MALTA

COURT OF APPEAL
(Inferior Competence)

HON. JUDGE
LAWRENCE MINTOFF

Sitting of the 19th November, 2021

Inferior Appeal number 260/2018 LM

Michelle Portelli (I.D. no. 70701(L))
('appellant')

***vs*.**

Martin Florian (I.D. no.885954(M))
('appellee')

The Court,

Preliminary

1. This appeal has been filed by plaintiff **Michelle Portelli (I.D. no. 70701(L))** [hereinafter 'appellant'] from the judgment delivered on the 25th March, 2021, [hereinafter 'the appealed judgment'] by the Court of Magistrates (Malta)

[hereinafter 'the First Court'], whereby whilst rejecting the first plea made by defendant **Martin Florian (I.D. no. 885954(M))** [hereinafter 'appellee'], it declared that the impugned statement is not defamatory in terms of subarticle 3(4) of Chapter 579 of the Laws of Malta, and thereby rejected appellant's claim with costs.

Facts

2. The facts of the present proceedings concern an allegedly defamatory and libellous email sent by appellee to the Hon. Minister of Health Dr. Chris Fearne wherein he criticised the allegedly objectionable attitude of appellant as she carried out her duties on the 4th April, 2019 as a senior nurse in the Obstetrics Ward at Mater Dei Hospital. On that day appellee's daughter Rebecca Cassar was recovering from a caesarian section, whereby she had given birth to a boy and her husband Duncan Cassar was at her side. When the latter attempted to change a soiled nappy, he was constrained to ask for the assistance of appellant, who allegedly was quite vociferous in her criticism towards him. After Rebecca Cassar was discharged from hospital, her father took the initiative to communicate his disatisfaction with the incident to the Hon. Minister Dr. Chris Fearne.

Merits

3. Appellant instituted the present proceedings by filing an application before the First Court on the 5th November, 2018, in the Maltese language, whereby she requested the following:

"...tiddeċiedi u tiddikjara li l-allegazzjonijiet, il-kummenti u d-dikjarazzjonijiet li ġew pubblikati u mxandra permezz ta' email, mibgħuta mill-intimat u distribwita lil numru ta' persuni b'referenza diretta għall-hawnhekk rikorrenti, kienu libellużi u malafamanti fil-konfront tar-rikorrenti, tant li kienu jikkontjenu allegazzjonijiet u insinwazzjonijiet inveritjieri, foloz u kellhom bħala skop dak li jtellfu jew inaqqsu r-reputazzjoni, il-ġieħ u l-kredibilità tagħha, kif ukoll li jesponuha għar-redikolu u dispezz tal-pubbliku, jigi ordnat iħallasha dik is-somma li tiġi liwkidata u ffissata minn din l-istess Onorabbli Qorti bħala danni b'applikazzjoni tal-Att dwar il-Midja u l-Malafama, Kap. 579 tal-Liġijiet ta' Malta, bl-ispejjeż u l-imgħaxijiet legali sal-pagament effettiv kontra l-intimat li huwa minn issa nġunt għas-subizzjoni."

4. Appellee filed his reply on the 28th January, 2019 whereby he declared that appellant's demands should be rejected because (a) the email in question was a *bona fide* report made to the competent authority, and he never intended or consented to its publication; and (b) the content of the said email was not libellous and it was his honest opinion based upon facts which were substantially true.

The Appealed Judgment

5. The First Court made the following considerations pertinent to the present appeal:

"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) (fn. 2 Hereinafter referred to as 'the Act'). 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 subisduum*, 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 statements (fn. 3 Dok. CP1, as received by Carmen Pace from the Head of Customer Care – fol. 45), 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.

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

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*." (fn. 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 proceedings. (fn. 7 Dok. MP1)

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." *(fn. 8 Gatley, On Libel and Slander, 2013 Ed. 6.1, page 187)*

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 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 media *(fn. 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 reproduceArticle 2 of the Act) is or **may be communicated to or brought to the**

knowledge of any person or whereby words or visual images are disseminated" *(fn. 10 Court's emphasis)*

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:-

"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 reputation (fn. 11 Collins on Defamation, page 148) 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.

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 plantiff'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, 2013 (fn. 12 Section 1), 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." *(fn. 13 Collins, On Defamation (2014 Ed.), page 152. Court's emphasis)*

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

Skont il-Gatley:-

"… 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." *(fn. 15 Gatley, On Libel and Slander (2013 Ed.), p.41, 2.5)*

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*." (fn. 16 Collins, ibid. p.154)*

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 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 Act (fn. 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).*

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*." (fn. 18 Fol. 32) 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*." (fn. 19 Fol. 39)*

Even plaintiff herself deemed the allegations to be "ridiculous" *and* "outrageous" *(fn. 20 Affidavit Michelle Portelli, fol. 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 harm (fn. 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). 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 midwife (fn. 22 Carmen D'Amato, Fol. 33; Doris Spagnol Abela, fol. 48; Dr. Mario Refalo, fol. 77).

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 further (fn. 23 Affidavit Rebecca Cassar Florian, fol. 92) 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 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"

The Appeal

6. Appellant filed an appeal before this Court on 12th April, 2021 whereby she is requesting that the appealed judgment be revoked and that all her requests be acceded to whilst appellee's pleas should be rejected, with costs of both instances against appellee. She declares that the following are her grievances: (a) the First Court did not consider that she had suffered serious harm as a result of appellee's actions; and (b) the First Court condemned her to pay appellee's costs although it found that he was incorrect in his actions, which had however not breached the threshold required for a finding of defamation.

7. Appellee replied on the 4th May, 2021 whereby he is humbly requesting this Court to confirm the appealed judgment and to reject all of appellant's arguments.

Considerations

8. This Court shall now proceed to examine the respective grievances of appellant in the light of the First Court's considerations as expressed in the appealed judment and taking into consideration appellee's submissions.

9. Appellant submits that the First Court was not correct in its application of the relevant law, jurisprudence and doctrine to the facts of the case, which had been duly proven in accordance with the required standard of proof. Though it had considered in depth the legal principles applicable, the First Court had failed to take into account particular evidentiary elements which would have led to a different decision whereby appellee would have been found to be in breach of Chapter 579 of the Laws of Malta as a result of his irresponsible actions, which had caused 'serious harm' to appellant. Appellant then proceeds to draw attention to some of the most salient evidence which in her opinion was not sufficiently and appropriately considered by the First Court, or which it had entirely overlooked. Appellant primarily accentuates the negative impact of the incident upon herself, both immediate and long-term. In referring to the trauma which she had passed through as a result of the interrogation and questioning by a number of senior staff, as well as the review carried out by her superiors, appellant expresses surprise that the First Court found no 'serious harm' here, merely because there were no unpleasant outcomes from the internal disciplinary review, since no action had been taken against her. She contends that this reasoning is of comfort to those like appellee who make serious allegations, thereby endangering the livelihood of others, without no responsibility for potential consequences because of the absence of actual harm. Appellant laments that thus the attempt at

committing a criminal offence would not be punishable as would an accomplished act. She insists that the First Court should have taken into consideration her anxiety, stress and trauma as constituting 'serious harm'. It should have also considered as serious the attempt at blemishing her reputation resulting from 15 years of sterling service, and that the doubt in the mind of her superiors and the rumours among her colleagues were 'serious harm'. The First Court should have also given due consideration to the long-term effects upon her as sufficiently serious in their nature. Appellant quoted from her affidavit the description she had given of the effects of appellee's actions, which also resulted in long-term mental health effects as corroborated by Dr. Mario Refalo, her superior in the Obstetric's Ward. These long-term effects were not being contested by appellee, who had chosen not to cross-examine her or Dr. Mario Refalo. However the First Court had founded its decision upon the fact that no action had been taken against her following defendant's actions.

10. Appellee's argument against appellant's first grievance is that every citizen has a duty to report in a diligent manner any misconduct of a public officer and he quotes the publication of Sweet & Maxwell entitled "On Libel and Slander", (para. 523) to substantiate his argument. In the present case, appellee contends that he had merely sent an email to the competent person, the Minister of Health, and not to any third party, and he should not be reprimanded for making a *bona fide* complaint, which could certainly not be considered as intended to cause 'serious harm' to appellant. Appellee cites the appealed judgment where the First Court decided 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', and refers to its conclusion that the claim presented by appellant does not fall within the legal requirements stipulated in Cap. 579. He states that he fully disagrees with appellant that the First Court did not take into account in a holistic and an integral manner several parts of the evidence, and insists that the First Court had personally heard the evidence submitted before it and reached its conclusion after evaluating the said evidence. He contends that an investigation by senior staff does not qualify as 'serious harm', and declares that a negative investigation does not make a complaint unfair or intended to cause serious harm. Appellee continues to argue that his email was very clear in its intentions, which were to investigate wrong-doing. As to appellant's allegation that he had failed to cross-examine Dr. Refalo, he submits that the latter spoke as a colleague of appellant, whilst it was expected that a psychiatrist or pyschologist should give evidence explaining the effect of his complaint upon applicant. Appellee argues that appellant failed to show that his complaint caused or could seriously cause harm to her reputation.

11. The Court considers that appellant's first grievance essentially concerns the appreciation of the evidence presented by said appellant, but also whether this evidence was satisfactory proof of 'serious harm'. After having dismissed appellee's first plea that he had never had any intention or granted his consent to the publication of the email in question, and thus no action could be taken in terms of subarticle 3(3) of Cap. 579, the First Court proceeded to investigate whether the impugned words could be considered as defamatory within the meaning of subarticle 3(4) of the same Act. In considering the requirements of the provisions of the law, the First Court correctly noted that the Media and Defamation Act of

2018 had shifted the focus on the effect or likely effect upon the reputation of claimant, and it required that the action should only succeed if claimant could show resulting serious harm or the tendency by the statements to cause such harm. In the words of the First Court, *"...**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"*** (emphasis by First Court)**.** The First Court rightly stated that the provisions of subarticle 3(4) of the Act were not to be satisfied with proof of mere reputational harm, even when this is considerable, because the said reputational harm must be shown to be serious. Whilst referring to Collins' thoughts as expressed in On Defamation[1], as well as Gatley's pronouncements on the subject of 'serious harm' in On Libel and Slander[2], the First Court expressed its opinion that if appellee's words were to be believed, it was unlikely that they would damage appellant's reputation, since they do not refer to any incompetence or unfitness in her profession, and they do not actually charge her with being a drug addict or a drunk, or questioned whether she could have actually been drugged or drunk. The First Court asserted that it did not find *"...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 Act".*

12. This Court does not agree here with the opinion of the First Court. In considering whether the impugned statements are defamatory or otherwise for the reason that they are likely to cause serious harm to the reputation of

[1] Matthew Collins QC, (Oxford 2014 Ed).
[2] 2013 Ed.

appellant, this Court cannot disregard the fact that, contrary to what was stated by the First Court, appellee's words were overtly strong and he not only states that appellant *"...also felt she should mention parts of her private human body",* but he goes as far as to compare appellant at that particular moment to a *"...drug overdosed or drunk person",* all of which behavioural traits particularly in her profession would lead to certain dismissal, or at the very least a tarnished reputation. Contrary to what was stated by the First Court, this Court believes that the words used by appellee do strongly allege "...*dishonourable conduct, dishonesty, inefficiency, incompetence or unfitness in the exercise of her profession...".*

13. As to the issue whether actual serious harm was caused by the impugned statements, this Court considers that the First Court was correct when it found that appellant had failed to show that the statements made by appellee had caused serious harm to her reputation, or that her long-standing respectable reputation was jeopardised or questioned in any manner as a result. The only evidence she offered was her own testimony and that of her superior Dr. Mario Refalo, who recounts what she herself had told him. Certainly this cannot be considered as strong enough to substantiate appellant's allegations of serious harm.

14. The First Court then noted that no serious harm to appellant's reputation could ensue from the statements in question, because the evidence showed that they were not believed by the recipients of the email, who were appellant's colleagues and superiors. Neither it stated had they thought the less of her as a result. The First Court here made particular reference to the testimony of Carmen

D'Amato, Director of Nursing at Mater Dei Hospital, and Carmen Pace, Midwifery Manager at the same hospital. However contrary to what the First Court seems to have concluded, this Court considers that the impugned statements were more likely to cause serious harm, since it results that appellant held an untarnished reputation.

15. The First Court further declared that the fact that appellee's daughter and her husband refused to follow up the matter or meet with Hospital authorities, showed the lack of adverse effects on appellant's reputation and repercussions of serious harm. However this Court does not agree with this assertion because a follow-up of the matter would have only resulted in more adverse effects and not an initiation of same.

16. The First Court also noted that the investigation conducted by appellant's superiors turned out to be standard procedure, and this was only limited to an informal meeting with her ward charges and colleagues, where it resulted that no other complaint had ever been made against appellant. Furthermore it said that no disciplinary proceedings were taken, and the complaint did not reach the CEO, who was usually only involved in the more serious complaints. However this Court cannot ignore the fact that the situation may have been different if the daughter and son-in-law of appellee had not decided to end the matter without following up the report further.

17. On a final note, the First Court observed that the impugned statements were only sent by email to one person, and therefore it was proven that they were made available to a very limited number of persons only. However this Court here

cannot but consider that that very same person to whom the statements were made is the Minister responsible for Health, and this changes significantly the context in which they were made. The Court concedes that in forwarding his heavy worded complaint to the Minister, the appellee had an ulterior and stronger motive beyond that of making a simple civil complaint as alleged in his email. Whilst considering that in forwarding his complaint to the Minister, appellee without doubt escalated the importance and seriousness of what turns out to be a trivial situation when taken objectively, it would be too easy to believe that he thought that the Minister would put them aside and thereby he would be the only person to view his statements.

18. Having made the above considerations, the First Court concluded that appellee's statements were not actionable under Cap. 579 because it did not cause serious harm to appellant's reputation, and it was also not proven that it was likely to cause such harm, and it therefore desisted from entering into the merits of appellee's second plea of honest opinion in terms of subarticle 4(2) of the said law.

19. The First Court nonetheless held that in view of the testimony tendered by Duncan Cassar in his cross-examination, appellee's allegation that appellant's behaviour was similar to that of a drunk or drugged person, could not be considered to represent the opinion of an honest person. However it declared that its' finding could not have any effect upon its examination conducted earlier for the purposes of subarticle 3(4) of the Act.

20. In the light of the deliberations expressed above, this Court considers that contrary to the conclusion of the First Court, though fortunately enough the

impugned statements failed to cause serious harm to the reputation of appellant, they were likely to cause serious harm even if by instilling a sense of doubt in their recipient, or any other person to whom they were subsequently communicated to for the purposes of investigating the report. This Court acknowledges however that the effects of the impugned statements were thoroughly mitigated when the persons directly involved in the incident chose to refrain from pursuing the report further.

21. It does not result that any apology or clarification in terms of 11(1)(c) of Cap. 579 was offered by appellee to appellant for his words as communicated to the Minister in his email. The Court considers that appellee's actions must have been taken at a delicate moment in the context of particular anxiety as to the physical as well as psychological well-being of his daughter, but it cannot overlook the fact that he should have weighed the implications of the content of his email and the chosen recipient, since the impugned statements without doubt had the potential to cause serious harm to appellant's reputation. It considers that these deliberations are particularly relevant in the interests of proportionality required by subsection 11(4) of Cap. 579, when establishing the moral damages to be liquidated and to be paid to appellant. The Court therefore believes that the amount of €250 to be paid to appellant for moral damages sustained, is just and fair in the present circumstances.

22. In view of the above considerations, the Court does not deem it necessary to deliberate upon appellant's second grievance.

Decide

For the above reasons, the Court decides to admit appellant's appeal and whilst acceding to her demands and rejecting appellee's pleas, it revokes the appealed judgment, and orders appellee to pay the appellant the sum of two hundred and fifty Euros (€250) being liquidated by the Court for moral damages.

All costs of the present proceedings and those before the First Court shall be borne by appellee.

Read.

Hon. Dr Lawrence Mintoff LL.D.
Judge

Rosemarie Calleja
Deputy Registrar