages, exemplary and aggravated damages, costs, and any other relief the court thinks fit.

[11] General damages may be aggravated by evidence of the circumstances of the publication, of the conduct of the defendant with reference thereto, and of the effect which it has actually produced. In support of his claim for exemplary and aggravated damages. Dr. Gonsalves pleaded that he was relying on the following facts:

- (a) that the broadcast was published in a sensational manner to excite, horrify and outrage listeners and the general public;
- (b) that the Defendants knew or ought to have known that the words used or meaning conveyed by such words were untrue;
- (c) that the Defendants published the said words (a) in the knowledge that they were slanderous and/or with reckless disregard as to whether or not they were slanderous; and (b) having established that the prospect of material advantage to themselves by reason of their publication outweighed the prospect of material loss.

- [12] In **McCarey v Associated Newspapers Ltd.**² Lord Diplock said that “In an action for defamation, the wrongful act is damage to the plaintiff’s reputation. The injuries that he sustains may be classified under two heads: (i) the consequences of the attitude adopted to him by other persons as a result of the diminution of the esteem in which they hold him because of the defamatory statement; and (ii) the grief of annoyance caused by the defamatory statement to the plaintiff himself.” Lord Diplock also stated that damages under head (ii) may be aggravated by the manner in which, or the motives with which the statement was made or persisted in.
- [13] It is settled law that the defendant’s conduct after the publication may afford cogent evidence of his malice in the original publication of the defamatory statements and thus evidence upon which aggravated damages may be awarded under head (ii) in addition to damages under head (i).³ On the authority of **Praed v Graham**,⁴ “the trial court in assessing damages is entitled to look at the whole conduct of the defendant from the time the libel was published down to the time the verdict is given. It may consider where his conduct has been before action, after action and in court during the trial.”
- [14] **Clerk & Lindsell on Torts**⁵ states with clarity, that it will be a matter of aggravation if the defendant has persistently and deliberately given publicity to the defamation complained of, or if he has on other occasions disparaged or assailed the plaintiff’s reputation; or if in his conduct of the litigation he has shown a spirit of determined hostility, or has persisted in unfounded imputations and introduced new ones. The plaintiff is not precluded from giving other acts of the defendant in evidence to prove malice by the fact that they are in themselves causes of action, but that evidence must be treated only as matters of aggravation.

² [1964] 3 All E.R. 947 at page 959.

³ Per Lord Reid in *Cassell v Broome* [1972] AC 1027, at page 1126.

⁴ (1889) 24 Q.B.D. 53,55 Per Esher M.R.

⁵ Twelfth edition at paragraph 1636, page 873.

[15] The significance of the nature of the defamatory statements in the assessment of damages was highlighted in **John v MGM Ltd** ⁶ by the Court of Appeal where it was said in part that:

"In assessing damages for injury to reputation, the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people."

[16] It is permissible at common law for a defendant to seek to mitigate the damages which may be awarded against him, by proving circumstances which show that he did not act with deliberate malice. A defendant may prove facts in mitigation of damages without pleading such facts. The English practice and procedure for the admissibility of that mitigation evidence is governed by the **Rules of the Supreme Court** Order 82, rule 7.⁷

[17] A refusal to retract after an apology or request for retraction is made is an aggravating circumstance which may increase the damages awarded.

The Master's Assessment

[18] In determining the sum to be awarded for general damages the master considered the gravity of the allegation, the extent of the publication, the extent and nature of the respondent's reputation, the effect of the publication, and the conduct and behavior of the appellants as the law required. She also considered whether the circumstances of the defamation called for aggravated damages. She made an award of \$160,000.00 for damages as an "aggravated award" after considering

⁶ [1996] 2 All E.R 35 at page 47.

⁷ See Clerk and Lindsell on Torts 12th ed at paragraph 1640; McGregor on Damages 14th ed. paragraph 1410.

several authorities.⁸ The master declined to make an award for exemplary damages.

[19] In considering the extent of the publication the master took into account and accepted (at paragraph 10 of her judgment) the contents of a witness statement made by Mr. Hans King on 3rd October 2007, concerning telephone calls Mr. King had received from his mother in the United States and his brother in Barbados who had heard the allegations of the appellants. We were informed by counsel for the parties that this witness statement was filed and subsequently withdrawn by counsel for Dr. Gonsalves.

[20] As for the conduct and behaviour of the appellant Mr. Lynch, the master at paragraphs 13 to 16 found that the appellants in their submissions before her had persisted in defending the allegations despite the rulings of Alleyne J (as he then was) in 2002, Thom J in 2005, and Barrow JA in 2006. The learned master referred to the submissions put forward for Mr. Lynch that he “sought consistently to show that to the extent the words were published by him, his motive was not to (sic) impugn the Claimant’s character as being corrupt but rather that he was attempting to criticize the Claimant’s priorities in the management of public finances.” The master observed thus (at paragraphs 14 and 15): **“Apart from the intent being irrelevant at this point, it is to be noted that this argument has consistently failed before the court and it does not address the actual words used which were determined as being defamatory of the Claimant. I also note that in Mr. Lynch’s witness statement filed on the 31st October 2003, he exhibits a copy of an article from the Searchlight newspaper dated 23rd August 2002 in which ... Dr. Gonsalves not only denies the allegations but printed copies of the government vouchers which show payment of the tickets for travel of himself and Mrs. Eloise Gonsalves only. [15] Counsel**

⁸Nathaniel France and Fitzroy Bryant v Kennedy Alphonso Simmonds, Civ. App No. 2 of 1985 (St Kitts & Nevis); The Gleaner and Dudley Stokes v Eric Anthony Abrahams, Privy Council App No. 86 of 2001; Vaughn Lewis v Kenneth Anthony Civ. App. No. 2 of 2006 (Saint Lucia); Murio Ducille v Robert Hoffman and others ANUHCv 1998/0151; Keith Mitchell v Steve Fassih and another Civ App No. 22 of 2003 (Grenada); Vance Amory v Hastings Daniel Claim No. 19 of 1999 (Saint Kitts and Nevis); Basedo Panday v Kenneth Gordon Privy Council No. 35 of 2004; John v MGN Ltd. [1996] 2 All ER 35.

for ...[BDS] despite the judgments of Alleyne J, Thom J and Barrow JA also persists in defending the allegations at paragraph 14 of his submissions where he states as follows:

“The Claimant repeatedly contends without more that the Defendants persisted in making serious allegations of corruption and criminality against him. Nothing could be further from the truth. Although the defences have been struck out the Court may take judicial notice of the fact that both Defendants were at pains to ensure that it was made clear, in the pleadings and at all times before the Court and right up to the First Defendant’s appearance before the Court of Appeal, that they never intended to imply that the Claimant was corrupt.” (My emphasis)

[21] Later, at paragraphs 21, 24 and 25 of her judgment the master stated thus:

“Aggravated damages are payable because of the way in which the defendant has behaved to the claimant. In this instance it is clear that the Defendants even after they knew of the falsity of the defamatory statements, persisted in maintaining that the statements made were not defamatory but out of concern for the economy. ...the Defendants for six years have not addressed the fact that the allegations that the State paid for the tickets for the Claimant’s mother and daughter are simply untrue....[24] It is my humble opinion that the behaviour of the Defendants entitles the Claimant to an award of aggravated damages. It is clear that a repetition of the defamatory statements even before another court after determination and a refusal to accept the judgment of the court as to the meaning of the actual words used to the extent that both Defendants still seek to justify their behaviour is an aggravating factor....[25] ... I find an aggravated award in the sum of \$160,000.00 to be reasonable compensation.”

[22] The master also took into account the fact that the appellants had tendered no apology to the respondent in determining the sum awarded for aggravated damages.

The Complaints in the Appeal

[23] The grounds of appeal for the appellant Mr. Elwardo Lynch complain that:

“(1) The finding of the Master that Mr. Hans King in his witness statement of 3rd October 2007 tells of receiving telephone calls from his mother in the United States and his brother in Barbados both of whom heard the allegations cannot be supported by the evidence.

(2) The Master erred in law in holding that the behaviour of the Defendants entitles the Claimant to an award of aggravated damages.

(3) Further or in the alternative the award of \$160, 000.00 in aggravated damages against each of the Defendants is unreasonable and excessive in all the circumstances.

(4) The findings of the Master that the First Defendant in his submissions on the assessment of damages repeated the defamatory statements which were determined in the Claimant's favour before in other courts, that he refused to accept the judgment of the court as to the meaning of the actual words used and that he sought to justify his behaviour as an aggravating factor cannot be supported by the evidence.

(5) The Master erred in law in awarding interest of 3% up to the date of judgment and/or statutory interest at the rate of 5% after judgment.

(6) The award of costs in the sum of \$33,000.00 and \$22,000.00 against each of the Defendants is excessive in all the circumstances."

[24] The appellant BDS Limited ("BDS") alleges that the master: (a) erred in law when she ordered BDS to pay part of the Claimant's costs in the Court of Appeal for an interlocutory appeal to which the appellant was not a party; (b) misdirected herself by finding that the conduct of BDS in the proceedings before her was of such a nature to have aggravated damages awarded against BDS; (c) awarded excessive and unreasonable damages against BDS; and (d) erred in law in awarding interest of 3% from the date of the filing of the claim form to judgment.

[25] Learned senior counsel Mr. Astaphan conceded that the master erred in relying on the contents of the witness statement of Hans King which was withdrawn by the appellants, and therefore not evidence at the assessment hearing. Mr. Astaphan also accepted in principle that damages should not be duplicated; and that an award of interest on interest is improper. These concessions have effectively narrowed the issues to be determined in the appeal. It then becomes a question of what matters the master could properly have taken into account in arriving at the amount of damages; and whether, bearing these matters in mind, the award should be disturbed. Before addressing these issues, it is prudent to remind ourselves of our jurisdiction.

The Jurisdiction of the Court of Appeal

- [26] The learned master had no advantage of seeing Dr. Gonsalves or any of the other witnesses testify as she determined the assessment on the witness statements and submissions that were before her. Guiding principles concerning this court's latitude in this appeal, exist in the cases **Flint v Lovell**⁹; **Kerry v Carter**¹⁰; **Redburn v Kemp**¹¹; and **Alphonse v D. Ramnauth**¹². The appellate jurisdiction for appeals concerning damages was considered in the leading case **Flint v Lovell** and explained by Greer L.J in the following manner:

"I think it right to say that this court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

- [27] In **Kerry v Carter** Lord Denning extended the circumstances in which the Court of Appeal will interfere with an assessment by a judge where he stated:

"This court adopts in regard to apportionment the same attitude as it does to damages. We will interfere if the judge has gone wrong in principle, or has shown to have misapprehended the facts; but even if neither of these is shown, we will interfere if we are of the opinion that the judge was clearly wrong."

It was also stated in **Redburn v Kemp** by Edmund Davies L.J that if the court of appeal thinks that the apportionment of damages are radically wrong then it ought to interfere even though the error cannot be pinpointed.

⁹ [1953] 1 K.B. 354 (C.A.) at pages 359 to 360.

¹⁰ [1969] 3 All E.R. 733 (C.A.) at page 725 to 726.

¹¹ [1971] 3 All E.R. 249 (C.A.) at page 253H.

¹² [1991] 1Q.B. 153 C.A.

[28] Gordon JA in **Vaughn Lewis v Kenny Anthony**¹³ also adopted and applied the following principles expressed in **Alphonse v D. Ramnauth** to an appeal against damages in a defamation action:

" ...it must be recognized that the burden on the appellant who invites interference with an award of damages that has commended itself to the trial judge is indeed a heavy one...But we are powered to interfere with the award if we are clearly of the opinion that, having regard to all of the circumstances of the case, we cannot find any reasonable proportion between the amount awarded and the loss sustained, or if the damages are out of all proportion in the circumstances of the case...The award of damages is a matter for the trial judge's discretion and unless we can say that the judge's award exceeded the generous ambit within which reasonable disagreement is possible and was therefore clearly and blatantly wrong we will not interfere."

[29] It is clear then that in reviewing the award of damages made by the learned master, we should in general be reluctant to interfere with her award unless we come to the conclusion that the master has acted on some wrong principle of law, by taking into account some irrelevant factor, or leaving out of account a relevant factor, or has misapprehended the facts or law, or made a wholly erroneous estimate of the damage suffered, or if there is no reasonable proportion between the amount awarded and the loss sustained, or if the damages are out of all proportion to the circumstances of the case, or that her award exceeded the generous ambit within which reasonable disagreement is possible and was therefore clearly and blatantly wrong. Further, if this court thinks that the damages are radically wrong, it ought to interfere even if the error cannot be pinpointed.

Mitigation

[30] Learned counsel Mr. John submitted that the evidence and submissions on behalf of the appellants which the master erroneously mischaracterized as conduct which persisted in the defamatory allegations, were advanced by the appellants in order to negative express malice and the existence of any malicious motive on their part.

¹³ Civil Appeal No. 2 of 2006 (Saint Lucia).

He submitted that on the authorities of **Simpson v Robinson**¹⁴; **Pearson v Lemaitre**¹⁵; **Gatley on Libel and Slander**¹⁶; and **Keith Burnstein v Times Newspaper Ltd.**¹⁷ the appellants were entitled to rely on and make submissions on such evidence for the assessment of damages in order to disprove the existence of a malicious motive in their publication of the defamatory statements. The rule relating to the admissibility of such evidence was stated by Tindal C.J when he said in **Pearson v Lemaitre** that, "...either party may with a view to damages give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of the defamatory matter."

[31] **Gatley** sums it up in the following manner (at paragraph 33.46):

"Although it is no defence that the defendant did not intend to refer to the claimant, or intend the words to be understood in any defamatory sense, the defendant may urge in mitigation any facts which go to show that he honestly believed, and had reasonable grounds for believing, that what he said or wrote was true, although such belief is no defence in the absence of privilege."

[32] The Court of Appeal in **Burnstein** considered the extent to which evidence concerning the context in which the defamatory publication came to be made may be adduced in reduction of damages after the defence of fair comment was struck out and damages were being assessed. The defamatory publication was: that the claimant "used to organize bands of hecklers to go about wrecking performances of modern atonal music, particularly anything by Sir Harrison Birtwhistle." The contextual background material contained particulars establishing that the claimant was associated with a group called "The Hecklers" in 1994 and subsequently claimed to have been the group's co-founder; but in a letter to the Times dated 7th April 1994 the claimant disassociated himself from The Hecklers boorish tactics of shouting down the opposition; that FS, under the name of The Hecklers encouraged people to join him at a musical performance at the Royal Opera House on 14th April 1994 when they would be booing at the end; that there was no

¹⁴ (1841) 12 Q.B.D. 511.

¹⁵ (1843) 5 M&G 700 AT PAGE 719.

¹⁶ 10th Edition at pages 1014 to 1015.

¹⁷ Case No. A2/2002/0510 Royal Courts of Justice (Unreported Judgment) 20/12/2000.

interruption of the musical performance but there was some booing at the end, and the claimant was present in the audience and joined in the booing. The Court rejected the submission that to allow reliance on these particulars would be to plead specific facts in partial justification of the meaning advanced by the claimant, for the purposes of mitigating damages, which is not allowed. It was held that the Deputy Judge was wrong in excluding the particulars on which the defendants wanted to rely in reduction of damages.

[33] The Court stated (Per Lord Justice May at paragraph 42):

“For practical purposes every publication has a contextual background, even if the publication is substantially untrue. In addition the evidence which *Scott v Sampson*¹⁸ excludes is particular evidence of general reputation, character or disposition which is not directly connected with the subject matter of the defamatory publication. It does not exclude evidence of directly relevant background context. To the extent that evidence of this kind may also be characterised as evidence of the claimant’s reputation, it is admissible because it is directly relevant to the damage which he claims has been caused by the defamatory publication.”

[34] The Court went on to consider whether it should reduce the jury’s award of damages of eight hundred pounds and stated further: “To succeed, the defendants have to persuade us that if the limited background facts ... had been before the jury to explain the context of the defamatory publication and if the claimant’s additional evidence had been called, the jury’s award would have been less than £8,000.00. I am quite unpersuaded that the award would be lower.” Having regard to the approach of the court in **Burnstein**, it is necessary to state in some detail the nature of the appellants’ evidence that was before the master. Before doing this I must state that learned counsel Mr. Commissiong QC, for BDS adopted this and all of the other oral submissions made by Mr. John; and relied on his written submissions.

¹⁸ See footnote 10.

The Appellants' Evidence

[35] Five of the eight witness statements for the appellants that were before the master for the assessment of damages spoke only to the economic hardship and poverty that each deponent was experiencing at the time the defamatory statement was published. Only two of the eight witness statements dealt with the publication and/or the reason for the publication. The first witness statement of Mr. Lynch filed on 31st October 2003 while admitting that he was host of the radio programme called "New Times", did not admit publishing the defamatory words set out in the statement of claim. He stated:

"4. However it is a fact that during the month of August 2002 there appeared in at least one weekly newspaper named "Searchlight" (which is published in the aforesaid State with a wide circulation in St. Vincent and the Grenadines and in the Caribbean Region) a photograph depicting the Claimant kneeling like a supplicant and kissing the hand of Pope John, with his wife, his mother and his daughter and at least one member of the clergy looking on with a brief insert indicating that the Claimant had left the State on July 15th for an audience with the Pope and in the said photo he greets the Pope at his summer residence Castle Gondolfo...5. The Claimant did visit the Pope in Rome Italy with his wife and mother. The tickets were purchased through the offices of Irie Travel Services which at all material times were a privately owned travel agency. 6. An invoice was submitted and a claim made out and the sum of \$41,000.00 was paid to Irie Travel Services by the Treasury towards the cost of the airline ticket in respect of the said trip... 7. The Claimant travelled First Class. 8. The Claimant had proposed a wages and salaries restraint policy among the Government and public service employees including teachers, civil servants, police and nurses outlined in an address delivered by the Claimant at the Methodist Church Hall Kingstown on October 11, 2001..."

The witness statement continued with Mr. Lynch chronicling the austerity program that the respondent and his government had advocated and implemented for the State and Vincentians, and his opinion of the effect it was having on poor and unemployed Vincentians. Mr. Lynch exhibited documentary exhibits including 105 pages of an irrelevant address made by Dr. Gonsalves on 11th October 2001.

[36] Mr. Douglas De Freitas who is the Chief Executive Officer of BDS Limited made no admission to the content of the defamatory broadcast on 14th August 2002 while acknowledging that the New Times program was aired, stated:

"10. If Mr. Lynch made the statements that Dr. Gonsalves alleges he made and there was discussion on the issue then the Program would have been in keeping with the objectives of NICE Radio; that is to disseminate and stimulate discussion on issues giving a voice to the criticisms leveled at those who have conduct of public affairs by their political opponents and the people that they govern.¹¹ NICE radio subscribes to the view the purpose of criticism of politicians by their adversaries is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would do a better job of it than those presently holding office and that New Times by its nature will therefore be calculated to shake up or stimulate the electorate and get them thinking... 14. It is my experience from reading the national and regional newspapers and listening to the opinions expressed about politicians and lawyers that the present public perception held of them in St. Vincent and The Grenadines and in the region generally is such that statements like those Dr. Gonsalves alleges Mr. Lynch made can hardly lower him as a lawyer or politician in public estimation."

Mr. Defreitas exhibited excerpts of publications from the Saint Lucia Star of Saturday, 25th October 2003 which would not have assisted any of the appellants in the assessment of damages.

[37] Mr. Lynch made a subsequent witness statement filed on 21st November 2007 in which he dealt with the scope and range of the NICE RADIO FM station transmission, the history of his relationship with Dr. Gonsalves at the material time, and the contextual background in which the defamatory statement was made. He stated:

"4. Although aired throughout the State, transmission of the Program to some areas such as beyond the Dry River to the north of Saint Vincent, and as near as the Grenadine Island of Bequia continues to prove difficult, at most times. Further, I have been informed that NICE radio broadcast of programmes is received in some areas of the south of the Island of Saint Lucia. I do not have any knowledge that the broad cast of the New Times program is received in other islands within the Eastern Caribbean fold or, for that matter, the rest of the Caricom-Caribbean region. My recollection is that broadcast of the programme via the internet commenced in 2005.

5. I have known the Claimant in a personal professional capacity since the 1980's... Further I venture to say that I have never at any material time entertained any malice, ill feelings, contempt or disrespect towards the Claimant.

6. The Claimant has often stated in public that NICE RADIO FM commands only 2% percent of the listening populace. ..

7. On 14th August 2002 a caller to the Program made mention that the Prime Minister's wife, daughter and mother formed part of the delegation to travel to Rome to see the Pope, and that tickets were purchased from Irie Travel Ltd and paid for by the Treasury in the amount of \$41,000.00 ECD to facilitate the travel of those persons.

8. My reaction to the caller's statement was that rather than spend the \$41,000.00 to purchase travel tickets for the Prime Minister, his wife, daughter and mother to travel to Rome, such monies should be used instead to assist with alleviating the social and economic hardships being experienced by many people in the State.

9. I was of the view then that as those persons were to form part of the delegation traveling to Rome travel arrangements and other related expenses were to be borne by the government, through the Treasury vouchers...

10. I was never, whether at the material time or otherwise, motivated by mercenary intentions when I reacted to the statements made by the caller to the Program, as is alleged by the Claimant.

11. At no time did I deliberately nor maliciously set out in my reaction to the statements of the caller to tarnish the reputation of the Claimant so as to bring him into public ridicule, scorn and contempt, or falsely to accuse him of corruption and misconduct in public office.

12. ...

13. I did receive a letter from the law firm of Hughes & Cummings, alleging that I made certain slanderous statements against the Claimant about the purchase of air travel tickets for the wife of the Prime Minister, his daughter and his mother to travel to Rome and demanding that I make a public apology and pay as compensation for injury to his reputation the sum of \$250,000.000 as damages.

14. As I had only stated that the \$41,000.00 would have been better spent on improving social and economic conditions in the State instead of towards those airfares and did not harbour an intention to deliberately or otherwise tarnish and malign the reputation of the Claimant, I therefore considered the demand for compensation in the sum of \$250,000.00 as intended to intimidate me for being critical of the ULP Government; I did not accede to the requests in the correspondence.

15. In fact I held no malice against the Claimant and we remained on good speaking terms subsequent to the broadcast in question. I can recall us meeting at a number of public events where we would engage in friendly discourse"

[38] In a supplemental witness statement filed on 21st January 2008, Mr. Lynch stated that the internet segment of NICE Radio broadcasting of programs came into operation on 5th January 2005, and when NICE Radio began streaming on the internet. This witness statement established further that: "Subsequent to the

publication of the offending broadcast, general elections were held in this State on 8th December 2005, and the Unity Labour Party (ULP) the political party which the Claimant leads received a renewed mandate ...[from] the electorate and was returned to Government for a second five year term by an overwhelming mandate of 12 seats to 3 seats to the Opposition New Democratic Party (NDP)." Mr. Lynch also deposed in this witness statement about Dr. Gonsalves' numerous accolades, and prestigious awards he has received including those from the Caribbean Institute of Democracy, Taiwan, the UNESCO gold medal, the Presidential medal from the Anna G. Mendez University in Puerto Rico; and the numerous invitations he has received throughout the Caribbean region Africa, Malaysia and elsewhere to address international conferences and political meetings, all of which occurred after the publication of the defamatory statement. Mr. Lynch deposed that this established that Dr. Gonsalves continued to be held in high esteem by the electorate, and his reputation had not been sullied abroad in anyway by the publication of the defamatory statement. In particular, the CARICOM Secretary General Dr. Carrington in an article dated 10th February 2006 has lauded Dr. Gonsalves as "the embodiment and distillation of the region's pride, its passion, dedication, intelligence, strength of character, courage and independent and principled voice, and hails him as a continuing source of inspiration and pride to his political peers". It was therefore inconceivable that Dr. Gonsalves' reputation sustained damage due to Mr. Lynch's defamatory statement in the New Times broadcast on NICE Radio on 14th August 2002 Mr. Lynch asserted.

[39] It is quite clear from the master's treatment of the appellants' witness statements and submissions on damages that she did not consider whether or not any of the appellants' evidence could mitigate the damages. She certainly did not recognize the submissions of counsel as touching on mitigation of damages. The absence of any discussion or findings concerning mitigation of damages and the mitigating value of the appellants' evidence equates with a failure to consider whether the appellants had mitigated the damages in my view. In all fairness to the master, she did not have the benefit of the cases cited by Mr. John in support of this issue,

and it does not appear from the submissions on damages that she was assisted by counsel on either side with this aspect of the law. Notwithstanding this, I am of the view that the master should have at least acknowledged that the damages could be mitigated by the appellants; and then pronounce on whether the evidence before her was of persuasive value for the purposes of mitigating the damages to be awarded. However, it does not follow that because the master made this error her award in damages must be disturbed.

[40] Learned senior counsel Mr. Astaphan pointed to the highly irrelevant political allegations contained in the appellants' witness statements and documents which could provide no basis or motive for making the slanderous statements which were rooted in partisan politics. He submitted that the appellant Mr. Lynch is a political activist who operates a paid political radio program on behalf of the New Democratic Party of St Vincent & the Grenadines and the slanderous statements were propelled into the public domain by an unadulterated, malicious and politically motivated personal attack on the reputation and character of Dr. Gonsalves. Mr. Astaphan contended that even if Mr. Lynch did not know whether the allegations were true or false, he was reckless in the extreme in publishing the allegations; and after he became aware that the allegations were false, he displayed nothing but contempt for the published documents which established the facts long before the litigation.

[41] I agree with Mr. Astaphan's submissions. The existence of the summary judgment and the confirmation of Thom J's ruling by the Court of Appeal means that the master was obliged to accept as a fact that the appellants acted with malice unless the appellants disproved the existence of deliberate malice which would mitigate the damages. For the purposes of mitigation, in considering whether the evidence and submissions of the appellants' counsel demonstrate that the appellants published the statements without deliberate malice, the master would be entitled to draw inferences from the language of the slanderous statements itself and the circumstances surrounding the publication of the comment. I am of the view that none of the evidence in the witness statements of Mr. Lynch and Mr. Defreitas

disproves actual malice, or negatives the existence of any malicious motive on their part. The marginal relevance of this contextual background evidence if any, strongly confirms the true political basis (which has been supplied by Mr. Astaphan) for the slanderous statements that were falsely and maliciously published by the appellants.

- [42] Mr. Lynch's self-serving assertions that he holds no malice against Dr. Gonsalves is not a fact which goes to show that he honestly believed, and had reasonable grounds for believing that what he said on the air was true. Neither is it any part of the contextual background. Mr. Lynch's assertions as to his respect for Dr. Gonsalves and the polite relationship he has had with Dr. Gonsalves following the publication of the defamatory statement cannot assist the appellants for the same reasons. That evidence is irrelevant for the purpose of mitigating the damages. Had the master considered the mitigation value of the appellants' evidence and submissions she would have been entitled to find that the appellants had not disproved that they acted with actual malice which resulted in increased mental distress for Dr. Gonsalves.

Persistent Conduct and absence of an Apology

- [43] Learned counsel Mr. John took issue with the master's finding that the appellants in the conduct of their case in the High Court and the Court of Appeal had persisted in defending the slanderous allegations about Dr. Gonsalves, repeated the defamatory statements before other courts after Alleyne J had ruled as to the meaning of the actual words in seeking to justify their behaviour; and used the absence of an apology from the appellants as conduct from Mr. Lynch which persisted in maintaining that the statements made were not defamatory but out of concern for the economy. Mr. John referred to the conduct of the defendants in the cases of **Keith Mitchell v Fassihi**¹⁹ and **Simmonds v France and Bryant**.²⁰

¹⁹ Grenada (Unreported judgment) Civ. Appeal No. 22 of 2003 para 12: The defendants printed the same libel in a second and subsequent issue of the newspaper without proof that the libelous statements were true and failed to offer an apology to the appellant.

He submitted that unlike the defendants in these two cases, the appellants did not repeat publication of the defamatory statements or behave as those defendants. In the absence of such comparable conduct of spite and malevolence, the master's findings cannot be supported by the evidence, Mr. John submitted.

[44] The master at paragraph 12 of her judgment expressed disappointment that though counsel for Dr. Gonsalves had approved the court's suggestion that the appellants issue an apology, the appellants' counsel had some difficulty with the form an apology should take. The master stated: "I must express difficulty and disappointment in accepting that Counsel for the Defendants in the face of that olive branch could ...[inure] to their... [clients'] benefit, could not have constructed and obviously did not construct a suitable apology at that time or at all." Mr. John submitted that there was no evidence to support this finding of persistence; and in fact an apology and \$90,000.00 was offered by the appellants, but was refused by Dr. Gonsalves. The problem he said was not with the form of the apology, but the difficulty encountered was in persuading Dr. Gonsalves to accept the quantum of damages that was being offered.

[45] On the other hand, Mr. Astaphan S.C. relied on the submission previously stated. He submitted further that the appellants' unsustainable pleadings protracted the litigation after the allegations were publicly established as false in the Searchlight newspaper publication dated 23rd August 2002. He said that, throughout the various litigation proceedings mentioned by the master, the appellants refused to accept that they had no sustainable defences. Mr. Astaphan submitted that the master was correct in finding that the manner in which they conducted their defences throughout the protracted litigation was an aggravating factor to be taken into account.

²⁰ St. Kitts & Nevis (Unreported judgment) High Court Civil Suit No. 34 of 1984 Singh J and on appeal Civil Appeal No.2 of 1985. See statement of Robotham CJ : "The recklessness and persistence of the appellant/defendant Bryant in forwarding his relentless attack on the plaintiff was further exhibited when having been served with the writ in this case...he wrote another column...[repeating the defamation]". Bryant also in court in the conduct of his defence cross examined the claimant for 6 hours, withdrew in favour of Dr. Browne, and the evidence shows that Bryant pressed on in the vilification of the claimant regardless of the consequences.

[46] I note that though Mr. John has complained of the master's findings concerning the issuing of the apology after the "olive branch" was extended in the absence of any evidence to substantiate the master's observations, he has sought to literally give evidence by way of his submissions concerning the reason why the apology was not forthcoming. Mr. Astaphan has not addressed this matter.

[47] Neither Dr. Gonsalves nor the appellants pleaded any facts pertaining to the absence of an apology. However, Mr. Lynch explained this in his second witness statement.²¹ That is the evidence that was before the master for the assessment. The reason advanced by Mr. Lynch for failing to make amends is not a convincing one in my view. It manifests remarkable ignorance of the law, and/or contemptuous defiance after publishing the slanderous statements, and becoming aware that the statements were untrue. In **Sutcliffe v Pressdram Ltd**,²² Nourse LJ gave some categories by examples of the type of conduct for which aggravated damages could be awarded based on the defendant's conduct which I endorse. Aggravated damages could, he stated, be awarded for: "**failure to make any or any sufficient apology and withdrawal**; a repetition of the libel; **conduct calculated to deter the plaintiff from proceeding**; persistence by way of prolonged or hostile cross-examination of the plaintiff or in turgid speeches to the jury, **in a plea of justification which is bound to fail**; the general conduct whether of the preliminaries or of the trial itself in a manner calculated to attract further wide publicity; and persecution of the plaintiff by other means." (My emphasis) Further, a plaintiff's resentment at a failure of a defendant to offer an adequate apology will properly add to the hurt to the plaintiff's feelings: see **Rantzen v Mirror Group Newspapers**²³

[48] The appellants did not republish or repeat the slanderous statements outside of the litigation proceedings, or cross-examine Dr. Gonsalves at any stage of the litigation proceedings. The irrelevant content of their witness statements and documentary exhibits and their counsel's submissions to the court in their attempts

²¹ See the details of this in paragraph 14 of his witness statement set out at paragraph 35 of this judgment.

²² [1990] 1 All ER 269.

²³ (1986) Ltd [1994] QB 670.

to explain the slanderous statements borders on portraying unrepentance and arrogance. To date they have not publicly acknowledged that the slanderous statements were not true. They defended the indefensible, while attempting to explain their motive for publication of the falsehood in the litigation proceedings. The appellant Mr. Lynch, without merit appealed Thom J's ruling and this clearly formed part of the process to deter Dr. Gonsalves from proceeding, in my view.

[49] The master's conclusions were guided by Lord Hoffman's observations in **The Gleaner Company and Dudley Stokes v Eric Abrahams**.²⁴ In presenting the respondent's case before the Board, a passage, though not expressly repeating the libel, complained that the Court of Appeal struck out their defences and thus deprived them of the opportunity to prove the relevant facts by: seeking discovery of the respondent's bank statements and other records, issuing subpoena for the production of relevant contractual documents, calling Mr. Gentles as a witness, cross-examining the respondent and giving him notice to admit relevant facts, Lord Hoffman stated: "**Their Lordships regard this passage as nothing more than a repetition of the libel under cover of absolute privilege and cannot understand how it could have been thought likely to induce their Lordships to reduce the damages.**" (My emphasis)

[50] This authority strongly suggests that for the purpose of a finding that the appellants repeated the defamatory statement, where the appellants have sought to assert that the defamatory statement is true in pleadings, or other material before the court, submissions and any material which for mitigation or other purposes complain that the defences were struck out and thus deprived the appellants of the opportunity to justify the defamation may be regarded by the court as a repetition of the defamation. This was not the position in the instant appeal. Unlike the situation in **The Gleaner v Abrahams** case, neither Mr. Lynch nor BDS Limited ever asserted that the slanderous statements made by Mr. Lynch were true; or repeated the allegation on the basis of it being true. It all depends on the nature of the defence being advanced in my view.

²⁴ Privy Council No. 86 of 2001.

[52] It seems to me that in the instant appeal, a distinction must be drawn between republishing the slanderous statements outside of court and addressing the pleaded allegations of Dr. Gonsalves in witness statements and submissions during court proceedings. The latter would form part of the general conduct of the defendants during the litigation in pursuing an unsustainable defence. Each case depends on its own set of circumstances as the master pointed out. Notwithstanding this, the conduct of the appellants falls within some of the examples Nourse L.J. identified. In this case, there was also evidence of real and persistent malice upon which the Master could properly base her finding of aggravated damages. The conduct of the appellants was definitely deserving of the master's conclusion that aggravated general damages should be awarded against them.

Proving General Damages

[53] The master's award of \$160,000.00 for each appellant would be inclusive of an unstated amount of general damages. Learned counsel Mr. John contends that the master wrongly assumed that "an allegation of abuse of government funds for his [Dr. Gonsalves] personal gain would have a negative impact which would go to the root not only of governance but also to his reputation as a regional stalwart. The words would have led all who heard about them to believe that Dr. Gonsalves used the consolidated fund of St. Vincent and the Grenadines to sponsor his daughter's and mother's trip to Rome." He submitted that nowhere in Dr. Gonsalves' witness statement did he testify that as a result his reputation was diminished in anyway whatsoever as an Attorney at Law, as Prime Minister and Minister of Finance of the State, or regionally in the perception of the Caricom Heads of Government and Bureau for which he was spokesman at the time, or as a member of the Eastern Caribbean Central Monetary Council, and a past lecturer of the University of the West Indies. The master singled out these credentials of Dr. Gonsalves from his impressive array of academic, political and international achievements and appointments. Neither did Dr. Gonsalves testify that he

suffered any retardation of his substantial and extensive responsibilities with which he was charged at the material times.

- [54] Mr. John contended also that the submission by Dr. Gonsalves' counsel that "The tag of corruption, however unfounded, had a direct effect of his reputation in the region and internationally" has no evidential basis. There was no serious effect on Dr. Gonsalves career as a lawyer, or as a notable intellectual figure regionally, and the fact that his government got a second term in office by an overwhelming majority and he is still Prime Minister is a significant mitigating factor showing that the allegations did not seriously affect his reputation. This calls for a review of the evidence tendered for Dr. Gonsalves.

The Evidence for Dr. Gonsalves

- [55] Four of the claimants' witness statements which were filed on 18th November 2003 addressed the falsity of the defamatory statement and the fact that the Treasury paid \$41,000.00 to Irie Travel Agency for the cost of the airline tickets for the respondent and his wife only. Another filed on 18th November 2003 addressed the publication of the defamatory statement.
- [56] Dr. Gonsalves' witness statement spoke to his academic and professional qualifications, his political office and portfolios, and his work experience; and addressed the defamatory statement of the appellants in the following manner:

"5. ...There is no question in my mind that the Defendants published these falsehoods knowing that they were false and were motivated by the attempt to paint me with the broad brush of corruption and secure some political gain or profit.

6. I became extremely upset and distressed when I heard the allegations. Indeed, when I met with my mother and family they too were deeply emotional and disturbed at the allegations. My daughter became quite distraught and I had to explain the facts to her. I remember my son Camillo, calling me to tell me that he heard the allegations and that he could not believe that I would do something like that. I had to explain to him that the allegations were false. Seeing my family go through that kind of distress caused me even more anguish and pain.

[Paragraph 7 of the witness statement relates the embarrassment that his wife and daughter went through in continuously having to defend the respondent against the lies in the defamatory statement.]

8. The Defendants' allegations that I corruptly or dishonestly used state funds to pay for my daughter and mother's airline tickets to Rome caused sensation in St. Vincent and was reported in the weekly newspapers. I was forced to make several public statements denying the allegations and to publicly declare that I intended to sue to protect my reputation. Also, every where I went in St. Vincent & the Grenadines, I was confronted by the allegations and had to repeatedly state the facts sometimes with difficulty. The idea was planted in the minds of the people that I had dishonestly used state funds for myself and family. (9 to 12 ...)

13. The First Defendant's radio program broadcasts by the Second Defendant reaches as far as the south of Saint Lucia and is broadcast on the Second Defendant's website on the Internet. I know that to be the case because when I travelled to Saint Lucia I was questioned about the allegations by Saint Lucians who had heard them on the radio station owned by the Second Defendant. Also, many Vincentians and other persons I met on some of my trips overseas told me they heard the allegations on the Internet which were broadcast by the Second Defendant on its website. They all expressed concerns at the allegations and I had to repeatedly explain the facts. That further aggravated my emotional stress and anxiety.

(14 and 15 ...)

16. The First Defendant has used and the Second Defendant has permitted others to use its radio station and website to slander me on several occasions. As a result, I have caused my lawyers to institute proceedings against them, namely Claim Number 477/06: Gonsalves v Daniel Cummings & BDS Limited, and Claim Number 64/07: Gonsalves v Mathew Thomas & BDS Limited.

(17 to 19 ...)

20. In the premises, I respectfully ask that this Honourable Court award substantial damages against the Defendants for their deliberate and calculated attack on my character and reputation on the footing of aggravated and exemplary damage"

[57] Mr. Noel Jackson who is the General Secretary of the National Workers Movement, stated in his witness statement that he had personally heard the defamatory broadcast. He stated:

" 2. ... I was shocked and outraged when I heard this allegation and presumed that the First Defendant had the evidence to prove that the allegation was true.

3. This allegation that the Claimant had used state funds to pay his daughter and mother's airline tickets to Rome caused uproar in Saint

Vincent and the Grenadines. I read and heard of reports on the allegation on local newspaper, SVG Television and as I recall CANA news. 4. The allegation also caused great consternation and anger among my union members and workers. Several of them approached me chastising the Claimant and demanding that he should do the honourable thing and resign. Wherever I went I became embroiled in discussions surrounding the allegations and the general comment was how could "the Comrade" do such a dishonest thing? The Claimant is known as "the Comrade". I also received telephone calls from family in the United States expressing shock that the Claimant would do such a corrupt thing.

5. I was and remained outraged and deeply disturbed by the allegation and public fallout because so many believed that the First Defendant had said and were condemning him as dishonest or corrupt even though he had repeatedly denied the allegation. Many were calling for his resignation as Prime Minister and Minister of Finance. ...I never heard the Defendants apologize or retract the allegation made against the Claimant. Their failure to apologize have led ...myself to believe that they must ...[have] had evidence to prove the allegation."

[58] Having reviewed this evidence along with the evidence of Mr. Defreitas and Mr. Lynch I have concluded that there is some merit in the submissions of learned counsel Mr. John. The master in fact accepted that the live broadcast on NICE Radio Station had limited transmission broadcast in St. Vincent and the Grenadines and she acknowledged that it was not broadcasted on the internet. The master erred in relying on the contents of a document not in evidence i.e. Hans King's witness statement. The evidence of Mr. Jackson cannot be relied on as Dr. Gonsalves did not sue the appellants in respect of third party republications of the slander by SVG Television or CANA news and there is no evidence that the appellants intended such republication.²⁵ For the same reason Dr. Gonsalves' evidence about the republications in the newspapers ought not to be taken into account in my view. There was clear evidence therefore that the slander was published in Kingstown and its immediate environs and in the south of Saint Lucia by the appellants.

²⁵ See: McGregor on Damages 14th ed at paragraphs 1389 to 1390. The rule in *Ward v Weeks* (1830) 7 Bing 211 establishes that a spontaneous and unauthorized communication of a slander repeated by a third party cannot be considered as the necessary consequence of the original uttering of the words. There are 4 exceptions to this rule established by *Speight v Gosnay* (1890) 60 L.J.Q.B. 231 (CA); and none of the exceptions have been established in the present case.

[59] The master had regard to the nature and extent of the reputation enjoyed by Dr. Gonsalves before he was traduced. The appellants did not refute the evidence supportive of the high reputation enjoyed by Dr. Gonsalves. The slander did have some negative impact on his reputation and integrity as some union members who obviously heard and believed the slander regarded him as dishonest and were calling for his resignation as Prime Minister and Minister of Finance. The evidence does not disclose that his "reputation as a regional stalwart" suffered. Dr. Gonsalves did suffer injury to his feelings in his travels to Saint Lucia, and throughout St. Vincent and the Grenadines. Every time that he had to correct the allegation by explaining would result in additional distress and injury to his feelings. I am of the view however, that the potential damage to his reputation was transient and was also minimized.

[60] Some of those persons who heard Mr. Lynch publishing the false slander and read or heard of the correct version of the event published in the Searchlight by Dr. Gonsalves, and or explained by Dr. Gonsalves and his family members, would realize and accept that there was no truth to the slanderous allegations. Others, despite these explanations would remain unconvinced. That is the nature of politics. A politician depends very much on the popular perception of his or her reputation. Damage to it can lead to diminished political advancement within support groups. It can lead to political demise. Fortunately for Dr. Gonsalves, it appears from the outcome of the subsequent elections in St. Vincent and the Grenadines that the damage to his reputation was substantially rehabilitated at the date of the master's assessment. The master did take this into account at paragraph 22 of her judgment. Damages must be presumed, since the slanderous allegation involved the commission of a criminal offence punishable with imprisonment. Those who have high and distinguished profiles as Dr. Gonsalves should receive a higher award than a person similarly defamed with a lesser public profile. These are well settled principles. Having regard to my analysis and conclusions of the master's judgment I am of the view that that portion of the

master's award for injury to reputation though unstated by the master, could be 30% more or less of the total award she made for aggravated general damages.

[61] The other relevant element of ordinary compensatory damages is for injury to the feeling of Dr. Gonsalves. In **Cassell and Co Ltd. v Broome**²⁶ Lord Diplock explained that: "The harm caused to the plaintiff by the publication of a libel upon him often lies more in his own feelings, what he thinks other people are thinking of him, than in any actual change made manifest in their attitude towards him. A solatium for injured feelings, however innocent the publication by the defendant may have been, forms a large element in the damages ... even in cases in which there are no grounds for 'aggravated damages'..."

[62] I have already identified the factors which the master was entitled to and did take into account as aggravating factors which would increase the component part of the general damages for injury to Dr. Gonsalves' feelings at paragraphs 41 to 49 above. One of the most hurtful factors to his feelings was the appellants' failure to apologise publicly. As I stated before, every time that Dr. Gonsalves had to nail the lie would also have aggravated the hurt to his feelings. It follows from the previous discussion that the unstated sum that the master awarded for aggravated injury to his feelings could represent approximately 70% of the total award.

[63] Applying a percentage to the elements for compensatory general damages is not a principle or rule. It is merely a convenient approach I have utilized, having reviewed the master's treatment of the various aggravating factors in making the award in light of Lord Diplock's explanation in **Cassell v Broome**.

Comparative Awards

[64] I accept the submissions of Mr. John that in determining the quantum of damages to be awarded it was preferable for the master to consider parallel awards for aggravated general damages in our jurisdiction since the circumstances relevant

²⁶ [1972] AC 1027 at page 1125.

to the social and economic conditions in the islands of the OECS are relevant and critical in assessing such damages. Mr. John complains that the master was influenced by the awards made in cases from Trinidad and Tobago and Jamaica in deciding on the quantum of damages.

[65] The courts in the OECS have awarded damages to several heads of government over the years in defamation suits brought by them for damage to their reputation because of defamatory statements made by others.

[66] In **Compton v Crusader Caribbean Publishing Co.**²⁷ the Premier of Saint Lucia Mr. John Compton was awarded \$60,000.00 by the trial judge for a libel published of him in the Crusader Newspaper. The Court of Appeal reduced this sum to \$35,000.00 on the ground that the damages were so excessive that no jury could reasonably have given that award. There was no sustained attack on Mr. Compton by the defendant, Mr. George Odlum and the libel was based on a factual sale of land. The defence was that the publication was a fair comment on a matter of public interest.

[67] In **France and Bryant v Simmonds**²⁸ the Prime Minister of the Federation of Saint Kitts and Nevis was awarded \$75,000.00 as compensatory damages including aggravated damages for the libel published in the Labour Spokesman on 23rd May 1981 by the defendant Mr. Bryant who was a former Attorney General and a practicing Attorney-at-Law who knew that his conduct was wrongful, and that the remedy for such conduct was an action for defamation. There was no factual basis for Mr. Bryant's repetition of the libel in his commentary. The evidence shows that he pressed on with his vilification of the Prime Minister Mr. Simmonds even in court during the trial regardless of the possible consequences. Robotham C.J. compared the award of \$35,000.00 in the **Compton** case in 1978 with the award to Mr. Simmonds and concluded that it was not excessive.

²⁷ (Saint Lucia Unreported judgment) Civil Appeal No. 9 of 1977.

²⁸ (Saint Kitts and Nevis Unreported judgment) Civil Appeal No. 2 of 1985.

[68] The case **Vaughn Lewis v Kenny D. Anthony**²⁹ involved two former Prime Ministers of Saint Lucia. At a political meeting, Dr. Lewis who was then leader of the opposition spoke slanderous words of Dr. Anthony the then Prime Minister at a political meeting with a small crowd of about 100 people. He issued an apology to Dr. Anthony and his defences included fair comment on a matter of public interest made without malice and good faith and qualified privilege. The trial judge awarded \$60,000.00 to Dr. Anthony for damages which included aggravated and exemplary damages. The Court of Appeal set aside the award for exemplary damages and substituted a global award of \$45,000.00.

[69] Also, in **Keith Mitchell v Steve Fasshi and others**³⁰ the then Prime Minister of Grenada was libeled in the "Grenada Today" newspaper twice in an article written by Mr. Fasshi which accused the Prime Minister of using his office to harbour and assist criminals, having his election campaign financed by criminals, and using public monies to set up private family businesses, and appointing criminals as Honorary Councils and Ambassadors at large among other accusations. The respondents did not file a defence or issue an apology or retraction. The master assessed damages and awarded \$100,000.00 as general damages including aggravated damages, and refused an award of exemplary damages. On appeal by the Prime Minister who was dissatisfied with the level of the award and the failure to award exemplary damages it was argued that the master did not take into account the repetition of the libel. The Court of Appeal dismissed the appeal against the award of \$100,000, having found that the master did consider that Mr. Fasshi had persisted in his allegation. An award of \$50,000.00 as exemplary damages was made based on the Court's finding that the respondents were contemptuous of any sanction that the law might provide and that compensatory damages even augmented by an element of aggravation was an inadequate remedy in this case.

²⁹ (Saint Lucia Unreported judgment) Civil Appeal No. 2 of 2006.

³⁰ (Grenada Unreported judgment) Civil Appeal No. 22 of 2003.

[70] Mr. Astaphan S.C. contends that the awards made in the abovementioned comparable cases were not based on the circumstances existing in the instant case. He commended the Privy Council decision in **Panday v Gordon**³¹ as the guiding light for an increased award. In the **Panday** case the Privy Council refused to interfere with an award of TT\$300,000.00 substituted by the Court of Appeal for the trial judge's award of \$600,000.00 in a defamation action brought by media mogul Mr. Gordon against the then Prime Minister Mr. Panday. The Privy Council approved of the rationale given by Hammel-Smith JA for "lifting the bar" although previous awards in that jurisdiction have tended to be on the conservative side over the years. The rationale was that times have changed, and the press no longer exhibits the restraint normally associated with responsible journalism. Consequently the Court has raised the bar in Trinidad and Tobago since 1983 in **Solomon v Trinidad Publishing Co Ltd**³²

[71] Mr. Astaphan submitted also that apart from the aggravating factors previously mentioned and considered by the master, the Court ought to send a message to persons who use the media as a platform to launch unwarranted allegations and attacks of corruption and criminality against public officials.

[72] The master did take into account the deterrent effect that the award should have apart from being compensatory. At paragraph 5 of her judgment she reminded herself that "The damages must be sufficient to demonstrate to the public that the plaintiff's reputation has been vindicated. Particularly if the defendants has not apologized and withdrawn the defamatory allegations, the award must show that they have been publicly proclaimed to have inflicted a serious injury"³³

Conclusions

[73] In my view, the errors that were made by the master concerning the extent of the publication and the effect of the slander on the reputation of Dr. Gonsalves must

³¹ [2005] UKPC 36.

³² (Unreported) Civil Appeal 125 of 1987 of the Court of Appeal of Trinidad and Tobago.

³³ *The Gleaner and Dudley Stokes v Eric Anthony Abrahams P.C.* Appeal No 86 of 2001 Per Lord Hoffman.

register in a reduction of the amount awarded for injury to his reputation. Though the sum awarded for injury to reputation was not stated, allowing 30% of the global award as the sum for injury to reputation, I would reduce that sum by \$20,000.00. I see no reason to interfere with the rest of the master's award even where it may appear that she has lifted the bar. The appellants are therefore successful to the extent that the global award is reduced to \$140,000.00.

- [74] On the authority of **Greenlands v Wilmshurst**³⁴ the master obviously erred in making separate awards for each of the appellants. What Dr. Gonsalves is entitled to receive is a sum representing the damage that he has suffered from a single wrong inflicted by both Mr. Lynch and BDS Limited. The award of \$140,000.00 for general damages including aggravated damages to the respondent is to be paid by both appellants who are joint tortfeasors.
- [75] The master's award relating to interest must also be set aside. The respondent would be entitled to interest on the judgment debt at the rate of 5% from the date of the master's order which is 26th November 2008.
- [76] The master's award for costs in the claim was prescribed costs under Part 65.5(1) of **CPR 2000** which in keeping with Appendix B would now be reduced to \$30,000.00.
- [77] In accordance with the Court of Appeal order of 18th September 2006 the costs in that appeal is two thirds of \$30,000.00 which is \$20,000.00 to be paid by the appellant Mr. Lynch only.
- [78] The general rule is that the Court of Appeal must order the unsuccessful party to pay the costs of the successful party: CPR 64.6(1). However the Court may make no order as to costs having regard to all the circumstances including those set out in CPR 64.6(6). Although the appellants have been successful in their appeals I would make no order as to costs because of the conduct of the appellants both

³⁴ [1913] 3 K.B. 531: Per Lord Hamilton.

before and during the litigation proceedings. The appellants were unreasonable in raising the defences that were struck out and the respondent has succeeded on the claim though not succeeding in this appeal. For these reasons I would make no order as to costs.

[79] In summary, the result of the appeals are that the appellants' appeals are allowed to the extent that the order of the master made on 24th November 2008 is set aside and the following order substituted:

IT IS HEREBY ORDERED THAT

- (a) The appellants Elwardo Lynch and BDS Limited jointly and severally do pay the respondent Ralph E. Gonsalves assessed damages in the sum of \$140,000.00 and prescribed costs of \$30,000.00 on the claim.
- (b) The appellant Elwardo Lynch do pay the respondent Ralph E. Gonsalves costs in the Court of Appeal pursuant to the order made on 18th September 2006 in the sum of \$20,000.00.
- (c) The appellants do pay interest on the judgment debt at the statutory rate of 5% from the date of assessment 26th November 2008 until full and final payment.
- (d) There be no order made as to costs in these appeals.

Ola Mae Edwards
Justice of Appeal

I concur.

Janice M. Pereira
Justice of Appeal

I concur.

Frederick Bruce-Lyle
Justice of Appeal [Ag.]