REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

PORT OF SPAIN

Civil Appeal No. P154/2013
Claim No. CV 2010 - 01764

BETWEEN

GARVIN SIMON
KEAVIN GREENE
WISDEN RAJCOOMAR
DAVID MADEIRA
LYNDON MASCALL
ISHMAEL PITT
DERYCK LAKE
ANTHONY CRAIG
ANTHONY WILLIAMS

Appellants/Claimants

AND

OMATIE LYDER
THE DAILY EXPRESS

Respondents/Defendants

PANEL

JUSTICE OF APPEAL BEREAUX
JUSTICE OF APPEAL MOOSAI
JUSTICE OF APPEAL PEMBERTON

APPEARANCES:

For the Appellants/Claimants: **Mr. I. Khan S.C. leading Mr. U. Skerrit**

For the Respondents/Defendants: **Mr. F. Hosein instructed by Mrs C. Ramjohn- Hosein**

DATE OF DELIVERY: 26th March 2018

I have read the judgment of Pemberton J.A. and I agree with it and have nothing to add.

/s/ N. Bereaux J.A.

I have read the judgment of Pemberton J.A. and I agree with it and have nothing to add.

/s/ P. MOOSAI J.A.

JUDGMENT

[1] **INTRODUCTION**

As one commentator wrote, *"to serve the public, journalism must be accurate, independent, impartial, accountable and show humanity"*.[1] This is an appeal from the decision of the trial judge in which he dismissed a claim filed by the Appellants/Claimants for damages for libel whilst ordering them to pay the Respondents/Defendants' costs. The main issues to be determined on appeal are, was the tort of defamation fully constituted and was the trial judge plainly wrong to reject the Reynolds privilege defence.

[2] I agree with the trial judge that the words were defamatory, but I disagree with him and find that the tort of libel was fully constituted notwithstanding that the first article and the editorial did not name the Appellants/Claimants but the subsequent articles mentioned them by name. Further I

[1] Author unknown

agree with the trial judge that the matter reported on was one of public interest, and that the Reynolds defence was not available to the Respondents/Defendants. Although not addressed by the trial judge, I find that based on the evidence the defence of fair comment was not met. These are my reasons.

[3] **BACKGROUND FACTS**

On August 17, 2007 at Wallerfield in East Trinidad five (5) civilians met their demise after a shooting incident involving the Appellants/Claimants, who at the time were and still are serving members of the Trinidad and Tobago Police Service ("TTPS"). I shall refer to them as "the Officers". The incident was subject to investigation and Coroner's inquest. At the conclusion of the inquest, the Coroner ruled that the actions of the Officers did not amount to negligence as against four (4) of the victims and that the death of the fifth victim, was a "misadventure".

[4] The incident excited the general public and was reported in the daily newspapers and became the subject of a number of articles appearing in the print and electronic media. These articles were circulated locally and were published or were caused to be published by Omatie Lyder ("the Editor in Chief") and Trinidad Express Newspaper Limited sued as The Daily Express, an experienced publishing establishment, which published its first issue on Tuesday 6th June 1967.[2] The publishing house has been supplying daily newsworthy items to the public of Trinidad and Tobago and beyond through print and electronic publications. I shall refer to them collectively as "The Publishers".

[5] **THE WORDS COMPLAINED OF**

The writings giving rise to this action, were published on diverse dates over the period December 2008 to July 2009 and comprised three articles and an editorial. The Officers claimed that the words were contained in three articles and one Sunday editorial were defamatory. The publications were as follows:

---

[2] *The Trinidad Express was first published on Tuesday June 6th, 1967. The first Board of directors comprised Dindial Maharaj, David Law, Neil Lau, Vernon Charles, Carlton Mack, Tajmool Hosein, Rodney Webb, Phillip Habib and Hamilton Holder. Tommy Gatcliffe and Sydney Know(x) joined the board subsequently. Ken Gordon assumed the position of Managing Director of the Express in February 1969. Under Ken Gordon as managing director and Owen Baptiste as editor, the Express became an institution in the Trinidad and Tobago landscape, known for its fearless journalism and support for freedom of the press.* **www.onecaribbeanmedia.net**

1. *"**Wallerfield 5 killed by police**"* appearing in The Daily Express of **Tuesday 2nd December 2008**;
2. *"**A clear call for justice**"* appearing as an editorial in The Daily Express **Wednesday 3rd December 2008**;
3. "***Forensic Expert testifies***" appearing in The Daily Express of **Friday 5th June 2009**;
4. "***Wallerfield inquest "Self –preservation important"*** appearing in The Daily Express of **Friday 5th July 2009.**

[6] In the first article as indicated above, *"**Wallerfield 5 killed by police**"* appearing in The Daily Express of **Tuesday 2nd December 2008**; the offending words were,

> ***Paragraph I: The police officers who killed five unarmed people in Wallerfield one year ago were hand-picked by a senior policeman who was later found to have ties with murdered drug queen Lily Layne.***
>
> ***Paragraph II. And according to a Special Branch Report into the killings the real target was the man believed to be behind Layne's murder who was mistakenly assumed to be in the car carrying the victims.***
>
> ***Paragraph III. The shocking revelation about the relationship between murdered drug baroness Lily Lane and the senior officer believed to be behind the killing was unearthed by the Special Branch who became involved in the issue following protests outside President's House, Circular Road, St Ann's in the weeks following the killings on August 17, 2007.***
>
> ***Paragraph IV. Forensic information about whether the victims had gunshot residue on their hands, which would indicate whether they had fired guns at the police, was missing from the original file.***
>
> ***Paragraph V. The officers involved had claimed that they were chasing the car carrying the four men when they were fired at.***
>
> ***Paragraph VI. However, autopsy results and photographs of the car seem to support eyewitness accounts that they were not being chased and that two of them, Charles and Goddard had been killed by guns aimed directly at them from in front of the vehicle. They were shot in the front of the head and chest. There were no bullet holes in the back of the car only through the front windscreen.***
>
> ***Paragraph VII. No guns were ever found in the Almera or any of the men.***
>
> ***Paragraph VIII. The police officers involved in the killings were selected from different police stations in the Northern Division and according to the Special Branch Report were instructed to look for the man believed***

to be behind Layne's killing, Shawn "Sawood" Allen, who was himself murdered in February.

[7] The publication, *"**A clear call for justice**"* appearing as an editorial in The Daily Express **Wednesday 3rd December 2008** contained the following words which the Officers found offending,

> ***Paragraph I. The Nation waits to see whether any action is going to be initiated against the policemen responsible for the deaths of five of our innocent and unarmed citizens just over one year ago. That the instigator of the ill-fated police exercise which resulted in the Wallerfield slaughter was able to personally hand-pick the officers for his killing spree suggests he must be reasonably high up in the police hierarchy and this, in turn, raises the real possibility that, even when all is said and done, he is going to enjoy a level of protection that will see him go free;***
>
> ***Paragraph II. The Police Commissioner did promise a more thorough investigation but nothing more was heard of this by the general public until this newspaper's Investigative Desk secured a Special Branch Report which disclosed that the four met their untimely deaths because the police killer team mistakenly thought notorious drug queen Lily Layne's executioner was in the car in which they happened to be travelling that fatal evening;***
>
> ***Paragraph III. And why, one may ask, was the police so intent on avenging Layne's largely unlamented death in the face of that investigative Lethargy only too common when it comes to the killings of ostensibly far more worthy citizens? Because, comes the appalling answer, the police mastermind of the pursue-and-kill exercise happened to have close ties with the woman who enriched herself by selling death to people, the nature of those ties of a kind that Trinbagonians, perhaps, can only too readily guess;***
>
> ***Paragraph IV. Now in the wake of the Wallerfield Slaughter, this newspaper noted that "family and friends have been at pains to stress the good characters and law-abiding records of the slain men." Even as we entered the caveat that we were "well aware of the predilection in some areas to paint even the notorious criminals as either life-long or born-again saints; serious questions have been raised in this instance."***

[8] The other two publications are, "***Forensic Expert testifies***" appearing in The Daily Express of **Friday 5th June 2009** and "***Wallerfield inquest "Self –preservation important"*** appearing in The Daily Express of **Friday 5th July 2009.** The words complained about in the earlier 5th June, 2009 article are,

> ***As a result, the conduct of nine police officers- Sgt. Garvin Simon, Cpls Kevin Green and Anthony Craig and PC'S David Madeira, Derrick Lake,***

Ishmael Pitt. Wisden Rajcoomar, Anthony Williams and Lyndon Mascal has come into question following the shooting deaths.

[9] In the later article published on 5th July, 2009, the following words which were published by the Publishers were relevant to the Officers' cause:

Paragraph I. "killed or be killed;

Paragraph II. The officers were Sgt. Garvin Simon, Cpls Kevin Green Anthony and Craig and PC'S David Madeira, Derrick Lake, Ishmael Pitt. Wisden Rajcoomar, Anthony Williams and Lyndon Mascal;

Paragraph III. Magistrate Gail Gonzales, presiding as coroner in the Arima Magistrates' Second Court ruled last week that the actions of the officers were in no way negligent against the four men killed and further ruled the death of Courtney was a "misadventure."

[10] **THE PROCEEDINGS**

THE CLAIM

On the 7th May, 2010, the Officers filed a claim against the Publishers claiming damages for libel, inclusive of general, aggravated and exemplary, interest and costs. The relief sought in damages was in relation to the alleged offending words contained in the first article and the editorial. The other two articles were mentioned in the statement of case but did not form part of the prayer for relief. [3] The trial of this action commenced on the 4th March 2013. The trial judge delivered judgment on 24th May 2013.

[11] The first article and the editorial did not mention the Officers by name. The second and third articles mentioned the Officers by name. The Officers contended that the words so printed and published were in their ordinary and natural meaning meant and were understood to mean that (1) they were rogue criminal members of the TTPS; (2) being solicited by a rogue senior member of the TTPS to commit the crime of murder of a person known, in retaliation for the murder of an alleged female drug trader; (3) that the killings were perpetrated against four unarmed occupants of a vehicle at Wallerfield; and (4) the Officers without just cause shot at the vehicle, the occupants of which at the time were four unarmed persons, mistaking one of them to be the person who had killed the female drug trader.

[3] The significance of this is discussed at paras. 39 – 44 *infra.*

[12] The words, they say were untrue and were published maliciously; they were not fair comment regarding them and were therefore calculated to ***"injure the Claimants in their character, credit and reputation***." The Officers further allege that they were brought into public scandal, contempt and odium causing "***damage to their characters and reputations in their public capacity as police officers and in their private capacity***". They sought to recover from the Publishers, through this court, damages for libel contained in the **first article and the editorial**, aggravated and exemplary damages and the usual orders for interest and costs.

[13] **THE DEFENCE**

The Publishers defended this claim by contending that the case as filed was an abuse of process and/or that there was no grounds for bringing the claim. They admitted that they were the printers and publishers of the words complained about in the first article and the editorial and the subsequent articles. Further,

i. At the time of the publication of the first article and the editorial, the Officers were not identified;
ii. That the words complained about in the first article and the editorial could not refer or be understood to refer or were capable of referring to the Officers;
iii. That the words complained about in the first article and the editorial were not defamatory of the Officers nor could they be understood as being defamatory of them;
iv. In relation to the second and third articles, these could not be relied upon to interpret the first article and the editorial;
v. That the Officers could not rely on subsequent publications in which they were named to assist them to constitute the tort due to the significant lapse of time between the two sets of publications;
vi. As a result, the tort of defamation was not properly constituted and no cause of action could have arisen by virtue of any subsequent publication;
vii. They denied that the words were defamatory. They further contend that even if there was a case for them to answer, and the words complained about were found to be defamatory,

a. In relation to the first article, those words were published *"on an occasion of qualified privilege*".

b. In relation to the editorial, the words were published *"on an occasion of qualified privilege"* and/or in the alternative in relation to paragraph 4 of that article, that the words complained about were fair comment on a matter of public interest.

[14] **THE TRIAL JUDGE'S FINDINGS**[4]

The action in the High Court brought mixed results. Even though the words in the first article and the editorial were found to be capable of bearing a defamatory meaning, the trial judge dismissed the Officers' Claim on the ground that the tort was not properly constituted. These are the trial judge's findings,

i. That "on the face of it" the words published in the editorial and the first article were defamatory.[5]

ii. That the matter was one of public interest;

iii. Since the words of the first article and the editorial referred to the Claimants, although their names were not mentioned in those publications but were mentioned in the subsequent publications, the correct principle to be applied to determine whether the tort was fully constituted so as to allow the Officers to succeed in their suit was the **HAYWARD**[6] principle;

iv. That upon an application of the **HAYWARD** principle, the Claimants did not establish that the subsequent publications were able to "calcify their identity".[7]

---

[4] See judgment of Seepersad J in **SIMON & ORS v LYDER AND TRINIDAD EXPRESS NEWSPAPERS LIMITED sued as THE DAILY EXPRESS CV No. 2010-01764.**

[5] See para. 31: *The court agrees with the Claimants' contention that the article suggested that the ranks involved were rogue criminal members of the Trinidad and Tobago Police Service given that the article went on to state that the officers involved in the shooting were dressed in black clothes, wore masks and were armed with heavy weapons, including Galil assault rifles, and further, the article goes on to suggest that the autopsy results and photographs seemed to be at odds with the police's account of what transpired.*

Para. 32: ***Accordingly, having considered the First Article in its entirety including the headline the court found that the words complained of were understood to bear and were/are capable of bearing a defamatory meaning.***

para. 35: ***When put into context the editorial went beyond the point of stating the Defendant's position in the matter. The editorial in its ordinary meaning labeled the police officers involved in the shooting as contract killers, working for a superior officer who had ties with the drug trade and seeking revenge for the death of a drug queen Lily Lane.***

[6] **HAYWARD v THOMPSON [1982] Q. B. 47**

[7] See para. 50 of the judgment of Seepersad J. *op. cit.* f. n. 4

v. The subsequent publications of the second defendant did not support the proposition that the first article and editorial were published 'of and concerning' the claimants as they were incapable of identifying the claimants as the subjects of the first article and the editorial. The basis of that conclusion lay in,

a. The lapse of time between the date of publication of the first article and the editorial and the subsequent articles naming the claimants which was significant so that no nexus between the two sets of articles was established.[8]

b. The claimants' pleaded case "*did not address nor was there any attempt to lead any evidence with respect to anyone making a connection between the subsequent articles and the first article and the editorial".*[9]

vi. That that Claimants' case failed.[10]

[15] Despite this finding, the trial judge nevertheless went on to consider The Publishers' defence of qualified privilege using the test laid down in the **REYNOLDS CASE**.[11] He found that notwithstanding the finding, The Publishers could not succeed on the defence of qualified privilege and that they would have been liable in damages but for the dismissal of the Officers' claim. The trial judge did not address the fair comment defence as advanced by the Publishers in relation to the editorial. The trial judge then went on the dismiss the Officers' claim and order that they pay the Publishers' costs in the sum of fourteen thousand dollars ($14,000.00).

[16] The Officers have now appealed the decision and the Publishers have cross appealed.

[17] **ISSUES ON APPEAL**

The Court had to consider and determine the appeal and cross appeal from the judgment of the trial judge on three (3) main areas,

---

[8] See para. 52 of the judgment of Seepersad J. *op. cit.* f. n. 4

[9] See paras. 56,57 and 58 of the judgment of Seepersad J. *op. cit.* f. n. 4

[10] See paras. 59 of the judgment of Seepersad J. *op. cit.* f. n. 4. *"Although the First Article and the editorial were capable of bearing a defamatory meaning, it was not part of the Claimants' pleaded case that after the publications of the First Article and the editorial that persons who knew that they were the officers involved in the shooting, knew or understood that the said publications referred to the Claimants. Further the subsequent publications did not serve to identify the Claimants as the persons who were referred to in the First Article and Editorial.* ***Accordingly the Claimants claim must fail.****"*.

[11] See **REYNOLDS v TIMES NEWSPAPER LTD [1993] 3 WLR 1010.**

- Was the trial judge plainly wrong when he found that on the facts of this case, that the tort of defamation, libel in particular was not fully constituted in relation to the first article and the editorial;
- Was the trial judge plainly wrong when he found that the Publishers could not have availed themselves of the **REYNOLDS PRIVILEGE** defence in relation to the first article and the editorial; and
- Was the trial judge plainly wrong in not considering whether the defence of fair comment with respect to the publication of the editorial was open to the Publishers.

[18] **ISSUE 1– WHETHER ON THE FACTS OF THIS CASE THE TORT OF DEFAMANTION, LIBEL IN PARTICULAR WAS FULLY CONSTITUTED IN RELATION TO THE FIRST ARTICLE AND THE EDITORIAL.**

On the issue of whether the words complained of in the first article and the editorial were defamatory, I am satisfied that the trial judge was correct in his approach, analysis and conclusion. The trial judge considered the articles as a whole in order to determine the ordinary and natural meaning of the offending words and engaged in a comprehensive analysis of both publications.[12] The trial judge used the concept of the reasonable reader as the basis of his analysis and adopted the reasoning in **SKUSE, JEYNES** and **KAYAM MOHAMMED AND OTHERS v TRINIDAD PUBLISHING COMPANY LIMITED AND OTHERS.**[13] There is no need to depart from the trial judge's finding on that ground.

[19] **IDENTITY OF THE VICITIM OF A LIBEL**

[12] See para. 14 *op. cit.*

[13] **SKUSE v GRANADA TELEVISION LIMITED [1993] EWCA Civ 34** per Sir Thomas Bingham MR at para 14; **JEYNES v NEWS MAGAZINE LIMITED [2008] EWCA Civ 130** per Sir Anthony Clark MR at para 14; **KAYAM MOHAMMED AND OTHERS v TRINIDAD PUBLISHING COMPANY LIMITED AND OTHERS Civil Appeal No 118 of 2008** per Mendonça J.A.

There is another major consideration in deciding whether the libel had been fully constituted. The main task of a person alleging defamation is that he must identify himself as such a person. In **KNUPFFER** the Lord Chancellor stated that "*It is an essential element of the cause of action for defamation that the words complained of should be published 'of the plaintiff.* [14] It is undisputed that the Officers were **not** identified by name in the first article or the editorial. These were the publications which formed the nub of the prayer for damages. The later publications though mentioned in the statement of case, contained the names of the Officers as those concerning The Coroner's inquest into the Wallerfield killings. Additionally, these publications were not made the subject of the prayer for damages.

[20] Mr Hosein was adamant that the undisputed fact that the Officers were not named in either the first article or the editorial, the publications complained about, was sufficient to dispose of this matter as against the Publishers. He used two bases for his arguments. The first one was the failure of the Officers to "*demonstrate that the ordinary reasonable reader could conclude that (the Officers) as police officers were the ones in question".* The second one was procedural.[15] In relation to the first ground, applying the dicta in **KNUPFFER,** [16] he submitted that the reference to "*police officers*" in the first article and the editorial, where they were not named, could not be a reference to the Officers. He reiterated his position in his oral arguments.

[21] Mr. Khan did not address this issue extensively in his written submission or in his oral submissions. It is then left for the Court to treat with Mr. Hosein's submissions.

[22] **ANALYSIS AND CONCLUSION**

A perusal of the first article and the editorial makes the answer to the question, *whether the words written were in relation to the entire class of persons, which in this case was the six thousand (6,000) odd police officers*, no. The words were patently referable to a class of officers. This was not a case of a defamation at large. The first article and the editorial were directed to

[14] **KNUPFFER v LONDON EXPRESS [1944] A.C. 116** p. 120.
[15] See paras. 39 – 44 *infra.*
[16] The dicta in **KNUPFFER** spoke to the reason why a publication of *"a libel of a large or indeterminate class of persons described by a general name"* could not succeed, was *"the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement"*.

certain police officers who were embroiled in a specific incident, the Wallerfield killings. It is undisputed that the entire six thousand (6,000) strong TTPS was not involved in the incident.

[23] I now consider whether the Officers were sufficiently identified in the first article and the editorial as the persons to whom the alleged offensive words referred. There were sufficient qualifying features to indicate clearly that the words written in the first article and the editorial sufficiently identified the Officers. The first article made specific *mention* that the officers were "*selected from different police stations in the Northern Division"*, that they were *"hand-picked by a senior police man who was later found to have ties"* with "*a known drug queen".* The editorial made mention of *"the policemen responsible for the deaths of five of our innocent and unarmed citizens just over one year ago. The instigator of the ill-fated police exercise which resulted in the Wallerfield slaughter was able to personally hand-pick the officers for his killing spree…".* To my mind this clearly cannot be termed references to a "*large or indeterminate class of persons described by a general name*".

[24] **GRAPELLI OR HAYWARD, WHICH IS THE PRFERRED TEST?**

Mr. Hosein was of the view that the applicable test was that laid out in **GRAPELLI**. He submitted that at the time of the publication of the article and the editorial, *"none of the Officers were identified by name nor could they be because nothing giving raise to their identification was published and such extrinsic facts, namely the identification of the police officers, only occurred at the very earliest in June 2009 and July 2009 when the coroner's inquest was reported".* A further essential ingredient was the relevant knowledge at the date of publication of the persons to whom it was published *"to support an innuendo"* must be, at the time of the publication, ***"not thereafter acquired knowledge".*** Mr. Hosein further alluded to the lack of a pleading of extrinsic facts. [17] He then sought to distinguish **HAYWARD** and concluded that,

> *In the present case since none of the Officers are named, in reliance on the Submissions on **Knuppfer** … there can be no finding that they or either of the Officers could have been referred to in the offending publications.*
>
> *In the present appeal the publications in which the Officers' names appear for the first time, in June and July 2009 are **not** the subject of any*

[17] I shall discuss this further from para. 39 - 43 *infra.*

defamatory complaint and absent these publications there can be no identification of the Officers or any of them.

Assuming that the Officers were entitled to rely on the publications in June and July 2009 neither of them were written by either the writer of the Article of the editorial.

[25] Mr. Hosein disagreed with the trial judge that the **HAYWARD** test was the applicable test. He opined that in this jurisdiction, since libel trials are by judge alone, and not by judge and jury, "*there is no room for confusion in the mind of a judge, as opposed to a jury of laymen"* as to the meaning of the words used in the article and the principles to be applied in determination of issues. Secondly, in **HAYWARD** there was a plea of innuendo that the words in the second article could be relied on to support the plea in respect of the words in the first article and to support the allegation that the words in the first article refer to the plaintiff. In this case there is no plea of innuendo. The third point of distinction according to Mr. Hosein was that neither the first article nor the editorial contained the Officers' names, neither are there any references in the subsequent article to the previous articles.

[26] In response Mr Khan examined a number of authorities. He agreed with the trial judge that the **HAYWARD TEST** was clearly applicable, *"since one ought not to escape liability for his libelous actions by simply publishing the names of his intended targets at a later date".* He laid much store on Lord Denning's dicta that "*… If a defendant intended to refer to a plaintiff, he cannot escape liability by not giving his name … if he intended to refer to the plaintiff, he is liable. He is to be given credit for hitting the person whom he intended to hit..".*[18]

[27] **ANALYSIS AND CONCLUSION**

I start by saying that the differences in the trial systems between the United Kingdom and Trinidad and Tobago, that is the use of trial by jury in the former and trial be judge alone in the latter does not and will not so greatly impact on the legal principles to be applied in cases such as these. To me, the preference for one test over the other lies,

1. in the feature distinguishing the two tests; and
2. the evidential issue concerning admissibility of the subsequent publications.

[18] **HAYWARD v. THOMPSON** *opt. cit per Lord Denning MR pg. 60 Letter B-D.*

The main feature distinguishing the two tests lies in the nature of the first publication in which the 'victim' of the libel was not identified by name in the publication complained about.

[28] In **GRAPPELLI** the court did not find that the original words complained of were defamatory. Lord Denning agreed with Blair J in **SIMONS PPTY LTD v RIDDELL**[19] that a subsequent publication cannot be used '*to read into the innocent matter a defamatory meaning…".* If the words complained about in the prior publication were innocent, a later publication will not render them defamatory. In this particular case, the Officers were not identified by name in the first article and the editorial. If it was found that the words complained about were innocent, the subsequent publication of their names could not as it were consummate the libel. The courts frown upon the use of a subsequent publication to render defamatory an earlier innocent publication. It is in this context that the requirement as to the plea with respect to legal innuendo arose.

[29] This is not the position in **HAYWARD**. That case concerned the admissibility of a subsequent publication in which the victim of the libel was named. The second publication was admitted into evidence to show that in the first publication, the writer trained his aim at the victim, that is, he intended to refer to him. The court determined that "*first article was published 'of and concerning'* the victim, notwithstanding that he was not named in the first article. Lord Denning set out the test as follows:

> One thing is of essence in the law of libel. **It is that the words should be defamatory and untrue and should be published of and concerning the plaintiff.** That is, the plaintiff should be aimed at or intended by the defendant. If the defendant intended to refer to the plaintiff, he cannot escape liability by simply not giving his name. … But still if he intended to refer to the plaintiff he is liable. He is to be given credit for hitting the person whom he intended to hit. The law goes further. Even if he did not aim at the plaintiff or intend to refer to him, nevertheless if he names the plaintiff in such a way that other persons will read it as intended to refer to the plaintiff, then the defendant is liable.

In this case, as a matter of pleading, the two articles were contained in the statement of case, which I shall discuss at paragraphs 39 – 43.

[19] [1941] NZLR 913

[30] In **HAYWARD**, which was decided after **GRAPPELLI,** it was recognized more importantly, that in order to constitute a cause of action, the libelous words must be contained in the first article in which the victim is not named. In other words, the original article must be defamatory of the victim even if he is not named. This is the major point of distinction between **GRAPPELLI** and **HAYWARD.** Sir George Baker in recognizing the distinction had this to say,

> *But there (*in **GRAPPELLI**) *the court was dealing with an attempt to make an innocent statement defamatory by facts which came into existence subsequent to its publication….*
>
> *In the present case, there was nothing innocent about the publication of April 9* (the first publication).

[31] **HAYWARD** and the case at bar bear some resemblance. In both cases, the subjects of the libel were not mentioned by name in the first article and in this case, the editorial. Both subjects gave evidence of the impact of the publications on them.[20] In both cases there were subsequent publications which named the subjects. In **BRADLEY**, the Irish Supreme Court sought to limit Lord Denning's "*conviction*" that intention to "*hit"* the victim was a relevant and necessary constituent of the tort of libel. Mr Justice Hardiman opined and I agree, that "*I do not believe that proof of intention is necessary to constitute a libel action and I do not believe that in general, the defendant's intention is of any relevance except in the case where malice is an issue…"*.

[32] Unlike Mr Hosein, I do not consider that there was any need to decide the issue of identity before interrogating whether the words were defamatory. I agree with the analysis done by the trial judge and his conclusion that the words published in the first article and the editorial were defamatory.

[33] One of the issues which the English and Irish courts had to grapple with was the evidential issues concerning the admissibility of the subsequent publications in which the subject's name was mentioned, that is, whether the subsequent publications as it were crystallised the libel. Admissibility of the subsequent article was not the issue in this case. Here I see it as an issue of weight, that is to say, could reliance be placed on the subsequent articles to crystallise the claim? I do not find that the trial judge plainly wrong when he placed sufficient weight on the subsequent

[20] See p 57 para D-H in **HAYWARD**. See also in this case the evidence in Chief and confirmed in cross examination of ……

publications and relied on their content to assist him to determine that the **HAYWARD TEST** was the correct test to be applied to the circumstances of this case.

[34] The next question is, *was the trial judge plainly wrong in the application of the **HAYWARD TEST** when he found that the subsequent articles naming the Officers as involved in the Wallerfield killings and as the subject of a coroner's inquest into the killings were **incapable of identifying** the Officers as the persons referred to in relation to the words complained of in the first article and the editorial?*

[35] There must be a sufficient nexus between the two sets of publications. In other words, it is necessary therefore to draw a conclusion that the defamatory words in the first article and editorial in which the Officers were not named were of and concerned the very persons named in the subsequent articles. The trial judge sought to raise the differences in the factual matrices of the case at bar and the authorities, for instance in **BRADLEY,** to conditions which had to exist for a positive outcome to be attained. The trial judge chose as his focus the lapse of time between publications. This may be of some merit but in this case it cannot be regarded as conclusive. I set out above, the offending words in the first article and the editorial. I have noted the continued mention of the "*killings of unarmed civilians*", by a group of *"hand-picked officers from the Northern Division"*, described in the editorial as *"the police killer team".* It is clear from the publications that the killings were of high visibility, attracting protests by family members asking for the involvement of the President of the Republic. Incidentally, the editorial admonished *"all citizens to pay close attention to the proceedings of the ordered inquest when it does come up at the Arima Magistrates' Court".*

[36] The subsequent articles referred to by the Officers in their claim are now examined. The article dated June 05 2009 was titled "***Forensic Expert testifies*** …. ***Wallerfield shootings***". The Officers' names were revealed for the first time. The words in this first article which the Officers highlighted in their pleading were "***As a result, the conduct of nine police officers Sgt Garvin Simon, Cpls Kevin Greene and Anthony Craig, along with PC's David Madeira, Derrick Lake, Ishmael Pitt, Wisden Rajcoomar, Anthony Williams and Lyndon Mascall, has come into question following theshooting deaths…".*** In the July 05 2009 article, the very title

"Wallerfield Inquest "Self - Preservation Important" , kept the incident alive. In this article, the Officers were named, leaving no doubt as to their involvement with the incident. An objective reading of all 4 articles will, to my mind, leave no one harbouring any doubt of the connection between the description of the persons who participated in the Wallerfield incident which saw the death of six (6) citizens of this country were the Officers referred to the 'hit squad' collected from officers of the Northern Division and the names appearing as the police officers concerned with the Inquest.

[37] Even though the 'lapse of time' was seven (7) months, in the context of the entire unusual event[21] this time period is not so substantial so as to allow the trial judge to find that this lapse of time was significant to displace the conclusion that the offending words in the first article and the editorial could be found to be of and concerning the Officers whose names were published in the subsequent publications. Further, I must take into consideration that ours is a small country with a population of one point three (1.3) million people. This is considerably less than that of a larger country, like the United Kingdom, or for that matter a larger city, for instance London. The chances that persons will make the connection between the publications is far greater in our country. A lapse of seven months between the publication of the first article and the editorial cannot be considered significant to displace the conclusion arrived at, that the first article and the editorial were published "of and concerning" the Officers.

[38] I do not share the trial judge's concern that the lapse of time between the two sets of articles could be inimical to a finding that there was a nexus between them. In fact, I am of the view that the tort of libel has been made out against the Publishers. In light of this conclusion, I find that the trial judge was plainly wrong.

[39] **THE PLEADINGS**

The following issues were raised but to my mind will not alter any of the findings made or to be made in this matter. I shall address them for completeness. Mr Hosein argued and the trial judge found that the Officers' failure to include the later articles which named the Officers in their prayer for damages for libel rendered the entire claim untenable enough to be struck out. I do not agree. The reasons are found in the answers to the following question:

[21] The unsual events are, igniting and fueling public interest and the circumstances surrounding it coupled with the writer's/publisher's stated intent of keeping the issue alive by the reports of the inquest and the language used in the reports.

1. Did the Publishers know the case that they had to meet from the existing pleadings?
2. Were the Publishers able to defend the claims made against them?
3. What therefore is the effect of the failure to include the naming articles as part of the prayer for relief if any?

The Publishers clearly knew the case that they had to meet. The single requirement of pleadings is to plead facts so that a Defendant knows the case he has to meet and that the claims are based on a legal wrong. Counsel Mr Khan S.C. conceded that it would affect the Officers' case in damages but was not sufficient to dispose of the entire claim. Therefore, the Officers' failure to ask for specific relief with respect to libel for the later articles which named them did not render the entire claim untenable enough to be struck out. The trial judge was therefore plainly wrong on this finding.

[40] Further, was the failure by the Officers to plead or to lead evidence with respect to someone making a connection between the subsequent articles and the first article and editorial fatal to their claim? Again, the answer to this question is no. There was evidence led by the Officers themselves which did not break down under cross examination. The trial judge asked himself the wrong question. The real question which faced the trial judge was *how much weight should I attach to the evidence led?* In answer to that question, the Officers not having any supporting evidence detracts from the main evidence and finding that the writing, printing and publishing of the words were found to be defamatory of them. Again, this may go to the award of damages but it cannot be of assistance to The Publishers to displace liability.

[41] Mr Hosien and the trial judge spent some time in discussing whether the failure to plead "innuendo" was fatal to the claim? Mr Khan submitted that this was a technicality and should not displace a publisher's liability. In fact, any lapse in this regard may only go to and affect the award of damages. Since Mr Hosein preferred to rely on the **GRAPPELLI** test, it is understandable that he should discuss the issue of innuendo. This to me does not arise if the **HAYWARD** test is applied since the words complained about in the first article and the editorial which did not name the Officers were defamatory.

[42] To my mind, this question does not arise when it was found as the trial judge did early in his judgment that the words complained about were defamatory of the Officers. So that, where the words in their plain, ordinary and natural meaning are found to be defamatory of a plaintiff, there is no need to plead innuendo. The case will not be reliant upon extrinsic evidence of any kind to prove the libel. I am fortified by the **FULHAM**[22] judgment of Lord Denning MR when he quoted the passage from **Gatley** which states,

> *But where the words are **not** defamatory in their natural and ordinary meaning, but only by reason of extrinsic circumstances, the plaintiff must assert an innuendo averring the precise defamatory meaning conveyed to those persons to whom the words were published; otherwise his statement of claim will disclose no cause of action.*

[43] I cannot agree with either the trial judge or Mr Hosien that that is of significance to a decision of the case at bar. I can safely conclude that that is not the case here. This case does not turn on innuendo at all, whether legal or referential. It is a strict case of what is the plain and ordinary meaning of the words used and whether there is a bridge between the first article and the editorial and the subsequent articles such that the Publishers cannot escape liability through the ruse of split articles. The trial judge was therefore plainly wrong to uphold the objection and to disallow the Officers to "*adduce evidence to show that on the morning of the first publication they received unpleasant phone calls from persons who recognized they were officers referred to in the publication*.".[23] That evidence ought to have been allowed as it would affect the nature and quantum level of damages to which the Officers will now be entitled.

[44] Since the questions at 1 and 2 were decided in the Officers' favour, it must be determined whether the Publishers mounted a successful defence against the claim on the bases of -

i. Fair comment on a matter of public importance?

---

[22] [1977] 3 All ER 32. See p 38 Letters a-b. There is a distinction between the "true or legal" innuendo, as a matter of substantive law and "innuendo" as a matter of "pleading significance" only. The true or legal innuendo is *"a separate defamatory meaning, different from the ordinary and natural meaning because it is apparent only to those readers possessed of special knowledge of extrinsic facts unknown to the ordinary person".* The trial judge cited *inter alia* **BUDU v BRITISH BROADCASTING CORPN [2010] EWHA 616 (QB)** and **BATURINA v TIMES NEWSPAPERS LTD[2011] 1 WLR** 1526. I am of the view that those authorities state that further evidence particularly from individual witnesses was necessary to link the defamatory publication to the subsequent publication which identified the Officers. These authorities are distinguishable as that is not the case here.

[23] See para. 57 of the judgment of Seepersad J. f. n. 4

ii. That they engaged in responsible journalism? Put another way: Did the Publishers meet the standards of responsible journalism so as to mount a successful defence?

[45] **THE DEFENCE OF FAIR COMMENT**

The trial judge did not address this defence in his judgment, although he mentioned it. I find that the defence of fair comment was not completely constituted. The matter was of public importance, but the extent of the libel contained in the words in a society such as ours, went beyond fair comment. The tone used in the first article and the editorial, which was condemnatory and accusatory took it out of the realm of fair comment, especially as it turned out that the allegations made were at best unproven and indeed contained no truth. This was not addressed by the trial judge. It was a ground of the respondent's cross appeal and therefore it failed.

[46] **THE REYNOLDS TEST**

I should look at this test against the background of the words which fell from the Andhra Pradesh High Court[24]**, "***it must not be forgotten that only those who maintain restraint can exercise rights and freedoms effectively"*. Since the trial judge's judgment in 2013, the Judicial Committee of the Privy Council ("JCPC") had to confront the question of the application of the Reynolds test in non-political cases in the Caribbean, Dominica to be exact, in the **PINARD-BYRNE[25]** case. This case concerned defamatory words said about an accountant/receiver about his role in a well published exercise concerning matters of public importance in Dominica. These were, the award of contracts and the receipt of monies from the Citizenship Programme. The short and salient facts are that between 1985 and 1997, KPB, a chartered accountant was a partner at a well-respected and established international accounting firm. Between 1991 and 1997, that firm was the auditor of another well-known firm in Dominica. Certain events transpired which caused the investors of the audited firm to suffer heavy losses. In 1998, KPB ceased being a partner of the international

[24] **LABOUR LIBERATION FRONT v. STATE OF ANDHRA PRADESH** commentary in ***"FREEDOM OF THE PRESS VIS-À-VIS RESPONSIBLE JOURNALISM"*** written by Prabhsahay Kur at www.legalserviceindia.com.
[25] **PINARD-BYRNE v. LENNOX LINTON [2015] UKPC 41.**

firm. He became involved in another firm, which continued its association with the client. Words were published by the defendants and others, amounting to KPB's professional dishonesty.

[47] The words complained of were found to be defamatory of KPB, as regards the application of the learning with respect to qualified privilege, the Reynolds Test in particular, the JCPC's description of the defence is,

> *It is perhaps more accurate to describe the defence 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.*

The JCPC quoted Lord Mance in the case of **FLOOD** and noted that the ten factors listed, which were coined by Lord Nichols in **REYNOLDS** are not exhaustive and that in each case a different emphasis may be laid on any of the factors. I am guided by this general statement of law with respect to the defence and the approach to be taken.

[48] The trial judge's approach was to set out his understanding of the "factors" which he identified. The trial judge recognized that the defence must satisfy two fundamental elements. One, that the subject matter of the publications, in this case, the first article and the editorial, must be of a matter of public interest. The trial judge summed it up,

> *Upon a close examination of the principles of law and the facts of this case, the court found that the material referred to (in) the First Article and the editorial was capable of being regarded as a matter of public interest. Further given the fact that constitutionally that the Police Force is the institution charged with affording service and protection to the public, there could be no doubt that members of the Trinidad and Tobago population have an interest/duty in disseminating and receiving information and opinion concerning the possibility that the country's protective force may have been contaminated with rogue elements and*

the need for transparent investigations when corrupted officers are being investigated for criminal activities….[26]

We cannot find fault with this and say that the trial judge was correct in his conclusion.

[49] The second limb is of more significance in this matter. Whether the publishers observed their duty in engaging in responsible journalism, The trial judge opined that they had failed in their duty.[27] The basis of his findings were:

1. Insufficient steps taken to verify information, the investigative steps;

2. The urgency with which the publications were attended; and

3. The tone of the first article and the editorial.

[50] With respect to the insufficiency of steps taken to verify the information contained in the first article and editorial, the trial judge had this to say,

> *The Defendant failed to take sufficient steps to verify the information contained in the First Article and the editorial. Both publications were largely based on allegations raised by an alleged special branch Report. During Cross Examination it was revealed that this report was not secured by the Journalist. The author of the First Article was not lead (led) as a witness in the trial and the author of the editorial is now deceased. Further the editorial erroneously stated that the special Branch Report had been secured. The Editors of the First Article and the editorial, …. contended that in witness statements that they were satisfied with the steps taken by the Journalists to verify the information received since the information was obtained from a previously reliable and credible source within the Trinidad and Tobago Police Service from whom reliable and accurate information*

[26] See para. 70 of the judgment of Seepersad J.
[27] See paras. 71-75 of the judgment of Seepersad J.

in the past had been obtained and which formed the basis for reports which were published without complaint.

No past articles which were based on information received from the previous reliable source were produced to this court nor were they even mentioned in the Defence filed. In the absence of any evidence to substantiate the claim that the source was in fact reliable and credible and having regard to the fact that the Special Branch Report was never secured the court was of the view that the Defendants' argument that the publications were products of responsible journalism is not tenable.

[51] The trial judge went on to say, in keeping with the **FLOOD CASE**[28] of what a reporter could have reasonably known at the time of publication, "*The facts in **FLOOD** make it clear that the Reynolds defence turns largely on what a journalist reasonably knew at the time of publication."*[29] The trial judge made the observation that unlike in this case, where there was no evidence that the writers of the first article and the editorial had sight of the Special Branch Report and neither could the Editor in Chief or for that matter any of the Publishers' witnesses assert that they had seen the report, the reporters in **FLOOD** had the actual report of the investigation, and it is upon this that they based their publication. This to him gave the reporters in **FLOOD** the advantage in their defence of responsible journalism, not evident in this matter. I agree with the entirety of the trial judge's conclusion and analysis and find that he was correct.

[52] On the issue of urgency, the trial judge referred to the evidence of the Editor in Chief in which she formed the view that the matters were urgent and "*having regard to the investigations conducted by the journalists employed by the Second defendant and the verification of the information, there was no justifiable need to delay the publication…".* What did the trial judge make of this evidence? The trial judge stated that "*there was no urgency to publish the editorial at the time the Defendants did because the editorial for the most part reiterated the matters referred to in the First Article*

[28] **FLOOD *op.cit.***
[29] See para. 73 of the judgment of Seepersad J *op.cit.* f. n. 4

which was based on information from a Special branch Report which was never in fact source"". I can find no fault with this.

[53] The trial judge found that the tone of the first article and the editorial was "*accusatory and sensational and weighted against the Defendants' claim of journalistic responsibility".* In fact in his oral submissions, Mr Hosein tried to persuade the court that the tone was not offensive I find no fault with the trial judge's assessment and conclusion on this issue. The Publishers' defence failed on this ground.

[54] In **PINARD**, the JCPC addressed other aspects of the defence which I think are relevant to this matter. The JCPC noted that *"no evidence was led to establish the truth of the defamatory words complained of…"* [30]. In the case at bar, at the trial stage, the Publisher's attempt to lead evidence fell flat for the reasons outlined above. I examined the evidence and found none to support the contention that there was any attempt to establish the truth of the words complained of. It was not explored by the trial judge whether the writers of the first article and the editorial of the Publishers as a whole sought to contact the Officers to hear their side of the events published before launching their scathing attacks. According the JCPC in **PINARD** the maker of the defamatory statements ought to have *"put them specifically to …"* the subject of the libel. Our journalists would do well to observe this.

[55] Of some import to this case and one not explored by the trial judge is whether the allegations of the Officers' wrongdoing were the subject of an investigation which commanded respect. This was clearly the situation in the instant case. The Publishers and the writers knew that the allegations surrounding the deaths of the six civilians were the subject of an investigation by no lesser means than a coroner's Inquest.

[56] To conclude this discussion, I commend the passage from Justice Edwin Cameron's autobiography in which he recounted his experience as a trial lawyer in perhaps the most high publicised case on the HIV-AIDS phenomenon in South Africa. Justice Cameron had this to say,

> *…What was more, more reporters well appreciated the underlying issues …. They published helpful articles informing readers about the*

[30] See para. 33 of the **PINARD CASE** *op. cit.* f. n. 29

> *stages of HIV infection, how the virus was transmitted, about seeing breakthroughs in treatment.* ***And they responded positively to our requests to stop using sensational language and demeaning terms – like 'victim' or 'sufferer' to refer to Barry and other persons living with HIV and AIDS. …***
>
> *And the experience of dealing with the media during Barry's trial later proved invaluable to me. It helped prepare me for my own very personal encounter with the media's interest in AIDS, years later when I made my own public stand.* ***Then I would also appreciate fully that the immense power the media wield can be put to good effect.*** [31]

[57] From this high profile case and Justice Cameron's account, there are some additional guidelines that may be added to Lord Nicholls's standards which may be helpful to responsible journalism or overall to the dissemination of information by the media for emergent societies like ours. They may include,

1. That articles be helpful in addressing the public interest
2. That the articles be informative.
3. That apart from the tone of the articles as a whole that the language used in the articles should not be sensational or demeaning or, accusatory or rabid.

It leaves to be said that the Defendant could not successfully rely on the Reynolds defence for the reasons outlined above. I therefore agree with the trial judge.

[58] **DAMAGES**

A. GENERAL/COMPENSATORY

Based on my considerations set out above, I am satisfied that the Officers must be compensated in general damages.

[31] Justice Edwin Cameron is a Judge of the Constitutional Court of the Republic of South Africa. His autobiography is titled "***Justice A Personal Account***". See p 89.

[59] **B. AGGRAVATED AND/OR EXEMPLARY DAMAGES**

Given the decision that the trial judge was plainly wrong to exclude the Officers' evidence, [32] the matter should be remitted to him to take and test the evidence so as to determine whether to made an award aggravated of and/or exemplary damages to the Officers.

[60] **CONCLUSION**

The Officers' appeal is allowed and the Publishers' cross appeal is dismissed for the following reasons:

1. The words published in the two articles sued upon, in their ordinary and plain meanings are libelous.

2. That at the time of publication, it was clear that there was a specific group within the class of policemen to which the words were referable.

3. That the evidence disclosed that even though the time of publication between the first two articles and the articles naming the Officers was approximately 7 months, the writer's, editor's and publisher's stated intention of keeping the issue alive was sufficient the connection necessary to effect a referral back, to the detriment of the Officers. In other words, the second set of articles were sufficient to establish that the tort of libel had been libel had been constituted at the time of publication.

4. The Judge was correct in his decision that the **HAYWARD** test was the preferred test in this case.

5. The Judge however misapplied the test by determining that the lapse of time between the two sets of publications was inimical to a finding that the defamatory words were published of and concerned the Officers who were named in the subsequent publications. The words contained in the editorial "*pay close attention to the proceedings of the ordered inquest"* suggested that the Publishers would

[32] See para. 43 *infra*

keep this matter alive in the minds of the public. This to my mind was sufficient to displace the significant 'lapse of time' conclusion. The trial judge's conclusion that the Officers' case was unsustainable is not upheld.

6. That the state of the pleadings, though not of the best, as readily admitted by Mr Khan, did not prevent the Publishers from knowing the case it had to meet and did not prevent them from meeting the case and mounting defences. If anything, the failure to seek relief as per the articles naming the Officers go to the nature and quantum of damages that the Officers would receive.

7. The issue of innuendo did not arise as the words complained about in the first article and the editorial were defamatory. The trial judge was plainly wrong not to allow the Officers to adduce evidence that on the morning of the publication of the first article, they received phone calls from persons who associated them with the publications.

8. The defence of fair comment was not completely constituted. The matter was of public importance, but the tone used in the first article and the editorial, which was condemnatory and accusatory took it out of the realm of fair comment, especially, as it turned out that the allegations made were at best unproven and indeed contained no truth. This ground of the Publisher's cross appeal failed.

9. The matter reported on was one of public interest.

10. Further, the trial judge was correct in his application of the tenents of the **REYNOLDS** principles which seek to balance the constitutional right to freedom of the press, a right guaranteed by Section 4(k) of our Constitution with the right of the individual to secure his good reputation.

11. The Trial Judge's findings that,

    i. the Publishers failed to take sufficient steps to verify their information;

ii. there was no urgency to justify the publication of the editorial;

iii. the tone of the first article and the editorial was accusatory and condemnatory; and my own deliberations that,

iv. there was no attempt to establish the truth of the words complained of, and

v. there was clear evidence that allegations of the Officers' wrongdoing were the subject of an investigation which commanded respect,

all went to establish that the Publishers could not avail themselves of the defence of qualified privilege.

12. That in light of the findings at paragraph 7, the matter be remitted to the trial judge to assess the evidence to determine whether aggravated and/or exemplary damages should be awarded to the Officers.

[61] **COSTS**

Upon the determination of whether to award aggravated and/or exemplary damages, costs are to be awarded to the Officers in the court below on the prescribed scale. The Publishers will pay the costs of this appeal determined to be two thirds of the amount prescribed below. The costs on the cross-appeal are to be paid by the Publishers to the Officers, determined to be two thirds of the costs of this appeal.

[62] **DISPOSITION**

In the premises and **IT IS ORDERED AS FOLLOWS:**

1. The Officers' appeal is allowed.
2. The Publishers' cross appeal is dismissed.
3. General Damages payable to the Officers to be assessed by a Master in Chambers.
4. The question of whether to award aggravated and/or exemplary damages to the Officers be remitted to the trial judge for determination and to be assessed if necessary by a Master in Chambers.

5. Costs of the action below, to be paid by the Publishers to the Officers on the prescribed scale following the Assessment of Damages.
6. Costs of the appeal to be paid by the Publishers to the Officers at two thirds (2/3) of the amount as prescribed in the court below.
7. Costs on the cross appeal to be paid by the Publishers to the Officers to be two thirds (2/3) of the costs on the appeal.

/s/ CHARMAINE PEMBERTON
COURT OF APPEAL JUDGE