JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 96 OF 2000

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN	**GLEANER COMPANY LTD.**	**DEFENDANT/ APPELLANT**
A N D	**VINCENT WELLESLEY**	**PLAINTIFF/ RESPONDENT**

W. John Vassell Q.C. and **Miss J Mais** instructed by **Dunn, Cox, Orrett & Ashenheim** for the appellant

Clark Cousins and **Tavia Dunn** instructed by **Rattray, Patterson & Rattray** for the respondent

March 27, 28, 30 and July 17, 2001

FORTE, P:

Having read in draft the judgment of Langrin J.A. I entirely agree and have nothing further to add.

BINGHAM, J.A.:

I have read in draft the judgment prepared in this appeal by Langrin J.A. I am in agreement with the reasons which he has fully set out for the conclusion reached in the matter and I have nothing further to add.

LANGRIN, J.A:

This is an appeal by the defendant, The Gleaner Co. Ltd. from the order of Theobalds J. dated, July 27, 2000 striking out its defence and

entering judgment for the plaintiff with damages to be assessed.

This matter arose out of a publication which appeared on the 2nd day of October 1999 in the "Saturday Star" which is owned by the defendant/appellant. The impugned publication was headed, "Jail my client, Attorney tells Judge". This headline appeared on page 1 and was elaborated on by an article on page 3 of the same publication under the caption, "Jail my Client, Lawyer tells Judge".

The plaintiff, an attorney-at-law, was retained to defend his client who was charged with possession of, dealing in and taking steps to export cocaine. The purport of the article was that instead of carrying out his function, the attorney proceeded to prosecute his own client. The plaintiff emphatically denies this version of what transpired on the day in question. In fact, he maintains that he was merely addressing the judge in mitigation of sentence since his client had already pleaded guilty to all three charges. The essence of his address, as he alleges in his statement of claim, was that the judge should shorten the length of time to be served in prison and substitute a fine thereon.

By letter dated the 4th day of October 1999 the plaintiff's attorneys-at-law requested:

(1) An apology and a retraction of the article in "The Star" and "The Gleaner" which should be published twice and given equal prominence as the offending one; and

(2) Monetary compensation of $1M.

In consequence of this request, an article entitled "Clarification" was published on the 7th and 8th day of October, 1999. Two days after on the 11th

of October 1999, a Writ of Summons was filed by the plaintiff's attorneys-at-law. The cause of action was defamation. Damages were claimed including exemplary and aggravated.

A defence was later entered which prompted the plaintiff/respondent to file a notice of motion to strike it out and enter judgment in his favour. The matter came on for hearing before Theobalds J who gave judgment in terms of the motion. More specifically, the pleading was struck out because it disclosed no reasonable, triable, arguable defence to the action and was an abuse of the process of the court.

The interlocutory judgment of Theobalds J has now been challenged on appeal by the defendant company. After hearing arguments we allowed the appeal and set aside the order of the court. We promised to put our reasons in writing which we now do.

The defendant filed four (4) Grounds of appeal as follows:

(1) The learned judge misapprehended or, alternatively, misapplied the guiding principles which were applicable on the Motion before him, viz, that the striking out power should only be exercised in clear cases where the defence raised was hopeless; he accordingly exercised his discretion on an erroneous basis and thereby arrived at an erroneous conclusion.

(2) The learned Judge failed to appreciate that since the sufficiency of the apology, for purposes of Libel & Slander Act, was a question of fact for the judge or jury at a trial, he could only properly strike out paragraphs 6 and 7 of the defence if he were able to conclude that

no such tribunal of fact could, after a trial, hold the view that the defendant had apologised as required by the Act, and the material before him on the Motion was not such as could enable him to arrive at that conclusion.

(3) The learned judge, in granting Order in terms of Motion, struck out paragraph 4 of the defence without appearing to appreciate that that paragraph raised an independent ground of defence and is a plea of such a nature that it could not or ought not to have been disposed of on a striking out application.

(4) The learned judge ought to have refused to entertain the Motion on the ground that it was not made as soon as possible after the defence was filed as required by the Rules.

In support of ground 1, Mr. Vassell Q.C. submitted that the power to strike out pleadings is a draconian one that should only be used in clear and obvious cases. He further submitted that in order for a defence to be properly struck out, it must be possible to say that it is hopeless.

In support of this proposition he cited the English Court of Appeal case of ***Walters v. Sunday Pictorial Newspapers Ltd.*** (1961) 1WLR 967. There it was stated that the pleading must disclose no arguable case in order to be properly struck out. The legal principles were further enunciated when the later case of ***McDonald's Corp. v Steel*** 1995 3 All ER 615 was relied on. The extracted learning was that the correct approach when striking out a defence as an abuse of the process of the court is to determine whether the defendant's case in relation to a particular passage is incurably bad.

Ground 2 dealt with the role that the trial judge should play in a case as this. The main contention was that the question of whether the "apology", required by section 3 of the Libel and Slander Act was sufficient, was ultimately one for the jury's determination. Counsel argued, that the trial judge misunderstood his role since he was only required to say whether the publication entitled "clarification" was capable of being an apology. Tl formulation of the judge's function which comes from Duncan and Neill on Defamation, 2nd edition, page 10 is significant:

> "Where a case is tried with a jury the decision as to the natural and ordinary meaning of the words is for the jury, but the judge may first have to rule whether the words are capable in law of bearing one or more of the meanings for which the parties contend."

It was further submitted that by deciding the question himself, the Learned Trial Judge usurped the function of the jury. The above position is buttressed by the ***Walters*** case (supra) which held that issues such as these are essentially matters for the jury to decide. Mr. Vassell Q.C. placed great reliance on the case of ***Risk Allah Beh v Johnson*** [1868] 18 LTR 620. There it was clearly stated:

> "Where an apology is pleaded in an action of libel, it is for the jury to say whether such apology is reasonably sufficient".

The case is particularly illustrative in that the judge was of the opinion that the apology was not sufficient. However, he acted in accordance with the rule in leaving the matter to the jury and accepting their verdict even though it was contrary to his own view. The case of ***Lafone v Smith and***

Others The English Reports Vol. 157. page 664 reiterates the point that the sufficiency of an apology or lack thereof is a matter for the jury.

The third ground of appeal was that the learned trial judge in striking out paragraph 4 of the defence made a finding of fact which was akin to an order for summary judgment which is prohibited in libel cases. The finding of fact that the judge allegedly made surrounded the interpretation of the article.

Mr. Vassell Q.C. contends that the construction to be given to the words of an article are the purview of the jury and cited ***Broome v Agar*** [1928] TLR 339 in support. The case was yet another example where the words of an article which constituted the alleged libel were left for the jury's determination.

Lord Bridge in ***Charleston v. News Group Newspaper Ltd.*** [1995] 2 All ER 313 stated that with matters such as these, there are two principles to bear in mind. The first is that if no legal innuendo was alleged, the single, natural and ordinary meaning to be ascribed to an allegedly defamatory publication was the meaning which the words conveyed to the mind of the ordinary and reasonable reader.

The second, which was analysed by Lord Diplock in ***Slim v Daily Telegraph Ltd.*** [1968] 1 All E.R. 497 at 504-506 is that a combination of words may convey different meanings to different readers. The jury is required to determine the single meaning which the publication conveyed to the rational, reasonable reader. Mr. Vassell, Q.C. maintains however that it

is inappropriate to determine the natural and ordinary meaning of alleged defamatory words on a striking out application.

Mr. Clark Cousins began his submissions by noting that the defendant/appellant did not plead justification, fair comment or privilege. Therefore, this is purely a section 3 defence which is in essence a full apology. He went on to identify the three significant aspects of section 3 and further noted that the absence of any one of the three would be fatal as the section was conjunctive. They are as follows:

(1) Libel must be published without actual malice and without gross negligence;

(2) the defendant must publish a full apology for the libel; and

(3) defence must be accompanied by a payment into court.

He submitted that this appeal can fairly be said to be reduced to one question. That is, did the defendant/appellant comply with the dictates of section 3 and in particular, was there a full apology? What is not in issue, he argued, is whether the plaintiff was actually libeled. The mere fact that the defendant/appellant has come under section 3 meant that it admitted the allegation of libel.

That both parties agreed that the appeal is based on the defendant/appellants' compliance with section 3 is without question. Where the two parties diverge is on the issue of who is to make the determination as to whether the apology was sufficient.

Mr. Cousins maintains that the defendant/appellant's compliance with section 3 of the Libel and Slander Act is a matter of law and one confined to

the judge as the arbiter of law. He goes on to state that since past judicial decisions have established the constituent parts of a full apology, the judge was fully competent to decide whether the requisite standard was met. The judge is entitled to make such determinations and strike out pleadings under the inherent jurisdiction.

In relation to ground 1, therefore, he submits that the judge has the inherent jurisdiction to strike out pleadings if they disclose no reasonable prospect of success and are otherwise an abuse of the process of the court.

With regard to ground 2 he posits that the interpretation of the statute, and compliance therewith based on previous authorities, is a matter of law for the judge alone.

Great reliance was placed on the Jamaican Court of Appeal case of ***Eric Anthony Abrahams v The Gleaner Company and Dudley Stokes*** SCCA 98/92, delivered 24th November, 1994 primarily in support of the proposition that this particular defendant knows how to make a "full apology". It was also cited as an example of the exercise of the inherent jurisdiction to strike out the pleas of justification and qualified privilege. The matter was then remitted to the court below to proceed on the basis that there was no defence.

The judge must first decide whether the law was complied with and then the question of sufficiency and adequacy is left to the jury. If the judge rejects it, then there is no need to trouble the jury.

Conclusion

The pivotal issue with which this appeal is concerned is who should determine the adequacy of the apology. The plaintiff/respondent says that this is properly a matter for the judge as arbiter of the facts. The defendant/appellant, based on decided cases, states that it should be the purview of the jury.

For obvious reasons we have hesitated to say anything which may have any bearing on the merits of the case before the trial.

We are however, of the view that in this case the judge who heard the motion to strike out was in no position to say that the defence under the Libel and Slander Act was utterly hopeless. The sufficiency of the apology is a question for the jury when all the material, oral and documentary are examined. It is for those reasons that we allowed the appeal with costs to the appellant to be agreed or taxed.