THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV No. 2010-01764

Between

GAVIN SIMON

KEAVIN GREENE

WISDEN RAJCOOMAR

DAVID MADEIRA

LYDON MASCALL

ISHMAEL PITT

DERYCK LAKE

ANTHONY CRAIG

ANTHONY WILLIAMS

Claimants

And

OMATIE LYDER

First Defendant

TRINIDAD EXPRESS NEWSPAPERS LIMITED

sued as

THE DAILY EXPRESS

Second Defendant

Before the Honourable Mr. Justice Frank Seepersad

Appearances:

1. Israel B Khan SC with Ulric Skerritt Esq for the Claimants

2. Faarees F. Hosein instructed by Carolyn Ramjohn-Hosein for the Defendants

Dated this 24th May, 2013

Introduction

1. This is an action in which the Claimants are seeking Damages for Libel.

2. The Claimants are and were at all material times members of the Trinidad and Tobago Police Service. The First Defendant, Omatie Lyder, was at all material times the Managing Editor of the Daily Express Newspaper. The Second Defendant, Trinidad Express Newspaper Limited, was at all material times the printer and publisher of The Daily Express Newspaper.

3. On the 17th August, 2007 the Claimants were involved in a shooting incident at Wallerfield which claimed the lives of four men and a woman.

4. At the conclusion of a Coroner's Inquest it was found that the Claimants were not negligent in the shooting deaths of five persons at Wallerfield on August 17, 2007.

5. By Claim Form and Statement of Case filed on the 7th May, 2010 the Claimants brought proceedings in respect of certain alleged defamatory statements made in relation to the shooting by the Defendants in the following publications:

    i. **"Wallerfield 5 Killed by police"**(hereinafter referred to as "The First Article") dated 2nd December, 2008, by Darryl Heeralal.

    ii. **"A clear Cause for Justice"** (hereinafter referred to as "The "Editorial") 3rd December, 2008, by Keith Smith (deceased).

    iii. "**Forensic Expert testifies"** dated 5th June, 2009 by Denyse Renne.

    iv. "**Self Preservation Important**" dated 5th July, 2009, by Denyse Renne.

The Claimants' Case

6. The words complained of and alleged to have been published by the Defendants are detailed in Paragraphs 3, 4, 5 and 6 of the Statement of Case. With respect to the First Article **"Wallerfield 5 killed by police"** the words complained of in paragraph 3 are as follows:

    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;*
    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;*
    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 in the weeks following the killings on August 17, 2008;*
    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;*
    v. *The officers claimed that they were chasing the car carrying the four men when they were fired at;*
    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;*

vii. *No guns were ever found in the Almera or any of the men;*

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. With respect to The Editorial "**A clear call for justice,"** the words complained of in paragraph 4 are as follows:

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 handpicked the officers for his killing spree suggest 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;*

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;*

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;*

iv. *Now in the wake of the Wallerfield Slaughter, this newspaper noted that "family and friends have been at pains to stress the good character 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. With respect to the Article "**Forensic expert testifies**" the words complained of in paragraph 6 are as follows:

   i. *"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. With respect to the Article "**Self Preservation Important**" the words complained of in paragraph 5 are as follows:

   i. *"killed or be killed;*

   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;*

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

10. At paragraph 11 of their Statement of Case the Claimants alleged that the words complained of in their natural and ordinary meaning meant and were understood to mean that:

    i. *"The Claimants were rogue criminal members of the Trinidad and Tobago Police Service;*

ii. The Claimants were solicited by a rogue senior member of the Trinidad and Tobago Police Service to commit the crime of murder of someone called Shawn "sawood" Allen in retaliation for the murder of Lily Lane;

iii. The Claimants murdered/negligently killed four unarmed occupants of a motor vehicle at Wallerfield;

iv. The Claimants without just cause shot at the vehicle which was at the time conveying the four persons one of whom the Claimants mistaken believed to be the said Shawn 'Sawood' Allen."

11. The Claimants contended that they were referred to by their names in the subsequent article entitled **"Self Preservation Important"** on the 5th July, 2009 in the Sunday Express.

12. The Claimants contended that the words were untrue and the Defendants maliciously printed and published same. The Claimants further contended that the comments regarding the Claimants were not fair in the circumstances and were calculated to injure the Claimants in their character, credit and reputation.

13. The Claimants further contended that by reason of the said words they have been brought into public scandal, odium and contempt and that they have suffered distress, inconvenience and damage to their character and reputation in their public capacity as police officers and in their private capacity.

The Defendants' Case

14. By their Joint Defence dated 16th September, 2010, and Amended Defence dated 12th November, 2010, the Defendants admitted to the printing and publishing of the three articles and one editorial as outlined by the Claimants.

15. The Defendants contend that at the time of the publication of the First Article and the Editorial the Claimants were not identified and no cause of action in libel for those publications can arise by virtue of any subsequent or other publication.

16. The Defendants denied that the words contained in the First Article and the Editorial referred to or were understood to refer and or are capable of referring to the Claimants.

17. The Defendants denied that the words contained in the First Article and the Editorial bore or were understood to bear or are capable of bearing the meaning ascribed to them by the Claimants or any meaning defamatory of the Claimants.

18. The Defendants contended that the Claimants are incapable of relying on the articles captioned "**Self Preservation Important**" and "**Forensic expert testifies**" as aids in interpreting the challenged articles because they were published a significantly long time subsequent to the publication of The First Article and or The Editorial.

19. The Defendants contended that even if they were defamatory and referable to the Claimants that the defences of qualified privilege and honest comment are available to them in relation to the publications.

ISSUES

20. The issues that arise for the Court's determination are:-

    i. Whether the words printed in the First Article and the Editorial are capable of bearing any defamatory meaning;
    ii. Whether the words in the First Article and the Editorial referred to the Claimants although their names were not mentioned in the said publications;
    iii. Whether the subsequent articles published by the Second Defendant established that the First Article and the Editorial were of and concerning the Claimants;
    iv. Whether the defence of Reynolds Privilege is open to the Defendants with respect to the First Article and the Editorial;

v. Whether the defence of Fair comment is open to the Defendant with respect to the Editorial; and

vi. Assuming that the words in the First Article and the Editorial are defamatory of the Claimants and the publications are not protected as aforesaid, what if any Damages are the Claimants entitled to.

Whether the words printed in the First Article and the Editorial are capable of bearing any defamatory meaning.

21. The Claimants contended that the words in the First Article and The Editorial in their natural and ordinary meaning meant and/or were understood to mean that:

    i. "The Claimants were rogue criminal members of the Trinidad and Tobago Police Service;

    ii. The Claimants were solicited by a rogue senior member of the Trinidad and Tobago Police Service to commit the crime of murder of someone called Shawn "Sawood" Allen in retaliation for the murder of Lily Lane;

    iii. The Claimants murdered/negligently killed four unarmed occupants of a motor vehicle at Wallerfield;

    iv. The Claimants without just cause shot at the vehicle which was at the time conveying the four persons one of whom the Claimants mistaken believed to be the said Shawn 'Sawood' Allen."

22. By Submissions dated April, 2013, the Defendants submitted that in seeking to determine the single meaning that an ordinary reader would give the words complained of and whether this is defamatory of the Claimants it is important for the Court to keep firmly in mind not only the actual words of which complaint was made but also the context in which those words were used.

23. With respect to the First Article the Defendants submitted the following:

i. *"The ordinary reasonable reader would not read The First Article and derive the meanings contended by the Claimants, namely that the Claimants murdered four unarmed occupants of a motor vehicle at Wallerfield as well as an innocent bystander.*

ii. *The words complained of must be read in their context, and that the Article must be therefore read as a whole and not dissected into its various parts which can then be read in isolation, the Article is not defamatory of the Claimants or any of them.*

iii. *If contrary to the Defendants' submissions the words complained of* in *The First Article do bear a meaning defamatory of the Claimants or any of them, when read in the context of the whole article, the Defendants submit that, at the highest, those words complained of could only bear the meanings that there were grounds to investigate whether the Claimants might have committed unlawful killings of the occupants of the motor vehicle in Wallerfield and the innocent bystander in a so-called "Chase Level 3" meaning."*

24. With respect to The Editorial the Defendants submitted the following:

i. *"The Editorial, as stated in the evidence of Sunity Maharaj was a statement of the Second Defendant's position in respect of what was styled "The Wallerfield Killing.*

ii. *When The Editorial is read as a whole the ordinary reasonable reader would have seen that the Second Defendant was clearly stating its position that the killings needed to be fully investigated having regard to the information obtained and reported in the Article.*

iii. *The ordinary reasonable reader would also have seen and read the Editorial and it would thus have been clear to him that the Second Defendant was stating its view on a matter of serious public concern and interest and calling for a thorough investigation and for justice to be done.*

iv. *No part of the Editorial was defamatory of the Claimants when read in the context of the Editorial as a whole."*

25. In deciding whether the words complained of bear any or all of the meanings ascribed to them by the Claimants the court sought guidance from the principles outlined by Sir Thomas Bingham MR in **Skuse v Granada Television Limited** [1993] EWCA Civ 34 at paragraph 14. He stated as follows:

    i. ***"The court should give to the material complained of the natural and ordinary meaning which it would have conveyed to the ordinary reasonable viewer …***

    ii. ***The hypothetical reasonable reader [or viewer] is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer, and may indulge in a certain amount of loose thinking. But he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available (per Neill L.J. Hartt v Newspaper Publishing PLC. Unreported 26th October, 1989 [Court of Appeal {Civil Division} Transcript No. 1015]:***

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

    iv. ***The court should not be too literal in its approach. We were reminded of Lord Devlin's speech in Lewis v Daily Telegraph Ltd. [1964] A. C. 234 at 277 Page 19 of 96 'My Lords, the natural and ordinary meaning of words ought in theory to be the same for the lawyer as for the layman, because the lawyer's first rule of construction is that words are to be given their natural and ordinary meaning as popularly understood. The***

proposition that ordinary words are the same for the lawyer as for the layman is as a matter of pure construction undoubtedly true. But it is very difficult to draw the line between pure construction and implication, and the layman's capacity for implication is much greater than the lawyer's. The lawyer's rule is that the implication must be necessary as well as reasonable. The layman reads in an implication much more freely; and unfortunately, as the law of defamation has to take into account, is especially prone to do so when it is derogatory.'

v. ***A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally (Sim v Stretch [1936] 2 All E.R. 1237 at 1240) or would be likely to affect a person adversely in the estimation of reasonable people generally (Duncan & Neill on Defamation, 2nd edition, paragraph 7.07 at pg. 32).***

vi. ***In determining the meaning of the material complained of the court is 'not limited by the meanings which either the claimant or the defendant seeks to place upon the words' (Lucas-Box v News Group Newspapers [1986] 1WLR 147at 152H).***

vii. ***The defamatory meaning pleaded by a plaintiff is to be treated as the most injurious meaning the words are capable of bearing and the question a judge sitting alone has to ask himself are, first, is the natural and ordinary meaning of the words that which is alleged in the statement of claim and, secondly, if not, what (if any) less injurious defamatory meaning do they bear? (Slim v. Daily Telegraph Ltd. above, at pg. 176).***

viii. ***The Court of Appeal should be slow to differ from any conclusion of fact reached by a trial judge. Plainly, this principle is less compelling where his conclusion is not based on his assessment of the reliability of witnesses or on the substance of their oral evidence and where the material before the appellate court is exactly the same as was before***

him. But even so we should not disturb his finding unless we are quite satisfied he was wrong."

26. In **Jeynes v News Magazines Ltd** [2008] EWCA Civ 130 at paragraph 14 Sir Anthony Clarke MR had the following to say in relation to the principles applicable to determining meaning at a trial:

    i. ***"The governing principle is reasonableness.***
    ii. ***The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.***
    iii. ***Over-elaborate analysis is best avoided.***
    iv. ***The intention of the publisher is irrelevant.***
    v. ***The article must be read as a whole, and any 'bane and antidote' taken together.***
    vi. ***The hypothetical reader is taken to be representative of those who would read the publication in question.***
    vii. ***In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, "can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation."***

27. The recent decision of the Court of Appeal in **Kayam Mohammed and Others v Trinidad Publishing Company Limited and Others** Civ App No. 118 of 2008 at paragraphs 10 to 15 Mendonca J.A confirmed the local acceptance of the above stated principles.

First Article

28. Adopting these principles, this court therefore disagreed with the Defendants that The First Article at its highest carried a "Chase Level 3" meaning, that is to say, that there were grounds to investigate whether the Claimants unlawfully killed the occupants of the motor vehicle in Wallerfield and the innocent bystander.

29. The court is of the view that a reasonable reader reading this article would have understood it to mean that owing to protests outside the President's House, weeks following the killings, the special branch unit was made to investigate the matter and according to the special branch report, the police officers who killed the five unarmed people in Wallerfield were hand-picked by a senior police officer who was later found to have ties with murdered drug queen Lily Lane and that the real target was the man believed to be behind Layne's murder and who was mistakenly assumed to be in the car carrying four of the victims.

30. The court is of the view further that the article in no way suggested that an investigation should be carried out, but rather it conveyed the message that an investigation had already been carried and that according to a Special Branch report the police officers who were involved in the shooting unlawfully killed the unarmed occupants of the car as well as a woman who was hit by a stray bullet.

31. This 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.

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.

Editorial

33. Having considered the Editorial in its entirety the court disagreed with the Defendants that the ordinary reader would have gathered that the Third Defendant was clearly stating its position that the killings needed to be fully investigated having regard to the information obtained and reported in the Article.

34. Even though the Editorial begins with words such as *"the nation awaits to see whether any action is going to be initiated against the policemen responsible for the deaths of five of our unarmed citizens"* it went on to say at paragraph 4 *"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 men met their untimely deaths because the police killer team mistakenly thought notorious drug queen Lily Lane's executioner was in the car in which they happened to be travelling that fatal evening,"*. This, this Court believed, in its ordinary meaning, meant that the police were contract killers.

35. When put into context the Editorial went beyond the point of stating the Defendant's position on 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 drug queen Lily Lane.

36. Accordingly the court found that on the face of it the words complained of in the challenged Editorial were/are capable of bearing a defamatory meaning.

<u>Whether the words in the First Article and the Editorial referred to the Claimants although their names were not mentioned in the said publications.</u>

37. In their Claim Form the Claimants sought Damages for Libel contained in an Article headed "Wallerfield 5 killed by police" dated 2nd December, 2008 and an Editorial headed "A clear call for justice" dated 3rd December, 2008 which were both published in the Daily Express.

38. It is undisputed that the Claimants are not named in either of these two publications.

39. In the premises the court had to determine the following sub-issues, namely:

    i. whether the subsequent articles of the Second Defendant which named the Claimants as the officers involved in the Wallerfield Shooting and which incident was subject to a Coroner's Inquest served to identify the Claimants as the persons referred to in the First Article and The Editorial; and

    ii. In light of the Claimants further argument that their names need not be expressly mentioned since in this case it was reasonable to conclude that members of the Trinidad and Tobago Police Service to which they belong, not least their family and close friends, were aware that they were the "police officers" involved in the incident and could identify them by reference to the articles and therefore whether the reference to "police officers" in the First Article and Editorial was understood to refer to the nine Claimants who were involved in the incident.

Whether the subsequent articles of the Second Defendant which named the Claimants as the officers involved in the Wallerfield Shooting and which incident was subject to a Coroner's Inquest prove that the First Article and Editorial were "of and concerning the Claimants."

40. The Claimants in their Statement of Case sought to rely on a subsequent articles entitled **"Forensic expert testifies"** dated June 2009 and **"Self Preservation Important"** published 5th July, 2009. In both subsequent articles the Second Defendant published the Claimants names as being the police officers appearing at the Coroner's Inquest.

41. By their Submissions, the Claimants relied on the authority of **Hayward v Thompson and Others** [**1982] QB at 47** to establish that they were entitled to rely on the subsequent

publications of the Second Defendant which expressly named them to establish that the First Article and Editorial 'were of and concerning them'.

42. The ***Hayward*** case related to the so-called "Scott Affair," in which a man called Norman Scott alleged that he was the subject of a murder plot, because of an affair he had with the former Liberal Party leader Jeremy Thorpe. Mr. Thorpe and his alleged conspirators were eventually all acquitted, but while the allegations were still being investigated, the Sunday Telegraph published two articles concerning the matter. The first Article which was headed 'Two more in Scott affair 'claimed that the names of two more people connected with the affair had been given to the police and that one was a wealthy benefactor of the Liberal Party. Mr. Hayward was a wealthy philanthropist resident in the Bahamas who had indeed given over £200,000 to the Liberal Party. He was not however named in the first article. A week later, however, a second article in the same newspaper headed "New name in Scott affair" named the Plaintiff and also referred to him as the Bahamas based millionaire who once gave the Liberal Party £150,000. The Plaintiffs claimed damages for libel contained in these editions of the Sunday Telegraph. The trial judge ruled that:

> *"Where words in a publication were not on the face of them capable of bearing a defamatory meaning it was not permissible to bring in a subsequent publication so as to make them defamatory. However that did not apply where the words used in the first publication were defamatory and the only question was one of identification. Since the words used in the first article were clearly defamatory and the mention of 'a wealthy benefactor of the Liberal Party' was intended to refer, and was understood by a number of people to refer, to the plaintiff, the judge had rightly directed the jury that they were entitled to look at the second article in order to identify the person referred to in the first article."*

43. The Claimants also relied on **Bradley and Anor v Independence Star Newspapers** (2011) ESC17 to reinforce the above stated principle enunciated in the *Hayward* case. In Bradley the courts were even more strident in their observations and highlighted *"the injustice which would arise if a defendant could avoid liability for gross libel… simply by*

publishing the article which identified the plaintiff separately and after the main defamatory publication…"

44. In ***Bradley,*** the Bradley bothers sued over a Sunday Star article published on the 13th June, 2004. The article did not mention the Bradley brothers by name; rather it referred to two brothers known as "the fat heads" who, the paper claimed led "the most dangerous criminal gang operating in Dublin's underworld." The article stated that the Garda and Criminal Assets Bureau were investigating the men, and that officials believed they were responsible for a string of robberies from ATMs (and from vans delivering money to ATMs). The story was accompanied by pictures of the Bradleys with their faces pixilated. Two months after the Defendant had published the first article, they published another one. The difference was that, on the second occasion the article was clearly about Alan Bradley and Wade Bradley. It gave their names. There was also published, as part of the second article a photograph of the first article as it had appeared in the Defendant's tabloid newspaper. The headline was I'm not the ATM bandit was accompanied by a picture of Alan Bradley and on another page a further headline "We are not ATM thieves" and underneath that paragraph "Dublin brothers say Gardaí are barking up the wrong tree". There was a picture, which this time was not pixilated or otherwise obscured of Alan and Wayne Bradley, who were both named. Above that there was a picture of the previous article "Brothers in Arms". The jury found that the story did not identify the Bradley brothers, resulting in a verdict for the paper. On appeal, however, the Supreme Court set aside the verdict of the jury and directed a re-trial on two separate grounds, one being that the court was of the view that the second publication was clearly capable of identifying the Plaintiffs as the subjects of the first article.

45. By their submissions the Defendants contended that none of the Claimants are named in either the article or the editorial and as such this is a sufficient basis for the determination of the claim in the Defendants' favour.

46. The Defendants relied on the principle enunciated by Denning MR in **Grappelli v Derek Block (Holdings) Ltd [1981] 1 WLR** to establish the point that the Claimants were not entitled to rely on the subsequent publications of the Second Defendant to establish that the words in the First Article and the Editorial referred, or would have been understood to refer to them.

47. In ***Grappelli,*** the Plaintiff, Stephane Grappelli, a renowned musician, employed the defendants to promote him. They purported to arrange various concerts, but did so without his authority. When they were cancelled, they told the venue owners that they were cancelled because the plaintiff was "very seriously ill in Paris" and that it would be surprising "if he ever toured again". About five months later the defendants by advertisement and a press release announced a number of concerts to be given by the plaintiff at different places on dates which included some of the dates on which the first concerts were to have taken place. The plaintiff claimed damages for injurious falsehood, and for libel alleging that the facts gave rise to an innuendo that the plaintiff had given a false reason for cancelling the concert which he knew to be false. The defendant sought to strike out the allegation of libel and slander because the pleadings did not identify any members of the public who were alleged to have knowledge of the intrinsic facts supporting the innuendo. The defendant appealed against rejection of this argument. The appeal succeeded. Denning MR stated:

> *"I would go by the principle, which is well established, that in defamation the cause of action is the publication of defamatory words of and concerning the Plaintiff. The cause of action arises when these words are published to the person by whom they are later read or heard. The cause of action arises then: and not later."*

Accordingly it was held that a Plaintiff cannot rely on events subsequent to publication to establish that the words referred, or would have been understood to refer to him.

48. Having considered the parties respective submissions and the authorities cited the court found that the instant case had special peculiarities which distinguished it on the facts from the authorities cited.

49. This court does not accept the Defendants' submissions with respect to the case of ***Grappelli***. Unlike ***Grappelli*** where there was an attempt to make an innocent earlier publication rendered defamatory by the consideration of subsequent advertisements for later concerts, the words in the First Article and Editorial in this case were found by this court to be clearly defamatory.

50. While on the face of it the words used in the First Article and Editorial are defamatory and therefore the Claimants in accordance with ***Hayward*** ought to be able to rely on the subsequent publications to calcify their identity, this court is of the view that 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. The court having considered the evidence in its entirety found as a fact that the subsequent publications were **not** capable of identifying the Claimants as the subjects of the First Article and Editorial and the court is of the view that the subsequent publications did not serve to establish the identity of the Claimants as the subjects of the First Article and Editorial.

51. The court observed several distinguishable features of this case from the authorities cited. Firstly, the lapse of time between, the First Article and Editorial, and the subsequent publications of the Second Defendant. Unlike ***Hayward***, where the subsequent publication was made a few days after the challenged article, in this case the subsequent publications were made several months after the First Article and the Editorial were published. Like the instant case, in ***Bradley*** the subsequent publication which named the plaintiff was made several months after the First Article. However the distinguishing feature with ***Bradley*** and this case is that in ***Bradley*** the subsequent publication which named the plaintiffs was found to be largely a repetition of the first article and there was a picture of the First Article that was published as part of the subsequent article. The subsequent publications in this case were essentially related to the Coroner's Inquest and

the outcome of those proceedings and made no reference to the First Article or the Editorial.

52. Due to the significant lapse of time between the publications of the First Article and the Editorial and the subsequent publications of the Second Defendant and the fact that the subsequent publications spoke largely about the Coroner's Inquest, without any reference to either the First Article or the Editorial this court is of the view that the readers of the First Article and Editorial could not at the time of the publication of the subsequent articles nor within a reasonable time thereafter make a sufficient nexus between the said articles and the Claimants. In fact at the time of the publication of the subsequent articles where the claimants were named, the reasonable avid reader would more likely than not have forgotten the tenor and purport of the First Article and Editorial. Further the Claimants pleaded case did not address nor was there any evidence before the court with respect to anyone making a connection between the subsequent articles and the First Article and the Editorial.

Whether reference to "police officers" in the First Article and Editorial was understood to refer to the Claimants who were involved in the incident.

53. The Claimants advanced the argument that the Claimants' names need not be expressly mentioned since in this case it was reasonable to conclude quite likely that members of the Trinidad and Tobago Police Service to which the Claimants belong and their respective family members and close friends, were aware that they were the "police officers" involved in the incident and could identify them by reference to the articles. All the claimants testified that their family, friends and colleagues knew of and were affected by the publication of the articles.

54. By their Submissions the Defendants contended:

    i. That in both publications reference is made to "police officers", whose ranks are not stated nor are the divisions to which they are attached.

ii. That there are approximately six thousand members in the Police Service and as such the Claimants would have to argue that somehow the reference to "police officers" referred to or was understood to refer to them. Given that the Claimants did not plead any reference innuendo in the Statement of Case in order to enable them to lead any extrinsic facts there is no evidential basis on which this argument could be mounted.

55. It was established in the case of **Bruce v Odhams Press Ltd** **[1936] 1 KB 697** at paragraph 8 that pleadings of this nature must be clear and the particulars must bear out what is alleged in the main allegation which is the material allegation. In **Fulham v Newcastle Chronicle Journal Ltd.** **[1977] 1 WLR 651** at 655, Lord Denning stated that *"he must in his statement of claim specify the particular person or persons to whom they were published and the special circumstances to that person or persons….there is no exception in the case of a newspaper…".*

56. In the instant case the Statement of Case is bereft of the requisite pleaded details needed to establish this particular line of argument. The Court also agrees with the defendants that the Claimants did not plead any reference innuendo in the Statement of Case in order to enable them to lead any evidence of extrinsic facts to support such a plea. The Claimants simply did not plead that anyone either a co-worker or family member were aware that they were the officers who were involved in the Wallerfield incident nor did they plead that anyone made a link between them and the First Article and the Editorial.

57. At the trial the Claimants sought to adduce evidence to show that on the morning of the first publication they received unpleasant phone calls from persons who recognized they were the officers referred to in the publication. This evidence was met with objection from the Defendants on the ground that it was not pleaded and as a result the court upheld the objection and disregarded that aspect of the evidence. In accordance with the clearly defined rules that now govern the evidence that can be led at trial the court declined to allow evidence with respect to matters that were not pleaded. It was not part of the pleaded case that anyone had special knowledge of the circumstances surrounding the

Wallerfield incident and knew that the Claimants were involved in same and that having read the First Article and the Editorial they would have connected them and would have or did conclude that the Claimants were the persons referred to in the First Article and Editorial.

58. Consequently having regard to the lack of pleaded support as well as the absence of evidence to that effect the court could not be satisfied that there were the persons to whom the First Article and Editorial were published who had knowledge that the Claimants were involved in the Wallerfield shooting and that these persons on reading the said First Article and Editorial knew that the said publications referred to any of the Claimants. The court must also point out that the Claimants did not even attempt to call any witness (es) who read the publications complained of and who allegedly connected them to any of the Claimants.

59. 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 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 said First Article and Editorial. **Accordingly the Claimants claim must fail.**

60. Notwithstanding the court's dismissal of the Claimant's claim, the Court finds it sufficiently important to make the following observations with respect to the defences raised by the Defendants. The Defendants in this case relied heavily on the defences of Reynolds Privilege and Fair Comment to escape liability.

61. Reynolds Privilege is based on the common law doctrine of qualified privilege which essentially seeks to strike a balance between the need of the recipient to receive frank and uninhibited communication on matters of public interest on the one hand and the protection of the reputation of the individual on the other. **Reynolds v Time Newspaper**

Ltd [1993] 3 WLR 1010 makes the defence a complete one and once established denies any remedy to the Claimant.

62. Baroness Hale of Richmond in ***Jameel*** [2007] 1 AC 359 at paragraph 146 stated that the defence of Reynolds Privilege:

> ***"springs from the general obligation of the press, media and other publishers to communicate important information upon matters of general public interest and the general right of the public to receive such information. The Reynolds public interest defence is designed to strike an appropriate balance between freedom of expression, freedom of the press and the right of the public to know on the one hand and the protection of a person's reputation on the other."***

63. Further at paragraph 109 Lord Hope of Craighead stated as follows:

> ***"The cardinal principle that must be observed is that any incursion into press freedom that the law lays down should go no further than is necessary to hold the balance between the right to freedom of expression and the need to protect the reputation of the individual."***

64. According to Lord Atkinson in **Adam v Ward** [1917] A.C. 309 *"An occasion is privileged where the person who makes the communication has an interest, or a duty, legal, social or moral to make it to the person to whom it is made and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."*

65. Whether a legal, moral or social duty to communicate the defamatory matter exists in the particular case is a question of law, to be decided by the judge. In **Stuart v Bell** [1891]2 QB 341, p, 350, Lindley L.J. stated that the test to be applied is as follows:

> *"Would the great mass of right minded men in the position of the defendant have considered it their duty, under the circumstances, to make the communication?"*

66. However, Reynolds case makes it clear that anyone who is entrusted with the duty to publish words which are defamatory by nature must ensure that the matter being communicated is a product of 'responsible journalism.' Lord Nicholls in the Reynolds case suggested a non-exhaustive list of factors which a court ought to take into account when deciding whether the test of 'responsible journalism' was satisfied. These factors include:-

    i. *"The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.*

    ii. *The nature of the information, and the extent to which the subject-matter is a matter of public concern.*

    iii. *The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for the stories.*

    iv. *The steps taken to verify the information.*

    v. *The status of the information.*

    vi. *The allegations may have already been the subject of an investigation which commands respect.*

    vii. *The urgency of the matter. News is often a perishable commodity.*

    viii. *Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.*

    ix. *Whether the article contained the gist of the plaintiffs' side of the story.*

    x. *The tone of the article. A newspaper can raise queries or call for an investigation.*

    xi. *It need not adopt allegations as statements of fact.*

    xii. *The circumstances of the publication, including the timing."*

67. It appears from *Reynolds* that the defence requires that two fundamental elements must be established, firstly that the article must be in relation to a matter of public interest and secondly the test for responsible journalism has to be met.

68. In **Flood v Times Newspapers Limited** (21 March 2012) UK Supreme Court, a recent English case which dealt with a similar issue, the claimant Flood had argued that, as a matter of principle, it was generally not in the public interest to publish detailed allegations about alleged criminal activity by a person before or while the allegations were investigated by the police. However, the Supreme Court rejected this argument, holding that it was generally in the public interest to publish allegations of police corruption provided that the journalism was responsible.

69. In *Flood* three of the five judges narrowed the defence down to a single question:

> *"Could whoever published the defamation, given what they knew (and did not know) and whatever they had done (and not done) to guard as far as possible against the publication of untrue defamatory material, properly have considered the publication to be in the public interest?* ***Overall, was the publication in the public interest?"***

70. Upon a close examination of the principles of law and the facts of this case, the court found that the material referred to the First Article and 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 in receiving information and opinions 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. However the court is of the view that the Defendants failed to satisfy the test of responsible journalism as outlined in ***Reynolds.***

71. The Defendants failed to take sufficient steps to verify the information contained in the First Article and 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 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, Sunity Maharaj and Omatie Lyder respectively contended in their 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 in the past had been obtained and which formed the basis for reports which were published without complaint.

72. 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.

73. The ***Flood*** judgment indicates a fairly dramatic forward movement of the law of defamation in favour of Defendants. The facts in ***Flood*** make it clear that the Reynolds Defence turns largely on what a journalist reasonably knew at the time of publication. In the said judgment a major reason why the journalists concluded that there were grounds to believe that the Claimant had been guilty of corruption was that the Metropolitan Police Service (MPS) had decided to investigate the Claimant and had searched his house. The journalists concluded that there must have been good reason for this to have happened, that is, that the MPS had obtained evidence of corruption. Unlike the instant case, the journalists in ***Flood*** armed themselves with the actual report of the investigation. This distinguishing feature gave the comments/opinion in ***Flood*** their 'responsible journalism' edge which is not evident in this instant matter.

74. On the issue of the urgency of the Editorial publication, Omatie Lyder contended that the matters reported on in the Editorial were in her view 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. The court is of the view 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 which was based on information sourced from a Special Branch Report which was never in fact secured. Care ought to be taken particularly in the writing of Editorials to ensure that the comments remain comments and that they do not appear to be confirming statements of fact unless there is a strong and reliable foundation upon which the statements are made.

75. **The court also found that the tone of the First Article and the Editorial was accusatory and sensational and weighted against the Defendants' claim of journalistic responsibility. The Defendants failed to act responsibly in presenting the information contained in the First Article and Editorial to the public.**

76. **Freedom of the press is an essential democratic pillar and a weighty and even onerous responsibility is placed upon the press to ensure that all publications are geared towards the dissemination of credible and useful information to members of the public. There is a disturbing trend of publications which are sensational and unmeasured. Society's penchant for gossip, rumor and innuendo ought not to be fuelled under the pretext of the exercise of the highly valued and democratic right of press freedom.**

77. **In future, therefore, the Defendants and all members of the press would be better advised to exercise due diligence in the verification and/or authentication of their source prior to the publication of matters they consider to be of public interest and there should be a conscious effort not to present material in a sensational manner.**

78. **For the reasons that have been outlined, the Claimants claim is dismissed with costs to be paid by the Claimants to the Defendants.**

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FRANK SEEPERSAD

JUDGE