[2016] JMCA Civ 50

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 38/ 2014

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**SHAWNA HAWTHORNE**	**APPELLANT**
AND	**FIONA ROSS**	**RESPONDENT**

Garth Lyttle and Miss Renee Malcolm instructed by Garth E Lyttle & Co for the appellant

Miss Tania Mott for the respondent

3 May and 28 October 2016

BROOKS JA

[1] I have had the privilege of reading in draft the judgments of my learned colleagues. I agree with their respective reasons and conclusions in respect of liability and damages. I agree, therefore that the appeal should be allowed in part, that the judgment in respect of liability and general damages in favour of the respondent should stand but that the award of special damages should be set aside. In light of the result, whereby the respondent has been successful on the major issue of liability, I would award her two thirds of her costs of the appeal.

F WILLIAMS JA

Background

[2] This appeal concerns the tort of defamation. Words used by the appellant, during a quarrel which took place on a street in the community of Lawrence Tavern, Saint Andrew on 16 May 2011, formed the basis of a claim in defamation filed by the respondent on 29 July 2011. The quarrel stemmed from the respondent's refusal to accede to the appellant's request to remove a vehicle which she had parked in the vicinity of the appellant's shop. The appellant, in response to the claim, filed a defence and counterclaim on 10 September 2011, alleging that it was the respondent who had used defamatory words to her in the said quarrel. On 18 October 2011, the respondent filed a reply to the appellant's defence and counterclaim denying using such words to the appellant.

[3] The appellant (the defendant in the court below), is a shopkeeper and the respondent (the claimant in the court below) is a dressmaker.

[4] On 4 April 2014, after a trial before G Fraser J (Ag) (as she then was), where evidence was given by: (i) the respondent; (ii) a Mr Donald Dacres (a witness called by the respondent) and (iii) the appellant, the learned judge granted judgment in the respondent's favour, dismissed the appellant's counterclaim and ordered as follows :

> "General damages is [sic] awarded in the sum of $600,000.00 for the damage to her reputation occasioned by the slander, with interest of 3% per annum as from 29th July 2011 until today.

Special damages is [sic] awarded in the sum of $446,000 relative of her loss of income, with interest of 3% per annum as from 16th May 2011 until today.

Costs to be agreed or taxed."

[5] The appellant appealed that decision by notice and grounds of appeal filed on 16 May 2014. The following are the grounds of appeal:

"1) The Learned Judge erred in law in holding that unless the defence proffered by the Appellant falls within the four categories laid down by the law of Slander, then such defence was untenable and without merit and thereby found for the Respondent and consequently awarded the Respondent damages in the sum as shown in the Formal Order.

2) The Learned Judge erred in not giving due regards [sic] to the admissions made under cross examination of the Respondent and her witness, that both the Respondent and the Appellant were in the street for ten (10) and fifteen (15) minutes respectively, cursing each other and therefore the Respondent could not be an innocent party to whom judgment should be given.

3) The Learned Judge erred in not giving due weight to the facts and circumstances of this case in that where it is proven by inter vivos [sic] evidence that both parties were within earshot of members of the public while they were cursing and slandering each other in the street, then it would not be just and or [sic] fair to give judgment to the Respondent when there was an abundance of evidence before the court by way of admissions that the respondent was not an innocent party in all the circumstances.

4) The Learned Judge erred in accepting the evidence of the Respondent without any documentary support or showing prior earnings from her trade or calling which would justify the awarding of a sum of money

> representing her losses or consequential loss suffered as a result of the purported slander on her."

Submissions for the appellant

[6] The gravamen of the arguments of counsel for the appellant was that since, by the respondent's own admission, there had been a quarrel in the street between the parties, the judge was wrong to have awarded judgment to the respondent and to have rejected the appellant's defence that there was no innocent party to the incident. Counsel for the appellant in support of that submission quoted from Gatley on Libel and Slander, 9th Edition, at paragraph 3.28 that:

> "It follows from the fact that the context and circumstances of the publication must be taken into account that the plaintiff cannot pick and choose parts of the publication which, standing alone, would be defamatory. This or that sentence may be considered defamatory, but there may be other passages that take away the sting. If in 'one part of the publication something disreputable to the plaintiff is stated, but that is removed by the conclusion, the bane and the antidote must be taken together' ..."

[7] It was the argument of counsel for the appellant that the respondent, having parked her vehicle in front of the appellant's shop and having (after being requested by the appellant to do so) refused to remove it, would have been the aggressor or initiator of the quarrel and would have been a willing participant in it and so consented to and reduced the sting of any defamatory words used by the appellant. He sought to draw an analogy between what he said were the respondent's actions and the defence of *volenti non fit injuria*.

[8] Counsel for the appellant also took issue with the award of damages for economic loss, positing that that award had been incorrectly made as there had been no evidence given by the respondent that the appellant had made reference to her (the respondent's) business, trade or calling. Additionally counsel contended that the learned trial judge had erred in making the award, as there was no documentary evidence to prove that claim for special damages.

Submissions for the respondent

[9] Counsel for the respondent relied on her written submissions, which examined the following six issues:

> "a) Whether the learned judge erred when she found in favour of the Respondent (Claimant at trial) and found that the appellant (Defendant at trial) did in fact utter defamatory words to the Respondent.
>
> b) Whether the fact that both women quarrelled in the streets on the morning of May 16, 2011 means that the words uttered to the Respondent by the Appellant, which words the Appellant does not deny saying, are not defamatory.
>
> c) Whether the defence of *volenti non fit injuria* can be supported in the circumstances.
>
> d) Whether any defence for defamation outside of truth (or justification), fair comment on a matter of public interest, words spoken on a privileged occasion, unintentional defamation or consent, exist.
>
> e) Whether the learned trial judge erred in giving judgment to the Respondent for her loss of income without having first seen documentary evidence to support her claim.

f) Whether the sums awarded to the Respondent for General and Special Damages were fair and reasonable in the circumstances."

[10] Counsel submitted that the learned trial judge had correctly applied the law and considered the evidence before her to find for the respondent and on that basis had not erred in her decision.

[11] In light of the emphasis placed by counsel for the appellant on the submission that there was a quarrel between the parties in the street, counsel for the respondent acknowledged that words uttered in the course of a vulgar and abusive exchange cannot amount to defamation in accordance with **Parkins v Scott** (1862) 1 H & C 153. She maintained, however, that in the case at bar there was no vulgar exchange but a mere retort by the respondent to the appellant's defamatory words, which retort did not defame the appellant. Accordingly, counsel for the respondent contended, the publication must be taken as a whole and, if a diminishing of the defamation is to be successfully established, the same person must publish both the defamatory words and the words which, it is contended, remove the 'sting' of their effect.

[12] Counsel for the respondent also sought to reject the submission made by counsel for the appellant that the defence of *volenti non fit injuria* was applicable to the circumstances, on the ground, *inter alia*, that there was no evidence of any such consent before the court below.

[13] With regard to the challenge directed at the learned trial judge's award of special damages counsel submitted that the respondent had not claimed that she had been defamed in her business as a dressmaker. Rather, the contention was that, as a result of her being defamed personally, she had suffered a loss of income from her business.

[14] Counsel for the respondent submitted that with regard to the requirement to specifically plead and prove special damages, in the light of the guidance given in **Ezekiel Barclay and Another v Kirk Mitchell** Suit No CLB 241 of 2000, judgment delivered 13 July 2001, the court could take judicial notice of certain factors with regard to proof of loss.

[15] Consequently, counsel for the respondent submitted, the award made by the court was reasonable, given the circumstances of the case and was a representation of what the judge found to be the extent of the damage to the reputation of the respondent. As such, the reasoning of the learned trial judge was sound and ought to be allowed to stand.

Issues

[16] These are the issues that fall to be determined:

(a) whether the learned trial judge erred in law in finding that a defence to defamation must fall within the four established categories laid down by the law of slander;

(b) whether the learned trial judge failed to give sufficient consideration to the respondent's admission that both parties were engaged in a quarrel and so erred in awarding judgment in the respondent's favour; and

(c) whether the learned judge erred in awarding special damages for loss of earnings to the respondent without such loss being proved by the tendering of documentary evidence and giving evidence of prior earnings.

Discussion and analysis

Issues:

(a) whether the learned trial judge erred in law in finding that a defence to slander must fall within the established categories of the law of defamation.

(b) whether the learned trial judge failed to give sufficient consideration to the respondent's admission that both parties were engaged in a quarrel and so erred in awarding judgment in the respondent's favour.

[17] It is convenient to analyze issues (a) and (b) together.

[18] At paragraph [6] of the written judgment, after setting out the elements which must be established on the evidence to prove the tort of slander, the learned trial judge stated that the onus was on the appellant to make out any of the available established defences such as: truth or justification; fair comment on a matter of public interest; statement made on a privileged occasion; unintentional defamation or consent.

[19] At paragraph [15] of the judgment the learned trial judge demonstrated that she was cognizant of the fact that each party was claiming that the other party was the aggressor and user of the defamatory words in the incident. She further observed that the appellant was not seeking to rely on any of the traditional defences but was instead claiming that there had been a vulgar exchange between the parties and as such there would have been no defamation. Accordingly, she proceeded to determine who, on each account, had uttered the words complained of, who had made retorts and, in the final analysis, who was to be believed. In that regard, the learned trial judge found Mr Dacres (a witness called by the respondent) to be 'a credible and neutral witness', (see paragraph [16] of the judgment). She accepted his evidence that he heard the defamatory words complained of spoken by the appellant and that the respondent had in turn made a retort. The learned trial judge was of the opinion that the retort when viewed objectively was not defamatory.

[20] The learned trial judge agreed with the submission that 'mere abuse' or 'vulgar abuse' is not defamatory, as Mansfield CJ opined in **Parkins v Scott**. In that regard she observed at paragraph [23] of the judgment that:

> "... [Winfield and Jolowicz on Tort, 5th Edition at page 406] states that words which are prima facie defamatory are not actionable if it is clear that they were uttered merely as general vituperation and were so understood by those who heard them."

[21] Having approached the issue thus, the learned trial judge concluded at paragraph [24] that:

> "As far as I am concerned if the Defendant is relying on the excuse of mere abuse, then the onus lies on her to displace the prima facie finding of defamatory words and to persuade the Court that nonetheless the words though defamatory are not actionable. She has not so persuaded me."

[22] In relation to the subject matter of vulgar abuse, I have had regard to Atkin's Court Forms, volume 15, at paragraph 50, in which it is stated that:

> "Notionally defamatory words or statements will not be actionable if the particular circumstances in which they were published mean that they would not have been understood as anything other than vulgar abuse ..."

[23] In a footnote accompanying the above statement the view was expressed that:

> "It is doubtful whether vulgar abuse would now be treated as a free-standing defence as opposed to a ground for striking out the claimant's meaning (either on the footing that the claim did not surmount the threshold of serious harm required by the Defamation Act 2013 s 1, or was otherwise an abuse of process)."

[24] Further, Halsbury's Laws of England (2012), volume 32, paragraph 549 states that:

> "A person may use strong language of another, which if taken literally would be defamatory, but if it is obvious to the reasonable viewer or reader, from the tone and context, that the words are not intended literally but merely as insults, then the natural and ordinary meaning conveyed will not be a defamatory one. This principle is sometimes called the 'defence of mere vulgar abuse' but in fact it is a doctrine of interpretation going to exclude liability...
>
> Whether words make a definite charge of misconduct, or are merely abusive or sarcastic, depends on all the circumstances of the case."

[25] It would seem to me that the force of those authorities, taken by themselves, in the context of the learned trial judge's approach to and analysis of these issues, would be sufficient to reveal grounds 1, 2 and 3 (corresponding with issues (a) and (b)) as having no merit and in necessitating a dismissal of those grounds of the appeal. This view is, however, fortified when those authorities are considered along with the instructive decision of **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, in which Lord Hodge at page 4, in discussing the proper role of an appellate court in the hearing of an appeal, cited with approval the well known and oft-cited decision in **Thomas v Thomas** as follows:

> "[12] In ***Thomas v Thomas*** [1947] AC 484, to which the Court of Appeal referred in its judgment, Lord Thankerton stated, at pp 487- 488:
>
> > 'I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion...' "

[26] Lord Hodge went on to say that:

> "...It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'. See, for example, Lord Macmillan in ***Thomas v Thomas*** at p 491 and Lord Hope of Craighead in ***Thomson v Kvaerner Govan Ltd*** *...* 2004 SC (HL) 1. This phrase ... directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a

> whole...The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions ..."

[27] From my review of the learned trial judge's decision, it is evident that she gave sufficient consideration to the submission that there had been a vulgar exchange in the street between the parties. The learned trial judge rejected the evidence of the appellant that it was the respondent who had used the defamatory words. She found that the appellant had not disproved that the words were defamatory. Those findings of fact made by the learned trial judge must stand, as it has not been demonstrated that she failed to take advantage of having seen and heard the witnesses or that she was otherwise in error.

[28] By applying an objective test, the learned trial judge found (as was open to her to have found on the evidence), that the words were in fact defamatory as they conveyed the meaning of promiscuity and imputed that the respondent was a woman of loose morals, an imputation which in Jamaica carries nothing but a stigma. The learned trial judge also found that the words were addressed to the respondent and were published in the hearing of several persons. It is clear that, from the words that the learned trial judge accepted were used by the appellant, she (the appellant) had in fact defamed the respondent; and that there was no "antidote" with which to take the "bane" or "sting" of the defamation. I have been unable, in my review of the evidence, to identify any instance in which the learned trial judge might be said to have misdirected herself in relation to these issues. These issues must, therefore, be resolved in the respondent's favour.

Volenti Non Fit Injuria

[29] Both counsel made submissions addressing the issue of *volenti non fit injuria*. I find it, however, sufficient to say that: (i) there is no ground of appeal expressly raising such an issue and (ii) even if ground 2 and/or 3 could be regarded in that light, there was no evidence before the court below on which a defence of *volenti non fit injuria* could successfully have been mounted.

Issue (c): whether the learned trial judge erred in awarding special damages for loss of earnings to the respondent without such loss being proved by the tendering of documentary evidence and giving evidence of prior earnings.

[30] In relation to this issue, my learned sister, Edwards JA (Ag) has taken a particular position in respect of which I am persuaded. It is therefore to her that I leave the treatment of this, the ultimate issue.

[31] I concur with the order as to costs proposed by Brooks JA.

EDWARDS JA (AG)

[32] I have read the judgment of my brother F Williams JA and I agree with his reasons and conclusions on the issue of liability and the quantum of general damages awarded by the court below. I find, however, that the learned judge was incorrect to award the sum of $446,000.00 as special damages for loss of earnings. The complaint by counsel for the appellant in his ground of appeal is that:

> "The learned judge erred in accepting the evidence of the Respondent without any documentary support or showing prior earnings from her trade or calling which would justify the awarding of a sum of money representing her losses or

> consequential loss suffered as a result of the purported slander on her."

[33] Though I believe the end result will be the same, I will address counsel's complaint on the basis of two separate principles. My first approach therefore, will involve an assessment of the principles surrounding damages in a case of slander actionable *per se*. The second approach, involves a discussion of the law surrounding the assessment of damages with respect to proof of special damages.

[34] I will begin with the first approach. In all cases involving slander actionable *per se* the court will award general damages on the basis that the plaintiff has suffered damage to reputation and there is no need to prove actual damage. In other words, such damage will be presumed by the court. However, if a plaintiff can prove that he has suffered actual economic or pecuniary losses resulting directly from such slander, the court will award such sum as he can prove as special damages.

[35] Where, as in this case, the slander involves imputation of certain diseases, which is slander actionable without proof of actual damage, the courts will award general damages, but in order to receive an additional sum for pecuniary loss in terms of a falling off in trade or business, such loss must be specifically pleaded and proved as special damages. Loss of particular customers may be pleaded as special damages and if this is done, proof must be given not only of the loss but the names of the particular customers (see **Bluck v Lovering** (1885) 1TLR 497).

[36] However, where, as in this case, the respondent claims a loss of earnings as a result of general falling off of her business directly linked to the slander, proof must be given of the loss but the claim will fail as against the respondent if the falling off in trade was as a result, not of the original words spoken by the respondent, but arising from the unauthorised repetition of the slander. As in the case of other torts, it raises the issue of causation and the special damages must have been caused by the respondent's slander. So in **Morris v Langdale** (1800) 2 Bos and P 284, where third parties had refused to complete their contracts with the claimant because of the defendant's wrong, this was held not to be damages which the claimant could successfully recover. This was based on the fact that it was the third party's wrong in acting on the slander which caused the damage and this was too remote to amount to special damages for which the defendant would be liable.

[37] In **Ward v Weeks** (1830) 131 ER 81, slanderous words were spoken to one Bryce who repeated it to another. The claimant suffered damage and loss arising from the repetition of the slander and not from its original publication. In that case Tindal C.J said at page 83:

> "Every man must be taken to be answerable for the necessary consequences of his own wrongful acts: but such a spontaneous and unauthorised communication cannot be considered as the necessary consequence of the original uttering of the words. For no effect whatever followed from the first speaking of the words to *Bryce*; if he had kept them to himself *Bryer* would still have trusted the Plaintiff. It was the repetition of them by *Bryce* to *Bryer,* which was the voluntary act of a free agent, over whom the Defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the Plaintiff's damage."

[38] The House of Lords in **Weld-Blundell v Stephens** (1920) AC 956 approved **Ward v Weeks**.

[39] A similar position was taken in **Dixon v Smith** (1860) 5 H & N 450. In that case, an action was brought by a surgeon for slander where it was said that he was the father of an illegitimate child with one of his servants. This resulted in him not being employed by a Mr Daws to attend to his wife, thus losing those fees, as well as a general falling off of his midwifery business to the extent of one third. On appeal to the Divisional Court it was held that the plaintiff could not recover damages in respect of a general loss of business which might have been caused by repetition of the slander. Further, that the plaintiff's decline in business could not have arisen from the speaking of the slanderous words by the defendant to Mr Daws and the defendant was not responsible for the repetition of those words.

[40] It has been seen from some of the authorities, however, that where by the general nature and circumstances of the case, it was impracticable or unreasonable to expect the claimant to identify all the customers by name, the claim for general loss of business as special damages will be allowed. This will be so in cases where the customers are transient, over the counter or walk-in customers whose names are not easily ascertained or who are not easily individually identifiable.

[41] The case of **Evans v Harries** (1856) 1 H & N 250 was an action for slander falling into that category of cases. In that case, the claimant was slandered in his

business as innkeeper and the head note of the case reveals that it was held that it was sufficient to allege and prove, as special damage, a general loss of custom, without stating the names of the customers who ceased to frequent the inn. However, this case was decided on the basis that it would be difficult for the innkeeper to determine all the names of the customers and why they stopped frequenting the inn, those customers being by way of passers-by. It having been found that immediately after the slander the inn was less frequented, then damages for general loss in business was allowed. It was also a fact in this case, that the words were spoken in the presence of various guests, customers and other persons in the inn.

[42] In **Hartley v Herring** 8 TR 130, as cited in **Evans v Harries**, Lord Kenyon CJ stated that:

> "Where a plaintiff brings an action for slander by which he lost his customers in trade, he ought in his declaration to state the names of those customers, in order that the defendant may be enabled to meet the charge, if it be false."

[43] Having stated that general rule he found, however, that the plaintiff being slandered in his office as a preacher, by which slander he was removed from that office and lost the emoluments attached to it, he need not name all the congregants.

[44] The general rule that prima facie a defendant is not liable for the repetition of the slander which may have resulted in damage which was expounded in **Ward v Weeks** and **Dixon v Smith** was relaxed in **Speight v Gosnay** [1891] 60 LJQB 231. In that case, involving a false imputation on the chastity of the female plaintiff, Lopes LJ in

defining the exceptions to **Ward v Weeks** held that where special damages arise from the repetition of a slander, such damages were recoverable if it can be shown that the repetition of the slander was as a result of one of the following:

1) The respondent had authorized or intended the repetition;

2) The persons who heard the original words were under a moral obligation to repeat it; or

3) Such repetition was in the circumstances the natural consequences of the defendant uttering them.

[45] In **McManus v Beckham** [2002] 4 All ER 497 the court reviewed the cases and the evolution of the exceptions. According to the head note of the case the court held inter alia that:

> "When determining whether a defendant who had slandered a claimant should be held responsible for damage that had been occasioned by a further publication by a third party, the root question was whether it was just that the defendant should be held responsible for that damage. If the defendant was actually aware that what she said or did was likely to be repeated in whole or in part, there was no injustice in her being held responsible for the damage that the slander caused via that publication..."

[46] This was a case of slander in the way of business, profession or trade. The allegations were that the claimants habitually sold fake memorabilia. The words were said in the presence of customers by a person who generally received extensive press coverage and did so in this case, resulting in the dramatic downturn in the claimant's business. The claimants claimed, as special damages, the general loss of profits and

gains which resulted from the negative press coverage. The question in the appeal was whether they were entitled to rely on the press coverage to establish their loss. The court considered the general principle dealing with repetition of defamatory statements as stated in Gatley on Libel and Slander (9th Edition, 1998) page 155, para 6.30:

> ".....In any event, the starting point is that the defendant is prima facie not liable because the voluntary act of a third person breaks the chain of causation. However, the defendant is liable for the republication or for the damage caused by it:
>
> > (1) where he authorised or intended the republication;
> >
> > (2) where the person to whom the original publication was made was under a duty to repeat the statement;
> >
> > (3) where the republication was, in the circumstances of the case, the natural and probable result of the original publication.
>
> Cases (1) and (2) are probably but examples of the broad principle in (3) ...."

[47] The Court of Appeal considered **Dixon v Smith** and **Ward v Weeks**, both of which held that the defendant was not liable for the consequences of the repetition of the slander, the repetition having broken the chain of causation. The Court also considered **Riding v Smith** (1876) 1 Ex D 91 which followed **Evans v Harries** and distinguished **Ward v Weeks**. **Riding v Smith** considered that the effect would be the same whether the words were slanderous to reputation or calculated to injure by way of trade.

[48] The exceptions to **Ward v Weeks** and **Dixon v Smith** as developed in **Speight v Gosnay** were considered in **Ratcliffe v Evans** (1892) 2 QB 524 at 530. In the latter case Bowen LJ stated:

> "... Verbal defamatory statements may, indeed, be intended to be repeated, or may be uttered under such circumstances that their repetition follows in the ordinary course of things from their original utterance. Except in such cases, the law does not allow the plaintiff to recover damages which flow, not from the original slander, but from its unauthorized repetition: Ward v Weeks [(1830) 7 Bing 211, 131 ER 81]..."

[49] The exceptions were further extended and qualified in **McManus v Beckham** to add what a reasonable person in the defendant's position would appreciate to be the result of the slander and whether it would be just to hold the defendant liable for the loss.

[50] The result of all these authorities is that: (1) in slander actionable *per se* to reputation, to allow for a general loss of business as special damages, loss of custom from particular persons who heard the libel must be proved as special damages (see **Bluck v Lovering**); (2) the particular customers lost must be pleaded (see **Hunt v Jones** (1618) Cro Jac 499); (3) prima facie, the court will treat the unauthorised repetition of a slander as a *novus actus interveniens,* thus breaking the chain of causation between the original publication and the damage suffered through the repetition; (4) in fairness to a defendant the effects of such repetition must be discounted or ignored for lack of proof; (5) it is not enough to show that the

defendant's slander is the cause of the repetition; (6) where the further publications are provable they must be proved to be the natural foreseeable consequences of the original publication, or that the defendant knew, or a reasonable person in the defendant's position ought to have known that it would likely be repeated ; (7) he so authorised the repetition; and (8) that the person(s) who repeated it was under a duty to do so, then a defendant may be held liable for such repetition, if it is just to do so.

[51] Outside of those cases, the general rule is that special damages must be proved to some particularity. Such special damages usually consist of evidence of loss of a contract or opportunity or loss of specific customers. In the instant case, there was no such evidence provided by the respondent in the court below. The respondent was obliged to prove that such persons who heard the words were customers or were under contract to her and as a result of hearing those words they ceased to be customers or it resulted in a breaking off of contractual relations. Otherwise, to recover special damages for a general falling off of business the respondent would have to prove that the appellant was responsible for the repetition of the slander which resulted in the loss of her customers by proving that her case fell into one of the exceptions to **Ward v Weeks** noted above.

[52] The respondent had claimed special damages at a rate of $27,000.00 per month from 1 June 2011 to 29 July 2011 for loss of income suffered in her trade or calling as a dressmaker. She pleaded that the slanderous words led to a decline in customers. However, no mention was made of who these customers were, whether they were actual or potential customers. Neither did she state whether those customers were

present and heard the original words or whether the loss in their custom resulted from a repetition of the words or why it was she would ask the court to find that the repetition was a natural and probable consequence of the utterances by the respondent. This is not a case which fell on the side of **Evans v Harries** or **Hartley v Herring**, that is to say, the appellant's customers would not fall into a category one could describe as unidentifiable or transient. These were customers she claimed were from her immediate neighbourhood and were, some at least inferentially, repeat customers.

[53] The learned trial judge herself, did not consider whether the chain of causation was broken or which of the exceptions applied to the appellant's case. This is especially important since the appellant herself, as stated in her evidence, was unsure as to whether the general falling off of business was attributable to the respondent's slander. She herself speculated on several other factors which may have impacted the level of custom before she concluded it was as a result of the slander. On this basis alone the award for special damages made by the learned trial judge could not stand, as she omitted to consider the relevant issue of causation and applied a wrong principle of law.

[54] This takes me now to my second approach. The claim made by the respondent for special damages is at a rate of $27,000.00 per month commencing from 1 June 2011 to 29 July 2011 and continuing, for loss of income suffered in her trade or calling as a dressmaker. She had pleaded that, as a result of the defamatory words, there had been a decline in the level of patronage of her business that she previously enjoyed. The relevant paragraphs of her witness statement in that regard are set out as follows:

"18. I would usually charge $550.00 to make a blouse, $750.00 for a skirt and $850.00 for the full tunic. Male shirts would range between $850 - $1,000.00 depending on the type of material. I would make approximately seven (7) shirts per day, 10 skirts, 10 blouses and 10 full tunics. These figures are the average numbers. I would work every day except Sundays.

19. When it got busy I would employ someone to work for me. I would pay the person $4,000.00 each week.

20. On one day we would do all the cut outs and then on the other days we would just sew. I have two machines and a surger.

22. My income therefore amounted to approximately $27,000.00 per month. I lost income from June 2011 to now. I am hoping that with back to school that things will improve."

[55] It is not contested that the above constituted the main part of the evidence of the particulars of the economic loss before the learned judge. The learned trial judge accepted that there had been some financial loss suffered by the respondent but that in the circumstances there could not be an award in the sum requested. She instead found that a reasonable sum would be 50% of the requested sum. Regrettably, however, the learned trial judge did not include in her written judgment her basis for arriving at the sum of $446,000.00.

[56] It is important that we remember that the particular ground around which the arguments concerning economic loss is centred is: on the learned trial judge's acceptance of the respondent's evidence as to loss of earnings in the absence of documentary proof.

[57] In **Lawford Murphy v Luther Mills** [1976] 14 JLR 119, Hercules JA in disallowing a claim for loss of earnings for what he found to be lack of adequate proof cited with approval the following passage from the case of **Bonham-Carter v Hyde Park Hotel (3)** (1948) 64 TLR 177 at page 178, where Lord Goddard CJ made the following observation:

> "On the question of damages, I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it."

[58] I take the view that to assert that she usually worked six days per week for this and that amount and charged this or that amount per garment and therefore her income per month was this figure, in my view is insufficient proof of loss of earnings.

[59] The respondent gave an average figure of seven shirts, 10 skirts, 10 blouses and 10 full tunics per day as her production output. There is no evidence for whom these were being made and over what period of time. No documentary proof of income was provided such as a receipt book, bank book or even a job book. Presumably this must exist because, in doing all that work and presumably being done for different persons, there would have to be a means of keeping track of it all. No such evidence to substantiate such a claim was presented to the court.

[60] Even the learned judge herself found it difficult to accept this evidence. She found that there had been some financial loss, though it is unclear on what she based

this finding, since this is not a loss which she in law could presume, but found that the sum claimed could not be awarded. She instead went for a reasonable sum of 50% of what was claimed. In my view the learned judge was wrong to do so and in fact did not include in her judgment any basis for doing so.

[61] Despite the submission of counsel for the respondent, this case does not fall into the category of cases in which the court can take "judicial notice of certain factors" with regard to proof of loss. In that regard, the case of **Ezekiel Barclay and another v Kirk Mitchell** Suit No CLB 241 of 2000, judgment delivered 13 July 2001, relied on by the respondent, is easily distinguished from this case.

[62] In any event, it is impossible to argue that this is a circumstance where the reasonableness and acceptability of the claim comes into play. The learned judge rejected the claim as unreasonable and unacceptable. She, therefore, in the absence of any other proof, documentary or otherwise, of loss which she herself could assess and come to a conclusion, had no basis upon which to make such an award.

[63] It is clear to me that the learned judge after reflecting on the respondent's evidence as to her loss, went on to presume loss as a result of the slander and award a figure, which she was not entitled to do and clearly fell into error.

[64] I accept that arithmetic calculations in some pecuniary losses may be a rough calculation where difficulties exists as to proof, but it still remains the principle that a claimant cannot simple throw figures at the court, there must be some reasonable basis upon which the court can act to do the best it can (see **Tai Hing Cotton Mill v**

Kamsing Knitting Factory [1979] AC 91). Where there is no such basis or where the facts forming such basis have been rejected by the court, then damages should not be awarded as there would be no proof of it.

[65] I am mindful of the fact that even if damages are difficult to assess this does not disentitle the claimant to compensation for loss. Where it is clear that the claimant has suffered loss but the evidence does not enable it to be precisely quantified, the court will fix damages as best it can on the available evidence. But there must be some credible and acceptable evidence for the court to work with. In her witness statement the respondent claimed at paragraphs 17 – 22 that:

> "17. After that incident with Mrs Hawthorne, business became slow. At first I thought it was just because things were getting hard for everyone but when it was time for back to school, when I normally make some money, I noticed that very few persons took their children to me to make their school uniforms.
>
> 18. I would usually charge 550.00 to make a blouse, $750.00 for a skirt and $850.00 for the full tunic. Male shirts would range between $850- $1,000.00 depending on the type of material. I would make approximately seven (7) shirts per day, 10 skirts, 10 blouses and 10 full tunics. These figures are the average numbers. I would work every day except Sundays.
>
> 19. When it got busy I would employ someone to work for me. I would pay the person $4,000.00 each week.
>
> 20. On one day we would do all the cut outs and then on the other days we would just sew. I have two machines and a surger.

> 21. I did not pay rent because I operated out of my parent's house. I just contributed to the light bill. My expenses were low and during the time when it got busy I would pay the lady who assisted me $4,000.00 per week.
>
> 22. My income therefore amounted to approximately $27,000.00 per month. I lost income from June 2011 to now. I am hoping that with back to school that things will improve."

[66] There is no evidence of how many customers were lost or to what extent her income per month fell. The incident occurred in May 2011 but there is no evidence of when the business became slow. The respondent herself was unsure it was as a result of the slander. The respondent gave evidence of loss in custom for the back to school period. The inference she was asking the court to draw was that the slander which occurred in May had resulted in less school uniform orders for September. There is no evidence to compare this with however; as she gave no evidence of how many uniforms she sewed during the previous back to school period compared to the present period. The state of her evidence was untenable or unsatisfactory in this regard.

[67] In the instant case, the learned trial judge considered the evidence given by the respondent and said this at paragraph 31 of her judgment:

> "Her lost income she calculates at approximately $27,000 per month. She does not however indicate how long after the incident she was able to re-establish her profession or whether or not her present endeavours is an improvement or decline in her previous income level. I accept that she has lost financially and that this loss is related to the defamation by Mrs. Hawthorne; I do not think however in the circumstances an award can be made in the sum requested.

> I am of the view that a reasonable award would be calculated on a 50% discount of the sum requested."

[68] It is clear here, that the learned judge was presuming a general loss of trade as a result of the slander which she was not entitled to do since the respondent was obliged to prove it as special damages.

[69] In **McCrae v Chase International Express Limited and another** [2003] EWCA Civ 505 the English Court of Appeal overturned an award made for future loss of earnings for want of sufficient evidence. Newman J in remarking on the necessity for evidence to support claims before the court said:

> "... If the method of preparation and presentation adopted in this case reflects a common circumstance in connection with personal injury cases in the district court it has, in my judgment, departed too far from the basic principle that a claimant must prove his case by evidence capable of supporting the conclusions to which the court is invited to come ..."

[70] He later went on at paragraph 32 to say:

> "Approaching a matter with a broad brush approach does not mean an absence of material is acceptable. The broad brush approach merely enables the court to do justice where there may be gaps in detail, which normally arise because of the character of the case under investigation."

[71] This is a most sensible view of the matter and I endorse and adopt this approach. In the premise, the learned trial judge having found that an award could not be made in the sum requested, erred in awarding her any sum at all. I would therefore

allow the appeal in part and I agree with my learned brother Brooks JA on the issue of costs.

BROOKS JA

ORDER

1. Appeal is allowed in part.
2. Judgment in favour of the respondent on the claim and counter claim is affirmed.
3. General damages awarded to the respondent is affirmed.
4. Award of special damages with interest thereon is set aside.
5. Costs below to the respondent.
6. Two-thirds of the costs of the appeal to the respondent.
7. Costs are to be taxed if not agreed.