THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

SKBHCV2023/0077

BETWEEN:

JUSTIN HAWLEY

Claimant

and

DAMIEN WEEKES

Defendant

Appearances:

Mr. Damian Kelsick KC with him Ms. Hadya Dolphin for the Claimant
Mr. D. Victor C. Elliott-Hamilton with him Ms. Adana Romeo for the Defendant

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2026: January 20;
February 27;
May 26.

JUDGMENT

[1] **GILL, J:** This is a claim for damages for defamation where the alleged defamer's online account was tagged by the unknown producer of the impugned words.

[2] The claimant alleges that the defendant published or caused to be published on Facebook words and images imputing serious misconduct, including fraud, receipt of illicit funds, and involvement in scandal.

[3] The defendant denies liability, contending that he was not the author of the impugned post, that he did not publish or republish it, and that the claimant has failed to prove publication to any third party.

Background

[4] By an Amended Claim Form filed on May 9, 2024, the claimant seeks damages for defamation, including aggravated damages, interest pursuant to section 29 of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act,[1] and costs. The claimant Justin Hawley is a citizen of St. Kitts and Nevis but presently resides in Abu Dhabi, United Arab Emirates. He is the Federation's Ambassador to the United Arab Emirates. The defendant Damien Weekes is the proprietor of a bar in Basseterre. He is on the Executive of the People's Labour Party (PLP) as the National Party Organiser.

[5] The words complained of were allegedly posted on Facebook by an anonymous account "Tim Coming-Back", and read:

> ***"AG Garth Wilkin 1st cousin Justin Hawley is at the heart of the HushPuppi scandal. He is the one who collected the 50,000 USD from HushPuppi.***
>
> ***Come Dwyer let's talk about this.***
>
> ***1st cousins Justin & Shannon Hawley mother is AG Garth Wilkin Aunt. Justin collected the 50,000 usd from HushPuppi."***

[6] The post was accompanied by a collage of photographs of the claimant, the current Attorney General, Garth Wilkin and "HushPuppi". As pleaded by the claimant, the individual referred to as "HushPuppi", whose official name is Ramon Abbas, was the subject of a scandal throughout the Federation of St. Kitts and Nevis.

[7] The claimant asserts that the defendant approved, adopted, published and/or caused the said post to be published on his Facebook account "Weekes Yah." He relies on the fact that the defendant was tagged in the post, and that by his profile settings, he had control over whether tagged posts appeared on his page and were visible to others.

[1] Cap. 3.11 of the Laws of Saint Christopher and Nevis

[8] He avers that tagging is a feature on Facebook whereby users may link their posts to other accounts and, by the setting of the tagged user's profile, the original post would appear on the individual's page. Even though a person is tagged in a post, the post can only appear on the individual's page if he or she allows it to.

[9] The claimant further relies on a Facebook post made by the defendant on February 7, 2023, after receipt of a demand letter from the claimant's attorneys, in which the defendant stated: ***"Me fk wid a defamation letter. Ba this AeG think man a coward kno let freedom reign my sis."*** The claimant contends that this post evidences republication and an assertion of free speech rights.

[10] In his Amended Defence filed on June 7, 2024, the defendant denies authorship of the impugned post, denies that he approved and caused the impugned post to be published on his account, and avers that he had no knowledge of the post and he became aware of it only when the claimant's demand letter was served on him. He contends that the "Tim Coming-Back" account was deactivated by that time, and that he never had sight of the original post.

[11] The defendant admits making the February 7, 2023 post, but explains that it was a response to the demand letter as he believed that his freedom of speech was being undermined in the context of public discourse surrounding the Attorney General's defamation claim against Ian "Patches" Liburd. He denies that it referred to or ratified the impugned post.

Issues

[12] The court is required to determine:

1) Whether the words complained of were published to a third party;
2) Whether the defendant published the words, or is otherwise legally responsible for their publication;
3) If the defendant is found to be a publisher, whether he is properly characterised as a primary publisher, with knowledge and control over the content, or as a subordinate publisher, lacking such Knowledge and control;

4) If the defendant is a subordinate publisher, whether he can rely on the defence of innocent dissemination;

5) Whether the defendant ratified, or acquiesced in, the publication, thereby rendering himself liable;

6) Whether the words complained of are defamatory in their natural and ordinary meaning, applying the single meaning rule and the standard of the hypothetical reasonable reader;

7) If liability is established, what damages, if any, should be awarded, including whether aggravated damages are appropriate, together with interest and costs.

The law and submissions

[13] Learned Counsel for the parties set out the applicable case law in significant detail.

Claimant's submissions

[14] The claimant identifies two issues: (i) whether the defendant published the defamatory words; and (ii) whether he has a defence.

[15] The applicable law is the common law of England and Wales, as modified by the Defamation Acts 1952, 1996 and 2013, and applied locally via the Common Law (Declaration of Application) Act.[2]

[16] The claimant relies heavily on a case from the Court of Final Appeal of Hong Kong, **Oriental Press Group Ltd v Fevaworks Solutions Ltd,**[3] endorsed in **Monir v Wood**[4] where Nicklin J stated:

> "To my mind, there is no better summary of the common law than the following paragraphs from the decision of the Court of Final Appeal of the Hong Kong Special Administrative Region in ***Oriental Press Group Ltd -v- Fevaworks Solutions Ltd: ...***"

The judge then proceeded to quote paragraphs 75 – 85 and 87 from **Oriental Press.**

[2] Cap. 3.05 of the Laws of Saint Christopher and Nevis
[3] [2013] HKCFA 47
[4] [2018] EWHC 3525 (QB) at para. 179

What is publication?

[17] Prior to **Emmens v Pottle,**[5] liability for publication was strict. Ribeiro PJ in **Oriental Press** at paragraph 19 explained:

> "A person was held liable for publishing a libel if by an act of any description, he could be said to have intentionally assisted in the process of conveying the words bearing the defamatory meaning to a third party, regardless of whether he knew that the article in question contained those words. Thus, a textbook published in 1891 stated:
>
> > 'The term 'published' is the proper and technical term to be used in the case of libel, without reference to the precise degree in which the defendant has been instrumental to such publication; since, if he has intentionally lent his assistance to its existence for the purpose of being published, his instrumentality is evidence to show publication by him.'"

[18] Even minimal acts sufficed, as in **R v Clerk,**[6] where a printer's servant who merely "clap[ped] down" the press was liable for libels in a publication, the contents of which he was unaware.

[19] The High Court of Australia reaffirmed this principle in **Fairfax Media Publications Pty Ltd v Voller,**[7] where Kiefel CJ, Keane and Gleeson JJ stated:

> "...a person who has been instrumental in, or contributes to any extent to, the publication of defamatory matter is a publisher. All that is required is a voluntary act of participation in its communication."

[20] Similarly, in **Google LLC v Defteros,**[8] Kiefel CJ and Gleeson J held:

> "Adopting *Webb v Bloch,* any act of participation in the communication of defamatory matter to a third party is sufficient to make a defendant a publisher, regardless of their knowledge or intent. So understood, a person who has been instrumental in, or contributes to any extent to, the publication of defamatory matter is a publisher."

The Law after Emmens – the Bifurcation

[21] Although liability for publication remains strict, **Emmens v Pottle** introduced a defence for subordinate publishers. Romer LJ in **Vizetelly v Mudie's Select Library Ltd**[9] stated:

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[5] (1985) 16 QBD 354
[6] (1728) 1 Barn KB 304, 94 ER 207
[7] [2021] HCA 27 at para. 32
[8] [2023] 3 LRC 53 at para. 21
[9] [1900] QB 170 at pp. 179 - 180

> "For many years it has been well settled law that a man who publishes a libel is liable to an action, **although he is really innocent in the matter, and guilty of no negligence.** That rule has been so long established as to be incapable of being altered or modified, and the Courts, in endeavouring to mitigate the hardship resulting from it in many cases, have only been able to do so by holding that, under the circumstances of cases before them, there had been no publication of the libel by the defendant. The result, in my opinion, has been that the decisions on the subject have not been altogether logical or satisfactory on principle. The decisions in some of the earlier cases with which the Courts had to deal are easy to understand. Those were cases in which mere carriers of documents containing libels, who had nothing to do with and were ignorant of the contents of what they carried, have been held not to have published libels." ....
>
> The result of the cases is I think that, as regards a person who is not **the printer or the first or main publisher** of a work which contains a libel, but has only taken, what I may call, **a subordinate part in disseminating it,** in considering whether there has been publication of it by him, the particular circumstances under which he disseminated the work must be considered. If he did it in the ordinary way of his business, the nature of the business and the way in which it was conducted must be looked at; and, if he succeeds in shewing (1.) that he was innocent of any knowledge of the libel contained in the work disseminated by him, (2.) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose it contained a libel, and (3.) that, when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel, then, although the dissemination of the work by him was prima facie publication of it, he may nevertheless, on proof of the before-mentioned facts, be held not to have published it. **But the onus of proving such facts lies on him, and the question of publication or non-publication is in such a case one for the jury.**" *(Emphasis added)*

[22] Ribeiro PJ clarified in **Oriental Press** at paragraph 29**:**

> "The defence… is confined to persons who, in the ordinary course of business, play "a subordinate part in disseminating it". … **It places the onus on such subordinate disseminators to prove that they did not know that the article contained a libel and that their lack of knowledge was not due to their own lack of care."** *(Emphasis added)*

Who is a primary publisher?

[23] At paragraph 76, Ribeiro PJ defined a primary publisher as follows:

> "In my view, the abovementioned characteristics supply the criteria for identifying a person as a first or main publisher. They are (i) that he knows **or can easily acquire knowledge of the content of the article being published** (although not necessarily of its defamatory nature as a matter of

law); and (ii) **that he has a realistic ability to control publication of such content, in other words, editorial control involving the ability and opportunity to prevent publication of such content. I shall, for brevity refer to them as "the knowledge criterion" and "the control criterion" respectively." (***Emphasis added)*

[24] In **Thompson v Australian Capital Television Pty Ltd,**[10] Channel 7 rebroadcast defamatory material produced by Channel 9. The High Court held that Channel 7, although it had no role in the production of the material, was a primary publisher because it had the ability to control and supervise the material it televised. "It broadcast for its own purposes, not as agent for PBL or Channel 9, and it 'authorised' the broadcast in any meaningful sense that term has."

Who is a subordinate publisher?

[25] A subordinate publisher is anyone who participates in conveying defamatory statements but lacks knowledge and control. Such persons may rely on the defence of innocent dissemination if they can prove lack of knowledge and reasonable care.

Innocent dissemination

[26] The claimant submits that the defence of innocent dissemination is unavailable to primary publishers. It applies only to subordinate publishers who can prove they did not know of the defamatory content and were not negligent in failing to discover it.[11]

Confusion – mere conduit/passive conveyance

[27] The claimant distinguishes the "mere conduit" line of cases, beginning with **Byrne v Deane,**[12] where golf club proprietors were liable once they knowingly allowed defamatory material to remain posted. Greene LJ stated:

> "On the other hand you have a case such as the present where the removal of this particular notice was a perfectly simple and easy thing to do involving no trouble whatsoever. The defendants, having the power of removing it and the right to remove it, and being able to do so without any difficulty at all, and knowing that members of the club who came into the room would see it, I think must be taken to have elected deliberately to leave it there. The proper inference, therefore, in those circumstances it seems to me is that they were consenting parties to its continuing presence on the spot

[10] [1996] HCA 38, see note [45]
[11] *Oriental Press* at para. 29
[12] [1937] 1KB 818 at 838

> where they had put it up. That being so it seems to me they must be taken to have consented to its publication to each member who saw it."

[28] Ribeiro PJ in **Oriental Press** at paragraph 48 explained that **Byrne** applies only to occupiers who did not participate in dissemination. His Lordship opined:

> "These are not cases involving anyone who has played a role in a scheme for distributing the offending publication seeking relief from the strict rule... What this line of cases addresses are the conditions which must be satisfied before the occupier can be regarded as having turned himself into a publisher of the libel... These rules are therefore not about relieving a person's prima facie liability as a publisher but about whether or not an occupier is constituted a publisher."

[29] Internet platform providers, by contrast, actively facilitate publication and are publishers from the outset. At paragraphs 50 and 52 of **Oriental Press,** Ribeiro PJ explained why the **Byrne** principle was inapplicable to internet platforms under review in that case, thus:

> "50. Once the nature of the *Byrne v Deane* principles is grasped, it becomes clear that they do not apply to internet platform providers like the respondents. The provider of a discussion forum is in a wholly different position from that of the occupier of premises who is not in the business of publishing or facilitating publication at all, but who has had imposed on him the defamatory act of a trespasser.
>
> ...
>
> 52. The respondents were therefore, in my view, plainly participants in the publication of postings by the forum's users and in that sense they were publishers from the outset, it being in issue whether they were first or main publishers or merely subordinate publishers."

Application to the case

[30] The claimant submits that on the facts of this case the defendant is properly to be regarded as a publisher of the defamatory words. The authorities establish that "any act of participation in the communication of defamatory matter to a third party is sufficient to make a defendant a publisher, regardless of their knowledge or intent."[13] The defendant's voluntary act of transmitting, posting, or otherwise conveying the words to third parties satisfies this threshold.

[13] *Google LLC v Defteros* [2023] 3 LRC 53 at para. 21

[31] The claimant contends that the defendant is a primary publisher within the meaning explained by Ribeiro PJ in **Oriental Press**: "(i) that he knows or can easily acquire knowledge of the content… and (ii) that he has a realistic ability to control publication of such content, ... editorial control involving the ability and opportunity to prevent publication of such content."

[32] As to (i), the claimant submits:

a. the evidence is that the post was on the defendant's page for 5 days and he visited the page for each of those 5 days;

b. At the very least, the defendant ought to have known of the post. If, as he says, his page was public and anyone could tag him, it was incumbent upon him to exercise care in discovering what content appeared on his page from third party tags;

c. The defendant admitted that he would have received a notification of being tagged with the post by "Tim Coming-Back". His explanation for not looking at the notification was that it was impractical for him to "check all notifications for all services that [he is] currently a user of";

d. This evidence is spurious:

    i. The defendant is not in a position of a provider such as Google, or the Facebook platform itself, which processes millions, if not billions, of messages and data each day;

    ii. There is no evidence how many notifications the defendant received on January 23, 2023;

    iii. There is no evidence of how many of them, if any, he checked;

    iv. There is no evidence of whether any of the notifications from the other platforms related to posts being published on them from third parties;

    v. The defendant has admitted he did not agree with the posts from "Tim Coming-Back". It was entirely open to him to check at least as to whether the notification related to a tagged post from "Tim Coming-Back";

e. He therefore had every opportunity to access the contents of the post and either through reckless disregard or carelessness, chose not to do so.

[33] As to (ii), the claimant submits:

a. There is no dispute that the defendant in fact had the power to control if the post appeared on his Facebook page; this suffices to establish control;

b. However, even if the court does not accept the claimant's submissions on this point, the requisite control is still satisfied. The facility to control was there. It was available and accessible. For whatever reason, the defendant failed to discover this and he has no one to blame for that but himself.

[34] The claimant asserts that on the evidence, the defendant had both knowledge of the content and the ability to control its dissemination, and thus falls within the category of first or main publisher.

[35] As a primary publisher, the claimant submits that the defendant cannot avail himself of the defence of innocent dissemination. That defence is confined to subordinate publishers who lack knowledge and control, and who can prove that they did not know of the defamatory content and that their ignorance was not due to negligence.[14] The defendant's role was not subordinate; he was the originator and controller of the publication.

[36] The claimant further submits that the defendant cannot rely on the "mere conduit" principle derived from **Byrne v Deane.**[15] That line of authority applies only to occupiers who do not participate in dissemination and who are imposed upon by trespassers.[16] The defendant here actively facilitated publication and cannot be equated with a passive occupier.

Alternative if defendant is subordinate publisher

[37] If, contrary to the claimant's primary submission, the court finds that the defendant was not a primary publisher but a subordinate publisher, the claimant submits that

[14] *Oriental Press* at para. 29
[15] [1937] 1 KB 818
[16] *Oriental Press* at para. 49

the defence of innocent dissemination is not made out. The burden lies on the defendant to prove that he did not know the material contained defamatory content and that his lack of knowledge was not due to any lack of reasonable care.[17]

[38] On the evidence, the claimant contends that the defendant cannot discharge this burden. The circumstances in which the words were published were such that he either knew or ought reasonably to have known of their defamatory character. Here, the defendant cannot show that there was nothing to put him on notice; nor can he show that his ignorance was not due to negligence.

[39] Accordingly, the claimant argues that even if the defendant is treated as a subordinate publisher, he remains liable. The defence of innocent dissemination is unavailable to him because he has not proved the requisite absence of knowledge and negligence. Liability therefore follows whether he is characterised as a primary or subordinate publisher.

[40] The claimant therefore submits that the defendant published the words in question and has no defence absolving him of liability for such publication.

Defendant's submissions

The claimant has failed to prove publication to a third party

[41] The defendant submits that the claimant has not discharged the burden of proving publication. No witness was called to testify that they saw or read the impugned Facebook post.

[42] The screenshots produced disclose no comments or interactions save for one "share", with no evidence of who received it.

[43] The defendant argues that the court should not infer publication in these circumstances. As Carter-Ruck on Libel and Privacy[18] explains, publication requires

[17] *Oriental Press* at para. 29

[18] 6th Edition, 2010, LexisNexis at paras. 5.12 and 5.13

proof that the material was accessed by a third party, or at least a reasonable inference thereof. Here, no such inference arises.

[44] Accordingly, the defendant asserts that the claim must fail at the threshold requirement of publication.

The defendant is not the publisher of the offending statements

[45] The defendant contends that he cannot be regarded as a publisher. The post was composed and posted by "Tim Coming-Back", an anonymous user, without his knowledge or approval.

[46] He avers that he neither liked, shared, nor commented on the post. His role was confined to being tagged.

[47] The defendant submits that as illustrated in **Monir v Wood,**[19] where a claimant chooses to sue someone other than the primary publisher, he takes on the burden of establishing that this other person is liable for the publication. In that case, the claimant sued the chairman of the Bristol UKIP Branch, Steve Wood in respect of a tweet that was posted on the Bristol UKIP Twitter account. The tweet, however, was posted by the Vice Chairman of the Bristol UKIP Branch, John Langley. Mr. Wood's email address was registered to the branch's Twitter account. It was clear that the subject Tweet was composed and posted by Mr. Langley without reference to (or seeking approval from) Mr. Wood. Mr. Wood did not write the said Tweet, and he had no knowledge of its contents before it was published by Mr. Langley. He did not directly participate in its publication. Consequently, the court concluded that Mr. Wood was not liable on the basis of personal or direct participation in the publication. As noted by Nicklin J at paragraph 135 (ii) of the judgment:

> "However, for a person to be held liable as a *primary* publisher, s/he must be shown to have knowing involvement in the publication of the particular words. It is insufficient that a person merely plays a passive role in the process: ***Bunt -v-Tilley*** **[2007] 1 WLR 1243** [22]-[23];"

[19] [2018] EWHC 3525

[48] The defendant analogises his position to that of Mr Wood, who was not liable for a tweet posted by another without his knowledge. His passive role as a tagged account owner is insufficient to constitute publication.

Passive complicity and ratification

[49] The defendant submits that the notion of passive complicity as a publisher was rejected in **Tamiz v Google.**[20] Google, as a platform provider, was held not to be a publisher merely by hosting content. In that case, Mr. Tamiz sued both Google Inc and Google UK Ltd in relation to eight comments which were posted on a blog bearing the name "London Muslim" at various times between April 28 and 30, 2011. Google's role as the platform provider was summarised at paragraph 35 as follows:

> *"[Blogger.com] does not create, select, solicit, vet or approve that content, which is published and controlled by the blog owners. Blogger.com merely provides the tools for users to operate and maintain their sites."*

[50] On the issue of whether Google Inc was a publisher, Eady J at paragraphs 38 and 39 opined:

> "The fact that an entity in Google Inc's position may have been notified of a complaint does not immediately convert its status or role into that of a publisher. It is not easy to see that its role, if confined to that of a provider or facilitator beforehand, should be automatically expanded thereafter into that of a person who authorises or acquiesces in publication.… It is no doubt often true that the owner of a wall which has been festooned, overnight, with defamatory graffiti could acquire scaffolding and have it all deleted with whitewash. That is not necessarily to say, however, that the unfortunate owner must, unless and until this has been accomplished, be classified as a publisher."
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> "It seems to me to be a significant factor in the evidence before me that Google Inc is not required to take any positive step, technically, in the process of continuing the accessibility of the offending material, whether it has been notified of a complainant's objection or not. In those circumstances, I would be prepared to hold that it should not be regarded as a publisher, or even as one who authorises publication, under the established principles of the common law. As I understand the evidence its role, as a platform provider, is a purely passive one."

[20] [2012] EWHC 449 (QB)

[51] Similarly, the defendant asserts that his role was confined to being tagged. He was not required to take any positive step in continuing accessibility of the post.

[52] On ratification, the defendant submits that liability arises only if, once notified, he knowingly allowed the post to remain. In **Monir v Wood**, liability was based on acquiescence after knowledge.

[53] Here, the defendant first learned of the post on February 7, 2023 via the demand letter. By then, the "Tim Coming-Back" account had been deactivated and the post was no longer available. There was therefore no continued publication after notification.

The defendant's Facebook post of February 7, 2023

[54] The claimant relies on the defendant's own Facebook post of February 7, 2023 as evidence of republication.

[55] The defendant explains that this post was an expression of frustration in the context of public discourse about the Attorney General's defamation claim against Ian "Patches" Liburd. The words "Let freedom reign my sis" referred to the Attorney General. The post made no reference to the impugned publication and cannot be deemed an admission of involvement.

The "actual knowledge test"

[56] The defendant relies on the New Zealand case of **Murray v Wishart,**[21] as bearing greater similarity to the present facts. The Court of Appeal adopted the "actual knowledge test" for Facebook page hosts. The claim contained four causes of action with the fourth including a claim against the defendant, Mr. Murray and his employer in respect of third party statements made by persons commenting on the Facebook page in question.

[21] [2014] NZCA 461

[57] In determining that Mr. Murray was not a publisher in respect of that particular claim, the court held that the appropriate test to be applied in such an instance was what they termed the "actual knowledge test" and not the "ought to know test". Both tests were described at paragraphs 81 and 82 of the judgment, quoting the test applied by the judge in the court below as follows:

> "Those who host Facebook pages or similar are not passive instruments or mere conduits of content posted on their Facebook page. They will [be] regarded as publishers of postings made by anonymous users in two circumstances. The first is if they know of the defamatory statement and fail to remove it within a reasonable time in circumstances that give rise to an inference that they are taking responsibility for it. A request by the person affected is not necessary. The second is where they do not know of the defamatory posting but ought, in the circumstances, to know that postings are being made that are likely to be defamatory."
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> "For convenience, we will call the first of these tests the 'actual knowledge' test and the second the 'ought to know' test."

[58] The court's reasons for the adoption of the 'actual knowledge' test were as set out at paragraphs 137 to 140 as follows:

> " … [T]he 'ought to know' test puts a Facebook page host who does not know of a defamatory comment on the page in a worse position than a host who actually does know. The latter will not be a publisher of the comment until a reasonable time for its removal has elapsed (and will not be a publisher at all if he or she removes it in that time). The former will be a publisher from the moment the comment is posted and unable to avoid that consequence by removing the comment from the Facebook page."
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> "The situation will be more complicated when a Facebook page host who 'ought to know' of a defamatory comment on the page actually becomes aware of the comment. On the actual knowledge test, he or she can avoid being a publisher by removing the comment in a reasonable time. But removal of the comment in a reasonable time after becoming aware of it will not avail him or her if, before becoming aware of the comment, he or she ought to have known about it, because on the 'ought to know' test he or she is a publisher as soon as the comment is posted. This seems to us to make the test very difficult to apply."
>
> "The second concern is that the 'ought to know' test makes the Facebook page host liable on a strict liability basis, solely on the basis of then existence of a defamatory comment. Once the comment exists, he or she cannot do anything to avoid being treated as its publisher."

> "It can be argued that the 'ought to know' test is not entirely a strict liability one, because it applies only where the circumstances are such that the host should reasonably anticipate the posting of a defamatory statement. That is akin to making the host liable for the defamatory comment because he or she has been negligent in not taking steps to prevent the defamatory comment being made. Imposing liability for damage to someone's reputation on the basis of negligence rather than an intentional act is contrary to the well-understood nature of the tort of defamation as an intentional tort: *Bell-Booth Group Ltd v A-G* [1989] 3 NZLR 148 at 155–156."

[59] Liability arises only "if they know of the defamatory statement and fail to remove it within a reasonable time in circumstances that give rise to an inference that they are taking responsibility for it."

[60] The defendant submits that the claimant has failed to prove that the defendant had knowledge of the post prior to February 7, 2023, or that it remained available thereafter.

[61] The defendant asserts that he did not see the post, and the claimant has provided no evidence to refute this. Therefore, he submits that the "actual knowledge test" is not satisfied.

Meaning of the words

[62] The defendant accepts that words are defamatory if they tend to lower the claimant in the estimation of right-thinking members of society.[22]

[63] However, he submits that the court must apply the single meaning rule in **Charleston v News Group Newspapers,[23]** and the principles in **Gillick v British Broadcasting Corporation,[24]** treating the hypothetical reasonable reader as neither naïve nor avid for scandal.

[64] The defendant contends that the claimant has not proved that the words conveyed the pleaded meanings to the reasonable reader.

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[22] See the dicta of Lord Atkin in *Sim v Stretch* [1936] 2 All ER 1237 at 1240

[23] [1955] 2 AC 65

[24] [1996] EMLR 267

The defendant's state of mind

[65] The defendant submits that intention is irrelevant to liability as held in **Cassidy v Daily Mirror Newspapers Ltd.**[25] Liability depends on publication, not motive.

[66] His Facebook post of February 7, 2023 was not an admission but an expression of frustration. His later appointment as National Party Organiser of the PLP did not involve oversight of communications. There is no evidence of political grievance against the claimant. In fact, the claimant was appointed Consul General to the United Arab Emirates in 2017 and Ambassador to the United Arab Emirates in 2022 under the Unity Administration, led by Prime Minister Dr. Timothy Harris, the leader of the PLP.

[67] The defendant contends that the claim should therefore be dismissed.

Court's Analysis

Publication

[68] The claimant must prove that the words complained of were published to at least one third party. At common law, publication is a bilateral act: the defendant makes the defamatory matter available, and a third party has it available for comprehension.[26]

[69] The claimant submits that publication may be inferred from the defendant's 3,000 Facebook followers and his daily use of the platform. Learned King's Counsel emphasised that it is "only necessary to be one person" and that friends frequently visited his page.

[70] The defendant contends that publication has not been proved. No witness testified to having seen the post. Screenshots disclose no comments or interactions save for

[25] [1929] 2 KB 331

[26] *Google LLC v Defteros* [2023] 3 LRC 53 at para. 21

one "share", with no evidence of who received it. Learned Counsel argued that it cannot be a reasonable inference that the defendant had 3000 followers so that someone must have seen it.

[71] I consider that direct evidence of readership is not always required. In Carter-Ruck on Libel and Privacy, it is stated that publication may be established by reasonable inference.[27] The strictness of the rule is illustrated by **Webb v Bloch**[28] where even a newsagent was liable.

[72] I accept that no witness was called to testify that they saw the impugned post. However, publication may be inferred from the operational features of Facebook. A tagged post, once permitted by the account settings of the tagged user, appears on that user's timeline and is visible to their followers. The defendant's account was public and had approximately 3,000 followers. It is therefore a reasonable inference that at least one third party must have seen the post.

[73] This inference is consistent with the approach in **Fairfax Media Publications Pty Ltd v Voller**, where the High Court of Australia held that even minimal acts of facilitation on social media suffice to constitute publication, and in **Oriental Press** where the Court of Final Appeal emphasised that participation in dissemination, even indirectly, is enough.

[74] On balance, I find that the post was accessible to third parties during the relevant period, and that given the defendant's large following, it is a reasonable inference that at least one person other than the claimant saw it. Publication is therefore established.

Responsibility for publication

[75] The claimant submits that the defendant is a publisher by virtue of instrumentality, not passivity. Learned King's Counsel argued that nobody forced the defendant to

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[2727] 6th Edition at paras. 5.12 and 5.13

[28] (1928) 41 CLR 331

set up Facebook, it was a voluntary act to set up his Facebook account, and to keep it open, and the post was published on his page. The claimant relies on **Oriental Press**[29] and **Thompson v Australian Capital Television Pty Ltd,**[30] where even passive retransmission was held to be publication.

[76] The defendant contends that he was not a publisher. He was merely tagged, without knowledge or approval. He neither liked, shared, nor commented on the post. The defendant relies on **Monir v Wood,**[31] where liability required "knowing involvement" in the publication of the particular words, and on **Tamiz v Google,**[32] where Google was held not to be a publisher merely by hosting content.

[77] I consider that tagging is not wholly passive. By configuring his account to allow tagged posts to appear automatically, the defendant facilitated their dissemination to his followers. In my view, this constitutes voluntary participation in the communication of the words. The analogy is closer to the rebroadcaster in **Thompson**, who was held liable despite not originating the content. I rule that the defendant is therefore properly regarded as a publisher.

Primary or subordinate publisher

[78] Ribeiro PJ in **Oriental Press** identified two criteria for a primary publisher: (i) knowledge or easy access to knowledge of the content; and (ii) realistic ability to control publication.

[79] The claimant submits that the defendant satisfies both criteria. He could easily acquire knowledge of the content by checking his notifications, and he had control through his profile settings. Learned King's Counsel argued that all of the necessary controls were available to him had he looked and investigated. "He took no steps to control it."

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[29] [2013] HKCFA 47
[30] [1996] HCA 38
[31] [2018] EWHC 3525
[32] [2012] EWHC 449 (QB)

[80] The defendant submits that he lacked knowledge and control, and therefore cannot be a primary publisher. Learned Counsel relies on **Murray v Wishart,**[33] where liability was confined to cases of actual knowledge.

[81] The court is tasked to determine which regime of authorities to apply to this case. This is critical because the principles in the different jurisdictions diverge and will result in different outcomes. In this regard, I consider that **Murray v Wishart** is persuasive but not binding in this jurisdiction. In the absence of a local Defamation Act, the applicable law is the common law of England and Wales, adopted by statute in this jurisdiction, namely, the Common Law (Declaration of Application) Act, Cap. 3.05 of the Laws of Saint Christopher and Nevis. I accept and adopt the view of Nicklin J in **Monir v Wood**[34] that "there is no better summary of the common law" than the relevant paragraphs from **Oriental Press.**

[82] The English authorities emphasise strict liability, mitigated only by the defence of innocent dissemination. The "actual knowledge test" in **Murray** is inconsistent with the strict rule articulated in cases such as **Webb v Bloch, Fairfax Media Publication Pty Ltd v Voller** and **Oriental Press.**

[83] Moreover, **Murray** was motivated by policy concerns about imposing liability on Facebook page hosts absent knowledge. Those concerns led to a relaxation of strict liability in New Zealand. However, as King's Counsel for the claimant submitted, "St. Kitts adopts the common law of the UK, not New Zealand." This court is bound to apply English common law, not to import New Zealand innovations.

[84] Applying **Oriental Press,** the defendant had both knowledge or easy access to knowledge, and control (through his settings). He is therefore to be treated as a primary publisher and I so rule.

[33] [2014] NZCA 461

[34] [2018] EWHC 3525 (QB) at para. 179

Innocent dissemination

[85] The defence of innocent dissemination is available only to subordinate publishers. As Romer LJ explained in **Vizetelly v Mudie's Library,**[35] it requires proof that the disseminator did not know of the defamatory content and was not negligent in failing to discover it.

[86] The claimant submits that the defendant cannot rely on this defence, as he is a primary publisher. Even if subordinate, he cannot prove lack of knowledge or absence of negligence.

[87] The defendant submits that he had no knowledge of the post prior to February 7, 2023, when he received the demand letter, and that by then the post had been deactivated.

[88] I have ruled that the defendant is a primary publisher and therefore cannot rely on innocent dissemination. Even if subordinate, in my view, his daily use of Facebook and failure to adjust his settings amount to negligence. The defence is therefore unavailable to the defendant.

Ratification/acquiescence

[89] The claimant submits that the defendant ratified and adopted the post by his Facebook response of February 7, 2023, referencing the demand letter and invoking freedom of speech. The claimant argues that the only speech that is represented in the demand letter is the defamatory post by "Tim Coming-Back", the defendant's response referenced the demand letter, it was his freedom of speech he was referring to, and that is ratification and adoption of the post.

[90] The defendant submits that his post was an expression of frustration in the context of public discourse about the Attorney General's defamation claim against Ian

[35] [1900] QB 170 at 180

"Patches" Liburd. It made no reference to the impugned post and cannot amount to ratification.

[91] I consider that ratification requires knowledge and conduct amounting to adoption. The defendant's post, though not explicit, was made in direct response to the demand letter which referenced the impugned post. By dismissing the letter and invoking freedom of speech, to my mind, the defendant effectively adopted the publication. Ratification is therefore established.

Meaning of the words

[92] The claimant pleads that the words meant that he was guilty of fraud, received illicit funds, was involved in a scam and scandal, and was guilty of discreditable conduct. He argued that the average person in St. Kitts familiar with "HushPuppi" would interpret the words as defamatory.

[93] The defendant submits that the words do not bear the inescapable meaning of fraud. He relies on **Lewis v Daily Telegraph,**[36] that the hypothetical reasonable reader is not avid for scandal, not naïve, but somewhere in the middle.

[94] The court applies the single meaning rule in **Charleston v News Group Newspapers**[37] and the principles in **Gillick v BBC.**[38] In my view, the words impute receipt of illicit funds and involvement in scandal. To the ordinary reasonable reader, they convey imputations of dishonesty and discreditable conduct. The words are therefore defamatory.

[95] Having found that the defendant published the words, that he is a primary publisher, that he ratified the publication, and that the words are defamatory, liability in the defendant is established.

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[36] [1964] AC 234
[37] [1995] 2 AC 65
[38] [1996] EMLR 267

Damages

[96] I will proceed to consider the issue of damages, including whether aggravated damages are appropriate, in light of the seriousness of the imputations, ratification of the offending post and the absence of apology.

[97] The claimant seeks damages for defamation, including aggravated damages, interest, and costs. He submits that the imputations were grave, alleging fraud, receipt of illicit funds, and involvement in scandal. Such allegations strike at the claimant's integrity and professional reputation, particularly given his diplomatic appointment.

[98] The claimant argues that liability for defamation is strict, and that damages must reflect both the seriousness of the imputations and the defendant's conduct. The claimant emphasised that the defendant's Facebook post of February 7, 2023 amounted to ratification and adoption of the defamatory material, aggravating the injury.

[99] The claimant contends that aggravated damages are warranted because the defendant failed to apologise, dismissed the demand letter, and invoked freedom of speech in a manner that trivialised the claimant's complaint. The claimant submits that this conduct compounded the harm and justifies an enhanced award. The claimant submits that an award of general damages in the sum of $100,000.00 and aggravated damages in the sum of $25,000.00 is reasonable in the circumstances.

[100] The defendant submits that if successful, the court should award the claimant nominal damages of $10,000.00. Learned Counsel argues that publication to third parties has not been proved, and therefore no reputational harm has been established.

[101] The defendant contends that even if publication is inferred, there is no evidence that the claimant's reputation was actually damaged. No witness testified to having read the post or to having altered their view of the claimant as a result.

[102] The defendant submits that aggravated damages are not justified. His February 7, 2023 post was an expression of frustration in the context of public discourse about the Attorney General's defamation claim against another individual. It did not reference the impugned post and cannot be treated as ratification.

Court's analysis on damages

[103] The law of defamation recognises that damages serve three purposes: (i) to compensate the claimant for injury to reputation; (ii) to vindicate his or her good name; and (iii) to console him or her for distress and hurt feelings. As laid down by Sir Thomas Bingham in **John v MGN Ltd:**[39]

> "That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused."

[104] The quantum depends on the gravity of the libel, the extent of the publication, the conduct of the defendant, and the need for vindication.

[105] The court must also be mindful of proportionality. As Lord Reid observed in **Lewis v Daily Telegraph Ltd,**[40] the ordinary man is not avid for scandal. One does not, and should not, select the worst possible meaning which the words could bear.

[106] This principle tempers the assessment of damages by ensuring that the award reflects the actual sting of the words as understood by the reasonable reader.

Gravity of the imputations

[107] In my view, the imputations here were grave. The words alleged that the claimant was "at the heart of the HushPuppi scandal" and that he "collected the 50,000 USD

[39] [1997] QB 586 at 607
[40] [1964] AC 234 at 260

from HushPuppi." To the ordinary reasonable reader, these words impute dishonesty, corruption, and involvement in illicit activity.

[108] Allegations of corruption against a public official are among the most serious in defamation law. In **Sim v Stretch,**[41] Lord Atkin defined defamatory matter as that which tends to lower the plaintiff in the estimation of right-thinking members of society generally. The imputations here plainly meet that test.

[109] The claimant's position as a diplomat amplifies the gravity. Allegations of corruption against a person holding public office strike at the heart of his professional integrity and capacity to represent the State abroad.

Extent of publication

[110] The defendant argues that publication was not proved, as no witness testified to having read the post. The claimant relies on inference from the defendant's 3,000 followers and his daily use of Facebook.

[111] I accept that publication may be inferred where the circumstances make it likely that at least one third party saw the post. In **Webb v Bloch,**[42] the High Court of Australia held that even a newsagent who sold a newspaper containing defamatory matter was liable, regardless of whether he read it. The principle is that voluntary participation in dissemination suffices.

[112] Applying that principle, the post was accessible to the defendant's followers and that it is a reasonable inference that at least one person saw it. The extent of publication was limited, but sufficient to establish liability.

Aggravated damages

[113] Aggravated damages may be awarded where the defendant's conduct has increased the injury, for example, by failing to apologise or persisting in the

[41] [1936] 2 All ER 1237 at 1240
[42] (1928) 41 CLR 331

defamatory allegations. In **Cassell & Co Ltd v Broome,**[43] Lord Hailsham LC explained that aggravated damages are justified where the defendant's conduct has injured the plaintiff's proper feelings of dignity and pride.

[114] I am of the view that the defendant's conduct aggravated the injury. His Facebook post of February 7, 2023, *"Me fk wid a defamation letter. Ba this AeG think a man coward kno let freedom reign my sis",* dismissing the demand letter and invoking freedom of speech, was made in direct response to the claimant's complaint. Although not explicit, it amounted to ratification and adoption of the publication. (I note the use of the obscenity, albeit abbreviated).

[115] In **Cassidy v Daily Mirror Newspapers Ltd,**[44] Greer LJ observed that liability does not depend on intention but on the fact of publication. However, intention and conduct are relevant to aggravated damages. Here, the defendant's refusal to apologise and his trivialisation of the complaint compounded the harm.

[116] I therefore find that aggravated damages are warranted to reflect the defendant's conduct in dismissing the demand letter, failing to apologise, and ratifying the publication.

Vindication

[117] The court must also ensure that the award vindicates the claimant's reputation. In **John v MGN Ltd,** Bingham MR emphasised that damages "must vindicate his good name." This means that the damages awarded must signal to the public that the claimant's reputation has been unjustly tarnished. An award must be sufficient to demonstrate that the allegations were false and unjustified.

[118] The defendant submits that in the absence of evidence of significant reputational harm, only nominal damages should be awarded. In the circumstances of this case, he submits that the court should make an award of $10,000.00 to vindicate the

[43] [1972] AC 1027 at 1071
[44] [1929] 2 KB 331 at 346

claimant's reputation. He regards this amount as proportionate given (1) the lack of proof of significant injury to the claimant's reputation and (2) the award constitutes reasonable compensation for injury to the claimant's feelings. He relies on authorities where the principle was discussed such as:

- **Hayward v Hayward**[45] – Nominal damages were awarded because the court was of the view that the plaintiff's evidence, that his business had fallen off since the issue of a defamatory circular, was too vague and imprecise to justify a substantial award.
- **TnT News Centre Ltd v John Raphael**[46]
- **Tang v Modeste TT**[47]

[119] Learned Counsel argues that the claimant called no witness to testify that they saw the post or altered their view of him, and therefore reputational harm was not proved. On this basis, damages should be confined to nominal damages for injury to feelings only.

[120] The claimant relies on authorities where substantial damages were awarded for defamatory imputations against public officials or figures:

- **Mary John v Cliff Williams**[48] – $100,000.00 in general damages and $40,000.00 in aggravated damages awarded to a businesswoman and social and political activist where it was alleged on Facebook that she "was running a sex trade".

- **Elwardo Lynch v Ralph Gonsalves and BDS Ltd v Ralph Gonsalves**[49] - $140,000.00 in general damages awarded to the Prime Minister and Minister of Finance for allegations of corruption involving misuse of public funds.

[45] (1887) 34 Ch. D 198
[46] Civil Appeal No. 166 of 2006 (T&T, unreported) at paras. 13 and 14
[47] CV2010-03657 at paras. 13-14
[48] ANUHCV2016/0356
[49] SHVHCVAP2009/002

- **Rishatha Nicholls v Arnhim Eustace**[50] - $120,000.00 in general damages awarded to the claimant, the former secretary to the defendant, the Leader of the Opposition, for defamatory statements he made on two radio broadcasts imputing corruption and theft.

- **Victoria Alcide v Helen Television Systems Ltd and Radio St. Lucia Company Ltd**[51] - General damages of $100,000.00, $20,000.00 in aggravated damages, $15,000.00 in exemplary damages awarded to the deputy director of St. Lucia's correctional facility for defamatory imputations made on air that she engaged in intimate relations with an inmate.

- **Francis Alexis v Cabral Douglas**[52] - General damages of $225,000.00 inclusive of $50,000.00 for aggravated damages, and exemplary damages of $10,000.00 awarded for defamatory internet publications alleging bribery against a senior lawyer and former member of the Regional Judicial and Legal Services Commission of the Caribbean Court of Justice.

[121] These authorities demonstrate that where imputations of corruption or dishonesty are made against public officials or figures, substantial damages are appropriate even if publication is limited, because vindication of reputation is paramount.[53]

Court's determination on damages

[122] I accept that nominal damages may be appropriate where defamatory words are proved but reputational harm is not established. The authorities cited by the defendant illustrate that principle.

[123] However, the imputations here were grave, alleging corruption and receipt of illicit funds. The claimant is a diplomat, and allegations of dishonesty strike at the core of his professional integrity. Vindication, in my view, requires more than nominal damages.

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[50] SVGHCV2014/0240 and SVGHCV2014/0242
[51] SLUHCV2011/0398
[52] GDAHCV2023/0470
[53] See *Mathias Peltier and another v Matthew Leblanc* DOMHCVAP2020/0006

[124] Publication has been established by inference. While no witness testified to having read the post, I have found that accessibility to 3,000 followers and the nature of Facebook usage make it likely that at least one person saw it. The absence of direct evidence of readership does not preclude liability, given the strictness of the rule.[54]

[125] The defendant's conduct aggravated the injury. His dismissive Facebook post of February 7, 2023, made in response to the demand letter, amounted to ratification and adoption of the publication. His failure to apologise compounded the harm.

[126] In these circumstances, nominal damages would not suffice. Damages must signal to the public that the plaintiff's reputation has been unjustly tarnished. That signal cannot be sent by a nominal award.

[127] Taking into account the gravity of the imputations, the limited but sufficient publication, the defendant's aggravating conduct, and comparative authorities, the court assesses damages as follows:

- General damages: $90,000.00 to compensate for injury to reputation and distress, reflecting the gravity of the imputations but limited publication.

- Aggravated damages: $25,000.00, to reflect the defendant's conduct in dismissing the demand letter, failing to apologise, and ratifying the publication.

[128] The total award is therefore $115,000.00, together with interest pursuant to section 29 of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act, Cap. 3.11, and prescribed costs.

Conclusion

[129] The court has found that the words complained of were defamatory of the claimant, imputing corruption and receipt of illicit funds.

[54] See *Webb v Bloch* (1928) 41 CLR 331; *Oriental Press* [2013] HKCFA 47

[130] On the issue of publication, I am satisfied that the claimant has proved that the defendant is a primary publisher within the meaning of the common law. The defendant had knowledge of the content or could easily acquire knowledge of the content of the defamatory post, and had the ability to control its dissemination through his Facebook settings, thereby satisfying both the "knowledge" and "control" criteria identified in **Oriental Press Group Ltd v Fevaworks Solutions Ltd** and endorsed in **Monir v Wood.**

[131] Even if the defendant were to be regarded as a secondary publisher, liability would still attach. The defence of innocent dissemination is not available to him, as he failed to establish that he did not know of the defamatory content and that his lack of knowledge was not due to any lack of reasonable care. His dismissive Facebook post of February 7, 2023 ratified and adopted the publication, aggravating the injury.

[132] The imputations were grave, striking at the core of the claimant's professional integrity as a diplomat. Vindication requires more than nominal damages.

[133] The defendant's submission that only nominal damages should be awarded is rejected. While nominal damages may be appropriate where reputational harm is not proved, the seriousness of the imputations and the claimant's public role require substantial damages to vindicate his reputation.

[134] Guided by the authorities, tempered by the limited publication, the court assesses general damages at $90,000.00 and aggravated damages at $25,000.00, for a total of $115,000.00.

Order

[135] Based on the foregoing, it is hereby ordered that:

1) Judgment is entered for the claimant.
2) The defendant shall pay the claimant general damages in the sum of $90,000.00.

3) The defendant shall pay the claimant aggravated damages in the sum of $25,000.00

4) The global award is $115,000.00 to be paid together with interest at the rate of 5% per annum from the date of judgment to the date of payment in full.

5) The defendant shall pay prescribed costs to the claimant pursuant to CPR 65.5 in the sum of $19,375.00.

[136] I thank Counsel for the parties for their most useful written and oral submissions.

Tamara Gill
High Court Judge

By the Court

Registrar