IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1995/K030

BETWEEN	W/CPL. JACQULIN "MAXINE" KENNEDY	PLAINTIFF
A N D	THE GLEANER CO. LTD.	DEFENDANT

Mr. A. Kitchen for Plaintiff with Mr. R. Gordon instructed by H.G. Bartholomew & Co.

Mr. D. Morrison Q. C. and Mr. Samuel Harrison instructed by Dunn Cox, Orrett and Ashenheim.

1ST & 2ND JULY 1999,
20TH & 23RD MARCH, 2000
26TH , 27TH APRIL, 2000
4TH MAY 2000
27TH APRIL 2001

DUKHARAN, J

The plaintiff's claim is against the Defendant to recover damages for libel of the Plaintiff by the defendant contained in an article printed and published by them in a news paper "The Star" on the 29th November, 1994. the Plaintiff alleges that the Defendant falsely and maliciously printed and published words concerning the Plaintiff to wit: "Fists Fly At Burial Site",

wife, sister-in-law clash over body, pastor chases fighters from church, police fire shots to quell fracas".

The article that was published by the defendant concerned the funeral of one Howard Kennedy the brother of the Plaintiff. The article stated that the deceased sister (Plaintiff) and his wife fought inside the church, forcing the funeral to be called off. Fighting between the two sparked the intervention of other family members which eventually triggered a barrage of gunfire by Policemen from Harman Barracks who were also present at the funeral.

By the publication of the above the plaintiff contends that she has been greatly injured in her credit and reputation and has been made the subject of investigation by her superior in the Jamaica Constabulary Force and has been brought into public scandal, odium and contempt.

The Defendant admits that it printed and published the words but denies that the said words were published falsely or maliciously. The defendant contends that the said words in their natural and ordinary meaning are true in substance and in fact, and was an occasion of qualified privilege. The defendant is also contending that the plaintiff is precluded by law from bringing an action of libel in respect of her action as a member of the Harman Barracks Mobile Reserve of the Jamaica Constabulary Force. The

defendant is relying on the case of Derbyshire County Council vs. Times Newspapers Ltd. 1993 1 A.E.R. 1011.

The Defendant's primary plea is justification and qualified privilege.

The Plaintiff is a Corporal of Police in the Jamaican Constabulary Force. She told the Court that on the 27th November 1994 she attended her brother's funeral in Manchester. She was accompanied by about fourteen co-workers, all members of the Mobile reserve at Harman Barracks. They all traveled in a bus. She said at the church she laid a wreath on the casket and began crying. She was taken by a co-worker and put back on the bus where she remained while the funeral service was in progress. She said she was told something and went to the grave site where it was filled with stones and debris. She went back in the church and sat beside the casket. She heard an explosion outside. She said no burial took place.

On the 29th November 1994 she was shown a copy of the "Star" (newspaper) published by the Defendant. She saw on the front page "wife, sister-in-law clash over body" the article referred to her. She said that the W/Cpl. Kennedy referred to in the article concerns her and that she is also called 'Maxine'. She understood the article to convey that she acted in breach of the law and committed a criminal offence and sacrilege and that she was indisciplined and of a violent nature.

She said the article about her was untrue and she felt belittled. She said her colleagues came to her about the article and told her they did not know she was so bad to be fighting in church. As a result of the article she was given guard and sentry duties at the Commissioner's Office and at Jamaica House. She is still doing statue duties. The Commissioner of Police ordered an investigation about the matter but up to now has heard nothing of the outcome.

She said as a result of this she is being teased about it. Her attorney wrote to the Defendant about the article but there was no response.

She was cross-examined about the article and although she admitted certain parts were true she denied that there was any fight in which she was involved. She said at no time she fought in the church with her sister-in-law. She said she was not aware that members of Harman Barracks fired any shots nor was she taken out of the chapel because of any disruption caused by her.

The plaintiff called several witnesses. Rosemarie Henry told the Court that she is a Sergeant of Police and knew the Plaintiff. She also knew her as 'Maxine'. She said she attended the funeral of the Plaintiff's brother in Mandeville. They all traveled in a bus. She said she saw no fight in the

church and at no time did she see the Plaintiff and anyone fighting, nor was there any altercation.

She said on the 29th, November 1994 she bought a "star" newspaper and on the front and second page she saw the article in which the Plaintiff is alleged to have fought in the church. She told the Court that this meant that the Plaintiff was in the breach of the law, was boisterous and ought not to be in the Police Force. She said the entire Mobile Reserve were talking about the article. In cross-examination it was suggested to her that there was an altercation between the Plaintiff and her sister-in-law but that she was not in a position to see. This was denied by the witness as she said at all times she was looking in the church and saw no fight.

Christopher Wilson told the Court that he knew the Plaintiff for over eight years as an active member in his community. He said when he saw the article in the 'star' he knew it referred to the Plaintiff and he asked her about it. He said he understood the article to mean that she had broken the law by fighting in the church and as a Police Officer ought to be setting a better example and that he did not expect that from her.

He said that he got the impression that the 'star' was printing false stories bout her. He said after he spoke to her he did not believe the story in the article.

Jaspher Wilson told the Court that he is a Sgt. of Police and that he went to the funeral along with the Plaintiff and other members of the Mobile Reserve in a Police bus. He said while he was in the church he heard a commotion outside the church yard and saw bottles and stones being thrown. He heard an explosion but does not know the source. The funeral was aborted. In cross-examination he denied that the Plaintiff was fighting inside or outside the church. He said he never saw the Plaintiff in an altercation with another woman in the church nor did she raise her voice in his presence and hearing. He said it also not true Policemen from Harman Barracks fired a number of shots in the air.

Mr. Morrison in opening the case for the Defence said the primary plea was Justification and Qualified Privilege. He submitted that the first issue for the Court's consideration would be whether the article was in fact true in substance. The second issue was whether this was an occasion of Qualified Privilege. Mr. Morrison further suggested that even if the court was to find that justification had not been made out the plea of Qualified privilege would nevertheless entitle the Defendant to judgment. The third issue he said that the circumstances would attract absolute privilege. That accordingly, the Plaintiff is precluded by law from bringing an action of libel in respect of her actions as a member of the Harman Barracks Mobile

Reserve of the Jamaica Constabulary Force. The Defendant is relying on the case of Derbyshire County Council vs. Times Newspapers Limited [1993] 1 A.U.E.R. 1011. In that case the Plaintiff, a local authority brought an action against the publishers of a Sunday Newspaper, its editor and two journalists, claiming damages for publishing articles about the authorities investments and control of its superannuation fund which were alleged to be defamatory of the local authority. The Defendants applied to have the action struck out as disclosing no cause of action against them on the grounds, inter alia, that a local authority being a non trading statutory corporation, could not maintain an action for a libel which reflected on its administrative reputation, when no actual financial loss was pleaded. It was **Held** that under common law a local authority did not have the right to maintain an action for damages for defamation as it would be contrary to the public interest for the organs of government whether central or local to have that right. Not only was there no public interest favouring the right of government organs to sue for libel but it was of the highest public importance that a government body should be open to uninhibited public critisism, and a right to sue for deformation would place an undesirable fetter on freedom of speech.

The Defendant called several witnesses. Desmond Bryan told the court that in 1994 he was a supervisor at the Oakland Memorial Gardens (Cemetry). On the 27th November 1994 there was a funeral. He heard a loud noise in the chapel and heard the Plaintiff using swear words. She had to be comforted by persons. She became calm and after a while went outside. He did not know the Plaintiff before. He said the funeral did not take place as there was stone throwing and he saw a man fire shots in the air. In cross examination he said he never saw the plaintiff fighting in the church. The editor in chief of the Gleaner publication Wyvolyn Gager gave evidence. She told the Court that she was a journalist for over twenty years. In relation to the article in question she said she did not see the story before it was published as it was not normal for her not to see it before publication. They have a system of checks to verify stories. She said she had read the story in this case and the involvement of the police would be of Public Interest as the Plaintiff in this case was a policewoman. In cross examination she did not agree that all the information could have come from one person. She was not aware if communication was made to the Police to verify the story. She does not agree that a story like this would attract more readers. She said if the story was true it would reflect negatively on the Plaintiff.

The statements of Rose Kennedy (the sister-in-law of the Plaintiff) and Nigel Allen were admitted in evidence under Section 31E of the Evidence Act on the basis that it was not reasonably practicable to secure their attendance at Court.

That was the evidence for the Defendant.

It was submitted by the Plaintiff that the Court should consider:-

a. Whether the natural and ordinary meaning of the words in the article are capable of conveying a defamatory meaning.

b. The issue of libel in relation to the publication of such in a newspaper and

c. The issue of the award of damages, including exemplary and/or aggravated damages.

The Court has to consider whether the words in the article are capable of conveying a defamatory meaning. In the case of The Gleaner Company Ltd. vs. Richard Small – 18 J.L.R 347 – Carey J.A. said at page 377. "The test in determining whether words are capable of conveying a defamatory meaning is one of reasonableness." "It is plain from the authorities that the judge must put himself in a place of a reasonable, fair-minded person to see whether the words suggest disparagement, that is would injure the Plaintiff's reputation, or would tend to make people think the worse of him."

It is clear therefore that in deciding whether or not a statement is defamatory the Court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand it in a defamatory sense.

The issue of libel in relation to the publication in a newspaper, the Plaintiff's cause of action is complete if she proves that a libel has been published of and concerning her. See .... Rowe J. in Caven vs Munroe – 16 J.L.R. at page 292.

It was submitted by the Plaintiff that based on the evidence given the natural and ordinary meaning of the words used in the article, including the headline gave the impression that the primary parties to the article, which was the Plaintiff and her sister-in-law, engaged in a physical fight which encouraged other family members to join in. Also that it was the Plaintiff who initiated it. It was further submitted that the statements contained in the offending article were clearly statements of fact which are false and the statements are not comment but substantially matters of fact based on falsehoods. It was submitted also that the Plaintiff has proven that

the words in the article have been injurious to her and that there was lowering of the esteem she enjoyed in her community.

With regards to Damages it was submitted that the Plaintiff ought to be awarded exemplary damages as the Defendant showed recklessness in its printing of the article, and clearly considered the amount of profit which the newspaper may have made from the publication that day. In the alternative it was also submitted that aggravated damages ought to be awarded to the Plaintiff, considering the Defendants conduct after the receipt of a letter from the Plaintiff's attorney and scant regards for the Plaintiffs feelings and reputation.

Mr. Morrison for the Defendant, has asked the Court to find that the plea of justification has been proved and urged the Court to look at the evidence and bear Section 7 of the Defamation Act in mind. Section 7 reads;

> "In an action for libel or slander in respect of words containing two or more distinct charges against the Plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the Plaintiff's reputation having regard to the truth of the remaining charges!!

Mr. Morrison submitted that in looking at the evidence of the Plaintiff there was a disagreement between the families over funeral arrangements. There was a serious fracas in Manchester and that the Plaintiff's credit has been severly impaired. It was further submitted that not every assertion in the article has been proven, but the thrust of the story that the funeral service was disrupted because of disagreement as to where it should have taken place, erupted into open confrontation between the faction.

Even if the plea of justification has not been proved the court has to look at Qualified Privilege as a separate head of Defence.

In the Gleaner Company vs. Small **(supra)** Carey J.A. said at page 380. "The authorities make it I think, perfectly clear that newsworthiness is not to be equated with Qualified Privilege otherwise mere salacious gossip would be protected. There must be a duty to publish and a corresponding interest so as to create an occasion of qualified Privilege. The Privilege depends not on any assumed duty or responsibility of the press to advice the public, but on whether the subject matter is such that the public should know!!

In the Gleaner CO. Ltd. Vs. Sibblies and Smart (1990) 27.J.L.R. 577 as Rowe J.A. at page 584 "A privileged occasion for the purposes of the

defence of Qualified Privileged to an action for libel occurs where the words complained of as defamatory are published in pursuance of an interest or of a duty, legal, social or moral, to publish than to the person to whom they were published and the person to whom they were published had a corresponding interest or duty to receive them. The reciprocity is essential".

As Lord Diplock explained in **Horrocks vs Lowe** [1974] **1 A.E.R. at Page** 669 – "the privileged is not absolute but qualified. It is lost if the

> occasion which gives rise to it is misused. For in all cases of Qualified Privilege there is some special reason of public policy why the law accords immunity from suit – the existence of some public or private duty, whether legal or moral on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege."

For a defence of Qualified Privilege to fail the Plaintiff has to prove by direct evidence, or by inference from what was written that the publication was the product of actual malice. The clearest evidence of malice is where a statement is made with the knowledge that it is false. Malice may well be found if a statement were published recklessly whether

it be true or false. As Viscount Dilhome said in Harrocks vs. Lowe (supra) at page 665.

> "If a man abuse a privileged occasion by making defamatory statements, which he knows to be false, express malice may easily be inferred. If, on such an occasion he makes statements recklessly not caring whether they be true or false, again malice may be inferred."

In assessing the evidence I have looked at the natural and ordinary meaning of the words used in the article, particularly the headline which gives the impression that the primary parties, the plaintiff and the widow were in a physical fight and it was the plaintiff who initiated it. I am satisfied that the plaintiff is a witness of truth. I find from the evidence that there was no fight in the church. I also find that she was not engaged in any disruptive behaviour. The witness for the defence Desmond Bryan said in evidence that he did not see the plaintiff fighting in church. From the statement of Rose Kennedy which was adduced she also does not speak about any fight in the church. I find as a fact that the statement in the article about the plaintiff was false. As Lord Diplock L. J. (as he then was) in Astaire vs. Campling [1966] 1 WLR 34 as page 41c. said

> "A statement does not give rise to a cause of action against its publisher merely because it causes damage to the plaintiff. The

statement must be false and it must also be defamatory of the plaintiff, that is to say, the statement must itself contain, whether expressly or by implication, a statement of fact or expression of opinion which would lower the plaintiff in the estimation of a reasonable reader which had knowledge of such other facts not contained in the statement, as the reader might expressly be expected to possess."

I find therefore that the Defence of justification must fail. Section 7 of the Defamation Act will not avail the Defendant as the words used in the publication has injured the Plaintiff's reputation.

The reliance of the Defendant on the doctrine in the Derbyshire County Councils Case (supra) in my view does not apply here. The Plaintiff brought the action in her private capacity and not as a member of the Jamaica Constabulary Force. There is no evidence or allegation that the Plaintiff as a Police Officer abused her powers.

The court has looked at the other defence of qualified privilege. It would be the conduct of the Police which makes qualified Privilege a defence. There is no criticism of the conduct of the police or that the plaintiff fought as a Police Officer or it concerned conduct in the execution of duty. Most of the authorities on qualified Privilege – concerns persons in a public office or person acting in the course of duty.

For the defence of a qualified Privilege to fail the Plaintiff must prove that the actions of the defendant was actuated by malice. Has the defendant misused that privilege ? The editor in chief who gave evidence said she did not see the story before it was published as the 'Star' has its own editors and sub-editors. She said in cross-examination that she was not aware if communication was made to the police to verify the story. She admitted that if the story was true it would reflect negatively on the plaintiff.

I find that the statement was published recklessly as to whether it was true or false as it related to the Plaintiff. I find that sufficient checks were not made to verify the story as it concerned the plaintiff. From their own witnesses there is no evidence that the Plaintiff fought in the church. In my view the Defendant has demonstrated reckless conduct as to whether the story was true or false.

The statement contained in the offending article are statements of fact and are based on falsehoods . The defence of qualified Privilege in my view cannot succeed. The plaintiff has proved her case and is therefore entitled to damages. On the question of damages it was submitted that the plaintiff ought to be awarded exemplary damages as the defendant showed recklessness in it's printing of the article, and clearly considered the amount

of profit which the newspapers may have made from the publication that day. Exemplary damages may be awarded where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation otherwise payable to the plaintiff. In Rookes vs Bernard [1964] 1 AER – Lord Devlin at page 410 said;"

"One man should not be allowed to sell another man's reputation for profit. Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably. exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impurity. ..... Exemplary damages can be properly awarded whenever it is necessary to teach a wrongdoer that tort does not pay."

The Defendant in the instant case is in the business of publishing newspapers. The 'star' newspaper is an evening tabloid which attracts a large readership. Everything which is published in it is done with a view to selling the paper, and hence making a profit, and that is why newspapers are in business. It is therefore not enough for the plaintiff to say that the defendant sells newspapers for a profit without more. If this was the case then all newspaper companies sued for libel would attract exemplary damages. Based on the evidence of the editor of the Defendant's company I

can find no basis that the story was published with a view that based on a calculation that the profit of sales of the paper on that day would outweigh any damages the defendant might be liable to pay.

The Plaintiff is therefore in my view not entitled to exemplary damages.

The plaintiff is contending that in the alternative she is entitled to aggravated damages. This is based on the conduct of the defendant in refusing to acknowledge a letter written to then and that there was no apology or withdrawal of the article.

In the case of Broadway Approvals vs. Odhams Press [1965] 2 AER 523 it was held inter alia, that failure to apologies or retract a defamatory statement and persistence in a plea of justification are in themselves not evidence or malice. They may be in certain circumstances, but more frequently they would show sincerity and belief in what had been said and establish the best reason for the publication. In this case the defendant failed to prove justification, but they succeeded in fair comment and in that circumstance their failure to apologise or retract the statement provided little indication of malice.

In the instant case the defendant failed to prove justification or qualified privilege. The situation here is different. The defendant in this

case had made no apology or retraction of the article as it relates to the plaintiff. In my view I find the defendant's conduct in this regard to be irresponsible to say the least

One must look at the adverse effect and the reputation of the Plaintiff in the eye of the public prior to the libel. The plaintiff in my view is entitled to aggravated damages.

In awarding damages I take into account that the plaintiff was removed from front line duty as a result and given static duty and was by passed promotion. In all the circumstances there will be judgment for the plaintiff in the sum of $750,000 which includes a sum for aggravated damages.

Costs to the plaintiff to be taxed if not agreed.

M. J. Dukharan
Judge