REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civ. App. No. 166 of 2006

BETWEEN

TnT NEWS CENTRE LTD. **APPELLANT**

AND

JOHN RAHAEL **RESPONDENT**

PANEL:
M. Warner, J.A.
W.N. Kangaloo, J.A.
A. Mendonça, J.A.

APPEARANCES:

Mr. V. Maharaj and Mr. R. Dowlath for the Appellant.
Mr. M. Quamina and Mrs. N. Kangaloo for the Respondent.

DATE OF DELIVERY: 9TH JULY 2009.

I have read the judgment of Kangaloo, J.A. and agree with it.

M. Warner
Justice of Appeal

I, too, have read the judgment of Kangaloo, J.A. and agree with it.

A. Mendonça
Justice of Appeal

Judgment

Delivered by W.N. Kangaloo, JA

1. This is an appeal from a decision of the judge below of 10th November 2006 whereby the learned judge awarded $400,000.00 in damages to the respondent in an action for libel relating to a defamatory headline and article which appeared in the TnT Mirror on September 30th 2005. The facts which gave rise to this appeal must be set out in order to understand the background against which the matter was decided. By claim form and statement of case dated 5th October 2005 the respondent brought a libel action against the appellant in relation to a front page headline and article which appeared in the TnT Mirror on September 30th 2005. The appellant company was at all material times the proprietor, publisher and printer of this newspaper. The offending headline reads as follows: *"War intensifies….Hit on Rahael…nephew's murder connected to Monos drug bust, Bryden fire."* The article appeared at page 5 of the newspaper under the caption *"Rahael is a marked man."*

2. By way of relief the respondent sought aggravated and exemplary damages, interest, an injunction restraining further publication of the libel, costs and any further relief.[1] By defence filed on November 25th 2005, the appellant admitted publication of the headline and article but goes on to state that the words in their natural and ordinary meaning were not defamatory. They further contended that the headline and article were nothing more than fair comment on a matter of public interest. Pleas of justification and qualified privilege were also advanced. The offending libel reads as follows:

> " (i) On Front Page:
>
> Headline: "*War intensifies….Hit on Rahael…nephew's murder connected to Monos drug bust, Bryden fire*."
>
> (ii) On Page 5:

[1] Pg 34 ROA.

Headline: **"*Rahael is a marked man*."**

"HEALTH Minister John Rahael is the main target marked for execution by a cartel of local executives and Colombian traders.

But because security was around him, it made the hit difficult. The message was telegraphed loud and clear, with the decapitation of Dr. Edward Koury, the nephew of Rahael's wife.

This is the information gleaned by TnT Mirror from an undercover international intelligence source.

Koury was snatched last week Wednesday from his business place at ISKO Limited, Macoya Industrial Estate, Tunapuna.

His headless body was discovered two days later, dumped in an orange field in Caparo, near where Rahael's son-in-law had staked a claim to lease a piece of former Caroni 1975 Limited estate…..

Mirror was told that since the daring daylight attack on Dr. Koury, the wealthy Syrian community has been under a self-imposed lockdown with heavy security and bodyguard services employed.

It is understood that while family members are being shipped out to secure destinations abroad, "professionals" are being shipped into Trinidad to "take care of business" against the

suspected perpetrators, who are reported to be high-ranking executives.

The Syrian mafia, Mirror was told, is bent on dealing with the big fishes in their own way, outside of the law.

With tensions and emotions running high in what has been described as a major split in an elite local cartel, the deadly war for control of the multi-billion-dollar drug-trade is expected to claim many more lives, a counter-drug agent told Mirror.

Agents are picking up intelligence on a possible connection between the recent $700 million Monos Island bust and multi-million dollar fire which destroyed the AS Bryden Warehouse in El Socorro…."[2]

3. At a pre-trial review on July 19, 2006 the learned judge made an order for the exchange of witness statements on or before September 27, 2006. It was also directed that these statements were to be used as evidence-in-chief and that in default, no evidence of witnesses would be allowed. By the trial date neither party had complied with this order nor was any application made for relief from sanctions. At the trial, the learned judge decided that the matter should proceed on the basis of an agreed statement of facts which had been filed by the respondent on May 5, 2006 by order of the Court.[3] The agreed statement of facts at paragraph 5 set out the libel but in the other paragraphs stated:

"The facts in this matter include the following:

[2] ROA p. 55 - 56.
[3] Para 6 of the judgment.

1. The Claimant is the Minister of Health in the Government of Trinidad and Tobago. He is the elected member of the House of Representatives of Trinidad and Tobago for the constituency of Port of Spain North, a seat which he won in the year 2000. The Claimant is also a former Mayor of the City of Port of Spain and a former Member of the Senate.

2. Prior to holding public office, the Claimant was a long standing and well respected member of the business community in Trinidad and Tobago being a major shareholder in and Director of several prominent businesses. The Claimant was also a founding member and the first President of the Downtown Owners and Merchants Association and President of the Trinidad and Tobago Businessmen Association. The Claimant is a member of the Rotary Club and an Honorary member of the Lions Club.

3. The Claimant is also a senior member of, and well respected member of the Syrian/Lebanese community of Trinidad and Tobago, having been the first member of this community to hold such high public office.

4. The Defendant is a limited liability company with its registered address at the Cor. 9th Street and 9th Avenue Barataria. At all material times it was the proprietor, publisher and printer of the TnT Mirror, a biweekly newspaper having a wide circulation in Trinidad and Tobago, the Caribbean, and internationally. The Defendant also enjoys a readership over the internet.

5. *[Libel as pleaded]*….

6. The Claimant's nephew, Dr. Koury was abducted from his business place on Wednesday 21st September, 2005.

7. The headless body of the Claimant's nephew, Dr. Koury was discovered two days later.

8. On or around August 22nd 2005 officers of the Trinidad and Tobago Police Service and the Trinidad and Tobago Coast Guard seized a quantity of cocaine of the value of approximately $700 million, the largest seizure of illegal drugs to date in Trinidad and Tobago along with several firearms and a quantity of ammunition. This seizure was effected at an island home belonging to a family with the surname Fitzwilliam.

9. On August 25th 2005, a large fire engulfed and destroyed a warehouse complex belonging to A.S. Bryden & Company. Two of the principals of A.S. Bryden & Sons Trinidad are also from a family with the surname Fitzwilliam.

10. Both the incidents at 8 and 9 above were of great public interest and held the spot of lead story in both the electronic and print media for several days thereafter. Because of the fact that both incidents occurred on premises with respect to which a family with the name Fitzwilliam had an interest, there was some speculation that there was a connection between the two. In fact, this matter was explored by the Defendant's newspaper in an article published in the TnT Mirror issued on September 2nd 2005 which carried the headline " Bryden blaze, $700m coke haul connected?"

11. By letter dated October 3rd 2005, the Claimant made it clear that the words complained of were false in all material respects and the Defendants failed to offer any apology and to give any undertaking not to repeat the offending words or similar words."

4. This therefore was the sum total of the evidence before the Court apart from the article itself which was admitted into evidence. Upon examination of this statement as well as the offending article the learned judge concluded that the publication was defamatory of the respondent and that he was entitled to general damages. The learned judge also held that there was no evidence to support the claim for exemplary damages, but that aggravated damages could be awarded because the appellant had maintained a plea of justification throughout the trial.[4]

5. This decision was challenged by the appellant by notice of appeal dated 21st December 2006. In essence four challenges to the decision of the learned judge have been advanced, each of which must now be examined and dealt with in turn. The first ground is that the learned judge erred in law in treating a document filed by the respondent bearing the heading *"Statement of Facts"* as an agreed statement of facts. At the hearing of this appeal counsel for the appellant indicated that he no longer wished to advance this argument and I therefore need not explore this issue.

6. The second ground of appeal relates to the decision of the learned judge to admit the article of September 30th 2005 into evidence despite her earlier ruling that no evidence would be received in the matter owing to the failure on both sides to file witness statements. The appellant contends that the effect of this ruling was that the article could not be tendered into evidence

[4] Para 32-33 of the judgment.

from the Bar Table except by consent, of which there was none. In her judgment the learned judge indicated that despite the appellant's objections the article was being admitted into evidence for two reasons: first, there was no dispute as to the publication of the words which formed the basis of this action and second, that pursuant to **Part 29.1 of the Civil Proceedings Rules (CPR)** the Court has extraordinarily wide power to decide the nature of the evidence required to decide the issues in the case as well as the form which that evidence must take. I am of the view that this challenge to the learned judge's decision cannot be sustained and is in fact inconsistent with the appellant's case as pleaded at paragraph 5 of the defence in which the appellant admits the publication of the words complained of and states that:

> *"The defendant will contend at the trial that the said words complained of in paragraph 5 of the Statement of Case comprised part of the Article referred at paragraph 5 of the Statement of Case, and the meaning of the said words must be understood, taken and or interpreted in their context within the entirely of the said article."*[5] (emphasis mine)

It is evident that there was no dispute as to the contents of the article which were in fact admitted through both the agreed statement of facts and the pleadings. Additionally, because in the defence the defendant admitted publication of the article, it could not claim prejudice by the admission of the article into evidence. Thus it does not lie in the mouth of the appellant to now contend that the learned judge erred in allowing the article to be tendered into evidence.

7. The third ground was that the learned judge erred in law by ascribing to the article certain defamatory meanings which had not been pleaded by the respondent and which are not borne out by the natural and ordinary meaning

[5] ROA p. 38.

of the words used in the article. In particular the appellant takes issue with findings of the learned judge that the article suggests that the respondent is part of the Syrian mafia, that he is involved in the drug trade, that he is marked for execution by persons involved in the drug trade, that the murder of his nephew was meant to send a message to him and that he would be involved in hiring professionals from abroad to avenge his nephew's murder. This ground of appeal has no merit. There is no significant departure from the meanings pleaded by the respondent and the findings of the judge such as to warrant the intervention of the Court of Appeal. The meaning ascribed to the article by the learned judge follows from the interpretation that would be arrived at by the ordinary reader of the words used.

8. In my view the only material ground of appeal concerns the challenge to the award of damages which the appellant contends is excessive given that there was no evidence that the respondent has suffered any damage. The award of damages is a matter which falls squarely within the discretion of the trial judge. As such, the issue to be resolved by the Court of Appeal is whether the trial judge was *"plainly wrong*" to make a substantial award of damages.[6] The Court of Appeal will only be justified in reversing the trial judge on this question if it is convinced that the judge acted upon some wrong principle of law, or that the amount awarded was so inordinately high as to make it an erroneous estimate of the damage to which the respondent is entitled.[7] I can say from the outset that the difficulty with the sum of $400,000.00 awarded below is that it would have included a sum for injury to hurt feelings and distress associated with the libel when no evidence was led of the same. I say so because the judge specifically says: *"Even in the absence of evidence, I infer that the circumstances of this public publication must have caused serious injury to the claimant's feelings."*[8] Further the

[6] **Fishermen and Friends of the Sea v The Environmental Authority & Or.** Civ. App. No. 106 of 2002 at para. 38-39.
[7] **Flint v Lovell** [1934] F. 353 per Greer L.J at pg 360.
[8] See paragraph 30 of the judgment.

judge later on says that the prominent headline and photograph of the respondent attending his nephew's funeral *"must have exacerbated the injured feelings of the claimant."*[9]

9. The reasons provided by the learned judge indicate the factors which were taken into account in the assessment of general damages to the tune of $400,000.00. In sum, the judge's reasons for making a substantial award of damages are that the newspaper enjoyed a wide circulation, that the offending publication was prominently displayed, that the allegation of involvement in the drug trade was pernicious and that respondent must necessarily have suffered grave embarrassment, humiliation and pain in light of the circumstances of the publication. Each of these reasons must now be examined to determine whether the learned judge acted upon some wrong principle of law or whether the award is an erroneous estimate of the damage suffered by the respondent as adduced on the evidence.

10. The purpose of an award of damages in a defamation action is threefold in nature: first, to compensate the claimant for the distress and hurt feelings, second, to compensate the claimant for any actual injury to reputation which has been proved or which may reasonably be inferred and third, to serve as an outward and visible sign of vindication. Thus in the assessment of damages several important factors fall to be considered. In **John v MGN**[10] it was noted that in assessing damages regard must be had to the extent of the publication and the gravity of the allegation. The following passage from the judgment of Sir Thomas Bingham is worthy of note:

> *"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*

[9] See paragraph 31 of the judgment
[10] [1997] Q.B. 586.

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 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."[11]

In **Cleese v Clark**[12] the matter was put thus by Eady J:

"It is necessary always to take into account the full circumstances of the case. Such factors have to be borne in mind as the gravity of the allegation, the scale of publication, the extent to which any readers believed the words to be true, any impact upon the claimant's feelings, reputation or career. There may also be matters of aggravation or mitigation which also need to be put in the scales. It is, moreover, often the case that the claimant's own conduct will have a part to play in arriving at the appropriate figure. A fundamental point always to be remembered is that the purpose of such damages, and indeed compensation awarded under s.3(5) [Defamation Act 1996 UK], is compensatory and not punitive."

11. The judgment of the learned judge in this appeal clearly illustrates that in her approach to the assessment of damages she was guided by these core

[11] Ibid at page 607
[12] [2004] E.M.L.R. 3 at para. 38.

principles. Thus the learned judge's decision is not open to review on the basis that the wrong principles were applied in conducting the assessment. The Court of Appeal must therefore consider whether the amount of the award was an erroneous estimate of the damage to which the respondent is entitled based on the evidence before the learned judge.

12. In the instant appeal, the assessment was not conducted in the usual course owing to the fact there was no evidence from either side apart from the statement of agreed facts. Instead it proceeded upon the basis that in a defamation action the law presumes that some damage will flow in the ordinary course of things from the mere fact of the invasion of the claimant's absolute right to reputation. Once a person has been libeled without any lawful justification or excuse, the law presumes that there will be injury to the person's reputation and his feelings. Thus it is often said that the claimant need not testify or produce any evidence to prove such injury. In this regard the following passage from **Halsbury** provides useful assistance:

> *"18.* ***Damages in libel.*** *If a person has been libeled without any lawful justification or excuse, the law presumes that some damage will flow in the ordinary course of events from the mere invasion of his right to his reputation, and such damage is known as "general damage." Thus a plaintiff in a libel action is not required to prove his reputation, nor to prove that he has suffered any actual loss or damage. The plaintiff is not obliged to testify, although it is customary for him to do so, but having proved a statement defamatory of him and not excused by any available defence he is always entitled to at least nominal damages."*[13]

[13] *Halsbury's Laws of England* 4th Edition Vol 28 at para.18.

13. Therefore although the claimant starts of with a presumption of damage and is not required to testify, evidence of damage should still be presented since a claimant offering no evidence at all may find himself with a small award of damages. To attract more than this small award for injured feelings and the distress associated with the libel, evidence is required. To the extent that the learned judge proceeded to award damages which given the quantum, must have included substantial damages under this head in the absence of any such evidence from the respondent or anyone on his behalf, I am of the view that she fell into error.

14. The effect of the failure to provide evidence in support of a claim for damages in a libel action is illustrated in **Hayward v Hayward**.[14] Here the plaintiff was unable to recover substantial damages in relation to a circular that was distributed by the defendant at a trade fair which cast the plaintiff and his business in a disparaging light. The court held that only a nominal award of damages should be made because the plaintiff had given no evidence of damage save that in his affidavit he deposed that the publication of the circular was calculated to injure and had injured him in his business which has fallen off since the issue of it. Despite the presumption of damage, North J felt that the evidence dealing with the issue of general damages was far too vague and imprecise to justify a substantial award. Nominal damages in the amount of £5 was considered sufficient compensation. Similar observations can be made in this appeal. Unlike in **Hayward,** the learned judge did not have the benefit of any evidence from the claimant.

15. The quantum of the award made by the learned judge is also difficult to maintain in light of her findings in relation to the impact of the publication on the respondent's reputation. At paragraph 29 of the judgment the learned judge deals with the injury to the respondent's reputation. She says *"by the fact of his continuing in office and the confidence with which he has continued*

[14] (1887) 34 Ch. D. 198.

to carry on with his ministerial, social and political duties, it can fairly be said that the article has not had serious impact on his reputation as a high office holder."[15] From this however it appears that the learned judge only dealt with the impact of the libel on the professional reputation of the respondent. The damage to the character or personal reputation of the respondent in the eyes of the ordinary members of the public can be presumed to be serious, given the pernicious nature of the libel.

However where the injury to the claimant's reputation is negligible, the evidence in relation to the claimant's injured feelings assumes prominence in the assessment exercise. Thus in **Fielding v Variety Incorporated**[16] the claimant, a theatrical impresario, brought a libel action against the defendant newspaper which ran an article claiming that his latest London production was a disastrous flop. The musical was actually a resounding success and continued to play to sold out audiences even after the article was published. The court held that it was obvious that the article had no serious effect on the claimant's reputation and the award of £5,000.00 under this head was set aside. However the court awarded £1,500.00 to the claimant for the anxiety and annoyance which he naturally felt by having his play erroneously described in such inelegant terms.

16. In the more recent case of **Cleese v Clark**[17] the claim arose out of an article published by the defendant which alleged that the claimant, a legendary comedian, was a perma-tanned Bob Hope wannabe, and that he must be humiliated by his latest TV flop which had seriously injured his reputation with American audiences. The court held that the evidence presented showed that Mr. Cleese's reputation both in the UK and abroad had not been damaged at all as he was still held in high esteem by millions of people. In the court's view the major element in assessing compensation was the impact of the

[15] Para. 29 of the judgment.
[16] [1967] 3 W.L.R. 415.
[17] Ibid, fn.10 at para. 39-40.

publication on the claimant's feelings. The court held that whilst by some people's standards Mr. Cleese might be regarded as unduly sensitive, his evidence clearly demonstrated that he was badly upset and that his hurt feelings were genuine. The defendants made unpleasant attacks against the claimant who was someone of particular sensitivity and vulnerability and must take their victim as they find them. An award of £13,500.00 was made as compensation for the injury to the claimant's feelings.

17. As I have indicated, in her judgment the learned judge dealt with the issue of injury to feelings at paragraphs 30 and 31. The judge held that the article must have caused serious hurt to the respondent's feelings due to the close relationship he enjoyed with his nephew, the prominence of the headline, the accompanying photograph of the respondent at his nephew's funeral and the serious nature of the allegation that the respondent is involved in the drug trade. To the extent that the learned judge relied on the presumption of injury and distress of the respondent, she cannot be faulted. However a major element in the assessment exercise was conducted based solely on the presumption of damage in relation to injury to feelings and distress. There was however no evidence before the learned judge as to the full extent of the respondent's hurt, humiliation and distress. Such evidence is of vital importance especially as the respondent is a politician.

18. The case of **Gorman v Mudd**[18] is particularly relevant in this regard for it clearly illustrates that politicians are expected to be more robust in the face of a defamatory attack. In that case the plaintiff, the Conservative MP for Billericay, complained of a "mock press release" written and circulated by the defendant, Mudd, a prominent member of the local community and chairman of the Billericay Conservative Businessman's Association, to ninety-one people most of whom knew something of the underlying quarrel between the parties. The publication suggested that the plaintiff had sought to destroy the

[18] Unreported, October 15, 1992, CA.

Association and to humiliate the defendant out of personal spite. The tone of the release was unpleasant (suggesting for example, that the plaintiff's female charms were inadequate despite a hormone implant). Although a plea of qualified privilege was upheld, the jury found express malice. There was no apology. Rather Mrs. Gorman had been subjected to unpleasant cross-examination which had increased her sense of humiliation. The Court of Appeal reduced the jury's award of £150,000 to £50,000. As Russell L.J. observed *"Mrs. Gorman was not entitled to be presented to the jury as a particularly vulnerable or sensitive litigant, deeply wounded by the press release."*

19. In her judgment the learned judge also considered that the nature of the allegation warranted an award of damages on the higher end of the scale.[19] In her view the allegation that the respondent was involved in the drug trade was far more serious than the allegation in the **Panday v Gordon**[20] case where the respondent was called a 'psuedo-racist.' Thus the learned judge stated that she was minded to make an award of damages that exceeds that in the **Panday** case based solely on the gravity of the allegations. The case of **Bull v Vazquez**[21] suggests that a reviewing court should not interfere with an award of damages which has been assessed at a high level because the trial judge thought the libel to be a heinous one. However care must be taken in reliance on this case owing to the fact that it is not clear whether the claimant testified or advanced evidence on the issue of damages and the court, per Asquith L.J., held that it was clear that the award contained a strong punitive element. In this matter the respondent has not advanced any evidence on the issue of damages and the judge has held that this is not an appropriate case for the award of exemplary damages.

[19] See para. 35 of the judgment.
[20] Privy Council Appeal No. 35 of 2004.
[21] [1947] 1 All E.R. 334.

20. In light of the nature of the evidence in this matter, I conclude that the award of damages by the learned judge was disproportionate to the damage shown to have been suffered by the respondent especially in light of the fact that there was no evidence from the respondent. The case of **Knuppfer v London Express Newspapers Limited** is authority for the proposition that *"there must be a reasonable relation between the wrong done and the solatium applied."*[22] Although the law does not regard the claimant's reputation as vindicated by a symbolic award of a token sum of damages, the court must be vigilant in the quantum of its awards. In this regard the observations of Sir Thomas Bingham M.R. in **John v MGN** must be noted**:**

> *"Any legal process should yield to a successful plaintiff appropriate compensation, that is, compensation which is neither too much nor too little. That is so whether the award is made by judge or jury. No other result can be accepted as just. But there is continuing evidence of libel awards in sums which appear so large as to bear no relation to the ordinary values of life. This is most obviously unjust to defendants. But it serves no public purpose to encourage plaintiffs to regard a successful libel action, risky though the process undoubtedly is, as a road to untaxed riches. Nor is it healthy if any legal process fails to command the respect of lawyer and layman alike, as is regrettably true of the assessment of damages by libel juries."*[23]

Whilst there are no jury trials in defamation actions in this jurisdiction, the words of Sir Bingham M.R. ought rightly to be regarded as reflecting principles of general application.

[22] [1943] K.B. 80 per Goddard L.J. at p. 91.
[23] Ibid, fn. 6 at page 611.

21. In my view an award of $250,000.00 would be more appropriate in the circumstances of this appeal. Such an amount would affirm the court's recognition that an allegation that a person is involved in the drug trade is an extremely serious libel. However in the absence of any direct evidence as to full extent of the injury to the respondent's feelings and reputation, the award of the judge below cannot be justified. The award of $250,000.00 is to vindicate the respondent and to compensate for the obvious damage to his reputation other than his professional reputation which according to the learned judge has not been seriously affected. The award also includes an element for distress and injury to his feelings as a result of the widespread publication of the offending libel. If there were evidence which demonstrated the full extent of the injury to his feelings and his distress over and above what can be assumed, this award would have been higher and the sum of $400,000.00 or more, might have been deserved. The appeal in relation to the award of damages is therefore allowed and the amount of damages awarded by the learned judge is reduced to $250,000.00.

22. The costs of this appeal are assessed at $9,333.00 which pursuant to part 67.14 of the Civil Proceedings Rules 1998, represents 2/3 of the costs which were assessed at $14,000.00 in the court below. Generally, the costs should follow the event, however in **Panday v Gordon** in the Court of Appeal where the damages awarded were reduced from $600,000 to $300,000, the successful appellant was nevertheless ordered to pay 75% of the costs of the appeal. This order for costs was not disturbed on appeal to the Privy Council. Here, because as in **Panday v Gordon**, the quantum is the only area upon which the appellant has succeeded, I would think that the appellant should pay 50% of the costs of the appeal. I therefore order the appellant to pay to the respondent the sum of $4,666.50 being half the costs of this appeal.

W.N. Kangaloo
Justice of Appeal