IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No. HBC 229/2016

BETWEEN	:	**NAMSOO CHO** of Martintar, Nadi, Businessman **FIRST PLAINTIFF**
AND	:	**SUNYUNG KWON** of 141 Kennedy Avenue, Nadi, Manager **SECOND PLAINTIFF**
AND	:	**ANNA JANG** of Martintar, Nadi, Businesswoman **DEFENDANT**
APPEARANCES	:	Mr Sailo for the Plaintiffs Mr Tunidau for the Defendant
DATE OF HEARING	:	21 & 22 January 2020
DATE OF JUDGMENT	:	13 March 2020

DECISION

1. The tort of what is now commonly referred to as defamation has a long history. The ninth commandment brought down from the mountain by Moses exhorts us not to 'bear false witness'. The origins of its enforcement go back at least to Roman law, and its development as a modern remedy can be traced through the invention of paper, the printing press, and the invention and growth of the mass media via radio, television and the internet. It has adapted to all of these developments, just as it has developed to reflect religious, political and social change through the centuries. It is still adapting to the recent popularity and use of social media. In the words of one commentator[1]

> *If the laws of each age were formulated systematically, no part of the legal system would be more instructive than the law relating to defamation. Since the law of defamation professes to protect personal character and public institutions from destructive attacks, without sacrificing freedom of thought and the benefit of public discussion, the estimate formed of the relative importance of these objects, and the degree of success attained in reconciling them, would be an admirable measure of the culture, liberality, and practical ability of each age. Unfortunately the English law of defamation is not the deliberate product of any period. It is a mass which has grown by aggregation, with very little intervention from legislation, and special and peculiar circumstances have from time to time shaped its varying course. The result is that perhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies. It is, as a whole, absurd in theory, and very often mischievous in its practical operation.*

[1] **The History and Theory of the Law of Defamation**. Van Vechten Veeder Columbia Law Review, Vol. 3, No. 8 (Dec., 1903), pp546-573.

2. That history is marked by continuing conflict between, on the one hand the need to protect the reputation and privacy of individuals (and sometimes organisations), and on the other the need to ensure freedom of expression. Just as the exercise of rights of free speech can be abused to bully, intimidate and deter dissenters, critics or political opponents, so too can the threat of defamation be used to silence legitimate and necessary criticism. This tension is referred to in the decision in **Derbyshire County Council v Times Newspapers Ltd** [1993] AC534 in which the House of Lords ruled that a public authority cannot sue for defamation. As Lord Keith put it:

> *It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.*

3. This tension also lies at the heart of the present case, which, although it does not involve great political or social issues, nevertheless calls for a ruling by the Court on where the line lies between the right of legitimate complaint (freedom of expression), and the right to be protected from false accusations.

4. At the completion of evidence at the trial on 22 January I made directions for the filing of submissions. Counsel for the plaintiffs was to file closing submissions within 14 days (a period counsel appeared to be happy with), and the defendant had a further 14 days to file submissions in reply. For reasons that are not now relevant there was a delay in counsel for the plaintiff filing his submissions, but I have now received these and they have been taken into account in arriving at this decision.

The factual background

5. The case arises from a relatively minor and probably not uncommon incident at the Denarau golf course in the early afternoon of 6 August 2016. Since the case revolves around the truth of what she says happened, and the motivation for her subsequent actions, I will describe what the defendant says occurred, with reference where appropriate to the plaintiffs' evidence where there are differences, or where there is additional relevant evidence.

6. The defendant Ms Jang is a member of the Denarau Golf and Racquets Club and on 6 August 2016 was playing a round of golf with her son. They were accompanied by her daughter, who was not playing but sat in and watched the action from the golf cart. Ms Jang and her son were not particularly experienced golfers; at the time of the incident Ms Jang had been playing golf for approximately 18 months. Her son was then aged approximately 13 years, and was also a relative beginner, although he had been taking golfing lessons.

7. In front of Ms Jang's group was another group of men players, and Ms Jang and her son (who both gave evidence) said that their own speed of play was affected by

having to wait for the group in front of them. Whether this was because two players generally progress more quickly than a larger group of players or because the group in front were particularly slow was not in evidence.

8. Behind Ms Jang and her son was another group of four men, made up of the first and second plaintiffs, Mr Namsoo Cho, and Mr Sunyung Kwon, plus Mr Pha Ki Hun (who also gave evidence), and Mr Jang Hyun Seok. Both of the plaintiffs are experienced, and apparently skilled (with single figure handicaps) amateur golfers, and so too, although apparently to a lesser extent, were the other two members of the group. Mr Cho says that he has been playing golf for 40 years, while Mr Kwon has been playing for 25 years. Mr Kwon is a Category A player in club competitions, but it seemed from what they said about themselves and each other, that Mr Cho was probably the best golfer in the group (he generally played last, which suggests that he generally won the previous hole). They are familiar, as is Ms Jang, with golf etiquette, including the rule that requires a golfer to shout 'Fore' when his/her golf shot seems in danger of hitting another player, and also the convention that a slow group of golfers should allow a faster group behind them to 'play through'. I note however that this convention does not necessarily apply when the front group is itself held up by the progress of other groups ahead of it on the course.

9. The evidence of Ms Jang and her son Daniel Kim is that the plaintiffs' group behind them seemed impatient, and appeared to be trying to hurry them along. Ms Jang says that she first realised at around hole number 3 that Mr Kwon and Mr Cho and their group was behind them. This first had an impact on the 5th hole, which at Denarau is a par 5 hole over 400m long (depending on the starting point). Daniel Kim says that while he and his mother were playing this hole the group of players behind them (which included the plaintiffs and Mr Pha) teed off before Ms Jang's group was far enough ahead for this to be safe. Daniel Kim observed that being hit by a golf ball can cause serious injuries or even kill a person. He said the golf balls hit by the group behind them were close enough for his sister to be afraid. There were then no issues at the 6th or 7th holes, but at hole 8 (another relatively long hole – Ms Jang says 400m from tee to cup - which at Denarau I know (from bitter experience) is crossed by a water course at driving length) one of the group of players behind them teed off when they were only 130m from the tee, and the tee shot went over their head, only just missing Ms Jang. The golf ball landed in front of his mother. As a result of this, Ms Jang and her son played out the 8th hole, but then stopped playing, because they were afraid of being hit.

10. That evening Ms Jang sent an email to the manager of the Denarau Club at the time, Mr David Roche. The email is dated 6 August 2016, and was sent at 10.47pm. The subject of the email is Disrespectful Golf Club Members, and the email says:

> *Dear Sir,*
>
> *My name is Anna Jang, and I am sending a complaint in regards to four Korean men: Mr Kwon, Mr Park, Mr Cho and Mr Jang. I booked for 1.00pm on Saturday (8/6/16) game to play with my son Jungsoo Kim. We were playing in a team of two, and these men were playing just behind us in a team of four. As we were just about to*

prepare for a second shot at Hole number 5 and 9, we almost got hit by the ball from those men.

They threatened us to hurry up, but we were not able to hurry up and move or skip to the next Hole, because there was another team still on the green before us.

I decided to send an email to inform you today, because I was, and I still am very mad at them for what they did; I surely felt that they did this on purpose, because today is not the first time they did this. I played with other members before, and those men committed this same action, telling us to hurry up or move aside until they were done playing. We gave him a notice on that day, but they did not even bother to listen to us. Instead, they complained back to us why we are such beginners. They always threatened us to hurry up by keep aiming the ball for us. They commit this same evil action to other members, or team who plays before them. I was playing with my son today, and we both could have gotten injured.

I hope that those men would be warned for a respect and a good manner for other golf club members, and a better improvement for other members to enjoy golf safely.

Yours sincerely,
Anna Jang.

Although the email refers to holes 5 and 9, Ms Jang in her evidence at trial confirmed that the incidents she was complaining of occurred at holes 5 and 8 (not 9).

11. Ms Jang says that she sent the email because she wanted to complain to the manager of the Denarau Golf Club, of which she was a member. It was not her intention to defame the plaintiffs; she just wanted them to be warned about their behaviour. In cross-examination she said that when the ball first landed in front of her, she didn't know where it came from, but it was clear that it didn't come from in front or to the side. She says that she did not tell anyone else in the club about the contents of the email, not even her husband, who first learned of the email when he was phoned by Mr Kwon after it was sent. She was aware that David Roche, the manager of the golf club, had contacted the plaintiffs about her email. She says that her email was simply a complaint to the management of the club. She did not know which of the four in the group hit the ball until Mr Kwon complained to her husband about the email. She did not elaborate on this, and it is still not clear which of four members of the plaintiffs' group hit the ball or balls that Ms Jang and her son specifically complain of, although Ms Jang understood it was Mr Cho. Nor I think does it particularly matter for the purpose of these proceedings.

12. Mr Kwon, who was the first of the plaintiffs to give evidence (and gave his evidence in English), recalls playing golf on the day in question. His recollection was that Ms Jang's group consisted of four women players. A copy of Ms Jang's email was shown to him by the manager of the golf club, who also forwarded him a copy of the email. He does not say exactly when this happened, though presumably it was at least the following day (given the time that the email was sent by Ms Jang). He says that what is set out in the email is not true, and is totally different from what happened. He

says that no-one in the group he was in ever hit the ball behind Ms Jang, and that what they say is *ridiculous*, they have never had other complaints, and this complaint has given them a bad reputation. He was 'dumb-struck' by the allegations in the email. He also says that they (referring to the players in his group referred to in the email) have good manners, that the members of Ms Jang's group were very poor players who should have given way to his group. He said that Ms Jang shouldn't be pointing out golf etiquette to *competent golf players* such as him and the group he was in that day.

13. Mr Kwon says that this complaint has affected his reputation. The news started to spread. Other members and staff at the golf course started to ridicule him. He did not say how. He said he had a witness about how this case has affected his reputation in the Korean community, but no such witness gave evidence before me. He says that his reputation was affected by people accusing him of doing this, and suggesting that he needed to be careful. Prior to this complaint his reputation was very high in the Korean community, but his name has now been damaged. He has a small business bringing Korean students to study in Fiji (which he has been operating for 16 years). The complaint has had an impact on the business. His business is based on teaching students (among other things) to be honest. He is worried about how students and their parents will react. There was no independent verification of any of this, and no documents were produced (or discovered) that corroborated what he says about the damage to his business, for example by showing a loss of turnover, or reduction in the number of student he is getting since the email was sent.

14. It is Mr Kwon's belief that Ms Jang had a motive for sending the email. He thinks she was trying to 'show off' to her group by challenging him and the others in his group, simply to show that she could get away with it. After he received a copy of the email Mr Kwon spoke to Ms Jang and asked her why she had referred to him in the email. Her reply – Mr Kwon says – was to the effect that she did so because he was playing with Mr Cho. Ms Jang was not cross-examined on this.

15. In his evidence the first plaintiff, Mr Namsoo Cho (who spoke partly in English and partly through an interpreter) confirms that he was in a group of four golfers at Denarau course on 6 August 2016, playing behind a group that included Ms Jang. He doesn't remember who was in Ms Jang's group.

16. Mr Cho was told about the complaint by Ms Jang in a telephone call from the manager of the golf course, but was shown the email not by the manager but by Mr Kwon. He understood part of the email, but not all of it. Mr Kwon explained what he did and didn't understand. He was deeply disappointed by Ms Jang's complaint, and wanted all four members of his golfing group to participate in this claim. He says that the allegations in the email are not true.

17. It seems, from Mr Cho's evidence, that the story has spread, particularly in the Korean community. He says that members of that community and other golf club members have lost trust in him as a result of this story.

18. Furthermore, Mr Cho believes that Ms Jang's complaint was malicious. The reason he gives for Ms Jang's alleged malice towards him relates to a business transaction between them in 2015, in the course of which he purchased a restaurant business at Jetpoint, Nadi from Ms Jang. He says that Ms Jang did not honour that agreement, in that, after selling the business to him, she opened a competing business with a similar name only 40metres away. He said that he was *really angry* about Ms Jang and her husband, but was not still angry at the time of this incident in August 2016. In answer to questions put to him in cross-examination he said that Ms Jang had said malicious things about him, but when asked what things she had said, Mr Cho's only response was to refer to the email that is the subject of these proceedings as *an example*. He gave no other evidence of malicious stories told of him by Ms Jang. He had not told his golfing partners of his business issues with Ms Jang.

19. Also called by the plaintiffs were Mr Pha Ki Hun (one of the plaintiffs' group of four on the day in question), and Simi Naduba (a member of the staff at the Denarau Golf Club). Because they were not available on the first day I allowed (rather than adjourning the case in mid-afternoon, at the risk of running out of time the following day) the plaintiff to call these witnesses on the second day of the trial, although the defendant and her son had already given evidence. Mr Pha gave evidence that he has been playing golf for 16 years, and has played regularly with the plaintiffs over the past 10 years. He has not seen Ms Jang's email himself, but was told of its contents by Mr Kwon and the manager of the golf club. His understanding of what the email says is that it complains that *we hit the ball towards them, and we swore at them.* Mr Pha denies that anyone in Ms Jang's group was hit by a golf ball from the group he and the plaintiffs were in. He says that *we waited until the front team was ahead. Only when the front team got away did we hit.*

20. Mr Naduba, as stated, is a staff member at the Denarau golf course. At the time of the incident in 2016 that is the subject of this case he had been working at the course for 7-8 years. He was working at the time as an attendant at the course (which involves carrying bags, giving directions etc). He says that he heard about the complaint that Ms Jang had made from his work colleagues, and from some other members of the club. He was not at work on the day in question. Mr Naduba knows some of the rules of golf, including the requirement that players should not hit the ball when someone is in front of them. He is aware that sometimes players in front have to give way to a group behind. Mr Naduba's evidence is that if this were to happen (assuming presumably that the front group needed to be asked/told to give way), he would expect that - once alerted to the problem - the attendants at the course would ask the slow players to give way.

21. In her response to the evidence of ill-feeling between them from Mr Cho, the defendant's evidence was that the business that Mr Cho had bought was in her husband's name but operated under the name Anna's Cake and Wine & Dine. At the time of the sale she and her husband also had another business nearby, operating under a similar name. They have continued to operate that business. About a year after the sale of the business to Mr. Cho she became aware of stories that Mr Cho

was telling about the transaction. Some of the stories she heard were that the business was no good, and that she had not helped in the business after selling it to Mr Cho. Nevertheless, she says, she remained on speaking terms with Mr Cho. She denied that she has any malice towards him, and denies that her complaint was motivated by malice.

The plaintiffs' claim and pleadings

22. In their statement of claim the plaintiffs say:

i. The plaintiffs and the defendant are members of the Denarau Golf & Racquet Club.

ii. The defendant sent an email dated 6 August 2016 addressed to Mr David Roche the manager of the club, as a result of which the plaintiffs had to attend a meeting to give explanation to other members of the club, and as such the said e-mail was revealed to other members of the club.

iii. The publication contains a number of defamatory statements that were calculated to damage the plaintiffs' reputations.

iv. Specifically, the defendant falsely and maliciously said the following defamatory words:

- Disrespectful Gold (sic – the email refers to Golf) Club Members
- 'we almost got hit by the ball from those men'
- 'They commit this same evil action to other members, or team who play before them'
- 'those men would be warned for a respect and good manner for other golf members and a better improvement for other members to enjoy golf safely'

v. In their natural and ordinary meaning these words mean, and were understood to mean (paragraph 8 of the statement of claim):

- The plaintiffs are not good sportsmen or alternatively do not know how to play golf
- The plaintiffs are hooligans and unprofessional in interacting with other members of the golf club while on the golf course
- The plaintiffs are sports bullies, in other words they are habitually overbearing, harsh and cruel
- The plaintiffs are trying to dominate and/or control other members of the golf club
- The plaintiffs are unsafe to be members of the golf club
- The plaintiffs are aggressive and not good to be members of the golf club
- The plaintiffs do not know the rules of the golf course.

vi. These defamatory and libellous statements go far beyond fair comment and are malicious and designed specifically to impugn the plaintiffs' personal character

vii. The defamatory words have brought them into hatred, ridicule and contempt and they have suffered damages as result as the plaintiffs continue to suffer

disrepute and disgrace amongst members of the golf club and the Korean community in Fiji.

23. Accordingly the plaintiffs seek:

i. Damages for defamatory statements
ii. Aggravated and punitive damages
iii. Interest under the Law Reform (Miscellaneous Provision)(Death and Interest) Act
iv. Costs on a solicitor/client basis.
v. Any other relief that the Court deems fit and proper.

24. In her statement of defence Ms Jang admits that she and the plaintiffs are members of the Denarau golf club, as alleged, and that she sent the email complained of to the manager of the club. Otherwise she says:

i. She did not ask for a meeting of the club, that was a decision of management of the club
ii. She is entitled to take issue, justify and make fair comment in writing of what actually happened on the golf course with the management of the club. Specifically she describes the incident as follows:
    - While she and her son were playing golf at the course on 6 August 2016, and were approximately one hundred and thirty feet ahead and in the same direction as a group of four players comprised of the plaintiffs and two others, Mr Cho intentionally and deliberately teed off in the direction of the defendant and her son, with the golf ball landing about one foot in front of the defendant.
    - The failure of Mr Kwon to stop, resist and discourage Mr Cho from teeing off as described irresistibly infer that he condoned and approved of such action.
    - The action of Mr Cho caused great fear, shock, alarm anxiety and distress to the defendant and her son.
    - Mr Cho's actions as described were malicious and intended to injure the defendant and her son.
    - After the first ball landed in front of her the defendant heard the plaintiffs scorning her and her son as being 'beginners' and very slow in playing golf.
    - The defendant had encountered the same experience when she teamed up with other club members on previous occasions when Mr Cho had hit his golf ball when the defendant and her group were directly in front of them, and had scorned them as beginners in the game of golf.
    - Teeing off in the circumstances described by the defendant was a serious breach and violation of golf etiquette and rules, the overriding purpose of which is that consideration discipline, courtesy and sportsmanship should be shown to others on the course at all times
    - In particular these rules require:

- Players should ensure that no one is standing close by or in a position to be hit by the ball when they make a stroke or practice swing
- Players should not play until the players in front are out of range
- If a player plays a ball in a direction where there is a danger of hitting someone, he should immediately shout a warning. The traditional word of warning in such situations is 'fore'.

iii. Otherwise the defendant denies the allegations in the statement of claim.

25. The defendant has also filed a counterclaim, in which she pleads that Mr Cho had negligently

i. Teed off with a in the direct direction of the defendant at a very short distance between him and the defendant
ii. Failed to comply with and adhere to golf etiquette
iii. Failed to withhold his stroke until the defendant and her son were out of range
iv. Failed to immediately warn the defendant and her son before teeing off in their direction,
v. Failed to take obvious steps to enable the Defendant and her son to advert to the likelihood of harm
vi. Knowing the consequences of his actions Mr Cho either decided to take the risk, or ignored the risks of teeing off.

Accordingly the defendant says that she and her son suffered great fear, shock, alarm, anxiety and distress, for which she seeks unspecified damages, interest and costs.

26. I need to say at once that very little of what has been pleaded, by either the plaintiffs or the defendant, has been led in evidence. There was no evidence from the plaintiffs, or cross-examination of them by counsel for the defendant, on the subject of the club meeting that was apparently called to consider the defendant's complaint email. What was said at that meeting and by whom, who was present at the meeting and what was its purpose, and what was the outcome of the defendant's complaint? I would have thought that this might have shed some light on who was responsible for the wider publication of the email (the defendant sent it only to the manager, and denies discussing it with anyone else), and also possibly on the strength of the plaintiffs' claim, the validity of the defendant's complaint and her defence, and the presence or otherwise, of malice.

27. Nor was there much in the way of evidence given by or for the plaintiffs about the extent to which the complaint has brought them into contempt, hatred, ridicule etc at the golf club and in the Korean community in Fiji. Particularly in the case of the Korean community, without evidence the Court has no means of judging what would or would not lower the plaintiffs in the estimation of right thinking members of that community. I assume that the plaintiffs are saying that this might be different from what might affect them in the wider community (otherwise there would be no point

in pleading their claim in the way they have), but without evidence how would I know? Furthermore, this is a threshold issue. It relates to whether or not the words are defamatory. While I accept that proof of damage is not essential in a defamation claim (damage is assumed if the words are defamatory), the plaintiffs first have to prove they have been defamed in the manner pleaded.

28. As regards the defendant's defence and counterclaim, no evidence was given by her (apart from what is said in the email – which she was not asked to elaborate on, either in examination in chief, or cross-examination) about hearing what was said by the members of the plaintiffs group about their slowness and in-experience. How did she hear these things, given the distances players are generally apart on the golf course, who said them, and what was said? Nor did she say anything about how frightened she, her son and daughter were, although I accept that there is evidence that they were sufficiently concerned to stop their game and go home after the 8th hole.

29. Nevertheless, the pleadings (leaving aside for the time being the defendant's counterclaim) are sufficiently clear to define the scope of the plaintiff's claim, and of the defendant's defence. The plaintiffs have pleaded the specific words complained of, the publication of those words (the pleadings and the evidence refer only to the publication to the manager of the club, although the statement of claim suggests – again not very clearly – that the defendant was responsible for the subsequent revelation of the contents of the email to the other members of the club) and have set out in the statement of claim the defamatory meanings that they say should be understood from these words. The plaintiffs also say that the email was sent maliciously. There are no particulars of malice, but the defendant has not asked for them. I will deal further with the issue of malice (and the evidence of it) in relation to the defences relied on by Ms Jang.

30. The defendant admits the words used in the email, and that she sent the email to the manager of the golf club, intending the email to be a complaint to the club about the conduct of the plaintiffs. She says that she did not ask or call for a meeting of the members of the club, which was a decision made by the club. She says, in effect if not in actual words, that what she said in the email is true. She also says, again in effect, that the email was sent on and for the purposes of an occasion of qualified privilege, in that it was a complaint by her as a member of the golf club, about the conduct of the plaintiffs as members of the same club, that called for an investigation and finding by the club about that complaint. The defendant also denies that the words are defamatory, and denies that the publication was malicious.

The law

31. Given these pleadings, to succeed in their claim the plaintiffs need to show:

i. That the words used by the defendant have the defamatory meaning pleaded
ii. That the words refer to the plaintiffs

iii. That the sending of the email to the manager of the club was a publication that is not privileged (the defendant has the initial burden of proof on this issue), or that the defendant published the email to a wider audience such that the qualified privilege defence is not available, or that the publication was malicious, so negating that defence.

32. For her part it is sufficient for the defendant to establish that what she says in the email is not defamatory, or if and to the extent they are defamatory, they are true. Even if the words are defamatory and are not shown to be true (she having the burden of establishing truth), it is a defence if she is able to show that the words were published on an occasion of qualified privilege, and the plaintiff is not able to establish malice.

33. Stephen Offei, the author of **Law of Torts in the Pacific** (1997) Oceania Printers suggests that words are defamatory if in their ordinary meaning they tend to:

- Lower the plaintiff in the estimation of right-thinking members of society generally[2]
- Cause others to shun or avoid the plaintiff
- Expose the plaintiff to hatred, contempt or ridicule
- Discredit the plaintiff in his office, trade or profession
- Injure his financial credit.

Of these alternative tests, the first is now most commonly applied, but the courts may have recourse to the others if appropriate in a particular case. As the author of **Street on Torts** 14th Ed. (2015) Oxford University Press suggests at p527:

> *The truth is that English law has not defined the term 'defamation' with satisfactory precision. With diffidence, it is suggested that the 'right-thinking' person test is of greatest utility but must be understood in the following way: If a substantial and respectable proportion of society would think less well of a person then the statement will be construed as defamatory, provided that their reaction is not plainly anti-social or irrational.*

34. In determining whether the words complained of are defamatory, the Court must – except in those cases where the plaintiff pleads and proves (the burden being on the plaintiff) that the words have a particular defamatory meaning - construe them in their ordinary and natural sense. In the words of Lord Bramwell in **Capital and Counties Bank Ltd v Henty** (1882) 7 AppCas 741 at 790:

> *... the question is not what the writer of any alleged libel means, but what is the meaning of the words he has used.*

35. The law also requires the whole statement to be looked at, not just the parts which the plaintiff says are defamatory.

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[2] Lord Atkin in **Sim v Stretch** [1936] 2 All ER 1237 at 1240.

36. The author of **Gatley on Libel & Slander** 7th ed at paragraph 93 says, on the subject of 'natural and ordinary meaning':

> *Words are normally construed in their natural and ordinary meaning, i.e. in the meaning in which reasonable men of ordinary intelligence, which 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.*

In striving to identify the 'natural and ordinary meaning' from the words used in that case the English Court of Appeal in **Dr Frank Skuse v Granada Television Ltd** [1993] EWCA Civ 34 followed these principles in arriving at the meaning of words used in a television broadcast:

i. *The courts 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.*
ii. *The hypothetical reasonable reader [or viewer] is not naïve but he is not unduly suspicious. He can read between the lines. He can read an implication more readily that 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.*
iii. *While limiting its attention to what the defendant has actually said or written, the court should be cautious of over-elaborate analysis of the material at issue (see the words of Lord Diplock in **Slim v Daily Telegraph Ltd** [1968] 2 QB 157 at 171).*
iv. *The court should not be too literal in its approach.(see Lord Devlin's speech in **Lewis v Daily Telegraph Ltd** [1964] AC 234 at 277.*
v. *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 would be likely to affect a person adversely in the estimation of reasonable people generally.*
vi. *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 Bros v News Group Newspapers Ltd** [1986] 1 WLR 147 at 153H).*
vii. *The defamatory meaning pleaded by the 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.*

37. I also note, rather wistfully, that in the United Kingdom the law[3] provides that a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.

[3] Defamation Act 2013 (UK), s.1(1)

38. In relation to defences to the tort, the law makes it clear that:
    i. For the defence of justification or truth, it is assumed that any defamatory statements are false; it is for the defendant to prove (on the balance of probabilities) that they are true.
    ii. It is not necessary, in a claim for libel (which this is) as opposed to slander, for the plaintiff to prove actual damage.

Analysis

39. In the present case it is not clear whether the plaintiffs argue that the ordinary meaning of the words is as pleaded (see paragraph 22(v) above), or whether the meanings referred to are said to be particular meanings likely to be taken out of the words by golf club members or members of the Korean community. If the latter applies, there has been no evidence on this issue from anyone from either the club or the Korean community. It is also important to make the point that the defendant did not publish her email to the Korean community, and there is no evidence to suggest that she, as opposed to the plaintiffs themselves (who seem to have complained to various people about the email) is responsible for any wider publication of the email's contents.

40. Nor am I attracted to the submission that the defendant's words that are complained of (see paragraph 22(iv) above) have all the meanings attributed to them in the statement of claim (see 22(v)).

41. The plaintiffs have chosen to plead that the defendant's allegations relating to a specific incident on a particular day, and the assertion that the same sort of thing had happened once before (which is what the email says in its ordinary and natural meaning) can instead be taken to as a generalised comment/statement about the plaintiffs' conduct when playing golf, and about their general character ('sports bullies, 'habitually harsh and cruel', 'poor sportsmen' etc).

42. In striving to find the worst possible interpretation of the defendant's words and language the plaintiffs and their advisers have over-reached themselves. In doing so they have overlooked the obvious meaning of the defendant's words, i.e. that someone In the plaintiffs' group of players deliberately played a dangerous shot or shots (hitting the ball when the group in front were not a safe distance away), and sought to intimidate and frighten the defendant and her son, and have behaved in the same way with others. I would readily accept that the defendant's words carry such a meaning, and that such an accusation, if based on false facts, is defamatory of the plaintiffs (leaving aside any possible defence). But the plaintiffs have not pleaded their case in this way.

43. I cannot see how the pleaded meanings (clause 8 of the statement of claim – which is denied in the statement of defence) can be taken from the words complained of on any natural and ordinary reading of those words, even allowing for available inferences (see the principles listed in paragraph 36 above).

44. Applying those same principles however (see in particular principle (vii)) I agree that the natural and ordinary meaning of the email as set out in paragraph 42 above is – if not shown to be true – defamatory, and I will now look at the defences that Ms Jang has raised, in case they provide an answer to this claim.

Truth

45. First, the defendants pleads (in effect – although not explicitly) that what she has said in the email is true. Even if, contrary to my finding in paragraph 43 above, the meaning of the email is taken to be as pleaded by the plaintiffs in paragraph 8 of the statement of claim, I nevertheless do not agree that all of the meanings pleaded in paragraph 8 are the 'natural and ordinary meaning' of the words used by Ms Jang. In my view it is impossible to construe from her email some of the elaborate meanings pleaded by the plaintiffs. I have set out below the meanings as pleaded in paragraph 8 of the statement of claim, but crossed out those meanings that are, in my view, simply not arguable. For example, nothing in the email can be taken as a suggestion, or should lead to an inference, that the plaintiffs should be removed as members of the golf club. Instead the email explicitly suggests in the final paragraph that, as members, they be warned about the need for respect and good manners towards other members of the golf club. This request is not compatible with a request that their club membership should be terminated.

- ~~The plaintiffs are not good sportsmen or alternatively do not know how to play golf~~
- ~~The plaintiffs are hooligans and unprofessional in interacting with other members of the golf club while on the golf course~~
- ~~The plaintiffs are sports bullies, in other words they are habitually overbearing, harsh and cruel~~
- The plaintiffs are trying to dominate and/or control other members of the golf club
- The plaintiffs are unsafe ~~to be members of the golf club~~
- The plaintiffs are aggressive ~~and not good to be members of the golf club~~
- ~~The plaintiffs do not know the rules of the golf course~~

It is what remains, or what I have found that is the 'natural and ordinary' meaning of the words used, that the defendant must justify, i.e. prove to be substantially true, that is, that the plaintiffs:

- or someone In the plaintiffs' group of players, deliberately played a dangerous shot or shots (hitting the ball when the group in front were not a safe distance away),
- sought to intimidate and frighten the defendant and her son,
- have previously behaved in the same way with others
- are/were trying to dominate and/or control the other members of the club,
- are unsafe and aggressive players.

The defendant is obliged to prove this on the balance of probabilities.

46. The defendant pleads in paragraph 2(c)(i) – (x) of her statement of defence how the incident that gave rise to her complaint happened, and her assertions as to the plaintiffs' conduct. She asserts that Mr Cho hit his golf ball off the tee intentionally and deliberately in the direction of her and her group of players. She says that the failure of Mr Kwon to stop and discourage Mr Cho from his conduct shows that he condoned and approved such actions. She says that she heard the plaintiffs 'scorning' her and her son as 'beginners'. She also says that she had encountered such behaviour from the plaintiffs on 'previous occasions', and that such conduct breaches the rules and etiquette of golf, which require consideration, discipline, courtesy and sportsmanship at all times.

47. In closing submissions counsel for the plaintiffs argues that the defendants statement of defence does not expressly and specifically plead truth as a defence, and that the function of the 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 the pleadings. I entirely accept the second part of this submission, and am led thereby to reject the first. Having observed the parties conduct of the case I am perfectly satisfied that the plaintiff well understood that part of the defendant's defence was that what she complained of was true. While I agree that the pleadings of neither party provide a model for others to follow, I don't accept that either party was impeded from prosecuting or defending the case by any deficiencies in the pleadings.

48. As I have observed, there is very little actual evidence to support the defendant's assertions in paragraph 2 of her statement of defence, which are denied by the plaintiffs. The defendant and her son gave evidence of golf balls landing nearby (at hole 5), and nearly hitting the defendant (at hole 8). Having observed Ms Jang and her son give evidence, I accept that they did so honestly, and that they believe that the golf balls that landed near them were hit by members of the plaintiffs' group of players. Indeed, there is no evidence to suggest that the balls could possibly have come from anywhere else on the golf course, and Mr Cho seemed to accept in cross-examination, that this would not have happened.

49. It is the plaintiffs' position that the defendant and her son are lying, and that nothing like this happened, but I do not accept this argument. On the other hand, neither Ms Jang nor her son claim to have seen the plaintiffs hitting the balls at them, and it is supposition on their part that the balls were hit deliberately. No doubt the fact that it happened more than once (i.e. on holes 5 and 8), that there was no apology from the plaintiffs' group (which would have indicated that it was accidental), that the plaintiffs were known to be experienced and skilful players (therefore less likely to have shots go astray), and that something similar had happened on previous occasions involving the plaintiffs' group – all of which is part of the defendant's evidence – provides a reasonable basis for the defendant's belief, and she may be right.

50. However, I remind myself that the onus of proving truth is on the defendant, and I am not satisfied that she meets that test. For her to justify as true the only alleged assertions that I have found could conceivably be defamatory as pleaded, the defendant would need to prove that the plaintiffs deliberately hit their shots near the defendant and her group with the intention of intimidating them. While I certainly accept that this is what she believes, I am not satisfied that Ms Jang has proved this on the balance of probabilities. Accordingly I find that Ms Jang has not established that her assertions are true.

51. Because of this finding, the defendant is not assisted by section 15 of the Defamation Act 1971, which provides:

> *In an action for defamation in respect of words containing 2 or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.*

since she has not shown that any of the alleged charges are true.

Qualified privilege

52. The defendant's other defence is qualified privilege. Again, the pleadings do not provide a text book model for students to follow, but I am satisfied that they convey this defence clearly enough. Paragraph 2(c) of the statement of defence asserts:

> *The Defendant, as a member of the Denarau Golf & Racquet Club, has the right to take issue, justify and make fair comment in writing of what actually happened in the golf course with the management of the Denarau Golf & Racquet Club. The issues complained by the Defendant are as follows: ...*

53. Clearly also, this defence is anticipated by the plaintiffs. In their statement of claim they allege that the assertions complained of in the defendant's email of complaint to the golf club management were made 'falsely and maliciously', which if shown to be the case would negate any qualified privilege defence, but which is not something that the plaintiffs are otherwise obliged to prove. The plaintiff is not therefore impeded by any deficiencies in pleading from presenting its case, and responding to this defence.

54. The reasoning behind the defence is explain succinctly by Lord Diplock in the decision of the House of Lords in **Horrocks v Lowe** [1975] AC 135 at 149:

> *The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so.*

55. The essential elements of the defence are summarised as follows in **Street on Torts** 14th Ed. (2015) at p.564:

> *In certain circumstances, it is thought desirable that reflections on the reputation of another, although untrue, should not give rise to tortious liability, provided those reflections were not published with 'malice'. These are occasions of qualified privilege and with respect to which the interest in freedom of speech is more important than the claimant's interest in the protection of her reputation. The defence is generally underpinned by the notion that the defendant was under a duty – whether legal, social, or moral – to make the communication complained of.*

56. The footnote to this passage refers to the judgment of Lord Atkinson in the House of Lords in **Adam v Ward** [1917] AC 309, at 334, and it is worthwhile quoting part of that speech as a ruling on all the important elements of this defence:

> *It is not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential. Nor is it disputed that a privileged communication – a phrase often used loosely to describe a privileged occasion, and vice versa – is a communication made upon an occasion which rebuts the prima facie presumption of malice arising from a false and defamatory statement prejudicial to the character of the plaintiff, and puts the latter on proof that there is malice in fact. ... Nor that the question of whether the occasion is a privileged occasion or not is ... a question of law to be decided by the judge at the trial. Nor yet that a person making a communication on a privileged occasion has not, in the first instance and as a condition of immunity, to prove affirmatively that he honestly believed the statement made to be true, his bona fides being in such case always presumed. ... All these matters were not questioned. They could not be questioned successfully. Nor was it suggested that, while on the question of malice the bona fide belief of the defendant that he was under a moral, or social duty to make the communication is relevant and important, the existence in fact of this duty or interest, not merely the defendant's belief in its existence, is the thing which is relevant to the question of whether the occasion was or was not privileged.*

57. The same decision also makes it clear that if the occasion of the communication is privileged, the language used in the offending communication does not change that, nor can that language be used as evidence of malice. The decision quotes the Privy Council in **Laughton v Bishop of Sodor and Man** (1872) LR 4 PC 495 at 508 as follows:

> *To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, the protection which the law throws over privileged communications.*

58. Applying these principles to the present case, it is for the court to decide, as matter of law, whether there was a reciprocal duty or interest between the complainant and the management of the golf club to make and to receive complaints about the conduct of other members, so as to negate the prima facie presumption of malice

that would normally arise if a false and defamatory statement is made of the plaintiffs. The fact that such occasions/communications have qualified privilege does not (in the balance to be struck between freedom of speech and protection of reputation) mean – to mix my metaphors - that the floodgates are opened for the disseminators of lies and abuse to pour out. All that the defence does is to impose on the plaintiff the need to prove malice to negate the privileged occasion. If the victims of defamation can do so, the defendant will be liable for the defamation.

59. The plaintiffs argue in their closing submissions that:

> *Mr David Roche had no interest in knowing what the issue was between the Plaintiffs and the Defendant. The Defendant had no duty to publish the said email. This was done through an indirect and improper motive on the Defendant's part, in making the communication complained of.*

60. In spite of this submission, I have no hesitation in holding that a complaint by a golf club member to the manager of the club about the conduct of another member on the golf course is an occasion of privilege, provided the complaint is not made maliciously. It is clearly a matter of reciprocal interest for the members and management of a golf club, as in any organisation of this sort, to be able to make and have determined disputes between members about matters for which the club exists, whether these are about conduct in the course of playing golf, or behaviour in the clubhouse, or communications between members relating to the activities of the club. It is also clearly in the public interest to enable organisations such as clubs to manage their own internal affairs themselves, rather than burdening the state or the public at large with the need to resolve such disputes or issues. Whether a golfer is cheating, playing too slowly, driving his golf cart in a dangerous way, or abusing other players, are not (usually) matters for the police, or the government to resolve, but they are nevertheless issues which have to be mediated, decided and remedied in some way. If members cannot even make a legitimate complaint without being sued for defamation that will quickly result in a complete breakdown in the order and comity between members on which the functioning of the club is dependent.

61. Furthermore, although there was very little evidence on the subject of how the club reacted to Ms Jang's complaint, what evidence there is (see paragraph 26 above) suggests that the club responded as one would expect, by conducting a meeting of some sort to investigate the complaint. Regardless of the outcome of this process, the fact that it took place supports the view that I have taken; that the club has an interest in receiving and managing such complaints that are raised with it.

62. The next question then is whether the plaintiff is able to show (on the balance of probabilities) that the defendant acted maliciously in making her complaint, so that she is not entitled to the protection of privilege that would otherwise apply.

63. In this context malice can mean all or any of:

- Where the defendant does not believe in the truth of her statement.

- Where the defendant has abused the purpose of the privilege
- The inclusion of extraneous matter.
- Unreasonable publication to persons outside the scope of the privilege.

Of these only the second requires any explanation. Even if the defendant believes what she says to be true, if the dominant motive for the publication was not to lodge a complaint with the club, but for some other, improper, purpose, the privilege will be lost.

64. I have referred previously (paragraphs 18 & 19 and paragraph 21) to the evidence given by the plaintiff Mr Cho about ill-feeling between him and the defendant Ms Jang. Mr Cho clearly believes that Ms Jang was motivated by this ill-feeling to make a false complaint about him and his fellow players. Whatever the true position was regarding the sale and purchase of the business, the plaintiffs' evidence fell a long way short of establishing that Ms Jang's feelings towards Mr Cho were sufficiently hostile to provide motivation to make a false complaint about his conduct on the golf course. From the evidence I heard it seemed that the preponderance of ill will was on the part of Mr Cho towards Ms Jang, not the other way around as he needed to show. I also note that although he attributes malice to Ms. Jang in making her complaint, he disclaims any malice on his part in his behaviour on the day in question.

65. As I have said previously, I am satisfied that Ms Jang honestly believed what she said in her email to the club manager about what had happened on the golf course. It is not necessary for me to decide (for the purpose of deciding whether Ms Jang acted maliciously) exactly what happened. The truth may lie somewhere in between their two versions of events, with Mr Cho and his group becoming impatient at the speed of progress and making their shots sooner than they should have done, and Ms Jang and her group, as novice golfers, being more anxious about that than they needed to be. I don't know, and cannot decide on the evidence provided. But I do not accept that Ms Jang made her complaint without believing in the truth of what she said happened.

66. Nor do any other aspects of malice - as listed in paragraph 63 – apply. There is no evidence that the motive for the complaint was other than as expressed in the email, to complain about something that Ms Jang believed happened on the golf course that day. The email that she sent is focussed on the incident and behaviour she was complaining about; it does not contain extraneous matter that relates to matters other than the plaintiffs' behaviour; and it was published by Ms Jang only to the management of the club to whom she was making the complaint (and which was the proper place to lodge the complaint). Although the plaintiffs say that the contents of the email became known in the club and in the Korean community, there is no evidence that Ms Jang was responsible for that happening. It seems more likely that it became more widely known only because of the plaintiffs' sense of grievance.

67. Accordingly I find that even though the email she sent has defamatory content which is not shown to be true, Ms Jang is entitled to rely on the defence of privilege. The

plaintiffs' claim is accordingly dismissed. It is important though to record that the fact that the plaintiffs' claim has not succeeded does not mean that the court has found that the plaintiffs conducted themselves in the manner complained of by Ms Jang. I have found that there is insufficient evidence before the court to establish that what Ms Jang said is true. I would expect that the golf club will have looked into the complaint, and reached a decision on her complaint. That is where the matter should have been left.

68. The defendant's counterclaim is also dismissed. I am not satisfied on the balance of probabilities that the plaintiff's deliberately or negligently hit the ball close to the defendant's group, and there is no evidence of distress or anxiety on the part of the defendant Ms Jang. She cannot sue (and does not purport to be doing so) on behalf of her son and daughter.

69. The plaintiffs are liable for costs to the defendant, which I fix at $3000.00 (taking into account the defendant's unsuccessful claim for damages). As between themselves the plaintiffs are liable equally for these costs. If they have not already done so the plaintiffs are also to reimburse the court for the cost of engaging an interpreter.

HIGH COURT OF FIJI
LAUTOKA

A.G. Stuart
Judge

At Lautoka this 13th day of March, 2020

SOLICITORS
Mr Sailo for the Plaintiffs
Mr Tunidau for the Defendant