[2020] JMCA Civ 51

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 94/2014

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA

BETWEEN SOUTH EASTERN REGIONAL HEALTH AUTHORITY 1st APPELLANT

AND THE ATTORNEY GENERAL OF JAMAICA 2nd APPELLANT

AND DR MICHELLE-ANN RICHARDS-DAWSON 3rd APPELLANT

AND DR SANDRA WILLIAMS-PHILLIPS RESPONDENT

Miss Tamara Dickens instructed by the Director of State Proceedings for the appellants

The respondent in person

7 June 2018 and 23 October 2020

MORRISON P

Introduction

[1] The 1st appellant ('SERHA'), a statutory body, is one of the four regional health authorities responsible for the delivery of public health care services in Jamaica. SERHA's areas of responsibility are Saint Catherine, Saint Thomas and Kingston and Saint Andrew. The Bustamante Hospital for Children ('the BHC'/'the hospital') is one of the hospitals falling under SERHA's aegis.

[2] The 2nd appellant is sued by virtue of the Crown Proceedings Act.

[3] At all material times, the 3rd appellant ('Dr Richards-Dawson'), a paediatrician, was a servant and/or agent of SERHA and the Senior Medical Officer ('the SMO') at the BHC.

[4] The respondent ('Dr Williams-Phillips') is a Consultant Paediatric, Adolescent and Adult Congenital Cardiologist and a consultant paediatrician. With effect from 3 August 2009, SERHA appointed her to the position of Consultant Paediatrician Cardiologist at the BCH.

[5] Dr Williams-Phillips' appointment at the BHC terminated on or about 19 January 2010 and, on 5 February 2010, Dr Richards-Dawson issued a memorandum ('the memorandum'/ 'the notice') in the following terms:

> **"MEMORANDUM**
>
> **TO**: All members of staff, Wards and Departments.
>
> **FROM**: Dr Michelle-Ann Richards-Dawson, Senior Medical Officer
>
> **DATE**: Friday, 2010 February 05
>
> **SUBJECT**: Dr Sandra Williams-Phillips, Paediatric Cardiologist
>
> Be advised that **Dr Sandra Williams-Phillips** is no longer employed as a member of staff of this hospital and therefore is not authorised to conduct business on or on behalf of the Bustamante Hospital for Children.
>
> This is particularly applicable to the clinical areas of Cardiology and Radiology.
>
> Should she visit either of these areas in the hospital at any time the SMO and or the CEO are to be advised immediately."

[6] The memorandum was posted on notice boards in various areas of the hospital where it remained on display for some time. Dr Williams-Phillips considered the memorandum to be libellous of her and she accordingly commenced action against the appellants. The appellants defended the action on the basis that the contents of the memorandum were true, and were, in any event, issued on an occasion of qualified privilege.

[7] On 11 March 2014, after a trial in the Supreme Court before Pusey J ('the judge'), sitting with a jury, judgment was given for Dr Williams-Phillips and she was awarded damages for libel in the sum of $4,250,000.00.

[8] This is the appellants' appeal against this judgment. In their notice of appeal filed on 14 November 2014, they contend that (i) in their natural and ordinary meaning, the words of the memorandum did not carry any meaning defamatory of the respondent; (ii) having correctly found that the memorandum was published on an occasion of qualified privilege, the judge erred in leaving the issue of malice to the jury; and (iii) the award of damages was manifestly excessive.

[9] In her counter-notice of appeal filed on 28 November 2014, Dr Williams-Phillips contends that the judgment of the court below was correct in all respects and that the appeal should therefore be dismissed.

[10] The issues which arise on the appeal are, therefore, whether (i) the memorandum was defamatory of Dr Williams-Phillips, either in its natural and ordinary meaning or by

way of innuendo; (ii) there was evidence of malice fit to be left to the jury; and (iii) the award of $4,250,000.00 was manifestly excessive.

The particulars of claim

[11] In her particulars of claim filed on 1 June 2010, Dr Williams-Phillips advanced the following as the defamatory meanings contained in the memorandum[1]:

> "i. The Claimant's past conduct while employed as a member of staff of [BHC] was improper and unprofessional, and was not consistent with the standard of conduct expected of a doctor;
>
> ii. The Claimant's presence at the [BHC] during her period of employment there impacted negatively on the operations of the hospital and its administration of patient care;
>
> iii. The Claimant's presence at [BHC] during her period of employment there did not further [sic] hospital's best interest/prejudiced the best interests of the hospital;
>
> iv. The Claimant's employment to the hospital was terminated because her past conduct and presence at the hospital had a negative impact on its operations and administration of patient care
>
> v. The Claimant's employment to the [BHC] was terminated because her continued employment and presence there was not in the best interest of the hospital
>
> vi. The Claimant was likely to do something improper/wrong or unprofessional if she was allowed on the premises;
>
> vii. The Claimant's presence at the [BHC] would be detrimental to its operations and patient care and would not be in its best interests;
>
> viii. The Claimant was such a person that her behaviour would not be consistent with the standard of conduct expected of a doctor"

[1] Particulars of claim, para. 8

[12] Next, Dr Williams-Phillips gave the following particulars in support of an innuendo, pursuant to rule 69.2(b) of the Civil Procedure Rules, 2002 ('the CPR'):

> "i. The Notice was posted on all the wards of the hospital, and was also posted at the main gate to the hospital;
>
> ii. The security guards on duty at the hospital were instructed by [SERHA and Dr Richards-Dawson] to be on the alert for the Claimant
>
> iii. There were no such Notices or alerts posted at the hospital or given in relation to any other medical doctors attending or visiting the institution
>
> iv. There were no restrictions imposed on the entry of any medical doctors to the hospital premises;
>
> v. [SERHA and Dr Richards-Dawson] had and/or caused the Claimant to be taken from a meeting at the Hospital on February 23, 2010 and off the hospital premises by security escort.
>
> vi. The said meeting had been arranged by the Claimant during the course of her employment at the hospital, and was attended by a team of cardiologists from overseas, namely the Caribbean Heart Menders, other local cardiologists as well as a number of patients;
>
> vii. The Claimant was removed from the said meeting and premises by security escort in plain view of the said medical professionals, patients, other members of staff, security personnel and other visitors to the institution."

[13] And finally, Dr Williams-Phillips pleaded[2] that SERHA and Dr Richards-Dawson "were motivated by malice and their desire to injure and/or lower [her] in the eyes of her colleagues and patients in using the words complained of in the Notice and in having

[2] Particulars of claim, para. 9

same posted as aforesaid throughout the hospital and its main gates". Dr Williams-Phillips also provided particulars of malice, pursuant to rule 69.2(c) of the CPR.

[14] On this basis, Dr Williams-Phillips pleaded[3] that she had been "seriously damaged in her personal and professional character and reputation and … suffered considerable distress and embarrassment". Accordingly, she claimed damages for libel, including exemplary and aggravated damages, and other reliefs[4].

The defence

[15] In their amended defence[5], the appellants averred that (i) the words complained of in the memorandum were true; (ii) the contents of the memorandum did not concern Dr Williams-Phillips in the way of her profession and/or in relation to her conduct; (iii) the memorandum was not published to the public but was published on an occasion of qualified privilege; and (iv) the words contained in the memorandum did not mean and could not be understood to mean what is alleged if at all. The appellants also denied that they were motivated by malice in publishing the memorandum and that Dr Williams-Phillips was entitled to damages of any kind.

The evidence at trial

[16] Four witnesses gave evidence at the trial, two on either side. In each case, the evidence was given by way of witness statements, which the judge admitted without any objection as the witness' examination-in-chief, and cross-examination in front of the jury.

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[3] Particulars of claim, para. 10
[4] Particulars of claim, para. 11
[5] Filed 6 March 2014

[17] Dr Williams-Phillips' first witness was her husband of 26 years, Mr Louis Phillips. In his witness statement[6], Mr Phillips described the circumstances in which he obtained and delivered a copy of the memorandum to Dr Williams-Phillips, his own reaction to it, and the negative impact that it had on her:

> "7. On or about the 23rd February 2010, I went to the gate of the Bustamante Hospital for Children and met Anthony Thomas who gave me a Notice, the Memorandum from [Dr Richards-Dawson]
>
> 8. Upon receipt of the Notice I read the same and became very angry and upset. I was angry, and upset that such a notice could have been placed in so many conspicuous places and could be viewed by so many members of the visiting public and her professional colleagues. I was upset and angry as the said notice in my mind conveyed the distinct impression that my wife had done something terrible at the hospital and which was so revolting that even in her capacity as a medical doctor she could no longer visit the BHC. This hurt me severely as my wife was an accomplished professional. I have never known her to be subject of any disciplinary offence and I knew of her love and devotion to the BHC and the children whose welfare were always paramount in her concerns. To see this level of humiliation meted out to her caused me great anxiety and worry.
>
> 9. After collecting the Notice from Mr Anthony Thomas, as arranged, I delivered the Notice to my wife. She read the said notice and I could observe that her whole demeanour changed after she read the same. She appeared to be in stupor and I could observe that she was deliberately trying to maintain her equilibrium. She subsequently composed herself and, in my presence, scanned and sent the said Notice to Dr Muriel Lowe of the Medical Council of Jamaica and to Dr Winston De La Haye of the Medical Association of Jamaica.
>
> 10. When I observed my wife's demeanour as she read the Notice I felt angry, as I concluded that the Notice was deliberately designed to be malicious to damage her

[6] Witness statement of Louis Phillips dated 4 March 2014, paras. 7-14

reputation in the eyes of her colleagues and general public as its publication followed termination of her employment at BHC.

11. Because of the publication of this Notice several things have happened to my wife. This included a severe reduction in her source of income since 2010, and me taking major and at times total responsibility for payments of my wife's office bills, staff's salary, and all home and personal bills. This imposed a terrible strain on me as our lives were planned around the joint incomes that we earned and our standard of living fell as a number of the things we could afford on a joint income we could no longer afford. This joint income could no longer support us not so much because of her dismissal from the BHC but due to the fact that her private practice and fee paying patients dwindled dramatically after the publication of the Notice. On those occasions when I visited her practice in Spanish Town I notice [sic] a marked reduction in the flow of patient traffic compared to the period prior to the publication of the Notice.

12. We have also suffered severe financial hardships since 2010, for the total family and the Claimant with inability to maintain extra lessons and specific needs required for our only child, whilst pursuing her Caribbean Examinations Council (CXC) examinations at the end of Grade Eleven. The financial challenges with our child's educational costs and needs continue to date.

13. This had led to my wife's two sisters, who live in Canada, sending her money to help pay our bills and daughter's school fees as well as one of my wife's brother giving her money to support or [sic] daughter.

14. I encouraged my wife to seek redress for defamation and for what I saw as wrongful termination of her employment. As she pursued redress, via legal action for defamation, I have observed her former colleagues not wanting to relate or speak to her; and her not being gainfully employed and able to help her former patients at BHC."

[18] Dr Williams-Phillips' evidence followed. In her witness statement[7], she set out her extensive qualifications, attainments and experience as a medical doctor. These included three degrees from the University of the West Indies, memberships in some 13 Jamaican, Canadian, American, European and British professional associations, and a number of publications in various medical journals.

[19] In reference to the immediate impact which her first seeing the memorandum had on her, Dr Williams-Phillips stated the following[8]:

> "6. I became aware of a Notice posted at the BHC. The Notice gave the distinct impression that I had [sic] something wrong at the hospital, like I was a common criminal, or had done something to a patient or other person which warranted my banishment from the BHC an institution which was very dear to me and to which I had devoted a considerable amount of my professional time. I tried to maintain my composure in the presence of my husband as I realized he was also getting upset … I was also very concerned at the negative impression the said Notice created in the minds of my colleagues, my patients and members of the public …
>
> 7. The Notice was up for 3 months. I was aware that the Notice was up for 3 months because I saw [it] myself.
>
> 8. It was there when the Overseas Caribbean Heart Menders team and Chain of Hope team came to Jamaica, 23rd February 2010 and stayed on for about ten days. I know it was there in full view of everyone who visited the hospital as it was placed in conspicuous places throughout the hospital.
>
> 9. …
>
> Notwithstanding the fact [sic] I was previously made aware of the contents of the Notice when I read the same feelings of hurt anger and resentment came over me. Seeing and

[7] Witness statement of Dr Sandra Williams-Phillips dated 6 March 2014
[8] At paras. 6-26

reading the contents of the Notice had a negative effect on me as it was then brought home to me that a person or persons were deliberately trying to sully my reputation and damage my professional standing in the medical community and the general public.

10. This was particularly worrying for me as it now appear [sic] that my whole professional life was wasted and my trust and integrity which I had built so painstakingly over numerous years were all gone in one fell swoop. I nevertheless tried to maintain my composure and the NOTICE was scanned and sent to Dr Winston De La Haye, then President of the Medical Association of Jamaica and Dr Muriel Lowe, the Registrar of the Medical Council of Jamaica.

11. I considered my dismissal to be unfair and took legal advice on the same. As a consequence of this advice I have issued a lawsuit against the BHC.

12. After leaving the BHC compound on Tuesday 19th February 2010, I returned on Wednesday 24th February 2010 and attended a Clinic, above the Casualty department of the [BHC] where Cardiac, Skin, Dental and other Clinics are held. I was escorted off the premises of the [BHC] in front of an Overseas Mission Doctor, Dr Mitchell Cohen, after Dr Charmaine Scott called the CEO – Beverley Needham in my presence. Beverley Needham had with her two male security guards, in the presence of the Mission Doctor. The guards threatened to remove me by force after I advised I was only taking advantage of the teaching of the overseas Doctor who only comes once per year. This took place in the presence of patients seated outside the door, most of which I saw during my tenure as Cardiologist at the [BHC]. With the threat of violence I was escorted off the BHC premises in front of all the patients upstairs in the Clinic area, in front of all the patients in the Casualty Department and those parked in the parking area and driveway at the front of the BHC. Beverley Needham left me at the driveway and instructed the security guard to remove me from the premises. The security guards escorted me to my car and apologised that they were only doing their jobs. Other security guards and staff and patients present came up to me and asked me what I did to make the CEO Beverley Needham escort me off the premises. I was overwhelmed with humiliation and embarrassment and from

that time onwards I keep getting questions from my colleagues about my competence and skills and knowledge to date.

13. The previous evening on Tuesday the 23rd February 2010, I drove my husband's car, and I went to the BHC during the presentation of patients needing Cardiac surgery from the mission doctors and nursing and anaesthetic team of about 20. I did this out of concern for some of my patients as I was very familiar with their case histories. Other Doctors from all over Jamaica were there and there was a function held on the balcony of the Clinic area which I was aware of and invited to attend. There was Dr Claudine Lewis, Cardiologist from Montego Bay, Dr Joseph Blidgen, Cardiothoracic Surgeon from the National Chest Hospital and many others from across the Island numbering a total of about 30 Doctors in addition to the Overseas Mission Doctors and their team Headed by renowned Cardiothoracic surgeon Dr Jeff Jacobs.

14. I was barred on 24 February 2010 by the CEO Beverley Needham and Dr. Michelle Ann Richards-Dawson from attending a Cardiac course on Saturday 27th February 2010, the only one of its kind in Jamaica, being done by the Caribbean Heart Menders team of doctors as it was held on the BHC compound by the CEO – Miss Needham and the SMO Dr Richards-Dawson. Both were subsequently written by the Medical Council Registrar Dr Muriel Lowe, indicating that they had no right so to do. Attached herewith and marked exhibit 'SP-2' is a copy of the said letter.

15. I had decided to visit the BHC on these occasions notwithstanding the contents of the Notice as I was of the view that since I was attending clinics at which an overseas mission was demonstrating certain learning techniques and that certain professional courtesies would be extended to me as a doctor. It was these incidents which brought home to me fully the impact of the notice. As a practicing member of the medical profession I did not imagine that I would have been denied the opportunity for learning. I subsequently became withdrawn from the medical community in general.

16. I was barred from observing a procedure called Transoesophageal Echocardiogram with 3 Dimensional

images not available in Jamaica, at BHC, being performed by overseas Mission Doctors.

17. Since the publication of the above Notice I have been shunned by my colleagues and nursing staff and paramedical personnel. I have been shunned by patients who initiate attempts to see me but who after visiting BHC, UHWI or other colleagues, choose to go elsewhere. I have been devastated professionally, academically and financially. I have been shunned socially by colleagues, nursing staff, paramedical personnel, radiological staff and also in areas of research with individuals who start working with me then finding an excuse for not continuing to work with me after publication of the Notice at the BHC and the actions of [Dr Richards-Dawson] and the CEO of the BHC.

18. I was doing a research project on medical assessment and screening of football athletes with Dr Georgianna Strachan. I have sent letters of recommendation and work achieved to Dr Georgianna Strachan, a statistician and research colleague, to confirm my competence.

19. Since the publication of the notice and the incidents mentioned above medical students do not return my calls and do not come to me in the clinics for teachings. They avoid me and stay away from me but go to the other doctors in the same clinic for teachings. They avoid me on the corridors in the hospitals and refuse to interact with me for no apparent reason. Whilst I was the Cardiologist at the [BHC] I was sought by Medical Students, at all levels, who would come to my Friday morning clinic for Cardiac teachings especially before their final exams in their final year. Since the publication of the Notice and the incidents mentioned above I have not been placed consistently on the list for teaching of the Medical students by the Consultants responsible in the Department of Medicine at the UHWI. Prior to the incident I was placed regularly on the teaching list and was happily interacting with students both professionally and socially.

20. Since the publication of the notice and the incidents above colleagues at my level avoid speaking with me, do not take or return my calls. Prior to the publication of the Notice I used to interact very well with persons such as Dr Leslie Samuels in the Obstetrics Department at the UHWI and Dr

Nadine Johnson at UHWI, respectively and they would refer patients to me regularly. They now refuse to do so and nothing personally has occurred among us which would justify the present course of conduct. They have ceased sending patients to me not-withstanding that they are still seeing patients of this nature. A further example is that of Dr. Claudine Lewis, not referring a patient to me who needed a special procedure which could only be competently carried out by me as I am the only person in Jamaica trained to do so. This happens with colleagues who previously communicated with me spontaneously and on request and would ask me for advice on the phone re management of cardiac patients. In fact, at least 2 patients in need of a special procedure have not been referred and their names and numbers had to be given to me surreptitiously for diagnosis and treatment via another individual. In the circumstances I am expected to call these patients without a proper referral, although they are in need of help that I can provide, but without any input from the doctor managing them.

21. …

22. I am also noticeably pointed out in meetings by some colleagues to others. In one meeting in 2011, a Consultant Pathology colleague noticeably surveyed me, with no acknowledgement or act of common courtesy. She subsequently left the meeting. This Consultant is a person that I have known for over 10 years and used to treat me cordially. This was in the presence of medical students and colleagues in the conference room where we were present.

23. I do not attend or reply to invitations to St Hugh's High School Alumni for fear of my working at BHC coming up in conversation and hearing any adverse comments being made about my tenure there.

24. I do not attend or reply to invitations to Alliance Francaise for the same reason or any other function invited.

25. I am required to attend CME – accredited symposiums to obtain points needed for Registration with the Medical Council of Jamaica. I go to the minimum needed. I avoid direct contact and explore booths with minimal interaction, to avoid discussions about BHC and why the Notice was placed.

26. I experience the following fears:

(a) Fear of going to social functions, symposiums where I may encounter my colleagues or paramedical personnel.
(b) Avoidance of any function within or without the medical fraternity.
(c) I am afraid of going to BHC and UHWI even when I have patients who are admitted there for fear of my treatment by staff at both BHC and UHWI, in front of them. In fact. [sic] I have never been to BHC to look for any patient since then.
(d) I have become a recluse to avoid embarrassment. I go nowhere associated with medical faculty, paramedical personnel unless absolutely necessary.
(e) Sleepless nights in constant worry about where I may see individuals that will ask me about the reason for the notice.
(f) I keep away from colleagues when out in public with daughter and husband [sic], to avoid not only embarrassment to them and myself.
(g) I keep my daughter away from colleagues and hospital personnel when out together, whether at school or in the plazas.
(h) Constant fear that I will not be vindicated and has [sic] to deal with this for the rest of my life.
(i) Fear that vindication in the court will not be believed by many who will still ostracise me. The Jamaican phrase stating 'if it no go so, It go near so' haunts me as I realise this will continue to haunt me.
(j) Fear of association with overseas medical personnel in the Teams at BHC at the time when the Notice was up as they were at BHC during end of February when they were already there.
(k) Fear that colleagues, medical and paramedical personnel will know of the Notice and keep ostracise me [sic], even when they have not actually seen notice [sic] and do not know me at all."

[20] Dr Williams-Phillips was cross-examined at great length. Close to the beginning of the cross-examination, she was asked about her status at the BHC[9]:

> "Q. … between about April 2009 to January 2010 you worked at the [BHC]?
>
> a. Yes.
>
> Q. As a pediatric cardiologist?
>
> A. Yes.
>
> Q. And as of January 20, 2010, you were no longer employed as a pediatric cardiologist at the [BHC]?
>
> A. Yes.
>
> Q. And, therefore, you would no longer from that date on have the authority to work at the [BHC] as its employee?
>
> A. I agree."

[21] In a further exchange in cross-examination, Dr Williams-Phillips was again questioned on the point[10]:

> "Q. When you look at Paragraph 1 [of the memorandum], Dr. Phillips, isn't it correct that as of January 20, 2010, you no longer worked at the [BHC]?
>
> A. Yes.
>
> Q. And isn't it true that you, thereafter, were no longer authorised to conduct business on behalf of the [BHC]?
>
> A. Yes.
>
> Q. And you were no longer authorised to administer patient care to the patients at the [BHC]?

[9] Notes of evidence ('NOE'), pages 72-73
[10] NOE, pages 75-76

A. I agree."

[22] However, Dr Williams-Phillips strongly disagreed with the suggestion that, as a result of the fact that she was no longer employed to the hospital after 20 January 2010, she was no longer authorised to have the right of access to the hospital records.

[23] Much of the rest of the cross-examination concerned the functioning of the BHC, particularly in relation to rights of access to members of the public and others, during Dr Williams-Phillips' time as a member of staff. It was also suggested to Dr Williams-Phillips that she herself had a role in causing the memorandum to be circulated widely to the medical profession in Jamaica and in the Eastern Caribbean.

[24] It was further suggested to Dr Williams-Phillips that, after 5 February 2010, there was no diminution in the high professional reputation which she had enjoyed before the publication of the memorandum[11]:

"Q. I suggest to you, Dr. Williams-Phillips, that your general reputation, did not suffer after the memorandum was published on February 5, 2010?

A. I have been devastated."

[25] After an intervention from the judge, who pointed out to Dr Williams-Phillips that that was not an answer to the question she was asked, cross-examining counsel repeated the suggestion, to which Dr Williams-Phillips answered simply[12], "I disagree". And, in

[11] NOE, page 134
[12] NOE, page 135

answer to counsel's further suggestions that the memorandum did not affect her ability to practise medicine in Jamaica, or lower her status as a Paediatric Cardiologist, Dr Williams-Phillips' responses were, "[s]trongly disagree", and "I strongly disagree".

[26] That was the case for Dr Williams-Phillips.

[27] SERHA called two witnesses, Dr Richards-Dawson, the SMO, and Mrs Beverly Needham, the CEO.

[28] In her witness statement filed on 6 March 2014, Dr Richards-Dawson explained the background to the publication of the memorandum[13]:

> "3. In February 2010, in an effort to protect the interest of the children scheduled for surgery in an imminent cardiac mission to be held at the [BHC], the decision was taken by the management team to limit access to the cardiology and radiology departments to those persons directly involved in these children's care. Dr Williams-Phillips would have therefore been excluded, as she no longer worked at the BHC. As such, the decision was taken by the management team of the BHC to remind the staff in a memorandum that Dr Williams Phillips no longer worked at the BHC and that she, no longer working for and or on behalf of the Government of Jamaica, was not to operate in the clinical areas of cardiology and radiology as if she were still working at the BHC. The management of the BHC had a duty to let the staff members of the BHC [sic] aware of this. The staff members of the BHC had a right to know, particularly those staff members who were part of the cardiac team or who otherwise worked in the areas of cardiology and radiology.
>
> 4. Members of the management team of the BHC prepared the memorandum. This included Mrs Beverley Needham, the then Chief Executive Officer of the BHC, Mr Henry Anglin, the then BHC Administrator and me, the Senior

[13] At paras. 3-11

Medical Officer. As the Senior Medical Officer of the BHC, I have a legal duty in respect of patients' information and allowing only authorized persons access to these records and the patients. In the circumstances, it was necessary to communicate to the staff, in the light of the imminent mission in February 2010 that if [Dr Williams-Phillips] was seen in any of the restricted areas that the Chief Executive Officer or the Senior Medical Officer be notified. There was no improper motive or malice on the part of the management of the BHC towards [Dr Williams-Phillips] in this regard.

5. The words used in the memorandum were objective and not inflammatory. They communicated that Dr Williams-Phillips was no longer authorized to conduct business or patient care, or attend confidential patient conferences on behalf of the BHC. The memorandum was addressed to all members of staff, Wards and Departments. It was not sent to anyone electronically and was not intended to be shown nor to the best of my knowledge was it shown to anyone who was not a member of staff of the BHC.

6. The first set of words of the memorandum was as follows:

> 'Be advised that Dr Sandra Williams–Phillips is no longer employed as a member of staff of this hospital and therefore is not authorized to conduct business on or on behalf of the [BHC]. This is particularly applicable to the clinical areas of Cardiology and Radiology'

7. This was a question of fact. [Dr Williams-Phillips'] post was terminated on or about January 20, 2010. She was no longer working at the BHC in the capacity of Consultant Pediatric Cardiologist. She was therefore no longer a servant and/or agent of the Government of Jamaica. She was no longer authorized to treat patients at the BHC or be part of the team that directed and/or managed the BHC's patient programme and was not authorized to be present or otherwise participate in confidential patient – doctor conferences which involved patients of the BHC. She was no longer authorized to access, be in possession of, create, use, interpret or make prognoses in relation to data collected from the examination of patients in the Cardiology and Radiology departments as if she was still a member of staff of the [BHC].

8. The second set of words of the memorandum was as follows:

> 'Should she visit either of these areas in the hospital at any time the SMO or the CEO are to be advised immediately'

9. In light of the cardiac mission which was to take place at the [BHC] in February 2010, it was imperative that the BHC limit access to the clinical areas of cardiology and radiology to persons who were employed to work at the BHC and who worked in those clinical areas or who were being treated in those areas. The memorandum helped to alert the staff, particularly those who were not a member of the cardiology team but who may have worked in those areas that Dr Williams-Phillips was no longer to have access to these clinical areas of the BHC.

10. Notably the memorandum did not stipulate nor was it intended that Dr Williams-Phillips was banned from the BHC generally. It was recognized that she could have come in her private capacity with a child, previously external to the BHC who was now seeking medical attention there, or visiting a patient, or coming with a child who had an accident and needed immediate care. I did not give instructions to ban Dr Williams-Phillips from the compound of the BHC, or to ban her from attending any open continuing medical education conference, or the cardiac symposium in the BHC Conference room on February 27, 2010.

11. Due to the nature of her previous employment and the position she held as Head of Department of Cardiology, it would not have been unusual for her to conduct her duties and the business of the BHC in the areas of Cardiology and Radiology. As she was no longer employed to the BHC she should not conduct any business at or on behalf of the BHC. The words in the internal memorandum mean to me that Dr Williams-Phillips was no longer employed to the BHC and as such did not have the right to access the patients or the patients' confidential files and/or records. This would include data stored in the Cardiology department and the radiology department. The staff of the BHC was advised by the memorandum to inform management of her presence if she was seen in either of these areas as the cardiology and

radiology areas of the BHC were extremely sensitive areas of the hospital."

[29] Then, as regards the issue of malice, Dr Richards-Dawson added this[14]:

> "12. The memorandum was not drafted nor does its content mean that the management team held any malice towards [Dr Williams-Phillips] or sought to lower her in the eyes of her colleagues or patients. The management team of the BHC did not act with malice toward Dr Williams-Phillips. To the best of my knowledge after ceasing to work at the BHC in January 2010, Dr Williams-Phillips continued to work at the University Hospital of the West Indies as an Honorary Consultant and Associate Lecturer in the Department of Medicine. She was also successful in obtaining gainful employment at the Heart Institute of the Caribbean, and Andrews Memorial Hospital Ltd.
>
> 13. I read a positive article about Dr Williams-Phillips' skills as a cardiologist in the Jamaica Observer on May 24, 2010. I intend to rely on a copy of this article at the trial of this matter. I read other articles in the Jamaica Observer on June 25, 2012 and August 6, 2012 where Dr Williams-Phillips was quoted and relied on. I intend to rely on a copy of these articles at the trial of this matter."

[30] Dr Richards-Dawson was also extensively cross-examined. Among many other things, she was probed as to the possibility of disseminating the information that Dr Williams-Phillips was no longer employed to BHC to the medical staff by some means other than issuing the memorandum. In particular, it was suggested that, in relation to other doctors who worked at the hospital, a feasible alternative would have been to contact them individually by telephone or by electronic mail ('e-mail'). While allowing that this might have been possible, Dr Richards-Dawson pointed out that there were over 100

[14] At paras. 12-13

doctors associated with the hospital and she could not say that she had up-to-date telephone numbers for or knew the e-mail addresses of all of them. Further, there was no internal e-mail system within the hospital.

[31] But Dr Richards-Dawson agreed with the suggestion that there had been nothing to prevent her making an attempt to contact the 100-plus doctors individually. In fact, she said, she did contact some of the doctors, including some heads of department in charge of the various firms which existed at the hospital. And she agreed that her expectation was that they would take steps to pass on the information to the persons who worked under their supervision.

[32] Dr Richards-Dawson also agreed that there was no evidence of which she was personally aware that, between the date of her termination on 20 January 2010 and the date on which the memorandum was issued, Dr Williams-Phillips had made any attempt to (i) enter the BHC to treat patients; (ii) access the Radiology and the Cardiology Departments; (iii) attend on any confidential patient-doctor meeting; (iv) impose herself "on any team that managed or directed patient programme [sic] between [20 January] and [5 February]"[15]; and (v) make "any prognosis, based on data collected from the examination of patients in the Cardiology and Radiology Unit …"[16]

[15] NOE, page 246
[16] Ibid

[33] Finally in cross-examination, the following exchange took place between counsel for Dr Williams-Phillips and Dr Richards-Dawson[17]:

> "Q. You have agreed that you knew who the various medical personnels [sic] were, working at the hospital?
>
> A. Yes, I did.
>
> Q. You agreed that Dr. Phillips was working in the Cardiology Department?
>
> A. And the rest of the hospital, as well.
>
> Q. You have agreed that who knew – who the Cardiology persons were and those persons would have also known that Dr. Phillips was working in the Cardiology Department, you have agreed that?
>
> A. The Cardiology team would know the Cardiologist, yes.
>
> Q. Can we agree then, ma'am, that the sole purpose to post this memo on all these wards were [sic] to defame Dr. Phillips?
>
> A. It was to inform the rest of the hospital and not in the same department that an individual was no longer at BHC here and should not be engaged in any activities in the hospital setting. And that is something simply which is done as information to the staff. We have medical, nurses in paramedical, pharmacy. We have a wide variety of services."

[34] SERHA's final witness was the CEO, Mrs Needham. As the CEO's evidence contained the fullest account of the background to the issuing of the memorandum, the actual placement of the memorandum and its sequel, I must quote from her evidence-in-chief at some length.

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[17] NOE, pages 254-255

[35] First, in relation to the circumstances in which the memorandum came to be issued, Mrs Needham said this[18]:

> "3. Dr Michelle-Ann Richards Dawson, Mr Henry Anglin and I thought that a memorandum to the staff could assist to remind them that Dr Williams-Phillips was no longer working at the BHC and was not authorized to handle or deal with patient information in the departments of cardiology and radiology.
>
> 4. Copies of the memorandum were not placed all over the BHC. Only ten copies were made of the memorandum and they were placed on clip boards or areas accessed only by medical staff. The memorandum was sent out after 5:00 pm on February 5, 2010 to only Wards 1, 2, 3, 4, 5, 5E and 7. The memorandum was also sent to the Nursery Guard house and old operating theatre suite. It was not widely circulated even within the hospital as all clinics and some departments were already closed at 5:00pm that day. No further copies of the memorandum were distributed after February 5, 2010.
>
> 5. The memorandum was not sent to the staff of the BHC with the knowledge that it contained defamatory meaning nor was it meant to be disparaging of Dr Williams-Phillips' reputation as a medical doctor. It was not intended to defame Dr Williams-Phillips. The memorandum was not intended to notify the visiting surgical team for the February mission of any information in relation to Dr Williams-Phillips.
>
> 6. The words in the memorandum meant that Dr Williams-Phillips was no longer employed to the BHC and therefore should not act on its behalf. Also as she was no longer authorized to carry out functions and be in possession of information in relation to patients of the BHC that if she were seen in areas of cardiology and radiology the Senior Medical Officer or the Chief Executive Officer was to be contacted. There was no intention to cause embarrassment to Dr Williams-Phillips.
>
> 7. The memorandum was addressed to members of staff only and was not a general notice posted on the main notice

[18] Witness statement of Beverley Needham dated 6 March 2014, paras. 3-7

boards or in passages. All the participants/patients in the February mission were accommodated in areas where the memorandum was not posted – the conference room, Ward 8, the Cardiology clinic, the new operating theatre and the new operating theatre waiting area."

[36] Next, as regards the events of 24 February 2010, and Dr Williams-Phillips' complaint that she was on that day escorted from the BHC compound by security personnel, Mrs Needham said as follows:[19]

"8. On or about February 24, 2010, an electrophysiology clinic was being conducted in the cardiology department at the BHC. This was during the time of the mission which took place between February 23, 2010 and March 6, 2010. Those who were authorised to participate in the clinic were Dr Alisha Robb, Cardiology Resident, Dr Sharone Forrester, Pediatrician, Dr Charmaine Scott, Pediatric Cardiologist and a member of the visiting cardiac team.

9. On that date, I was told something about a confidential patient – doctor conference being held during the electrophysiology clinic. After I received notification, I went to an area of the BHC along with the Administrator of the BHC and spoke briefly with the visiting doctor, advising that Dr Williams-Phillips was no longer a member of staff at the BHC and could not therefore participate in the clinic. He asked that I speak with her after he was through with the patient. After the patient had left the room, I went inside and observed Dr Williams-Phillips sitting on an examination couch. I greeted her and asked what the purpose of her visit was. She replied that she was there to learn. I advised her that as she was no longer a member of staff, she could not participate in the management of the patients.

10. Dr Williams-Phillips responded that as a medical doctor she could go anywhere in the BHC. I advised Dr Williams-Phillips however, that this was not so and although the BHC was a public facility she would need permission from the

[19] At paras. 8-14

Senior Medical Officer to access certain areas of the BHC. She enquired of the case conference held on February 23, 2010 and whether the other doctors she had seen, who were not employed to the BHC had gotten permission to attend. I answered yes.

11. At that time, Dr Williams-Phillips enquired about patients she indicated that she had prepared for surgery and those patients she had referred for some kind of procedure. I advised her that those patients were now being managed by Dr Charmaine Scott. In light of the circumstances that the clinic entailed the conduct of confidential patient – doctor conferences such as the one that was interrupted, I asked Dr Williams-Phillips to exit the room but she refused. I then advised her regrettably that I would therefore have to ask security to assist to remove her. She then jumped down from the examination couch and turned to Dr Charmaine Scott who was present and in an attacking tone said to Dr Scott, 'you see what you have caused, you must be very happy. You are running two institutions BHC and UHWI. You get what you want.' At that point in time I invited Dr Williams-Phillips to leave and apologized to the visiting doctor for what had transpired.

12. As Dr Williams-Phillips was leaving the room she asked if I would be barring her from attending the Cardiac symposium on February 27, 2010. I told her that she was free to attend but that I did not think it would be a good idea in light of what had just transpired. She said that she was going to attend and that I should be prepared to remove her. She walked out of the room by herself from the cardiology department to her car alone and was not escorted by security in plain view of the overseas medical professionals and/or patients.

13. Based on what occurred on February 24, 2010 it is clear that Dr Williams-Phillips was not prevented from accessing the cardiology department of the hospital. It is just that as she had not sought the relevant permission from the Senior Medical Officer she was asked to leave the confidential patient – doctor session as she was no longer a member of staff. Dr Williams-Phillips would have had no cause to attend the cardiology or radiology departments after January 20, 2010 unless she was the caregiver of a child who was accessing those services at the hospital.

> 14. I did not nor did anyone to the best of my knowledge give instructions to security personnel about Dr Williams-Phillips. They were not advised to keep her off the premises after January 20, 2010. It is recognized that the BHC is a public institution and therefore Dr Williams-Phillips was never refused entry to the compound. She was not prevented from accessing any area of the BHC. I did not instruct the security guards to watch out for Dr Williams-Phillips. I do not know of anyone else giving such an instruction."

[37] And finally, with respect to distribution of the memorandum once it was issued, Mrs Needham added the following[20]:

> "15. I did not distribute or authorise the distribution of the memorandum other than what is outlined in this witness statement. I did not email the memorandum to anyone. I did not give instructions for this to be done either. I did not make any copies of the memorandum apart from the ten copies that were made. I did not cause any such copies to be made after the ten copies were sent out to the staff of the BHC."

[38] Under cross-examination, Mrs Needham confirmed that copies of the memorandum had been placed in all but one of the nine wards in the hospital. However, despite having said in her witness statement that only 10 copies of the memorandum were made, she explained that she had been told how many copies were made. She therefore accepted the suggestion that she could not say for sure "if the person who made the copies, made some and put them elsewhere"[21].

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[20] At para. 15

[21] NOE, page 265. Mrs Needham further confirmed this in answer to the judge during re-examination, when she said that she could not "absolutely be sure" – NOE, page 290

[39] Mrs Needham also stated that, prior to the issue of the memorandum on 5 February 2010, she had no information that Dr Williams-Phillips had been "coming to BHC to act on behalf of the institution"[22]; nor that she had been involved "in any confidential patient-doctor conference at the hospital"[23].

[40] In response to detailed questioning about the provenance of the memorandum, and the occasion of Dr Williams-Phillips' further visit to the BHC on 24 February 2010, Mrs Needham's answers were generally consistent with what she had stated in her witness statement. The cross-examination ended on the following note[24]:

> "Q. I am going to give you one last question, one last opportunity. On reflection, and being a person that I can sense is honest, can you honestly say that the issuance of [the memorandum] was appropriate?
>
> A. Under the circumstances, yes."

[41] And that was the case for SERHA.

The judge's directions to the jury on liability

[42] First, having completed the general parts of his summing-up, the judge gave a definition of defamation, emphasising the requirement that the words complained of must tend "to lower [a person] in the view of right thinking persons", thereby exposing him or her "to thoughts of ridicule or contempt"[25].

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[22] NOE, page 279
[23] NOE, page 280
[24] NOE, page 287
[25] NOE, pages 350-351

[43] Next, the judge told the jury of the requirement that the defamatory words must have been "disseminated to persons other than the persons involved in this particular case". He advised them that he had ruled as a matter of law that the words complained of had been published to others[26].

[44] Then, as he had previously indicated to counsel, the judge told the jury that he had ruled as matter of law that, of the pleaded meanings of the memorandum, the only two which were capable of carrying a defamatory meaning were those alleged in paragraphs vi and viii of the particulars of claim[27]. For ease of reference, I will set them out again:

> "vi. The Claimant was likely to do something improper/wrong or unprofessional if she was allowed on the premises;
>
> …
>
> viii. The Claimant was such a person that her behaviour would not be consistent with the standard of conduct expected of a doctor;"

[45] The judge accordingly told the jury to disregard any of the other pleaded meanings in determining whether Dr Williams-Phillips had been libelled; but that it was for them to determine whether any of the two meanings which he had identified were defamatory.

[46] Turning to the defences open to SERHA, the judge first mentioned the contention that the words complained of were not defamatory, in the sense that they "are not words

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[26] NOE, pages 351-352
[27] NOE, page 354

which any right-thinking person would think would lower [Dr Williams-Phillips] in the eyes of anyone else"[28].

[47] The judge then addressed the issue of justification, telling the jury that "[j]ustification in law simply means truth". In other words, "if the person is lowered in the eyes of well thinking person[s] for something said of them which is true, then the person who said it should not be accountable for it"[29].

[48] And finally, the judge dealt at somewhat greater length with the defence of qualified privilege[30]:

> "What that is, is whether or not the circumstances of the publication or the use of the words are protected in law. What the law says is that there are circumstances where persons can make a particular communication, where the person who makes the communication has a duty to make it and the person receiving the communication would have a duty to receive it. This is a [sic] issue of law and I have ruled as a question of law that this is a case where qualified privilege would apply.
>
> It means that the words are protected when persons may be allowed to say something which may be defamatory in terms of one's business or one's duty. It says it is a legal moral or ordinary duty to pass on this information. However, we say it is qualified privilege, because this is not a complete defence. In other words, there are circumstances in which even though what is being said is said in a circumstance that it is a qualified privilege the person can be found liable or responsible. That circumstance is what is called 'circumstance of malice' or 'expressed malice'. Malice is another word that lawyers use that you don't have to [sic] for normal English meaning in this particular context, it does not mean that you have a bad

[28] NOE, page 355
[29] NOE, pages 356-357
[30] NOE, page 360

> feeling; that you intend to get the person. Malice simply means that you have acted outside of or in abuse of the privilege that you have."

[49] After giving the jury an example of how the concept of malice might operate to defeat a plea of qualified privilege, the judge concluded this section of the summing-up as follows[31]:

> "In this case [Dr Williams-Phillips] has suggested that … the phrasing of the documents [is] an indication of such malice it's an indication of the fact that the defendants were acting outside of the general circumstances in which … they would have had qualified privilege in this particular case. I have found that that would be the only circumstance or evidence that could indicate malice; which could defeat or overcome the qualified privilege ...
>
> You look to see whether or not in the way this statement has been put together - - Mr Smith raised the issue of the phrase at any time and immediately in the memo whether or not that would defeat or overcome the qualified privilege in this particular case and those would be issues for you."

[50] The judge then summarised the evidence which the jury had heard, before giving general directions on the issue of damages, to which I will return in due course[32].

The grounds of appeal

[51] The appellants filed the following grounds of appeal:

> "i. The learned judge erred in finding that the words used in the memorandum were capable of bearing a defamatory meaning.

[31] NOE, pages 362-363
[32] See NOE, pages 379-384

ii. The learned judge erred in finding that there was a case to leave to the jury.

iii. The learned judge erred in finding that the words 'at any time' and 'immediately' created an evidential basis of malice to be considered by the jury.

iv. The learned judge erred in finding that the words 'at any time' and 'immediately' could nullify qualified privilege.

v. The Court erred in finding that the words used in the memorandum were defamatory.

vi. Damages ought not to have been awarded. In the alternative, the damages awarded are excessive in the circumstances."

The submissions

[52] Taking grounds i. and v. together, Miss Dickens submitted that the words used in the memorandum were not defamatory; and that they were in any event true. In so far as the pleaded innuendo was concerned, Miss Dickens pointed out that, of the various particulars set out in the particulars of claim, some of the matters referred to arose after the publication of the memorandum. In any event, she submitted there were no extrinsic facts pleaded which were capable of supporting a 'true' innuendo. It was therefore necessary for Dr Williams-Phillips to establish on a balance of probabilities that the words themselves bore a defamatory meaning, and this she had failed to do.

[53] On grounds ii.-iv., Miss Dickens pointed out that the judge ruled that qualified privilege applied in this case and that, on the evidence, malice could only be found in the content of the memorandum itself. She submitted that the words used in the memorandum were not disproportionate or unduly disparaging of Dr Williams-Phillips in

any way. Accordingly, in the absence of any evidence or suggestion of malice on the part of SERHA and its agents, the judge ought not to have left the issue of malice to the jury.

[54] And finally, on ground vi., Miss Dickens submitted that, in the absence of any evidence that Dr Williams-Phillips had suffered any loss or diminution in her reputation as a result of the publication of the memorandum, and in the light of previous awards, the jury's award of damages was manifestly excessive. Therefore, in the event that the court was not with her on the issue of liability, the damages should be reduced to a maximum of $1,000,000.00.

[55] I will refer in due course to some of the authorities to which Miss Dickens referred us in support of these submissions.

[56] Dr Williams-Phillips represented herself at the hearing of the appeal. In preparation for the hearing, she provided the court with a bundle containing a written submission, running to 28 pages of text and accompanied by supporting documentation[33]. Dr Williams-Phillips also made oral submissions on the day of the hearing.

[57] Dr Williams-Phillips told us that BHC is a public and teaching hospital, with over 350 students passing through. As many as 30 copies of the memorandum were published for three months in every department of the hospital. She complained that on the first day of trial some parts of her witness statement were eliminated, with the result that much of the evidence which could have shown malice was not made available to the

[33] Court of Appeal: Judges Bundle, filed 5 April 2018

court. She referred to the occasion on which she was "evicted" from the BHC as a consequence of the memorandum. She referred to the contents of the memorandum itself, which was addressed to "all members of staff", which included cooks, cleaning staff and security guards, despite the fact that, after the termination of her employment to BHC, she had not been back to the BHC, conducted any business or requested anything. She insisted that there was extrinsic evidence of malice. She told us that she had lost her house, her car and had suffered many other losses as a result of the publication of the memorandum. In all the circumstances, the award of $4,250,000.00 was "extremely low" and could not possibly replace the things which she had lost. She complained that the appeal had taken four years to come on for hearing, and told us that the publication of the memorandum had affected her daughter, who was afraid of what people might say about her.

[58] In considering this appeal, I have naturally taken into account everything which Dr Williams-Phillips has said in both her written and oral submissions.

Discussion and analysis

[59] I will consider the matter under the following heads: (i) Was the memorandum defamatory? (ii) Did the defences of justification and/or qualified privilege apply? and (iii) Were the damages manifestly excessive?

(i) Was the memorandum defamatory?

[60] In **Bonnick v Morris et al**[34], Lord Nicholls of Birkenhead stated the following as the correct approach to the question of whether a particular statement is capable of bearing a defamatory meaning:

> "As to meaning, the approach to be adopted by a court is not in doubt. The principles were conveniently summarised by Sir Thomas Bingham MR in *Skuse v Granada Television Ltd* [1996] EMLR 278, 285-287. In short, the court should give the article the natural and ordinary meaning it would have conveyed to the ordinary reasonable reader of the *Sunday Gleaner*, reading the article once. The ordinary, reasonable reader is not naïve; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other, non-defamatory meanings are available. The court must read the article as a whole, and eschew over-elaborate analysis and, also, too literal an approach. The intention of the publisher is not relevant. An appellate court should not disturb the trial judge's conclusion unless satisfied he was wrong."[35]

[61] While this statement of the law was made in the context of a newspaper publication, I have no doubt that it is equally applicable to the circumstances of this case. So the issue in this case, therefore, is whether the words complained of in the memorandum, giving them their natural and ordinary meaning, would have conveyed a defamatory meaning to the persons to whom they were published. Or, as Lord Atkin put it in his oft-cited judgment in **Sim v Stretch**[36], "would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?"

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[34] [2002] UKPC 31, para. 9
[35] Emphasis in the original
[36] [1936] 2 All ER 1237, 1240

[62] Miss Dickens referred us to **Deandra Chung v Future Services International Limited and Yaneek Page**[37] ('**Deandra Chung**'), in which this court upheld D McIntosh J's decision that the following notice published in the newspapers in respect of a former employee was not capable of bearing a defamatory meaning[38]:

> "**NOTICE** – The public is hereby advised that **Miss Deandra Chung** is no longer employed to **Future Services International Ltd** and is therefore not authorized to conduct any business on our behalf."[39]

[63] In explaining the basis for the decision in that case, I said this[40]:

> "In my view, the ordinary, reasonable and fair-minded reader of this notice would take it to mean no more than it said, *viz*, that the appellant was no longer employed to the 1st respondent and that she was as a result not authorised to conduct any business on its behalf. Such a reader would appreciate, I think, that persons leave the employment of other persons for a variety of reasons, including, as in this case, resignation of their own volition, or other reasons not necessarily reflecting on their honesty or competence. It seems to me that it would take a reader who is either unduly suspicious or especially astute to discover scandal at every turn, to, assuming the worst, attribute to the notice in this case the meanings that (a) the appellant's employment was terminated for misconduct by the 1st respondent and (b) after the termination, the appellant was engaging in conduct detrimental to the 1st respondent, making it necessary to warn the public."

[64] Reference was also made in that case to, among other 'announcement' cases, **Beswick v Smith**[41], in which the plaintiff's former employers circulated a letter advising

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[37] [2014] JMCA Civ 21
[38] At para. [2]
[39] Emphasis in the original
[40] At para. [42]
[41] (1907) 24 TLR 169

that, "H Beswick is no longer in our employ. Please give him no order or pay him any money on our account". The Court of Appeal held that, taken in their natural meaning, these words would not convey to the mind of a person of ordinary intelligence the impression that an imputation of anything criminal was being made against the plaintiff.

[65] This case was contrasted with **Morris and Another v Sanders Universal Products**[42], in which the defendants wrote a circular letter addressed to their customers informing them in respect of each plaintiff that "…we have dismissed [the plaintiff] from our employ, he having been our representative in your area, and… he has now no connection whatsoever with our company". The plaintiffs contended that, by the said words, the defendants meant and were understood to mean that they had dismissed the plaintiffs from their employment against their will, and that they had been guilty of some conduct entitling the defendants to terminate their employment without notice or salary in lieu, or that the circumstances of the termination of the plaintiffs' employment were such as to be discreditable to them. The Court of Appeal held that the words "we have dismissed the [plaintiff] from our employ" were plainly capable of conveying to the ordinary reader that the termination of the plaintiffs' employment was involuntary and in circumstances that were discreditable to them.

[66] Each case must therefore be determined on its own facts. I must accordingly look back at the memorandum itself. It was addressed to all members of staff, wards and departments. It advised that Dr Williams-Phillips was no longer employed as a member

[42] [1954] 1 All ER 47

of staff of BHC and was therefore not authorised to conduct business on or on behalf of the hospital. It went on to state that this was "particularly applicable to the clinical areas of Cardiology and Radiology" and that "[s]hould she visit either of these areas in the hospital at any time the SMO and or the CEO are to be advised immediately".

[67] It will be recalled that the judge limited the defamatory meanings for the jury's consideration to the pleaded implications that Dr Williams-Phillips (i) "was likely to do something improper/wrong or unprofessional if she was allowed on the premises"; and (ii) "was such a person that her behaviour would not be consistent with the standard of conduct expected of a doctor".

[68] As with the notice in **Deandra Chung**, I think that the ordinary, reasonable, fair-minded and not unduly suspicious reader would have been hard put to discern either of these meanings in the language of the memorandum. If, as the memorandum correctly advised, Dr Williams-Phillips was no longer employed to BHC, it would seem to me to follow that her security clearance to enter sensitive areas of the hospital would also be withdrawn. The need to do so would not necessarily have anything to do with the likelihood of her doing something improper, wrong or unprofessional if she was allowed on the hospital compound. Nor would it lead anyone to conclude that she was guilty of behaviour inconsistent with that expected of a doctor. In my view, this therefore makes the case distinguishable from **Morris and Another v Sanders Universal Products**, where the reference to the plaintiffs having been "dismissed", in a context in which the public was being informed that they therefore had "no connection whatsoever with our

company", was held to be apt to convey the meaning that they had been dismissed for discreditable conduct on their part.

[69] But this still leaves open the question of the pleaded innuendo. For, as the authorities establish, an innuendo when pleaded and proved gives rise to a separate cause of action. The nature of the innuendo was explained in the judgment of Lord Morris in **Lewis and Another v Daily Telegraph Ltd**[43] in this way:

> "Where a plaintiff brings an action for libel he may sustain his case (where there is a trial with a jury) if the judge rules that the words, in what has been called their natural and ordinary meaning…are capable of being defamatory and if the jury find that they are defamatory. A plaintiff may, however, sustain his case in a different way. He may plead an innuendo. He may establish that because there were extrinsic facts which were known to readers of the words, such readers would be reasonably induced to understand the words in a defamatory sense which went beyond or which altered their natural and ordinary meaning and which could be regarded as a secondary or as an extended meaning."

[70] It is therefore necessary for the claimant who relies on an innuendo to plead and prove extrinsic facts, known to readers of the allegedly defamatory material, which would have reasonably induced them to understand the words complained of in a defamatory sense going beyond their natural and ordinary meaning[44].

[71] The leading older case of **Capital and Counties Bank Ltd v George Henty & Sons**[45] is a good example. In that case, the defendant ('Henty & Sons'), a firm of brewers,

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[43] [1963] 2 All ER 151, 159-160.
[44] See also **Deandra Chung**, paras. [21]-[36], where this issue is fully discussed.
[45] (1882) 7 App Cas 741

was in the habit of receiving from its customers cheques drawn on various branches of the plaintiff ('the bank'). As a convenience to Henty & Sons, these cheques would be cashed at a particular branch of the bank. After a squabble with the manager of that branch, Henty & Sons sent a printed circular to a large number of its customers (who knew nothing of the squabble) indicating that, 'Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of [the bank].' The circular became known to other persons, there was a run on the bank (though it was not proved that the circular is what caused the run) and the bank sued Henty & Sons for libel, alleging an innuendo that the circular imputed that it was insolvent. The House of Lords held that, in their natural meaning, the words were not libellous and that there was no evidence fit to be left to the jury to support the pleaded innuendo. The bank's action accordingly failed.

[72] As regards the pleaded innuendo, Lord Selborne LC said this[46]:

> "There was no evidence of any extrinsic fact affecting the reputation or credit of the plaintiffs' bank at the time which could be connected with the circular, so as to give it a meaning to those who read it which it might not otherwise have had ... **it seems to me that without some evidence of facts which, when connected with the words of the document, would justify the meaning imputed to it, such a case ought not to go to a jury** …
>
> The document, not being a libel on the face of it, is not shewn to be so by any extrinsic evidence proper, in my judgment, to be considered by a jury for that purpose." (Emphasis supplied)

[46] At pages 748 and 750

[73] A classic example of a case in which a claim for libel based on an innuendo succeeded is **Cassidy v Daily Mirror Newspapers Ltd**[47]. In that case, the defendant newspaper innocently published a photograph of a man and a woman, identifying the woman as the man's fiancée. As it turned out, the man was already married to the plaintiff. The plaintiff successfully sued the newspaper for libel, alleging an innuendo that the publication conveyed to those who knew her as the man's wife the defamatory imputation that the plaintiff was an immoral woman who had in fact been living with the man without being married to him. She called evidence at the trial from persons who said that she had been lowered in their estimation by the publication.

[74] It was accepted that, on the face of it, the actual words published in the newspaper conveyed nothing defamatory of the plaintiff. However, the Court of Appeal (by a majority) upheld the trial judge's ruling that the publication was capable of a meaning defamatory to the plaintiff by way of the pleaded innuendo. This is how Russell LJ explained the operation of the principle[48]:

> "… words may be published with reference to such circumstances, and to such persons knowing the circumstances, as to convey a meaning which would not be attributable to them in different circumstances: see per Lord Blackburn in *Capital and Counties Bank v. Henty*."[49]

[47] [1929] 2 KB 331
[48] At page 351
[49] Emphasis in the original

[75] For ease of reference, I will repeat the particulars upon which Dr Williams-Phillips relied in support of the innuendo in this case:

> "i. The Notice was posted on all the wards of the hospital and was also posted at the main gate to the hospital;
>
> ii. The security guards on duty at the hospital were instructed by [SERHA and Dr Richards-Dawson] to be on the alert for the Claimant
>
> iii. There were no such Notices or alerts posted at the hospital or given in relation to any other medical doctors attending or visiting the institution
>
> iv. There were no restrictions imposed on the entry of any medical doctors to the hospital premises;
>
> v. [SERHA and Dr Richards-Dawson] had and/or caused the Claimant to be taken from a meeting at the Hospital on February 23, 2010 and off the hospital premises by security escort.
>
> vi. The said meeting had been arranged by the Claimant during the course of her employment at the hospital, and was attended by a team of cardiologists from overseas, namely the Caribbean Heart Menders, other local cardiologists as well as a number of patients;
>
> vii. The Claimant was removed from the said meeting and premises by security escort in plain view of the said medical professionals, patients, other members of staff, security personnel and other visitors to the institution."

[76] I can say at once that, as Miss Dickens pointed out, particulars v., vi., and vii. have no bearing on the issue, since they relate to matters which arose after the memorandum was issued.

[77] As regards particulars i. – iv., it seems to me that these lend no support to the pleaded innuendo. In other words, there is nothing in those particulars which, when connected with the words of the memorandum, would give the memorandum the expanded meaning contended for: that is, that Dr Williams-Phillips was likely to do something improper/wrong or unprofessional if she was allowed on the premises, or was such a person that her behaviour would not be consistent with the standard of conduct expected of a doctor.

[78] I therefore think that there was no evidence of defamation fit to be left to the jury and that the judge erred in this regard.

(ii) Did the defences of justification[50] and/or qualified privilege apply?

[79] In the light of my conclusion on the first issue, this issue, which has to do with defences to a claim of libel, does not strictly speaking arise. However, in the event that I am wrong on the first issue, and for completeness, I will nevertheless deal with it briefly.

[80] Taking the defence of justification first, as Professor Kodilinye puts it[51], "[i]t is a complete defence to an action for libel or slander that the words complained of were true in substance".

[81] In their amended defence dated 5 March 2014, the appellants pleaded a number of particulars of justification. The following are the most relevant:

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[50] Or truth, as section 20(1) of the Defamation Act 2013 now provides that the defence of justification should be known.

[51] Gilbert Kodilinye, Commonwealth Caribbean Tort Law, 5th edn, page 273

> "a. [Dr Williams-Phillips] is a Paediatric Cardiologist who worked at the [BHC] from about April 2009
>
> b. [Dr Williams-Phillips] ceased to work at the [BHC] on or about January 20, 2010
>
> c. After January 20, 2010, [Dr Williams-Phillips] was not authorised to act for or on behalf of the [BHC]
>
> d. After January 20, 2010, [Dr Williams-Phillips] was not authorised to assume any duties she undertook between April 2009 and January 2010 in relation to the [BHC], its records, processes or patients. She was not to operate in the clinical areas as if she was still working at the [BHC].
>
> e. In the premises, the words complained of were justified in expressing the fact that [Dr Williams-Phillips] no longer worked at the [BHC] and was not authorised to conduct business on behalf of the Hospital."

[82] The trial was conducted on the common basis that Dr Williams-Phillips' employment to the BHC came to an end on 20 January 2010. It is clear from the evidence of Dr Richards-Dawson in particular that, after that date, "Dr Williams-Philips was no longer authorized to conduct business or patient care, or attend confidential patient conferences on behalf of the BHC"[52]. In the end, the evidence on this was in fact purely one way. For, as will be recalled, when she was cross-examined[53], Dr Williams-Phillips agreed that, after the date of her separation from the BHC, she was no longer authorised to conduct business on behalf of the BHC, nor was she authorised to administer patient care to the patients at the BHC.

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[52] Witness statement of Michelle-Ann Richards Dawson, para. 5
[53] See paras. [21]-[22] above

[83] In light of this uncontradicted evidence, the memorandum, which advised all members of staff, wards and departments that "Dr Williams-Phillips is no longer employed as a member of staff of this hospital and therefore is not authorised to conduct business on or on behalf of [the hospital]", was plainly true.

[84] In my view, therefore, the defence of justification was fully made out on the evidence and the judge ought not to have left the case to the jury on this issue.

[85] Turning now to the defence of qualified privilege, the judge ruled as a matter of law that the memorandum was published on an occasion of qualified privilege. Both sides have accepted this ruling. But Miss Dickens' complaint is that, in the absence of any evidence of malice, the judge ought not to have left the issue to the jury at all.

[86] The law in this area is not in doubt. It is only necessary to refer briefly to a few of the authorities to which we were referred by Miss Dickens.

[87] The learned editors of Gatley on Libel and Slander[54] state the effect of malice on a plea of qualified privilege as follows:

> "Proof of malice defeats the defence of qualified privilege … Malice is a question for the jury, if there is one, **provided there is evidence of it to be left to them**." (Emphasis supplied)

[54] Gatley on Libel and Slander, 10th edn, page 2008, para. 16.2

[88] As to the meaning of the word malice in this context, Lord Diplock explained in **Horrocks v Lowe**[55]**:**

> "… it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. **But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication**; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests." (Emphasis supplied)

[89] And finally, as to proof of malice, I will mention the following passage from Commonwealth Caribbean Tort Law[56]:

> "The onus of proving malice rests on the claimant. Evidence of malice may be either *intrinsic* (that is, found in the words themselves) or *extrinsic* (that is, found in external circumstances unconnected with the publication itself). There may be intrinsic evidence of malice where the language used by the defendant is violent, insulting or utterly disproportionate to the facts. However, it has been said that, when considering whether the actual expressions used can be treated as evidence of malice, 'the law does not weigh words in a hair balance' …"[57]

[90] As an example of the kind of words that could be described as "violent, insulting or utterly disproportionate to the facts", Professor Kodilinye referred to **Richardson v Tull**[58], a decision of the High Court of Trinidad and Tobago, in which "the claimant, an

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[55] [1974] 2 WLR 282, 291
[56] Kodilinye, page 309
[57] Emphases in the original
[58] [1976] Trin LR 8

attorney-at-law and chairman of a committee set up to investigate alleged malpractices in a public company, was accused, in a letter addressed to the general manager of the company, of holding a 'kangaroo court' and 'witch hunting'"[59].

[91] In this case, the judge made an express ruling that there was no extrinsic evidence of malice, and that any such evidence would therefore have to be sought in the language of the memorandum itself. In other words, if there was malice, it was purely intrinsic[60].

[92] In this regard, Dr Williams-Phillips placed particular reliance on the final sentence of the memorandum as evidence of malice. That sentence, as will be recalled, stated that, "[s]hould [Dr Williams-Phillips] visit either of these areas in the hospital **at any time** the SMO and or the CEO are to be advised **immediately**" (emphasis supplied).

[93] In my view, the language of this sentence falls far short of the kind of violent, insulting or utterly disproportionate language instanced at paragraph [90] above. Despite the use of the words "at any time" and "immediately", the sentence was temperate and measured. In short, taken in the context of the memorandum as a whole, it was plainly insufficient to raise any inference of malice.

[94] I therefore think that the judge also erred in leaving the issue of malice to the jury.

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[59] Kodilinye, footnote 290, page 309
[60] See footnote [54] above

(iii) Were the damages manifestly excessive?

[95] Again, in the light of my conclusions on the first two issues, this issue does not strictly speaking call for decision. But, again in the event that I am wrong on those issues, I will deal with it briefly.

[96] The judge gave lengthy directions to the jury on damages[61]. He invited them to consider, among other things, the gravity of alleged libel; Dr Williams-Phillips' standing in the community; the extent of the publication; and the damage to her reputation (pointing out that, save for Dr Williams-Phillips' own evidence, there was not much evidence on this in the case). He also told the jury that, as a matter of law, no question of exemplary damages arose on the evidence in the case. However, "if you find that the notice was placed on the notice board where the public could see it, where it could have been done in another way, then you may find that that aggravates or make worst [sic] the damages in this matter and this is something you can consider in your award"[62].

[97] In submitting that the award of $4,250,00.00 was manifestly excessive, Miss Dickens' principal complaint was that there was a dearth of independent evidence showing any damage to Dr Williams-Phillips' reputation as a result of the alleged libel. She submitted that, all things considered, the damages should have been no more than $1,000,000.00.

[61] NOE, pages 379-386
[62] NOE, page 386

[98] On this issue, I start from the position that, as Panton P observed in **The Jamaica Observer Limited v Orville Mattis**[63] ('**Orville Mattis**'), a case to which Miss Dickens also referred us, "[i]t has long been settled in this jurisdiction that the size of an award of damages may only be interfered with if it is either inordinately high or inordinately low". This principle has a long history in the common law, as can be seen from a case like **Blackshaw v Lord and Another**[64], in which Stephenson LJ stated[65] that "[a] defendant challenging a jury's award of damages for defamation has an uphill task". To which Dunn LJ added this[66]:

> "A series of decisions which are binding on us show that this court must not interfere with such an award unless the damages are so large that no reasonable jury could have given them, or unless the jury were misled, or took into account matters which they ought not to have considered."

[99] Miss Dickens' submission that the damages in this case ought not to have exceeded $1,000,000.00 was based in part on **Orville Mattis**, in which the respondent/claimant was a serving member of the Jamaica Constabulary Force. In an article published by the appellant/defendant newspaper, it was reported that he was one of three police officers who "were recently transferred after it was alleged that they took away cocaine from a man without turning it over to the Narcotics Police". The respondent/claimant's suit for

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[63] [2011] JMCA Civ 13, at para. [16]
[64] [1983] 3 WLR 283
[65] At page 303
[66] At page 313

libel succeeded and this court declined to interfere with the jury's award of $1,000,000.00 for general damages, which was given on 11 February 2008.

[100] By Miss Dickens' calculations, which I accept, that award, when updated by reference to the consumer price index, equated to $1,743,210.00 on 11 March 2014, the date of the award in this case.

[101] Miss Dickens also referred us in her skeleton arguments to **Edward Seaga v Leslie Harper**[67] ('**Leslie Harper**'). In that case, the respondent, a Deputy Commissioner of Police, was libelled when the Leader of the Opposition suggested in a public speech that he was unable to perform his duties as a senior police officer with impartiality, was motivated by political bias and partisanship and was therefore unfit to hold the high office of Commissioner of Police, in which a vacancy was shortly to arise. However, the respondent was able to show very little evidence of any lasting injury to his reputation. The trial judge's award of $3,500,000.00 for general damages was reduced by this court to $1,500,000.00, principally because he awarded aggravated damages when none were pleaded[68]. The appellant's further appeal to the Privy Council was dismissed and the Board affirmed the reduced award of $1,500,000.00.

[102] By Miss Dickens' calculations, which I again accept, that award, when updated by reference to the consumer price index, equated to $3,358,351.00 on 11 March 2014.

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[67] [2008] UKPC 9

[68] (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 29/2004, judgment delivered 20 December 2005

[103] In my view, had Dr Williams-Phillips been able to hold her judgment on liability in this case, she would have been entitled to damages reflecting the serious aspersions on her professionalism of which she complained. On the authority of **Orville Mattis** and **Leslie Harper**, such damages could have been anywhere in the range of $1,743,210.00 to $3,358,351.00. But I also bear in mind that, as Sir Thomas Bingham MR observed in **John v MGN Ltd**[69], "comparison with other awards is very difficult because the circumstances of each libel are almost bound to be unique". In these circumstances, I would have found it impossible to say that the jury's award of $4,250,000.00 in this case was inordinately high, or so large that no reasonable jury could have given it.

Conclusions and disposal of the appeal

[104] The appellants' contentions that the words used in the memorandum were not capable of bearing a defamatory meaning, and were in any event true, have been made out. The further contention that the judge ought not to have left malice to the jury also succeeds. I have therefore come to the conclusion that this appeal must be allowed, the counter-notice of appeal dismissed and the judgment awarded in the court below set aside.

[105] The usual rule is that costs should generally follow the event. Accordingly, I would propose the following order:

1. Unless a contrary submission is received in writing from the parties within 21 days of this judgment, the appellants are to

[69] [1997] QB 586, 612

have the costs of the appeal and the costs of the trial in the court below, such costs to be taxed if not agreed. There should be no order as to costs on the counter-notice of appeal.

2. Should a contrary submission be received from either party within the time limited above, the other side is to reply in writing within a further period of 14 days.

3. The court will give its decision on costs in writing within a yet further period of 14 days of receipt of the appellants' submissions.

An apology

[106] Although it was unavoidable in the circumstances, I apologise unreservedly to the parties for the delay in rendering this judgment. The court is fully aware of the great inconvenience and anxiety which delays such as this must inevitably cause the parties.

BROOKS JA

[107] I have had the privilege of reading, in draft, the judgment of the learned President. I agree with his reasoning and conclusion and have nothing further that I could usefully add.

MCDONALD-BISHOP JA

[108] I have read in draft the judgment of the learned President. I agree with his reasoning and conclusion and there is nothing that I could usefully add.

MORRISON P

ORDER

1. The appeal is allowed.

2. The counter-notice of appeal is dismissed.

3. The judgment entered in the Supreme Court on 11 March 2014 is set aside and a judgment for the appellants is substituted in its stead.

4. Unless a contrary submission is received in writing from the parties within 21 days of this judgment, the appellants are to have the costs of the appeal and the costs of the trial in the court below, such costs to be taxed if not agreed. There shall be no order as to costs on the counter-notice of appeal.

5. Should a contrary submission be received from either party within the time limited above, the other party is to reply in writing within a further period of 14 days.

6. The court will give its decision on costs in writing within a yet further period of 14 days of receipt of the parties' submissions.