

COURT OF MAGISTRATES (MALTA)

DR. RACHEL MONTEBELLO B.A. LL.D.

MAGISTRATE

Application Number: 260/2018 RM

Michelle Portelli

-vs-

Martin Florian

Today, 25th March 2021

The Court,

Having seen the application filed by Michelle Portelli in the Registry of this Court on the 5th November 2018 where she premised and requested:-

“... lil din il-Qorti tikkundanna lill-konvenut previa dikjarazzjoni li l-allegazzjonijiet, il-kummenti u d-dikjarazzjonijiet li gew pubblikati u mxandra permezz ta’ email, mibghuta mill-konvenut u distribwita lil numru ta’ persuni b’referenza diretta ghall-attrici, kienu libelluzi u malafamanti fil-konfront taghha, tant li kienu jikkontjenu allegazzjonijiet u insinwazzjonijiet inveritjieri, foloz u kellhom bhala skop dak li jtellfu jew inaqsu r-reputazzjoni, il-gieh u l-kredibilita’ taghha, kif ukoll li jesponuha ghar-redikolu u disprezz tal-pubbliku, jigi ordnat ihallas dik is-somma li tigi likwidata u ffissata minn din l-istess Qorti bhala danni b’applikazzjoni tal-Att dwar il-Midja u l-Malafama, Kap.

579 tal-Ligijiet ta' Malta, bl-ispejjez u l-imghaxijiet legali sal-pagament effettiv kontra l-konvenut li huwa minn issa ngunt ghas-subizzjoni.

Having seen the reply filed by Martin Florian¹ in the Registry of this Court on the 28^h January 2019:

"Illi t-talbiet attrici ghandhom jigu michuda stante li:-

L-email hija rapport in bona fede lill-awtorita` kompetenti u qatt ma kien hemm l-intenzjoni jew il-kunsens tal-esponent ghall-pubblikazzjoni tal-istess, u ghalhekk mhux azzjonabbli a tenur tal-Art. 3 (3) tal-Kap. 579 tal-Ligijiet ta' Malta.

Il-kontenut tal-email mhux libelluz billi hija l-opinjoni onesta tal-esponent ibbazata fuq fatti sostanzjalment veri.

Salv eccezzjonijiet ulterjuri."

Having seen that in virtue of a decree dated 4th February 2019, it was ordered that the proceedings are conducted in the English language;

Having also seen that during the hearing held on the 10th March 2020, the parties declared that it was not necessary for the judicial acts that had already been filed in the Maltese language, to be translated into the English language;

Having heard the testimony of the parties and their witnesses and having seen all the evidence adduced;

Having seen all the acts of the proceedings;

¹ Fol. 13.

Having heard the final oral submissions of the parties' counsel during the hearing of the 18th January 2021;

Having seen that the case was adjourned for today for the delivery of judgement;

Having considered;

That this is a libel suit instituted by the plaintiff in terms of the provisions of the Media and Defamation Act, 2018 (Cap. 579 of the Laws of Malta)². Plaintiff alleges that the statement contained in the email sent by defendant to the Minister of Health Mr. Chris Fearne, some time in early April 2018, is libellous and defamatory in her regard as it contains false allegations and insinuations which diminish her reputation, credibility and esteem as well as expose her to ridicule.

Defendant pleaded that the allegedly defamatory statement consists in a bona fide report to the competent authority which was never intended to be published and consequently, it is not actionable in terms of the provisions of Article 3(3) of the Act. *In subsiduum*, defendant also pleaded that the statement is an expression of defendant's honest opinion on facts that are substantially true.

In its entirety, defendant's email, containing the impugned statements³, reads as follows:-

"My daughter Rebecca Cassar Florian, has just left hospital after 4 days, during which she gave birth to a baby boy on the 3rd April at 16.40 hrs. Although the service at Mater Dei was very much up to standard and most of the staff proved helpful and cordial, I am compelled to forward the incident below for your kind attention.

² Hereinafter referred to as 'the Act'.

³ Dok. CP1, as received by Carmen Pace from the Head of Customer Care – fol. 45.

It all happened on the 4th April at 02.00 a.m. (9 hours after a caesarean operation). My daughter, who was placed in Bed 19 at Obstetrics Ward 1, called for assistance and was greeted by a British speaking female nurse, who in a vociferous manner, without any provocation whatsoever and for no apparent reason, tried (and successfully managed) to ridicule and humiliate my daughter and her husband. She seemed more compatible to a drug overdosed or drunk person. To highlight her arrogance, she also felt she should mention parts of her private human body. To add insult to injury, it transpires that later she boasted with those colleagues who had not noticed the incident, and highlighted them regarding her hilarious show. The above staff member concerned was - staff nurse MICHELLE PORTELLI.

Notwithstanding such an arrogant attitude, my daughter and husband remained calm and they felt it would be better to minimize the problem, especially due to their vulnerable state.

I am sure that should the same incident happen to someone else, it would have been settled immediately, but in another manner. But, I feel that we acted in the correct way and that such a shortcoming should not be reciprocated by another wrong-doing from our side.

I am submitting the above information for any action you deem necessary.

Thanks and best regards,

MARTIN FLORIAN

Plaintiff, in her testimony, explains:-

*“The allegations made in the email where [sic. were] **completely false** and I could not imagine why they were being made since nothing of what was said in the email had in fact occurred. **Indeed in his email Mr. Florian accused me of being intoxicated or drugged up whilst taking care of his daughter and accused me of behaving unprofessionally in her presence.** This was incredible to me not only because I did not behave remotely in that manner which he was describing but also because he was not there to witness anything which may have happened. In any event **I was furious that such ridiculous allegations were being made when they were completely untrue**, so much so that Mr and Mrs Cassar had not made any complaint whilst they were in hospital.”⁴*

⁴ Court’s emphasis. Affidavit of Michelle Portelli, fol. 20.

In his first plea, defendant opposes the claim by asserting that his email was not intended for public consumption and that it was circulated by the original and sole recipient, the Hon. Minister Chris Fearne, without his consent. On this basis, he maintains that the element of publication that is necessary for the statement to be considered defamatory for the purposes of a libel suit, is lacking and that consequently the claim is not actionable.

The Court considers that the material part of the cause of action in libel is not the writing but indeed the publication of the libel. The plaintiff, naturally, bears the burden of establishing that publication has occurred.

It is held that:-

*“Publication occurs when a person intentionally or negligently takes part in or authorises the communication of material. Published material can include the written or spoken word, pictures or sounds, or even conduct bearing defamatory meaning.”*⁵

The Court observes that the original email sent by defendant to the Minister of Health was not exhibited in the acts of the proceedings, and consequently it is not possible to establish with certainty the date of alleged publication and the recipients of the email, although it results from both parties’ testimony that this email was sent sometime in April 2018. In his testimony defendant maintains that the email was addressed solely to Mr. Chris Fearne as Minister for Health under whose remit Mater Dei Hospital falls:-

*“I confirm that I had not sent any emails to anybody except to Dr. Chris Fearne personally.”*⁶

⁵ Collins on Defamation. Matthew Collins QC, (Oxford 2014 Ed). Pg. 69.

⁶ Defendant’s testimony, 16th January 2020, fol. 88.

In any event, it is also amply proven from the evidence that even if the the said email was exclusively addressed to and received by the Minister, it was eventually forwarded to the Customer Care Department at Mater Dei Hospital and ultimately transmitted to plaintiff's superiors in the Obstetrics Ward. The circulation of defendant's email results from the testimony of various witnesses who testified in these proceedings, amongst whom Charlene Camilleri, Carmela Pace and Carmela D'Amato and indeed, a reproduction of the said email - as received by the Head of Customer Care at Mater Dei Hospital and consequently forwarded to the plaintiff's superiors - was exhibited in the acts of the proceedings⁷.

In the Court's view, the element of publication required by law, is satisfied in this case. Regardless of defendant's intention and regardless also of the fact that the email might have been originally addressed to one recipient only, the fact in itself that the email was addressed to a third party, that is the Minister Mr. Chris Fearne, is sufficient to satisfy the element of publication. After all, the burden of proving publication is deemed to be satisfied if it is shown that **at least one person, other than the claimant, read, saw or heard the allegedly defamatory statement.**

According to Gatley:-

*"In order to constitute publication, the matter must be published by the defendant to (communicated to) a third party, that is to say, at least one person other than the plaintiff. ... It is not sufficient that the matter has been merely communicated to the third party, it is also necessary that it be communicated in such a manner that it may convey the defamatory meaning and that persons acquainted with the claimant could understand it to refer to him."*⁸

Moreover, in any event, it is an established fact that the same email was also circulated and transmitted to other third parties by the original recipient. The

⁷ Dok. MP1.

⁸ Gatley, On Libel and Slander, 2013 Ed. 6.1, page 187.

Court also finds that defendant should have in any event reasonably expected his email to be transmitted to third parties, given that he concluded his complaint by specifically stating:- *“I am submitting the above information for any action you deem necessary”*. This statement in itself is sufficient to satisfy the Court that the email, which essentially consists of a complaint about the actions of a public sector employee falling under the direct remit of the recipient of the email, was susceptible of publication for the purposes of the Act.

Indeed, Article 2 of the Act defines publication as:-

“any act whereby any written media⁹ is or may be communicated to or brought to the knowledge of any person or whereby words or visual images are disseminated”¹⁰

It is evident that the email sent by defendant falls well within the definition of written media and consequently, should the content of that email or certain words contained in that email, be deemed to be defamatory within the meaning of Article 3(4) of the Act, then by application of the provisions of Article 3(1) of the Act, those defamatory words in email are deemed to have been published and would therefore, constitute libel.

Having established the element of publication, and consequently having to reject defendant’s first plea, the Court must now proceed to determine whether the words complained of by plaintiff, contained in the email in question, could be considered as defamatory within the meaning of Article 3(4) of the Act:-

⁹ In its turn, *“written media”* means any writing or print made by any device and includes any written media content distributed by any means, both if distributed through electronic online platforms and if distributed by any means offline without the use of electronic platforms and any other means whereby words or visual images may be heard or perceived or reproduce Article 2 of the Act.

¹⁰ Court’s emphasis.

“Statements are not defamatory unless they cause serious harm or are likely to seriously harm the reputation of the specific person or persons making the claim.”

Having considered;

That the Media and Defamation Act, 2018, has clearly introduced a new threshold for the success of libel suits in general, by requiring that the harm that is caused or is likely to cause to the reputation of the claimant, is serious. Instead of the previous minimum bar established by case-law, of the tendency of a statement to affect substantially in an adverse manner the attitude of others towards the claimant, the law now requires a more onerous, minimum, threshold of serious harm to be caused or have the tendency to cause to, the claimant’s reputation¹¹ in order for an action for defamation to succeed. In the Court’s view, this means that **the harm caused or likely to be caused, must be significant to a worrying degree, as opposed to slight, negligible or even substantial harm to reputation.** It is also quite clear that the focus of this novel legislative provision falls squarely on the effect or likely effect of the publication on the **reputation of the claimant**, rather than on the adverse effect that the publication has on the **attitude of other persons towards the claimant.**

The Court deems that it is appropriate to refer to the UK “Defamation Act” of 2013, since it is abundantly clear that the provisions of the Media and Defamation Act, Chapter 579 of the Laws of Malta, were lifted almost *verbatim* from the United Kingdom statute. In any event, however, it is clear that the legislator’s aim in introducing this raised threshold seems to have been to discourage trivial or doubtful claims by disallowing them to proceed to a stage where the Court will need to examine the merits of the suit.

¹¹ Collins on Defamation, page 148.

Fi kliem Collins, din ir-regola: “... *operates solely as a threshold for preventing or stopping defamation actions where the claimant cannot demonstrate that he or she has suffered or likely to suffer, serious reputational harm or, in the case of a body that trades for profit, serious financial loss.*”

After examining the latest commentaries on the Defamation Act, UK (2013), the Court is also of the view that the criterion of serious harm must be established mandatorily by the Court *sponta sua* even in the absence of a specific plea raised by the defendant on this ground: after all, this threshold of seriousness was also introduced in order to secure conformity with the guarantee of freedom of expression in Article 10 of the European Convention on Human Rights (ECHR). Moreover and in any event, such assessment must be carried out, **prior** to any examination of the claim on the merits. This would mean that even if the pleas on the merits might not be upheld because perhaps they might lack the elements required by law in order to be upheld, the plaintiff’s action may nonetheless fail the test established by Article 3(4) of the Act if it is established that the publication of the impugned statement did not cause or is not likely to cause, serious reputational harm to the claimant. It is no longer sufficient, for the success of a libel action, to show that the impugned statement adversely affected the claimant’s reputation in a “substantial” manner, but it must be shown that the statement caused or has the tendency to cause **serious harm to such reputation**. The requirement of Article 3(4) of the Act will not be satisfied with proof of mere reputational harm, even if this is not inconsiderable: the law requires specifically “**serious**” and not any other lesser scale of reputational harm, and it is the Court’s view that the standard of “seriousness” was imposed purposely in order to be the new benchmark for the success of a libel action under the Act.

Having considered;

That in the case at hand, plaintiff described the allegations that were made against her by defendant in his statement contained in the email sent to the

Minister of Health and subsequently forwarded to Mater Dei Hospital's Customer Care Department, as serious allegations which were intended to discredit her and which caused damage to her professional reputation and her good standing with her colleagues and superiors who have since questioned her on the content of the complaint. She claimed that the allegations affected also her self-esteem.

Collins opines that for the purpose of the equivalent provision in the UK Defamation Act, 2013¹², it is likely that Parliament intended that the word reputation to have a broad meaning such as that propounded by Neill J. in **Berkhoff v. Burchill**, comprising all aspects of a person's standing in the community, so that:-

*"...whether or not the statement bears upon the personal qualities of the claimant by expressing or implying any blame, or moral default on his or her part. ... The question will be in the particular case, whether publication of the statement has caused or is likely to cause serious harm to the reputation of the claimant, in the sense of **adversely affecting in a serious manner his or her standing in the community**, assessed by reference the attitude of others towards the claimant."*¹³

The Court also considers that the medium and extent of the publication, as well as the nature of the statement and the number of recipients, is a relevant factor for the purpose of assessing whether or not there has been serious harm to the claimant's reputation or whether there is the likelihood of serious harm in the future, as is the determination of whether the imputation is capable in its particular context, of being defamatory to the particular claimant¹⁴.

Skont il-Gatley:-

¹² Section 1.

¹³ Collins, On Defamation (2014 Ed.), page 152. Court's emphasis.

¹⁴ Collins, On Defamation (2014 Ed.), p. 128 6.56.

“... whether a publication has caused or is likely to cause, serious harm is likely to require a careful investigation of facts of the particular case and in particular the inherent gravity of the allegation, the nature and status of the publisher and publishee, the claimant’s current reputation and financial position, and whether similar allegations have been published before.”¹⁵

It has been held that statements which are evidently humorous or flippant or which amount to an exhibition of bad manners or discourteous criticism, might not be likely to satisfy the criterion of serious harm to reputation, although the tone and expression of the statement might be relevant to the assessment. *“The focus will be on the effect or potential effect of the statement on the reputation, rather than the feelings of the claimant.”¹⁶*

Having considered;

That in the case at hand, it is clear that the defendant’s statement describing plaintiff’s behaviour as being *“more compatible [sic. comparable] to a drug overdosed or drunk person ... [who] also felt she should mention parts of her private human body”*, was not made in a jocular manner since the express insinuation is that plaintiff acted in a reprehensible manner, lacking in the attributes normally expected of a midwife employed by the State hospital. It is the Court’s view that while this statement clearly constitutes an express and substantial criticism of plaintiff’s conduct towards a particular patient, in itself it is unlikely to be damaging to the plaintiff’s reputation, even if it were to be believed, since it attributes no incompetence or unfitness in her profession. Even if the episode described in the email and the imputation that plaintiff behaved in a manner **similar to** that of a drunk or drugged person, were to be believed, the statement does not in fact attribute misconduct to the plaintiff as would be the case had the statement **actually** charged her with being a drug addict or a drunk or perhaps, questioned whether she could have **actually** been drugged or drunk. Indeed, no such imputation was made and the unfortunate

¹⁵ Gately, *On Libel and Slander* (2013 Ed.), p. 41, 2.5.

¹⁶ Collins, *ibid.* p. 154.

comparison with a drunk or drugged person appears to have been drawn – rather unfittingly – by defendant to highlight plaintiff’s allegedly derisive behaviour.

Although as a midwife, plaintiff is necessarily expected to perform a delicate task that requires care, focus and attention and a good degree of support and modesty, rather than ridicule and scorn, the Court does not find that a description of her alleged behaviour on **one particular occasion** could imply, let alone impute, dishonourable conduct, dishonesty, inefficiency, incompetence or unfitness in the exercise of her profession and consequently, cannot possibly be capable of being defamatory within the meaning of Article 3(4) of the Act¹⁷.

Moreover, plaintiff failed to show that the statements made in the complaint caused serious harm to her reputation, or that her long-standing respectable reputation was jeopardised or questioned in any manner as a result of defendant’s statement regarding the particular episode concerning his daughter.

It is also evident that no serious harm to plaintiff’s reputation can ensue from the impugned statements because it does not result from the evidence adduced, that these imputations were believed by the recipients of the email who were plaintiff’s colleagues and superiors or that they thought the less of her as a result. Carmen D’Amato, Director of Nursing at Mater Dei, testified that she was told that “*Michelle Portelli has an exemplary role in ... the wards ... and she was a role model.*”¹⁸ Moreover, Carmen Pace, Midwifery Manager at Mater Dei, testified that although she was not happy with the complaint: “*Before I spoke, I know Michelle, I couldn’t believe it’s true to be honest.*”¹⁹

¹⁷ In **Eccelstone v. Telegraph Media Group** [EWHC 2779 QB], 2009, it was held that the imputation that claimant was dismissive of, or showed a lack of respect to, others, was not capable of being defamatory, even before the introduction of the “serious harm” threshold.

¹⁸ Fol. 32.

¹⁹ Fol. 39

Even plaintiff herself deemed the allegations to be “*ridiculous*” and “*outrageous*”²⁰.

Furthermore, the mere fact that defendant’s daughter and her husband refused to follow up the matter or even meet with Hospital authorities, underlines the lack of any form of and adverse impact or repercussion on the plaintiff’s reputation, let alone repercussions of serious harm²¹. While the complaint was indeed investigated by plaintiff’s superiors, this appears to be standard procedure in such cases and in any event, investigations were limited to an informal meeting with her ward charges and colleagues wherefrom it resulted that this complaint was the only one ever registered in respect of plaintiff concerning her duties as midwife²².

Moreover and more significantly, Ivan Falzon, the Chief Executive Officer of Mater Dei Hospital, confirmed that while he would normally be involved in more severe complaints made against Hospital staff, he was not involved in the complaint made against plaintiff and had no records concerning this particular complaint. Indeed, no disciplinary proceedings were taken against plaintiff as a result of defendant’s allegations and it does not result that any such action was ever even contemplated by the Hospital authorities or by plaintiff’s superiors. Finally, it also results that defendant’s daughter and her husband did not file any complaint in respect of plaintiff at the time of the alleged incident and they moreover declined to take the matter further²³ or even discuss the matter when invited to do so by Carmen D’Amato.

The Court, in its assessment of whether the statements made by defendant in his email, can be deemed to be defamatory in terms of Article 3(4) of the Act, also took into account the fact that defendant’s statements, having formed part of an

²⁰ Affidavit Michelle Portelli, fol. 20.

²¹ Neither of the witnesses produced by plaintiff stated that they thought less of her as a result of this incident. Indeed their general reaction is one of incredulity.

²² Carmen D’Amato, fol. 33; Doris Spagnol Abela, fol. 48; Dr. Mario Refalo, fol. 77.

²³ Affidavit Rebecca Cassar Florian, fol. 92.

email addressed to a single person, are proven to have been made available to a **very limited number of persons**. This fact cannot but continue to impact adversely the realisation of the serious reputational harm test.

In view of the above, it is the Court's view that the imputation made in defendant's email that she acted in a manner comparable to "*a drug overdosed or drunk person ... [who] also felt she should mention parts of her private human body*" does not satisfy the criterion imposed by Article 3(4) of the Act in that such statement which, as already considered, does not carry an imputation of discreditable conduct or incompetence in the exercise of her profession, did not and is not capable of causing serious reputational harm to the plaintiff. Therefore, defendant's statement is not actionable in terms of the Act.

Having considered;

Having established that the statement describing plaintiff, made by defendant in his email to Mr. Chris Fearne, did not cause serious harm to plaintiff's reputation and in the circumstances, it was not proven that it is even likely to cause such serious harm, the Court finds that it is not necessary to examine whether defendant's second plea of honest opinion, based on Article 4(2) of the Act, is founded. In any event however after having seen Duncan Cassar's testimony in cross-examination, it is evident, in the Court's view, that the part of defendant's statement where it was alleged that plaintiff's behaviour was comparable to that of a drunk or drugged person, could not be deemed to represent an opinion which an honest person could have held based on the basis of the description of events in the said testimony.

The Court maintains that this conclusion does not in any manner impinge upon the assessment already made for the purposes of Article 3(4) of the Act, as an unsuccessful plea of honest opinion cannot operate so as to validate the serious harm criterion, which requires an altogether different assessment based on

factors that are entirely distinct from the elements of a successful plea raised in terms of Article 4(2) of the Act.

For these reasons, the Court while rejecting defendant's first plea, declares that the impugned statement is not defamatory in terms of Article 3(4) of Chapter 579 of the Laws of Malta and consequently rejects plaintiff's claim with costs.

**DR. RACHEL MONTEBELLO
MAGISTRATE.**

**Dr Graziella Attard
Deputy Registrar**