

IN THE COURT OF APPEAL, FIJI
Appeal from the High Court
[CONSOLIDATED APPEAL]

CIVIL APPEAL NO.ABU 031 OF 2023
CIVIL APPEAL NO. ABU 033 OF 2023
[SUVA HIGH COURT CIVIL HBC 353 OF 2015]

BETWEEN : **FIJI BROADCASTING CORPORATION LIMITED**

Appellant

AND : **SHANJIVN PADARATH**

Respondent

BETWEEN : **SHANJIVAN PADARATH**

Appellant

AND : **FIJI BROADCASTING CORPORATION LIMITED**

Respondent

Coram : **Prematilaka, RJA**

Clark, JA

Winter, JA

Counsel : **Mr. A Kumar for the Appellant**

Mr. V Kumar for the Respondent

Date of Hearing : **05 November 2024**

Date of Judgment : **28 November 2024**

JUDGMENT

Prematilaka, RJA

[1] I have had benefit of the judgment of Clark, JA and agree with reasons, conclusions and orders.

Clark, JA

Background

[2] Dr Padarath is a qualified doctor. He was admitted to the degree of Bachelor of Medicine and Bachelor of Surgery on 13 December 2013. One day, in September 2016, Dr Padarath's mother telephoned him. She sounded flustered. She had seen an article on Facebook about a fake doctor who was due to appear in court. The article was accompanied by a photograph of a man which Dr Padarath's mother recognised was her son.

[3] Others who knew Dr Padarath — friends, colleagues and patients — also recognised him. There was a virtual online outcry with those who knew and esteemed Dr Padarath posting complaints about the publication and suggesting, in some cases, that he sue for defamation.

[4] Dr Padarath did just that. First, Dr Padarath tried to enlist the assistance of the Fiji Medical Council and the Fiji Medical and Dental Secretariat but was advised they were not the organisations to whom complaints against the media should be addressed. Dr Padarath then wrote to the Chair of the Fiji Media Development Authority expressing his frustration and describing his emotional and social stress. The reporter responsible for the article was an employee of the Fiji Broadcasting Commission (as it then was). Dr Padarath wanted the Commission to be charged and he wanted compensation. The Authority wrote immediately to the Commission seeking its response to Dr Padarath's complaint within 14 days.

- [5] Meanwhile, Dr Padarath had instructed his lawyers. On 16 September, Sumil Kumar put the Commission on notice that if an unqualified apology and \$2,000,000.00 was not received within seven days of receipt of his letter, steps would be taken towards recovery of greater damages. The Commission’s lawyers responded without delay asking for a form of acceptable apology which it could discuss with its client on a “without prejudice” basis and take further instructions. There was no response to the request for a form of apology.
- [6] In October 2016 Dr Padarath filed proceedings against both the reporter, Savaira Tabua and her employer, the Fiji Broadcasting Commission, now known as the Fiji Broadcasting Corporation Ltd (FBC). Dr Padarath sought \$2,000,000.00 in damages for defamation, further damages for libel, exemplary damages, aggravated damages, interest and costs.
- [7] Following a two-day hearing in April 2022, his Honour ALB Brito-Mutunayagam delivered judgment awarding to Dr Padarath damages in the sum of \$50,000.00 and costs of \$4,000.00. Both sums were to be paid by the FBC.¹
- [8] FBC filed an appeal seeking to have the decision set aside.² Dr Padarath also filed an appeal. He protested the quantum of damages awarded and challenged the High Court’s refusal to award aggravated or exemplary damages.³
- [9] The two appeals were consolidated and heard together. Consequently, both appeals are to be determined in this single judgment.
- [10] In the following sections of this judgment I address:
- [a] the online publications in respect of which Dr Padarath sued for defamation;
 - [b] the pleadings;

¹ *Padarath v Tabua* [2023] FJHC 159; HBC250.2016 (16 March 2023) [**High Court Decision**].

² Civil Appeal No ABU31/2023 filed 20 April 2023.

³ Civil Appeal No ABU33/2023 filed 27 April 2023.

- [c] the High Court's approach to the test for whether a publication is defamatory and the reasons for the Court's ultimate finding;
- [d] FBC's grounds of appeal and whether the High Court erred in concluding Dr Padarath had been defamed;
- [e] Dr Padarath's appeal against the award of damages which will be considered in light of the conclusions reached on FBC's appeal.

The publications

- [11] The publication which Dr Padarath says was defamatory of him appeared in two places: on the FBC Fiji Broadcasting Corporation news site and on the MIRCHI FM Facebook site. MIRCHI FM is a Hindi-language radio station in Fiji and is one of the FBC's radio stations.
- [12] The article that appeared on the MIRCHI FM Facebook site read:

Fake Doctor to appear in Court

A man pretending to be a doctor will be appearing in court today. The individual, who allegedly ran a clinic from his home in Nasinu, has been exposed as a fraud with no medical qualifications. Chief Executive of the Fiji Medical and Dental Council Dharmesh Prasad says he was arrested on Wednesday after a patient came for a review and became suspicious of his medical treatment. "He has some sort of medical equipment whereby he can tell what someone has and for each consult he was charging \$75 without giving any receipt, this is highly irregular and illegal. The so-called fake doctor had been operating for the last three months and according to the Fiji Medical Council, this is quite a serious matter because the individual allegedly administered cough mixture to people who have heart problems. See more at :<http://www.fbc.com.fj.../436.../fake-doctor-to-appear-in-court>

- [13] A photograph was placed immediately below the article. The photograph depicts a consultation situation with a man behind a desk facing a child and accompanying adult. The photograph is taken from behind but not directly behind. The angle on which the shot is taken from behind means one can clearly see the man's left ear, the shape of part of his head, part of his hairline at the back and part of his left cheek.

[14] Clicking on the link at the end of the MIRCHI FM article took the reader to the FBC news site where the same article was posted, along with the same photo. The only difference was in layout and presentation. On the FBC news site, the photograph was placed to the right of the beginning of the article as depicted below:

Fake Doctor to appear in court

A man pretending to be a doctor will be appearing in court today.

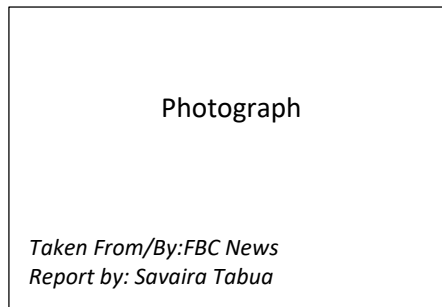
The individual, who allegedly ran a clinic from his home in Nasinu, has been exposed as a fraud with no medical qualifications.

Chief Executive of the Fiji Medical and Dental Council

Dharmesh Prasad says he was arrested on Wednesday after a patient came for a review and became suspicious of his medical treatment.

“He has some sort of medical equipment whereby he can tell what someone has and for each consult he was charging \$75 without giving any receipt, this is highly irregular and illegal.”

The so-called fake doctor had been operating for the last three months and according to the Fiji Medical Council, this is quite a serious matter because the individual allegedly administered cough mixture to people who have heart problems.”



[15] It is evident that nothing in the article identifies Dr Padarath. He is not named nor is he described. The association of Dr Padarath to the report about the “fake doctor” arose from the fact that the accompanying photograph which the FBC reporter used, just happened to be a photograph of Dr Padarath. Dr Padarath agreed that he had consented to the photograph but in an entirely different context. He consented to have his photograph taken earlier in 2016 during a conjunctivitis outbreak and for the purpose of a news report on the outbreak.

[16] Mr Singh, the Manager of News and Sports with FBC gave evidence about the FBC’s use of the photograph. Although taken with Dr Padarath’s consent at an earlier point in time FBC then kept the photograph in its archives, a practice Mr Singh described as “general media practice globally” so that an image can be accessed and used at any time.

- [17] There was no dispute that without the photograph, Dr Padarath could not have been associated with the news story about the fake doctor. Many people read the article, saw the accompanying photograph and recognised it to be Dr Padarath. Those readers, however, were family, friends and colleagues of Dr Padarath. And they expressed outrage in their social media posts variously demanding the photograph be taken down and encouraging Dr Padarath to take legal action against FBC and MIRCHI FM.
- [18] The comments had a dual effect. First, the comments had the effect of identifying Dr Padarath as the person in the photograph. Secondly, in their condemnation of the media the comments attracted attention and thus drew further and similar comment. It does not seem to have been clear at trial precisely how many comments there were. The MIRCHI FM page included in the Court of Appeal record states at the bottom “4444 comments”. But the MIRCHI FM pages and comments, each of which Dr Padarath addressed in evidence-in-chief, had 38 comments and 10 shares.
- [19] During the High Court hearing considerable attention was given to the question whether it was possible to identify Dr Padarath from the photograph if one was not a relative, colleague or friend. In other words, was Dr Padarath able to be identified by those who did not know him? Much time was taken in the pursuit of agreement as to whether the photograph showed an eye, or profile or hairline or other feature so as to be able to call it a photograph of a “face” and if it was not an image of a “face” was it possible to say Dr Padarath was identifiable? Dr Padarath was even cross-examined, in his capacity as a doctor, about what constitutes a face. To the extent it is even relevant he agreed that it was from the forehead to the chin.
- [20] The publication sued on consists of the article and the photograph. To assist an understanding of the contention around the photograph and what it shows, I have decided to attach to this judgment a copy of the photograph that was used with the article. While the FBC says the picture was included to show a “medical situation”, on Dr Padarath’s pleaded case, the photograph must be considered with the article because it was through the visual medium of the photograph, rather than the article that he was able to be identified.

[21] I turn now to the pleadings.

The Pleadings

Statement of Claim

[22] In his statement of claim Dr Padarath pleaded that the words, in their ordinary and natural meaning, alongside the photograph are capable of meaning and were understood to mean that:

- [a] he is not a qualified doctor and carries a fake qualification;
- [b] he practices deception, is therefore dishonest in his treatment of patients and society as a whole;
- [c] he engages in lies, deceit and corrupt practices to further his own greed and to the detriment of patients and the community; and
- [d] he engages in such criminal and corrupt practices for his own gain regardless of the welfare of his patients and society.

[23] Dr Padarath also pleaded that the picture:

- [a] imputed conduct or qualities tending to degrade or disparage him or expose him to public nuisance, hatred, contempt or ridicule;
- [b] disparages his reputation and tends to lower him in the estimation of right thinking members of society generally;
- [c] was calculated to injure or tarnish him in his professional reputation as a qualified doctor;
- [d] imputes serious misconduct or want of qualifications and skill;

[e] meant he was dissolute and profligate and “good for nothing except to be a fake doctor” and unfit to associate with respectable members of his profession and that the representations were false, untrue inaccurate and misleading.

[24] Dr Paradath pleaded that the defendant’s conduct had been calculated to attract more clients and a “good return” and the pictures had brought injury to his reputation and feelings and as a result he had suffered distress, embarrassment and mental anxiety.

[25] Dr Padarath claimed that as a result of the defendants’ unlawful action he had suffered “loss and damage to his name, profession, dignity, prospect of promotion, employment abroad, mental distress, anxiety, pain and suffering” in relation to which he claimed the relief set out at paragraph [6] above.

Statement of Defence

[26] The defendants pleaded Dr Padarath had consented to the use of the photograph. They denied the article was defamatory, that it could be understood to mean Dr Padarath was not a qualified doctor or that it had brought Dr Padarath into ridicule and contempt as he alleged.

[27] The defendants further pleaded the publication was in good faith, without malice and they relied on “the defence of free speech and innocent publication and the protection accorded by the Fiji Constitution and the Defamation Act Cap 34”.

The High Court decision

[28] The Judge set out each party’s case by reference to their pleadings. He then summarised the evidence of the four witnesses for the plaintiff (which included Dr Padarath’s evidence) and the single witness called by the defendants. The Judge set out 17 issues for determination and then commenced his analysis of the primary issue which was whether the article was defamatory. The Judge took the view that the article and photograph “must be considered as a whole to ascertain the character of the alleged libel and to determine the

person against whom the libel is directed”.⁴ His Honour’s essential finding is at [31] of the judgment:

In my judgment, the natural and ordinary meaning which would have been conveyed to the ordinary reasonable reader by the article and the photograph is that the plaintiff was the fake doctor with no medical qualifications. Any reasonable man would come to this conclusion. Why else was the plaintiff’s picture used and not an animated picture.

- [29] It was material to the Judge’s conclusion that the plaintiff “was in fact identified by several people as testified by [the four witnesses for the plaintiff which included Dr Padarath]”. As well, the article had been accessed “by a substantial number of people”, as evidenced by the posted interactions and comments.⁵
- [30] The plaintiff was not obliged to show he had suffered actual damage. Considering “all the circumstances of this case” the Judge awarded \$50,000.00 as general damages which his Honour “[found] adequate in all the circumstances”⁶.
- [31] The plaintiff had failed to plead particulars of his claim for aggravated damages. That claim, and his claim for exemplary damages, which were “exceptional” and awarded “only in rare cases” was declined.⁷

FBC’s Grounds of Appeal

- [32] FBC’s grounds of appeal are particularised and detailed. The appeal is advanced on the principal basis that the “posting in its plain and ordinary meaning is not defamatory or is not capable of being defamatory” and the plaintiff has not suffered injury to his reputation. As it did in the High Court, FBC places considerable reliance on the fact the photograph of the plaintiff was taken and used with his consent (albeit the context was a previous interview about an unrelated matter).

⁴ High Court Decision at [28].

⁵ High Court Decision at [33].

⁶ High Court Decision at [50].

⁷ High court Decision at [48] and [51].

[33] FBC's further grounds of appeal assert the publication was in good faith and without malice and that the Judge erred in overlooking its further defences of free speech, innocent publication and the protection accorded by Fiji's Constitution and the Defamation Act.

Did the High Court Judge err in finding the publication to be defamatory?

[34] Determining whether a published statement is defamatory of a plaintiff is a three-stage process.⁸ It must be decided whether the publication:

[a] refers to the plaintiff;

[b] bears a meaning that is defamatory of the plaintiff; and

[c] has caused or is likely to cause substantial harm to the plaintiff's reputation.

Did the article refer to the plaintiff?

[35] As for every claimant in a defamation suit, it is necessary for Dr Padarath to prove the statements he complains of were published about him. Because, in this case, they are intricately intertwined, I consider the identification issue alongside the issue of the meaning of the words.

[36] In considering whether a publication is defamatory the first task for a trial judge is to determine whether the words complained of are capable of bearing a defamatory meaning. Words will be defamatory if they "tend to lower the plaintiff in the estimation of right-thinking members of society generally".⁹ Whether words are capable of bearing a defamatory meaning is a question of law and, as such, is for the judge to decide. Whether the words are in fact defamatory will be a question for the decider of fact. In a jury trial the decider of fact is the jury. Where there is no jury the decider of fact is the judge. As

⁸ *Lachaux v Independent Print Ltd, Lachaux v Evening Standard Ltd, Lachaux v AOL (UK) Ltd* [2015] EWHC 2242 (QB) at [13].

⁹ *Sim v Stretch* [1936] 2 All ER 1237 (HL).

stated in the recent Supreme Court decision in *Nawaikula v Khaiyum* where there is no jury it is the judicial officer who —¹⁰

“...represents the ordinary person charged with the objective task of assessing whether [a publication] had the tendency to lower [a plaintiff] in the eyes of reasonable members of society.”

[37] I do not find it necessary to turn to the numerous authorities in which the court has been called upon to determine the reasonable meaning of particular words alleged to be defamatory. What Dr Padarath’s case requires is a construction of the particular words used in the pleaded article which was published alongside a photograph of Dr Padarath. The question the court is required to determine is whether these particular words are capable of being defamatory. Lord Atkin’s observation almost a century back remains pertinent. In *Sim v Stretch* his Lordship —¹¹

... [did] not find much value in other cases where words are held to be incapable of being defamatory. Like cases on construction in other branches of law they often darken counsel rather than give light.

[38] Looking simply at the article I do not regard the words alone as capable of lowering the plaintiff in the eyes of right-thinking members of society. The evidence at trial bears that out but, for the moment, I decide the point without the evidence because at this stage the exercise requires a simple construction of the words.

[39] The article on the MIRCHI FM Facebook page and on the FBC site tells the reader that a man pretending to be a doctor is due to appear in court that day. The article describes how the man who ran a clinic from his home had been exposed as a fraud with no medical qualifications. He had been arrested on the Wednesday after a patient became suspicious of his medical treatment. Then the article quotes a patient who refers to “some sort of medical equipment” being used by the man for each consultation and for which he was charging \$75. The article concludes by saying the so-called fake doctor had been operating for the past three months and that the Fiji Medical Council regarded it as a quite serious

¹⁰ *Nawaikula v Khaiyum* [2024] FJSC 23; CBV0016.2022 (28 June 2024).

¹¹ *Sim v Stretch* above, fn 9, at p 1241.

matter because the individual allegedly administered cough mixture to people who had heart problems.

[40] It is impossible to think that perusal of the words in the article alone could impact Dr Padarath's reputation or have the effect of lowering Dr Padarath in anyone's estimation much less right thinking members of society. The words are not capable of conveying to any reader that Dr Padarath had been running a clinic from his home for the past three months and had been exposed as a fraud with no medical qualifications. As a matter of law, the words alone are not capable of a defamatory meaning. Dr Padarath has not established therefore, that which he pleads, namely, that the words in the statement, in their natural and ordinary meaning, were understood to convey that he, Dr Padarath was not qualified, that he practiced deception or any of the other meanings set out above at [22].

[41] But of course Dr Padarath's case was that the article is capable of bearing the meanings and innuendo he particularises in his statement of claim because those meanings come from the words "alongside the photograph".¹² The Judge found for Dr Padarath on this point when he concluded that the natural and ordinary meaning conveyed to the ordinary reasonable reader would have been that the plaintiff, being the man in the photograph, was a fake doctor with no medical qualifications.

[42] I respectfully disagree with the learned Judge. The most that the ordinary and reasonable reader could take from the words and accompanying photograph, was that the man in the photograph was the fake doctor. But reaching that conclusion begs the question: "who is the man in the photograph?" Without knowing the identity of the man in the photograph how could the words in the article lower Dr Padarath in the estimation of a right-thinking audience?

[43] Where, as in this case, a plaintiff is not named but is pictured alongside the words complained of, the plaintiff must prove that the words were read by people who were able

¹² Amended statement of claim at [11].

to identify the plaintiff from the photograph.¹³ The evidence of the three witnesses who Dr Padarath called was to that effect. Poonam Rajnita Pal was a registered nurse who knew Dr Padarath professionally. They had worked together. Ms Pal recalled seeing the article and the photograph. In fact it was the photograph that drew her attention to the article. When asked about the first thing that came to her mind Ms Pal answered: “Well the first thing that came to mind was this is entirely false.”¹⁴ Ms Poonam went on to say that Dr Padarath was working at the Samabula Health Centre at the time and they had been working together that year.

[44] The next witness was Dr Bal Govind. Dr Bal Govind and Dr Padarath were colleagues at CWM when doing their internships. Dr Bal Govind saw the article when she was on Facebook. She then started reading all the comments. She gave evidence of the first thing that came to her mind when she read the post:¹⁵

“I found that post was defamation of someone’s character because I knew Shanjivan Padarath as a qualified doctor because we went through the training together at CWM and we passed our internship and we were posted to separate medical health centres. So I knew it would affect him professionally and mentally”.

[45] Dr Bal Govind said she understood all the comments to be saying “remove the picture ... Dr Shanjivan is a qualified doctor”.¹⁶ She added her own post to the Facebook comments asking: “Are they even seeing our comments?” Dr Bal Govind understood that the friends of all those who had commented (there were 10 “shares” at the time she posted hers) might have access to the comments.

[46] The next witness for the plaintiff was Akshay Ashil Kumar, Projects Manager at Engineer Designs. His evidence was that during a lunch break his work colleagues were talking about a fake doctor. When Mr Kumar asked to be shown the face they said no face was there. When Mr Kumar saw the post he recognised Dr Padarath because he “knew

¹³ *Dwek v Macmillan Publishers Ltd* [2000] EMLR 284 at 291 and the discussion in Duncan and Neill on Defamation, (5th ed, LexisNexis, London 2020) at [7.13].

¹⁴ Notes of evidence at p 73.

¹⁵ Notes of evidence at p 85.

¹⁶ Notes of evidence at p 83.

Shanjivan from [birth]”.¹⁷ Mr Kumar was asked to identify his posted comment which, because it was a public page, he said everybody would be able to see, including Shanjivan’s name. Mr Kumar’s post appeared on the Facebook page exactly as reproduced below:

Bro take this matter up ... mirchi sucks and they can't b posting photos like this ... we are on full support ... this people don't have work to do and they want to ruin others profession. What the government is doing since he is a qualified doctor working for ministry of health ... shame on u

[47] Viewed as a whole, the evidence adduced on behalf of Dr Padarath during the High Court hearing establishes the following key facts:

[a] Some viewers of the publication recognised the photograph was of Dr Padarath.

[b] Those who recognised Dr Padarath in the photograph were colleagues, family, or friends. And they all knew the article was not about Dr Padarath because they knew he was a qualified doctor and not a fake doctor operating a clinic from his home and due to appear in court.

[c] The other class of viewers was not in a position to recognise Dr Padarath not having come across him. Dr Padarath’s own evidence makes the point:¹⁸

Qn: So apart from your peers, friends and colleagues, nobody else can actually recognise you from that photo?

A: No

...

Qn: And in terms of the post only people who knew about the post or knew that it was you was your colleagues, your family members and your friends, is that right?

A: Yes

[d] And Mr Kumar’s evidence (referred to above at [46]) is an example of the point. Mr Kumar’s colleagues could not see the face in the photograph and could not

¹⁷ Notes of evidence at p 95.

¹⁸ Notes of evidence at pp52-53.

therefore identify who the article was about much less identify that it was Dr Padarath who was pictured. While this class of viewers neither knew nor recognised Dr Padarath they may have come to know the name of the person in the photograph because the comments identified him by name.

[48] To summarise the position to this point: as a matter of law, the words in the article are not capable of bearing a defamatory meaning. Read alone, the words do not convey to an ordinary reader the meanings which Dr Padarath has alleged in his amended statement of claim. Even taking into account the photograph, which one must do because there is no doubt it is part of the publication, the words are only capable of meaning that the person in the photograph is likely to be, or is in fact, the fake doctor. At this point the issue of recognition is relevant. For Dr Padarath to have succeeded in his claim he needed to show that reasonable people reasonably understood the article to be about him.¹⁹ But the evidence in fact showed that readers who did recognise Dr Padarath in the photograph understood the article was **not** about him. And the understanding of the online viewers who were not called to give evidence, but whose online comments were relied upon by Dr Padarath, was to the same effect.

[49] In evidence-in-chief, Dr Padarath took the Court to each of the 38 posted comments that he relied upon to demonstrate that he had been identified. A random selection is reproduced below:

Mirchi FM you have got yourself a lawsuit on your hand for blatantly defaming a qualified doctor in this posting!!! This young man graduated with an MBBS degree with honors and you should be ashamed of yourself for reporting false information!!! Shame on you!

The least you MIRCHI FM can do is remove this pic. Get your facts right before you post anything.....

1. Is the person or the fake doctor in question Dr Shanjivan who is also picture here? 2. Did MIRCHI FM ask Dr Shanjivan for permission to have his picture taken for a news piece? 3. Did MIRCHI FM know that anybody who reads this will immediately

¹⁹ See Duncan and Neill, above fn 13 at [7.02]-[7.03] for a discussion about the test for identification, including where identification depends on extrinsic facts.

think that Dr Sanjivan (pictured), is the doctor who appeared in court? I guess MIRCHI FM ALREADY KNEW?

Just sue the ppl involved in this fake rumours. Damn his got the degree.we all know that

Sanjivan Padarath.....this is jst plain shitty from a news channel.....defamation of character for sure.....

Hes 1 of the best docs. I knw of. Dz z defamation of character ... Jivan dz kols 4 a legal action

Hellooo why you put this picture here. This person is a doctor by profession.

He is an amazing doctor and a very loving and compassionate human being! This is ridiculous!

This is Samabula Health Center n he is a government doctor Sanjivan what this media people are doing plz stop accusing this innocent brainy boy

Omg..wht d hell..he's a qualified doctor..n yes mirchi fm..gt yr facts right..

Why is there a photo of a registered and qualified doctor posted with the article?

Sanjivan bhai this cant be you....omg!!! Someone who has worked so hard to achieved his dream.....graduated with honors.....looked up by his families has been defamed by so called "fake" news. Just can't believe this

OMG!!! This is intolerable! Get ur facts right mirchi FM!!!

[50] Dr Padarath relied upon the comments to prove he had been defamed even to those who did not know him. In closing submissions in the High Court counsel submitted:

Any person reading those comments, who didn't know the person in the picture became aware that the picture was of Dr. Sanjivan Paradath and the publication is about him.

...

... Dr. Sanjivan Paradath was also defamed to the people who did not know him by the comments published by the Fiji Broadcasting Corporation.

[51] Even if the publication, in its natural and ordinary meaning, had a defamatory tendency it caused no harm to Dr Padarath's reputation. The difficulty for Dr Padarath is that while the comments were shared with others and had the effect of identifying him to those who

did not previously know his name, the comments are a powerful demonstration of the esteem in which he was held – and continued to be held – by readers of the publication. The comments are compelling evidence that Dr Padarath’s good standing and reputation was not lowered or otherwise harmed by the publication.

[52] During the hearing Dr Padarath referred to comments made to him. He said that after the publication “patients and colleagues started coming and asking if I was the Fake Doctor” and that thereafter he could not practice in primary health care but had to ask to be transferred to a specialist clinic. But Dr Padarath also accepted he was being teased.²⁰ Then Dr Padarath said he “had patients who were asking me to my face whether I was a fake doctor”. Putting aside the apparent hearsay nature of this evidence, Dr Padarath did not call these people. It is entirely possible that they too were teasing Dr Padarath. In any event, Dr Padarath’s testimony does not demonstrate that his reputation was harmed. The reported comments are equally consistent with the other forms of teasing Dr Padarath apparently experienced. Ultimately, Dr Padarath brought no evidence of any reasonable reader seeing the publication and understanding that Dr Padarath himself was the fake doctor referred to in the article.

[53] None of this is to say that the emotional stress Dr Padarath said he experienced was not real. But what was genuinely and deeply distressing for Dr Padarath may very well have been shrugged off by another. Faced with identical circumstances individuals will respond differently and their responses may vary widely.

[54] Dr Padarath’s feelings were injured. Damages may be awarded in tort for injury to feelings but only where mental or emotional well-being is an interest “which is itself protected by the law of tort”. The point was discussed by the UK Supreme Court in its recent decision in *George v Cannell and Another*.²¹ Lord Leggatt (with whom Lord Hodge DP and Lord Richards agreed) observed that although “mental or emotional well-being is not an interest which is itself protected by the law of tort” that fact did not preclude damages caused by

²⁰ Notes of evidence p 36.

²¹ *George v Cannell and Another* [2024] UKSC 19; 4 All ER 431 at [100].

torts which protect aspects of personality. In defamation cases “damage wrongfully done to a person's reputation may naturally cause injury to feelings for which damages can be recovered”.²²

[55] Dr Padarath’s suit is in defamation. Whether a claimant has been defamed is not gauged by injury to feelings but by the harm to reputation caused by a defamatory publication. Applying the classic test, the publication at the heart of this proceeding “did not tend to lower the plaintiff in the estimation of right thinking members of society generally”.

[56] It follows that the High Court Judge erred in finding that Dr Padarath had been defamed by the publication. The appeal in ABU 31 of 2023 is allowed and the orders of the High Court will be set aside.

[57] I turn briefly to Dr Padarath’s appeal against the award of damages.

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[58] The FBC and Savaira Tabua have succeeded in their appeal against the High Court’s determination that the publication was defamatory and that they should pay damages.

[59] That being the case it is not necessary to address Dr Padarath’s appeal against the award of damages and the High Court’s refusal to award aggravated or exemplary damages.

[60] This Court has concluded there was no defamation of Dr Padarath. Consequently, there is no liability to pay damages to Dr Padarath.

[61] That leaves only the issue of costs.

[62] Dr Padarath would not have been placed in the situation in which he found himself had his photograph not been used without his consent. The first and second respondents rely on Dr Padarath’s previous consent and assert that his photograph was already in the public

²² At [101].

domain. Dr Padarath's claim was not of course for wrongful use of his photograph, or invasion of privacy, so there has been no argument on the legal position in Fiji with regard to the use by media of photographs of private individuals. There was some faint reliance on the Media Industries Development Act 2010. The Court was not directed to, nor have I been able to identify any provision in the Act that supports the FBC's use of Dr Padarath's image in the way it did.

[63] Had his photograph not been associated with the article about the fake doctor, Dr Padarath would have been spared the embarrassment and hurt he undoubtedly suffered.

[64] For these reasons, although Dr Padarath does not succeed in ABU 33 of 2023, costs will lie where they fall, as with civil appeal ABU 31 of 2023.

Winter JA

[65] I agree.

ORDERS

- (1) The appeal in ABU 31 of 2023 is allowed.
- (2) The appeal in ABU 33 of 2023 is dismissed.
- (3) Costs in both appeals will lie where they fall.



A handwritten signature in blue ink, appearing to read "Chandana Prematilaka", is written over a horizontal line.

Hon. Mr. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

A handwritten signature in blue ink, appearing to read "Karen Clark", is written over a horizontal line.

Hon. Madam Justice Karen Clark
JUSTICE OF APPEAL

A handwritten signature in blue ink, appearing to read "Gerard Winter", is written over a horizontal line.

Hon. Mr. Justice Gerard Winter
JUSTICE OF APPEAL

ATTACHMENT AS PER PARA [20]

