



The Educator



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Liability Issue

Watch your mouth - Libel revisited

Glen Lall is the editor/proprietor of the Kaieteur News, a weekly Guyanese newspaper which is printed by the National Media and Publishing Company Limited ('National Media'). Between 21st January 2000 and 10th February 2000, Kaieteur News published an article and two caricatures with accompanying captions ('the publications') all of which referred to Dr Walter Ramsahoye, a neurologist, in disparaging terms.

The publications suggested that Dr Ramsahoye had demonstrated dictatorial tendencies in relation to the Guyana Medical Association ('GMA'), had an elevated sense of importance, held himself out as being competent in areas outside his profession, and had failed to serve his country in any significant way. They also insinuated that he had mental health problems and had caused the death of several patients in his care. The published materials are now conceded to have constituted a libel on Dr Ramsahoye's reputation. In sum, Dr Ramsahoye argued that the offending publications caused injury to his character and professional reputation and made him the subject of public ridicule, odium and contempt, occasioning him great distress and humiliation.

The trial

In a judgment delivered on 4th December 2008, the trial judge, Persaud J, of the Guyana High Court found in favour of Dr Ramsahoye a highly qualified medical practitioner of long standing in Guyana in the field of neurology, and awarded G\$4.5 million in damages.

At trial, the trial judge found that the offending publications unlawfully injured Dr Ramsahoye's character and reputation in that he was:

'effectively painted as incompetent demeaned and humiliated in the eyes of the public which no doubt caused injury to his feeling'.

He recognized that this was aggravated by the lack of an apology, the insistence on the defence of fair and accurate comment and the general attempt to defend the publications.

Mitigating factors

As a mitigating factor, the judge took into account that the Kaieteur News at the time was not a daily publication and was not available on the internet which would restrict its reach and effect. The judge also expressed himself mindful of comparatively higher awards in more developed countries but considered that the local socio-economic realities had to be borne in mind.

Having regard to all the circumstances, the judge awarded the sum of \$4,500,000 (four million five hundred thousand dollars) in damages to the plaintiff against the defendants jointly and severally. He noted, while that being minded of the potential of an award to inhibit responsible journalism and even economically ruin a publisher, as far as he was aware, this is the highest award in a case of this nature in that jurisdiction.

The test

Injury to a person's good name cannot readily be assimilated to injuries to a leg such as a broken tibia and fibula. There are some who would rather die than have their good name besmirched. At the heart of defamation is the protection of a person's reputation, a factor which does not readily feature in personal injury claims. Damages for defamation are intended to demonstrate to the public that the defamed person's reputation has been vindicated; if there is no apology and no withdrawal of the defamatory publication the award should amount to a public proclamation that the defamation has inflicted a serious injury. The sum that is required to achieve this objective must necessarily vary from case to case.

The Appeal

The Court of Appeal in its judgment of 29 January 2015, increased this award to G\$15 million - G\$12 million in general damages and G\$3 million in aggravated damages. The court accepted that the high award of G\$15 million might be said to run afoul of the guarantees of freedom of the press, but felt that the award might be a catalyst for more responsible journalism, media accountability and self-censorship. The court considered that whilst the awards in other territories in the Caribbean are not binding on the courts of Guyana, they do give an indication of the approach which the judiciaries which observe the rule of law will take in assessing compensation in libel actions. In this regard the court considered the Trinidad and Tobago case of **Panday v Gordon** [2005] in which the Privy Council refused to reduce the award of TT\$300,000 and the Jamaica case of the **Gleaner Co Ltd v Abrahams** [2003] in which the Privy Council allowed an award of J\$35,000,000 to stand.

Cummings-Edwards JA dissented on the ground that there was no justification for disturbing the award made by Persaud J. She considered that the judge had correctly applied the law and had 'meticulously balanced those important factors relevant to the assessment of damages in reaching his decision'. She further reasoned that the purpose of damages in defamation is to compensate for the injury suffered rather than punish the wrongdoer.

The CCJ

Glen Lall and National Media appeal this G\$15 million Court of Appeal decision to the Caribbean Court of Justice (CCJ) arguing for a reinstatement of the original award of G\$4.5 million while Dr Ramsahoye cross-appeals on the ground that the award ought to have been further enlarged.

There is no issue of liability, Glen Lall and National Media having conceded that point in the lower courts. The sole question raised by this appeal to the CCJ and cross-appeal, therefore, is whether the increased award is appropriate having regard to the reputational damage suffered by Dr Ramsahoye.

The issue for decision was whether the increase of the award by the Court of Appeal was appropriate in light of the injury sustained to Dr Ramsahoye's reputation. In allowing the Appeal, the court concluded that there was no justification to vary the award of damages made by the trial judge in that it was not shown that the judge acted on a wrong principle of law, or misapprehended the facts or, for these or other reasons, made an award that was a wholly erroneous estimate of the damages to which Dr Ramsahoye is entitled.

Source:

Caribbean Court of Justice case on Appeal from The Court of Appeal of Guyana of **Glen Lall & National Media and Publishing Company Limited v. Walter Ramsahoye** [2016]

A very long wait - motor third party liability

Nineteen years ago, on July 15, 1997 on the Ogle Airstrip Road, East Coast Demerara, Guyana. Tulsieram Dukhi was standing with his bicycle on the road when he was struck by a pick-up truck belonging to the Guyana Sugar Corporation Inc. and driven by Guysuco's employee, Michael Thakoordin. He suffered injuries to his left leg, a broken tibia and fibula. In 1998 he was hospitalised on three occasions for treatment and three surgical procedures and had suffered from a permanent incapacity and loss of earning capacity.

In February 1998, Dukhi, a carpenter, commenced proceedings in negligence against Guysuco and Thakoordin, seeking special damages in the sum of G\$1,097,500.00, general damages and interest.

Guysuco and Thakoordin filed a defence on November 11, 1999. They denied the sequence of events leading to the accident as alleged by Dukhi in his statement of claim and denied any liability in negligence. They alleged negligence or contributory negligence on the part of Dukhi in controlling his bicycle in such a way as to cause it to collide with the pick-up truck which was slowly overtaking a taxi on the road.

The trial

The trial of the action began before La Bennett J on December 12, 2005. Dukhi amended his statement of claim on February 6, 2006 to include further personal injuries, that is to say, lumbar scoliosis, shortening of the left leg resulting in a limp, difficulty dorsiflexing the left foot, scarring and indentation of the left leg and wasting of muscle. A further amendment to the statement of claim related to future medical care in the form of neurological intervention abroad. Amendments were also made to the particulars of special damages to include a claim for loss of earnings covering two separate periods:

- (1) from the date of the accident to September 15, 1999 and
- (2) from September 16, 1999 to January 16, 2006.

Further claims were made for travelling expenses, medicine, a medical certificate, bicycle, crutches and x-rays. In sum, the amount claimed by way of special damages increased to G\$2,794,000.00. Guysuco also amended its defence.

In December 2005, before the trial judge, Dukhi gave evidence and so did Simon Agard, an eye-witness to the accident. Dr Walter Ramsahoye, a neurologist, who saw Dukhi for the first time on December 8, 2005, about seven years after the accident, gave evidence on Dukhi's behalf. His medical report dated December 9, 2005, was admitted into evidence without objection. Dr Rogers, who had treated Dukhi after the accident at the Georgetown Public Hospital, did not

testify at the trial, but his medical report was admitted without objection. Guysuco and Thakoordin presented no evidence before the trial judge. The trial continued on December 19, 2005 and December 27, 2009.

In July 2009, on the eve of her retirement from the Bench, the trial judge made an order giving judgment in favour of Dukhi and awarding damages in the sum of G\$850,000.00, together with costs in the sum of G\$50,000.00 and interest. The judge did not provide either written or oral reasons for her decision.

The Appeal

Dukhi promptly appealed the award of damages, arguing that it was wholly inadequate and inordinately low and that the trial judge failed to take into account that the evidence in support of the alleged special damages was uncontradicted and unchallenged. Guysuco also appealed.

The appeal to the Court of Appeal came some 18 years after the accident in 1997. The Court of Appeal heard the appeal in 2014 and delivered its judgment in January 20, 2015 substantially increasing the trial judge's award of damages to G\$5,446,000.00..

The court explained that the global award of G\$850,000.00 was 'a gross under assessment' of Dukhi's full loss and indicated that they could 'find no reasonable proportion between the amount awarded and the loss and damage and residual disability claimed and proved' by Dukhi. In their view, there was abundant evidence to show that Dukhi was entitled to 'an award far over and above that which was awarded. As such the court exercised what they referred to as their powers under section 7 of the Court of Appeal Act to set aside the trial judge's award of G\$850,000.00 and undertook a re-assessment of the damages to be awarded to Dukhi.

Dukhi's evidence was generally supported by the medical report of Dr Rogers which confirmed that Dukhi remained an out-patient until May 1998, when on examination, he was found to have 'satisfactory healing' and by the medical report and evidence of Dr Ramsahoye, whose findings were virtually unchallenged in cross-examination.

Dr Ramsahoye testified that Dukhi would need neurological surgery as well as knee and hip joint replacement. The Court of Appeal found that Dukhi had failed to prove this item of special damage. Over fifteen years had elapsed between the accident and the hearing before the Court of Appeal, and there was still no evidence that Dukhi required these medical interventions.

special damages

The re-assessment of the Court of Appeal focused on special and general damages. By way of special damages, the court made an award in relation to loss of earnings for two separate periods:

- (1) February 1998 - August 1999 (inclusive) [from the date of the writ of summons for 18 months when Dukhi could not work] and
- (2) September 1999 - July 2009 (inclusive) [from the date when Dukhi returned to work to the date of judgment].

The loss for both periods amounted to G\$1,178,000.00 and G\$824,000.00 respectively. Further special damages were awarded to cover travelling expenses, medicine, damaged clothing, medical certificate, cost of bicycle, crutches and x-rays. The Court of Appeal, however, refused

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to make an award for future medical costs in relation to the neurological surgery and joint replacement surgery which they observed could possibly run into thousands of US dollars. Although the court accepted Dr Ramsahoye's evidence as 'fairly objective' it held that Dukhi failed to prove these items of special damage. The Court of Appeal therefore awarded the sum of G\$2,218,000 in special damages with interest at 6% per annum from the date of the writ to judgment in the High Court and at 4% thereafter until payment in full.

general damages

Under general damages, the Court of Appeal held that Dukhi was entitled to an award under the following heads:

- loss of earning capacity,
- pain and suffering and
- loss of amenities.

In relation to loss of earning capacity, the court noted that Dukhi was able to return to his former employment as a carpenter, but with several restrictions of body movement on account of the injuries he had sustained.

the multiplicand and multiplier

The court also observed that Dukhi had suffered permanent partial disability assessed at 50%. Dukhi's loss of earnings had been put at approximately G\$12,000.00 per month. The court determined that G\$12,000.00 should represent the multiplicand and chose a multiplier of 12 having regard to Dukhi's age at the time of judgment (45), his normal life expectancy and a retirement age of 65.

Dukhi's evidence, was that after the accident he was unable to work for a period of about eighteen (18) months. His evidence was that at the time of the accident he worked as a carpenter earning G\$18,000.00-\$20,000.00 per week. The Court of Appeal held that on the basis of Dukhi's evidence, they were entitled to find that the sum for loss of earnings during that period amounted to G\$1,178,000.00 after tax.

Based on this formula, Dukhi's loss of future earnings was assessed at G\$1,728,000.00. In relation to the pain, suffering and loss of amenities, the Court of Appeal took into account that Dukhi had suffered personal injuries and had undergone three separate surgical interventions with resultant pain, discomfort, inconvenience and the loss of the ordinary amenities of life. Having reviewed other conventional awards, the court made 'an award for pain and suffering'⁹ in the sum of G\$1,500,000. The court awarded interest on this sum at a rate of 6% per annum from the date of the writ to judgment in the High Court and at 4% thereafter until payment in full.

Accordingly, the following was the breakdown of the award of damages as set out in the judgment of the Court of Appeal:

Special Damages --- G\$2,218,000.00

General Damages

(a) Loss of earning capacity --- G\$1,178,000.00

(b) Injuries sustained and for pain and suffering and loss of amenities ---
G\$1,500,000.00

Total damages G\$5,446,000.00

The Court of Appeal further recognized that Dukhi's evidence had been virtually unchallenged and that the claim for special damage, excluding all others which had been proved, far exceeded the global sum awarded by the trial judge. The Court of Appeal had made clear that Dukhi had suffered personal injuries, had undergone three separate surgical procedures with resultant pain, discomfort, inconvenience and the loss of the ordinary amenities of life. The Court of Appeal also had regard to the medical reports which were tendered into evidence and to several conventional awards made by courts in similar or near similar cases in Guyana.

The CCJ

Both Guysuco and Dukhi were dissatisfied with the outcome of the Court of Appeal proceedings and, with leave granted, appealed to the Caribbean Court of Justice.

Guysuco argued that the medical evidence of Dr Rogers and Dr Ramsahoye was replete with contradiction. On the one hand, Dr Rogers, whose report was prepared some ten months after the accident, indicated that Dukhi's injuries had healed satisfactorily, they were not life threatening but had caused a temporary partial disability of 50%. On the other hand, Dr Ramsahoye, who only saw Dukhi in 2005, days before he gave evidence at the trial and who was not a bone specialist but a neurologist, indicated that Dukhi's injuries were quite extensive and would require specialist medical intervention in the near future. However, it was submitted, it was not possible for Dr Ramsahoye to have made any determination as to whether Dukhi's worsened medical prognosis was attributable to the accident or some intervening event in the eight-year period which had elapsed.

The CCJ cautioned that a trial judge ought to be diligent to give reasons in a timely manner and that the Court of Appeal observed that the total damages of G\$5,446,000.00 by itself exceeded the global sum awarded by the trial judge. In those circumstances, the CCJ agreed with the Court of Appeal that it was entitled to re-assess the award made on the basis of the obvious disparity between the sums claimed and the global sum awarded by the judge.

Special Damages

In sum, the CCJ did not interfere with the decision of the Court of Appeal in respect of the loss of earnings but adjusted the award for obvious errors. Accordingly, the sum for loss of earnings for the first period amounts to G\$1,409,400.00 less taxation of G\$118,000.00 totalling G\$1,291,400.00 and for the second period, the sum of G\$1,599,600.00, that sum being subject to taxation in the amount of G\$592,000.00 resulting in a total of G\$1,007,600.00.

The CCJ did not see any reason to interfere with the award of the Court of Appeal in respect of other items of special damage, that is to say, for travelling expenses, medicine and nourishment, damaged clothes and boots, cost of medical certificate, bicycle, crutches and x-rays.

General Damages

Applying the principles of the well-known case of **Cornilliac v St Louis** in which Wooding CJ set out the considerations which ought properly to be borne in mind in assessing general damages as follows:

- (a) the nature and extent of the injuries sustained;
- (b) the nature and gravity of the resulting physical disability;
- (c) pain and suffering;

- (d) loss of amenities;
- (e) the extent to which pecuniary prospects were affected.

Counsel for the Respondent argued that the Court of Appeal ought to have made separate awards for pain and suffering on the one hand and loss of amenities on the other. Counsel for the Respondent placed reliance on several Guyanese cases, including:

Kent Garment Factory v Sharmala Shiwdas [2002] where the Court of Appeal of Guyana upheld an award of the High Court in the sum of G\$2,500,000.00 for pain and suffering and G\$2,000,000.00 for loss of amenities.

Whilst admitting that the injuries in ***Kent Garment Factory*** were far more severe and that the plaintiff had been rendered paralysed by her injuries, counsel for the Respondent however argued for an increase in the award of general damages.

Counsel for the Respondent also relied on:

Candacie Johnson v National Insurance Board [1997] where the trial judge made separate awards for pain and suffering (G\$800,000.00) loss of amenities (G\$300,000.00) disfigurement/scarring of the abdomen (G\$200,000.00) and side effects of the drugs (G\$200,000.00).

Ingelbirth Winston Hercules v Barama Company Ltd [2015] where George J, of the High Court of Guyana suggested that a range of 6½ to 11 was appropriate for a man aged 49,

It is accepted that the injuries suffered in the ***Candacie Johnson*** case were far more severe. The case involved a claim for damages for personal injury arising out of an accident where a 12-year-old girl was hit by a car on her way to school. She suffered a head injury, had to have her kidney and spleen removed and spent four (4) days in intensive care. The injuries resulted in severe pain and in the aftermath her ability to concentrate and sleep were affected. She also suffered from black outs and had to give up her dream of becoming a police woman.

The ***Ingelbirth Winston Hercules*** case is discussed below.

Loss of earning capacity

The Court of Appeal awarded G\$1,728,000 under this head, using a multiplicand of G\$144,000.00 (G\$12,000.00 per month x 12 months) and a multiplier of 12.

Dukhi has not appealed this aspect of the award. Guysuco on the other hand submits that the award made is an erroneous estimate of the loss suffered by Dukhi in two respects:

1. the Court of Appeal failed to explain adequately its choice of a multiplicand of 12, save to say it was to 'take care of all the contingencies' and
2. that the award did not take taxation into account.

The CCJ did not agree with either submission and found no error in this aspect of the award made by the Court of Appeal. It also noted that the authority of ***Ingelbirth Winston*** relied upon by Guysuco was delivered on January 26, 2015, after the decision of the Court of Appeal [January 20, 2015]. In this regard, it is merely persuasive and in any case the multiplier relied on by the Court of Appeal is not so far outside the range suggested by George J as to warrant the intervention of the Court.

In addition, having regard to the difficulties as to the computation of tax in respect of Dukhi's earnings, based on the evidence which is before the CCJ, it did not think that it should interfere with the multiplicand used by the Court of Appeal. The Court of Appeal's order of G\$1,728,000 therefore stands.

The award

The CCJ ordered that Guysuco shall pay to Dukhi damages (all in Guyanese dollars) as follows:

Special Damages

- (a) Loss of earnings from July 15, 1998 to January 15, 1999 (less taxation) \$1,291,400.00
- (b) Loss of earnings from January 16, 1999 to July 13, 2009 (less taxation) \$1,007,600.00
- (c) Travelling expenses \$ \$60,000.00
- (d) Medicine and nourishment \$ 120,000.00
- (e) Damaged clothing, boots etc \$ 10,000.00
- (f) Cost of medical certificate \$ 3,000.00
- (g) Cost of bicycle \$ 10,000.00
- (h) Cost for crutches \$ 3,000.00
- (i) Cost for X-rays \$ 10,000.00

Total Special Damages \$2,515,000.00

General Damages

- (a) Loss of earning capacity \$1,728,000.00
 - (b) Injuries sustained, pain and suffering and loss of amenities \$1,500,000.00
- Total General Damages \$3,228,000.00

Total Damages \$5,743,000.00

Costs

Guysuco was ordered to pay to Dukhi the costs ordered in the courts below and the costs of the appeal to be taxed in default of agreement.

Some brief observations

The CCJ noted that during the hearing of the appeal, it was discovered that no damages have been paid to Dukhi although he emerged victorious before the lower courts. There was no stay of the order of La Bennett J. Guysuco never appealed on the issue of liability or on the damages awarded by her. On appeal, the Court of Appeal increased the damages awarded and although a stay was imposed, it was only of six (6) weeks duration.

"With this state of affairs, one would have expected Dukhi to pursue enforcement proceedings at least of the trial judge's award. This would have done something to assuage the obvious hardship which he must have endured since the making of the order of the trial judge in 2009. It is quite lamentable that no such action was taken" said the CCJ.

Source: The Caribbean Court of Justice case on Appeal From The Court of Appeal of Guyana of *Guyana Sugar Corporation V. Tulsieram Dukhi* [2016] (Released 28th day of July, 2016)

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