REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2016-03205**

BETWEEN

RICARDO ERIC CHARLES

Claimant

AND

CCN TELEVISION LIMITED

1st Defendant

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

2nd Defendant

<u>Before the Honourable Mr. Justice V. Kokaram</u>

Date of Delivery: Friday 27th July, 2018

Appearances:
Mr. Earle Martin James instructed by Mr. Tyril Boudeth for the Claimant

Mr. Faarees F. Hosein instructed by Mr. Carolyn Ramjohn-Hosein for the First Defendant

Mr. Brenston Francois instructed by Ms. Ryanka Ragbir for the Second Defendant

JUDGMENT

*"Falsehood flies, and truth comes limping after it so that when men come to be undeceived, it is too late; the jest is over, and the tale hath had its effect: like a man, who hath thought of a good repartee when the discourse is changed, or the company parted; or like a physician, who hath found out an infallible medicine, after the patient is dead."-**Johnathan Swift**[1]*

1. The false news that the Claimant, Ricardo Eric Charles, was a "Most Wanted man" for having committed a crime, "flew" over the Defendants' live and recorded television broadcasts on their crime prevention television programme "Beyond the Tape". On several

[1] The Examiner No XIV (Thursday 9th November 1710)

occasions in May 2015 the Claimant's photograph was beamed on these programmes in its "Most Wanted" segment together with printed words describing him as a wanted man for an outstanding warrant on the criminal charge for driving without a driver's permit. This together with the spontaneous commentary by the show's host suggested that the public's assistance was needed to find this person who was wanted by the police on that outstanding warrant. The truth that the Claimant was neither a suspect nor in any way associated with that charge, far from "limping" after the false news, was never published by the Defendants.

2. The Defendants' publication was an error. There was another person carrying the same name who was of interest to the police. It was a case of publishing the right name but wrong image and neither Defendant has sought to justify the publication as a true statement. The Claimant attended the Santa Flora Police Station on 21st May, 2015 to clear his name. To add insult to injury when the Defendants discovered their error, his picture was eventually taken down from the show not by way of an apology or mistake, but by publishing in a later broadcast that he had "surrendered to the police".

3. As a result of this incident he has commenced this claim for damages for libel against the Defendants and for false imprisonment against the Second Defendant in relation to his alleged detention at the Siparia Police Station on 26th May 2015.

4. To date no one has apologised to the Claimant for this "fake news". To the contrary, three years later to the day of trial, his image still featured as "Most Wanted" on the broadcaster's website despite the broadcaster's knowledge that this was an error. Indeed, had his picture not been published this claim would never have been filed.

5. The following issues have been raised by the parties for the Court's determination at this trial:

Libel

(a) **The publication issue:** Whether the television broadcasts on 20th, 21st and 22nd May and their re-runs, if defamatory, constitute a libel or a slander in our common law.

(b) **The defamatory issue:** If it was a libel, is the natural and ordinary meaning of these words and images alleging that the Claimant was accused of having committed a minor criminal offence defamatory of the Claimant.

(c) **The public interest issue:** If so, is the publication of outstanding warrants a matter in the public interest and did the First Defendant exercise the requisite degree of responsibility before publishing these images and information to avail themselves of the "Reynolds privilege" defence[2].

(d) If not, what will be the appropriate award of compensation in damages for the claim.

The undercurrent of these issues is the competing rights of the protection of Mr. Charles' reputation on the one hand and the protection of the Defendants' right to free speech and expression on the other. It is the careful balance of these twin values that craft the contours of our defamation law.

False Imprisonment

(a) Whether the Claimant voluntarily attended the Siparia Police Station and was not detained unlawfully by the Second Defendant.

(b) If he was unlawfully detained, what will be the appropriate award of compensation in damages for his claim.

6. Mr. Swift's observations of the damage to reputation by false statements in the 18th century was made in the early development of the common law of defamation which drew a distinction between slander and libel. Such a distinction can be traced as far back as the 15th century recognising the permanency of the publication as the defining distinction between slander and libel. The concept of the permanency of a publication of defamatory matter drew its inspiration from the paper based medium of newspapers or mail delivered by horse drawn carriages or steam ships. However, the permanency of a publication test unnecessarily focuses attention on the mode or medium used in publishing defamatory matter rather than on its impact and effect by its dissemination. At any rate, such historical distinctions made between libel and slander based on the mode or medium of publication originating in a paper based society of the 15th century would be out of context in the 21st century age of information. In this judgment I have therefore examined the need to reform our common law

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[2] Notably although the Second Defendant argued in its written submissions that the words do not bear any defamatory meaning and if so that it is protected by the defence of Reynolds privilege, neither of these matters were raised in its Defence. Furthermore, when pressed by this Court in their oral submissions Counsel for the Second Defendant accepted that the broadcasts constituted a libel and that it was defamatory of the Claimant but they rely on the Reynolds privilege.

to deal with defamation by television broadcasts focusing on the realities of the insidious impact of this form of communication in which falsehoods fly quickly and damage occurs long before the truth can remedy the impact of false news.

7. While technology has advanced in the communication of information by broadcasts, the distinction between libel and slander along a line which focuses on the permanency of a communication has created difficulties in maintaining such a distinction. The distinction seems also premised on the assumption that the libel and not slander is the more insidious form of damage to one's reputation. However, in many cases, falsehood by means of broadcasts can "fly" much faster than a falsehood reduced in writing. In this age of information where data moves seamlessly and instantaneously beyond borders and beyond physical barriers, the truth will always come limping long after the false news has long spread. New analytical tools are therefore required to be devised by our common law to analyse the effect of communications by broadcast in the law of defamation.

8. The special nature of broadcasts has made many legislatures for good reason either abolish the distinction between libel and slander altogether or provide for broadcasts to be deemed to be a libel or a "publication in a permanent form". Presumably, this is an acknowledgment that the widespread dissemination of information by broadcast is an indicia more consistent with permanency than a transitory mode of communication. Alternatively, it is an admission that for policy reasons we must recognise the special specie of broadcasts in the law of defamation, not in as much defined by a test of permanency, but by its impact on the viewership or audience.

9. For the reasons set out in this judgment I have found the Second Defendant and not the First Defendant liable for damages for libel and the claim for false imprisonment as against the Second Defendant is unsustainable.

<u>Libel</u>

10. I will begin this judgment with a declaration exonerating the Claimant in no uncertain terms as in my view this is one of the most important aspects of defamation claims which goes beyond any award of damages. See **Faaiq Mohammed v Jack Austin Warner** CV2013-04726. To this extent I make the following statement for the benefit of Mr. Charles:

This Claimant, Ricardo Eric Charles of No #16 ¾ Erin Road, Santa Flora (whose image is included later in this judgment) was never wanted by the police. He was never under suspicion of having committed any crime. His image should not have appeared on Beyond the Tape on those episodes appearing on May 20th 21st and 22nd 2015. He ought not to have been subjected to the inconvenience and shock of discovering from friends and family that he was "Most Wanted" by the police. This Claimant had not breached any road traffic offences at that time and no warrant at that time was issued for his arrest.

The publication issue:

(a) The broadcasts if defamatory constitute an actionable libel. At common law words published in a form that is deemed to be permanent amount to a libel. In this case, these broadcasts are deemed to be in a permanent form. The words were clearly reduced into a permanent form available for republication during the evening on re-runs of the programme. The moment the show was aired it was also being recorded for the purpose of re-runs later in the night. It was still at the trial available on the First Defendant's Facebook page. There was a deliberate intention that this matter will be republished and kept in permanent form. The defamatory material also comprised a picture composed and displayed by the Defendants together with accompanying text. The oral statement of the presenters, although unscripted, were ancillary to the published picture and text.

(b) In each broadcast words were spoken spontaneously together with a printed text. Such broadcasts contain a combination of material appealing both to the visual and auditory senses and challenges the common law approach of pigeon-holing a communication into a libel or slander box without considering the contextual approach of a publication bearing the hallmarks of both but being neither one nor the other. It is therefore necessary to reframe the common law's distinction between libel and slander to keep in step with a world saturated with electronic data in this age of information. Using the traditional test of "permanency", a television broadcast must be analysed by its effect rather than medium of communication. The impact and effect of a television broadcast by its instantaneous and wide dissemination together with its audio visual presentation satisfies such a "permanency" test.

(c) I have also found in the alternative that the common law distinction between libel and slander for broadcasts ought to be abolished. The obsession of the common law with a permanency test was to justify a presumption of damages because of the effectiveness of the mode or medium to communicate defamatory matter. In the past the paper medium proved such an effective method of communication but with the electronic communication of data, a television broadcast easily substitutes for such paper based medium. In any event searching for a "permanent" medium misses the point of the impact and effect of the communication which was the purpose for determining what is a libel.

(d) Television broadcasts therefore fall in its own specie of publication which should be actionable per se without requiring proof of special damage. Although parliamentary intervention is desirable, simply put, if the Judges have created the artificiality of the distinction between libel or slander then the Judges can remove it recognising its present irrelevance to this modern form of communication and its insidious impact caused by the instantaneous wide dissemination of defamatory matter.

The defamatory meaning issue:

(e) The sting of the words used amount to the meaning that the Claimant was wanted by the police on an outstanding warrant for a charge for breaching the Motor Vehicles and Road Traffic Act Chapter 48:50 which carried a punishment of a fine or imprisonment and that he was delinquent in not dealing with the charge. It is a matter which is not of trifling insignificance. The statement was simply not true. The matter, however, was given prominence by the Defendants and the Claimant understandably would be the subject of ridicule by his friends and family as a "wanted man" and liable to be arrested. The fact that it was published on multiple occasions suggests to the reasonable viewer that he was delinquent in facing the Courts to answer this charge. It was in reality a matter for which he was in no way responsible.

The public interest defence issue:

(f) While the publication of matters concerning the detection of crime is in the public interest generally, the First Defendant did exercise the requisite degree of care and responsibility in the publication of the defamatory statement. They had engaged with the Second

Defendant in a public campaign to raise the profile of matters involving the criminal justice system. The programme was used to highlight in part a number of outstanding warrants for persons who were wanted in the prosecution of different types of crime. The First Defendant relied upon none other than a senior officer in the ranks of the Trinidad and Tobago Police Service (TTPS) on the information that was supplied to them as to the persons who were wanted in relation to outstanding charges. There could be no fault in their failure to authenticate the facts.

(g) The Second Defendant did not plead a public interest defence. In fact, there is no properly articulated defence by the Second Defendant beyond a denial. If, as it contended, that it could rely on a public interest defence, I have found that it did not act responsibly in the identification of the Claimant as the "Ricardo Eric Charles" that was the subject of the warrant. As it turns out, there was simply no proper fact checking by the police of the proper identity of the individual. There was no process of verification engaged to confirm this information before it was published when the simplest of enquiry from the Complainant would have revealed within minutes that the information was manifestly false. It was simply erroneously assumed by them that this picture was the picture of the man who was "Most Wanted" and eluded police custody on a dated outstanding warrant.

(h) A suitable award of damages in libel against the Second Defendant is in the sum of $60,000.00. This is not a suitable case for any award of exemplary damages.

<u>False imprisonment</u>

11. The Claimant voluntarily attended the Siparia Police Station and was free at any time to leave. It was in his interest to remain there until the police officers verified and checked the information clearing his name of any wrongdoing.

12. Many of the facts in this case are agreed. The parties also agreed on a transcript of the broadcast relevant to the proceedings obtained from the First Defendant's DVD. At the trial the following persons gave evidence for the Claimant, Mr. Ricardo Eric Charles[3] and the following persons for the respective Defendants: Ms. Leslie Corbie[4] the producer of the show

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[3] Witness statement of Ricardo Eric Charles filed 22nd January 2018
[4] Witness statement of Leslie Corbie filed 6th February, 2018

and Inspector Roger Alexander[5] of the TTPS for the First Defendant and PC Marlon Scipio[6] a warrant officer and PC Shashtri Maharaj[7] the Complainant in the criminal charge for the Second Defendant.

13. I will examine the offending publications first before dealing with each issue identified above.

The Publication-Beyond the Tape

14. Beyond the Tape is a programme which is aired on the First Defendant's TV6. It is a crime detection and prevention programme produced by the TTPS together with the First Defendant. It is shown daily between the hours of 6pm and 7pm. It ends before the prime time news which begins at 7pm. The programme is re-run later in the night. Its aim is to build and foster the public trust in the TTPS and in getting assistance from the public in the fight against crime. The hosts of the programme were, one Marlan Hopkinson and an officer representing the TTPS, Inspector Roger Alexander. The programme begins with dramatic theme music, inclusive of the sound of sirens, with the show's opening billboard. The hosts then appear in the studio with a backdrop displaying a thematic interpretation of Beyond the Tape with an artistic rendition of caution tapes and a miniature helicopter.

15. There are different segments in the show punctuated by dialogue between the hosts and viewers who were given the opportunity of calling in to ask questions or make comments. One of the segments which comes at the end of the programme is its "Most Wanted" segment. At this point Marlan Hopkinson turns the programme over to the "police's" most wanted segment. There is dramatic music again played for the graphics which appear on the screen "Most Wanted". Then pictures that have been designed as "mug shots" appears on the screen with accompanying written information about the person, name, address and crime. The TV camera pans away from the hosts and Inspector Alexander's voice is heard while the accused is displayed prominently on the screen.

16. That segment issued by the TTPS is a request to members of the public to assist the TTPS in finding persons against whom there are outstanding warrants and to generally obtain

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[5] Witness statement of Roger Alexander filed on 6th February 2018
[6] Witness statement of Marlon Scipio filed 29th January 2018
[7] Witness statement of Shashtri Maharaj filed 29th January 2018

assistance in the fight against crime. Quite apart from simply publishing the name of the person, his or her picture and the outstanding warrant, Inspector Alexander adds commentary to almost each outstanding warrant to give it a sense of urgency and colour to attract the attention of the public assistance. In some instances Inspector Alexander would make a joke out of the particular offence and person. I must confess at some points the broadcast becomes more jocular than serious.

17. Ms. Leslie Corbie who is the producer for the First Defendant explains that she is involved in the scripting, researching, writing and building of graphics of the material for broadcast. As the producer of the show she is involved in the programme outlining and graphics building for the broadcast. The Claimant's photo was obtained by Ms. Corbie from members of the TTPS and she transcribed that information into the computer system and imported his photograph from the information supplied to her by the TTPS for the broadcasts.

18. On Wednesday 20th May, 2015 at around 6:50pm the Claimant was at his workplace when he began receiving telephone calls and text messages from his family and friends indicating that his photograph was being featured on the "Beyond the Tape" programme. He immediately returned home in fear that he would be arrested even though he knew he was innocent. Around 10:00pm on the same night, his photograph and likeness were featured on a broadcast of the earlier programme.

19. On Thursday 21st May 2015, the Claimant went to the Santa Flora Police Station and made a report to the police officers that he was innocent and a mistake was being made. He was issued an official receipt and he left the station. Apparently his report did not get through to the police as later that night, his photograph was again featured on "Beyond the Tape" at or around 6:45pm and again at or around 10:00pm. It was again broadcast on the following day Friday 22nd May 2015 at or around 6:45 pm and again at or around 10:00pm.

20. His picture was obtained by the TTPS from his Facebook page and no background checks were done by the TTPS to confirm whether this picture identified the same person wanted by the police.

The publications- the offending words

21. It is important in a libel claim to properly set out the words complained of to constitute the cause of action. See **Best v Charter Medical of England Ltd** [2001] EWCA Civ 1588 and **Gatley on Libel and Slander 12th Edition** paragraph 26.11 and 26.12[8]. The Claimant's pleaded case of the defamatory words is unfortunately inelegantly set out. The pleading apparently sets out a narrative of events and then sets out in a separate section "Particulars of Defamation". His claims rests on the words published in the broadcasts on three specific days as set out in his relief in his Claim Form and Statement of Case yet he makes reference to other broadcasts in the body of the Statement of Case and by inference in his particulars of defamation.

22. Even though leave was granted to amend the Statement of Case no attempt was made to clarify whether the cause of action also extended to other publications beyond those referenced in the said relief. I made it absolutely clear during the management of this claim that the cause of action must be limited to the publication in the broadcasts on the days which were actually the subject of the prayer for relief in both the Statement of Case and the Claim Form.

23. The words of which complaint are made are set out in the particulars of defamation as:

    "Ricardo Eric Charles: Most Wanted"

    "Ricardo Charles Wanted by the TTPS"

    "Ricardo Charles you know why I put you up on this programme let me tell you why because persons believe that simple offences should not be dealt with look what you get charge for driving without a valid D/P you know why you because you didn't have your D/P at the time when it expired so you are charged and now you didn't go and now you are wanted by the TTPS for outstanding warrant."

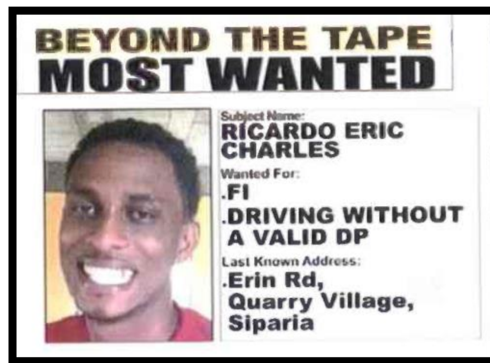
24. However, these words were not said on all three days of the broadcasts. Both parties had access to and downloaded copies of the programme and had portions of it transcribed.

[8] Although it was also noted in **Gatley on Libel and Slander, 12th Edition** at para 26.11 that "the rigours of the rule of pleading may be slightly relaxed when the matter complained of is part of a television or film or other audio visual presentation where the combinations and permutations available are endless and the matter is not easily susceptible to a detailed description of its defamatory aspects."

Eventually, for the trial, the parties agreed to a transcript of the relevant portions of the broadcasts which form the subject matter of this dispute. There eventually emerged some discrepancy between the pleading and the agreed transcript of the actual words used by Inspector Alexander on the days of the broadcast.

25. There are two aspects to the Claimant's claim of defamation: first he complains of the broadcast of his scripted image and accompanying words and the second the commentary of the host Inspector Alexander which the viewer would have heard accompanying the photograph.[9]

26. ***The image***: On all the broadcasts on 20th 21st and 22nd May 2015 at around 6:45pm and later around 10pm in a re-run of the live show, the following image and script which was created by Ms. Corbie, the producer of the show, was published:



27. ***The accompanying commentary:*** Accompanying this image were the following words broadcast on the three respective days.

A. <u>Beyond the Tape broadcast on 20th May 2015</u>

> "Mr. Charles. Ricardo Eric Charles. Yuh never had one but yuh driving. Daz why yuh here. Driving without a valid DP. Wanted by the Trinidad and Tobago Police Service for outstanding warrant."

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[9] Having examined the entirety of the Claimant's Statement of Case, I propose to set out the publications which were pleaded in the Statement of Case followed by the actual words used as found in the agreed transcript. From this comparison of the words actually said on the different days and the words which form the subject of the Claimant's complaint, I then set out the specific publication for each day which is the subject of this claim for libel.

B: Beyond the tape broadcast on 21st May 2015

"And Ricardo Charles. **Ricardo Charles you know why I want to put you up on this programme? Lemme tell you why. Because persons believe dat simple offence should not be dealt with. Look what you get charged for. Driving without a valid driving permit. Yuh know why? Because you didn't have your driving permit at the time, it expired. So, you are charged and now you didn't go so you wanted by the Trinidad and Tobago Police Service for outstanding warrant**. Zero tolerance. Zero tolerance."

C: Beyond the Tape broadcast on 22nd May 2015

"And the Commissioner of Police told me, he said don't just put up persons on this programme that is murders and thieves and ting, we want people to realise that is zero tolerance against crime doh matter; what yuh do and yuh fail to do what yuh supposed to in terms of d court level, this happens to you. We take out warrant for you. So Ricardo Charles, driving without a valid DP. Now, some persons might say dat is a simple ting, is a simple ting but there is a warrant out for him. If it was so simple, the magistrate would have never done it."

28. In his claim, as set out in his Statement of Case, the Claimant takes issue **only** with the words highlighted above. None of the other words said by Inspector Alexander in the broadcasts are the subject of complaint in the Statement of Case. The accompanying words do provide the context for the image and both the impact of the image and the commentary must be analysed.

29. Importantly, when the picture was published it occupied the entire screen of the television with the commentary of Inspector Alexander being made "off camera". The broadcast therefore had a publication of a combination of printed and oral words.

30. Subsequent to these broadcasts, the Claimant's image was portrayed in the programme on Monday 25th May 2015, when the Claimant saw and heard a broadcast on the "Beyond the Tape" programme that he was a wanted criminal and was in custody with the following words:

"Ricardo Eric Charles: Most Wanted"

"Ricardo Eric Charles: surrenders and in custody."

31. Inspector Alexander is heard saying *"First man up, dis man Ricardo Eric Charles, surrendered to the Police today. So Ricardo yuh gone, we doh want to see yuh here ever again. Don't come back. We make yuh a movie star in a short space of time.*"

32. The Claimant contended that as a result of the broadcasts, he suffered bouts of depression and distress. The event also placed a strain on his relationship with his wife which was subsequently dissolved. He was also summoned by his work supervisor to ascertain the truth of the broadcasted allegations. He alleges that he has since then been unable to be regularly employed.

33. It is admitted by the Defendants that the broadcasts were re-run in the later time slots.[10] That the show itself was uploaded to the "Beyond the Tape" Facebook page and was maintained in the First Defendant's web site up to the date of the trial.

34. I will analyse the Defendants' evidence in some more detail when dealing with the Reynold's privilege defence. However, I first deal with the first issue whether the broadcast is to be treated as a libel or slander.

<u>1.The broadcast: an actionable libel or slander?</u>

35. There were two main arguments by the Claimant that his action is well founded in libel rather than slander. The first is that by statute, by virtue of the provisions of the 1952 UK Defamation Act, broadcasts are deemed to be a libel. Second, that the Court should so recognise broadcasts to be a libel in the common law. I deal first with the question of the reception of the UK Defamation Act of 1952.

<u>1A. Reception of the 1952 UK Defamation Act</u>

36. Section 1 of the 1952 UK Defamation Act provides as follows:

    "For the purposes of the law of libel and slander, the broadcasting of words by means of wireless telegraphy shall be treated as publication in permanent form."

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[10] Under cross examination, Inspector Alexander who was one of the co-hosts, acknowledged that the shows were being shown live and then re-runs later in the evening

37. It is the Claimant's submission that wireless telegraphy includes broadcast by television and that all of English statutory law as at 31st August 1962 is deemed to be applicable as the law of Trinidad and Tobago. Therefore, as the Defamation Act of UK was enacted in 1952 it became the law of Trinidad and Tobago in 1962. The Claimant relies on sections 20 and 21 of the Interpretation Act Chapter 3:01 to support his proposition that such English law was "received" into our local legislative landscape. This proposition only has to be stated to be rejected.

38. Section 21 and 21[11] deals with (a) any statutory law in the United Kingdom which has effect as part of the law of Trinidad and Tobago, (b) any written law domestically passed before 1962 which applies the law of England or United Kingdom to Trinidad and Tobago and (c) such enactments or Acts that had effect as part of the law of Trinidad and Tobago. Indeed Section 12 of the Supreme Court of Judicature Act further makes the 1952 UK statute inapplicable in this jurisdiction. It states:

> "12. Subject to the provisions of any written law in operation on 1st March 1848, and to any written law passed after that date, the Common Law, Doctrines of Equity, and Statutes of general application of the Parliament of the United Kingdom that were in force in England on that date shall be deemed to have been enacted and to have been in force in Trinidad as from that date and in Tobago as from 1st January 1889."

39. Section 2 of our Libel and Defamation Act which commenced on 26th January 1846 simply codified such actions for defamation maintainable with respect to spoken words as in those cases in England. There is no similar reception of any English statutory instrument or specifically the Defamation Act of 1952. If that were the case then similarly all of the statutory instruments in force in England at that time would form the legislative landscape of this country. This cannot be the case as the 1846 Libel and Defamation Act Chapter 11:16

[11] Sections 21 and 22 of the Interpretation Act provides as follows:
"21. Where any written law passed before 31st August 1962 applies the law of England or of the United Kingdom to Trinidad and Tobago and such application is qualified by words of an ambulatory nature, including the words "from time to time in force" or "for the time being in force", the same shall be construed as applying the law in force in England on 30th August 1962.
22. (1) Words in a written law relating to time and a reference therein to a point of time shall be construed as relating or referring to the standard time prescribed for Trinidad and Tobago. (2) The President may by Order prescribe the standard time for Trinidad and Tobago; but, in default of a prescription under this section, the standard time for Trinidad and Tobago shall be four hours behind Greenwich Mean Time."

clearly sets out the local statutory regime for actions in libel and defamation. Section 1 of the UK Defamation Act 1952 which provides that the broadcasting of words by means of wireless telegraphy shall be treated as publication in permanent form is not the law of Trinidad and Tobago. Indeed the Claimant did not refer this Court to any authority which has held that this Act or that section applies at all as part of our defamation laws. In contrast see **Jones v Pereira** W.I.C.A 4/1949 Volume X (1949-1950) Trin. L.R. 78 which held that the English statutes of conveyancing law is not applicable to our jurisdiction.

40. There is therefore no statutory provision in this jurisdiction which makes the publication by broadcast a libel. Equally, there is no common law rule which states that all broadcasts are to be treated as slander. Absent legislative intervention to deal with the case of broadcasts, the Court must utilise the common law principles which have emerged to determine whether a broadcast is to be treated as a libel or slander. I will deal first with the distinction between libel and slander in common law, the rationale for the distinction, the irrelevance of the distinction to broadcasts and the need for reform and development of the common law.

1B.The common law distinction between Libel vs Slander

41. Words can hurt. The essence of an action in defamation is the publication of defamatory matter. If, of course, the defamatory matter is kept to oneself then simply no one is hurt by them. The wrong is committed in its communication, its publication and the law has developed along an intense focus on, among other things, the communication of defamatory content, the nature of the communication and the receiving audience and in libel damage to reputation is presumed. Broadcasts over the airwaves give rise to its own nuances in the area of defamation law and the distinctions between libel and slander which developed in a simpler time bears no relevance to this medium.

42. At common law as **Gatley**[12] explains, the distinction between libel and slander is that a libel is committed when the defamatory matter is published in a permanent form "or in a form which is deemed to be permanent". However, defamatory matter published by the spoken word or in some other transitory form is considered a slander. A libel is actionable per se

[12] **Gatley on Libel and Slander, 12th Edition paragraph 3.6**

without proof of actual damage whereas in slander, save in the case of four exceptions[13], the cause of action is not complete unless there is special damages.

43. This distinction is of historic origin and arose long before the era of broadcasts and the present golden age of information. The First Defendant has made heavy weather of the distinction between libel and slander for if the words amounted to a slander then unlike a libel the words are not actionable per se and the Claimant must also prove that there was special damage to him and in any event there is no alterative claim in slander. Counsel for the Second Defendant to his credit did not pursue this point either in his written or oral submissions leaning no doubt to a modernist view of treating broadcasts as a libel.

44. The First Defendant relied on the well-known Australian cases of **Meldrum v. Australian Broadcasting Corporation** (1932) V.L.R.425 and **Wainer v. Rippon** (1980 VR129). In **Meldrum** the issue for consideration was whether a television broadcast of words read from a prepared script was a slander or libel. In its decision, the Victoria Court of Appeal per McArthur J maintained it was a slander:

 "The distinction lies solely, in my opinion, in the mode of publication. Written defamatory words may, of course, be communicated to third persons by word of mouth; but, when so communicated to third persons by word of mouth it is slander and not libel no matter whether the speaker openly reads out the written words, or whether he learns them off by heart and recites them or sings them; so long as the communication is by word of mouth it is, in my opinion, slander and not libel."

45. In **Wainer v. Rippon** [1980] VR 129 the Supreme Court of Victoria per O'Bryan P. stated:

 "A variety of eminent text-book writers from time to time have suggested the criteria for distinguishing between libel and slander but, necessarily, as technology has advanced and developed and man's ingenuity for discovering new methods for injuring a person's reputation has progressed the traditional criteria and definitions have undergone changes.

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[13] a) Where word impute a crime for which the Claimant can be made to suffer physically by way of punishment.
b)Where the words disparage the Claimant in any office or profession.
c)Where the words impute a contagious or infectious disease.
d)Where words impute adultery or unchastity

Gatley, the most renowned English text book on Libel and Slander, in the most recent (7th) edition draws the distinction in one sentence: "Broadly speaking, if the publication is made in permanent form or is broadcast or is part of a theatrical performance, the matter published is a libel, if in some fugutive form, it is a slander." Legislation in England has extended the definition of libel to include wireless and television broadcasts and theatrical performances (Defamation Act 1952, s1, and Theatres Act 1968, s4).

......It is sufficient to say that the consensus of opinion between the text-book writers is that, aside from legislation, where the defamatory matter has been published by spoken words only it is actionable as slander because the form of publication is transient but where the publication is in writing or the equivalent of writing and is capable of being retained in a permanent form it is actionable as libel."

46. The decision in **Meldrum** has been criticized in legal journals, but reflected the common law in Victoria and not that of the other states in Australia such as New South Wales, Queensland, Tasmania and the Australian Capital Territory.

47. The First Defendant submitted that like the State of Victoria, in the absence of any statutory intervention deeming a television broadcast a libel, and the English Defamation Act is not such an intervention, that the common law of Trinidad and Tobago remains unchanged and it amounts to a slander. In essence, the words spoken and the images of the Claimant by the viewer is the subject matter of the claim and according to the First Defendant it is the perception of the viewer which is relevant, and what the viewer saw were the images and heard the words spoken. If the Defendants are correct it would mean that the words spoken of the Claimant amount to a slander and his claim is struck out as his damage is not presumed by simply the spoken word. He must prove his damage. Yet, if these words were published in a form such as a letter to one person his claim is actionable per se without proof of special damages.

48. The Claimant contends that the First Defendant's attempt to confine broadcasts to within the definition of "slander" on the lack of permanency in form is regressive in that it lacks consideration for the strides in modern technology. In relying on **Eden Shand v Caribbean Communications Network Ltd** H.C.S No. 1782 of 1994, the Claimant submitted that the

instant case calls for judicial activism. Moosai J (as he then was) in **Eden Shand** commented at page 43:

> "I should think, having regard to the remarkable strides in modern technology allowing for the subject matter to be embodied in a permanent form, that actions for television broadcasts which are alleged to be defamatory ought to be framed in libel."

49. Defamation is concerned with the damage to a person's reputation by the publication of defamatory matter. The tort is committed when a communication lowers the estimation of the person to right thinking person in our society. In most jurisdictions in the Commonwealth the distinction between libel and slander has been abolished. However, the distinction is still alive in this jurisdiction. To determine what should be the applicable rules to determine whether a broadcast amounts to a libel and slander I return to first principles on the origins and the rationale for the distinction.

1C. The origins and rationale for the distinction

50. The historical origins of the distinction remains obscure. A Select Committee of the House of Lords concluded as early as 1843 that the distinctions between the libel and slander "do not rest on any solid foundation". An advocate appearing before the Select Committee noted that "a whisper may fly as quickly and be as pernicious as a pamphlet". The law of libel is theorised as having developed as first a criminal remedy against seditious defamation then developed to encompass civil actions heavily influenced by the invention of the printing press which was a powerful new medium of communication. The law of libel "represented a stern legal response to the emergence of a feared new technology for mass communication that threatened to dispute existing power relations in society."

51. Communication of words or data other than by word of mouth in a printed medium clearly has now evolved in the era of the computer and data exchange in the 21st Century. Until the telegraph was in widespread use in the 1850s information exchange would be in a paper based medium with mail being delivered by horse drawn carriages or sailing ships[14].

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[14] The following commentary puts the development of the law of defamation in perspective with the medium of communication:

> "The telegraph disengages the transmission of information from general transportation, By the 1880s, voice communication by telephone was beginning to challenge the telegraph's supremacy as the primary means of communication. As for broadcasting, in the early 1900s radio technology came into use, 25 years later

52. The problem of a distinction in a cause of action being based on modes or mediums of publication in printed or spoken words immediately poses a problem with the new media of communication that contains elements of both. The result of utilising an outmoded tool of analysis for a new means of communication has led to confusing results. Even the distinction that a slander refers to the spoken word and the libel to the written word is not entirely accurate as a libel may include a picture or a gesture or a statue. In **Monson v Tussauds Ltd** [1894] 1 QB 671 at page 692 Lopes J described libels as:

> "Libels are generally in writing or printing, but this is not necessary; the defamatory matter may be conveyed in some other permanent form. For instance, a statue, a caricature, an effigy, chalk marks on a wall, signs or pictures may constitute a libel."

53. Placing a lamp in front of a house to signify it to be a brothel (**Jefferies v Duncombe** (1809) 2 Camp 3) or burning a person's likeness in effigy (**Eyre v Garlick** (1878) 42 JP 68) are considered a libel. However, a store owner publicly preventing a customer from leaving a store in order to effect a search for suspected shoplifting committed is a slander or being marched publicly through an airport concourse by police would have meant that she was being arrested for a serious offence and was slander by conduct.

54. Another basis for the distinction is to consider slander as in a transitory form and a libel in permanent form. However the images seen and voices heard in a documentary and a film is a libel but are no less transitory than hearing the spoken word. See **Youssoupoff v MGM Pictures** [1934] 50 TLR 581. Therefore, there may be the transient publication of matter which is embodied in a physical form. "So that it may be a libel, to play a record or audio tape or to call up on secret words or images from a computer memory". The showing of a defamatory film is a libel "and this cannot turn on this fact that the images are permanently on film so the same should apply to the showing of a DVD hence it is thought that the

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the first crude television was demonstrated, and in the mid-1960s cable television was beginning to rapidly penetrate the market in Canada. At the same time that cable television appeared in Canada, early efforts of data communications between computers were being perfected. By the early 1970s computers were beginning to be linked together into local and wide area networks. In the early 1990s, cellular radiotelephone and satellite transmission data services were introduced. Today, the Internet, a network of networks, brings together many of the disparate elements of the computer and telecommunications revolutions."

showing of a film or DVD in television would be libel in common law and perhaps the same is true of a recorded radio broadcast."[15]

55. The test of permanency when applied to a broadcast becomes much of a moving target. The test becomes illusory and an artificial concept to achieve the purpose of identifying such defamatory matter which has a pernicious effect on a Claimant. Indeed permanency does not even necessarily mean long lasting.[16]

56. Another indicia of "permanency" may be its retrievability other than from human memory or recollection. This useful passage from Duncan and Neil on Defamation, 4th edition on telephone recordings demonstrate the fluid application of this test of permanency:

> "3.04 Publications over the telephone may, however, be more difficult to classify. Traditionally telephone conversations have been conducted by instantaneous and unrecorded communications in a similar manner to conversations that take place face to face. But at the present day many telephone conversations are recorded or messages are transmitted to an answering device that will record what is said. It is certainly arguable that telephone conversations are of a fleeting nature only and, if defamatory, should be classified as slanders rather than libels because they lack any degree of permanence. However, once a communication has assumed a form that is recoverable, either by a recording device or otherwise, it is capable of being classified as libel. In *Cooper v Turrell* it was held that the recording of defamatory words on a voicemail was plainly a libel. On the other hand, there may be cases where the speaker on the telephone may be unaware that what is said is being recorded and it may then be necessary to distinguish between responsibility for the initial utterance and responsibility for its separate albeit contemporaneous recording. So far as text messages are concerned, although they are, like ordinary telephone conversations, fleeting in nature, they may be retained on the memory of a mobile phone, so that they can be viewed repeatedly and it is increasingly common for them to be stored automatically by the service provider. Accordingly, where a text is stored and retrievable, it should be treated as a libel."

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[15] **Gatley on Libel and Slander 12th Edition, paragraph 3.10**

[16] **See Gatley on Libel and Slander 12th Edition, paragraph 3.9**

57. Another difference lies in what is heard from what is seen with the latter being a libel. But gestures in a live broadcast can constitute a slander as it is heard and perceived and is transitory. It has been held that a broadcaster reading a letter is capable of constituting a libel as he is reading from a printed script. Even on this question of whether reading a printed text to a third person can constitute a slander or libel has not produced consistent results in common law. See **Forrester v Tyrell** (1893) 9 TLR 257 and **Robinson v Chambers** No 2 (1946) NL 148 compared to **Meldrum**. In **Forrester** the reading of defamatory material from a written document was held to be a libel. However, in **Osborne v. Thomas Boulter** & **Son** (1930) 2 K.B 226 Scrutton LJ held that the publication of defamatory matter by reading it out from a written document was the publication of a slander..

58. The essence of these decisions is that something transitory, such as the spoken words, can have a lesser impact on a person's reputation when communicated than in some other more permanent visual form such as writing. This has spawned a number of different assumptions and tests which underlie the distinction but which reveals as well its incoherency. After all the lamp signifying the brothel can be removed and becomes no less transitory than the spoken word.

59. In this context a broadcast or "talking pictures" creates a conundrum for the common law by trying to force it within the prisms of the slander or libel lens. However, in my view, the underlying difficulty in applying this distinction to broadcasts is recognising an important flaw in the distinction: the distinction is based on a presumption of damage from the form or mode of communication rather than assessing its real or practical overall impact and effect. It is presumed that there is greater damage in a libel than a slander as a libel was perceived to be in a more "permanent" or "visceral" form or mode of delivery than the other. Libel for this reason was viewed as actionable per se with slander not being a complete cause of action unless there are special damages except in four areas where by the nature of the imputation damages is also presumed.

60. From this very first principle the distinction in my view faces considerable challenges. With this focus on the presumption of damage the words may have or are capable of having by the mode of publication, the strands of distinction that have developed over the centuries are as follows:

(a) a libel shows greater deliberate malignity than slander, a greater degree of mischief;

(b) a libel is more durable in character and more easily disseminated;

(c) the mode of communication is in written form;

(d) libel appeal to the eye and has a greater impact that a slander that appeals to the ear;

(e) the perception of the audience is decisive of whether a broadcast is a slander or libel.

61. It therefore puts the television broadcast which bears the semblance of both slander and libel but being neither, standing as a defamation law zombie with odd bits and pieces of old law moulded together. The distinction between libel and slander in the common law therefore lies in a mix match of hypotheses and assumptions all with a disjointed justification which really originated from a simpler time when words were either spoken or written on paper and which have now outlived historical origins. From making the distinction based on the form of publication to the mode of publication; from it being transitory as distinct from permanent; from making a distinction from the wide dissemination to limited publication. The strands of the distinction is at times difficult to draw and any one test may be an oversimplification of the nuanced view of the communication of defamatory matter and its effect.

62. **Gatley** in particular noted the criticisms of the distinction. See paragraphs paragraph 3.8-3.9. Sir James Mansfield CJ observed in **Thorley v. Lord Kerry** (1812) 4 Taunt. 355, 128 Eng. Rep. 367, 371, as far back as 1812 that:

> "It is argued that written scandal is more generally diffused than words spoken, and is therefore actionable; but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter; it is true that a newspaper may be very generally read, but that is all casual. These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal."

63. **Gatley** concluded that "Not only does the distinction between libel and slander rest on unsatisfactory grounds but how the distinction should be drawn is rather unclear at a number of points even leaving aside modern technology".

64. A critical review of this distinction between libel and slander with respect to broadcasts in this new age of information with the elimination of physical borders and the seamlessness of

communication is therefore needed. The rapid communication networks and the visual impact of broadcasts contribute to a longer lasting impression on the mind beyond that of a single reading of a printed text.[17] If the common law is to preserve a distinction between libel and slander then new tests must be devised for broadcasts or the distinction abolished altogether with respect to this medium of communicating defamatory matter.

1D. Broadcasts-The irrelevance of the distinction in the age of information

65. The First Defendant submitted that **Meldrum** and **Wainer** established that broadcasts in the common law constitute a slander. Whose common law? It may apply to the State of Victoria but it has no binding effect on our Courts. It is even inconsistent with **Thorley**. **Meldrum** and **Wainer** are but useful illustrations of the application of one of the traditional tests to distinguish libel and slander of "permanency" to the broadcasts under examination but is not binding on our Courts. As Justice Leibson once noted that our common law is "not a stagnant pool but a moving stream. It seeks to purify itself as it flows through time"[18]. We are not Victorians or English, we are Trinbagonian and Caribbean. Our experience is one unique from any other and "the common law is our responsibility; the child of our Courts. We are responsible for its direction"[19]. In a relatively small society such as ours which has been able to sustain more than one television station, it would well be more appropriate to acknowledge the wider impact of defamatory matter in broadcasts rather than obsess over the form of dissemination of such matter or to struggle to force broadcasts to a straitjacket test of "permanency".

66. It appears that one of the reasons for Parliament's intervention in making broadcast a libel in the 1952 UK Defamation Act and replaced by the UK Broadcasting Act 1990 was its wide dissemination. To that extent it was certainly acknowledged that it was the dissemination of the material which carried the mischief of the "permanence" of publication in its likelihood of causing harm. It is therefore rationale to view any broadcast as a libel, it having an immediate, instantaneous impact on a wider audience and greater likelihood to cause harm. In several Commonwealth jurisdictions statutory reform has effectively abolished the

[17] Counsel for the First Defendant drew an analogy for the Court in his oral submission "My Lord which do you remember as a young person, a verse you read from Shakespeare or a bugs bunny cartoon you saw on television."
[18] **Hilen v Hays** 673 S.W.2d 713 (Ky., 1984) at 717 (Leibson J)
[19] **Hilen v Hays** 673 S.W.2d 713 (Ky., 1984) at 717 (Leibson J)

common law distinction and especially in the case of broadcasts. However, the lack of legislative intervention should does not prevent the Court's sensible development of the common law in this jurisdiction to keep in step with the obvious strides in technology and its impact on society. From a survey of the treatment of this distinction of libel and slander in other jurisdictions demonstrates the need for our own introspection and reform.

Canada

67. In **Colour Your World Corp v Canadian Broadcasting** (1994) 17 OR (3d) 308 Justice Somers noted that while a newspaper or magazine article can be read and re-read, broadcasts are ephemeral and fleeting. But it may have a far more potent effect than a newspaper article due to the juxtaposition of visual and textual matter. The Court of Appeal's decision certainly demonstrates why broadcasts should be viewed as its own specie of defamation separate from a libel or slander:

> "17 There is no doubt that the audio-visual dimension of a television broadcast can transform the impression one might otherwise get from a statement. The audio-visual aspects of a broadcast bring into unique play features such as voice intonation, visual background, facial expression, and gestures, all of which can accompany the articulated facts to dramatic effect. Because of these distinguishing factors in a broadcast, the overall impression, in addition to the accuracy of the statements, is relevant.
>
> 18 There may well be circumstances where the impact of what the viewer sees and hears so dramatically contradicts the words used, that the meaning of those words attributed by a viewer, is distorted. But one cannot ignore the content of the statements made. The fact that there are both visual and auditory components to a television broadcast does not render the words used irrelevant. When determining how a reasonable viewer might perceive the meaning of a broadcast, we must look not only to image, sound and sequence, we must also look to the actual words used. If the content of those words is not distorted by the audio-visual aspects of the broadcast, they should be deemed the primary conveyor of a programme's meaning."[20]

[20] **Colour Your World Corp v Canadian Broadcasting Corp** [1998] O.J No 510 paragraph 17 and 18

68. In **Macintyre v Canadian Broadcasting Corporation** [1985] 23 DLR (4) 235 the Supreme Court considered the principal historic reason for considering a libel more serious than a slander appeared to be that a libel shows more deliberate malignity than a mere oral slander and requires a degree of premeditation and design. It was also thought that a libel was more serious as it was more durable and easily transmittable. The Court observed "In Gatley on Libel the authors point out that the modern system of broadcasting has completely destroyed the reason for the distinction between libel and slander." It noted that the majority of the common law provinces in Canada have "recognised the artificiality of distinguishing between libel and slander". Several enactments have been passed in provinces that eliminate the distinction.

69. In Williams The Law of Defamation, Canadian Legal Text Series, Chapter 3, he observed: "The application of the common law tests for distinguishing between libel and slander have been of limited utility when applied to modern forms of communication. Radio, television and telegraph have posed many problems…computer print our present even more problems."

Australia

70. In the limited time available this Court's searches found no further authority in Australia applying **Meldrum**. Reference was made to **Wainer** in **Mickelberg v 6PR Southern Cross Radio Pty Ltd** [2002] WASCA 270 [2002] where the Australian Court had to decide whether a radio interview that could be listened to on a website constituted libel or slander. Steytler J noted at paragraph 44:

> "It is probable that, absent legislative intervention the spoken words would amount to a slander, and not a libel (*cf* ***Wainer v Rippon*** [1980] VR 129). That is because, as I have earlier mentioned, only the sound, and not the text of the interview, was obtainable by means of the Internet."

71. Statutory intervention has made in the most part the broadcast of words amounting to a libel. See for example section 124 of the Broadcasting and Television Act 1942. (WA). In **Wainer** the Court applied the test of permanence and mode of publication to determine that the broadcast under review as a slander. The complaint was about the words spoken and not the film itself.

> "In my view I am bound to follow the decision in *Meldrum's case* because it is a Full Court decision directly in point. Therefore, in the absence of legislation, the common law in this State would require me to rule that the publication of the allegedly defamatory words by the defendant in this case by means of a telecast is actionable slander and not libel. I should emphasize that the film itself is not complained about, only the words spoken. It is common ground between the parties that the words complained of were spoken simultaneously in the course of an interview and the listening audience, who were also viewing the programme and observing the speakers, would understand that the words were being spoken without any prepared or rehearsed script. So far as the audience was concerned, there was no permanence about the programme or the spoken words. The sound of the spoken words was carried over vast distances into numerous places of residence where, possibly, many thousands of persons could hear them, but save for the few who possessed remarkable memories the spoken words were transient in their nature."

<u>United States</u>

72. In the United States Case of **The Charles Parker Company V. The Silver City Crystal Company Et Al** 142 Conn. 605 (1955) the Supreme Court of Connecticut per Baldwin J, referred to and dis-applied the statement of McArthur J in **Meldrum**. The Court explained:

> "The first question is whether the acts complained of are to be tested by the law of libel or the law of slander. The statements complained of were read by DePaola from a prepared manuscript and were broadcast by the facilities of the defendant company. If the statements were defamatory, the acts in question constitute libel. Sorensen v. Wood, 123 Neb. 348, 355, 243 N.W. 82, 82 A.L.R. 1098 and note, 1106, 1109; Hartmann v. Winchell, 296 N.Y. 296, 300, 73 N.E.2d 30, 171 A.L.R. 759 and note, 765, 780; Restatement, 3 Torts § 568, comment f; Salmond, Torts (10th Ed.) § 98. The case of Meldrum v. Australian Broadcasting Co., [1932] V.L.R. 425, 432, decided by the Supreme Court of Victoria, Australia, holding that such a broadcast constitutes slander, appears to represent only a minority viewpoint. A distinction between defamatory words spoken and defamatory words printed and published has prevailed for many years. We have been urged to disregard it as an anachronism. The reasons for its appeal to us are

still valid. "Many things that are defamatory may be said with impunity through the medium of speech. Not so, however, when speech is caught upon the wing and transmuted into print. What gives the sting to the writing is its permanence of form. The spoken word dissolves, but the written one abides and `perpetuates the scandal.'" Ostrowe v. Lee, 256 N.Y. 36, 39, 175 N.E. 505. There is a specific criminal statute against publishing a libel but not against uttering a slander. General Statutes § 8518; see Salmond, Torts (10th Ed.) p. 871; 33 Am. Jur. 42, § 6. If one deliberately commits defamatory words to writing or printing and then publishes them by reading them aloud or by circulating copies, as in a newspaper, to others, the offense is much more serious and the result much more permanent than if the words were simply spoken. Reading a defamatory letter in the presence of others has been held to be libel. Snyder v. Andrews, *612 6 Barb. (N.Y.) 43, 46; Forrester v. Tyrrell, 9 T. L.R. 257, 57 J.P. 532 (C.A.), cited with approval in Hartmann v. Winchell, supra, 299. The basis of the distinction between libel and slander is the written or printed word or passage. Having been reduced to permanent form and published, the written or printed word has greater capabilities of harm. We can see no difference between the reading of defamatory words from a prepared manuscript to a group of people within the presence of the reader, which constitutes libel, and reading defamatory words from a prepared manuscript to be broadcast by the facilities of a radio station. The latter simply carries the defamatory words farther because the defamer has used a medium for dissemination which reaches listeners far beyond the ordinary limits of the human voice. The law of libel is applicable to the case at bar."

73. In **American Broadcasting-Paramount Theatres v Simpson** 126 S.E.2d 873 (Ga. Ct. App 1962) 97 the Court of Appeal of Georgia determined that television defamation could not be easily classified within the old torts of libel or slander and the medium of television has outlived the principles which form the basis for the distinction between the two actions. The Court established a new cause of action designed to deal with defamation by mass media "defamacast". It observed:

"In television and radio cases, the courts have often based classification of the defamatory matter on whether or not a prepared script was used; a libel being found where script is used and 'slander' where the extemporaneous remarks are made. Compare

Landau v. Columbia Broadcasting System, Inc., 205 Misc. 357, 128 N.Y.S.2d 254 (dramatic television presentation from script held libel) with Remington v. Bentley, 88 F.Supp. 166 (S.D.N.Y.) (defamatory remark on extemporaneous television program held slander, applying New York law). But see, Shor v. Billingsley, 158 N.Y.S.2d 476, 4 Misc.2d 857, holding to the contrary. Occasionally the situation is analogized to the reading of a libelous letter, which is still libel although an oral publication takes place. E. g., Hartmann v. Winchell, 296 N.Y. 296, 73 N.E.2d 30, 171 A.L.R. 759. See Code § 105-705. But whatever the rationale, we think the distinction bears very little relationship to the realities of the problem. After all, the listener or viewer cares little and often does not know whether a script is being used. Nor does the use of a script have any relationship to the broadcast's ability to harm. Commercial television began during the latter part of the decade beginning in 1940 and commercial radio less than forty years ago. Thus both media present new factual situations with respect to defamation, and we have pointed out abov some of the difficulties that the courts have had in reconciling this type of defamation with the traditional libel-slander dichotomy. In truth, these new media pose new problems which cannot realistically be solved by resort thereto. In Georgia, the libel and slander code sections are a codification of the common law. When the common law first recognized a right of action for defamatory remarks the only action was for slander. Then the development of a new media-the printing press-led to the development of an action for printed defamation called libel. May not the common law of Georgia develop a new classification to deal with these new media?"

74. Fuld J in **Hartmann v**. **Winchell** 296 N.Y.296, 73 N.E.2d30 (1947) noted that the capacity for harm by broadcasts by radio, although equally applicable to television broadcasts, should be a governing factor than the older distinction between written and unwritten forms:

"If the base of liability for defamation is to be broadened in the case of radio broadcasting, justification should be sought not in the fiction that reading from a paper ipso facto constitutes a publication by writing, but in a frank recognition that sound policy requires such a result… That defamation by radio, in the absence of a script or transcription, lacks the measure of durability possessed by written libel, in nowise lessens its capacity for harm…. Since the element of damage is, historically, the basis of the common-law action for defamation and since it is as reasonable to presume damage from

the nature of the medium employed when a slander is broadcast by radio as when published by writing, both logic and policy point the conclusion that defamation by radio should be actionable per se."

75. From this brief survey it is apparent that either through the development of the common law or by statutory intervention there is a growing acknowledgment that the application of the outmoded test of distinguishing between two forms of tort is unsuited to the novelty posed by television broadcast, "talking pictures", appealing to both sight and sound and having a wide and instantaneous impact.

1E. Broadcasts-The Caribbean's response

76. "The genius of the common law has been its ability to meet the challenges posed by changing circumstances. Can there be any doubt that this situation poses one of those challenges?" **American Broadcasting v Simpson** 106 Ga. App. 230 (1962) Judge Eberhardt. In the Caribbean common law the distinction between libel and slander continues to be made save for statutory intervention notably in Jamaica and Guyana. A survey of our local cases demonstrates the various means by which the Courts consider defamatory material libel and distinct from slander along the traditional test of the spoken word and the written word. There has however been an emerging discomfort with these traditional tests being applied to broadcasts.

77. Tracing our reports as far back as **Sunansingh v Ramkerising** Vol 1 (1893-1910) Trin L.R 46 an action in slander was constituted by words uttered by the Defendant during a panchayat meeting that the Plaintiff was guilty of cohabitating with his sister in law and had "put her in a family way". Goldney CJ noted that "In law words spoken are different from words written and special damage is necessary to support an action for slander, not imputing crime, misconduct in a profession or trade or some kinds of disease. (Bowen L.J in Chamberlain v Boyd L.R 11 Q.B.D. 415). The same principle of law is laid down by Baron Channel in Foulger v Newcomb L.R 2 Ex. 330. "Where words are spoken which are of a defamatory nature yet such that the law will not imply" (as in this case) "damage from them, still they are actionable if they are shown actually to cause (as their legal and natural consequence) damage of a character which the law will recognise." Of course defamatory words spoken in a panchayat would have serious and far reaching consequences for the person defamed in that

small community and it is inconceivable to draw a hard and fast distinction between spoken words as merely something that is transitory rather than recognising the reality of the permanent stain on a person's character.

78. In **Kwasi Bekoe v Horace Broomes** CvA: No. 112 of 2001 a telephone conversation was held to be a slander.

79. In **Bobby Persad et al v Water and Sewerage Authority** H.C.A. No. S 723 of 1998 although the defamatory matter was not in writing it was in a permanent form of a sign which was deemed to be defamatory. A prominent red arrow measuring 26 inches x 16 inches in front of Claimant's premises painted by WASA indicating that it was ear marked for disconnection constituted an actionable libel. In determining whether the red arrow was libellous, the Court found that the statement which the painting of the red arrow conveyed to the public must have lowered the first and second named Claimants in the estimation of right thinking members of society generally and was therefore libellous.

80. In **Daniel Chookolingo v Rex Chookolingo** H.C.A Cv. 2685 of 1992 concerned a claim in libel and slander where letters were read out to shareholders. The action in libel was based on the actual letters and slander was based on the speech by the Defendant to the shareholders about the letters.

81. In **Dr. Keith Christopher Rowley v Michael Annisette** CV2010-04909, concerned a telephone interview and the publication of that interview in the newspaper. The action was both in slander for the interview and the libel of the newspaper.

82. In **Rueben Cato v Caribbean New Media Group (CNMG) Limited** CV2011-01810 concerned a claim for damages in slander against the Defendant for statements made in a radio programme "Front Line" on the radio station Talk City 91.1.

83. In **Faaiq Mohammed v Jack Austin Warner** CV2013-04726 concerned a libel claim. The statements were made at a press conference hosted by the Defendant at the Corporation. The statements gathered commentary on the social media. In commenting on the effect of the World Wide Web, it was noted:

    "28. Our global village exists due to in the large part, the instantaneous connectivity facilitated by the World Wide Web. There is no dispute that the defamatory words were

communicated online in various media; the information was downloaded, accessed and became the subject of public conversation and chat rooms. In the virtual world information can be exchanged seamlessly with such social networks as twitter, facebook, online blogs where the published word filters through the bytes of cyberspace, the "virtual grapevine".

29. In cases of internet or online publications there is no presumption that the extent of publication is significant because the potential audience is the whole online world. See *Gatley on Libel and Slander 12th Ed* paragraph 9.5 and **Al Moudi v Brizard** [2006] EWHC 1062. However the evidence is that the defamatory information was the subject of online chatter. In a world where such communication is instantaneous, impulsive and emotive, very little time is taken by members of the global community to decipher, sift or seek clarification. Misinformation in such a world becomes engorged into something even more sinister in the eyes of the public after its story is embellished, twisted and multiplied several fold through multiple conversations. In **Barrick Gold Corp v Lopehandia** [2004] 71 OR (3d) 416, the Court observed that the style of the internet was not that of a traditional medium of communication and that readers of bulletin boards might well take seriously attacks which might appear exaggerated or ludicrous in a newspaper. In such an environment of instantaneous impulsive communications one's character, reputation and dignity, already a fragile commodity can easily be damaged and in some cases destroyed.

30. Not only is it a world of instantaneous conversations, it is also a world of infinite memories. Data is permanently imprinted in the computers "brain" or database to be retrieved at the slightest mention of anything remotely connected to words that may have no reference to Mr. Mohammed but to the mayoral race for the Chaguanas Local Government Elections. In **Slipper v BBC** [1991] QB 282 Bingham LJ commented "the law would part company with the realities of life if it held that the damage caused by publication of a libel began and ended with publication to the original published. Defamatory statements are objectionable not least because of their propensity to percolate through underground channels and contaminate hidden springs". There is no deletion nor rectification on the world wide memory. The damaging words become a permanent www

imprint remaining accessible in ways that hard copies never did. See **Crampton v Nugawela** [1996] NSWC 651 and ZAM v CFW [2013] EWHC 662."

84. In **Indra Roopnarine v Kamahit Bhola** CV2006-1863 it was a slander to call the Claimant a "jamette" at the Divali Nagar. However, Justice Tiwari Reddy found that the attack on the Claimant's reputation was not as serious as in other cases and the circulation of the slander was to some fifty (50) persons at a public function and awarded judgment for the claimant in the sum of $25,000.00.

85. In **Terrence Williams v Terrance Baynes and Kaisoca Productions Limited** CV2010-04231 the Claimant brought a claim for libel against the Defendants who addressed a political rally over a microphone connected to loud speakers and uttered words, which the claimant alleged to have been defamatory. The words were rebroadcast by the Second Defendant through Radio Tambrin 92.7 fm. The First Defendant also drove through the streets of Glen Road Scarborough and uttered the following words through a public address system *"Don't vote for Terrence Williams, he has no integrity. He was in the bank and the bank fire him."* There was no issue in this case that the words were a libel on the basis that the words were played over the loudspeaker from a tape.

86. In **Ameena Ali v Watson Duke** CV2015-00974 the Claimant claimed that the Defendant made defamatory statements against her in a letter. It was republished by being read the same day at a meeting to workers at the Sangre Grande hospital using a megaphone. The Court found that the words were defamatory and that the reading of the letter constituted slander.

87. In **Kishore Ramadhar et al v Prakash Ramadhar** et al CV2014-02122, the Claimants claimed slander and libel against the Defendants who read a letter to a meeting and made certain statements at a press conference which were defamatory of the Claimants.

88. It would appear that in this survey of cases the traditional rules have been followed focusing on the form of the publication. Spoken words constituted slander and the written words libel. For radio broadcasts the spoken words constituted the slander and if the interview or spoken words were reduced into writing it constituted an actionable libel. Interestingly, the spoken words to a crowd with a megaphone was a slander and the words spoken from a tape over a megaphone was a libel.

89. It is only recently that our Courts have been leaning towards treating broadcasts as libel applying a test of the effect and impact of the publication rather than the form of publication. It viewed the wide dissemination capable of broadcasts giving the defamatory matter a degree of permanency or at the very least could not be treated as transitory in the pure sense of a slander.

90. In **Eden Shand v Caribbean Communications Network Ltd** H.C.S No. 1782 of 1994, one of the issues was whether the television broadcast of a programme and the publication of the words spoken by the interviewees constituted a libel or slander at common law. The Defendant contended that the television broadcast if actionable was actionable as a slander and not as a libel. The Plaintiff contended that the television broadcast was a libel and not a slander since a libel is committed when defamatory matter is published in a permanent form or in a form which is deemed to be permanent. Therefore, as regards matters recorded on a record, tape or some other recording instrument, the Plaintiff submitted that the publication of the recorded matter would be publication in a permanent form and would therefore amount to a libel. Moosai J (as he then was) stated at pages 42-43:

> "It would therefore seem that in distinguishing libel and slander one of the tests to be applied is to consider the mode of publication. Publication of defamatory matter in a permanent form would be libel. Having regard to the facts and circumstances of this case, I am of the view that the application of that test would be sufficient for me to hold that, if defamatory, the television broadcast would amount to a libel.
>
> In the instant case it is clear that this was not a spontaneous live television broadcast. Rather it was a television documentary on the life of Dr. Bal Ramdial, put together by the Second Defendant after interviews with the speakers depicted therein. Further, on the pleadings, in response to the allegation by the Plaintiff that the said programme was disseminated as a video programme by the First Defendant to members of the public including the family of the late Dr. Ramdial, the First Defendant admitted that copies of the recorded programme were given to members of the family of Dr. Bal Ramdial. No doubt copies of these videotapes would occupy a significant place in the family archives and would be available for viewing by descendants of Bal Ramdial for at least generations to come. In that regard it is similar to the sale of a book where there is a

presumption of publication to a third person. See **Gatley ibid para 3.8 and footnote 79; Duncan and Neil ibid. para. 8.02**. It is this degree of permanency which leads me to the conclusion that the television broadcast and the publication of the words spoken by the interviewees would, if defamatory, amount to a libel.

I should think, having regard to the remarkable strides in modern technology allowing for the subject matter to be embodied in a permanent form, that actions for television broadcasts which are alleged to be defamatory ought to be framed in libel."

91. Of course there were compelling reasons in **Eden Shand** for the Court to apply the traditional rule of permanency to the broadcast in question to determine that it was a libel. However, Moosai J (as he then was) in his judgment had let loose the genie of the possibility of abolishing the distinction altogether for television broadcasts.

92. In **Jwala Rambarran and Dr. Lester Henry** Claim No CV 2014 -03990 Rampersad J noted in paragraph 19:

"The time has long passed for the categorization of the transient nature of slander in the modern era to be revised. To my mind especially in circumstances where radio stations are not limited by the strength of their broadcasting signal but now extend over the internet to an international audience visa multitude of online live streaming software apps and other technology ; all with the capability of recording ;such programs along with the requirements of the law or lawful procedure for the maintenance of recordings of radio programs ,the court would be hard pressed to accept that radio broadcasts are the sole domain of the category of slander. The transience of the spoken word in the golden age of radio has been replaced by the relative permanence in the current era of global information and technology. Therefore the court finds that in this case the cause of action lies in libel and not in slander."

93. In **Junior Sammy and Ors v. More FM and Ors** CV 2016 -04456 Seepersad J. did not have to decide whether the radio broadcast was a libel or slander as it was admitted by the broadcaster that it was a libel. However he commented obiter at paragraph 7:

"The format into which statements can be reduced so as to be considered as being in a permanent form has evolved and extended way beyond the sphere of written or typed text. Audio, visual and electronic formats inter alia are capable of having a degree of

permanency that transcends geographical boarders. In this context, the law in relation to libel and slander can no longer be viewed through the myopic lens of written word versus spoken word as technological advances have created circumstances by virtue of which the spoken word can easily encrypted into a permanent irreversible format which can be accessed from a global platform."

94. The TV6 live broadcast of a newscast was deemed to be a slander in **Jude Reddy v Caribbean Communications Network Limited et al** CV2008-00225. Importantly, the cause of action was based in both libel and slander. That broadcast was treated as a slander primarily based on the manner in which the case was framed and presented. The Claimant simply heard the words spoken by the news broadcaster and was unable to prove the actual words spoken. There was no tape of the broadcast nor recording. Nothing to suggest that it was in any permanent form. It was no different from someone standing in the square and hearing these words. There was no claim that the words were spoken from a text or that the action was based on the text.

95. Simply reading from a printed text such as in **Panday V Gordon (Trinidad and Tobago)** [2005] UKPC 36 or extempore gestures and speeches without more is a transient form of expression. Where the form chosen is a medium which impresses the images and words in a more durable form or less transient in nature the more a Court will be inclined to hold that the words are a libel. A broadcast can still be capable of being either a slander (**Jude Reddy**) to a libel (**Eden Shand**). It is a question of context and examination of the impact of the medium chosen by the publisher to give expression to the defamatory matter.

96. The treatment of broadcasts in these recent local cases can be reconciled. From these cases the following principles emerge. The onus is on the Claimant to properly frame its case in libel or slander even with broadcasts. Clearly, a claim in slander will attract the normal common law rules. In dealing with a broadcast as a slander the traditional tools of the spoken word are in play. Where, however, a claim in libel is based upon a broadcast, the Courts are alive to examine the nature of the broadcast to apply the permanency tests not only limited by the mode of delivery but by its dissemination and impact. It therefore examines both the underlying principle of damage caused by this mode which is presumed upon its publication

by the fact that it attracts a different perception and type of engagement which comes with electronic media.

1F.Broadcasts- Abolishing the distinction between libel and slander

97. How is the common law to develop in this jurisdiction? How then are we to strike the balance between free speech and protection of reputation? Are artificial lines to be drawn on the basis of the mode of communication of a broadcast or is it necessary to focus on the effect of the words on a case by case basis?

98. Our legislatures in the Caribbean have seen the merit in abolishing the distinction. In Jamaica a committee chaired by Justice Hugh Small reviewed the law of defamation and made recommendations for "changes that will ensure transparency and accountability in the context of a new framework of good governance". The Committee published a report entitled the Review of Jamaica's Defamation Laws in 2008 which led to the passing of a new Defamation Act in late 2013. This new Defamation Act brings their laws closer in line with other common law jurisdictions where the trend has been to liberalize defamation law. Some of the changes include:

    a) To abolish the distinction between libel and slander, establishing a single cause of action known as defamation.

    b) To abolish the common law offence of criminal libel.

    c) To introduce non-litigious methods of resolving disputes, including a procedure for making amends or an apology to the aggrieved person.

    d) To reduce the limitation period from six years to two years from the publication of the defamatory statement, while providing for extensions of that period by the Court when the interests of justice so require up to a period of four years from the date of the publication.

    e) To make available a defence of "innocent dissemination" to a defendant whose capacity was merely a distributor, or an employee or agent of a secondary publisher, and when the defendant neither knew, nor ought to have known, that the statement was defamatory and the said lack of knowledge was not due to negligence.

f) To limit the role of the jury to the finding of fact as to whether the defamatory statement was published and to whether the defence has been proven; but to leave it to the judge alone to assess the amount of compensation that may be awarded.

g) To introduce new remedies such as a declaratory order in which the Court may pronounce that the defendant is liable to the claimant in defamation, and a correction order in which the Court will order that the defendant publish a correction of the matter that is the subject of the proceedings.

99. Similarly, in Trinidad and Tobago the legislature considered modernising our defamation laws in the Defamation Bill 2001 designed to repeal the Libel and Defamation Act, Chap. 11:16. In its introductory notes of the Bill it states:

> "The present law is out of date and has failed to keep pace with technology as well as the contemporary needs of our society to be informed. The Bill seeks to abolish the existing distinction between libel and slander and to incorporate reform of the law in this area into a single action of defamation. Additionally, the Bill proposes other new and innovative changes to the law of defamation. ….. A court of summary jurisdiction is also given the power to hear and determine matters in relation to untrue statements which are not defamatory of the person and to order the defendant to insert a correction or apology in a daily newspaper. The defence of triviality is also included to discourage the bringing of frivolous actions."[21]

100. The fact is that the legislature is pointing in the right direction in removing the distinction between publication that amounts to slander and libel where the dividing line is not settled and at times difficult to draw. To refer to libel as a publication in writing and slander in oral words is an over simplification. To say it is in permanent form or deemed to be permanent amounts to a libel creates further rules of artificiality. The question is fact specific and involves an inquiry as to the context and form of the communication.

101. The time has come to abolish the distinction altogether for broadcasts and simply on a case by case basis to examine the impact the words have had on the individual. If broadcasts are treated in the common law as actionable per se, it is a matter for the Court to reflect the

[21] The Defamation Bill 2001 was not passed but lapsed and we still await modern defamation legislation in this jurisdiction.

impact of the defamatory matter in the appropriate award of damages. The cause of action can be simply defamation. Of course to take the quantum leap of imposing a serious harm test as done in the UK Defamation Act of 2013 although commendable and sensible, would require further legislative reform or in abolishing the distinction between slander and libel altogether. There could be no objection in the common law to view a special and unique feature of communication not contemplated in the age of the horse drawn carriage and pigeon mail to be viewed as a libel. I have of course not dealt with the internet and that will of course call up for its own special reconsideration in the law of defamation.

102. As Lord Hoffman observed in **Hall v Simons** [2000] 3 WLR 543 it was the judges who created the rule and it is for the judges to end it:

> "So I do not think that your Lordships would be intervening in matters which should be left to Parliament. The judges created the immunity and the judges should say that the grounds for maintaining it no longer exist. Cessante ratione legis, cessat lex ipsa."[22]

103. In applying the traditional test to broadcasts as recast above the publications in this case will constitute a libel. However, in my view, the distinction should be abolished and any matter defamatory of another person by way of broadcast is actionable and the method of publication would be the context within which any damage would be assessed.

1G. The Beyond the tape broadcast-Libel or Slander?

104. From this analysis, adopting the new approach, the words having been said on a television broadcast constitute a libel and damage is presumed. In a television broadcast unlike the traditional spoken word, the audience is a wide one, the impact is immediate and instantaneous to countless viewers, the defamatory matters flies quickly the truth limping long after, the audio visual impact dramatic. The damages that would be caused by such a publication becomes impactful and hurtful. Of course the question of what words were spoken is still a matter of proof. If the broadcast was not taped there would be difficulties for the Claimant in proving the words that were spoken and eliminating the distinction does not

[22] **Arthur J.S Hall and Co v Simons** [2000] 3 WLR 543 at 576

remove the burden of proof on the Claimant. Simplifying the test based on this common sense approach of the impact of the publication for a broadcast removes the artificiality of the discussion of "talking picture" "transitory forms" "reading from scripts" and the search for permanency.

1H. Application of the common law test of "permanency"

105. However, even utilising the traditional tests of permanency the same conclusion can be drawn. It is clear that at all times a picture and text with the defamatory sting of identifying the Claimant as a "wanted" man for a criminal charge was published. It was text based and it was designed by the graphic artist of the First Defendant. It had assumed a permanent form.

106. The words and commentary accompanying was certainly incidental to its publication. For all intents and purposes the entire publication assumed a permanent character. The later re-runs clearly were a replay of an earlier broadcast and what was being shown was in fact defamatory matter which was stored in a permanent form and constituted a libel. Of course it would constitute a libel provided that the meaning of the words are defamatory. I now examine the second issue of the meaning of these words used in the broadcast.

2. The defamatory meaning of the words

107. The Claimant contends that the natural and ordinary meaning of the broadcast was that he was one of the most wanted criminals in the country, that there was an outstanding warrant for his arrest and that he was a public enemy in respect of whom the general public should be fearful and should exercise extreme caution should he approach. The Claimant does not rely on any innuendo. One the other end of the spectrum the First Defendant contends that the broadcasts bear no defamatory meaning at all. At best it meant that he was under investigation by the TTPS and he would have been investigated or cleared which was the actual outcome. He was, as submitted by Counsel for the First Defendant, the subject of enquiry and to be cleared by a process of elimination.

108. The First Defendant also contends that the broadcast meant that he was a mere suspect within the third level **Chase** meaning: See **Chase v News Group Newspapers** [2003] EMLR 11. In that case from the gravest to the less serious meaning the Court ascribed three levels of imputations from words used to describe a person's involvement in criminal activity or

wrongdoing: Level 1 imputation of guilt. Level 2 imputation that there are reasonable grounds to suspect that the Claimant is involved. Level 3 that there are grounds to investigate what the Claimant has done.

109. It is important to note, however, firstly that the First Defendant is the only Defendant that has specifically denied that the words carry any defamatory meaning. There is no such denial by the Second Defendant. Second, neither party has pleaded any defence of justification to a lesser meaning of the words used.[23] The **Chase** meaning of words is material only in so far as a Defendant seeks to justify a lesser meaning of the words published. Neither Defendant seeks to do that here. Indeed a Defendant will not be allowed to advance a case of justification of a lesser meaning when the words are capable of bearing a more serious imputation. Equally, suspicion of guilt is not a separate or distinct charge when guilt has been directly imputed.[24]

110. The task of the Court is to determine the actual single meaning of the words and to determine if that carries any defamatory meaning. See **Gatley on Libel 12th Edition paragraph 30.14.** The litmus test is what are the words reasonably and sensibly capable of meaning? See **Bercow v Lord Mc Alpine of West Green (no 1)** [2013] EWHC 1342.

111. In a broadcast the Court considers more than just the text but the delivery, the audio visual impact on the viewer, the context of the presentation. The legal principles relevant to meaning have been summarized many times and the parties are not in dispute on these common principles. I had summarised these principles as follows[25]:

112. **The general approach:**

(i) The governing principle is reasonableness.

(ii) The Court should give to the mater complained of the natural and ordinary meaning which it would have conveyed to the ordinary reasonable viewer or reader or listener.

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[23] See **Lucas-Box v News Group Newspapers Ltd** [1986] 1 All ER 177

[24] See Gatley on Libel on Libel paragraph 3.28 and **Fallon v MGN Ltd** [2006] EWHC 783 (QB)

[25] See **Darren Byron v Daily News Limited** CV2016-02132

Who is the ordinary viewer:

(iii) The hypothetical reasonable viewer is representative of those who would read the publication in question. That person is not naïve but he is not unduly suspicious. He/She can read between the lines. He/She can read in an implication more readily than a lawyer, and may indulge in a certain amount of loose thinking.

(iv) Such a viewer will be treated as being a person who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available (per Neill L.J. Hartt v Newspaper Publishing PLC Unreported 26 th October, 1989 [Court of Appeal {Civil Division} Transcript No. 1015]:

The content:

(v) The court should not be too literal in its approach. The court must examine the broadcast as a whole and eschew over-elaborate analysis and also a literal approach. The "bane and antidote" should be taken together.

(vi) While limiting its attention to what the defendant has actually said or written, over-elaborate analysis of the material in issue is best avoided. Its audience would not have given it the analytical attention of a lawyer to the meaning of a document, an auditor to the interpretation of accounts, or an academic to the content of a learned article. In deciding what impression the material complained of would have been likely to have on the hypothetical reasonable viewer the Court is entitled (if not bound) to have regard to the impression it made on it.

(vii) The intention of the publisher is irrelevant.

The meaning:

(viii) The ordinary and natural meaning may be either a literal meaning, an implied meaning or an inferred or indirect meaning. A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally (Sim v Stretch [1936] 2 All ER 1237 at 1240) or would be likely to affect a person adversely in the estimation of

reasonable people generally (Duncan & Neill on Defamation, 2 nd edition, paragraph 7:07 at pg.32).

(ix) In determining the meaning of the material complained of the court is ‘not limited by the meanings which either the claimant or the defendant seeks to place upon the words’ (Lucas-Box v News Group Newspapers [1986] 1 WLR 147 at 152H). In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, “can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation …” (see Eady J in Gillick v Brook Advisory Centres approved by this court [2001] EWCA Civ 1263 at paragraph 7 and Gatley on Libel and Slander (10th edition), paragraph 30.6).

(x) The defamatory meaning pleaded by a plaintiff is to be treated as the most injurious meaning the words are capable of bearing and the questions a judge sitting alone has to ask himself are, first, is the natural and ordinary meaning of the words that which is alleged in the statement of claim and, secondly, if not, what (if any) less injurious defamatory meaning do they bear? (Slim v Daily Telegraph Ltd above at pg 176).”) It follows that “it is not enough to say that by some person or another, the words might be understood in a defamatory sense.” Neville v Fine Arts Company [1897] AC 68 per Lord Halsbury LC at 73.

See **Skuse v Granada Television Limited** [1996] EMLR 278**, per Sir Thomas Bingham MR at 285–7. Bercow v Lord Mc Alpone of West Green (no 1)** [2013] EWHC 1342**, Trinidad Express Newspaper and others v Conrad Aleong CA Civ.** 122 of 2009**, Syad Mohammed. Jeynes v News Magazine Ltd** [2008] EWCA Civ. 130.

<u>Headlines and Context</u>

113. In this case there was a prominent headline “Wanted” with a picture resembling a mug shot. There is no doubt that the artistic rendition of the Claimant’s photo and the manner in which it was displayed was to give the impression of a mug shot of a wanted criminal. But the reasonable viewer would have viewed the entire segment to obtain context. In **Galloway v Telegraph Group Ltd** [2005] EMLR 7 the Court observed that context is always

important. “In order to determine the natural meaning of the words of which a Claimant complains it is necessary to take into account the context in which they were used and the mode of publication.”[26] It also observed that it would be legitimate to take into account the viewers general impression of their viewing the programme the day before viewing the Claimant’s second image. Indeed the programme would have been aired on three days. The general viewer would have observed all three days and ask the question on the third day “why has Mr. Charles still not responded to his charge”, an impression which would not immediately come to mind on the first day when his photo was aired.

114. Another aspect of context was discussed in **Charleston v News Group Papers** [1995] 2 A.C. 65 which warned against salacious headlines but acknowledged that the entire publication must be read and understood to appreciate the context of the message. In this case the Court grappled with what was then a novel argument but which in the context of television broadcasts can be a continuing debate. It was accepted in that case that the entire article when read would not convey a defamatory meaning of the Claimants. The argument however, was that in this tabloid magazine with its penchant for salacious headlines there is a high risk and indeed reality that the reasonable reader would simply read the headlines and move on to another article without condescending to reading the entire article which contains the antidote to the sting of the headline.

115. The same equally could be said of the viewer of a broadcast. Is it the case that the viewer would simply watch the picture and script of Ricardo Eric Charles and move onto to another channel? The standard of course as established in **Charleston** is that of the reasonable reader or viewer having read or viewed the entire article or broadcast. Lord Bridge commented at page 73-73:

> “Whether the text of a newspaper article will, in any particular case, be sufficient to neutralise the defamatory implication of a prominent headline will sometimes be a nicely balanced question for the jury to decide and will depend not only on the nature of the libel which the headline conveys and the language of the text which is relied on to neutralise it but also on the manner in which the whole of the relevant material is set out and presented. But the proposition that the prominent headline, or as here the headlines

[26] **Galloway v Telegraph Group Ltd** [2005] EMLR 7 paragraph 48

plus photographs, may found a claim in libel in isolation from its related text, because some readers only read headlines, is to my mind quite unacceptable in the light of the principles discussed above."[27]

116. In any event in this case the segment on Ricardo Eric Charles was hardly a documentary or docudrama. It was a short blurb which was strong in its impact as it was intended to convey to the viewer the level of seriousness of the subject matter of criminal activity.

117. The dominant message was about the commission of a criminal offence which was punishable by fine or imprisonment. See section 42 of the Motor Vehicle and Road Traffic Act. **Gatley** observed in para 2.28 that the imputation of criminal offences or conviction or attempt to commit an offence would usually be defamatory. It may not however for "minor cases". See para 2.28. In **Berry v British Transport** Commission [1961] 1 Q.B. 149 Justice Diplock, as he then was, opined that being accused of the charge of pulling a communication which only carried a fine not exceeding five (5) pounds could not be defamatory as the reasonable person would consider that there are many legitimate reasons for pulling the chord which is not consistent with a defamatory imputation such as he had forgotten some valuable property behind or had awoken on the train after missing his stop. His choice to pull the chord to stop the train would incur a penalty but would not affect his character if found guilty. Similarly in **Saunders v Nationwide News Pty Ltd** [2005] NSWCA 404 (2005) to accuse an infant of committing a crime of petrol sniffing would for the ordinary decent members of the community think no less of him because of his immaturity. In **Vroman v Vancouver Daily Province** Ltd 1941 Carswell BC 136 (1941) it was not defamatory to publish that a committal order was made against the plaintiff in alimony proceedings and the sheriff was ordered to take him into custody when such an order to take him into custody was revoked. It was not defamatory as in substance it was a fair report of the proceedings and in substance it was true that a committal order was made. However, in **Groom v Crocker**

[27] Lord Nicholls also usefully commented at page 74:

> "This is not to say that words in the text of an article will always be efficacious to cure a defamatory headline. It all depends on the context, one element in which is the layout of the article. Those who print defamatory headlines are playing with fire. The ordinary reader might not be expected to notice curative words tucked away further down in the article. The more so, if the words are on a continuation page to which a reader is directed. The standard of the ordinary reader gives a jury adequate scope to return a verdict meeting the justice of the case."

[1937] 3 All ER 844 it was defamatory to state that the Claimant was negligent in driving his vehicle.

The impression on the reasonable viewer

118. Who would be the viewers of this programme? The average Trinbagonian who looks at "Beyond The Tape" would be receiving yet further information about the state of crime in this country. In a society where crime is one of its major concerns the programme further sensitises the viewer to the crime situation in Trinidad and Tobago and would have been highlighting various aspects of crime detection being performed by the TTPS. Advice is generally given on the show on how to deal with criminal activity and to avoid criminal behaviour. The programmes hosts are counterfoils of one another. A civilian Mr. Hopkinson who is dwarfed by a larger police officer dressed in full tactical gear Inspector Alexander. At the beginning of the show's "Most Wanted" segment there is a disclaimer that person are "presumed innocent until proven guilty". Notwithstanding this, Inspector Alexander begins to identify several people who in his view are wanted criminal persons evading capture or who have to answer charges. In the context of the entire show these are the people who are part of the problem in our society.

119. How is this programme presented? Is it a bland news item or has it been sensationalised to peek your interest? It is the latter. Understandably, some viewers may just tune in at the time when the segment is being run. In any event what would the broadcast have conveyed to the reasonable Trinbagonian living in a crime impacted society? Inspector Alexander himself representing the Second Defendant took this segment very seriously. It is for him not only for major offences it is for all offences as he advocates a position of zero tolerance and calls upon his viewership to adopt his same attitude when his loud voice booms that we should have zero tolerance for all criminal behaviour.

120. In this context what is the reasonable Trinbagonian to think when they see the broadcast of Ricardo Eric Charles and hear the booming voice of a high ranking officer on this programme. Will they shrug their shoulder and say "no big thing it's just a minor offence of driving without a valid driver's permit?" Would they say "well he did nothing wrong he is under suspicion and he will clear his name eventually"? Or would they say "here is another

one who is part of our problem" "here is a delinquent" and would they be surprised to learn that he was not even the person the police was looking for?

121. In our small society news spreads quickly. Your name being mentioned on a crime prevention programme must attract some attention. Each day as the broadcast is made with the same message that the Claimant is still wanted would even cause the reasonable viewer to think that he is delinquent in attending to Court to answer these charges. To another reasonable viewer it will be the object of some banter where someone viewing the offence of driving without a valid driver's permit in a light hearted manner saying to the Claimant jokingly "boy the police looking for you" "why you ent renew your driver's permit?" While some degree of humour at the expense of others is generally regarded as part of normal life and insults which do not diminish a person's standing with others do not found action for damages, the broadcast carries that additional element of being delinquent in responding to the law which is hurtful and shameful to someone who is presumed to be considered a law abiding citizen. In **Byrne v Deane** [1937] 1 KB 818 the "ribbing" of the Claimant being the subject of a humorous limerick published on a piece of paper on the wall of a pub was considered defamatory in the context that being accused of underhand disloyalty to members in the pub would carry a defamatory sting.

122. For a law abiding citizen the dominant message in this case could not be treated lightly. It caused the Claimant to immediately go to the police station. If it was a light hearted matter he would have easily ignored it and laughed it off. He, of course, could not. The insinuation that he has not responded to the law was a serious one. I would not like to think that we live in a society where the reasonable viewer would look at driving without a driver's permit as a trite matter that can be easily ignored. Or that if there are outstanding warrants for your attendance in Court it is something that we can laugh off and say to the Claimant "think nothing of it". This was not about an immature child as in **Saunders** for which one must feel sympathy nor is it about a minor offence as in **Berry** that carried no implication for others. He had been given the spotlight for delinquency on a show highlighting criminal activity and denouncing criminal delinquency. The stigma is that he was cavalier and irresponsible in not dealing with such an offence. In my view, for a reasonable viewer looking on "if your name make this programme it's got to be bad news." As Inspector Alexander mockingly sneered in a later broadcast "we make you into a movie star doh let us see you here again.."

123. In my view, the broadcasts do not carry the more serious meanings as alleged by the Claimant that he was a dangerous criminal and a most wanted man which the public must be fearful of. In my view the reasonable viewer looking at the entire broadcast would not get that impression. Yes, his image comes under the broad headline of "Most Wanted" and yes there is a dramatic beginning to this "Most Wanted" segment with sirens blaring. Yes, his image is positioned as a mug shot. But the words scripted on the screen and uttered by Inspector Alexander do no more than suggest that he was wanted by the police on an outstanding warrant to answer a charge of driving without a warrant and that he was delinquent in responding to the charge before the Magistrate's Court.

124. Such a suggestion was patently not true and not every untrue statement about another gives rise to a claim in defamation. However, the meaning of the broadcast discredits the Claimant, lowers him in the estimation of others and exposes him to ridicule. In my view, notwithstanding that fact that it is not a serious offence it is still defamatory. It would cause the Claimant to be ashamed and at the very least ridiculed by those that know him.

125. It would cause others who do not know him to think less of him as irresponsible in being unresponsive to the orders of the Court to stand trial for the offence.

126. However, if one is to analyse the First Defendant's submissions it does amount to a case that the words if defamatory it would attract nominal damages as it is a trifling injury to the Claimant's reputation and any attack on the Claimant's integrity of character is not sufficiently serious to affect his psychological integrity.

127. There has been a recent development in the UK of establishing a threshold of seriousness to qualify as defamation. See **Thornton v Telegraph Media Group** Ltd [2010] EWHC 141 and **Cammish v Hughes** [2012] EWCA Civ 1655. "Whatever definition of defamatory is adopted it must include a qualification or threshold of seriousness so as to exclude trivial claims" See **Sim v Stretch** [1936] 2 All ER 1237.

128. Such a development of determining a threshold of seriousness so as to exclude trivial claims was a prequel to the UK Defamation Act 2013 "serious harm" test. It was thought appropriate having regard to the passage of the Human Rights Act 1998 and Article 10 jurisprudence. It is a useful test to balance the competing interests of the right to reputation and the right to free expression. The question will arise in borderline cases whether our

Courts will fashion a test of serious harm or a threshold of seriousness, borne out of the UK's unique circumstances, to amount to defamation or rather leave the question of the serious harm to one's reputation to sound in damages rather than in liability. Indeed, if such a test is introduced it would mean that there will be no need to award nominal damages as those low threshold or trivial cases would simply not pass muster on being defamatory. As the parties did not have the benefit to address me on this point I will not embark upon a determination of whether a threshold of seriousness should be introduced into our common law at this time.

129. It is sufficient here to make it clear that one's reputation is regarded as a valuable asset and the Claimant has a right to vindicate any injury to that reputation.[28]

3. The Reynolds Public Interest Defence: The Duty to Act Responsibly

130. Although both Defendants provided submissions on the "Reynolds privilege" or "Reynolds public interest defence" this was only the pleaded defence of the First Defendant. There was no pleading of Reynolds privilege by the Second Defendant at all. Insofar as the Second Defendant has albeit inappropriately sought to rely on this defence I still deal with this later in the judgment.

131. The Reynolds public interest defence is a form of qualified privilege which is sui generis and can be described as a "public interest" defence, which is designed to strike an appropriate balance between the right to freedom of expression and the right of an individual to protect his reputation. See **Jameel v Wall Street Journal Europe Sprl** and the Privy Council decision of **Pinard-Byrne v Linton** [2015] UKPC 41. There are a host of different considerations that are in play in striking the balance between freedom of the press and protection of reputation:

a) That the public as a whole concerned matters of public interest;
b) The inclusion of alleged defamatory material was justified; and
c) The publication met the standard of responsible journalism.

132. A determination of responsible journalism is guided by the non-exhaustive guide of by Lord Nicholls[29] which include: (i) the seriousness of the allegation; (ii)the nature of the information and the extent to which the subject matter is a matter of public concern; (iii) the

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[28] **Jameel and others v Wall Street Journal Europe Sprl** [2006] UKHL 44
[29] **Reynolds v Times Newspapers Ltd** [2001] 2 AC 127

source of the information; some informants have no direct knowledge of the events; some have their own axes to grind; (iv)the steps taken to verify the information; (v) the status of the information; the allegation may have already been the subject of an investigation which commands respect; (vi)the urgency of the matter and (vii) whether comment was sought from the claimant or some other person with knowledge of the facts. (viii) Whether the publication contained the gist of the claimant's side of the story. (ix) The tone of the publication. (x) The circulation of the publication, including the timing. Essentially, it is for the Defendants to satisfy the Court, that they acted responsibly and had a duty to publish and broadcast the allegations made against the Claimant to the public to pass the litmus test set out in **Reynolds**.

133. Importantly, the Privy Council in **Pinard-Byrne** was of the view that it was demonstrably not in the public interest to have criminal allegations, even if bona fide and responsibly made ventilated through the news media. That would only encouraged trial by media and associated developments that would be inimical to the criminal justice processes. Society has mechanisms for investigation and determination of guilt or innocence and it was not in the public interest that such mechanisms be bypassed or subverted. One also must guard against the overall tone of the offending publications which also reeked of rancour rather than even handed reporting. This indeed reflects much older authority such as **Purcell v Sowler** and **De Buse v McCarthy** where there is no reason for charges to be made public before the person charged had been told of the charges and had the opportunity of meeting them. Such communications should legitimately be confined to those whose duty it is to investigate the charges or to those who have a limited interest in receiving the information.

134. In so far as the First Defendant is concerned, I accept their Counsel’s submission that the broadcast is protected by the public interest defence of Reynolds privelege. There was a public interest in publishing the material and the First Defendant was justified in doing so. I say so for the following reasons. First the evidence illustrates that the broadcasts served a legitimate purpose of obtaining public participation in the apprehension of individuals wanted on an outstanding warrant. In a society concerned about crime this is a matter of public concern. Second, it is justifiable as the First Defendant had co-hosted the programme with the TTPS the main protagonist in the fight against crime. Their information is valuable to the programme and there is no reason to second guess its importance in this case.

135. The First Defendant has also satisfied the test of responsible journalism as explained below.

136. The seriousness of the allegation: As I have pointed out the programme highlighted the fact that there was an outstanding warrant as particularly serious and no light-hearted manner. Inspector Alexander stated in his examination in chief that Beyond the Tape is a daily crime detection and prevention programme produced by the TTPS in conjunction with the First Defendant aimed at building and fostering the public trust in the TTPS and in getting assistance from the public in the fight against crime. He contended that the Claimant's photo was shown in the segment of Beyond the Tape devoted to persons wanted for questioning and on outstanding warrants for arrest where they had failed to attend the TTPS. He stated that "seeking of assistance by the TTPS from the viewing public in the detaining and questioning of an individual was based on information received had committed the offence of driving without a valid driver's permit was a matter of public concern and interest." In cross-examination he pointed out that the aim of the Beyond the Tape programme was to obtain information and to foster a good relationship between the police and the members of the public. When questioned that persons of interest with respect to murder and burglary were broadcasted with persons on outstanding warrant, this is what he had to say "All persons who, where a warrant is issued by the court of law must comply, and that is all we were saying. It doesn't matter to me whether it, if it came to be murder, assault, whatever it is, once a warrant is issued, instructions from the court--". A critical element for the police was getting the public's assistance to obtaining information to have the warrant successfully executed.

137. The nature of the information and the extent to which the subject matter is a matter of public concern: The programme was a crime fighting programme and intrinsically a matter of public concern. The programme comprised various segments of information and advice on criminal law and on criminal activity. This segment of "Most Wanted" can be treated equally as a public outreach to interface with the public to obtain their assistance in the work of the criminal courts.

138. The source of the information and the steps taken to verify the information: In this case the source of the information was from Inspector Alexander the employee of the Second

Defendant. He bore the authority of the police and the First Defendant could look no further to authenticate the information.

139. Naturally, the First Defendant took no steps to verify this information as they could not know there was any need to do so. They can safely rely on the information provided from a senior ranking officer of the TTPS. In a matter as routine as a warrant it can be expected that the police would have done their proper checks to provide reliable information to the First Defendant. There is no reason to doubt otherwise.

140. <u>The status of the information and the urgency of the matter:</u> Similarly the status of the picture came from Inspector Alexander. The TTPS would be the one to determine the urgency of publishing the matter on the "Most Wanted" segment. There is no onus on the First Defendant to sift through information which are being provided to them from a reliable and high ranking source unless there is some sign or indication which would cause the First Defendant to require further checks or cast doubt on the veracity of the information supplied.

141. <u>The tone of the publication:</u> As indicated before the broadcast was in a sensational tone deliberately so to attract the public attention.

142. <u>The circulation of the publication including the timing:</u> This programme did air at prime time just before the evening news when there would be a high viewership. Indeed as our news typically feature crime and criminal activity this last segment would be the prequel to the television station's news on crime on the evening 7pm news.

143. <u>Whether comment was sought from the Claimant or some other person with knowledge of the facts and whether the publication contained the gist of the Claimant's side of the story</u>: Clearly in the circumstance of this case this was not possible.

144. I also take note that there was no cross examination of Ms. Corbie on the issue of the public interest defence. The cross examination was focused on Inspector Alexander. Although a witness of the First Defendant, Inspector Alexander was the servant and agent of the TTPS. Taking all the circumstances into account including these factors, the First Defendant cannot be said to be acting irresponsibly in accepting the information provided to them by the TTPS and assisting them in the fight against crime.

145. As I have indicated above this defence was not pleaded on behalf of the Second Defendant and they cannot avail themselves of this defence. There was little evidence led by the Second Defendant if at all to deal with this defence. However, in so far as they have sought to rely on it, such a defence is doomed to fail principally for the following reasons. First, it is the TTPS which obtained the information about the Claimant and it is clear that no proper fact checking was done by the First Defendant before the material was published.

146. Mr. Scipio, who is the warrant officer, provided the sources of information from which he obtained the warrant which bore the Claimant's name. However, in order to get his picture he simply googled "Ricardo Eric Charles" and obtained his picture, matched it to the address of the person that they were looking for. They purveyed this information for three days on six occasions when a simple enquiry of the arresting officer would have revealed that this was not the person of interest to the TTPS.

147. Second, there was absolutely nothing urgent for the TTPS (unknown to the First Defendant) to publish this information about a warrant that was six (6) years old without first doing a proper check. The harm to one's reputation far outweighed the importance of publishing material on a dated outstanding warrant.

148. Third, there were equally other less offensive options for the TTPS to activate and obtained the public's assistance such as simply publishing the name of the person and his address and asking the public "Do you know who this person is and where he is?" The fact remains that the TTPS, the arresting officer PC Maharaj, knew at all material times that the Claimant was not the person that they were looking for. In short, they clearly and knowingly nabbed the wrong person.

149. Fourth, the TTPS compounded matters by publishing in a later broadcast that the Claimant had surrendered and was in custody. It clearly demonstrates that the TTPS was very loose, reckless and irresponsible in its information gathering and communication.

150. The claim of defamation as against the Second Defendant succeeds. Any prosecution of the Claimant was doomed to fail and expose the TTPS to an action for malicious prosecution. Indeed, inherent in the tort of malicious prosecution is this component of loss of reputation which is compensated by the law of defamation.

151. This is a convenient point to turn to the Claimant's claim of false imprisonment.

False Imprisonment

152. On 26th May, 2015 the Claimant visited the Siparia police station where he was allegedly detained for a period of approximately three (3) hours (8:30am-11:30am) while checks were made to verify whether the was the subject of the said warrant. He was released at 11:30am without any charges being laid. The TTPS contends that he was always free to leave and he had voluntarily visited the office to clear his name.

153. On 26th May, 2015, the Claimant contends that at around 8:30am he attended the Siparia Police Station where he was met by PC Scipio who insisted that he was the person named in the warrant. He was ordered to sit in the lobby of the police station and PC Scipio took his driver's permit and told him not to move until PC Maharaj verified where or not he was the person whom PC Maharaj had charged. Around 11:30am he was approached by PC Scipio and PC Maharaj who informed him that he was not the person named in the warrant.

154. The Second Defendant contends that the Claimant was never arrested or detained during his voluntary visit to the Siparia Police Station on 26th May, 2015 and denies that the Claimant was told not to move. They contend that the Claimant was not falsely imprisoned on 26th May, 2015 at the Siparia Police Station and that the Claimant visited the station of his own free will and stayed there on his own free will since he wanted to ensure that his name was cleared.

155. False imprisonment is the "unlawful imposition of constraint on another's freedom of movement from a particular place."[30] It is established on:

a) The fact of imprisonment.

b) The absence of lawful authority to justify the imprisonment.[31]

156. The burden is on the second Defendant to justify the arrest of the Claimant and establishing reasonable and probable cause for the arrest. In **Dallison v Caffrey** [1965] 1 Q.B. 348 Lord Diplock stated at page 370:

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[30] **Collins v Wilcock** [1984] 3 All ER

[31] Clerk and Lindsell on Torts, 20th Edition at paragraphs 15-23

"Where a felony has been committed, a person, whether or not he is a police officer, acts reasonably in making an arrest without a warrant if the facts which he himself knows or of which he has been credibly informed at the time of the arrest make it probable that the person arrested committed the felony. This is what constitutes in law reasonable and probable cause for the arrest. Since arrest involves trespass to the person and any trespass to the person is prima facie tortious, the onus lies on the arrestor to justify the trespass by establishing reasonable and probable cause for the arrest."

157. He further stated at page 371:

"The test whether there was reasonable and probable cause for the arrest or prosecution is an objective one, namely whether a reasonable man assumed to know the law and possessed of the information which in fact was possessed by the Defendant would believe that there was reasonable and probable cause."

158. Justice Des Vignes (as he then was) in **Collin Carrera v The Attorney General** CV2010-00694, in commenting on the test for reasonable and probably cause noted as follows at paragraph 23:

"The test of reasonable and probable cause consists of both an objective and a subjective element, that is to say: objectively, whether a reasonable man having knowledge of facts that the Defendant knew at the time he instituted the prosecution, would have believed that the Claimant was guilty of the alleged crime and subjectively, whether the arresting officer has formulated a genuine suspicion within his own mind that the accused person has committed the offence."

159. In **Chandrawtee Ramsingh v The Attorney General of Trinidad and Tobago** [2012] UKPC 16 the Privy Council commented on the relevant principles of false imprisonment at paragraphs 7 and 8:

"7. The legal principles are clear. Section 3(4) of the Criminal Law Act 1936, Chapter 10.04 provides: "Where a police officer, with reasonable cause, suspects that an arrestable offence has been committed, he may arrest without warrant anyone whom he, with reasonable cause, suspects to be guilty of the offence."

8. The relevant principles are not significantly in dispute and may be summarised as follows:

    i) The detention of a person is prima facie tortious and an infringement of section 4(a) of the Constitution of Trinidad and Tobago.

    ii) It is for the arrestor to justify the arrest.

    iii) A police officer may arrest a person if, with reasonable cause, he suspects that the person concerned has committed an arrestable offence.

    iv) Thus the officer must subjectively suspect that that person has committed such an offence.

    v) The officer's belief must have been on reasonable grounds or, as some of the cases put it, there must have been reasonable and probable cause to make the arrest.

    vi) Any continued detention after arrest must also be justified by the detainer."

160. In the Claimant's evidence in chief[32] he contends that on 26th May, 2015 he made arrangements to attend the warrant police officer at the Siparia Police Station, Court and Process Section, PC Scipio to determine the true facts of the situation. At around 8:30 am he visited the Siparia Police Station with his motor vehicle where he met PC Scipio who "vehemently stated" that he was the person named in the warrant. He heard his order to have a seat in the lobby and PC Scipio took his driver's permit. He then heard that he was not to move and that he had to wait for PC Maharaj to verify whether or not he was the person PC Maharaj charged on the warrant.

161. He contends that he could not drive his motor vehicle since PC Scipio took his driver's permit but he knew he was not free to leave. Therefore, he was still seated in the lobby until 11:30am when he was approached by PC Scipio and PC Maharaj who informed him that he was not the person named in the warrant.

162. He stated he was detained in the "full view of members of the police in the lobby of the Siparia Police Station and suffered indignity, disgrace and humiliation" caused by his

[32] Witness statement of Ricardo Eric Charles filed 22nd January, 2018

wrongful arrest and false imprisonment by PC Scipio. He also suffered mental trauma at the Siparia Police Station and started to cry since no one paid any attention to his protestation of innocence.

163. In cross examination he stated that when he visited the Siparia Police Station on the 26th May, 2015 it was on his own free will to clear his name. PC Scipio asked for his driver's permit and he held onto it and told him to have a seat. The Claimant stated that he could not leave the station without his driver's permit and because they also told him to wait, he could not just leave. When asked if PC Scipio told him that he was under arrest he admitted that he did not nor was any rights read to him. He further admitted that he was happy to clear his name. He stated that when PC Maharaj arrived at 11:30am and said that he was not the man named in the warrant, he had to wait for his driver's permit before he could have left the station. From his cross examination, I did not discern any sense of an officer ordering the Claimant to remain in the police station rather than his willingness to wait until the matter is cleared up.

164. PC Marlon Scipio in his evidence in chief[33] contends that on 26th May 2015 while on duty at the Siparia Police Station, he received a telephone call that a gentleman was waiting on the ground floor to see him. Upon visiting the ground floor, he met the Claimant who introduced himself as "Ricardo Eric Charles." The Claimant informed him that he saw his picture on Beyond the Tape stating that he was charged and that there was a warrant out for his arrest. He therefore visited the station to "clear up the matter." PC Scipio informed the Claimant that he did have a warrant in his possession for a "Ricardo Eric Charles." The Claimant repeated that his name was "Ricardo Eric Charles" but he was never charged with any offence. Upon requesting that the Claimant show proof of his name, the Claimant showed him his driver's permit which had the name "Ricardo Eric Charles" on it and his address.

165. PC Scipio then retrieved the warrant and noted that the address on the warrant and the Claimant's address were similar. He again enquired of the Claimant if he was driving motor vehicle registration number PBA 7265 in Siparia on 20th January, 2009 but the Claimant maintained that he was not the person in the warrant. PC Scipio informed him that he will

[33] Witness statement of Police Constable Marlon Scipio filed 29th January 2018

call PC Maharaj who was the Complainant on the warrant to come to the station to **clear up the issue**. After calling PC Maharaj, PC Maharaj came to the station within fifteen minutes and he was identified to the Claimant. PC Scipio asked PC Maharaj in the Claimant's presence if the Claimant was the person named in the warrant No. 1052/09 and PC Maharaj replied that he was not. PC Scipio informed the Claimant that he did not have a warrant for his arrest and the Claimant left the station.

166. He denied that the Claimant was arrested and/or detained at the Siparia Police Station on 26th May, 2015. He contends he never insisted that the Claimant was the person named in the warrant but instead made efforts to ascertain whether the Claimant was the person named in the warrant.

167. He further contended that the Claimant came to the Siparia Police Station of his own free will and he waited on his own free will to have the issue cleared up. He also denied that the Claimant was in the Court and Process section of the Siparia Police Station since that station is located on the upper floor and the Claimant was in the receptionist area. He contends that he did not tell the Claimant not to move and he denies PC Maharaj told him that he should know the persons whom warrants were issued since he is the Warrant Officer.

168. In cross examination he contended that he retrieved the warrant from the Court and Process office in the building which he did show to the Claimant in order to clear up any ambiguities that he is the person named in the warrant. He contended that he attempted to call PC Maharaj who was the complainant in the warrant to identify if the Claimant was the person named in the warrant. He maintained that he did not tell the Claimant not to move from the lobby and that he was free to leave at any given time. He stated if a person who voluntarily comes into the station knowing that he does not have a warrant, he has to do investigations to ascertain whether a warrant is outstanding for him. He denied that the Claimant was sitting in the lobby area after he, PC Scipio took his driver's permit. He further stated that the Claimant left the station voluntarily after he was satisfied that there was no warrant for his arrest.

169. In his evidence in chief[34], PC Sashri Maharaj contends that on 26th May, 2015 he received a telephone call at approximately 10:15 am from PC Scipio. PC Scipio requested that he attend the Siparia Police Station to identify a person by the name of "Ricardo Eric Charles" and he informed PC Scipio that he would come to the police station.

170. Upon arriving at the Siparia Police Station he met with PC Scipio in the reception area. PC Scipio was with the Claimant whom he identified to him as "Ricardo Eric Charles." PC Scipio asked him if the person standing next to him was the "Ricardo Eric Charles" named in the warrant of 1052/09 of 17th August 2009 whom he would have charged for driving without a valid driver's permit. He told PC Scipio that the Claimant was not the person he charged and the Claimant then left the Siparia Police Station around 10:40am. He contends that his interaction with PC Scipio and the Claimant about the Claimant's identity lasted approximately ten (10) minutes.

171. In cross examination he contended that on 26th May, 2015, he received a call from PC Scipio to come to the Siparia Police Station. He stated PC Scipio had a document in his hand relative to the warrant concerning the Claimant but he could not see the document properly.

172. From the evidence, on a balance of probabilities, I have found that the Claimant was not detained against his will. He was at all times free to leave the Siparia Police Station. He was asked to assist the officers in their enquiries which he himself had an interest in resolving. In any event if he was detained, the officers did have reasonable and probable cause to do so to clarify the issue of whether he was correctly named in the warrant. Even if the officer retained his driver's permit it was voluntarily provided to the officers for the purpose of conducting a verification exercise to determine whether the Claimant is the subject of the enquiry, a matter which the Claimant was keen to resolve. The fact that he may have spent longer than expected at the station to clear up the matter does not make his stay there unlawful or that he was illegally detained by the officers.

173. His claim for false imprisonment therefore fails.

[34] Witness Statement of Shashri Maharaj filed 29th January, 2018

Damages for Defamation against the Second Defendant

174. Counsel for the Claimant submitted in his oral submissions that this was a serious matter deserving of an award of damages in the sum of $350,000.00.[35] The Claimant also claims aggravated and exemplary damages. The idea of compensation for defamation serves three purposes. First, as a consolation for the distress that was suffered from the publication. Second, it serves to repair the harm to the reputation. Finally, it serves to vindicate his reputation. A single amount is awarded by way of reparation, consolation and vindication. **Cerutti v Crestside Pty Ltd** [2014] QCA 033. See **Trinidad Express Newspapers Ltd et al v Conrad Aleong** Civil Appeal No. 122 of 2009 per M. Rajnauth-Lee JA at pages 55 to 56.

175. The Claimant's evidence of his sense of hurt feelings is intrinsically a personal view and it is largely a subjective exercise to quantify the natural injury to his feelings and the grief and distress that he may have felt as a result of the defamatory words. As Lord Diplock observed in **Broome v Cassell and Co Ltd** [1972] AC 1027: "The harm caused to the plaintiff by the publication of the defamation often lies more in his own feelings of what he thinks other people are thinking of him than in any actual change made manifest in their attitude towards him."

176. In **TnT News Centre Ltd v John Rahael** Civ App No. 166 of 2006 Kangaloo JA citing the judgment of Sir Thomas Bingham in **John v MGC** [1997] Q.B. 586. observed at page 607:

> "The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate 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 the

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[35] The only local authorities referred to me on damages by the Claimant were **Dr Keith Rowley v Micheal Annisette** CV2010-04909 and **Father John Theodore v T&T News Centre** HC No. 1099 of 2003

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."

177. I had earlier in **Faaiq Mohammed** alluded to the following wide range of factors that are relevant, though not mutually exclusive in arriving at an award of damages at paragraph 51:

- "Objective features such as: The gravity of the allegation, its prominence, its social context, the mode, extent and duration of circulation of the medium in which it was published, its enduring nature, its repetition. The position, reputation and standing of the Claimant; his credibility. The stature of the defendant and the extent to which his statements will be given prominence and belief. Evidence that the libel was believed and the capacity of the allegation to generate hatred and /or anger against the Claimant.

- Subjective features: Effect on the claimant's feelings, importance of reputation for working life, the importance of reputation in the eyes of the recipients of the defamatory remarks. The difficulty of remedying the libel.

- Matters tending to aggravate the injury: The absence or refusal of any retraction or apology. The conduct of the defendant from the time when the libel was published. Any offensive conduct of the defendants: prior to, at the time of or after publication.

- Matters tending to reduce and mitigate damage: The publication of an apology. Evidence of bad reputation of the Claimant. Conduct of the defendant subsequent to the libel and during the course of proceedings. See Peter A Downard, Libel, Second Edition pp. 228-244, Carter Ruck on Libel para 15.10 to 15.13. **Jones v Pollard** [1996] EWCA Civ 1186. **John v MGN**, **Cleese v Clarke**, **Rahael v TNT News**, **Express Newspaper v Aleong**, **Lillie and Reed v Newcastle City Council** [2002] EWHC 1600, **Gordon v Panday**."

178. I do not believe that this is a case suitable for an award of exemplary damages as there is no evidence of the Second Defendant gaining some improper advantage by making the publication. However, an award of general damages together with aggravated damages will be appropriate. I have taken into account the following factors. The number of times that the defamatory matter was broadcast and re-broadcast on a show which the Defendants admit

was one in the public interest. The TTPS had within its disposal to either correct the error after the first day when the Claimant went to the Santa Flora Police Station or upon proper checks even before the picture was published. The further publication on 25th May 2015 that he had surrendered into police custody which is an erroneous report. On the other hand, the evidence of the impact of the statement on the Claimant was not grave and there is no cogent or compelling evidence of loss. I do not accept that his marriage had dissolved as a result of this allegation and find such a suggestion exaggerated. I have taken note of his failed attempt to have even his wife corroborate his evidence. His evidence of the impact that this broadcast had on his employment was not credible and speculative. I also take into account the minimal nature of the charge of driving without a valid driver's permit as compared to the other more serious and defamatory imputations referred to me in our local authorities.

179. I have considered the range of awards in comparable cases. In recent defamation cases where the sting of the defamatory matter was far more severe has attracted awards upwards form $200,000.00. In those cases there are allegations for corruption, fraud, serious criminal activity. This is not that type of case. In the lower bracket are cases such **Kishore Ramadhar et al v Prakash Ramadhar et al** CV2014-02122, **Krishna Persad v Trinidad Express Newspapers Limited** H.C. 981/2007, **Gita Sakal v Michael Carbello** CV2009-02468 Tiwari J case. The range of awards from these cases are in the region of $30,000.00 to $90,000.00. No case was argued by the Claimant for awards for each publication but I have nevertheless taken each publication on the three days into account. This case would fall on the lower end of that threshold and I would award the sum of $60,000.00 in general damage inclusive of aggravated damages against the Second Defendant.

<u>Conclusion</u>

<u>Libel:</u>

180. I have therefore found that the broadcast was a libel which was defamatory of the Claimant. The claim against the First Defendant will be dismissed as its public interest defence has succeeded. There will be judgment for the Claimant against the Second Defendant for damages for defamation assessed in the sum of $60,000.00.

181. The Second Defendant will pay to the Claimant his prescribed costs of its claim in libel quantified in the sum of $16,000.00.

182. Although the Claimant is liable to pay the First Defendant's prescribed costs in the libel claim, in light of the fact that it was reasonable for the Claimant to bring his claim against both the Second Defendant and the First Defendant, I will make a Sanderson order to the effect that the First Defendant's costs shall be paid by the Second Defendant quantified in the sum of $16,000.00.

183. I also wish to record that the First Defendant has voluntarily undertaken to publish a suitably worded correction in accordance with the judgment together with the Claimant's photograph and correct address.

False Imprisonment:

184. The claim for false imprisonment against the Second Defendant will be dismissed with prescribed costs quantified in the sum of $2,500.00.

Vasheist Kokaram

Judge