

A REVIEW OF *SHAILEND SHANDIL AND ANOTHER V AIR FIJI LIMITED*

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This was an appeal heard by the Fiji Court of Appeal in its July sitting this year. The hearing was concluded on 12 July and judgement was delivered 3 days later. The appeal arose from the award of damages made by Mr. Justice Pathik in an assessment decision. Both judgments deal with substantive issues of law. Although the claim was based in defamation the underlying principles for assessment of damages generally were discussed at length in both Courts. The guidance given is invaluable in assessing damages in defamation claims in particular and in torts generally. The decision is unreported at present and no appeal has been filed challenging the decision of the Fiji Court of Appeal. It is the Fiji Court of Appeal decision, which forms the basis for this Case Note, however, reference will be made to the High Court decision as well as it lays down the framework on which the appeal was founded.

THE FACTS

On 24 July 1999, an aircraft owned by the plaintiff and bound for Nadi from Nausori crashed in the course of its flight. All 15 passengers and the two crew members on board died as a result. This was a fatal crash that could not be compared with any other previous air disaster in Fiji. The news of the crash shook the nation as a whole and both the local travelling public and those in the industry continue to be affected by it even some five years later. It took the Civil Aviation Authority of Fiji [CCAF] and their Air Inspectors several weeks to analyze the crash.

Ten days after this crash an aircraft of the plaintiff had to undergo some repairs after a flight to Moala in Lau. The defendants Shalend Shandil and Island Network Corporation Limited broadcast a news item stating that another aircraft of the plaintiff's had "managed to make safe landing after its propeller suffered a mechanical failure mid-air." This report was broadcast twice on 3 August 1999 and once on 4 August 1999.

HISTORY OF PROCEEDINGS

On 13 August 1999 defamation proceedings were issued by the Appellant Company in its capacity as the Plaintiff in the High Court at Suva. In the particulars of claim the plaintiff set out *ad seriatim* the full transcript of the broadcast as read by the first defendant. Although the proceedings were initiated by a Writ of Summons the Statement of Claim filed in the first place, was ordered by Madam Justice Shameem to be amended appropriately so as to incorporate the full broadcast to enable the defendants to properly file a defence. The defendants did not respond to the amended statement of claim within the required time. This lack of response resulted in the entry of judgment by default with damages to be assessed. It is unclear why a defence was not filed against the claim and it is again unclear why no effort was made to set aside the judgment by default once it was entered and brought to the attention of the Defendants and or their solicitors. This point is made considering the fact that the learned counsel for the Appellant made every effort on appeal to seek to introduce arguments to contest the issue of defendant's liability.

THE DEFAMATORY STATEMENT

The second defendant was the parent company of the oldest radio station more commonly known as 'Radio Fiji' and it is the publisher of the news item complained of. Amongst other things, the broadcast, in the manner and form it was written and presented, impliedly reminded its listeners of the earlier crash of

the Plaintiff's aircraft in the jungles of Naitasiri. More importantly, the context in which the said broadcast was made implied that in the natural and ordinary meaning of the words the reasonable man would believe that the plaintiff's aircraft was not airworthy. It could also imply that it was unsafe, prone to serious malfunction and that it had suffered a serious malfunction to its propeller in mid-flight on 3 August 1999.

LEGAL ISSUES

Apart from the issue of damages no strict legal issues were contested, tried and determined in the proceedings before the High Court when the pleadings closed. In fact the defendants had lost the opportunity to contest the matter, except as to quantum, by failing to file and deliver a statement of defence to the amended statement of claim lodged by the plaintiff. Judgement by Default with damages to be assessed having been duly entered against the defendants, the only contest was as to the quantum of damages. It must be noted that in the Fiji Court of Appeal the defence tried its utmost to seek opportunity to orally challenge the question of liability as well and it even went to the extent of mounting challenges to it in their written outline. Their Lordships were clearly determined to uphold the ever-strong celebrated decisions on the subject and cited cleverly researched authorities in limiting the defendant's arguments to the quantum only. The rule stated by the Fiji Court of Appeal on the question of seeking opportunity to attack liability on appeal will be set out appropriately in the ratio section of this note.

THE PROCEEDINGS FOR ASSESSMENT OF DAMAGES

The task of assessing damages was undertaken in the High Court by His Lordship Mr Justice Pathik, sitting as a first instance court. As there was no statement of defence filed by the defendants their Counsel had little or nothing to offer in assistance before the learned judge. The best he could do in the circumstances was to concede that the basis for assessment of damages lay squarely on the amended statement of claim filed as per order of Madame Justice Shameem.

The plaintiff was claiming damages under the following heads:

- (a) General damages
- (b) Special damages
- (c) Punitive damages
- (d) Interest

It was also seeking the usual relief of "such other orders" as the Court deemed fit.

THE EVIDENCE ON ASSESSMENT OF DAMAGES

In support of its claim in seeking damages the Plaintiff led evidence through its Chief Executive Officer and the Chartered Accountant and Manager Finance. These two witnesses were so to say the heart and soul of the Plaintiff Company. The defence did not lead evidence by calling any witnesses. It nevertheless cross-examined both witnesses of the plaintiff.

The tendering of evidence of witnesses was followed by submissions from respective Counsel. Although legal submissions were in fact advanced by the defence, no evidence was adduced on their behalf. The only pleading was the amended statement of claim and reliance upon it by the Court was crucial for the assessment process.

Although judgement by default with damages to be assessed was already entered against the Defendants, His Lordship took the ever-guarded approach to satisfy himself that the words of the broadcast must have

affected the Plaintiff adversely in the estimation of reasonable persons generally. This is usually done on formal proof of matters and to some extent the process before him was no different. His Lordship accordingly found that the said broadcast was not only defamatory but irresponsible as well.

PRINCIPLES OF ASSESSING DAMAGES AND HEADS OF DAMAGES – OUTCOME IN THE HIGH COURT

In commencing his assessment His Lordship states that in defamation claims generally damages are awarded on a compensatory basis but exemplary or punitive damages can be awarded where the situation demands. He reiterated that compensatory damages by their very nature are awarded as compensation for injury and not as punishment for wrongdoing. In doing so His Lordship was merely setting out well-established principles to afford sufficient explanation and credence to his assessment.

The award of damages was discussed under the following heads:

- (A) Compensatory damages,
- (B) Special damages and
- (C) Exemplary damages

His Lordship also considered the award of interest under the above headings.

Compensatory Damages

Under this head the learned judge appears to have relied on the defamation text *Duncan and Neill on Defamation*^[1] which cites Lord Blackburn's pronouncements in *Livingston v Rawyards Coal Co*, on the requirement of correct assessment on the size of injury for which compensation is sought and payable. Compensation, it is noted, was also referred to as reparation in those days and continues to be so referred to in some jurisdictions even now. Reparation means compensation or damages and the term was significantly used to deal with damages for defeated states after wars.

His Lordship then moved to distinguish the developments thus far made in terms of uniformity in the two major areas of claim namely personal injuries involving pain and suffering and loss of amenity. He is indeed correct in drawing the inference that by way of comparison in defamation cases, awards are not seen to approximate to any conventional scale. This is worthy of note, however, the explanation given for this may be genuine as well, as the magnitude of defamation cases is far smaller compared to that of personal injuries for pain and suffering and loss of amenities.

While still dwelling on the subject of nature of damages and purposes for their award His Lordship referred to the observations of Windeyer J in the famous Australian Case of *Uren v John Fairfax & Sons Pty Ltd* [1967] 117 CLR, 150.^[2] In that case the learned judge was comparing award of damages in defamation suits to that of cases in personal injuries. He referred to award of damages in defamation as being "at large."

The learned judge then sets out very succinctly factors that ought to be taken into account in assessing damages. He said that although seriousness of the libel was a relevant consideration other factors that needed attention were:

- (1) special damages;
- (2) injury to the plaintiff's feelings including any aggravating factors therein;
- (3) extent of publication and
- (4) mitigating factors

His Lordship sought in aid the decision of Singapore Court of Appeal in *Tang Liang Hong v. Lee Kuan Yew & Anor*, [1998] 1 SLR 97 (CA) in expressing some relevant and established principles determined in earlier cases^[2], to confirm some basic matters he had in mind while determining the award of damages. The fact that defamation was an action to vindicate a person's reputation falsely defamed, award of damages was primarily to mark that vindication. The size of the award in damages was part of that exercise in vindication and it in addition reflected any aggravation caused to the plaintiff or defendant's mitigation and subsequent conduct. The learned judge concluded here by confirming that evidence had been received in relation to the alleged loss suffered the plaintiff. He made an award of \$80, 000.00 as compensatory damages.

Special Damages

In dealing with special damages His Lordship alludes to the definition referred to in the textbook by Duncan and Neil namely that it is any material or temporal loss, which is either a pecuniary loss or is capable of being estimated in money. This text sets out that "*special damages can include the loss not only of a specific contract or of any specific customers but also a general loss of business*". In adopting this statement His Lordship was mindful of the plaintiff's claim of 'general loss of business' and the fact that details of such loss including figures had been evidenced before him. He was also particularly persuaded by views expressed in Neills text that publication in a national newspaper or radio brings the defamatory material to a very large public thus culminating in "a very substantial award of damages".

Whilst discussing his views and authorities under this head of damages the learned judge appears to confirm his findings, which, he said, he made upon evidence before him, in regard to the success and the good reputation of the plaintiff as an airline. He nevertheless makes mention of the fact that a serious air accident 10 days before the defamatory broadcast could not be lost sight of in assessing damages in this case. Although concluding that the said air accident undoubtedly seriously affected peoples wish to travel by the plaintiff's aircraft, he was firm in his view that the plaintiff was nevertheless entitled to special damages. It is on this point that the learned judges of the appellate court found themselves in disagreement with the learned first instance judge.

The learned judge in assessing special damages noted that it could include the loss not only of a specific contract or of any specific customers but also a general loss of business. He relied on the summary of claim for loss, which was quantified by the plaintiff at \$245,383.00 as was set out in the statement of claim. The plaintiff's witness Mr. Pitt obviously gave evidence in support of this figure and the manner in which he arrived at it. Towards the end of his assessment His Lordship sets out in substantial detail the working of the quantum as was arrived at by the plaintiff and as supported by its witness. Even after this point he does not appear to misplace the fact that the fatal crash of 24 July 1999 caused more loss of revenue or business than the broadcast of the defamatory statement. He even then relates the greatest loss to the plaintiff through the fatal crash and states that 4.10% loss as worked out by the plaintiff was not quite the loss it suffered. These repeat statements by the learned judge in his assessment are capable of reinforcing the view that he did attribute the majority of the loss to the plaintiff to the fatal crash.

His Lordship, it appears, was determined to award damages under this head. Upon production of facts and figures he was satisfied that the plaintiff had suffered general loss of business. However, in making an award of special damages in the sum of \$120,000.00 he overlooked to make sufficient allowance for losses the plaintiff had suffered as a result of the serious accident 10 days before the defamatory publication.

Exemplary Damages

Under this head His Lordship discusses the salient feature of this head of damages by referring to Lord

Devlin's statement in *Rooks v. Barnard and others* [1964] AC 1129, which states that the object of exemplary damages is to punish and deter. That decision further sets out the three categories of cases in which exemplary damages could be awarded. First, cases of oppressive, arbitrary or unconstitutional acts by government servants. Second, where defendant's conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff and thirdly where expressly authorized by statute. From the Singapore Case previously referred to, His Lordship cited an extract, which confirms that exemplary damages may only be awarded if the libel had been done with guilty knowledge and that chances of economic advantage outweigh chances of economic penalty. The learned judge concluded on this head by forming the view that in all the circumstances of the case an award was not justified. He added that in any event he had made up his mind to award adequate sum as compensation including special damages sufficient to punish the defendants.

Interest

The learned judge also considered award of interest on the damages he assessed and found support in *Gatley on Libel and Slander*^[3] in this respect. In a claim for damages for financial loss, His Lordship found that interest was payable. He awarded interest at the rate of 5% on full sum of award calculated from the date of the filing of the claim in the matter.

THE DECISION OF THE APPELLATE COURT

It is noted that although the learned judges in the Court of Appeal did not really query the primary judges finding of the fact that the statements were in fact libellous, they did examine critically the claim of the Plaintiff. They observed that the Plaintiff's references in the broadcast to "a mechanical failure mid-air" and to the aircraft having to make "an emergency landing" were not really expressly referenced in the broadcast matter. They, however, attributed this to the rather overstatement in the pleadings and the somewhat strained version of the ordinary and natural meaning of the words.

The learned judges of the Court of Appeal identified the issues on appeal as being a challenge to the award of damages under the both categories of general and special damages. Their Lordships, from the outset, acknowledged that one of the difficulties associated with assessing damages for libel was that "the categories of general and special damages were not completely well defined nor altogether mutually exclusive." They also considered that Mr. Pitt's method of calculating special damages was not sufficient to establish it as a matter of proof either in law or in fact. Further they declined to accept that the degree of hurt to the plaintiff's business as a result of defamatory statement was capable of being disentangled with a degree of such precision as to entitle the plaintiff to an award on this score.

Ratio

1. An action of libel will lie at the suit of an incorporated trading company in respect of libel calculated to injure its reputation in the way of its business without proof of special damages.
2. It is not open to the defendants on appeal from assessment of damages in the High Court, to challenge the judgment given against them as distinct from the amount assessed.
3. In libel the categories of general and special damages are not completely well defined, nor altogether mutually exclusive.
4. An incorporated trading company was, without proof of actual loss, entitled to general damages for the injury caused by the defamatory matter published about it in the course of its business.

5. The Company was nevertheless not entitled to compensation for the loss suffered in the way of hurt feelings and the like, which would have been recoverable by an individual defamed in similar circumstances.

CONCLUDING COMMENTS

There are at least two matters which are worthy of comment in the Court of Appeal. First, that damages for the general decline of business by the plaintiff was recoverable, however, the court found that the plaintiff failed to quantify these losses in any specific way. The court nevertheless found that damages under this head were likely to be contained in the assessment of \$80,000.00 as general damages. Presumably this is the reason why it did not attempt to reduce the said amount while explicitly commenting that the award of that size was rather high.

Second, on the point of special damages in the sum of \$120,000 as assessed by the learned judge in the High Court, the Court of Appeal found grounds to disagree with the learned judge. It observed that the method of calculating special damages as offered by the plaintiff through its witness was not sufficient to establish as a matter of law or in fact. It went further to state that even though accepting that plaintiff evidence was showing likely loss of goodwill or reputation it could not be construed as being capable with any precision of being disentangled from the consequences of earlier fatal accident. Therefore the Court of Appeal vacated in total the learned judge's assessment of special damages in the sum of \$120,000.00. The learned judges said they were not satisfied that the plaintiff had proved special damages to the sum assessed or to any degree. They leave room to accept that any loss suffered by the plaintiff as a result of defamatory statement was, nevertheless reflected in the assessment of \$80,000.00, under the head of general damages.

The analysis of the Court of Appeal is sound in respect of all matters it was asked to intervene and their approach in dealing with assessment of damages in the area of defamation law is commendable. It will be interesting to see, what if any, guidelines they may issue should they have another opportunity in the near future in dealing with general damages on this subject.

[*] [2005] FJCA 25 (15 July 2005).

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[1] Duncan, Colin, Neill, Sir Brian, *Duncan & Neill on Defamation* (1st ed, 1978), 130.

[2]. *Air Fiji limited v Shalend Shandil & Another* (unreported, High Court Fiji, Civil Case 380 of 1999 Pathik J).

[2] For Instance, *Dingle v Associated Newspapers Ltd. & Ors* [1964] AC37; *John Fairfax & Sons Ltd. V Carson* [1991] 24 NSWLR 259; *Sutcliffe v Pressdram Ltd* [1991] 1QB 153; *Rantzen v Mirror Group Newspapers [1986] Ltd. & ors* [1994] QB 670 and, *Carson v John Fairfax and Sons Ltd.* [1993] 178 CLR 44.

[3] Gately J.C.C., *Gately on Libel and Slander* (9th ed, 1998).