

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 53 OF 2011

AND : **TANDEM SKYDIVE (FIJI) LIMITED** a duly incorporated limited liability company having its registered office at 11 Zahoor Road, Martintar, Nadi, **TIM** and **SUSAN JOYCE** both of 28 Sovereign Quays, Denarau, Business Persons.

PLAINTIFFS

AND : **DARKO TUPEK** of Namaka, Nadi, Skydiving Instructor.

DEFENDANT

R U L I N G

INTRODUCTION

- [1]. A statement is defamatory if it tends to lower the plaintiff in the eyes of right-thinking members of society. This case concerns some written and spoken statements by the defendant which are alleged to have defamed the plaintiffs. The matter was at pre-trial discovery stage when the defendant, Tupec, failed to comply with certain discovery orders. His lawyers, Koyas, sought several adjournments to contact Tupec but to no avail. I eventually struck out the defence and counterclaim on 21 June 2012 and ordered costs of \$300.00 in favour of the plaintiffs. I then adjourned the case for formal proof to 12 February 2013. Notably, at some point earlier, Koyas had indicated that they would be seeking leave to withdraw as counsel but never got around to filing that application.
- [2]. Timothy Joyce, the second plaintiff, is a qualified pilot and skydiving instructor. He is a director of Tandem Skydive (Fiji) Limited (“TSFL”). Timothy’s wife, Susan, is TSFL’s company secretary. TSFL carries on the business of skydiving for recreational purposes. Its market is mostly tourists. The company owns an aircraft and employs a number of pilots and dive instructors. The Joyce’s came to Fiji in 2004. Prior to that, Timothy was involved in a skydiving business in Australia.
- [3]. Darko Tupec, the defendant, is a Croatian national. Tupec was employed by TSFL on two spells as diving instructor. His last spell was from December 2010 to 25 February 2011.

- [4]. The plaintiffs are claiming damages for the defamatory remarks and comments made by Tupec on various occasions in March 2011. The first set of acts of defamation occurred when Tupec circulated a letter he wrote to various government departments and agencies which contained damaging allegations about the Joyces and their business in TSFL. The second occasion happened when Tupec posted similar negative comments on a website on the internet. And the third set of acts happened when Tupec spoke the same words almost in verbatim to numerous other individuals within the Joyces' business and social circle in Nadi. Tupec's damaging allegations caused such a ripple that the Joyces were even shunned by their peers in Australia.

THE DEFAMATORY WORDS

- [5]. The letter that Tupec wrote and circulated was tendered by Timothy and marked **PEX1**. It reads as follows:

"During my work with Sky Dive Fiji (meaning the first named Plaintiff) I have discovered numerous illegal, criminal and highly dangerous activities which I feel must be stopped. I wish to report the flaws I have uncovered in this operation, please find them stated below:

1. Unsafe maintenance and procedures with aircraft operations.
2. Unsafe maintenance and procedures with Tandem Skydive operations.
3. Unsafe maintenance and procedures with Helicopter operations.
4. Employing expatriate workers without work visas and tax registration.
5. Employer did not provide contract of employment and did not honor the terms agreed upon before commencement of employment.
6. The company has been carrying out major tax evasion through taking payments in cash for services rendered and paying staff in cash without tax deductions.
7. Cheating tourists through credit card terms, cancelation policy, not supplying service as advertised.
8. Abuse and ill treatment of his local and expatriate staff.
9. Employing staff without necessary experience and qualification.
10. Reckless disregard for staff and customer safety in aviation operational decision making.
11. Not paying minimum wage as agreed with staff prior to commencing employment.

..... I also have to say that Mr. Joyce was constantly telling me of his good relationship with the Attorney General, Mr. Saiyed Khaiyum, and that he does not have to worry about being prosecuted.

I am willing to witness, testify and explain all the above mentioned criminal and fraudulent actions caused out by Skydive Fiji under the leadership of

Managing Director Tim Joyce with the full knowledge and assistance of Susan Joyce.

..... Mr Tim Joyce, the Managing Director of this company has just attained his Fiji Citizenship status as a long term investor into Fiji. Clearly allowing a person who abuses the system in this way to continue to represent Fiji as an operator and citizen is not a good image for Fiji especially when the Government is doing so much to encourage investment and trade in this country. In the process of his bad dealings I must advise that a lot of tourists have booked to enjoy these skydives have turned away very disappointed and will never return. This is something serious especially when the Tourism Industry in Fiji is booming not to mention that their safety and security is questionable or better said in danger.

I believe in Justice and proper judgment regarding all the concerns raised above and that the relevant authorities are informed accordingly and more-so that the appropriate action and investigations are carried out about the unscrupulous dealings of this company in Fiji"

- [6]. In paragraph 4 of the statement of claim, the plaintiffs plead that in addition to circulating the above letter to the persons named above, Tupec also uttered the same words on various occasions in March 2011 as pleaded therein:

On several occasions thereafter the Defendant falsely and maliciously spoke and published the letter in paragraph 3 herein and/or words from the said letter to others including on 31st March 2011 to one Valentino Fries; on the 21st of March, 2011 to Mr. Chris Chand; in the afternoon of the 25th March 2011 at Cardos bar in the hearing of Mr. David Jamison, other patrons and a group of patrons who were celebrating a birthday; on 29th March 2011 to the owner of Anna's Cafe in Martintar in the hearing of Mr. Richard Hatherly and other persons not known to the Plaintiffs', the Plaintiffs will provide dates of other occasions and names of other persons to whom the words aforesaid and the letter were published before discovery or trial hereof.

- [7]. Timothy, Susan, and a Nadi businesswoman by the name of Joyce gave evidence for the plaintiffs. Timothy and Susan both said that Tupec wrote the above letter on 25 February 2011 and sent it to the Chief Executive Officer of the Fiji Islands Revenue and Customs Authority. Timothy said the letter was copied to the Prime Minister's Office, FICAC, CAAFI, Ministry of Labour, the Attorney General, Ministry of Foreign Affairs, Ministry of Defence and FTIB. It was also circulated to various other people. These other people are named in paragraph 4 of the statement of claim.
- [8]. Timothy said Tupec also posted damaging articles on the web concerning them and their business. A copy of the said web posting

was tendered in evidence and marked **PEX2**. Below I reproduce in full the posting in question.

hi there people,

whoever thinks of going there here come my 2 cents...

having worked for skydiver Fiji in 2 times, I can only say its a shameful skydiving operation which is just waiting for tragic accident to happen and I have to say that I witnessed 2 close calls with this operation.

one involving a crash accident with the companies 182 (VH-PQR) while landing at an island with a result that the plane was damaged behind repair possibility and another one when the owner (Tim Joyce) sent a new pilot to fly into meteor conditions which were becoming questionable for a safe VFR flight and ended up in aborting the jump run at 12k ft and descending in a 11k ft storm cloud in a tiny 182 VFR equipped with a cloud base at 1000ft, luckily we survived that ride and guess what the owner said after we landed (who BTW has cca 12.000 hours flight time, CPL etc and is living there for the past few years) he says that he didn't know that the weather would close so fast up.

there are a lot of stories which all more or less ended with a happy ending but believe me someone will have less luck and it will be game over.

there will for sure be some more people that worked at the place writing their experiences, when they see this thread

just a few other aspects, the skydiving equipment he uses would be banned in any place but somehow gets away with using gear that is way behind the usage limits.

FYI Skydive Fiji changed in the past 2 years about 6-8 pilots and for sure about 10 tandem instructors so thats another interesting aspect and all of them left in a way that their notice to the owner was given just before they boarded the flight out of Fiji.

the owners don't have any aspect for their employees, although on first hand they seem so sweet and nice but once you discover their dark side you just want to run away asap.

beside all they have as well financial and tax problems giving to the staff faulty payment slips which the Fiji government is investigating now.

good luck people.

- [9]. Timothy said the web postings made recruitment of pilots and instructors difficult for TSFL. As a result, Timothy had to give up his time to flying and acting as an instructor. This caused more stress and anguish to the Joyces.

COMMENTS

- [10]. The defamatory comments alleged in this case consist of written as well as spoken matter. For either of them to be defamatory, the written or the spoken word must injure the reputation of the plaintiffs either by exposing them to hatred, contempt or ridicule or by tending to lower them in the esteem of right thinking members of society (**Sim v Stretch [1936] 2 ALL ER 1237, 1240** per Lord Atkin).
- [11]. Written and spoken defamatory words are treated slightly differently at common law. Libel, which is a defamatory statement permanent in form of which written statements, perhaps, make up the most number, are actionable *per se*. As for slander, which is any transient defamatory statement such as spoken words, the common law requires damages to be proved except where the words spoken allege that the claimant has committed an imprisonable offence or that the plaintiff is unfit to carry on his profession, trade or calling.
- [12]. Section 10 of the Defamation Act of Fiji (Cap 34) appears to have enacted the common law exception with regards to the latter.

Slander affecting official, professional or business reputation

10. In an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.

- [13]. Since our Defamation Act does not enact a similar provision with regards to slander cases which allege the committing of an imprisonable offence, the common law exception in this regard would apply in Fiji anyway.
- [14]. The plaintiffs must prove that the statement was defamatory, that the statement referred to them and that it was communicated to a third person. The onus then shifts to Tupec to prove any of the defences that he might rely on. Tupec has not appeared so I will proceed to assess whether or not the statement is defamatory of the plaintiffs and whether or not it was published.

ARE THE STATEMENTS DEFAMATORY?

- [15]. Firstly, as a question of law, I must determine at the outset whether or not the words in question are capable of conveying a defamatory meaning. If I were to answer that legal question in the affirmative, the question then arises as to whether or not the words in question are in fact defamatory in the particular circumstances of this case. This is a question of fact.
- [16]. In deciding whether words are capable of conveying a defamatory meaning the court will reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation.
- [17]. In **Chand v Fiji Times Ltd [2007] FJHC 1; HBC0306.2000L (13 April 2007)**, Madam Justice Phillips, in a case which concerned an article printed in the Fiji Times, summarised the relevant principles as follows:

[11] The leading authority is **Lewis –v- Daily Telegraph**[2] in which an article in the *Daily Telegraph* headed ‘**Inquiry on Firm by City Police**’ reported that the City of London Fraud Squad were inquiring into the affairs of Rubber Improvement Ltd. The Chairman of the company, Mr. Lewis, sued for libel. He and the company claimed that the natural and ordinary meaning of the article was that they were guilty of fraud. Their Lordships held that no ordinary and reasonable reader would conclude guilt merely because the police were investigating the matter. The article was capable of conveying the impression that the plaintiffs were *suspected* of fraud and that this was a defamatory allegation in itself, albeit less serious.

[12] The following general principles of construction emerge from their Lordships’ speeches and subsequent authorities.[3]

(i) The natural and ordinary meaning is that which the words convey to ordinary reasonable persons.

(ii) The ordinary reader is not avid for scandal but can read between the lines and draw inferences. Ordinary men and women have different temperaments and outlooks. Some are unduly suspicious and some are unusually naïve. One must try to envisage people between these two extremes and see what is the most damaging meaning that they would put on the words. On the facts of **Lewis**, it was held that only an unduly suspicious person would have concluded that the plaintiffs had been guilty of fraud simply because the police were investigating their affairs.

(iii) The effect of the publication on an ordinary reader is one of impression and the court should be wary of an over-elaborate analysis. The narrow and analytical construction put on words by a lawyer is inappropriate.

(iv) The ordinary reader considers the publication as a whole in determining its meaning. If "in one part of the publication, something disreputable to the

plaintiff is stated, but that is removed by the conclusion, the bane and antidote must be taken together." [4]

(v) "As we have seen, there is now a strong current of authority supporting the view that a report which does not more than state that a person has been arrested and been charged with a criminal offence is incapable of bearing the imputation that he is guilty or probably guilty of that offence. The decisions are, I think, soundly based, even if we put aside the emphasis that has been given to the process of inference on inference that is involved in reaching a contrary conclusion. The ordinary reasonable reader is mindful of the principle that a person charged with a crime is presumed innocent until it is proved that he is guilty. Although he knows that many persons charged with criminal offences are ultimately convicted, he is also aware that guilt or innocence is a question to be determined by a court, generally by a jury, and that not infrequently the person charged is acquitted." [5]

(vi) "In deciding whether the words are capable of conveying a defamatory meaning the court will reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation..... The ordinary and natural meaning of words may either be the literal meaning or it may be implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words.....The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words." [6]

[18]. In **Borron v Fiji Broadcasting Commission [1982] FJCA 7; ABU0040.1981 (2 April 1982)**, the Fiji Court of Appeal reviewed some authorities as follows:

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

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

If the words are capable of conveying a defamatory meaning then it is a question to decide whether the words, do in fact, convey a defamatory meaning. In deciding whether words are capable of conveying a defamatory meaning the court will reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation.

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

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

In considering this question it is not enough to say that by some person or another the words **might** be understood in a defamatory sense. (Nevill v. Fine Art and General Insurance Co. [1897] A.C. 68.)

In Stubbs Limited v. Russell [1913] A.C. 386 Lord Shaw said at p. 398:

"Is the meaning sought to be attributed to the language alleged to be libellous one which is a reasonable, natural, or necessary interpretation of its terms? It is productive, in my humble judgment, of much error and mischief to make the test simply whether some people would put such and such a meaning upon the words, however strained or unlikely that construction may be. The interpretation to be put on language varies infinitely. It varies with the knowledge, the mental equipment, even the prejudices, of the reader or hearer; it varies - and very often greatly varies - with his temperament or his disposition, in which the elements, on the one hand, of generosity or justice, or, on the other, of mistrust, jealousy, or suspicion, may play their part. To permit, in the latter case, a strained and sinister interpretation, which is thus essentially unjust, to form a ground for reparation, would be, in truth, to grant reparation for a wrong which had never been committed.

In Gatley on Libel and Slander 7th Edition at paragraph 93 the learned authors state:

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

Any statement is defamatory if it tends to lower the individual to whom it refers in the estimation of right-thinking persons generally or to bring him into hatred ridicule or contempt. In Tournier v. National Provincial & Union Bank of England [1924] 1 K.B. 461 both Scrutton L.J. and Atkin L.J. considered that this "ancient formula was not sufficient in all cases for words may damage the reputation of a man as a business man which no one would connect with hatred ridicule or contempt."

ARE THE WORDS IN QUESTION CAPABLE OF DEFAMATORY MEANING IN THEIR NATURAL AND ORDINARY MEANING AND ARE THEY IN FACT DEFAMATORY IN THIS CASE?

[19]. After considering the words in question and the above cases, I am satisfied that the words written and circulated by Tupec and which he uttered to various other persons, are capable of defamatory meaning and that they were in fact defamatory in the circumstances of this case and that they conveyed the imputations pleaded therein paragraph 5 of the statement of claim.

That the plaintiffs activities were criminal and/or illegal and without legal authority.

Tupec's letter alleges that in his work with Sky Dive, he had "discovered numerous illegal, criminal and highly dangerous activities". He then sets out in detail the specific allegations which are listed above. In my view, the words clearly impute that the plaintiffs were carrying out their business with utter disregard of the law.

Compromising the safety of their patrons.

I would say that the allegations clearly impute that the plaintiff's operations were a complete compromise of the safety of their patrons. Allegations 1, 2,3, 9 and 10 clearly impute so.

Using Unsafe Aircrafts for their Operations.

As above.

Not properly or at all maintain their equipment and facilities.

As above.

Not following or complying with any safety or maintenance regime or regulations required by law.

As above.

Cheating Tourists and Obtaining Money from them by False Pretences.

As above.

Abusing and Ill-Treating their Staff.

As above.

Not Complying with Employment Laws.

As above.

Dishonest.

As above.

Fraudsters.

As above.

Providing services to public and tourists in a dangerous and unsafe/illegal manner.

As above.

The Joyces corruptly obtained their citizenship of Fiji and are not fit to be citizens of Fiji.

As above.

Plaintiffs have no morals or ethics.

As above.

PUBLICATION

[20]. Defamation requires a publication to a third party. I note that **PEX1** is dated 25 February 2011. The document tendered in Court appears to be a copy of the copy of the letter that was circulated to and received at FIRCA because there is a FIRCA stamp on it which tells that FIRCA Lautoka did receive the document on 01 March 2011. This is sufficient evidence of publication. I also accept the evidence of Ms. Beatrice, the second witness and a businesswoman in Nadi who gave evidence that she was visited by Tupec in 2011 at her business premises where he gave her a copy of the said letter and also repeated the contents over to her verbally.

[21]. Timothy's evidence is that it was Susan who alerted him to the existence of the letter and about how Tupec was spreading rumours about them. Thereafter, several other people mentioned the letter to him and advised him that Tupec was repeating the words in the letter to them. Timothy referred to all those people as those listed in paragraph 4 of the statement of claim. They are as follows:

On 13th March 2011 to one Valentino Fries; on the 21st of March, 2011 to Mr. Chris Chand; in the afternoon of the 25th March 2011 at Cardos Bar in hearing of Mr. David Jamison, other patrons and a group of patrons who were celebrating a birthday; on 29th March 2011 to the owner of Anna's Cafe in Martintar in the hearing of Mr. Richard Hatherly and other persons not known to the Plaintiff.

INJURY TO REPUTATION & SHUNNING BY MEMBERS OF PUBLIC

- [22]. Both the Joyces gave evidence that the contents of the letter was damaging to their reputation and caused them great distress. As a result they were brought into scandal, contempt and ridicule and were shunned by what used to be their business and social circle. According to Timothy, and this evidence was also echoed by Susan, they moved and mixed within the business community in Nadi, and in particular, with those connected with the tourism industry. Both Timothy and Susan said that before the incident, they used to receive invites to various social and business functions. After 25 February, 2011, he noticed that the invitations had declined drastically. He also noticed that people would stare at them and whisper whenever they went to a bar or to a night spot. He knew they were talking about them and this embarrassed him greatly.
- [23]. Susan cried and was emotional in court as she gave evidence. Clearly, she was still greatly upset and distressed as she recalled the events. She said people were ignoring her and Timothy. They were suddenly dropped from the invitation list of various functions and found themselves not being included in the social circuit of the tourism industry in Nadi. She sensed that people talked behind their backs and she noticed people would stare at them. She has had to make trips to Australia just to regain her peace of mind. The false allegations caused such a stress to her marriage almost to breaking point.
- [24]. Timothy said that, following the letter, CAAFI did carry out an audit which took four days but was spread over a month. That investigation returned no adverse findings were made against TSFL or against the Joyces.
- [25]. CAAFI had also called into assistance auditors from Australia to assist. The auditors were from an Association of which Timothy was a member. Although the audit returned no adverse finding, Timothy said the news of the audit did affect his membership activities and he was shunned by members there. He found that he was no longer

invited to attend functions that he previously attended, some of which, as guest speaker.

[26]. The audit, said Timothy, caused him and Susan great stress, embarrassment, anguish and distress.

[27]. Apart from the CAAFI audit, Tupec's letter also resulted in an audit by FIRCA. This FRICA audit lasted over a year. Several teams of FIRCA staff (usually around 5 per team) would turn up at various places of TSFL business operation. However, like the CAAFI investigation, the FIRCA investigation also returned no adverse finding.

BUSINESS LOSS

[28]. Timothy said the web articles also caused people to hesitate about bookings they had made. They received alot of queries in this regard. Timothy said he and Susan went to great lengths and trouble to try to convince people that the facility was safe. Timothy estimated a loss of about 330 participants (at \$700 per participant) between 2010 and 2011 who were put off from skydiving by Tupec's mudslinging. That is an estimated loss to the business of approximately \$231,000.00. I note though that the letter was allegedly circulated only in February 2011 so the above figure may be grossly exaggerated. Susan said Tupec's allegations were clearly malicious and he made no secret that he wanted to set up a rival operation in competition with TSFL's. He said this to the second plaintiff and others and also to PW2 and her husband. All the attacks appear to have commenced when the Joyces laid off Tupec due to various incidents at work including abusing fellow staff and the plaintiffs.

REFERENCE TO THE PLAINTIFFS

[29]. The letter (**PEX 1**) clearly refers to all plaintiffs. It says as follows in its captioning:

Re Criminal and faulty Business/Operation and employment by Tandem Skydive (Fiji) Limited T/A Skydive Fiji.

[30]. Thereafter reference is made to Skydive Fiji and the Company on numerous occasions. The second and third Plaintiffs are referred to specifically by name in the penultimate paragraph on page one in the last sentence. The Second Plaintiff is referred to in the first paragraph on page two with reference to his relationship with the Attorney General. The Second Plaintiff is again mentioned by name in respect of his citizenship in the third paragraph on the second page.

DAMAGES

- [31]. Damages in defamation are awarded generally to compensate the plaintiff for the injury done to his or her reputation (see **Rabuka v Fiji Daily Post Company Limited** (2005) FJHC 174). Exemplary and punitive damages are sometimes awarded.
- [32]. The plaintiffs submit that on the basis of the false and maliciousness of the attacks damages of not less than \$100,000.00 should be awarded to each plaintiff. They rely on the award of Mr. Justice Brito in **Trade Air Engineering (West) Limited & Ors v Mechanical Services Limited** Suva HCCA No. 338 of 2003.
- [33]. Windeyer J in **Uren v John Fairfax & Sons Pty Ltd** [1967] 117 CLR at 150 said:

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

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

- [34]. Factors relevant in assessing damages were noted in the **Rabuka** case as follows:

As stated in Neill (supra) at 18.09 the factors which are to be taken into account in assessing damages, apart from the 'seriousness of the libel is of course always a relevant consideration, the other factors to be considered are: (a) special damages; (b) injury to the plaintiff's feelings including aggravating factors; (c) extent of the publication; and (d) mitigating factors.' The factors relevant in considering the measure of damages in defamation cases have been held as follows in the **Singapore Court of Appeal** case of **Tang Liang Hong v Lee Kuan Yew & Anor and other appeals** [1998] 1 SLR 97 (CA) (also reported in Commonwealth Law Bulletin – January and April 1998 at 195):

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

It is said that 'a publication in a national newspaper or by means of a television or radio may lead to a very substantial award because the defamatory material is likely to come to the notice of a very large number of people...' (Neill, supra at 18,14).

- [35]. As to whether or not exemplary damages should be awarded, I draw guidance from the House of Lords decision in **Rookes v Barnard and Others** 1964 AC 1129 at 1221-1231 where Lord Devlin stated the principles as follows at page 1131:

"that exemplary damages could be awarded in cases (i) of oppressive, arbitrary or unconstitutional acts by government servants; (ii) where the defendant's conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff; (iii) where expressly authorised by statute (post , pp. 1226 1227); that in a case in which exemplary damages were appropriate a jury should be directed that

only if the sum which they had in mind to award as compensation (which might of course be aggravated by the defendant's behaviour to the plaintiff) was inadequate to punish and deter him, could it award some larger sum (post , p.1228); that the facts disclosed in the summing-up showed no case for exemplary damages and possibly none for aggravated damages (post , pp. 1232, 1233); however, the plaintiff could, without any departure from the compensatory principle, invite the jury to look at all the surrounding circumstances and award a round sum based on the pecuniary loss proved (post , pp. 1221, 1233)."

[36]. The Fiji Court of Appeal in James Arthur Rennie Borrón & Mago Islands Estate Limited v Fiji Broadcasting Commission & Newspapers of Fiji Limited (Civ. Appeal No. 40/81 FCA at p5):

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

CONCLUSION

[37]. In this case, after considering all, I consider that an award of \$85,000 (eighty five thousand dollars is appropriate) inclusive for all three plaintiffs plus costs of \$500. I award no interest.



A handwritten signature in black ink, consisting of several large, stylized loops and a long horizontal stroke extending to the right.

Anare Tuilevuka
JUDGE
 16 May 2014.