JAMAICA

IN THE COURT OF APPEAL

R.M. CIVIL APPEAL No. 80 of 1971

BEFORE: The Hon. Mr. Justice Fox, J.A., Presiding.
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

ALTON YING v. LAWRENCE RICHARDS

Hugh Small for the appellant.

L.I. Clarke and P.J. Robotham for the respondent.

1971: Dec.12. 1972: Mar.24

SMITH J.A.

Messrs. Courtenay Squire and Joseph Lewars were, in December 1970, employees of a company in Saint Catherine of which the defendant Alton Ying was plant manager. The plaintiff is a medical practitioner in private practice in Spanish Town. On December 27, 1970 both young men, Squire and Lewars, consulted the plaintiff at his office. He examined and treated them and gave each of them a certificate recommending ten days leave of absence on the ground of ill health. These certificates were sent in to their employers. Each of them subsequently received a letter dated December 30 from the company which was signed by the defendant. They were told in the letters that the company had reviewed their production "program" for 1971 and found that "at the moment (their) services will not be required." As a result of these letters both men went to see the defendant - Lewars on December 31 and Squire on January 4, 1971. As a result of what each said he was told by the defendant they went together to the plaintiff at his office and in the presence of his nurse and patients there in his waiting-room demanded back the fee of $4.20 each had paid the plaintiff.

The plaintiff subsequently brought two actions against the defendant in the Resident Magistrate's Court for Saint Catherine claiming $600.00 in each case as damages for slander in respect of the words allegedly used by the defendant to Lewars and Squire. Both of them gave evidence for the plaintiff at the trial. Lewars said that the defendant told him: "You and Squire should not have gone to that gangster doctor. He is no good and no one recognize him." Squire said he was told: "Next time you sick you see

Courtenay don't go back to that deaf ears man Richards. Nobody recognizes him." There was some evidence that the plaintiff is hard of hearing. The defendant denied that he had used the words alleged or that he had said anything to either Lewars or Squire of and concerning the plaintiff.

The learned resident magistrate tried both actions together by consent and found that the defendant used the words given in evidence by Lewars and Squire. This finding was not challenged on appeal. It was conceded that the words used to Lewars were actionable per se, but in respect of those used to Squire it was contended that those words are not slanderous per se and that the resident magistrate, therefore, "erred in law in giving judgment for the plaintiff-respondent in the absence of any innuendo being pleaded or being supported by evidence." It was said that in the context of the case there was nothing to show that the words were being used to call into question the competence of the plaintiff in his professional capacity. I do not agree. Apart from the fact that Squire obviously understood the words in this sense and, as a result, went to get his money back from the plaintiff, the words themselves, as well as the context in which they were uttered, plainly impugn the professional competence of the plaintiff.

The substantial complaint made on appeal was against the damages awarded the plaintiff. He was awarded the $600.00 he claimed in each case, the maximum the resident magistrate had power to award. The grounds of appeal in each case stated that the award of damages was excessive and completely out of context having regard to the fact that there was no evidence that the plaintiff suffered loss as a result of the publication of the defamatory words. Reliance was placed on McCarey v. Associated Newspapers, Ltd. & others, [1964] 3 All E.R. 947. In that case Diplock, L.J. said, at p.959:

> "In an action for defamation, the wrongful act is damage to the plaintiff's reputation. The injuries that he sustains may be classified under two heads: (i) the consequences of the attitude adopted to him by other persons as a result of the diminution of the esteem in which they hold him because of the defamatory statement; and (ii) the grief or annoyance caused by the defamatory statement to the plaintiff himself."

Damages under head (ii) may be aggravated by the manner in which, or the motives with which, the statement was made or persisted in (per Diplock, L.J. ibid). It is made clear in the McCarey case that, save in one exceptional

circumstance, the award of punitive or exemplary damages is not permissible in defamation cases. At p.958 Diplock, L.J. said:

> "It is recognised today (though it has not always been so) that the basic rule of common law is that damages are awarded in civil actions as compensation for injury, not as punishment for wrong-doing. To punish the wrong-doer is the function of the criminal courts. That principle, I think, has been plainly laid down in such cases as British Transport Commission v. Gourley [1955] 3 All E.R.796, Browning v. War Office [1962] 3 All E.R. 1089, and most recently in the speech of Lord Devlin in Rookes v. Barnard [1964] 1 All E.R. at pp. 407 et seq., to which Pearson, L.J., has referred, a speech which received the express approval of all the other members of their lordships' House. To this basic rule there are two exceptions discussed by Lord Devlin in his speech. There is first the historical and anomalous exception of abuse of power by servants of government ..... There is the second exception flowing from the principle that the law is mocked if it enables a man to make a profit from his own wrong-doing."

The first exception is not relevant in an action for defamation and the second exception is not relevant in the case now under consideration. The injured plaintiff was entitled, therefore, only to compensatory damages.

In his reasons for judgment the learned resident magistrate did not state the basis on which he awarded damages to the plaintiff. He merely said: "Having found as a fact that the words alleged had been used by the Defendant of and concerning the Plaintiff in his professional capacity, I entered judgment for the Plaintiff on each plaint for the full amount of each claim." In order to decide whether the damages awarded were a proper assessment of monetary compensation for the injury caused to the plaintiff the relevant evidence in the case, or lack of it, must be considered. In relation to Diplock, L.J.'s head (i) above, there was no evidence that the plaintiff's professional practice has diminished or that he has suffered any other pecuniary loss. There was, also, no evidence either direct or inferential that the attitude shown to the plaintiff by any persons with whom he came into social or professional contact was any different as a result of the slanders. Nor was there any evidence to justify an award of aggravated damages under head (ii). We are left, therefore, with an award of compensation for grief or annoyance caused by the defamatory statements. In this connection the

extent of the publication of the words is relevant. Apart from the publication to Lewars and Squire, the only publication proved was to the plaintiff's nurse and the patients in his office when the men went to complain. It was submitted by Mr. Small that there was no evidence that the words were repeated to the plaintiff or, if they were, that the nurse and the patients heard them. There was no direct evidence but there was ample evidence from which both of these matters could be inferred.

There was evidence that both men were angry and were boisterous and agitated when they complained and demanded back their money from the plaintiff in the presence of his nurse and "several" patients. Lewars said that as a result of the words used to him he believed the plaintiff was no good. Squire said that he was upset. There is no evidence that the words had any effect on the nurse or the patients. The plaintiff said that he felt humiliated and surprised. His professional qualification and experience were not challenged. He has been in practice since 1935.

On this evidence, are the damages awarded excessive? I think they are. I am of this view even though there is no formula by which to measure the quantum of damages. The resident magistrate had an advantage in assessing the value of the plaintiff's reputation which we do not have in that he saw the plaintiff. Even so, I do not think that this factor justifies the amounts awarded. There is a further important circumstance which, in my opinion, affects the assessment of the proper award to which the plaintiff is entitled. Though the defamatory words were spoken and published on two separate occasions, they were communicated to the plaintiff simultaneously. So that the injury to his reputation and the humiliation which resulted from the publication to his nurse and patients was one and indivisible. This, it seems to me, is where the greater part of the injury lay. For this plus the separate publications to Lewars and Squire the plaintiff was awarded a total of $1,200.00. Viewed in this way it is manifest, in my view, that the damages are out of all proportion to the proved injury to the plaintiff. If the learned resident magistrate had applied the proper principles and had taken into account the joint injury caused by the separate slanders he could not, in my opinion, have arrived at the amounts awarded. In my judgment,

a total of $500.00 ($250.00. in each case) is adequate to compensate the plaintiff for the injury to his reputation. I would, accordingly, allow the appeals as to damages.

GRAHAM-PERKINS, J.A.

I agree.

FOX, J.A.

I entirely agree and have nothing further to add. The appeals as to liability are dismissed. The appeals as to damages are allowed. The amount of $600.00. awarded in each case is set aside and the amount of $250.00. in each case substituted therefor. The appellant is to have the costs of the appeals fixed at $20.00. in each case.