

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION No. 19 of 2018

BETWEEN : **DARREL RAJCHARAN** of Lautoka, Insurance Advisor
PLAINTIFF

AND : **RAJESHWAR PRASAD** of Mulomulo, Nadi
DEFENDANT

Counsel : (Ms) Saleszni Jyotika Devi for the plaintiff.
The defendant is absent and unrepresented.

Date of hearing : Tuesday, 11th December, 2018.
Date of judgment : Friday, 15th March, 2019.

JUDGMENT

(A) INTRODUCTION

- (1) By writ issued on 01st February, 2018, the plaintiff, 'Darrell Rajcharan', claimed damages, from the defendant, 'Rajeshwar Prasad', for **libel** in connection with a letter published on 26th July, 2017 alleged to have been written by the defendant, which reflected upon the conduct of the plaintiff, as an insurance agent.
- (2) According to the affidavit of service filed on 19th February, 2018, the defendant was duly served with the writ of summons and the statement of claim on 12th February 2018.
- (3) The defendant did not file an acknowledgement of service and notice of intention to defend.
- (4) The defendant did not enter an appearance to the writ either in person or by legal representation.

(5) I heard **formal proof** of the plaintiff's claim.

(B) THE FACTUAL BACKGROUND

(1) The statement of claim which is as follows sets out sufficiently the facts surrounding this claim from the plaintiff's point of view as well as the prayers sought by the plaintiff.

1. *The Plaintiff is an Insurance agent operating out of New India Assurance Co. Ltd. ("NIA"), Lautoka office.*
2. *The Defendant is an insurance policy holder in respect to his motor vehicle placed with NIA through the Plaintiff's agency.*
3. *On or about the 26th day of July 2017 the Defendant had one Azhar Khan write a letter ('the Letter') on his behalf and had Mr. Khan send it by email to the branch manager of NIA, Lautoka and copied in:*
 - i) *The Compliance and Enforcement Department of the Reserve Bank of Fiji;*
 - ii) *The Consumer Council of Fiji;*
 - iii) *The CEO of NIA, Suva and*
 - iv) *Mr. Anil Amin, Ba.*
4. *The Reserve Bank of Fiji as the regulator deals with the granting or renewal of insurance agents' licenses.*
5. *The Consumer Council of Fiji has a series of statutory functions for the protection of consumers.*
6. *Mr. Anil Amin is another agent of NIA.*
7. *The Letter in the first part contained the following statements:*
 - i) *"We have never contacted Darell for his agency's help and will never will as I had very bad experience due to his unethical insurance advise for my own business which was placed with Darell's agency."*
 - ii) *"For the fact that Darell is always in your office, he is placing all incoming new business under his agency without your client's knowledge."*

- iii) *"I have checked with other agent of insurance companies and was advised that an agent cannot be working from insurance company's office and should be having his own office."*
8. *The Letter in the second part contained the following statements:*
- i) *"He has chosen his own preferred garage who does not have any credibility and I doubt is registered under FIRCA."*
 - ii) *"Darell forcing us to place order with his preferred garage is not on."*
9. *In their natural and ordinary meaning the said words in the first part meant and were understood to mean:*
- i) *That the Plaintiff was, without any right, acting as an agent of the Defendant and was therefore acting improperly, deceitfully and dishonestly;*
 - ii) *That the Plaintiff gave unethical advice; and*
 - iii) *That the Plaintiff was, without any right, operating out of NIA's office and was therefore acting illegally and unprofessionally, and was a deceitful and dishonest person.*
10. *In their natural and ordinary meaning the said words in the second part meant and were understood to mean:*
- i) *That the Plaintiff was immoral and unprofessional; and*
 - ii) *That the Plaintiff was deceitful and dishonest.*
11. *The Defendant's written statements published and communicated to the parties specified in this claim were incorrect and calculated to disparage the Plaintiff in his said business.*
12. *In consequence, the Plaintiff's reputation has been seriously damaged and he has suffered considerable distress and embarrassment.*
- (2) *The plaintiff claims from the defendant;*
- (a) *Damages (Compensatory and Exemplary);*
 - (b) *Costs; and*
 - (c) *Any such further or other relief as this Honourable Court may deem fit.*

(C) ORAL EVIDENCE

Plaintiff's case

- ❖ Darrel Rajcharan, the plaintiff.
- ❖ Kushal Chand.

(D) DOCUMENTARY EVIDENCE

- i. PE 1 - Copy of statement of affirmation of Mr. Rajeshwar Prasad, the defendant, sworn on 8th August, 2017.
- ii. PE 2 - Copy of email with attached letter dated 26th July, 2017.
- iii. PE 3 - Letter dated 26/07/2017, addressed to the branch manager, New India Assurance Co, Ltd, **RE – Vehicle Accident HF 453**
- iv. PE 4 - Copy of yearly commission bill of Mr. Darrel Rajcharan, the plaintiff, from December, 2016 to November, 2017.
- v. PE 5 - Copy of motor comprehensive fleet policy of 'Valley Riders' insured at the sum of \$822,000.00 embedding the name of the agency or broker as 'Darrel Rajcharan', the plaintiff.

(E) THE SUMMARY OF EVIDENCE

- (1) The plaintiff, 'Darrel Rajcharan', is an insurance agent for 'New India Insurance Limited'. He has been an insurance agent for the past 19 years. The defendant, 'Rajeshwar Prasad' is a compulsory third party motor vehicle insurance policy holder of 'New India Insurance Limited' through the plaintiffs' agency.
- (2) On 26th July, 2017, the defendant wrote a letter and sent by an email to 'New India Insurance Limited' Manager, Mr. Nawang Tamba, which was alleged to be libellous, as follows; [See, plaintiff's exhibit (2) and (3)]

26th July 2017.

managerltk@niafiji.com

Mr. Nawang Tamba
The Branch Manager
New India Assurance Co. Ltd.
Lautoka

Dear Sir,

Vehicle Accident HF 453

Firstly, I would like to advise that I am acting on behalf of Ranjeshwar Prasad as he had bought this vehicle from me.

We are very disappointed from the service and response your claim department had shown us.

I am also surprised as to how, Darell, New India's agent, has come in the picture and advising us that this policy is place with his agency. We have never contacted Darell for his agency's help and will never will as I had very bad experience due to his unethical insurance advice from my own business which was placed with Darells agency. For the fact that Darell is always in your office, he is placing all incoming new business under his agency without your client's knowledge.

I have checked with other agent of insurance companies and was advised that an agent cannot be working from insurance company's office and should be having his own office.

This makes me wonder why Darell is no longer Sun Insurance agent.

I want to move things swiftly on this claim and do not wish to deal with Darell. He has chosen his own preferred garage who does not have any credibility and I doubt is registered under FIRCA.

Ranjeshwar is the legal owner of this damaged vehicle and has all the right to look for 2 repair quotations and Darell forcing us to place order with his preferred garage is not on. He rudely told us to go out of New India Assurance Co. Ltd if we do not follow his demands.

I attach here with repair quotation of Asco, and 2 other garages for your reassessment. The other two garages have suggested that the vehicle be written off. Can you look into this urgently as this is beyond 3 months now due to Darells deliberate delays?

You can always contact me to discuss and my contact is as below:

The letter was copied to:

- ❖ The compliance and enforcement department of the Reserve Bank of Fiji.
- ❖ The Consumer Council of Fiji.
- ❖ The CEO of New India Assurance of Suva.
- ❖ Mr. Anil Amin, the New India Assurance agent in Ba.

(3) The letter was written by one 'Azhar Khan' on behalf of the defendant. In the statement of affirmation (Plaintiffs' exhibit -1) the defendant deposed ;

[1] That I am the Legal Owner of vehicle No. HF453.

[2] That I depose to the facts herein as within my personal knowledge and that acquired by me in the course of interaction with my family members save and except where stated to be on information and belief contained herein are true and correct.

[3] That I am the Author of the email sent from email address vallyriders@ymail.com to various receiver of the said email.

[4] That I have sought the assistance of Azahar Khan in relation of the accident that had occurred on 21st May, 2017 as I am not well educated and do not have any email address to correspond with.

[5] That it is my opinion that seeking assistance from an educated person is not a crime. And I am grateful to have received assistance from Mr, Azahar Khan.

[6] That I do not have any experience in making claims for accident previously and the deliberate delay by the Agent was unexplained and very frustrating.

- [7] *That I was more frustrated when I went to lodge my insurance claim, I was informed by New India Assurance Company Ltd that I had to make my application to the Agent.*
- [8] *That I am of the opinion that I made New India Assurance as my insurance company and Not the Agent. I believe the Agent has taken over my Insurance without my consent.*
- [9] *That the agent after taking over my Policy from New India, the Agent failed to inform me that for any claim I had to make application through them.*
- [10] *That should you have any questions in relation to the said email, please liaise directly with me and not Mr. Azahar Khan.*
- [11] *That all future correspondence and liaising have to be made direct to me with immediate effect. And I would appreciate if the Agent should immediately stop coercing and/or causing duress to Mr. Azahar Khan.*
- [12] *That I am giving this Statement of Affirmation on my own free will without any coercion and/or duress from any one.*

(Emphasis added)

- (4) The 'Reserve Bank of Fiji' deals with granting and renewing of Insurance agents licenses. The Consumer Council of Fiji is the statutory body for the protection of consumers.
- (5) The email has reached the persons to whom it was addressed.
- (6) The first part of the letter (plaintiff's exhibit (3)) contained the following words;
- i) *"We have never contacted Darell for his agency's help and will never will as I had very bad experience due to his unethical insurance advise for my own business which was placed with Darell's agency."*
 - ii) *"For the fact that Darell is always in your office, he is placing all incoming new business under his agency without your client's knowledge."*
 - iii) *"I have checked with other agent of insurance companies and was advised that an agent cannot be working from insurance company's office and should be having his own office."*

- (7) The second part of the letter contained the following words;
- i) *“He has chosen his own preferred garage who does not have any credibility and I doubt is registered under FIRCA.”*
 - ii) *“Darell forcing us to place order with his preferred garage is not on.”*
- (8) The plaintiff claimed that in their natural and ordinary meaning the said words in the first part meant and were understood to mean:
- i) *That the Plaintiff was, without any right, acting as an agent of the Defendant and was therefore acting improperly, deceitfully and dishonestly;*
 - ii) *That the Plaintiff gave unethical advice; and*
 - iii) *That the Plaintiff was, without any right, operating out of NIA’s office and was therefore acting illegally and unprofessionally, and was a deceitful and dishonest person.*
- (9) The plaintiff claimed that in their natural and ordinary meaning the said words in the second part meant and were understood to mean:
- i) *That the Plaintiff was immoral and unprofessional; and*
 - ii) *That the Plaintiff was deceitful and dishonest.*
- (10) The plaintiff says that the words contained in the first and second part of the letter are false due to the following reasons;
- ❖ The administration work and accident claim process was purely dealt by New India Insurance office staff.
 - ❖ He, the plaintiff, did not recommend any specific garage to the defendant with regard to his third party claim for vehicle registration no. HF 453.
- (11) The plaintiff says that the letter got into the hands of all the recipients. The words contained in the letter had reference to him and the plaintiff claims that the words were defamatory of him and as a result he was seriously injured in his character, credit and reputation. He says that his reputation as an Insurance agent was gravely affected and destroyed.

- (12) He further testified that the business 'Valley Riders Hire Limited' (the valley riders) were one of New India's client whose policy was underwritten by him. His relationship with the directors of Valley Riders was very good. Valley Riders had continued its insurance policy with New India until 19th October, 2017.
- (13) However, after the defendant caused Mr Azhar Khan to send the letter via the email of Valley Riders, Valley Riders withdrew its insurance with New India and did not renew. Mr. Rajcharan further testified that after the letter was circulated to the respective third parties, his relationship with the Manager of New India Mr. Mehta was detrimentally affected because Mr Mehta looked at Mr Rajcharan with suspicion due to the letter. There was a break in communication between them.
- (14) I heard that due to this Mr. Rajcharan was stressed and his feelings were hurt. He stated that he did not understand why anyone would write such statements about him when he has not done anything unethical.
- (15) Mr. Rajcharan also informed the court that his concentration at work had not been 100% due to the contents of the letter that seriously affected him.
- (16) Mr. Rajcharan is not employed elsewhere and solely depends on the insurance agency commission earned for his livelihood. His work and income was greatly affected. He says that during his 19 years of experience as an insurance agent this was the first time anyone had written about him in such a manner.

(F) THE CONSIDERATION AND THE DETERMINATION

- (1) Counsel for the plaintiff has tendered extensive written submissions in support of her case.

I am grateful to counsel for those lucid and relevant submissions and the authorities therein collected, which have made my task less difficult than it otherwise might have been. I may add that the submissions are careful and competent.

If I do not refer to any particular submission that has been made, it is not that I have not noted that submission or that that submission is not relevant; it is simply that, in the time available, I am not able to cover in this decision every point that has been made before me.

- (2) This is an action for **libel** brought against the defendant by the plaintiff.

It was said by A.L. Smith M.R. in 'Sadgrave v Hole' (1901) 2 K.B. at p.4 that;

"The plaintiff in order to succeed in the action must prove a publication of and concerning him of the libelous matter, and if he does not satisfy the onus of proof which is on him in this respect, there is no cause of action."

- (3) Therefore, to establish a cause of action in libel it must be shown that the defamatory words of and concerning the plaintiff have been published.
- (4) Let me now turn to the evidence to address the issue. The action arises out of the publication by the defendant of a letter written by him to the branch manager of New India Insurance Co, at Lautoka. The defendant sent copies to; *The Compliance and Enforcement Department of the Reserve Bank of Fiji; The Consumer Council of Fiji; The CEO of New India Assurance, Suva and Mr. Anil Amin, New India Assurance agent, Ba.* The publication to the recipients is by means of email.

It was hard hitting criticism of plaintiff's conduct. The essence of the letter is to be found, in the words;

- i) *"We have never contacted Darell for his agency's help and will never will as I had very bad experience due to his unethical insurance advise for my own business which was placed with Darell's agency."*
- ii) *"For the fact that Darell is always in your office, he is placing all incoming new business under his agency without your client's knowledge."*
- iii) *"I have checked with other agent of insurance companies and was advised that an agent cannot be working from insurance company's office and should be having his own office."*
- iv) *"He has chosen his own preferred garage who does not have any credibility and I doubt is registered under FIRCA."*
- v) *"Darell forcing us to place order with his preferred garage is not on."*

I can ascertain who the writer was.

The statement of affirmation by the defendant at plaintiff's exhibit-(1) discloses the author. I am clear that the defendant was the architect of the letter. For the

sake of completeness, the defendant's statement of affirmation is reproduced below in full:

- [1] *That I am the Legal Owner of vehicle No. HF453.*
- [2] *That I depose to the facts herein as within my personal knowledge and that acquired by me in the course of interaction with my family members save and except where stated to be on information and belief contained herein are true and correct.*
- [3] *That I am the Author of the email sent from email address vallyriders@ymail.com to various receiver of the said email.*
- [4] *That I have sought the assistance of Azahar Khan in relation of the accident that had occurred on 21st May, 2017 as I am not well educated and do not have any email address to correspond with.*
- [5] *That it is my opinion that seeking assistance from an educated person is not a crime. And I am grateful to have received assistance from Mr, Azahar Khan.*
- [6] *That I do not have any experience in making claims for accident previously and the deliberate delay by the Agent was unexplained and very frustrating.*
- [7] *That I was more frustrated when I went to lodge my insurance claim, I was informed by New India Assurance Company Ltd that I had to make my application to the Agent.*
- [8] *That I am of the opinion that I made New India Assurance as my insurance company and Not the Agent. I believe the Agent has taken over my Insurance without my consent.*
- [9] *That the agent after taking over my Policy from New India, the Agent failed to inform me that for any claim I had to make application through them.*
- [10] *That should you have any questions in relation to the said email, please liaise directly with me and not Mr. Azahar Khan.*
- [11] *That all future correspondence and liaising have to be made direct to me with immediate effect. And I would appreciate if the Agent should immediately stop coercing and/or causing duress to Mr. Azahar Khan.*
- [12] *That I am giving this Statement of Affirmation on my own free will without any coercion and/or duress from any one.*

(Emphasis added)

There is no doubt that the letter (PE-3) refers to the plaintiff by his name. I see evidence of publication because the letter got into the hands of the recipients.

Thus, the claim passes the first test. There is a further requirement.

- (5) The next thing to see is whether the words which were derogatory were true in relation to the evidence placed before the court by the parties.

An examination of this issue must start from familiar first principles. Reputation is an integral and important part of the dignity of the individual. A reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. Therefore, publication of a statement adversely affecting a person's reputation is actionable. The whole purpose of defamation law is to enable a plaintiff to clear his or her name. **The foundation of an action of defamation is malice. If words are used which are defamatory and untrue the law implies 'malice'. That presumption is rebutted if the occasion when the words were used is privileged. The privilege destroys the presumption.**

- (6) The plaintiff testified that the accusations contained in the defendant's letter were false and malicious. The plaintiff says that the true facts are that the administration work and accident claim process was purely handled by New India's staff. The plaintiff gave specific testimony that he did not recommend the defendant to any specific garage.
- (7) The transcript of Darell Rajcharans' evidence in chief contains this; (page (8), (9) and (10) of the transcript of evidence).

Q: *So, from the letter of 26th July, 2017, that is being referred to that you withhold his own office, at paragraph 4. As an Insurance agent where is your operations based at?*

A: *Within New India Assurance, Lautoka Branch.*

Q: *And do you just write policies for the Lautoka area or?*

A: *That is correct, for a transact business on behalf of Lautoka branch only.*

Q: *So, from this Statement made by the Defendant in the first paragraph of this letter, first part of this letter, that you have just read out, I would say paragraphs 1 to 5, is this accurate or false?*

A: *That is false.*

Q: *And why do you say it is false information against you?*

A: *It implies the Defendant is implying that he was not aware that I have transacted his Insurance Business for New India Assurance and that I am operating out of the Lautoka branch unethically.*

- Q: *What else you can say about the contents?*
- A: *I am of the view that the Defendant is implying that I am not fit and proper to be an Insurance Agent for any Insurance Company.*
- Q: *Now Witness, would you please explain whether as an Insurance Agent, you have an agreement with New India to have an office space at New India's Lautoka Office?*
- A: *It is not, we have a standard practice. Other Agents also frequent the office and operate from the Office.*
- Q: *Is there anything unlawful for an Insurance Agent to operate out of the Insurance Office?*
- A: *No.*
- Q: *Now Witness, what is the Defendant's saying or implying against you by making this false statement in the first part of letter that you had read out?*
- A: *It is my view that he's implying that I am dishonest, unethical and not fit to be an Agent.*
- Q: *Now Witness, we refer to the same letter again of 26th July, 2017, would you please read out paragraph 6 and 7 of the letter? paragraph 6 and 7 of the letter?*
- A: *I want to move things swiftly on this claim and do not wish to deal with Darrell. He has chosen his own preferred garage who does not have any credibility and I doubt is registered under FIRCA. Ranjeshwar is the legal owner of this damaged vehicle and has all the right to look for 2 repair quotations and Darrell forcing us to place order with his preferred garage is not on. He rudely told us to go out of New India Assurance Co. Ltd if we do not follow his demands.*
- Q: *So, with reference to the paragraphs that you have read out, Witness as an Agent please explain the procedures you follow when there is a claim situation such as a motor vehicle accident?*
- A: *The Insurance Company has a template to follow for any motor Vehicle Insurance Claim which we pass on to the client and explain. The documents required to be produced is : 1. A police report. 2. A copy of the Driving License. A completed Claim form. Two quotations and Registration, lastly Registration Documents for the Vehicle.*
- Q: *So Witness, as per the paragraphs, did you advise the Defendant to go and see a particular garage or get the repairs done at a particular garage?*
- A: *No, we are not authorized to give any such advice to clients.*

Q: *Witness, please explain or confirm with the Statement made by the Defendant in the second part of this letter that you have read out is accurate or false and why do you say so?*

A: *It is false.*

Q: *Why do you say so?*

A: *Because no such conversation took place.*

Q: *And what about the referring preference to the garage?*

A: *There was no reference to any garage or any conversation of any sort to a preferred garage.*

Q: *And what is the procedure in relation to the repair works with New India when there's a motor vehicle claim?*

A: *Any individual who has lodged a motor vehicle claim with the Insurance Company is required to produce two quotations of their own choosing. We do not have any restrictions or we do not place any of our own or the Insurance Company's restrictions as to which garage can be quoted, can be used to quote.*

Q: *So Witness, as per this paragraphs, what is the Defendant's saying or implying against you by making this false statement in the second part of the letter that you have read out?*

A: *I am of the view that the Defendant is implying that I'm following a corrupt practice.*

Q: *And?*

A: *And that I'm trying to benefit from an Insurance Claim which is illegal.*

Q: *And you are saying that this is not true?*

A: *And that is not true.*

- (8) I certainly think that there is nothing in the plaintiff's conduct which could justifiably be the object of any robust criticism whatever. The criticism lacks coherent rationale and is plain nonsense. I see no evidence that the plaintiff was capricious, unduly dilatory, or inconsistent or in any way underhand or dishonourable.

Therefore, I do not hesitate to say that the statements contained in the letter are contrary to true facts and it is a far cry from the reality. One word more, in this case in the absence of a statement of defence, *inter alia*, denying the allegations, one has no alternative but to come to the conclusion that the statements contained in the letter were "false" and "untrue" as alleged. I regard the letter as a whole as an unfair and tendentious assessment of the plaintiff's

conduct and it established gross and unreasoning prejudice on the part of the defendant. It is a 'fortiori' case that one cannot make defamatory statements or comments about someone else, unless one is prepared to justify it.

- (9) The plaintiff claimed that the alleged defamatory words contained in the letter were meant and understood to mean that ; (1) *The plaintiff was, without any right, acting as an agent of the defendant and was therefore acting improperly , deceitfully and dishonestly* (2) *The plaintiff gave unethical advise* (3) *The plaintiff was, without any right, operating out of New Indias' office and was therefore acting illegally and unprofessionally , and was deceitful and dishonest,* (4) *The plaintiff was immoral and unprofessional* (5) *The plaintiff was deceitful and dishonest.*

Before I address myself to the question whether the words complained of are capable of conveying a **defamatory meaning**, I think it is advisable to lay down what I consider would be a true exposition of the law in such matters.

"Any statement which tends to lower the plaintiff, to whom the article refers, in the estimation of right-thinking persons generally or bring them into hatred, ridicule or contempt is defamatory" – **Broome v Castell & Co, (1972) 2. WLR 645.**

The question as to whether the words which are complained of are capable of conveying a defamatory meaning is a question of law. This question is one for the trial Judge to determine. In **Hopwood v. Muirson [1945] 1 K.B. 313 at p.316** Lord Goddard C.J. said:

"Whether or not words are capable of bearing a defamatory meaning is always for the court and is therefore to be regarded as a question of law".

In **Gatley on' Libel and Slander', 7th Edition, at paragraph 93** the learned author states:

"Words are normally construed in their natural and ordinary meaning, i.e. in the meaning in which reasonable men of ordinary intelligence, with the ordinary man's general knowledge and experience of worldly affairs, would be likely to understand them. The natural and ordinary meaning may also include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words."

"The law of defamation does not even look to the meaning intended by the writer or speaker, but to the meaning attached by a reasonable reader or listener" – **The Law of Torts by John F.Fleming, 9th Ed. 1998, p.590.**

It is further stated at Lee v Wilson (1934) HCA 60, 51 C.L.R. 276 at 278 (Dixon J)

"A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff is in fact he did both"

'In 1825 it was finally settled that absence of ill-will against the persons defamed and honest belief in the truth of the allegation did not excuse'. Broomage v Proser, (1825) 4 B & C 247, 107 ER 1051.

'Whether statements which have a clearly disparaging meaning are to be found defamatory depends very much on the context in which they are made, and the audience to whom they are made.' Law of Torts by Balkin & Davis at 558.

'Case of a newspaper article the hypothetical reader or listener is less concerned with the precise words used and more with the overall impression gained.' (Balkin & Davis – supra at 562-563)

The defamatory words must refer to the plaintiff. If it is defamatory, liability in defamation is imposed irrespective of the actual intention of the defendant. (Hulton & Co, v. Jones [1910] AC 20 (H.L.)).

All that is important or relevant is that;

'Some ordinary reasonable people reading the publication would understand it to refer to the plaintiff.' (Balkin & Davis – supra).

What would the words convey to an ordinary man? How an 'ordinary man' looks at them? Lord Reid in the classic judgment in Lewis v Daily Telegraph Ltd [1964] A.C. 234 at 258-260 said as follows:

"There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs... What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But the expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go

beyond the words themselves, as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning... Generally the controversy is whether the words are capable of having a libelous meaning at all, and undoubtedly it is the judge's duty to rule on that."

(Emphasis added)

*"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, or be likely to affect a person adversely in the estimation of reasonable people generally". **Lord Justice Neill in Gillick v British Broadcasting Corporation and Anor., 20 October 1995 The T.L.R. 527 at 528***

Sir Thomas Bingham M.R. in Dr. Frank Skuse v Granada Television Ltd (1993) EWCA Civ 34 said;

"[14] There was no substantial dispute between the parties about the correct approach of the court in determining this preliminary issue, although naturally the parties tendered to lay emphasis on different features. It is, however, relatively unusual for the court to be asked to decide the meaning actually to be attributed to the words used and the sense (if any) in which they are defamatory; its usual function is to rule whether in law words are capable of bearing a defamatory meaning. For that reason it is appropriate to summarize the principles upon which we have approached the task:

- (1) The court should give to the material complained of the natural and ordinary meaning which it would have conveyed to the ordinary reasonable viewer watching the programme once in 1985.*
- (2) "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): our addition in square brackets).

(3) 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. We were reminded of Diplock L. J.'s cautionary words in Slim v. Daily Telegraph Ltd. [1968] 2 Q.B 157 at 171:

“In the spring of 1964 two short letters appeared in the correspondence columns of the ‘Daily Telegraph’. Written by Mr. Herbert, they formed part of a robust though desultory controversy about the prospective use by motor vehicles of a public footpath forming part of Upper Mall in Hammersmith. Neither letter can have taken a literate reader of that newspaper more than 60 seconds to read before passing on to some other, and perhaps more interesting, item. Any unfavourable inference about the plaintiff’s characters or conduct which he might have drawn from what he read would have been one of first impression. Yet in this court three lords justices and four counsel have spent the best part of three days upon a minute linguistic analysis of every phrase used in each of the letters. If this protracted exercise in logical positivism has resulted in our reaching a conclusion as to the meaning of either letter different from the first impression which we formed on reading it, the conclusion reached is unlikely to reflect the impression of the plaintiffs’ character or conduct which was actually formed by those who read the letters in their morning newspaper in 1964.”

In the present case we must remind ourselves that this was a factual programme, likely to appeal primarily to a seriously minded section of television viewers, but it was a programme which, even if watched continuously, would have been seen only once by viewers many of whom may have switched on for entertainment. 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.

(4) 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:

“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."

- (5) *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 p.32).*
- (6) *In determining the meaning of the material complained of the court is "not limited by the meanings which either the plaintiff or the defendant seeks to place upon the words" (Lucas – Box v. News Group Newspapers Ltd [1986] 1 W.L.R. 147 at 153H).*
- (7) *The defamatory meaning pleaded by a plaintiff is to be treated as the most injurious meaning the words are capable of bearing and the questions 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 p.176.)*
- (8) *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.*
- (9) *The court is not at this stage concerned with the merits or demerits of any possible defence to Dr. Skuse's claim."*

In Capital & Counties Bank v. George Henty & Sons [1881] 7 App. Cases 741 Lord Selbourne at p. 745 said:

“The test, according to the authorities, is whether under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libelous sense.”

Applying the above principles, my conclusion is that a reasonably-minded man could have drawn the inference from the statements in the defendant’s letter that (ie, **the sting of the letter**)

- 1) *That the plaintiff was, without any right, acting as an agent of the Defendant and was therefore acting improperly, deceitfully and dishonestly;*
- 2) *That the plaintiff gave unethical advice; and*
- 3) *That the plaintiff was, without any right, operating out of NIA’s office and was therefore acting illegally and unprofessionally, and was a deceitful and dishonest person.*
- 4) *That the plaintiff was immoral and unprofessional; and*
- 5) *That the plaintiff was deceitful and dishonest.*

Thus, I find the words complained of concerning the plaintiff tend to lower the plaintiff in the estimation of right – thinking members of society generally. Put another way, the words complained of must have affected the plaintiff ‘*adversely in the estimation of reasonable persons generally*’.

To be more precise, **the issue is what inference may be drawn from the statements in the defendant’s letter, by a honest, fair-minded onlooker?**

Let me put it in a better way; – would any ordinary fair minded reader, not unduly suspicious and nor over astute to seek out a hidden meaning, regard the plaintiff as a dishonest person with the result that his reputation and the estimation in which he stands in the opinion of others would be lowered ?

I would answer the question posed, in the affirmative.

I cannot help coming to the conclusion that the words complained of are libellous. I have concluded in paragraph (8) that the words complained of are factually false. If words are used which are defamatory and untrue the law implies malice. I am of opinion that the letter was written with malice. I do not,

of course, for a moment presume to doubt the correctness of the view which I have formed.

In the upshot it comes to this; the words complained of concerning the plaintiff are contrary to true facts, proved to be false and libellous. Thus, the defendant is liable for the statements in his letter.

Having found that the letter is libellous, the next question is what damages ought to be awarded in all the circumstance of the case.

Damages

- (10) I shall now consider what damages should be allowed.

Damages – General [On compensatory basis]

- (11) The plaintiff is claiming an award of \$70,000.00 as general damages.

The effect of libellous statements

- (12) I listened to the plaintiff with patience. I heard that;

The 'Valley Riders Hire Limited' was one of New India's clients whose policy was underwritten by him, the plaintiff. His relationship with the directors of Valley Riders was very good. Valley Riders had continued its insurance policy with New India until 19th October, 2017.

However, after the defendant caused Mr. Azhar Khan to send the letter via the email of Valley Riders, Valley Riders withdrew its insurance with New India and did not renew.

After the letter was circulated to the respective third parties, the plaintiff's relationship with the Manager of New India, Mr. Mehta was detrimentally affected because Mr Mehta looked at the plaintiff with suspicion due to the contents of the letter. There was a break in communication between them.

Due to this the plaintiff was stressed and his feelings were hurt. He stated that he did not understand why anyone would write such statements about him when he has not done anything unethical.

His concentration at work had not been 100% due to the contents of the letter that seriously affected him.

The plaintiff is not employed elsewhere and solely depends on the insurance agency commission earned for his livelihood. His work and income was greatly affected. In his 19 years of experience as an insurance agent this was the first time anyone had written about him in such a manner.

The letter was addressed to the Manager of New India Assurance Company Ltd (New India) at Lautoka, where the plaintiff was based as the agent. The letter was copied to the CEO of New India in Suva. The evidence shows that the relationship between the plaintiff and the CEO was affected after the letter. The letter was also copied to the Compliance and Enforcement Department of Reserve Bank of Fiji, the very department that issues agency license to the plaintiff and all other insurance agents in Fiji. This was designed to harm the plaintiff so that his licence would not be renewed and as per evidence the letter will remain in the records of Reserve Bank of Fiji.

The plaintiff has suffered embarrassment at New India. He has suffered a strained relationship with the CEO of New India. He has been made to suffer the embarrassment of the communication that went to the Compliance Section of Reserve Bank of Fiji that regulates and manages the renewal of his agency license. He could not focus on work and said both he personally and his business suffered. His entire business and livelihood was put at risk.

(13) I quote the following portion of the plaintiff's evidence in his evidence-in-chief. (page 10 to 15 of the transcript of evidence)

Q: *Very well. Witness, would you like to tender this letter as exhibit, Plaintiff exhibit?*

A: *Yes.*

Q: *Evidence in Court today? May this be marked as Plaintiff exhibit 3. Witness, would you briefly explain to the Court who is Mr Nawang Tamba and Chief Operating Officer is?*

A: *Mr Nawang Tamba is an Indian National contracted by the New India Assurance Company worldwide to manage New India Assurance Lautoka Branch. He is my immediate Supervisor. Mr Subhash Metah is also an Indian National contracted by New India Assurance worldwide to manage Fiji operations of New India Assurance Company Limited. He is the Chief Operating Officer and he is based in our Headquarters in Suva.*

Q: *So Witness, after this letter was sent to them, did your relationship with each of Mr Tamba or Mr Metah get affected?*

A: *Yes.*

Q: *Would you please explain to this honourable Court as to how this relationship got affected?*

A: *I am of the impression that there was some withdrawal in our communication in general. There was a significant drop in communication in particular with the Chief Operating Officer, Mr Subhas Metah who is the person who signs off my License.*

Q: *And how was your relationship with them prior to this letter being sent?*

A: *I am of the view that we had a very friendly, very open conversation with regards to issues regarding claims, clients and many other matters concerning the Insurance Company.*

Q: *So, you are saying that after receiving of this letter this has completed changed, you could feel that this had changed?*

A: *Yes. To a significant degree, yes.*

Q: *And where is Mr Tamba now?*

A: *Mr Tamba now resides back in India. His contract term expired in September, this year.*

Q: *Very well. Witness, you stated that Reserve Bank regulates your Agency License. What would be the reason the Defendant circulated this letter to Reserve Bank of Fiji through Valleyriders?*

A: *I am of the view that the Defendant was attempting to damage my reputation and cause some concern with the Licensing Authority to reconsider its decision when a License would be due for renewal. And to put a blemish on my record which has never happened ever. I've never actually had any sort of complain by any client in the last 19 years of being an agent.*

Q: *So, from past 19 years as an Agent before this letter went through, there was no issues ever raised with your Agency?*

A: *No.*

Q: *So in this matter now, due to this letter, did your Insurance Agency License get affected with Reserve Bank?*

A: *No, it was renewed that year, later on.*

Q: *But, did this letter affect you and Reserve Bank's relationship in any way?*

A: *I cannot say that it was affected, my relationship with the Reserve Bank because I do not interact with Reserve Bank directly, all inter-actions*

between Agents and the Regulator are through the principal which is the Chief Operating Officer, Mr Subhash Metah, the Supreme Authority of the Insurance Company in Fiji.

Q: Witness, when such letters are being sent to Reserve Bank as the regulator for Insurance, do they keep a record or track of these things?

A: Yes.

Q: And that record is kept under your name?

A: Yes.

Q: And how long does that record be there?

A: For the duration of an Agent's term. So, there's no definite time span for a record. If an Agent acts for 40 years, that record stays for 40 years with the Regulator and the Insurer.

Q: Very well. Now Witness, how do you feel about the contents of the letter when it was circulation to Reserve Bank of Fiji, Mr Tamba, Mr Metah and Mr Khan who was the sender of the document on, sender of the letter on behalf of Defendant.

A: This was the first time I had actually received any such complaints so, I was very confused initially. Later on, frustrated very much and uncertainty as to why this was happening.

Q: Witness, please explain whether while this letter being circulated to the parties it was circulated to you, did you lose any business or any Insurance policies?

A: I am of the view that yes, I did lose some business.

Q: And that would be?

A: There was a drop in first of all, the Company Valleyriders withdrew its business with me. That company I had been looking after for very many years, from the time when I had worked for Sun Insurance, in effect more than seven (7) years till that day, till that time. Thereafter that Company withdrew its business from me. The premium that that Company paid to the Insurer was \$20, 982.00. That Company had a fleet of \$922,000.00, a fleet worth, fleet of vehicles worth \$922,000.00. Out of that I was earning 10% which was \$2,098.00 a year. So, I'll immediately after that incident, I lost that business. After that I temporarily lost concentration, I was very confused. As I said before, this was of very new thing. I had never experienced this sort of thing in my last 19 years. My Principal, my Supervisors in the Insurance Company, they had withdrawn communication with me, they were not talking to me at that point in time and it caused much concern. And it distracted me from my work, from fulfilling my obligation and duties as an Agent.

- Q: *So Witness, you mentioned that Valleyriders was one of your clients whilst you were in with Sun Insurance?*
- A: *That is correct.*
- Q: *So you did have a good relationship with them over these years?*
- A: *That is correct.*
- Q: *And when you came to New India as an Agent, they still came with you and had a policy with New India?*
- A: *Yes.*
- Q: *Witness, can you confirm that Valleyriders took its Insurance placements away from you because of this letter dated 26th July, 2017?*
- A: *Yes.*
- Q: *How could you confirm that?*
- A: *The policy was cancelled. Sorry, it was not renewed after the expiry.*
- Q: *And that had expired sometimes in?*
- A: *October, 2017.*
- Q: *So this letter was referred to in July, 26th of July, 2017 and their policy had expired in October of 2017?*
- A: *Yes.*
- Q: *After that they did not renew their policy with New India?*
- A: *No.*
- Q: *And would you please reconfirm to the Court how much had you earned in 2017 from the Commission of Valleyriders, premium?*
- A: *\$2098.00 (Two Thousand and Ninety Eight Dollars).*
- Q: *That would be the 10%?*
- A: *Yes.*
- Q: *And as you said that you earn commission and you lost concentration in work so fastly your work was affected, your pay must have been affected?*
- A: *Yes.*
- Q: *Would you please confirm, how would you confirm with the Court that your pay has been affected? How do you get to know how much your commission is for a month? If you receive by monthly or weekly?*
- A: *We are paid our total commissions on a monthly basis. Any business that I introduce to the Company for the month of July is paid in August. If any*

business transacted through August, the commission of that is paid in September. There was a drop in, mark drop in my commission earnings for the two subsequent months after that incident.

Q: *So, if you are shown a copy of your commission bill, would you be able to recognize it?*

A: *Yes.*

Q: *If the Witness could be shown the document? Witness, what is the document before you?*

A: *That is a Statement of Commissions earned and provisional tax deducted for the year ended 2017.*

Q: *And who prepares this?*

A: *A member of the Accounts Department based in New India Assurance Company, Lautoka Branch.*

Q: *And you received, you said that your work was affected thereby your income was affected, would you please elaborate to the Court from the amounts stated, that you say in the months you were affected?*

A: *After the incident in July, you will notice a drop in the average income for August and September. Which is marked by the months September on October, on the 1st column on the left. Which is significantly below the average monthly income that was being earned throughout the year.*

Q: *Very well. Would you please refer to which amounts are you referring to?*

A: *The amounts I'm referring to is the line marked by September, which is \$21,616.40 and the line after that which is marked by October \$21,958.80.*

Q: *Right, in July what was your Commission that you had earned?*

A: *\$26,581.80*

Q: *July?*

A: *Yes*

Q: *That would be of August that you just read out?*

A: *That was paid in August.*

Q: *Very well and June, that was paid in July?*

A: *Yes.*

Q: *And what would be that amount?*

A: *\$31,003.60.*

Q: *So you do notice a drop in your income?*

A: Yes.

Q: Would you like to tender this as evidence in Court?

A: Yes.

Q: To be marked as Plaintiff's Exhibit 4

So, witness you said that Valley Riders renewed their Policy with New India in October, after October or in October. If they had renewed the Policy with New India, how much Commission would you have earned if they did not withdraw

A: May I be permitted to use a calculator my Lord

Q: Just an average figure that would be, otherwise if the Court allows.

Crt: You got a calculator?

A: Yes.

Crt: Yes.

A: Thank you. My Lord at the current Tariff's rates applied by the Company, the Commission I would have earned this year would have been \$3,227.00 assuming that that client had retained the same fleet of \$922,000.00.

(14) At this stage, it is pertinent to quote some of the important aspects of the law.

In 'Reynold v Times Newspapers Ltd and Others' (1999) 4 All.ER 609, Lord Nicholas of Birkenhead said at p.622;

"Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognize that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others".

As stated by Duncan and Neill on Defamation (1978 Edition) at page 130 for **compensatory damages**, the 'basic rule of common law is that in civil action damages are awarded as compensation for injury, not as punishment for wrongdoing'. (18.03). The authors go on to state:

"The purpose of an award of compensatory damages is to restore the plaintiff, as far as money can do so, to the position he would have been in if the tort had not been committed. This principle of restitutio in integrum was stated by Lord Blakburn in Livingstone v Rawyards Coal Co as follows:

'Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which would put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.'"

The nature of damages and the purposes for which it is awarded has been well expressed by Windeyer J in Uren v John Fairfax & Sons Pty Ltd [1967] 117 CLR at 150 ;

"It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money."

"That is why it is not necessarily fair to compare awards of damages in this field with damages for personal injuries. Quite obviously, the award must include factors for injury to the feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology, or the reaffirmation of the truth of the matters complained of, or the malice of the defendant. The bad conduct of the plaintiff himself may also enter into the matter, where he has provoked the libel, or where perhaps he has libeled the defendant in reply. What is awarded is thus a figure which cannot be arrived at by any purely objective computation. This is what is meant when the damages in defamation are described as being "at large"."

- (15) **What factors should be considered in awarding General damages on compensatory basis ?**

As stated in Neill (supra) at 18.09 the factors which are to be taken into account in assessing damages, apart from the 'seriousness of the libel are: (a) special damages; (b) injury to the plaintiff's feelings including aggravating factors; (c) extent of the publication; and (d) mitigating factors.'

What are the factors relevant in considering the measure of damages in defamation cases?

In the Singapore Court of Appeal case of Tang Liang Hong v Lee Kuan Yew & Anor and other appeals [1998] 1 SLR 97 (CA) (also reported in Commonwealth Law Bulletin – January and April 1998 at 195) said;

"First, a defamation action was fundamentally an action to vindicate a person's reputation on a matter as to which he had been falsely defamed, and the damages awarded had to be regarded as the demonstrative mark of that vindication. Thus, the amount of damages awarded in defamation actions was only given in relation to circumstances of the past and present but it must be sufficient to vindicate the plaintiff's reputation in the relevant respect in the future. Damages, and the size of the award, were the only means which ordinarily were available to attract the public or private attention involved in the vindication of the plaintiff's position; Dingle v Associated Newspapers Ltd & Ors [1964] AC 371, Broome v Casell and Co Ltd [1972] AC 1027 and John Fairfax & Sons Ltd v Carson (1991) 24 NSWLR 259 followed. The defamation award also had to reflect the aggravation caused to the plaintiff by the defendant's subsequent conduct or any mitigation, in addition to the need to vindicate the plaintiff's good name; Sutcliffe v Pressdram Ltd [1991] 1 QB 153, Rantzen v Mirror Group Newspapers (1986) Ltd & Ors [1994] QB 670 and Carson v John Fairfax and Sons Ltd (1993) HCA 31, (1993) 178 CLR 44 followed."

Assessing damages for defamation is fraught with difficulties; Lord Atkin in Ley v Hamilton (1935) 153 L.T. 384, H.L.) said:

"The damages for defamation were not arrived at as the Lord Justice seems to assume by determining the 'real' damage and adding to that a sum by way of vindictive or punitive damages. It is precisely because the 'real' damage cannot be ascertained and established that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach: it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation. No doubt in newspaper libel injuries take into account the vast circulations which are justly claimed in present times. The 'punitive' element is not something which is or can be added to some known factor which is non-punitive."

As for damages a greater amount can be awarded where “the publication of a libel was irresponsible. No effort was made to check the report’s accuracy and the plaintiff’s name was included” (**Kiam v Neill and Another**, TLR 26.7.96 p.33 C.A.)

The **Court of Appeal** in **Kiam** (supra) went on to say further:

“The libel jury could properly take into account the prominence of the plaintiff’s reputation when deciding what figure was required to vindicate it. They were also entitled to take account of the fact that it struck at the core of his life’s achievement and that, according to the unchallenged evidence, it had a prolonged and significant effect on him personally”.

Sir Thomas Bingham M.R. said in **John v MGN Ltd [1996] 2 All ER 35, 48**

“The most important factor is the gravity of the libel; the more closely it touches the plaintiff’s person, integrity, professional reputation, honor, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant; a libel published to millions has a greater potential to cause damage than a libel published to a handful people.”

- (16) In the case of **Sakiusa Rabuka and Volau Rabuka vs Fiji Daily Post Company Limited and Others, Civil Action No. 511 of 2000**, a sum of \$40,000.00 was granted by the High Court as damages for the Permanent Secretary of Justice in respect of an article which reported that Mr Rabuka’s wife had been caught in a raid by New York Police at a house suspected by Police as a base for a migration racket. Mrs Rabuka was given an award of \$38,000.00. These awards have been confirmed by the Fiji Court of Appeal.

In the case of **Mohammed Hassan –v- Fiji Times and Herald Limited, Supreme Court Decision no. 304 of 1983**, Honourable Justice Kermode said in respect of a Prison Officer who had been alleged to have offered \$1500.00 in a bribe to protect his name following the bashing of a prisoner.

“National Newspapers overseas have a very wide publication and this has some bearing on the high damages that juries overseas award. Those national dailies make profits out of circulating a sensational libel which juries consider justify very substantial awards.

In **Air Fiji Ltd v Shandil, High Court of Fiji Civil Action No. 380 of 1999**, the court awarded general damages of \$80,000 and special damages of \$120,000 with respect to a media broadcast after there had been a fatal air crash.

- (17) Damages in defamation are awarded generally to compensate the plaintiff for the injury done to his or her reputation.

The libellous material came to the notice of a number of people since it was copied to a number of persons and that this was some evidence of an indirect and improper motive on the defendant's part in making the communication complained of. The lack of foundation for the statements made and their tendentious quality lead me to hold that there was gross and unreasoning prejudice and malice. I consider this as an aggravating factor and it leads to a very substantial award.

In my view, the statements contained in the letter taken in the context of the plaintiff being an insurance agent who has engaged in the field of insurance for the past 19 years and the letter having being copied to the compliance and enforcement department of Reserve Bank of Fiji , the very department that issues agency licenses to all the insurance agents in Fiji is calculated to disparage the plaintiff in his profession and bring the plaintiff into contempt, hatred, or ridicule, or to injure his character.

From the circumstances in which the statements were made an inference of deliberate and calculated view to prejudice or to impute blame to the plaintiff can easily be drawn. There is evidence to satisfy the court that the publication of the libel was wanton conduct and was made in contumelious disregard of the plaintiff's right to his good name. Therefore, the conduct of the defendant had been high-handed, insolent, vindictive or malicious. He had exhibited a 'contumelious' disregard of the plaintiff's rights.

The evidence show that the statements contained in the defendant's letter were very wounding to the plaintiffs feelings. What is more, the oppressive or contumelious behavior of the defendant increased the mental pain and suffering caused by the libel. Here no apology was tendered. There were no mitigating factors. The statements complained of were made with a deliberate and calculated view to tarnish the reputation of the plaintiff. Can we simply put the clock back as if nothing has taken place? Presumably the plaintiff has suffered much at the really extraordinary treatment meted out to him. There was no opportunity to vindicate the plaintiff's reputation and the damage was forever. I must confess to surprise and even to some degree of indignation, that the defendant has not tendered the plaintiff the smallest expression of regret at the really extraordinary treatment meted out to him.

I award \$50,000.00 as general damages on a compensatory basis. This award includes factors for (1) injury to the plaintiff's feelings (2) the anxiety and uncertainty undergone by the plaintiff in the litigation (3) the absence of apology by the defendant and (4) the malice of the defendant.

Damages – Special

- (18) In the written submissions filed on 20.02.2019, the plaintiff claims \$21,064.30 as special damages.
- (19) I note with concern that there is no claim for special damages pleaded by the plaintiff in the statement of claim. Therefore, there is no basis for any award in special damages. I decline to award special damages. I cannot resist in saying that it is not the function of the trial judge in the context of an adversarial trial to assist a party to overcome the problems consequent to the position taken by that party in the pleadings.
- (20) It is well established in cases such as (1) Mark v Redwing Aircraft Co. Ltd (1942) 1 K.B. 182, (2) Hayroad & Another v Pullinger & Partners Ltd (1950) (1) ALL E.R. 581, (3) British Transport Commission v Gourley (1956) AC 185 that in order to found a claim for special damages, the claim must be specifically pleaded. Not the least basis for this rule in fairness; to ensure that the party against whom such damages are claimed has proper and particularized notice of the claim.

Exemplary Damages (Punitive Damages)

- (21) The plaintiff claims exemplary damages.
- (22) The plaintiff's pleadings do not show the circumstances and the basis upon which he, the plaintiff, seeks 'exemplary damages'. The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them.
- (23) **Leave aside the defective pleadings for a moment. In what circumstances exemplary damages are awarded?**

Lord Devlin has dealt with it quite extensively in the House of Lords in Rookes v Barnard and Others 1964 AC 1129 at 1221-1231.

His Lordship said at p.1131;

“that exemplary damages could be awarded in cases (i) of oppressive, arbitrary or unconstitutional acts by government servants; (ii) where the defendant’s conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff; (iii) where expressly authorized by statute (post, pp.1226-1227); that in a case in which exemplary damages were appropriate a jury should be directed that only if the sum which they had in mind to award as compensation (which might of course be aggravated by the defendant’s behavior to the plaintiff) was inadequate to punish and deter him, could it award some larger sum (post, p.1228); that the facts disclosed in the summing up showed no case for exceptional damages and possibly none for aggravated damages (post, pp. 1232, 1233); however, the plaintiff could, without any departure from the compensatory principle, invite the jury to look at all the surrounding circumstances and award a round sum based on the pecuniary loss proved (post, pp. 1221, 1233).”

Further down at p.1221

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter....”

- (24) Sir Thomas Bingham M R in John v MGN Ltd (T.L.R. 14.12.1995 675 at 677 C.A.) said;

“The authorities gave judges no help in directing juries on the quantum of exemplary damages. Some such damages, were analogous to a criminal penalty, and although paid to the plaintiff played no part in compensating him, principle required that award should never exceed the minimum sum necessary to meet the underlying public purpose: that of punishing the defendant, showing that tort did not pay and deterring others.”

- (25) The Fiji Court of Appeal said as follows in James Arthur Rennie Borron & Mago Islands Estate Limited v Fiji Broadcasting Commission & Newspapers of Fiji Limited (Civ. Appeal No. 40/81 FCA at p5):

“Exemplary damages are damages which are awarded to punish a defendant and vindicate the strength of the law. In considering whether exemplary damages should be awarded the Court should ask itself whether the sum it proposes to award as compensatory damages, which may include an element of aggravated damages is adequate in all the circumstances for compensating a plaintiff and also for punishing or deterring a defendant. Only if it is inadequate for the latter purpose should the Court consider awarding exemplary damages.”

- (26) Further the Appeal Court stated that 'exemplary damages or punitive damages are exceptional and only in rare cases are they awarded'. The Court then referred to the following passages in Manson v Associated Newspapers Ltd. [1965] 1 W.L.R. 1038 where Widgery J said:

"Of course, a newspaper is always published for profit. It is the purpose of a newspaper to make money and build up circulation. You must not go away with the idea that because of that any libel in a newspaper is a libel for which exemplary or punitive damages must be awarded. If a newspaper, in the ordinary way of business, publishes news in regard to a particular item and happens to make a mistake, the mere fact that it is publishing for profit does not open the door to an award of exemplary or punitive damages. The only cases (and they must be very exceptional, you may think) in which exemplary or punitive damages are permissible are those cases where the jury, is satisfied that the publication was done with a deliberate, calculated view to making a profit out of that publication and ignoring the fact that damages might be payable because they would be so small, at any rate so small in relation to the potential profit."

- (27) Whether or not to award exemplary/punitive damages?

The guidelines of Lord Reid in Broome v Cassell & Co. [1972] 2 W.L.R. 645:

"The only practical way to proceed is first to look at the case from the point of view of compensating the plaintiff. He must not only be compensated for proved actual loss but also for injury to his feelings and for having had to suffer insults, indignities and the like. And where the defendant has behaved outrageously very full compensation may be proper for that. For the tribunal will fix in their minds what sum would be proper as compensatory damages. Then if it has been determined that the case is a proper one for punitive the tribunal must turn its attention to the defendant and ask itself whether the sum which it has already fixed as compensatory damages is or is not, adequate to serve the second purpose of punishment or deterrence. If they think that sum is adequate for the second purpose as well as for the first they must not add anything to it. It is sufficient both as compensatory and as punitive damages. But if they think that sum is insufficient as a punishment they must add to it enough to bring it up to a sum sufficient as punishment. The one thing which they must not do is to fix sums as compensatory and as punitive damages and add them together. They must realize that the compensatory damages are always part of the total punishment".

- (28) The sum I awarded as general damages on compensatory basis includes an element of exemplary/punitive damages and it is adequate to (1) punish the defendant for this outrageous conduct (2) to mark the court's disapproval of such conduct (3) to deter him from repeating it.


- (29) Therefore, I decline to award exemplary/punitive damages. I consider that my award in general damages on compensatory basis reflect the serious nature of the libel and compensate the plaintiff for the mental torment and distress he must have suffered.

(G) ORDERS

- (i) Judgment entered in favour of the plaintiff.
- (ii) The defendant to pay \$50,000.00 as general damages (on compensatory basis) to the plaintiff within fourteen (14) days from the date of this judgment.
- (iii) The plaintiff is entitled to 6% simple interest per annum on \$50,000.00 from the date of filing of the writ (i.e. 01st February 2018) to the date of the judgment of this court. (Pre-judgment interest)
- (iv) The plaintiff is entitled to 4% simple interest per annum on \$50,000.00 from the date of the judgment of the court until payment is made in full. (Post-judgment interest).
- (v) The claim for special damages is dismissed as it has not been pleaded.
- (vi) The claim for exemplary/punitive damages is dismissed because the sum awarded as general damages on a compensatory basis includes an element of exemplary damages and is adequate in all the circumstances for compensating the plaintiff and also for punishing and deterring the defendant.
- (vii) The defendant is ordered to pay costs of \$2000.00 (summarily assessed) to the plaintiff within fourteen (14) days from the date of this judgment.



At Lautoka,
Friday, 15th March, 2019.


15/03/2019.
Jude Nanayakkara
[Judge]