

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

COMMONWEALTH OF DOMINICA

DOMHCVAP2018/0006

BETWEEN:

**[1] MATHIAS PELTIER
[2] WEST INDIES COMMUNICATION ENTERPRISES LTD.
[3] ANGELO ALLEN**

Appellants

and

CLEVILLE MILLS

Respondent

Before:

The Hon. Mde. Vicki Ann Ellis
The Hon. Mde. Esco L. Henry
The Hon. Mr. Gerard St. C. Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Cara Shillingford for the Appellants
Ms. Heather Felix-Evans for the Respondent

2025: September 16;
2026: October 20.

Civil Appeal – Defamation – Assessment of Damages – Missing transcript – Whether absence of transcript or Master’s notes prevents fair appeal – Freedom of Expression and Public Interest - Existing reputation – Evidence of claimant’s reputation admissible in mitigation - Aggravated Damages – Malice – Affirmative evidence required to support finding of malice used to increase damages - Separate publications of defamation – Separate awards - Proportionality – Whether the separate and aggregate awards were disproportionate, excessive or duplicative - Appellate Interference with Award – Reassessment of damages – Substituted awards

This appeal concerns the assessment of damages arising from defamatory statements uttered by unidentified callers to two live broadcasts on Q95 FM radio station in the Commonwealth of Dominica. The broadcasts were aired on 2nd January 2015 during a

programme hosted by Mr. Mathias Peltier ('Mr. Peltier') and on 24th November 2015 during a programme hosted by Mr. Angelo Allen ('Mr. Allen'). The broadcasts occurred against the background of disciplinary proceedings initiated by the Police Service Commission ('PSC') concerning the disappearance of US\$16,000.00 in public funds while those funds were under the supervision of Mr. Cleville Mills ('Mr. Mills' or 'the respondent') at the Marigot Police Station. Mr. Mills was, as a result, charged with five disciplinary offences due to his inability to properly account for the missing cash. In 2010, the PSC found him guilty of all but one charge and imposed disciplinary sanctions. On appeal, the Public Service Board of Appeal ('PSBA') quashed the PSC's decision in September 2014 because the proceedings had not afforded Mr. Mills a fair hearing. However, the PSBA did not make a positive finding that the underlying allegations were factually untrue. Therefore, it became part of the public discussion surrounding the missing funds which led to the two publications on Q95 FM radio station.

Subsequent to the two publications on Q95 FM radio station, Mr. Mills filed a suit in the High Court on 31st December 2015 pleading that the statements made by the unidentified callers during the programmes hosted by Mr. Peltier and Mr. Allen and transmitted by West Indies Communication Enterprises Ltd ('WICE'), falsely accused him of stealing the missing monies and engaging in criminal conduct while he was serving as a police officer and rendered him unfit to continue serving in that office. Mr. Mills alleged that the publications gravely damaged both his personal reputation and his professional standing within the Police Force and the wider community. He sought damages and an injunction to restrain the appellants from repeating the broadcasts. By judgment dated February 2018, the Master accepted that the broadcasts were defamatory of Mr. Mills and concluded that they had caused serious injury to his reputation. In respect of the first publication, Mr. Mills was awarded damages in the sum of \$80,000.00 against Mr. Peltier and WICE, and in relation to the second publication \$80,000.00 in damages against Mr. Allen and WICE, inclusive of an unspecified aggravated damages component, together with prescribed costs.

Being dissatisfied with the Master's decision, the appellants filed this appeal on 12th July 2018 seeking a rehearing of the assessment or alternatively, an order quashing or reducing the Master's award of \$160,000.00 in damages. The appellants contended that the Master erred by a) failing to give adequate weight to Mr. Mills' pre-existing bad reputation arising from the disciplinary proceedings; b) finding malice on the part of the appellants; c) awarding aggravated damages; d) not according proper significance to the public interest context of the broadcasts; e) improperly assessing the evidence relating to Mr. Mills' reputation; f) making manifestly excessive and disproportionate awards; g) not attaching adequate weight to constitutional freedom of expression; and h) making separate awards which produced an impermissible duplication of compensation. They also raised a preliminary issue regarding the absence of the transcript and Master's notes.

The respondent filed a counter-notice of appeal on 27th July 2018. However, it was withdrawn. It was therefore dismissed.

The issues which arose for determination on appeal were therefore: 1) whether the absence of the Master's notes and the transcript prevents a fair appeal; 2) whether the Master erred by not attaching sufficient weight to constitutional freedom of expression and the public

interest aspects of the broadcasts; 3) whether the Master directed herself as to Mr. Mills' pre-existing reputation and the injury caused by the publications; 4) whether the findings of malice and award of aggravated damages were supported by the evidence and 5) whether the separate and aggregate awards were disproportionate, excessive or duplicative.

Held: allowing the appeal in part, dismissing the counter appeal and making the orders set out at paragraph [176] of this judgment that:

1. A retrial is not ordered merely because a transcript is unavailable. The Court in such a case is required to consider whether having regard to the grounds of appeal and the available record, the appeal can be fairly determined without the missing material. The appellant must identify material prejudice or a realistic risk of miscarriage of justice before the appellate court will order a retrial. In some cases, all that is necessary to complete the record would be the retaking of some of the more important evidence, but to discard all that has been done to give the litigant an untrammelled right to begin again and present his case de novo is not usually just or reasonable. In this appeal, the grounds raise mixed questions of fact and law, regarding existing reputation, aggravated damages, separate publications and proportionality, which can be resolved from the existing materials without needing the transcript or Master's notes. The appellants filed no formal application on the transcript issue and did not include it as a ground of appeal, but the Court addressed it for completeness.

Peverley v Arctic Construction Ltd 1966 CanLII 446 (BC CA), 56 DLR 701 applied; **Garry Roy and Charles Legér v Assumption Mutual Life Insurance Co** [2003] NBCA 21 applied; **W. Eric Whebby Limited v Doug Boehner Trucking & Excavating Limited et al** [2006] NSCA 129 applied; **Morrison v Aldridge** [1933] 2 D.L.R 624 applied.

2. The common law recognizes that a fine balance must be maintained between on the one hand, a person's right to exchange and express ideas about public figures freely and the corresponding right of that public figure not to have his reputation unjustifiably destroyed in the process. The essential point is that, wherever the balance is struck, the rights to freedom of expression and to express political views do not protect malicious falsehoods. No constitutional challenge to the applicable law was pleaded or adjudicated before the Master, and none can be raised on this appeal, which concerns only assessment of damages. However, the public interest concern is a material consideration in this case. Malicious falsehoods do not mean that proof of express malice is a necessary condition of liability in the present proceedings. It confirms simply that the constitutional importance of public debate does not require the court when assessing damages to treat an unqualified allegation of criminal dishonesty as equivalent to criticism, comment or political ridicule. Therefore, the appellants' constitutional argument fails, but the public interest context remains relevant as a part of the overall assessment of damages.

Silkin v Beaverbrook Newspapers and another [1958] 1 WLR 743 followed; **Phillip Edward Alexander v Andrew Gabriel** [2026] UKPC 7 followed; **New York Times Co. v Sullivan** 376 US 254 (1964) considered.

3. Evidence of the claimant's bad reputation is admissible in mitigation of the damages to be awarded but must be confined to the sector of the claimant's character relevant to the libel. Existing reputation is always relevant because damages are awarded only for the diminution actually caused by the defamatory publication. If a claimant already possessed a damaged reputation in relation to the subject matter of the defamatory publication, that fact is capable of materially affecting the assessment of damages. A publication cannot destroy what has already been substantially impaired. However, it must be recognized that such publication may aggravate or extend the existing injury. Reputational harm is assessed by reference to the claimant's actual standing in the relevant community at the date of publication. Where harm arises from separate publications, the court must, so far as possible, isolate the damage caused by the publication under consideration. A bad reputation cannot be attributed to a claimant merely because he was the subject of earlier defamatory publications. Although the PSC proceedings and their outcome were widely known, the equally publicised PSBA decision setting aside the PSC's determination would have vindicated Mr. Mills and restored his image and reputation. The Court found no factual or legal basis for finding that his reputation was not unblemished at the relevant times.

Associated Newspapers Ltd v Dingle [1962] 2 All ER 737 followed; **Greenlands Ltd v Wilmshurst and another** [1913] 3 KB 507 followed; **Scott v Sampson** (1882) 8 QBD 491 applied.

4. Aggravated damages are justified where the defendant's conduct has increased the injury to the claimant's feelings or dignity. Malice is a distinct legal concept which may involve knowledge of falsity, reckless indifference to the truth, or the use of an occasion for a dominant improper purpose. Where liability has already been established, a finding of malice used to increase damages must rest upon affirmative evidence. Where the appellants' substantive defences were struck out before trial, the distinction between procedural failure and malicious conduct is critical. However, the reasons outlined by the Master do not clearly explain why the conduct of each appellant independently warranted aggravated damages, nor do they contain separate findings identifying the conduct attributable to each. The award cannot be justified merely by the striking out of the defences or by the appellants' decision to contest quantum; it may, however, be supported by conduct associated with the publication and its aftermath that objectively intensified the claimant's humiliation and distress. The finding of express malice was not supported by the evidence, though the failure to correct the allegations or issue apologies supports a modest aggravated component. The Master's reasons did not distinguish adequately between ordinary and aggravated damages or identify the aggravated component of either award. The appellants' failure to correct or retract the allegations or apologise after formal demand did not establish express malice, but was capable of increasing Mr. Mills' injury and justified a modest aggravated

component. The Court reassessed the damages and awarded \$5,000.00 in aggravated damages for each publication.

Cassell & Co Ltd v Broome [1972] All ER 801 applied; **John v MGN Ltd.** [1996] All ER 35 applied; **Elwardo Lynch and BDS Ltd v Ralph Gonsalves** SVGHCVAP2009/002 consolidated with SVGHCVAP2009/004 (delivered 21st June 2011, unreported) followed.

5. An appellate court does not intervene in an assessment of damages in a defamation case merely because it would itself have arrived at a different figure. In assessing damages for injury to reputation, the most important factor is the gravity of the libel. In this case, it is not disputed that the libel was grave. The nature of a live call-in programme on an established radio station permits the reasonable inference of publication to a material audience. Even though the precise number of listeners was not proved, the uncertainty as to exact coverage would temper, but not eliminate the substantial award by the gravity of the accusation. The widely publicised PSBA decision setting aside the PSC's determination would have vindicated Mr. Mills and restored his image and reputation. The Court found no factual or legal basis for treating his reputation as blemished at the relevant times. Taking account of the gravity of the accusation, the prior controversy, the unquantified extent of publication, and the limited aggravating conduct proved, the Court substituted damages of \$65,000.00 for the first publication and \$40,000.00 for the second.

Lall & National Media Publishing Co Ltd v Ramsahoye [2016] CJ 18 (AJ) applied; **Flint v Lovell** [1935] 1 KB 354 applied.

6. Every defamatory publication gives rise to a separate cause of action, and a claimant is entitled to recover damages in respect of each actionable publication. This reflects that each publication independently injures the claimant's reputation and potentially reaches a different or additional audience. The publications in this case are to similar effect and although uttered on different dates would have been published in the same environment, no doubt with like consequences save that the second publication covered a smaller period than the first. The appellants' responses have been consistent in relation to both publications in that they failed to retract the publications or offer an apology. The second publication, made by a different host after a substantial interval, was a separate cause of action and renewed and reinforced the accusation. Its award had to be confined to the additional injury it caused and avoid compensating again for the full harm caused by the first broadcast. WICE and Mr. Peltier are jointly and severally liable for the first publication; WICE and Mr. Allen are jointly and severally liable for the second. The Court assessed damages for the first publication at \$65,000.00, comprising \$60,000.00 in ordinary compensatory damages and \$5,000.00 in aggravated damages. It assessed damages for the second publication at \$40,000.00, comprising \$35,000.00 in ordinary compensatory damages and \$5,000.00 in aggravated damages. The lower ordinary award for the second publication reflects the sequential and separate nature of the injury, not any reduction in the gravity of

the libel. The Master's prescribed costs order in the court below was affirmed, with costs to be calculated by reference to the substituted awards.

Phillip Edward Alexander v Andrew Gabriel [2026] UKPC 7 applied; **Phillip J. Pierre v David Vitalis et al** SLUHCV2011/0667 & SLUHCV2011/0868 (delivered 21st June 2017, unreported) followed; **Mathias Peltier & WICE v Matthew LeBlanc** DOMHCVAP2020/0006 (delivered on 18th April 2024, unreported) followed; **Sandiford Ruel Edwards v Dennis Canning** GDAHCV2020/0411 (delivered 24th January 2022, unreported) followed; **Roxanne Linton v Louisiana Dubique et al** DOMHCV2011/0062 (delivered 15th April 2013, unreported) followed; **Dr. Philbert Aaron v Abel Jno, Baptiste** DOMHCV2013/0015 (delivered 28th March 2014, unreported) followed; **Victoria Alcide v Helen Television System Limited & Radio St. Lucia Company Ltd** SLUHCV2011/0398 (delivered 25th October 2017, unreported) followed; **Rishatha Nicholls v Arnhim Eustace** SVGHCV2015/0240 and SVGHCV2015/0242 (delivered 30th September 2019, unreported) followed; **Agnes Francis v Richard Frederick et al** SLUHCV2020/0203 (delivered 18th December 2023, unreported) followed.

JUDGMENT

- [1] **HENRY JA:** This appeal concerns the assessment of damages arising from defamatory statements uttered by unidentified callers to two live radio broadcasts on Q95 FM radio station in the Commonwealth of Dominica. In substance, the unidentified callers stated that Mr. Cleville Mills ('Mr. Mills' or 'the respondent') had stolen US\$16,000.00 from the Marigot Police Station and had afterwards been promoted. At the material times, Mr. Mills was a gazetted police officer holding the rank of Inspector in the Dominica Police Force.
- [2] Mr. Mills successfully sued Mr. Mathias Peltier and Mr. Angelo Allen, the hosts of the radio programmes on which the publications were made as well as West Indies Communication Enterprises Ltd. (WICE), the owner and operator of the radio station, (collectively 'the appellants'). In respect of the first publication, Mr. Mills was awarded by the learned Master, damages in the sum of \$80,000.00 against Mr. Peltier and WICE, and in relation to the second publication \$80,000.00 in damages against Mr. Allen and WICE, together with prescribed costs.

- [3] The appellants by their Notice of Appeal filed on 12th July 2018 seek a rehearing of the assessment or alternatively, an order quashing or reducing the Master's award of \$160,000.00 in damages. Mr. Mills filed a Counter-Notice of Appeal on 27th July 2018 challenging aspects of the Master's decision regarding the damage to his reputation. He has since withdrawn it¹. The Counter-Notice of Appeal must therefore be dismissed. Mr. Mills wholly supported the Master's judgment.
- [4] The broadcasts occurred against the background of disciplinary proceedings initiated by the Police Service Commission ('PSC') concerning the disappearance of US\$16,000.00 in public funds while those funds were under Mr. Mills' supervision at the Marigot Police Station. The disappearance of the monies was said to have been discovered on 29th November 2006 when Mr. Mills was handing over responsibility of the district police station to another inspector of police. Mr. Mills was as a result charged with five disciplinary offences due to his inability to properly account for the missing cash. The charges were for failure to perform duty properly, two counts of neglect of duty, corrupt practice in failing to account for the missing cash, and corrupt practice in failing to make a prompt and true return of it.
- [5] In 2010, the PSC found Mr. Mills guilty of all but one charge and imposed disciplinary sanctions. On appeal, the Public Service Board of Appeal ('PSBA') quashed the PSC's decision in September 2014 (four years after the PSC's decision) because the proceedings had not afforded him a fair hearing. The PSBA did not, however, make a positive finding that the underlying allegations were factually untrue. Its decision was published in the Dominica Police Force Order dated 11th October 2014. It became part of the public discussion surrounding the missing funds.
- [6] The matter attracted considerable public attention because it concerned the accountability of a senior police officer entrusted with public funds. The disciplinary process and its outcome therefore entered the public domain independently of the broadcasts which subsequently gave rise to these proceedings.

¹ See para. 2 of the respondent's skeleton submissions filed on 8th April 2025.

[7] The first publication was broadcast on 2nd January 2015 during a programme hosted by Mr. Peltier. The second publication was broadcast on 24th November 2015 during a programme hosted by Mr. Allen. During those radio programmes persons were permitted to call into the shows and make contributions to the broadcasts by way of public statements that were broadcast live on air. It is those broadcasts, specifically the statements attributed to the callers that formed the basis of Mr. Mills' defamation claim.

[8] Regarding the first broadcast, Mr. Mills complained that Mr. Peltier and WICE broadcast or caused to be broadcast the following statement by an unknown caller:

*"Unidentified caller: '... Matt, the whole regime is corrupt with not godliness in their heart and soul. Law enforcement can't be effective here when they are so corrupt. The high security of the state, which is Dominica Police Force, after Cleville Mills stole the money at the Marigot um Police Station, he was promoted as a thief! Where is the respect for security? Who will guard the guard? Mills was suppose to be demoted after the stealing; how can the police apprehend thieves when the Police Force them are promoted for stealing? Let us be real! You expect civilians to cooperate? Please give me a break, thank you very much.'"*²

[9] As to the second, it was alleged that Mr. Allen and WICE broadcast or caused to be broadcast the following by an unidentified caller:

"Unidentified caller: 'Angelo, to deal with that Cleville Mills guy, Angelo, I mean, I'm not upholding criminal activities but don't you realize that since Mr. Skerit and his government have had the reigns of power in Dominica, you have seen an increase in criminal activity, Angelo, an increase in robbing, cheating, stealing, an increase in drug trafficking, Angelo and we saw where this Cleville Mills guy stole sixteen thousand dollars US and he got promoted, Angelo, what do you expect to happen right now, Angelo?'"

[10] As a result, Mr. Mills filed a claim in the High Court on 31st December 2015 pleading that the statements made by the unidentified callers during the appellants' radio programmes, transmitted by WICE and hosted by Messrs. Peltier and Allen falsely accused him of stealing the missing monies and engaging in criminal conduct while

² See para. 8 of Statement of Claim filed on 31st December 2015; At pg. 53 of the Record of Appeal.

he was serving as a police officer and rendered him unfit to continue serving in that office.

- [11] Mr. Mills pleaded that the broadcasts conveyed, in their natural and ordinary meaning and by innuendo that he had stolen the missing funds; he was corrupt and dishonest; guilty of criminal misconduct; unfit to continue serving as a police officer; and that he had escaped criminal responsibility through improper means. He alleged that the publications gravely damaged both his personal reputation and his professional standing within the Police Force and the wider community. He sought damages and an injunction to restrain the appellants from repeating the broadcasts.
- [12] Liability was ultimately determined in his favour after the appellants' pleaded defences denying liability and advancing justification and fair comment as defences were struck out³. This order was not appealed and therefore stands. The substantive defences having been struck out, the proceedings thereafter proceeded to an assessment of damages before the learned Master limited to the issue of the proper measure of damages. Mr. Mills relied on his own evidence and that of witnesses who spoke to his reputation and the effect of the broadcasts.
- [13] The appellants relied on the prior disciplinary proceedings, the public controversy surrounding the missing funds, the public-interest context of the broadcasts, the reach of Q95 FM, and the conduct of the parties. They submitted that any recoverable damages had to be confined to the additional injury caused by the broadcasts and maintained that such damages could not compensate Mr. Mills for reputational damage arising independently from the disciplinary controversy. They sought to demonstrate that Mr. Mills' reputation had already been materially affected by the disciplinary proceedings and by the initial extensive publicity surrounding the disappearance of the funds. They also relied on the public-interest context in which the broadcasts occurred and submitted that the damages claimed bore little relationship to the actual injury sustained.

³ By order of the Master dated 1st June 2016.

The Master's Decision

- [14] In a judgment dated February 2018, the Master accepted that the broadcasts were defamatory of Mr. Mills and concluded that they had caused serious injury to his reputation. She treated the allegations as serious attacks on Mr. Mills' honesty, integrity and fitness to serve as a senior police officer. In assessing damages, the Master considered the gravity of the allegations, the extent of publication, Mr. Mills' standing as a senior police officer, and what she regarded as the appellants' aggravating conduct before and during the proceedings. She found that the appellants had demonstrated conduct which aggravated Mr. Mills' injury and she therefore awarded damages which included an unquantified aggravated component.
- [15] Being dissatisfied with the Master's decision the appellants filed this appeal challenging the legal basis and quantum of the awards. They advanced eleven grounds of appeal. One ground⁴ was withdrawn by which they contended that the Master erred by striking out the defence of justification. It would therefore be dismissed.
- [16] In summary, the appellants contended that the Master erred by a) failing to give adequate weight to Mr. Mills' pre-existing bad reputation arising from the disciplinary proceedings; b) finding malice on the part of the appellants; c) awarding aggravated damages; d) not according proper significance to the public interest context of the broadcasts; e) improperly assessing the evidence relating to Mr. Mills' reputation; f) making manifestly excessive and disproportionate awards; g) not attaching adequate weight to constitutional freedom of expression; and h) making separate awards which produced an impermissible duplication of compensation. They also raised a preliminary issue regarding the absence of the transcript and Master's notes.

⁴ Ground of appeal (j).

[17] The grounds of appeal may conveniently be condensed into five discrete issues as follows:

- (1) Whether the absence of the Master's notes and the transcript prevents a fair appeal. ('the preliminary issue').
- (2) Whether the Master erred by not attaching sufficient weight to constitutional freedom of expression and the public interest aspects of the broadcasts. ('the freedom of expression and public interest point').
- (3) Whether the Master misdirected herself as to Mr. Mills' pre-existing reputation and the injury caused by the publications. ('the reputation point').
- (4) Whether the findings of malice and award of aggravated damages were supported by the evidence. ('the malice and aggravated damages point').
- (5) Whether the separate and aggregate awards were disproportionate, excessive or duplicative. ('the proportionality point').

The Preliminary Issue – Absence of Transcript and Master's Notes

[18] The audio recording of the assessment and the Master's notebook do not form part of the record of appeal because they are unavailable. The appellants argued that their unavailability precluded a fair appeal. They filed no formal application on this point and did not include it as a ground of appeal. The Court entertained arguments on the point at the hearing and it is therefore addressed for completeness. The audio recordings and the Master's notes of evidence were presumed destroyed during the passage of Hurricane Maria⁵. The appellants contended that the absence of a

⁵ The court takes judicial notice that Hurricane Maria struck the Commonwealth of Dominica on September 18th, 2017 as a Category 5 hurricane causing widespread destruction of government buildings and private structures.

complete transcript impaired their constitutional right of appeal. They submitted that this was reason to allow the appeal and order a retrial.

- [19] Mr. Mills disagreed. He countered that the absence of a transcript does not automatically vitiate appellate proceedings where the issues can fairly be determined on the available record. He relied on certain provisions of the **Civil Procedure Rules 2000** ('CPR') and other authorities.

Appellants' Submissions

- [20] The appellants submitted that the appeal should be allowed in the absence of an available record of what transpired in the Master's court. Without this record they argued, this Court cannot properly review what happened in the proceedings below.
- [21] Citing sections 8(8), (9), and 106 of the **Constitution**⁶ and Part 62 of the **CPR** and referencing bits of correspondence between the parties and the Court, the appellants argued that they have a right to access to justice, including a right to pursue their appeal. They submitted that a retrial would advance the interest of justice. They cited in support **Benedict Alexander v The King**⁷ in which inordinate delay in the trial of an accused was held to infringe his constitutional right to a fair hearing within a reasonable time; and the Canadian case of **Peverley v Arctic Construction Ltd**⁸ where an appeal was allowed and a new trial ordered in the interests of justice, on the basis of the breakdown of the transcript recording machinery. It was held that the appellant could not succeed on the merits of his appeal without the transcript.

Respondent's Submissions

- [22] Mr. Mills submitted that based on the language of CPR 62.12(3) a transcript is not always necessary for the effective prosecution of an appeal where the parties agree

⁶ Commonwealth of Dominica Constitution Order 1978.

⁷ GDACRAP2019/0011 (delivered 26th July 2024, unreported).

⁸ 1966 CanLII 446 (BC CA), 56 DLR 701.

to dispense with it. It was submitted that even where there is no agreement to dispense with the transcript, an appellant is not automatically entitled to a new trial on demand, by virtue of such unavailability of the transcript and absence of the judge's notes. An appellant must go further and satisfy the Court that the unavailability of such records would amount to a miscarriage of justice and deprive him of justice if the appeal proceeds without such records. Mr. Mills cited **Morrison v Aldridge**.⁹

- [23] **Garry Roy and Charles Legér v Assumption Mutual Life Insurance Co**¹⁰ and **W. Eric Whebby Limited v Doug Boehner Trucking & Excavating Limited et al**¹¹ were also cited. Mr. Mills argued that the appellants have put forward no evidence that prosecuting the appeal in the absence of the audio recording and the Master's notes would give rise to a miscarriage or denial of justice. Accordingly, the Court must reject their request for a new trial.

Discussion

- [24] This is a short point. The parties may, pursuant to **CPR 62.9(3)** agree in writing to dispense with the need for the transcript to be included in the record of appeal. The parties in this appeal have made no such agreement. The essential question therefore is whether absent these documents the circumstances of this case justifies setting aside the Master's order and directing a re-trial.
- [25] Section 34(1) of the **Eastern Caribbean Supreme Court (Dominica) Act** ('the Supreme Court Act')¹² empowers this Court on the hearing of an appeal in any civil cause or matter, to set aside the order appealed against and order a new trial, if it appears to the court that a new trial should be held. The provision is directory and confers a discretionary jurisdiction. When exercising a discretionary power, the Court is required to act judicially and seek to further the interests of justice. The case

⁹ [1933] 2 D.L.R 624.

¹⁰ [2003] NBCA 21.

¹¹ [2006] NSCA 129.

¹² Cap. 4.02 of the Revised Laws of the Commonwealth of Dominica.

law relied on by the parties, although not binding, is of persuasive authority and emphasize these foundational principles.

- [26] The learning from **Peverley v Arctic Construction Ltd**, **Morrison v Aldridge**, **Garry Roy and Charles Legér v Assumption Mutual Life Insurance Co**¹³ and **W. Eric Whebbby Limited v Doug Boehner Trucking & Excavating Limited et al** is that a retrial is not ordered merely because a transcript is unavailable. The Court is in such a case is required to consider whether having regard to the grounds of appeal and the available record, the appeal can fairly be determined without the missing material. The appellant must identify material prejudice or a realistic risk of miscarriage of justice before the appellate court will order a retrial.
- [27] Middleton JA in **Morrison v Aldridge** explained that each case must be decided on its own facts and stated that such an appellant must ‘show some special circumstances before the court should go so far as to grant a new trial *simpliciter*. In some cases, all that is necessary to complete the record would be the retaking of some of the more important evidence, but to discard all that has been done, to give the litigant an untrammelled right to begin again and present his case *de novo* is not usually just or reasonable.’¹⁴
- [28] Applying those principles to the instant appeal it is clear that the grounds of appeal raise mixed questions of fact and law, namely the legal relevance of existing reputation, the basis for aggravated damages, the treatment of separate publications and proportionality. Those are issues that can be resolved by having regard to the available materials, without the necessity of having the transcript or Master’s notes.

¹³ [2003] NBCA 21.

¹⁴ At pg. 627.

- [29] In **Samuel Felicien v Stanislaus Modeste**,¹⁵ this Court ordered a new trial where significant portions of the trial judge's notes, including material cross-examination were not available and the proposed reconstruction of the evidence was disputed and unreliable. The appeal depended substantially on challenges to findings of fact, and the Court could not fairly test the judge's decision-making process without a reliable record. That case does not establish that the absence of an official transcript invariably justifies a new trial. In any case, this case is distinguishable. The grounds raise principally legal challenges to the Master's decision.
- [30] The absence of the transcript and the Master's notes does not, without more, invalidate the Master's assessment or entitle the appellants to a rehearing. The relevant question is whether the omissions prevent this Court from determining the particular grounds of appeal fairly and reliably. The record of appeal contains the pleadings, the witness statements of the witnesses who testified before the Master, the parties' written submissions at the assessment and the Master's reasons for her judgment.
- [31] In my opinion, these documents contain adequate materials from which this Court could satisfactorily determine the issues arising on appeal. Although the appellants maintained generally that the missing transcript prevented effective appellate review they identified no particular disputed testimony, concession, credibility findings or procedural issue that prevents this Court from adjudicating the grounds actually pursued. The principal grounds concern errors of legal principle and the adequacy of the Master's stated reasons. Those matters can be resolved on the existing record.
- [32] I am satisfied that it would be more advantageous to all parties concerned and not substantially prejudice any of them to proceed with the appeal on the basis of the available evidence and record. No justifiable basis has been advanced for allowing this appeal by reason only that the transcript and the Master's notes are unavailable.

¹⁵ Saint Lucia Civil Appeal No. 8 of 2003 (delivered 29th October 2004, unreported).

I am not satisfied that the missing material has occasioned material prejudice or creates a realistic risk of a miscarriage of justice. I would accordingly refuse the appellants' request to allow the appeal and for an order directing a retrial, simply because the transcript and Master's notes are unavailable. Accordingly, this ground of appeal fails. I turn next to the appellant's freedom of expression grounds of appeal.

Freedom of Expression and Public Interest

Appellants' Submissions

- [33] One of the appellants' main arguments is that the Master ascribed insufficient weight to the context in which the broadcasts occurred. They contended that the programmes concerned the conduct of a senior public official, the administration of the Police Force, and the handling of public funds, all matters lying at the heart of legitimate public discussion in a democratic society. They submit that the Master approached the assessment without giving adequate consideration to the constitutional importance of freedom of political expression and discussion on matters of public concern.
- [34] It was submitted that the fact that US\$16,000.00 went missing from a police station was a major cause of concern for all law-abiding individuals in the jurisdiction. Further, if police officers are engaged in unlawful activities as the missing money suggests, there can be no rule of law because police officers will be regarded as having no moral authority to exercise their powers to maintain and uphold the law through enforcement. The appellants reasoned that in order to protect the fibre of a society and to protect the public interest, many civilized nations have recognised that expressions on matters of public interest must enjoy a heightened degree of protection. Further, the recognition of such rules is necessary to prevent public officials from completely abusing their offices with impunity. Without public watchdogs there can be no checks and balances, and society as a whole will suffer.

[35] They contended that they cannot be faulted as journalists for engaging members of the public in discussions concerning the missing monies or the PSC and PSBA decisions. They stress that they had a duty as members of the public to provide a forum for such public discourse. In addition, they noted that Mr. Mills was not retried therefore the disciplinary case against him was not determined on its merits. Instead, on instructions from the Commissioner of Police, he repaid the US\$16,000.00 to the State in January 2007, kept his job and was promoted to the rank of Assistant Superintendent of Police.

[36] The appellants cited **New York Times Co. v Sullivan**¹⁶ in which the US Supreme Court held 'The constitutional guarantees require, ... a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.' They argued that the same reasoning should be adopted in this case to give effect in the Commonwealth of Dominica to the fundamental right to freedom of expression and recognition of the fact that public scrutiny is necessary for the proper functioning of the government.

[37] With respect to public interest concerns, it was submitted that the Master made no reference to the need to protect public interest as a mitigating factor. Reliance was placed on **Novaya Gazeta Voronezhe v Russia**¹⁷ in which it was stated:

“Freedom of expression constituted one of the essential foundations of a democratic society and one of the basic conditions for its progress. ... The press played an essential role in a democratic society. Although it should not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only did it have the task of imparting such information and ideas, the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog”.’

¹⁶ 376 US 254 (1964).

¹⁷ [2010] ECHR 27570/03.

Respondent's Submissions

- [38] Mr. Mills countered that the allegations broadcast against him are among the gravest imputations known to the law of defamation. He argued that the broadcasts went far beyond reporting the disciplinary proceedings and instead presented him to the public as a dishonest police officer who had stolen public money.
- [39] Regarding the balance to be struck between the exercise of one's constitutional right to freedom of expression and right to protect the reputation of others, it was submitted that an individual's reputation is an important part of his dignity and social identity as held in **Reynolds v Times Newspapers Limited**¹⁸ and **Lachaux v Independent Print Limited et al.**¹⁹ Equally, freedom of expression does not give a person license to publish rumours or untruths.

Discussion

- [40] By their argument, the appellants have essentially invited this court to adopt and apply the rule in the US Supreme Court's decision in **New York Times Co. v Sullivan** under which a public official may only recover for defamatory statements concerning official conduct on proof of 'actual malice'. They suggested that this should be done to vindicate their fundamental right to freedom of expression and the recognition of the necessity for public scrutiny in furtherance of the proper functioning of the government.
- [41] This may well be a novel submission in this jurisdiction. It must be noted that decisions of the US Supreme Court are not binding on this court. Absent any persuasive authority, the legal principles outlined in them may be considered and adopted by this court. The jurisprudence of the Eastern Caribbean Supreme Court historically aligns with other commonwealth jurisdictions, principally courts in the United Kingdom by reason of their common jurisprudential roots. On this issue, the

¹⁸ [2000] EMLR 1.

¹⁹ [2018] QB 594.

Queen's Bench Division of the English Court in **Silkin v Beaverbrook Newspapers and another**²⁰ examined this question.

[42] Diplock J opined:

“Freedom of speech, like the other fundamental freedoms, is freedom under the law, and over the years the law has maintained a balance between, on the one hand, the right of the individual, like Lord Silkin, whether he is in public life or not, to his unsullied reputation if he deserves it, and on the other hand, but equally important, the right of the public, which means you and me, and the newspaper editor and the man who, but for the present bus strike, would be on the Clapham omnibus, to express their views honestly and fearlessly on matters of public interest, even though that involves strong criticism of the conduct of public people. ...

In the first place, every man, whether he is in public life or not, is entitled not to have lies told about him; and by that is meant that one is not entitled to make statements of fact about a person which are untrue and which redound to his discredit, that is to say, tend to lower him in the estimation of right-thinking men.”

[43] That statement succinctly states the governing principles regarding the strict and fine balance which the common law recognizes must be maintained between on the one hand, a person's right to exchange and express ideas about public figures and public interest issues freely and the corresponding right of that public figure not to have his reputation unjustifiably destroyed in the process.

[44] More recently in **Phillip Edward Alexander v Andrew Gabriel**,²¹ the Privy Council stated that it would not:

“... wish to detract in any way from the importance accorded by the Court of Appeal to the need to avoid chilling legitimate political expression. That is a relevant concern, not only in determining the extent of liability for defamatory statements, but also at the stage of assessing damages. The Board also accepts that special caution is required when the statements complained of are directed at politicians or others who have chosen to enter the political arena or engage in political activity. As the Board observed in *Ramadhar v Ramadhar*, para 37: “Politicians cannot expect to be free from banter and ridicule, good-humoured or otherwise, or from scrutiny of their

²⁰ [1958] 1 WLR 743.

²¹ [2026] UKPC 7.

motives. If politicians were entitled to be protected by the law of defamation against mere criticism, that ... might have a chilling effect on democratic debate.”²²

[45] Importantly, the Board added at paragraph 69:

“There is, however, a critical limit on the rights to freedom of expression and to express political views which Rajkumar JA mentioned in passing (at para 83) but of which the Court of Appeal appears to have lost sight when assessing damages in this case. Those rights do not protect speech that is malicious.”

[46] On this point the Board touched briefly on the **Sullivan** case and concluded at paragraph 71:

“The essential point is that, wherever the balance is struck, **the rights to freedom of expression and to express political views do not protect malicious falsehoods**. Even in the United States, where the Supreme Court has held since the famous case of *New York Times Co v Sullivan*, (1964) 376 US 254 that the right to freedom of speech guaranteed by the First Amendment generally precludes an award of damages for defamation of a public figure, a defendant is liable if shown to have acted with “actual malice” - meaning that the statement was made with knowledge that it was false or with “reckless disregard” for the truth.” **(Emphasis added)**.

[47] Those countervailing ideas are long-established, jealously guarded concepts and principles of law that are routinely applied and upheld in this jurisdiction by this Court. While the rule articulated in **New York Times Co. v Sullivan**, which forms part of the constitutional law of the United States, may seem attractive and evolutionary, the common-law balance is different.

[48] By longstanding judicial precedents in this jurisdiction, it is settled law that freedom of expression protects robust discussion of public affairs, but it does not confer a licence to publish false statements of fact that unjustifiably injure reputation. Diplock J’s formulation in **Silkin v Beaverbrook Newspapers Ltd** and the Board’s recent pronouncement in **Phillip Edward Alexander v Andrew Gabriel** captures the

²² Ibid., at para. 68.

ideals of the balance - public criticism may be strong and fearless, but every person remains entitled not to have discreditable falsehoods stated as facts.

[49] The Court is not required by this appeal to determine whether the **Constitution of the Commonwealth of Dominica** may in some future case compel or require further development of the common law governing defamatory publications about public officials. It is noteworthy that no constitutional challenge to the applicable law was pleaded and adjudicated before the Master. Moreover, liability was conclusively determined. This appeal concerns only assessment of damages. It would be impermissible to introduce at this stage a new constitutional condition of liability derived from the US **New York Time Co. v Sullivan** case.

[50] Nonetheless, the public interest concern is a material consideration in this case. The disappearance of the monies from the police station and the accountability of a senior police officer were legitimate matters that properly elicited public inquiry and discussion. That context may bear upon motive, aggravation and proportionality of the award. It does not, however, convert an unqualified factual assertion that Mr. Mills stole the money into protected commentary.

[51] The Board's reference to malicious falsehoods does not mean however that proof of express malice is a necessary condition of liability in the present proceedings. It confirms simply that the constitutional importance of public debate does not require the Court when assessing damages to treat an unqualified allegation of criminal dishonesty as equivalent to criticism, comment or political ridicule. The appellants' constitutional argument and related grounds of appeal accordingly fail, but the public interest context remains relevant as a part of the overall assessment of damages.

The Reputation Point

Appellants' Submissions

[52] As regards the reputation point, it was submitted by the appellants that the Master misdirected herself in principle by assessing damages as though Mr. Mills

possessed an unblemished reputation immediately before the broadcasts. They argued that the evidence demonstrated that Mr. Mills' reputation had already been substantially affected by the highly publicised disciplinary proceedings. Accordingly, the Master failed properly to apply the well-established principle that damages in defamation compensate only for injury actually caused by the defamatory publication and not for injury previously sustained from independent events. They argued that in assessing the damages the Master failed to distinguish between injury flowing from the broadcasts and injury attributable to the disciplinary proceedings themselves.

- [53] It was submitted further that the Master treated Mr. Mills as a saint and failed to consider that he played an important role in the feud that existed between callers to Q95 FM radio (which is aligned with the political opposition in the country) and callers of Kairi FM (which is aligned with the government). In this regard, it was submitted that Mr. Mills frequently called both radio stations to utter political propaganda in support of the government and by so doing played an important role in the feud, by provoking supporters of the other political party. This provocation they said, attracted vitriol by way of the impugned publications.

Respondent's Submissions

- [54] It was emphasized on Mr. Mills' behalf that the defamation complained of is that he stole money and/or is a thief, in circumstances where he was neither charged nor convicted of theft. It was submitted that the defamation concerned his personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality. Further, since his conviction of disciplinary offences had been set aside, they were not equivalent to a conviction for theft, therefore by virtue of the order quashing the PSC's findings and decision the allegations against him remain charges. He therefore remains innocent of those charges.
- [55] In response to the appellants' assertions that his behaviour was provocative and aggravating, Mr. Mills countered that the law recognizes that a person whose

character or conduct has been attacked is entitled to answer such attack and any defamatory statements made by him about his attacker will be privileged provided that they are published bona fide and are fairly relevant to the accusations made against him. This privilege must however be deployed as a shield and not as a weapon of attack and it must be proportionate to the attack. **Hamilton v Clifford**²³ was also cited.

- [56] Mr. Mills submitted that he did not conduct himself in a manner that justified the attack on his character by the appellants. Additionally, they were not defending themselves against any attack from him directed to them. Further, the alleged annoying behaviour by him did not amount to provocation or such that would justify the publication of the defamatory statements that he stole money and was a thief. Mr. Mills contended that the disciplinary proceedings cannot diminish the seriousness of the defamatory publications. He argued that whatever public controversy may have existed previously, the broadcasts renewed and intensified the attack upon his reputation in a manner that justified substantial damages.
- [57] He submitted further that failure to account does not necessarily involve dishonesty and no such evidence was presented to the Master. In addition, as noted by Lords Radcliffe and Denning in **Associated Newspapers Ltd v Dingle**²⁴ evidence of rumours and/or reports and/or suspicions to the same effect as the defamatory matter complained of is not evidence of reputation. Reliance was also placed on **Scott v Sampson**,²⁵ **Plato Films Ltd v Speidel**,²⁶ **Lachaux v IPL et al**²⁷ and **Mueen-Uddin v Secretary of State for the Home Department**.²⁸ To bolster these arguments, Mr. Mills submitted that the Master erred in finding that he had already acquired a bad reputation because of the talk on the public domain for several years about the missing monies.

²³ [2004] EWHC 1542 (QB).

²⁴ [1962] 2 All ER 737.

²⁵ (1882) 8 QBD 491.

²⁶ [1961] 1 All ER 876.

²⁷ [2016] 4 All ER 140.

²⁸ [2024] 3 All ER.

[58] In my view, the parties' competing contentions on this issue highlight the distinction between the setting aside of adverse disciplinary findings for procedural unfairness and a factual determination that the alleged conduct did not happen. This distinction assumes considerable importance in evaluating the Master's treatment of Mr. Mills' pre-existing reputation and the damages awarded.

Discussion

[59] The central contention in the foregoing arguments concerns the proposition that the law protects the reputation actually enjoyed by the respondent immediately before publication. On this subject, the learned authors of **Halsbury's Laws of England** explain that 'at common law, if a person has been libelled without any lawful justification or excuse, the law presumes that some damage will flow in the ordinary course of events from the mere invasion of his right to his reputation, and such damage is known as "general damage"'²⁹. The law therefore compensates for injury to the reputation which existed at the time of publication.

[60] The foregoing principle has consistently informed the assessment of damages for defamation at common law. **Gatley on Libel and Slander**³⁰ makes the point that evidence of the claimant's bad reputation is admissible in mitigation of the damages to be awarded but must be confined to the sector of the claimant's character relevant to the libel.³¹ This demonstrates that existing reputation is always relevant because damages are awarded only for the diminution actually caused by the defamatory publication. A publication cannot destroy what has already been substantially impaired. Notwithstanding, it must be recognized that such publication may aggravate or extend the existing injury.

²⁹ Volume 32 (2023) para. 515.

³⁰ Clement Gatley, *Gatley on Libel and Slander* (Patrick Milmo, W.V.H. Rogers, Sweet & Maxwell, 2004).

³¹ *Ibid.* at para. 33.28 and 33.32.

[61] In **Associated Newspapers Ltd v Dingle**³² the House of Lords accepted that evidence directly bearing upon the particular aspect of reputation said to have been injured may properly be considered in assessing compensation. However, they did not advocate for a general reduction of damages merely because the claimant's reputation was imperfect.

[62] Similarly, in **Greenlands Ltd v Wilmshurst and another**³³ the UK Court of Appeal recognised that where the defamatory publication concerns a matter already notorious or already affecting the claimant's standing, damages must reflect the claimant's actual reputation at the relevant time rather than an assumed reputation. It follows that if a claimant already possessed a damaged reputation in relation to the subject matter of the defamatory publication, that fact is capable of materially affecting the assessment of damages. The reason is self-evident. Compensation must reflect the actual injury caused by the publication, not injury already sustained from independent causes.

[63] Both authorities illustrate that the law does not permit a defendant to embark upon a general attack upon the claimant's character merely to reduce damages. At the same time, where the evidence shows that the claimant's reputation concerning the allegation complained of had already been affected by earlier events, the court cannot ignore that reality. To do so would risk compensating the claimant for injury which the defendant did not cause.

[64] As stated by Cave J in **Scott v Sampson**:

“... it seems most material that the jury who have to award those damages should know if the fact is so, that he is a man of no reputation. As is observed in STARKIE ON EVIDENCE: “To deny this would be to decide that a man of the worst character is entitled to the same measure of damages with of unsullied and unblemished reputation.””³⁴

³² [1962] 2 AAL ER 737.

³³ [1913] 3 KB 507.

³⁴ At pg. 503.

- [65] Those principles assume particular importance in the present appeal because the broadcasts occurred against the background of highly publicised disciplinary proceedings concerning the disappearance of public funds. If Mr. Mills' professional reputation had already been materially affected by those proceedings before the broadcasts occurred, the Court is required to distinguish between damage flowing from the disciplinary proceedings and additional damage, if any, flowing from the appellants' broadcasts. Failure to maintain that distinction would offend the compensatory nature of damages in defamation.
- [66] The Court is concerned therefore, not with whether Mr. Mills deserved his reputation, but with the narrower question of what his reputation was immediately before the broadcasts. Only after answering that question can the Court determine the additional injury, if any, occasioned by the publications.
- [67] In **Scott v Sampson** the Court recognized and gave effect to the reality that an existing bad reputation may reduce damages, while in **Associated Newspapers Ltd v Dingle** the court ruled that proof of a claimant's bad reputation cannot be established by the use of mere rumours or prior similar publications. Read together, the authorities require the court to distinguish admissible evidence of actual reputation from repetition of the defamatory allegation itself.
- [68] **Greenlands Ltd v Wilmshurst** likewise illustrates that where the relevant subject matter is already notorious or has already affected the claimant's standing, damages must reflect the claimant's actual position at the date of publication.⁶ Therefore, the inquiry is not whether the disciplinary allegations were true. The narrower question is reputational, namely, what standing did Mr. Mills actually enjoy in relation to honesty and stewardship of public funds immediately before each broadcast, and what additional harm did the actionable words cause.
- [69] The evidence reveals that before either broadcast, Mr. Mills had already been the subject of formal disciplinary proceedings that were not private. They concerned

him, culminated in adverse PSC findings followed by substantial reversal of those findings by the PSBA and generated widespread public discussion attracting condemnation and adverse judgment in some quarters. A salient feature of the background was his rank as an inspector of police. It is important to note that although it was part of that history, the legal and reputational effect of the PSBA's decision are not necessarily identical.

[70] While the PSBA decision vindicated Mr. Mills' right to a procedurally fair hearing, it is important to note that while the procedural vindication may be important, - it does not necessarily erase the public controversy that preceded it or restore the subject's reputation to its earlier state. Further, it did not appear to do so in this case.

[71] On this point, the Master acknowledged the disciplinary history. She summarized the factual background leading to and occurring after the PSBA's decision was published and widely known. She concluded:

“... the institution of charges and finding of guilt by the PSC which was in the public domain would have negatively impacted Mr. Mill's reputation in the mind of ordinary thinking persons. ... Whether and the extent to which the quashing of the charges may have restored Mr. Mill's reputation is not clearly ascertainable.”³⁵

[72] She stated further: ‘I am not satisfied from the evidence that the defamatory publications complained of were the sole cause of any diminution to Mr. Mills' reputation. ... I do not accept the evidence of Mr. Howard Ambrose ... or Mr. Simeon Albert ... and Mr. Joseph ... which asserts or seeks to suggest that it is only after “these allegations” – presumably the published defamatory statements – that they began to wonder about Mr. Mill's honesty. As noted, the information regarding Mr. Mills' charges and finding of guilt by the PSC were in the public domain for many years prior to the decision being quashed and many years prior to the defamatory publication.’³⁶ She added that she accepts that the publications ‘could have further

³⁵ At para. [18] of the judgment.

³⁶ At para. [20] of the judgment.

negatively impacted Mr. Mills' reputation'³⁷ and noted that in light of his subsequent promotion, the publication did not appear to have affected his job prospects.³⁸

[73] The referenced paragraphs in the judgment demonstrate that the Master recognized that not only did Mr. Mills suffer from a diminished reputation prior to the impugned broadcasts because of the fallout from the disciplinary proceedings, she acknowledged too, that incremental injury was caused to his reputation by the impugned publications on Q95 FM radio. However, her analysis and reasons do not sufficiently separate the damage already occasioned by that history from the additional injury caused by the second broadcast.

[74] In this regard, the Master stated:

"I am not of the view that Mr. Mills' position and standing is the same as some of the claimants in the cited cases. Further, his reputation prior to the publication was affected by his disciplinary charges and finding of guilt by the PSC for the offence.... which information was in the public domain for several years. ... It cannot be stated with any degree of certainty to what extent Mr. Mills' reputation was restored in the minds of the ordinary citizens by the quashing of the decision. As put by Mr. Mills, *"there were persons who would always believe the defamatory statements against me regardless of how much I denied it."* I would add that there may be people who may continue to believe his guilt notwithstanding the quashing of the decision. However, by law, the quashing of the decision means that Mr. Mills has not been found guilty of any disciplinary offences. More significantly, he has never been convicted in a court of law of the offence of theft. Based on the evidence the publication of the defamatory statements may have had some negative impact on Mr. Mill's reputation. ..."³⁹

She then stated: 'Having regard to all the circumstances of this case, I award damages as follows:'... She then quantified the damages in the sum of \$80,000.00 inclusive of aggravated damages.⁴⁰

³⁷ At para. [21] of the judgment.

³⁸ At para. [23] of the judgment.

³⁹ At para. [41] of the judgment.

⁴⁰ At para. [42] of the judgment.

- [75] Having regard to her analysis of the issue of reputation, the Master's assessment of damages appears to have treated the publications as the principal source of reputational harm. This is consistent with the posture Mr. Mills' adopted and described in his witness statement. That omission does not mean that the broadcasts caused no injury. In fact, the Master accepted that there was very likely some unquantifiable lingering injury to Mr. Mills' reputation.
- [76] I accept that there is a distinction between reporting or discussing disciplinary charges of failure to account for missing monies and asserting as a fact that a police officer stole the money and was a thief. The latter accusation was capable of intensifying, extending and crystallising the existing controversy into an allegation of criminal dishonesty.
- [77] It must be noted that the prior disciplinary proceedings were relevant in a more restrained sense. They were formal, public events concerning Mr. Mills' responsibility for missing public funds while under his supervision. The PSC had made adverse findings, although those findings were subsequently quashed. The PSBA's decision restored Mr. Mills' legal position in that no valid disciplinary finding of dishonesty remained against him.
- [78] It is evident that the Master did not ignore the disciplinary history. She expressly recognised that the PSC proceedings had already adversely affected Mr Mills' reputation and that the broadcasts were not the sole cause of any diminution. The question is whether the reasons read as a whole demonstrate that the awards compensated only the additional injury caused by the actionable publications.
- [79] In my judgment, they do not. Having found that Mr. Mills' standing had already been materially affected, that the extent of any restoration following the PSBA decision could not be ascertained, and that no impairment of his career prospects was demonstrated, the Master's reasons do not explain how those findings affected the compensatory assessment. They do not distinguish ordinary from aggravated

damages, identify the aggravating conduct attributable to each appellant, address adequately the uncertainty surrounding the extent of the publication or demonstrate that the second award was confined to the further injury caused by the second broadcast.

[80] Together, those omissions disclose an error in the structure of the assessment. They consequently leave it uncertain whether the appellants were required to compensate Mr. Mills only for the additional injury caused by the broadcasts or included injury attributable to the broader reputational effects of the disciplinary controversy. This Court is therefore entitled to reassess damages on that basis.

[81] I would not conclude that the evidence established a general bad reputation or a reputation for theft. Mere rumour or repetition of the accusation could not establish either contention. What was established was a formal and widely known disciplinary controversy concerning Mr. Mills' accountability for the missing funds. In my opinion, the impugned broadcasts caused a distinct and graver incremental injury by converting unresolved questions of accountability into assertions of theft and criminal dishonesty.

[82] Considered by itself, the Master's failure to quantify the effect of the prior controversy would not necessarily justify appellate interference. A judicial officer is not required to conduct a mathematical or formulaic exercise in arriving at an award or to ascribe a monetary value to aggravating or mitigating factors, but rather to assess their impact cumulatively. In this appeal, the Master's reasons did not distinguish general from aggravated damages or state the aggravating conduct attributable to each appellant. She did not indicate how uncertainty as to the reach of the broadcasts affected quantum and did not demonstrate that the award for the second broadcast was confined to the incremental injury caused. Taken together those matters disclose an error in the structure of the assessment and not merely a disagreement over the weight to be assigned to each relevant factor. This Court is therefore entitled to reassess damages.

- [83] This is not to say that the evidence justifies treating Mr. Mills as a person with no reputation for honesty or as one proved to possess a generally bad character- It suffices that he accepted that his reputation had been impacted by allegations of misconduct and the subsequent disciplinary proceedings years before the broadcasts were aired. This fact has to be factored into any assessment of damages.

Malice and Aggravated Damages

Appellants' Submissions

- [84] The issues of malice and aggravated damages are inter-related. I shall address them together. The appellants contended that the finding of malice cannot properly be sustained upon the evidence before the Court. They argued that the Master effectively inferred malice from the absence of a successful defence, whereas the authorities establish that malice constitutes a distinct legal concept requiring proof of an improper motive or dominant purpose. They maintain that no such evidential foundation existed.
- [85] As to the Master's finding of malice against WICE, WICE contended that it is a company whose knowledge is based on the knowledge of its directors, in whom its directing mind and will repose. Further, it pointed out that Mr. Peltier and Mr. Allen are not its directors and no evidence was adduced as to the identity of its directors. Accordingly, the Master erred in making a finding of malice against WICE.
- [86] WICE submitted further that none of the appellants uttered the defamatory words and this was not taken into account by the Master who gave inadequate weight to this fact in relation to all the appellants. It was submitted that had she done so, she probably would not have made a finding of malice which requires a deliberate intention to make a false statement knowing that it is false.

- [87] The appellants argued that on the facts there was no way that any of them could have deliberated and decided to maliciously publish a false statement since they were not in the minds of the actual speaker. They maintained that they presented the correct facts about the quashing of the disciplinary proceedings on their shows, and this demonstrated that they were not trying to mislead their listeners through misinformation. They argued that this fact alone undermines the finding of malice.
- [88] It was submitted further that the Master failed to address her mind to the sting of the publication when she said ‘they were aware that the PSC’s decision was quashed and made no effort to correct the callers’. It was argued that the sting of the publication is not whether the PSC’s decision was quashed but instead, whether or not Mr. Mills stole the money at Marigot police station, in which case it cannot be said that the appellants or even the callers knew that the sting was false. It was submitted that a finding of malice requires actual knowledge that the defamatory statement (the sting) is false.
- [89] The appellants contended further that the circumstances relied upon by the Master to make an award of aggravated damages either formed part of the ordinary compensatory assessment or were unsupported by the evidence. They argued that the learned Master blurred the distinction between ordinary compensatory damages and aggravated damages, thereby producing an inflated award.
- [90] Citing **Gatley on Libel and Slander**,⁴¹ the appellants submitted that the court may examine the defendant’s conduct and his state of mind, as well as the conduct of the case when determining if the facts justify an award of aggravated damages. They contended that the facts of this case do not justify an award for aggravated damages. Consequently, the award should be reduced to a figure in the region of \$25,000.00.

⁴¹ 10th Edn. Para.33.28.

Respondent's Submissions

- [91] On Mr. Mills' behalf, learned counsel contended that an appellant who invites interference with an award of damages in a defamation case has a formidable task to accomplish since assessment is peculiarly within the province of the master or trial judge. Citing **Mathias Peltier et al v Matthew LeBlanc**⁴² and **Jenny Lindsay v Harriet Carty**⁴³ it was submitted that an appellate court would be entitled to interfere only if satisfied that the award is inordinately low or unwarrantably high or the judge is plainly wrong.
- [92] As to malice, Mr. Mills relied on **Anselm Caines v Janette Nisbett-Meloney**⁴⁴ for the proposition that a claimant will be required to prove malice only where a viable defence of qualified privilege or fair comment is raised. In this case, judgment having been entered against the appellants in the absence of a viable defence, the Master was not required to make a finding of express malice or malice in fact.
- [93] As regards aggravated damages, Mr. Mills argued that the appellants persisted in repeating and maintaining the defamatory allegations, failed to apologise or retract them, and conducted the litigation in a manner that compounded his injury. He argued that there was more than sufficient evidence on which the Master was entitled to conclude that such conduct aggravated the hurt and humiliation which he suffered and to proceed to assess the measure of damages accordingly.

Discussion

- [94] Having concluded that the Master did not sufficiently distinguish between Mr. Mills' alleged pre-existing reputational injury and the additional injury caused by the broadcasts, it is necessary to consider whether the award of aggravated damages can nevertheless be sustained. Aggravated damages occupy a distinct place in the law of defamation. They do not constitute a separate head of loss. Rather, they

⁴² DOMHCVAP2020/0006 (delivered 18th April 2024, unreported) at paras. 13-14.

⁴³ AXAHCVAP2015/0007 (delivered on 7th December 2021, unreported) at paras. 33-34.

⁴⁴ NEVHCVAP2024/0004 (delivered 14th November 2024, unreported).

recognise that the manner in which a defamatory publication is made, or the defendant's conduct before, during or after publication, may intensify the claimant's humiliation, anxiety or distress and thereby increase the compensatory damages necessary to fully redress the injury suffered.

- [95] Aggravated damages are compensatory. They are not awarded to punish the defendant. That function is served by the grant of exemplary damages in appropriate cases. The court must therefore guard against allowing understandable disapproval of a defendant's conduct to transform a compensatory award into a punitive one.
- [96] The authorities distinguish between the defamatory publication itself and the defendant's subsequent conduct. In **Cassell & Co Ltd v Broome**,⁴⁵ Lord Hailsham explained that aggravated damages are justified where the defendant's conduct has increased the injury to the claimant's feelings or dignity. The focus is on the effect on the claimant rather than punishment of the defendant. **Gatley** similarly recognises that aggravated damages may arise where a defendant acts in a high-handed, insulting or oppressive manner, persists in a known falsehood, refuses to apologise where appropriate, or conducts litigation in a manner calculated to increase the claimant's humiliation. The distinction between aggravated compensation and punishment was also recognised in **John v MGN Ltd**.⁴⁶
- [97] In **Elwardo Lynch and BDS Ltd v Ralph Gonsalves**,⁴⁷ this Court adopted the same approach, observing that aggravation depends on conduct that objectively increases the injury suffered by the claimant. However, mere failure to succeed in defending proceedings does not itself constitute aggravating conduct.
- [98] Malice is likewise a distinct legal concept. It is not synonymous with hostility, political opposition, vigorous criticism, or the eventual failure of a pleaded defence. Depending on the context, it may involve knowledge of falsity, reckless indifference

⁴⁵ [1972] All ER 801.

⁴⁶ [1966] 2 All ER 35.

⁴⁷ SVGHCVAP2009/002 consolidated with SVGHCVAP2009/004 (delivered 21st June 2011, unreported).

to the truth, or the use of an occasion for a dominant improper purpose. Where liability has already been established, a finding of malice used to increase damages must still rest upon affirmative evidence.

[99] In **Halsbury's Laws of England**⁴⁸ the learned authors make it clear that actual or express malice must be distinguished from legal malice or malice in law which means publication without lawful excuse and does not depend upon the defendant's state of mind. Express malice must be pleaded and may arise where a defence of qualified privilege or fair comment is pleaded.⁴⁹ It may also be relevant to the assessment of aggravated damages but in every case, it must rest on affirmative evidence. It cannot be inferred merely from the striking out or failure of a substantive defence. As liability has already been determined, it is unnecessary for present purposes to invoke the concept sometimes described as 'legal malice'.

[100] The Master regarded the appellants' conduct as demonstrating malice sufficient to justify aggravated damages. That conclusion requires closer examination. In a case such as the present, where the appellants' substantive defences were struck out before trial, the distinction between procedural failure and malicious conduct is critical. The striking out of a defence establishes only that the pleaded defence cannot be relied upon procedurally. It does not establish, without more, that the defendant acted maliciously, nor does it justify treating every subsequent attempt to challenge damages as evidence of aggravation.

[101] I am not satisfied that the evidence established express malice in the sense of proved knowledge of falsity or a dominant improper purpose on the part of each appellant. The Master's reasoning went too far to the extent that it inferred malice from the striking out of the defences, political hostility, absence of remorse or the appellants' decision to contest the proceedings.

⁴⁸ Volume 32 (2023), at para. 646.

⁴⁹ Ibid. at para. 646.

- [102] That does not conclude the issue of aggravated damages. The lingering question is whether conduct attributable to a particular appellant objectively increased Mr. Mills' humiliation or distress. The failure to correct an unqualified allegation during the broadcasts, any immediate adoption or reinforcement of that allegation, and the refusal to retract or apologise after formal demand are capable of bearing upon that inquiry. They must, however, be considered separately in relation to each appellant and must be shown to have aggravated the injury rather than merely to reflect an unsuccessful defence.
- [103] The appellants evidently considered the public controversy surrounding the disappearance of the monies as a matter warranting public discussion. While that position failed to establish a legal defence, it does not necessarily demonstrate improper motive. More fundamentally, the judgment does not contain separate findings identifying the conduct of each appellant that justified an award of aggravated damages.
- [104] It is also relevant that Mr. Mills pleaded that Mr. Allen sought to give credence to the 24th November 2015 publication by immediately after it was published, by saying that Mr. Mills was now paying back for his alleged crime by calling every radio station and talking politics. The Master did not address this in her judgment, and it is unclear if the assertion was rebutted or established. Mr. Mills pleaded further that the three appellants published the words out of a desire to blacken his character; and they have not retracted the statements or offered an apology despite receiving a letter from his lawyer dated 11th December 2015 requesting that they do so.
- [105] Mr. Mills repeated these assertions in his witness statement. He added that he knew that Mr. Peltier and Mr. Allen became aware of the PSBA's decision because before the publications he heard them discussing it on their radio broadcasts. He added that he felt embarrassed, insulted and humiliated and ostracized by the publications. He asserted that based on the frequencies on which Q95 FM operates, it can be inferred that the statements were broadcast and published to a substantial but

unquantifiable number of listeners. He averred that the damage he suffered as a result is considerable, unending and may be irreparable.

- [106] None of the appellants issued an unequivocal retraction or apology in response to the solicitor's demand. That omission did not prove knowledge of falsity of the defamatory statements and could not be used to penalise the appellants for maintaining their legal position. It was nevertheless relevant to compensation to the extent that the continued absence of any correction prolonged the public effect of the accusation and increased Mr Mills' sense that the charge remained publicly endorsed. I would therefore treat it as a modest aggravating factor.
- [107] In the present case, the record refers to an apology made by Dr. Thompson Fontaine, another Q95 FM presenter in relation to a separate defamatory statement on his programme. The Master did not resolve whether that apology was authorised by, adopted by, or legally attributable to WICE. What is clear is that Dr. Fontaine's apology was spontaneously issued immediately after he was contacted by Mr. Mills' then lawyer regarding a third and unrelated statement by another unknown caller on his radio programme.
- [108] Mr. Peltier was the broadcaster and publisher, WICE the licensed radio station and publisher, and Mr. Allen a participant in and publisher of the broadcasts. However, the reasons do not clearly explain why the conduct of each appellant independently warranted aggravated damages. That omission is significant because aggravation depends upon the conduct attributable to the individual defendant concerned. The foregoing principles demonstrate why a separate examination of each appellant's conduct was required. Whether aggravated damages were justified depended not upon collective responsibility for publication alone but upon the conduct attributable to each appellant individually and whether that conduct increased Mr. Mills' injury. Knowledge and state of mind may also be relevant but express malice is not indispensable to a finding of aggravation.

[109] By failing to undertake that analysis, the Master erred in principle by omitting a relevant consideration in the assessment of damages. The error was compounded by the failure to identify what portion of the global awards of EC\$80,000 represented aggravated damages. The process by which the awards were calculated was thereby undermined.

[110] I would add that the Master did not err merely because she assessed damages separately in respect of the two broadcasts. They were distinct publications made on different dates, during different programmes and under the supervision of different hosts. Each constituted a separate actionable wrong and was capable of causing additional injury. I will therefore consider each appellant's culpability in turn.

Mr. Peltier

[111] In relation to Mr. Peltier, the relevant evidence was not confined to his passive role as host. Immediately following the first unknown caller's accusation, the evidence is that he - played the calypso 'Technicality'. He did not deny this but explained that he did so in support of the PSBA's decision. The Master found this statement to contradict his averment that he was unaware at that time of the PSBA's decision quashing the PSC's orders. She was entitled to so conclude. However, she drew no inference from the playing by him of the song 'Technicality' that he intended thereby to reinforce the false publication.

[112] The playing of 'Technicality' cannot, without a finding as to its meaning in context and Mr. Peltier's purpose, be treated as an aggravating endorsement of the accusation. The Master did not find that he played it to reinforce the allegation of theft. I therefore would attach no aggravating weight to Mr. Peltier playing the song.

[113] Mr Peltier's responsibility rests instead upon his failure, as host, to correct or distance the programme from an accusation that Mr. Mills had stolen public money, notwithstanding his awareness that the disciplinary findings had been quashed. Whether that conduct warrants a higher award than the second broadcast depends

on his conduct immediately after the first publication and any resulting additional injury. In the absence of a finding that his subsequent behaviour adopted or intensified the accusation, there is no secure basis for differentiating the awards solely by reference to his conduct.

Mr. Peltier and Mr. Allen

[114] The Master concluded that during their testimony, neither Mr. Peltier nor Mr. Allen appeared to be remorseful for allowing the defamatory publications. In the absence of the transcript and her notes, the Court is not in a position to reconstruct the evidential exchanges that informed that impression. In any case, an apparent absence of remorse is not a juridical basis for aggravated damages. The inquiry should be whether the appellants' conduct during or after publication objectively increased Mr. Mills' humiliation, distress or injury. I therefore place no independent weight on the Master's impression as to Mr. Peltier's and Mr. Allen's demeanour. I will instead determine aggravation by reference to the conduct established in the record.

[115] The Master also noted the hosts' failure to correct the unknown callers after they made the unfortunate utterances and that neither of them extended an apology to Mr. Mills. These factual findings are borne out by the record. The learned Master was therefore entitled to find that Mr. Peltier's and Mr. Allen's personal conduct aggravated the damages. This should be reflected in the global awards.

WICE

[116] The position of WICE required separate consideration. Its liability for the ordinary compensatory award arises from its direct participation in the publication. As in Mr. Peltier's and Mr. Allen's cases, the absence of an apology would aggravate damages, as WICE persisted in an unjustified and continuing affront by failing to issue a retraction or an apology after receiving the letter from Mr. Mills' lawyer seeking both.

[117] WICE did not in its formal pleaded defence or through Mr. Peltier's or Mr. Allen's witness statement seek to assert that Dr. Fontaine's apology was extended in respect of the broadcasts that are the subject of this appeal. There is no evidential or legal basis to so conclude. Suffice it to say that based on the evidence, the appellants' (including WICE's) continued refusal to retract the statements or issue and apology objectively aggravated Mr Mills' distress. Accordingly, a modest, aggravated component would be justified.

[118] Mr. Mills pleaded that Mr. Peltier and Mr. Allen were acting in the course of their employment when the broadcasts were aired and that WICE being their employer was therefore vicariously liable for their actions and defaults in relation to the publication of the defamatory materials. Alternatively, it was pleaded that Mr. Peltier and Mr. Allen were independent contractors acting for and on his own behalf.

[119] Mr. Peltier and Mr. Allen denied being WICE's employees and admitted being independent contractors.⁵⁰ That dispute does not affect WICE's direct liability as a publisher. By transmitting the offending words through its broadcasting facilities to its audience, WICE participated in the communication of the defamatory words and was therefore a joint primary publisher with the hosts.

[120] In **Linton Lennox, Island Communications Ltd and Raglan Riviere v Kieron Pinard-Byrne**⁵¹ this court stated:

"[54] Publication would normally be considered to have taken place when the defamatory words were communicated to a third person, meaning a person other than the claimant or defendant in the defamation action, while communication would normally be considered to have taken place when the words were heard or read by the third person.' and

[55] ... In the case of a radio broadcast, it has long been established that publication takes place once the broadcast is heard by any third person,

..."⁵²

⁵⁰ Paras. 6 and 8 of the amended defence.

⁵¹ DOMHCVAP2011/0017 (delivered 25th March 2013, unreported).

⁵² Ibid. at paras. [54] and [55], per Michel JA.

[121] The Trinidad and Tobago Court of Appeal in **MORE FM (formerly known as More FM 104.7 Limited) v Junior Sammy and others**⁵³ held:

“The libel was committed through the use of More FM’s programme, its air waves and its equipment. It actively aided in the publication of the broadcast. They are jointly and severally responsible for the words uttered by their hosts.”⁵⁴

[122] Applying those principles in **Linton Lennox et al v Byrne and MORE FM v Sammy and others** it follows that WICE’s liability was direct rather than vicarious and did not depend on proving an agency or employment relationship with the hosts, or even an independent contractor relationship. Its liability arose through its own voluntary act of communicating the defamatory words to its listeners. The quantum of a damages awarded against it would be influenced by aggravating or mitigating conduct, before, during or after the publication as would any award against the hosts’. Accordingly, it is liable equally for each of the two defamatory publications to the same extent respectively as Mr. Peltier and Mr. Allen. In that regard, the Master did not err in ascribing equal responsibility to WICE.

[123] Furthermore, contrary to Mr. Mills’ further contention, I do not accept that the appellants’ pursuit of the assessment proceedings and this appeal, without more, can be treated as aggravating conduct. Litigants are entitled to challenge quantum. What matters is whether the manner in which the litigation was conducted involved repetition of the allegation, oppressive tactics, or other conduct objectively increasing the claimant’s injury.

[124] In summary therefore, the evidence justified substantial ordinary compensatory damages. However, the Master’s reasoning does not sufficiently distinguish between unsuccessful defences and conduct that objectively caused additional injury. Nor does it contain the individualized analysis required for findings of aggravation. Finally, it does not identify the aggravated component of either award.

⁵³ Civil Appeal No. S295/2018.

⁵⁴ Civil Appeal No. S295/2018 at para. 7.

I therefore conclude that the aggravated element cannot stand as assessed and must be reconsidered on the correct legal basis.

[125] The two broadcasts were separate actionable publications and could properly attract separate awards. The second publication occurred nearly eleven months later. Its repetition was capable of reviving the allegation, reinforcing it in the minds of listeners and creating a fresh need for vindication. Conversely, some part of the respondent's injury had already been caused by the first broadcast. The second award must, however, be confined to the further injury caused by renewed publication. It cannot again compensate Mr. Mills for the entirety of the reputational harm and distress caused by the first broadcast. The second award should therefore reflect substantial additional harm but ordinarily should be lower than the first unless the evidence establishes materially wider dissemination, clearer adoption by the host or more serious aggravating conduct, none of which materialized in this case.

[126] In conclusion, it is noted that the evidence did not establish that the appellants knew that Mr. Mills had not stolen the monies. The PBSA had not determined that issue. The hosts however knew that the disciplinary findings had been quashed and that no valid adjudication of dishonesty or theft existed in relation to Mr. Mills. Further, after each caller made an unequivocal assertion of criminal guilt neither host corrected them nor made clear that the allegation had not been established. In the context where the broadcast was naturally spontaneous being a live call-in programme, the host could not realistically have prevented the utterances unless their equipment accommodated a delay in the broadcast – a system utilized by other broadcasters. Their failure and relevant conduct lay in their decision not to distance the programme and radio station from the false narratives or inform listeners of the outcome of the PBSA's proceedings.

[127] Their subsequent failure to issue either a retraction or suitable apology following receipt of the lawyer's letter placing them on formal notice did not prove express malice and ought not to be viewed or treated punitively but are relevant. In this

regard, such behaviour was capable of prolonging the public effect of the accusations, increasing Mr. Mills' distress and injury and enhancing the need for vindication. Collectively, those matters justified a modest aggravated component.

The Proportionality Point

Appellants' Submissions

[128] Regarding the global award of damages, the appellants contended that the overall quantum was manifestly excessive when compared with awards approved in comparable Caribbean and Commonwealth authorities. They submitted that the Master failed to apply the principle of proportionality and that the resulting awards exceeded the range reasonably open to a judicial assessment.

[129] It was submitted further that Mr. Mills was entitled to receive only one award of damages for the single alleged wrong that was essentially for joint torts against all the appellants where the defamatory statements had the same sting. **Elwardo Lynch and BDS Ltd v Ralph Gonsalves** was cited in support. The appellants quoted thus:

“the Master obviously erred in making separate awards for each of the appellants. What Dr. Gonsalves is entitled to recover is a sum representing the damage he suffered from a single wrong inflicted by both Mr. Lynch and BDS Limited.”⁵⁵

Reliance was also placed on **Phillip J. Pierre v David Vitalis et al**⁵⁶ in which two defamation claims dealing with two separate publications of defamatory material were heard together.

[130] The appellants submitted further that the separate awards against different combinations of appellants risked compensating the respondent twice for what was, in substance, a single injury arising from substantially the same publications.

⁵⁵ At para. 74.

⁵⁶ SLUHCV2011/0667 & SLUHCV2011/0868 (delivered 21st June 2017, unreported).

- [131] In addition, it was submitted that the Master erred in the assessment in that she seemed to have held against Mr. Peltier the fact that he played the calypso 'Technicality' on the radio. Mr. Peltier argued that this was unjust because the calypso contains no defamatory or unlawful material and was played in the lawful exercise of discretion.
- [132] The appellants contended further that the Master erred by referring to live broadcasts of the Hot Seat programme from Monday to Friday without recognizing that there was no evidence that the publications were played on all of those days or that the publications were recorded for re-broadcast and no evidence was led from the host that the programme has a wide listenership. They argued that to the contrary, the Master did not consider the host's indication in his witness statement⁵⁷ that Q95 FM did not have island-wide reach as there were locations in the Commonwealth of Dominica where it could not be heard due to lack of access to its frequency.

Respondent's Submissions

- [133] In response, Mr. Mills argued that the awards were not disproportionately high when considered against comparable cases in the Eastern Caribbean and viewed against the facts. He maintained that they were on the low end, which might have been influenced by the mitigating factors considered by the master. It was submitted that the Master was correct to treat the two publications as separate and distinct and not conflate them and then to apportion the damage between the appellants in respect of their individual publications which were twelve months apart and involved different hosts on the same radio station.
- [134] He cited seven decided cases from Eastern Caribbean Supreme Court jurisdictions to demonstrate that the awards to him were within normal range: **Mathias Peltier & WICE v Matthew LeBlanc, Sandiford Ruel Edwards v Dennis Canning**,⁵⁸

⁵⁷ At para. 5.

⁵⁸ GDAHCV2020/0411 (delivered 24th January 2022, unreported).

Roxanne Linton v Louisiana Dubique et al,⁵⁹ Dr. Philbert Aaron v Abel Jno Baptiste,⁶⁰ Victoria Alcide v Helen Television System Limited & Radio St. Lucia Company Ltd.,⁶¹ Rishatha Nicholls v Arnhim Eustace⁶² and Agnes Francis v Richard Frederick et al.⁶³

- [135] As to the weight to be attached to the apology by another host on Q95 FM, Mr. Mills noted that the Master took into account⁶⁴ the apology extended by Dr. Thompson Fontaine. It was submitted that the apology ought not to have been regarded as a mitigating factor because Dr. Fontaine was neither a party in the case nor a director of WICE and at no time did he purport to act on behalf of the appellants. Further, they cannot seek to benefit from it because the apology issued by him was directed at addressing defamatory statements made by a caller on Dr. Fontaine's radio show and was not adopted or followed by the appellants.
- [136] Finally, it was submitted that the libel was grave and direct. In addition, the callers did not merely hint at dishonesty but rather uttered a full-throated accusation that Mr. Mills stole US\$16,000.00 and was a thief. These publications were broadcast on shows hosted by different personalities at different times of the day almost a year apart, on all frequencies of Q95 FM radio. Mr. Mills asserted that the shows had a wide listenership and were available through internet streaming for local and international coverage. Additionally, there was cogent evidence of the extent and nature of the impact on his feelings, reputation and character and of the appellants' conduct.

⁵⁹ DOMHCV2011/0062 (delivered 15th April 2013, unreported).

⁶⁰ DOMHCV2013/0015 (Delivered 28th March 2014, unreported).

⁶¹ SLUHCV2011/0398 (delivered 25th October 2017, unreported).

⁶² SVGHCV2015/0240 and SVGHCV2015/0242 (delivered 30th September 2019, unreported).

⁶³ SLUHCV2020/0203 (delivered 18th December 2023, unreported).

⁶⁴ At para. 36 of the judgment.

Discussion

- [137] An assessment of damages including in defamation cases, is quintessentially an exercise of judicial discretion. Consequently, an appellate court does not intervene merely because it would itself have arrived at a different figure. Appellate intervention is justified only where the master proceeded upon an erroneous principle of law, misapprehended the evidence, failed to take account of a material consideration, took into account an irrelevant consideration, or arrived at an award that is so inordinately high or so inordinately low that it represents an entirely erroneous estimate of the damage suffered.
- [138] It follows that the appellants bear a substantial burden in persuading this court to vary the awards made by the Master. It is not enough to demonstrate that another judge might reasonably have awarded a lesser sum. They must establish that the Master's reasoning disclosed an error of principle or that the resulting award fell outside the range within which reasonable judicial assessment could properly lie.
- [139] In **Lall & National Media Publishing Co Ltd v Ramsahoye**⁶⁵ Justice Nelson of the Caribbean Court of Justice ('CCJ') stated:
- “An award of damages is fundamentally a species of what used to be called ‘local actions’ in that the award is a function of the place and the extent to which the deemed person’s reputation was injured.’ and ‘Damages are always conditioned by inter alia, the prevailing socio-economic circumstances in the country in which the assessment is made.”
- [140] In **Flint v Lovell**,⁶⁶ Greer LJ framed what is now considered the classic formulation of appellate review of damages, where he stated:
- “I think it right to say that this court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make

⁶⁵ [2016] CCJ 18 (AJ).

⁶⁶ [1935] 1 KB 354.

it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.”⁶⁷

That principle has repeatedly been affirmed by this court (including in **Elwardo G. Lynch and BDS Ltd v Ralph Gonzalves et al**)⁶⁸ and is the governing standard for appellate review of such discretionary awards.

[141] Indeed, in **Elwardo G. Lynch v Ralph Gonzalves**,⁶⁹ this court adopted and applied the following formulation of that principle from **Alphonse v D. Ramnauth**:

“... it must be recognized that the burden on the appellant who invites interference with an award of damages that has commended itself to the trial judge is indeed a heavy one. ...But we are powered to interfere with the award if we are clearly of the opinion that, having regard to all the circumstances of the case, we cannot find any reasonable proportion between the amount awarded and the lost (sic) sustained, or if the damages are out of all proportion in the circumstances of the case. ... The award of damages is a matter for the trial judge’s discretion and unless we can say that the judge’s award exceeded the generous ambit within which reasonable disagreement is possible and was therefore clearly and blatantly wrong we will not interfere.”

[142] It is important to note that damages are not susceptible of precise mathematical calculation. Their assessment involves the exercise of judicial judgment informed by legal principle, comparison with similar cases and the particular facts of the individual case. Accordingly, appellate restraint therefore recognizes that the Court at first instance enjoys a considerable margin of appreciation in evaluating the gravity of the defamation and its consequences.

[143] The governing principles in relation to the proper assessment of damages in defamation cases are well-established. Damages for defamation perform several related functions. It compensates for injury to reputation, vindicates the claimant’s good name and provides comfort for the distress, humiliation and embarrassment occasioned by the defamatory publication.

⁶⁷ Ibid at pg. 203.

⁶⁸ At para. 26.

⁶⁹ At para. 28.

[144] In **John v MGN Ltd**, Sir Thomas Bingham MR explained that damages for defamation fulfil three principal purposes:

“... to compensate [the plaintiff] for the damage done to his reputation; to vindicate his good name; and to take account of the distress, hurt and humiliation which the defamatory publication has caused.”⁷⁰

[145] It was further explained that of those factors, the nature of the defamatory material assumes greatest significance:

“In assessing damages for injury to reputation, the most important factor is the gravity of the libel; the more closely it touches the plaintiff’s personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of the 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.”⁷¹

[146] Likewise, the learned authors of **Gatley on Libel and Slander** explain that general damages in defamation are awarded because the law presumes that injury flows from the publication itself. Unlike many other torts, proof of specific financial loss is unnecessary. The publication of the defamatory matter is itself treated as causing damage to reputation, although the extent of that damage depends upon the circumstances of the particular case.

[147] Nevertheless, damages are compensatory, not punitive. The purpose of the award is not to punish the defendant for objectionable conduct but to compensate the claimant for the injury actually suffered. This distinction is important when considering aggravated damages, since care must be taken to ensure that compensation does not become punishment in disguise.

[148] As to the matters that aggravated the damage sustained, Mr. Mills pleaded that the words contained serious allegations and imputations of dishonesty, corruptness and

⁷⁰ [1996] 2 All ER 35 at pg. 47.

⁷¹ At pg. 607.

criminality by him; that the appellants made no inquiries of him prior to the broadcasts or sought to confirm the allegations; they ought to have known that the statements were false or acted with reckless indifference as to whether they were false; they did not attempt to stop the callers from broadcasting the defamatory words; Mr. Peltier immediately after the 2nd January 2015 publication played the Calypso 'Technicality' which speaks to dishonesty and criminal activity of lawmen in Dominica and their getting away with such alleged dishonesty on technical grounds.

[149] It is not disputed that the libel was grave. In addition, the callers did not merely hint at dishonesty but rather made an unequivocal unabashed accusation that Mr. Mills stole US\$16,000.00. The evidence is that these publications were broadcast on shows hosted by different personalities at different times of the day almost a year apart, on multiple frequencies of Q95 FM radio. Mr. Mills asserted that the shows had a wide listenership and was available through internet streaming for local and international coverage. The words were published by live radio broadcast and were therefore disseminated beyond the small and identifiable audience characteristic of private oral slander.

[150] The precise number of listeners was not proved. The Court should not assume that the words were repeated on other days or accessed internationally merely because the programme aired regularly. Likewise, it is not appropriate or justifiable to conclude that they were heard internationally merely because streaming facilities existed. Nonetheless, I am mindful that the nature of a live call-in programme on an established radio station permits the reasonable inference of publication to a material audience. The uncertainty as to exact coverage would temper but not eliminate the substantial award warranted by the gravity of the accusation, in line with comparable awards in Dominica and elsewhere in the jurisdictions served by this Court. Additionally, there was cogent evidence of the extent and nature of the impact on Mr. Mills' feelings, reputation and character and of the appellants' conduct.

[151] The authorities demonstrate that reputational harm is a question of fact, assessed by reference to the claimant's actual standing in the relevant community at the date of publication. In **Lachaux v Independent Print Ltd et al**⁷², the Supreme Court of the United Kingdom held that serious harm⁷³ requires proof of actual reputational damage, and it is ordinarily to be assessed at the date of publication of the defamatory material. Where reputational harm arises from separate publications at different times the court, in assessing damages, is required to isolate as best as possible the damage occasioned by the subject defamation. However, it is not appropriate or correct in law to attribute a bad reputation to the claimant by reason only that he was the subject of defamatory publications. Accordingly, the appellants' contentions that Mr. Peltier was labouring under a blemished reputation on the broadcast dates run contrary to well-established legal principles.

[152] In **Associated Newspapers Ltd. v Dingle**⁷⁴, Lord Denning explained:

“If the judge isolated the damage for which the “Daily Mail” were responsible from the damage for which they were not responsible, he would have been quite right, ... But it is said that he did not isolate the damage. He reduced the damages because the plaintiff's reputation had already been tarnished by reason of the publication of the report of the select committee and of the privileged extracts from it in the “Daily Mail” and other newspapers. I think he did do this and I think he was wrong in so doing.”

[153] Based on the circumstances of the widespread knowledge of the disciplinary proceedings at the PSC level and the outcome, it is clear that Mr. Mills' reputation had suffered a serious blow. However, the equally well publicized PSBA decision setting aside the PSC's determination would have served to vindicate him and restore his image and reputation. Therefore, no factual or legal basis exists for finding that his reputation was not unblemished at the relevant times. As regards the appellants' reliance on provocation, the evidence does not disclose any provocation by Mr. Mills that would have warranted publication of the defamatory

⁷² [2019] UKSC 27 at [20].

⁷³ Under section 1 of the Defamation Act.

⁷⁴ [1964] AC 371 (HL) at pg. 410.

statements in response. I find this submission by the appellants to be peculiar in circumstances where they did not themselves utter the statements.

- [154] The evidence does not permit a finding that each appellant positively knew that Mr. Mills had not stolen the monies. The PSBA decision did not determine that factual question. What the appellants knew, or must be taken to have known, was that the adverse disciplinary findings had been quashed, that no valid finding of theft was made against Mr. Mills, and that he had never been convicted of that offence. Their failure to correct an unqualified assertion of guilt must be evaluated against that state of knowledge.
- [155] Such conduct may demonstrate irresponsibility and may, when coupled with the refusal to retract or apologise after formal demand, support a - finding of aggravation. It does not, without further evidence, establish that the appellants knowingly published a falsehood. I would therefore, as indicated earlier, avoid a finding of express malice based upon knowledge of falsity and confine the conclusion to whether the proved conduct objectively increased the injury suffered by Mr. Mills.
- [156] Another material consideration involves the cautionary approach to assessment where multiple publications by different publishers are concerned. In **Phillip J. Pierre v David Vitalis et al** this Court held that every defamatory publication gives rise to a separate cause of action and a claimant is entitled to recover damages in respect of each actionable publication. This reflects that each publication independently injures the claimant's reputation and potentially reaches a different or additional audience. The extent of the reputational damage in such cases depends on the publisher's identity, the size of the audience, the timing and prominence of the publication and whether the second publication enlarged or renewed the damage caused by a previous publication.

[157] This Court emphasized that the objective is compensation and not multiplication of damages. It follows that where separate awards are made, they must correspond to the actual injury attributable to each publication and must not produce double recovery for substantially the same damage. In such cases, the Court has to consider the overall impact on the claimant's reputation while identifying the incremental harm caused by each publication.

[158] In **Phillip Edward Alexander v Andrew Gabriel** the Board considered a similar scenario. It restated the settled and established principles regarding how the court treats with an appeal against an award of damages in defamation cases, as follows:

“No sum of money is equivalent to harm to a person's reputation or feelings. But a court cannot compel a defendant to apologise or correct a defamatory statement and awarding a sum of money is the best that a court can do by way of compensation. ... Disturbing the trial judge's assessment of damages is justified only if it was made on a legally incorrect basis or if the appeal court considers the sum awarded to be outside the generous range within which there is scope for reasonable disagreement.”⁷⁵

[159] That case involved multiple publications of defamatory statements by the same person on different dates. The Board held:

“Where – as here- there is more than one defamatory publication, it is the cumulative effect on the claimant's reputation and feelings that must be assessed. It is therefore not appropriate to make separate awards ... a single, holistic assessment of damages is necessary.”

I interpret this to mean that this is the correct approach when only one publisher or tortfeasor is involved. This principle, however, does not erode the corresponding and complementary legal principle that each tortfeasor is separately liable for his, her or its own publication.

[160] The material facts and circumstances have been rehearsed above. I do not propose to repeat them for purposes of the assessment. Likewise, I am guided by the legal principles already recited.

⁷⁵ At para. 16.

- [161] The publications in this case are to similar effect and although uttered on different dates would have been published in the same environment, no doubt with like consequences save that the second publication covered a smaller period than the first. Additionally, the appellants' responses have been consistent in relation to both publications in that they failed to retract the publications or offer an apology. I am therefore satisfied that in arriving at an award there is no need for differentiation in treatment as between Mr. Peltier and Mr. Allen. I bear in mind that on the authority of **Phillip Edward Alexander v Andrew Gabriel** that WICE's culpability is to be captured in a single global award.
- [162] In **Mathias Peltier & WICE v Matthew LeBlanc, Sandiford Ruel Edwards v Dennis Canning, Roxanne Linton v Louisiana Dubique et al, Dr. Philbert Aaron v Abel Jno Baptiste, Victoria Alcide v Helen Television System Limited & Radio St. Lucia Company Ltd., Rishatha Nicholls v Arnhim Eustace and Agnes Francis v Richard Frederick et al** all cases decided within the last two decades, awards were made ranging from \$60,000.00 to \$120,000.00 inclusive of aggravated damages. It is noteworthy that the claimants included respectively a Labour Commissioner and Minister of the Gospel, a customs officer, an ambassador, a deputy director of prisons, a secretary and a former chairperson of the Tourist Board.
- [163] It is instructive that the defamation in those cases accused the claimants respectively of the commission of the criminal offence of buggery; allegations of corruption in relation to payment of a salary and per diem higher than the contractual rate; allegations of theft and corrupt practices; causing contraband to be brought into prison; and aiding and abetting persons to evade customs duties and tariffs in exchange for monetary bribes. They therefore fall within the general ambit of the nature of the defamation in this case and would inform the awards in the present appeal.

- [164] Undoubtedly, the accusation in this appeal was exceptionally grave. It imputed theft of public money to a serving police inspector and struck at the central qualities of honesty and integrity required by his office. Publication by live radio carried a materially wider potential for injury than a private communication, although the precise audience and any subsequent online dissemination were not proved.
- [165] Mr. Mills is entitled to substantial vindication. The assessment must nevertheless recognise that his reputation had already been affected by the public disciplinary controversy, that no financial or occupational loss was proved, that he remained employed and was subsequently promoted, and that the public-interest setting, though no defence, mitigates against treating the publications as a wholly gratuitous personal attack.
- [166] I also take account of the appellants' failure to issue any correction or apology after notice, but I do not find that they were proved to have known the allegation of theft to be false. The aggravated component should therefore be modest.
- [167] In assessing the second publication, I recognise that it constitutes a separate cause of action from the first committed by a different host. It renewed and reinforced the accusation after a substantial interval. At the same time, the award as against Mr. Allen must be confined to the additional injury and must avoid compensating again for the full harm caused by the first broadcast over the same period.
- [168] WICE was a primary publisher of each broadcast. In respect of the first broadcast, WICE and Mr. Peltier jointly participated in the same publication and are jointly and severally liable for the damage caused by it. In respect of the second, WICE and Mr. Allen are similarly jointly and severally liable. The two broadcasts are distinct torts and may attract separate awards, but must each represent the total compensation payable for the injury caused by it.

- [169] In assessing damages as against WICE, I remain mindful of the Board's decision in **Phillip Edward Alexander v Andrew Gabriel and Dingle** that it is the cumulative effect of the multiple publications on the respondent that must be compensated. Therefore, ultimately the final award must avoid the effect of double recovery against it. The aggregate aggravated component of the awards would in these circumstances reflect WICE's greater culpability occasioned by the repeated broadcast without retraction or apology.
- [170] Taking all of the circumstances into account, I would allow a modest component of aggravated damages in respect of each appellant, an appropriate discount in relation to the second broadcast to reflect an acknowledgement that its effects on Mr. Mills' reputation must be considered in isolation from the harm attributable to the first defamatory publication. This is in recognition that the second broadcast caused renewed and additional injury but could not be assessed as though the first publication had not taken place.
- [171] The comparative decisions are not tariffs. Their utility lies in testing the broad proportionality of the award. Differences in dissemination, existing reputation, proven consequential loss, aggravating conduct and the date of assessment necessarily limit exact comparison. Accordingly, taking the comparable awards as guides and giving particular weight to the gravity of the imputations, the prior controversy, the unquantified extent of the publications, and the limited aggravating conduct proved, I assess damages for the first publication on 2nd January 2015 at \$65,000.00 comprising \$60,000.00 in ordinary compensatory damages and \$5,000.00 as aggravated damages. Mr. Peltier and WICE are jointly and severally liable for that sum.
- [172] I would assess the further injury caused by the second publication at \$40,000.00 comprising \$35,000.00 in ordinary compensatory damages and \$5,000.00 in aggravated damages. Mr. Allen and WICE are jointly and severally liable for that sum.

[173] The first publication caused the actionable injury and the principal need for vindication. The second although equally grave in its sting, operated on a reputation already damaged by the first broadcast and therefore warrants a lower general award to avoid duplication in compensation. The equal aggravated components reflect the common post-publication failure to correct or apologise rather than any finding of express malice. The lower award for the second publication does not reflect any reduction in the gravity of the sting. The difference reflects the sequential and isolated nature of the injury. It recognizes that the second broadcast revived and reinforced the accusation in the first and caused further compensable injury. It would be duplicative to assess it as though the earlier publication had not occurred.

Costs

[174] The appellants have succeeded in reducing the damages awards, but they have failed on the request for a retrial and on their principal contention that the public interest context displaced the ordinary law of defamation. Mr. Mills retained substantial awards. The appeal has therefore produced divided success weighted materially in the appellants' favour. Pursuant to CPR 64.6, 65.7 and 65.13 I would therefore order the appellants to pay seventy-five percent of the respondent's costs of the appeal, if not agreed within 21 days in accordance with the costs regime mandated by those rules.⁷⁶ I would also affirm the Master's costs order, which followed Mr. Mills' success on the assessment. It must be noted and made clear that the prescribed costs at first instance are to be calculated by reference to the aggregate value of the substituted awards and in accordance with **CPR 65.5**.

Interest

[175] Section 7 of the **Judgments Act**⁷⁷ stipulates that interest is payable at the rate of 5% per annum from the date of judgment until full satisfaction. The awards will attract interest on this basis.

⁷⁶ Under CPR 2000.

⁷⁷ Cap. 4.70 of the Revised Laws of the Commonwealth of Dominica.

Disposition

[176] For the foregoing reasons, I would allow the appeal in part and make the following orders:

- (1) Mr. Mills' counter-notice of appeal, having been withdrawn, is dismissed.
- (2) The appellants' request for a rehearing of the assessment on the ground that the transcript and the Master's notebook are unavailable is refused.
- (3) The appeal is allowed to the extent that the damages awards made by the Master are set aside and the following awards substituted:
 - (a) In respect of the broadcast of 2nd January 2015, the first appellant Mathias Peltier and the second appellant West Indies Communication Enterprises Ltd shall jointly and severally pay Cleville Mills damages in the sum of \$65,000.00 comprising \$60,000.00 in ordinary compensatory damages and \$5,000.00 in aggravated damages.
 - (b) In respect of the broadcast of 24th November 2015, the third appellant Angelo Allen and the second appellant West Indies Communication Enterprises Ltd shall jointly and severally pay Cleville Mills damages in the sum of \$40,000.00 comprising \$35,000.00 in ordinary compensatory damages and \$5,000.00 in aggravated damages.
- (4) The Master's order for prescribed costs pursuant to CPR 65.5 in the court below is affirmed. For the avoidance of doubt the costs amount

is to be calculated on the basis of the awards in the preceding subparagraphs of this order.

(5) The appellants shall pay seventy-five percent of costs of the appeal to the respondent in accordance with CPR 65.5, 65.7 and 65.13, if not agreed within 21 days of today's date.

(6) Interest is payable on the substituted awards at the applicable statutory rate of 5% per annum from the date of this order until payment.

Miscellaneous

[177] Determination of this appeal and delivery of this judgment were delayed by certain unavoidable circumstances. The Court appreciates the patience and understanding demonstrated by the parties during the wait and apologizes to them for any inconvenience caused.

I concur.
Vicki Ann Ellis
Justice of Appeal

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

By The Court

Chief Registrar