

**SAKIUSA RABUKA and Anor v FIJI DAILY POST CO LTD and 2 Ors
(HBC0511j of 2000s)**

5 HIGH COURT — CIVIL JURISDICTION

PATHIK J

8 July 2005

10 **Defamation — damages — newspaper headline — “Ex-diplomat’s wife found in home raid” — whether published newspaper article defamatory — whether damages proper — whether mitigating circumstances.**

The Plaintiffs husband and wife (P1 and P2 respectively), sought damages and injunction against the Defendants for an article published on the front page of the *Sunday Post*. The newspaper was published by the Defendant. In large letters were the words *Ex-diplomat’s wife found in home raid* followed by an article in smaller letters. The Plaintiffs were both civil servants at the time of the institution of the action holding very senior and responsible positions in two separate government departments. The Plaintiffs testified that the article referred to both of them. The Plaintiffs also alleged that they were defamatory statements; that no inquiry as to the article’s authenticity was made upon them by the Defendants and that the article was repeatedly published. The Defendants, on the other hand, alleged that the statement when read as a whole was not defamatory and did not refer to the Plaintiffs. The defendants presented no evidence during the trial.

15 **Held** — (1) In this case whether the words complained of are capable of conveying a defamatory meaning is a question of law for the court to determine. The Plaintiffs proved that the article was defamatory since the article referred to the Plaintiffs by their names and the same was published. The Plaintiffs were dishonoured by the statements. The reasonable people who knew the Plaintiffs and read the publication would understand that the article referred to the Plaintiffs. The Defendants were reckless in publishing the article. The Defendants gave no thought as to what damage the article would cause the Plaintiffs and did not check the truthfulness of the statements which was easy to do. The most damaging false statement was that P2 was “found in home raid” in New York where the raid took place, but in fact P2 was in Fiji at the time. Moreover, the Defendants did not rebut the Plaintiff’s evidence.

20 (2) There are factors to be taken into account in defamation cases such as (a) special damages; (b) injury to the plaintiff’s feelings including aggravating factors; (c) extent of the publication; and (d) mitigating factors. The Defendants were careless and inaccurate as to the article’s publication and did not offer a correction or apology to the public. Thus, the Plaintiffs were entitled to compensatory, but not exemplary damages.

Application granted.

35 **Cases referred to**

40 *Bromage v Prosser* (1825) 4 B & C 247; 107 ER 1051; *Carson v John Fairfax and Sons Ltd* (1993) 178 CLR 44; 113 ALR 577; *Associated Newspapers Ltd v Dingle* [1964] AC 371; [1962] 2 All ER 737; *Gillick v British Broadcasting Corporation* [1995] TLR 527; *E Hulton & Co v Jones* [1910] AC 20; *John Fairfax and Sons Ltd v Carson* (1991) 24 NSWLR 259; *Kiam v Neill (No 2)* [1996] EMLR 493; *Lee v Wilson* [1935] VLR 113; (1934) 51 CLR 276; [1935] ALR 51; *Pacific Daily (Fiji) Ltd v Leonard Gray Usher* [1971] 17 FLR 122; *Rantzen v Mirror Group Newspapers Ltd* [1994] QB 670; [1993] 4 All ER 975; *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153; [1990] 1 All ER 269; *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107, cited.

45 *Capital & Counties Bank Ltd v George Henty & Sons* [1882] 7 App Cas 741; *Cassell & Co Ltd v Broome* [1972] AC 1027; [1972] 1 All ER 801; *James Arthur*

Rennie Borron v Fiji Broadcasting Commission [1982] FJCA 7; *Lewis v Daily Telegraph Ltd* [1964] AC 234; [1963] 2 All ER 151; *Ley v Hamilton* (1935) 153 LT 384; *Manson v Associated Newspapers Ltd* [1965] 1 WLR 1038; [1965] 2 All ER 954; *Rookes v Barnard* [1964] AC 1129; [1964] 1 All ER 367; *Sadgrove v Hole* [1901] 2 KB 1; *Tang Liang Hong v Lee Kuan Yew* [1998] 1 SLR 97; *Uren v John Fairfax and Sons Pty Ltd* (1966) 117 CLR 118; [1967] ALR 25, considered.

R. Chand for the Plaintiffs

S. Inoke for the Defendants

Pathik J. This is a *defamation* case.

By a *writ of summons* issued on 10 November 2000 the Plaintiffs *Sakiusa Rabuka* of Ministry of Justice of the Government of the Republic of the Fiji Islands, Permanent Secretary and *Volau Rabuka* of Colonial War Memorial Hospital, Dental Therapist who are husband and wife respectively claim damages and injunctive relief against the Defendants the *Fiji Daily Post Company Ltd* the publisher of the daily newspaper *The Fiji Daily Post* (the D1), *Ranjit Singh*, publisher and general manager (the D2) and *Mesake Koroi*, acting editor (the D3).

As for the *pleadings* herein the Plaintiffs filed their *statement of claim* and the Defendants filed their *statement of defence* followed by *reply to defence*. The Plaintiffs gave evidence on oath. Apart from cross-examining the witnesses the defence counsel did not adduce any evidence either on liability or on assessment of damages.

The hearing was completed in September 2004 and an order was made for filing of written submissions. The last of the written submissions was filed on 8 October. Thereafter, I went on long leave and did not return until end of February 2005.

A. Background facts

At the time when this action was instituted in November 2000 the Plaintiffs were both civil servants serving as Permanent Secretary for Justice in the Ministry of Justice but now Chief Executive Officer, Ministry of Justice and Dental Therapist at the Colonial War Memorial Hospital, Suva respectively.

It is agreed that the *Fiji Daily Post* a newspaper is “printed daily and has a wide circulation throughout the Fiji Islands and overseas”. The *Sunday Post* is also published by D1.

The Defendants by themselves and/or through their agents and servants caused the publication of the materials and facts referred to hereafter in the said newspaper the *Sunday Post* on Sunday 22 October 2000 the subject matter of the complaints by the Plaintiffs.

The Plaintiffs gave their evidence along the lines stated in their statement of claim.

B. The article

In the second half of the front page of the *Sunday Post* newspaper there appeared in large letters the words *Ex-diplomat’s wife found in home raid* followed by an article in smaller letters.

The alleged defamatory words from the statement issued by the D1, D2 and D3 themselves and by their agents or servants and published in *The Sunday Post* newspaper are as follows (hereafter referred to as the *Article*):

- 5 1. Paragraph 1 ... *“The wife and two sons of a former Fiji Diplomat were caught in a raid of a New York home suspected by police as the base for a migration racket.”*
2. Paragraph 2 ... *The Fijian woman, Mrs Volau Rabuka is the wife of the former deputy head of the Fiji Mission in New York, MR SAKIUSA RABUKA, A lawyer by profession, Mr Rabuka is now acting Permanent Secretary of Justice in Suva.*
- 10 3. Paragraph 3 ... According to the Suva based Pacific news agency service PACNEWS, Mrs Rabuka was in the United States legally.
4. Paragraph 4 ... *“She was in New York to visit her two sons who are continuing their studies there”, PACNEWS said.*
- 15 5. Paragraph 5 ... The couple returned to Fiji when Mr Rabuka’s contract at the Fiji Mission in New York expired early this year, but the children remained behind to complete their education.
6. Paragraph 6 ... PACNEWS says *Mrs Rabuka was visiting her two sons when members of the New York Police Department (NYPD) raided the house* at the New York suburb of Queens.
- 20 7. Paragraph 7 ... *The house owners, former Fiji residents now residing permanently in the US were later charged in connection with an alleged green card racket.*
8. Paragraph 8 ... While details of the charges could not be obtained, it is believed the couple, *Ratu Seru Cavuilati and his wife, Salote Cakobau were selling green cards* in the pretext that buyers could become permanent residents of the US.
- 25 9. Paragraph 9 ... The couple’s *Queens’ home has been raided*, seized by the US Government and the couple have been granted bail in the sum of FJ\$500,000 (US\$250,000). They will appear in court again in December.
- 30 10. Paragraph 10 ... *The raid also netted in four Fijian men who were living in the house with expired visas. One of the four included a rugby player.*
11. Paragraph 11 ... Arrangements are being made to deport the four home.
- 35 12. Paragraph 12 ... PACNEWS says Mrs Rabuka and her two sons were not arrested in the NYPD raid. *Mrs Rabuka has sought the assistance of the Fiji Mission in finding alternative accommodation* for her children.
13. Paragraph 13 ... It is not clear whether the *Fiji Mission could meet such requests* and if such assistance have indeed been provided.
- 40 14. Paragraph 14 ... A senior government official in Suva told PACNEWS *that this is not the first time the couple have had problems with the law.* The official said Salote Cakobau had similar problems in Vanuatu and Geneva while working for the United States.
- 45 15. Paragraph 15 ... She has also worked for the International Monetary Fund in Washington DC.

C. Plaintiffs’ evidence

The Plaintiffs testified that the article intended and referred to both of them. At no time the Defendants inquired from the Plaintiffs to determine the
50 “truthfulness, authenticity and accuracy of the defamatory statement and allegations contained” in the article which they published. They failed to advise

other newspaper editors as to the libellous or slanderous publication made by them. The libel was repeated in *The Fiji Times* newspaper of 4 November 2000.

The Plaintiffs had requested *The Daily Post* and its editor in particular to withdraw and/or retract the alleged defamatory allegations against them but they
5 have neglected and/or refused to do so.

They further testified that the Defendants “have failed in their duty as editors, reporters and publishers to report fair, honest and true story and in doing so they have caused damage to the Plaintiffs through this negligent act on their part”.

10 The Plaintiffs testified that the allegations were false and malicious in each and every respect. They have been defamed as people read and talk about what appeared in the newspaper.

The true facts are that at the relevant time the second Plaintiff (P2), the wife of the first Plaintiff (P1), was in Fiji and not in New York.

15 She did not seek assistance for alternative accommodation or any other assistance from the Fiji mission.

She was never caught in the house raid. She had no knowledge of or had any part or connection whatsoever in the alleged green card racket. She was never found in the home raid made by the New York Police Department.

20 The Plaintiffs say that the said article referred to and were understood to refer to both the Plaintiffs as members of one family.

They say that the *Article* has caused them great harm implicating that they were involved in the selling of green cards; that they are untrustworthy, dishonest and money making racketeers involved in the green card scam; that they are
25 involved in the alleged migration and green card racket as they were using the same home for accommodation. When Mrs Rabuka was not even in New York how could she have been with her children and why would she seek assistance from Fiji mission? The *Article* implied that they are all of ill repute and have the character and propensity to be involved in such rackets and problems with the
30 law; that they are not to be trusted even though they both hold high positions in the government and that Mrs Volau Rabuka was caught in the raid when she was not even there.

D. Defendants’ defence

35 Although the Defendants filed a statement of defence through their solicitors, they did not adduce any evidence during the trial.

In the defence filed they admit that the article was published but they deny that they bear defamatory meaning. They deny that the Plaintiffs were injured in their reputation. *Alternatively*, they say that in so far as “the words complained of
40 consist of statement of fact, they are true in substance and in fact and in so far as they consist made in good faith and without malice on the said facts which are a matter of public interest”.

The learned counsel for the Defendants says that it is not disputed that “Mrs Rabuka was not in New York at the time of the raid”. Other facts which are
45 not in dispute are: (a) a raid actually took place; (b) the children were at the house at the time of the raid; (c) Ratu Seru Cavuilati and his wife Salote Cakobau were involved in a green card racket, (d) the source of the newspaper article was PACNEWS and (e) the Defendants published the article.

50 The Defendants’ main contention is that the words in the article when read as a whole are not defamatory either because the words themselves in their natural meaning are not defamatory or if defamatory, do not refer to the Plaintiffs.

E. Determination of the issue

As far as the trial goes the evidence that I have on oath is the evidence of the Plaintiffs only. The Defendants adduced no evidence apart from filing a statement of defence. It is to be noted that the Plaintiffs were cross-examined by the learned
5 defence counsel.

As ordered both parties made useful written submissions for court's consideration.

Both the Plaintiffs testified as to the effect the article had upon them as already
10 stated hereabove and as stated in detail in their evidence.

Despite having been written to before the commencement of this action, the Defendants did not even apologise for publishing the *Article*. There appears to be an element of recklessness in the publication of the libel. There is no doubt that the Plaintiffs have suffered greatly by this irresponsible publication.

15 (i) *The principles of law — What constitutes defamation?*

The onus of proof is on the Plaintiffs to prove that the alleged publication was defamatory of them.

On the evidence before me and on the authorities, I have no doubt whatsoever
20 that the words used in the article were capable of bearing a defamatory meaning.

It was said by *Smith MR* in *Sadgrove v Hole* [1901] 2 KB 1 at 4 that:

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

To establish a cause of action in defamation it must be shown that the defamatory words of and concerning the Plaintiffs have been *published*. There are three aspects to this requirement, namely, (a) the nature of defamatory statement; this I have already stated hereabove; (b) the way in which it refers to the Plaintiff; this
30 has already been done; and (c) the means by which it was published; here it was through the newspaper as already stated.

A defamatory statement has been defined as one that is of a kind likely to lead ordinary decent folk to think less of the person about whom it is made. A statement is sufficient if he or she is dishonoured:
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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: Balkin and Davis, *Law of Torts*, p 558.

It falls within the province of the judge to give his interpretation of defamatory
40 statements and he does that in the way that an ordinary reasonable person would; in the:

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 and Davis, pp 562–3.

The defamatory statement must refer to the Plaintiff. If it is defamatory, liability in defamation is imposed irrespective of the actual intention of the Defendant: *E Hulton & Co v Jones* [1910] AC 20. All that is important or relevant is that:
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some ordinary reasonable people reading the publication would understand it to refer to the Plaintiff: Balkin and Davis.

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It is accepted that it is essential to know what the actual words are and on which the Plaintiffs frame their claim and everything may turn on the form of words. What the actual words are have already been stated hereabove.

The next thing is to see what those words would convey to an ordinary man. How an “ordinary man” looks at them is very well stated by *Lord Reid* in the classic judgment in *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 258–260; [1963] 2 All ER 151 at 154 as follows:

10 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
15 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 libellous meaning at all, and undoubtedly *it is the judge's duty to rule on that*.

20 There is no doubt that the *article* refers to the Plaintiffs by their names and the *Article* does in fact and will lead reasonable people, who know the Plaintiffs to the conclusion that it does refer to them.

25 One of the guiding principles on which the court has approached the task of deciding the meaning to be attributed to the words used is that:

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: per Neill LJ in *Gillick v British Broadcasting Corporation* [1995] TLR 527 at 528

30 In this case whether the words complained of are capable of conveying a defamatory meaning is a question of law for the court to determine. If it does then the court does decide whether in fact it was conveying a defamatory meaning. In *Capital & Counties Bank Ltd v George Henty & Sons* [1882] 7 App Cas 741 *Lord Selbourne* at 745 said:

35 *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 libellous sense.*

40 On the aspect of “natural and ordinary meaning” in *Gatley on Libel and Slander*, 7th Ed, at [93] the authors state and it is apt:

45 Words are normally construed in their natural and ordinary meaning, ie 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”.

(ii) Damages

50 On damages in defamation, I have dealt with this subject at some length in *Air Fiji Ltd v Shandil* [1999] FJHC 175 and at the risk of being lengthy but for completeness reiterate the authorities hereunder.

Since the *Article*, as I find, has proved to be defamatory of the Plaintiffs they are entitled to the remedy in the form of award of damages.

I shall now consider what damages should be awarded.

5 Damages in defamation are awarded generally to compensate the Plaintiff for the injury done to his or her reputation.

Apart from assessing damages on a compensatory basis, in some circumstances exemplary (or punitive) damages can be awarded.

The Plaintiffs have claimed compensatory (including aggravated) damages and exemplary damages of \$200,000 as well as general damages.

10 **Compensatory damages — What should the award be?**

As stated by *Duncan and Neill on Defamation*, 1978 ed, p 130 (*Neill*) 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”: at [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 Blackburn in Livingstone v Rawyards Coal Co as follows:

20 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.

25 In defamation cases, as compared to actions for personal injuries where awards for personal injuries for pain and suffering and loss of amenity have achieved a measure of uniformity, awards, however, in defamation do not approximate to any conventional scale: *Neill*.

30 The nature of damages and the purposes for which it is awarded has been well expressed by Windeyer J in *Uren v John Fairfax and Sons Pty Ltd* (1966) 117 CLR 118 at 150; [1967] ALR 25 thus and is worth noting:

35 *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.*

40 *This 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 libelled 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”.* (emphasis added)

45 **Factors considered in awarding compensatory damages**

50 As stated in *Neill* [18.09] the factors which are to be taken into account in assessing damages, apart from the “seriousness of the libel is of course always a relevant consideration, the other factors to be considered are: (a) special

damages; (b) injury to the plaintiff's feelings including aggravating factors; (c) extent of the publication; and (d) mitigating factors".

The factors relevant in considering the measure of damages in defamation cases have been held as follows in the *Singapore Court of Appeal* case of *Tang Liang Hong v Lee Kuan Yew* [1998] 1 SLR 97 (also reported in *Commonwealth Law Bulletin* — January and April 1998, p 195):

10 *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; Associated Newspapers Ltd v Dingle* [1964] AC 371; [1962] 2 All ER 737, *Cassell & Co Ltd v Broome* [1972] AC 1027; [1972] 1 All ER 801 and *John Fairfax and 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; *Sucliffe v Pressdram Ltd* [1991] 1 QB 153; [1990] 1 All ER 269, *Rantzen v Mirror Group Newspapers Ltd* [1993] 4 All ER 975; [1994] QB 670 and *Carson v John Fairfax and Sons Ltd* (1993) 178 CLR 44; 113 ALR 577 followed.

20 It is said that "a publication in a national newspaper or by means of a television or radio may lead to a very substantial award because the defamatory material is likely to come to the notice of a very large number of people ...": *Neill*, pp 14, 25 18.

Is this a case of exemplary damages?

I shall now consider whether *exemplary damages* should be awarded in this case or not. On the aspect of "exemplary damages", particularly its nature and in what circumstances it is awarded, *Lord Devlin* has dealt with it quite extensively in the *House of Lords* in *Rookes v Barnard* [1964] AC 1129 at 1221–31; [1964] 1 All ER 367 (*Rookes*).

I refer to the salient features of the exemplary principles as stated by Lord Devlin. He said (at AC 1221):

35 *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 ... (emphasis added)*

It was held in *Rookes* at AC 1131:

40 *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 authorised 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 behaviour 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 exemplary 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).*

Lord Devlin said that the three considerations stated above “should always be borne in mind when awards of exemplary damages are being considered”. I have come to this conclusion mainly because I intend to award adequate sum as compensation sufficient to punish the Defendants. Also because it is highly unlikely that this careless act would be repeated as being a case of “once bitten twice shy”. When I say this I should not be understood as departing from the principle stated below by *Sir Thomas Bingham MR* in *John v MGN Ltd* [1997] QB 586; [1996] 2 All ER 35 at 58 (*John*):

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.

As to when this damages is awarded has been stated by the Fiji Court of Appeal as follows in *James Arthur Rennie Borron v Fiji Broadcasting Commission* [1982] FJCA 7 at 5:

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.

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 passage in *Manson v Associated Newspapers Ltd* [1965] 1 WLR 1038; [1965] 2 All ER 954 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.

In considering whether or not to award exemplary damages I have taken into consideration the following guideline from the judgment of *Lord Reid* in *Cassell & Co Ltd v Broome* [1972] AC 1027; [1972] 1 All ER 801; [1972] 2 WLR 645 (*Broome*):

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 then 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 realise that the compensatory damages are always part of the total punishment.

Applying the principles applicable to “exemplary damages” to the facts and circumstances of this case, I do not consider it to be a case of award of exemplary damages.

Conclusion

To sum up, on the evidence before me and applying the principles applicable to a case of this nature, I find that the statements in the *Article* are defamatory of the Plaintiffs.

I find that it is published “of and concerning” the Plaintiffs and therefore the defamatory statements contained in the *Article* are actionable. The Plaintiffs are both mentioned by name. The authorities even go to the extent of stating that they “need not be specifically mentioned or identified, nor need there be so much as a ‘peg or pointer’, so long as the tenor reasonably implicates him”.: John G Fleming, *The Law of Torts* by, 9th ed, 1998, p 590.

Any statement which tends to lower the Plaintiffs, to whom the *Article* refers, in the estimation of right-thinking persons generally or bring them into hatred, ridicule or contempt is defamatory: *Broome*.

This is what has happened in this case.

Look at the circumstances surrounding the facts of this case. Here is a case of two well-known professional people, being husband and wife, holding responsible positions for many years in government, having been ridiculed in public without rhyme or reason by the Defendants publishing the said *Article*.

The Plaintiffs’ evidence on oath have not been rebutted and I find that the Defendants were reckless in publishing the *Article*. They did not give any thought to what damage the statements in the *Article* will cause the Plaintiffs. They did not check with the Plaintiffs as to the truth of the statements which they could have quite easily done. What is most damaging is the false statement that Mrs Rabuka was “found in home raid” when in fact she was not even in New York where the raid took place. She was in Fiji at the time.

It is quite obvious that the Defendants were all out to disgrace the Plaintiffs who are both law-abiding citizens who held and are holding very senior and responsible positions in two separate government departments. The P1 Mr S Rabuka was as is well-known and as the *Article* states a diplomat in New York before. Why drag them both in the front page of their newspaper in bold and large letters by saying *Ex-diplomat’s wife found in home raid?*. Why give such a false story when she was home in Fiji?

The Defendants should have known and as the law is:

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: Fleming, p 596.

It is further stated:

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 if in fact he did both: *Breast v Wilson* [1935] VLR 113; (1934) 51 CLR 276 at 278; [1935] ALR 51 per Dixon J.

The authorities even go so far as to say that “not only is the intention of the writer immaterial in considering whether the meaning of his statement is defamatory, but it is equally irrelevant that he did not mean to refer to the Plaintiff at all”: Fleming, 596.

5 Whether there was malice or not in the publishing of the article “remains of importance today only for the purpose of defences of qualified privilege and fair comment or a reason for awarding exemplary damages”: Fleming. It is to be borne in mind that ‘in 1825 it was finally settled that absence of ill-will against the person defamed and honest belief in the truth of the allegation did not excuse’: *Bromage v Prosser* (1825) 4 B & C 247; 107 ER 1051.

10 Therefore, although the Defendants’ counsel denies that the alleged article is defamatory, nevertheless on the authorities and the facts and circumstances of this case, the Defendants have made themselves liable for the statements in the article pertaining to the Plaintiffs.

15 In coming to the conclusion that the statements were defamatory, I have taken into consideration the whole context of the Article from which the alleged libel is extracted: *Pacific Daily (Fiji) Ltd v Leonard Gray Usher* [1971] 17 FLR 122.

Having found that the Article is defamatory of the Plaintiffs the next question is what damages ought to be awarded in all the circumstances of this case.

20 Assessing damages for defamation is fraught with difficulties and the general picture that presents itself in such a case can be obtained from the speech of Lord Atkin in *Ley v Hamilton* (1935) 153 LT 384 where he said:

25 *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 libels 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.* (emphasis mine)

As stated, D1 is the publisher of the newspaper, D2 was general manager and D3 was the acting editor at the time of the publication of the libel.

35 As far as liability is concerned, the principles of vicarious liability are as much applicable to defamation as to any other act. On this *Gatley on Libel and Slander*, 9th ed states:

40 *First, that where A procures or authorises B to commit a tort, A is liable with B as a joint tortfeasor. Secondly, that where there is a relationship in the nature of employment (commonly referred to as that of “master and servant” and signifying a contract of services) between A and B “in the course of that employment B (the servant) commits a tort, A is vicariously liable for B’s act”.*

Hence all the Defendants are liable for the defamation for “it is a fundamental principle of English law that no tortfeasor can excuse himself from the consequences of his acts by setting up that he was acting only as the agent of another” per Lord Moulton in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 131.

45 The picture that is portrayed by the Article is as the Plaintiffs allege or/and imply: “(a) that they were involved in the selling of green cards and migration racket, (b) that they had criminal intentions and are untrustworthy, dishonest and money-making racketeers involved in the green card scam, (c) article implicates,

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imputes and insinuates the Plaintiffs with those involved in the alleged migration and green card racket because the same house was used for accommodation, (b) the article insinuates and imputes that they are of ill repute and have the character and propensity to be involved in such rackets and problems with the law”.

5 The libel I find was a gross imputation upon the Plaintiffs who held and still hold high positions in Fiji in their respective government ministries whose character was unassailed. The Defendants’ counsel admitted that certain imputation (that Mrs Rabuka was there at time of raid) was incorrect.

10 The Defendants have stated that the news was obtained from ‘Pacnews’, but this will not absolve them from liability. Here the Defendants were not careful and accurate as they should have been. The publisher did not even offer to public a correction and apology despite being written to in this regard. They have been careless and did not take the trouble to correct the errors and did not stop the publication by another newspaper.

15 In arriving at a figure for the award of damages various factors are relevant in mitigation of the amount. Here there was no mitigating factors. No apology was published and if it was the Defendants could have sought to reduce the award of damages.

20 *Aggravated damages* could be awarded and to justify such an award the conduct of the Defendants has to be in some way unjustifiable, improper or lacking in bona fides. Also to publish material which the Defendants knew to be false or ought to have known after due inquiry will amount to such conduct and this was the situation in this case. I have taken this into account in assessing

25 compensatory damages.

It is to be noted that although the Defendants filed a statement of defence they did not adduce any evidence to be cross-examined which goes to show that there is no defence. 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

30 accuracy and the Plaintiff’s name was included”: *Kiam v Neill (No 2)* [1996] EMLR 493 (*Kiam*).

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

35 *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.*

It is also pertinent to note what *Sir Thomas Bingham MR* said in *John*

40 at All ER 48. He said:

45 *The most important factor is the gravity of the libel; the more closely it touches the plaintiff’s person, integrity, professional reputation, honour, 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 of people.*

Quantum of damages and Order

On quantum of damages to be awarded both counsel referred the court to a number of cases. Some are very old cases and they are not a guide to present day

50 situations. In any case each case has to be considered in the light of the facts of a particular case.

In determining the quantum the factors and principles pertaining to defamation as I have stated hereabove should be borne in mind. Just as it is difficult to measure damages in ‘pain and suffering’ in personal injury cases so it is to some degree a difficult exercise to arrive at a figure which would be a sufficient
5 compensation to the injury caused to the plaintiffs in their senior employment with the Government of Fiji and also for being ridiculed in public through the publication.

In the English case of *Kiam* the award of 45,000 pounds damages was not excessive where the publication of a libel was irresponsible and where no effort
10 was made to check the report’s accuracy.

Here the assault on Mrs Rabuka’s reputation was altogether untrue. They were very damaging statements in the *Article* against both the Plaintiffs.

Granted, that the newspaper companies, editors of newspapers and reporters like to enjoy freedom of speech and publication, they cannot ignore and be
15 oblivious to the law as to “defamation”. Newspapers have fallen foul of the law quite often in this country and they will pay dearly for their recklessness in their reporting. They will not be able to get away with \$200 as damages anymore in this day and age. So they should be mindful of the law or suffer the consequences. I say all this because I have seen over a long period of years that there is a
20 propensity and a temptation for people in the media business to indulge in misreporting.

For these reasons, on the facts and circumstances of this case and bearing in mind the law as to damages the Plaintiffs are entitled to *compensatory damages*.

25 **Order**

I assess *compensatory damages* in the sum of \$40,000 (*forty thousand dollars*) to be paid to *Mr Sakiusa Rabuka* P1 and the sum of \$38,000 (*thirty-eight thousand dollars*) to be paid to *Mrs Volau Rabuka* P2 making a total sum of
\$78,000 (*seventy-eight thousand dollars*).

30 There will therefore be *judgment* for the total sum of \$78,000 (*seventy-eight thousand dollars*) against the Defendants payable to the Plaintiffs with costs which I fix in the sum of \$700 but no interest as it has not been pleaded.

Application granted.

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