BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV No. 1875 of 2013

BETWEEN:

ROSEANN JORDAN	**CLAIMANT**
AND	
HANSCHELL INNISS LTD	**DEFENDANT**

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court.

2016: November 24
December 01
2017: February 20
April 03
July 19
2020 April 03

Appearances:

Mr. Chester L. Sue, in association with Mr. Philip Gaskin, Attorneys-at-Law for the Claimant
Mrs. Richelle Nicholls, Attorney-at-Law for the Defendant.

DECISION

Introduction

[1] This is an action by the Claimant seeking damages for defamation against her former employer the Defendant.

Background

[2] The Claimant joined the Defendant company from 18 June, 2010. She was employed as a Van Sales Representative. In that capacity she sold meat products for the Defendant, using a vehicle provided by the Defendant. Paragraph 4 of her Witness Statement aptly described her duties as including "driving a delivery truck with the Defendant's meat products for delivery and sale to customers in Barbados". Her co-workers referred to the truck as "Roseann's van".

[3] The Claimant's letter of engagement referred to her appointment as temporary, and set out her hours of work and her wages. Additional terms and conditions were also contained in a Van Sales Operating Policies and Procedures document, signed by the Claimant on 29 June 2012. The Claimant signed this document as an indication of her acceptance of these additional terms and conditions. Another document, referred to as the Sales Vans Operating Procedures manual, was signed by the Claimant on 23 May 2013.

[4] The Claimant received an order for lamb necks from Vembe Johnson. And on the afternoon of 12 June 2013, Ms. Johnson went to the Defendant's compound to collect the lamb necks from the Claimant. Ms. Johnson parked next to the Defendant's van which was in its usual spot in a plug in bay. This plug in bay is outside and beyond the security check point if one is leaving the premises.

[5] The Claimant waited for Ms. Johnson by the security gate. She was observed by a security guard who made a call to Christopher Donawa. Mr. Donawa is the Manager, Retail Sales & Marketing for the Defendant. As a result of his conversation with the security guard, Mr. Donawa sent Gregney Holder, the Sales & Merchandising Coordinator, to conduct an investigation.

[6] Mr. Holder spoke with the Claimant and accompanied her to the truck, where she placed the package of lamb necks on the truck step. He confirmed that the lamb necks were accounted for in a van stock transfer form in the Claimant's possession. The Claimant did not have a sales receipt for the lamb necks. After speaking with Mr. Holder, the Claimant returned the lamb necks to the van's cold storage bin. She then left the premises in Vembe Johnson's vehicle.

[7] Mr. Holder reported back to Mr. Donawa, who gave instructions for security ties to be placed on the truck. On her return to work the following day, a

security guard pointed out the security ties on the truck to the Claimant. The Claimant was unable to gain access to the truck. She was advised by the guard not to touch or move the truck until management came.

[8] The Claimant informed Mr. Holder that her sales van had been tagged. She also spoke to Mr. Donawa who asked her to explain what had happened. She did so and was then informed by Mr. Donawa that he would have to undertake a stock check of the truck's cold storage contents.

[9] The stock check was carried out at the entrance to the Defendant's premises. The Claimant, her assistant Mr. Gregg Scantlebury, Mr. Holder and a stock clerk were present. No discrepancies were found with the van's stock. Nevertheless, Mr. Holder instructed the Claimant and her assistant to return home until they were contacted.

[10] On 14 June 2013, the Claimant again met with Mr. Donawa at the Defendant's premises. During the meeting the Claimant's contract was terminated by Mr. Donawa. When her claim was filed in October 2013, the van used by the Claimant was in active service on behalf of the Defendant.

The Claimant's Case

[11] The Claimant alleges in her Statement of Claim that:

> "3. On or about the 12th day of June 2013 [Mr. Holder], a Supervisor of the Defendant said in a

loud voice (in the presence of other persons) to the Claimant:

> **"I was told to come downstairs and check suspicious activity by the truck".**

4. The Defendant placed a security tie on the truck operated by the Claimant thereby preventing the Claimant's access to the cold storage bin of the truck and, thereafter, in the presence of others conducted a stock search of the truck.

5. In their natural and ordinary meaning and conduct of the Defendant, the said words meant and were understood to mean that:

   1. The Claimant was stealing meat or meat products from the Defendant.

   2. The Claimant was a dishonest employee.

   3. The Claimant was an untrustworthy employee.

   4. The Claimant was engaged in suspicious or illegal activity.

6. In consequence .... the Claimant's reputation, both personal and as a Van Sales Representative, has been seriously injured and she suffered considerable stress and embarrassment.

7. Further or alternatively, the words and conduct of the Defendant were calculated to disparage the Claimant as a Van Sales Representative".

[12] A claim was made for damages, interest, costs and further or other relief as deemed appropriate.

The Defence

[13] The Defendant denies that its servants or agents spoke the words alleged. It was conceded that a stock search of the van was conducted on the following day, but only in the presence of employees of the Defendant. Random and scheduled stock searches of cold storage vans were said to be an established practice and procedure of the Defendant.

[14] The Defendant maintained that the stock search of the Claimant's van was conducted at a usual and designated place for such searches. The security ties used on the van were placed there to ensure that no one had overnight access to the vehicle's cold storage bin.

[15] The Defendant also contends that even if the words alleged were spoken, those words and the conduct of the Defendant could not be understood as bearing, and were not capable of bearing, the meaning alleged by the Claimant. The words alleged were not defamatory to the Claimant.

[16] It was also argued on behalf of the Defendant that if the words were defamatory, and referred to the Claimant, the Defendant was protected by the defence of triviality because the Claimant was unlikely to suffer any harm to her reputation.

The Statutory Framework

[17] The Long Title to the Defamation Act, Cap.199 ("the Act"), describes this piece of legislation as "An Act to revise the law relating to defamation, malicious falsehood and criminal libel and to provide for related matters".

[18] In **Phillips et al v. Boyce and P.S.M.T. (Barbados) Inc., Civ. App. No.9 of 2005** (**decision dated 18 September 2006**), Simmons C.J. informed that the Act:

> "...which came into force on 15 August 1997, made sweeping and fundamental changes to the law of defamation. We cite only some of the many changes. The distinction between libel and slander is abolished; there is now a cause of action for defamation simpliciter – s.3. A new defence of triviality is created – s.6; some of the traditional defences have been renamed and stripped of certain procedural technicalities or impediments. The defence of "justification" is now known as "truth" – s.7; and the defence of "fair comment" has been named "comment" – s.8". (Para.[18]).

[19] Section 3(2) of the Act provides that:

> "An action shall arise where a person publishes any matter by means of the whole or any part of which, the publisher makes an imputation defamatory of another person, whether by innuendo or otherwise".

[20] And according to Section 2:

> " "publication" means publication by the defendant or his servant or agent in any manner and

> whether or not in a permanent form; and "published" shall be construed accordingly".

[21] "Matter" is defined as meaning words, and words include "gestures and other methods of signifying meaning". (Section 2).

[22] Following the statutory definitions, at the outset the Claimant must prove, on a balance of probabilities, that Mr. Holder, as a servant or agent of the Defendant, used words about the Claimant (including actions), that were seen and heard by another person. The words and actions used must also have made an imputation defamatory to the Claimant. The Defendant has not denied that Mr. Holder was its servant or agent when he interacted with the Claimant.

Findings of Fact

[23] Mr. Holder denied making the statement alleged. He told the Court that:

> "I did not say "I was told to come down and check something suspicious by the truck". I did not have a conversation with the Claimant about suspicious activity. I was not told to go downstairs and check suspicious activity".

[24] However, Mr. Holder admitted in his evidence that, when he spoke to the Claimant, he was aware that her actions had aroused suspicion at the level of management. His evidence is that:

> "It is my understanding that suspicion was aroused because the Claimant was seen with meat after the

> close of business. ...We suspected that the meat was being taken without authorisation".

[25] In comparison, Mr. Donawa chose his words very carefully. He referred to a "stock situation", "a potential issue with stock", and "a discrepancy in procedure". Mr. Donawa's witness statement alleges that he was notified by the gate security about "a potential concern with stock on the sales van assigned to the Claimant". (Para.4). As a result, Donawa instructed Mr. Holder "to go down to security and ascertain the exact details of the concern". (Para.5).

[26] Notwithstanding his careful choice of words, Mr. Donawa also referred to his suspicions. He said that:

> "I suspected that there was a situation that needed investigating... I suspected that something may have been amiss with her stock...I do not agree that my suspicions were unfounded".

[27] The Court noted the inconsistencies between the evidence given by Messrs. Holder and Donawa. Mr. Holder disavowed that, on the evening of 12 June 2013, he knew that the Claimant's van was placed on an overnight lock down or why it was placed on lock down. However, it was Mr. Donawa's evidence that he gave Mr. Holder a directive that afternoon, to inform security to place security ties on the truck to prevent tampering with its contents.

[28] Mr. Holder gave clear evidence that he verified that the meat in the Claimant's possession was accounted for, and that he "relayed that information to whoever requested me to go down and check". Mr. Holder was shown the van transfer form for the meat by the Claimant. He agreed that "The time for producing the invoice and cash had not arisen for stock that was on [the Claimant's] van".

[29] Mr. Donawa's evidence of what transpired between himself and Mr. Holder was that Mr. Holder:

> ".....reported back to me the same afternoon. He told me that there was an issue whereby some stock had been removed from a vehicle, the Claimant's vehicle. He said that there was no invoice for the item. It is a sales invoice....Mr. Holder did not say to me that the Claimant had a van transfer form for the meat".

The Court notes that later in his evidence Mr. Donawa contradicted himself when he said that:

> "[Mr. Holder] came back and told me the Claimant had a van transfer for the meat but not a sales invoice".

[30] The inability of both of the Defendant's witnesses to agree on an important aspect of their evidence, devalued their evidence in the mind of the Court. Also, Mr. Donawa did not offer any explanation to resolve the inconsistency in his evidence. And it may be reasonably inferred from Mr. Holder's

evidence that he was aware of alleged suspicious activity when he spoke to the Claimant. The Court also noted that neither Defence witness challenged the Claimant's version of the oral reasons given by Mr. Donawa on the day of her separation from the Defendant.

[31] Vembe Johnson made the following assertions in her witness statement:

> "6. ...I saw the Claimant [walk] towards the truck she used to drive and a man, apparently an employee of the Defendant came to the truck fretting with the Claimant.
>
> 7. This man was talking loudly and he said he was sent by someone (whose name I do not recall) to inspect the truck. I later learnt that this man was [Gregney] Holder, a supervisor of the Defendant.
>
> 8. He said something suspicious going on and asked the Claimant to unlock the truck so that he can inspect it.
>
> 9. The Claimant had a bag with the [lamb] necks and a paper (bill) in her hand.
>
> 10. The man [Holder] peeped into my car and then went to the side of the truck".

[32] During her cross examination, Ms. Johnson explained that she arrived at the Defendant's compound around 4 p.m. She parked next to the Claimant's van, and the Claimant was by the security gate with the lamb necks and a paper bill in her hand.

[33] Ms. Johnson added that:

> "[The Claimant] walked straight to her truck. There was a short brown skinned guy and he was walking behind her and quarrelling and saying he needs to inspect the truck, he wants to get inside the truck and stuff like that.... [Mr. Holder] got into the truck. He was flaring off his hands and quarrelling".

[34] Having listened to Ms. Johnson and observed her demeanour, the Court accepts her as a truthful witness. She heard and observed the interaction between the Claimant and Mr. Holder. Counsel for the Defendant did not persuade the Court that this witness was mistaken or untrue in her recollection of the events; or that her account was based on what the Claimant told her when they left together.

[35] Although Ms. Johnson did not refer to the precise statement that the Claimant alleged Mr. Holder used, she confirmed that he used words indicating that someone sent him to inspect the truck, and that something suspicious was going on. What impressed the Court is that Ms. Johnson made no attempt to give a verbatim iteration of the alleged statement made by Mr. Holder. Her evidence is to be preferred to that of the Defendant's witnesses.

[36] The Court also accepts the Claimant as a credible witness, and finds that Mr. Holder said "I was told to come downstairs and check suspicious activity by the truck". The Court now turns to a consideration of whether these words,

when taken together with the conduct of the Defendant's servants or agents, were defamatory; whether there was a clear reference to the Claimant; and whether there was publication to at least one person other than the Claimant herself. (See Gilbert Kodilinye "Commonwealth Caribbean Tort Law", 5th ed. at p. 253).

Were the Words and Actions Defamatory?

[37] According to Matthew Collins:

> "There are a number of common law tests for ascertaining whether a statement conveys a defamatory meaning, the most important of which are whether the words 'tend to lower the plaintiff in the estimation of right-thinking members of society generally', were calculated to injure the reputation of another, by exposing him to 'hatred, contempt, or ridicule', or tend 'to make the plaintiff be shunned and avoided and that without any moral discredit on her part'….
>
> In applying these tests, regard must be had to the context in which the statement was made and evolving social mores and opinions. Whether a statement is defamatory is assessed by reference to the standards of society as a whole, and not sensational attitudes….
>
> Whether a statement is defamatory is assessed by reference not to the literal words used by the publisher, but to the imputation or imputations borne by, or the gist of, the statement…". (See "Collins On Defamation", 2014, Oxford University Press, at paras. 6.03 to 6.07).

[38] The words used by the Defendant's servant or agent referred to suspicious activity occurring by the van used by the Claimant. Counsel for the Claimant urged upon the Court that the words amounted to the imputation of a crime or dishonesty on the part of the Claimant. (See para. [11] supra). Statements which impute that an individual was or may be involved in criminal activity generally satisfy the test that the words would tend to lower a Claimant in the estimation of right thinking members of society. (Collins supra at para. 6.11 and the cases cited at fn. 23).

[39] Counsel for the Defendant argued that the words complained of were not defamatory in their ordinary meaning. Reliance was placed on **Lewis v. Daily Telegraph Ltd [1963] 2 All ER 151 (HL)**, where it was observed that not every statement of suspicion imputes guilt. In the words of Lord Devlin:

> "It is not, therefore, correct to say as a matter of law that a statement of suspicion imputes guilt. It can be said as a matter of practice that it very often does so, because although suspicion of guilt is something different from proof of guilt, it is the broad impression conveyed by the [defamation] that has to be considered and not the meaning of each word under analysis. A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire; but it can be done. One always gets back to the fundamental question: what is the meaning that the words

> convey to the ordinary man: you cannot make a rule about that. They can convey a meaning of suspicion short of guilt; but loose talk about suspicion can very easily convey the impression that it is a suspicion that is well founded". (P. 173I to 174B).

[40] Referring to the **Lewis** case, Worrell J noted that:

> "Lord Devlin in his decision stated, "I dare say that it [the Plaintiff's reputation] would not be injured if everybody bore in mind, as they ought to, that no man is guilty until he is proved so, but unfortunately they do not […] Just a bare statement of suspicion may convey the impression that there are grounds for belief in guilt […]". (See **Nyika Marshall v. The Nation Publishing Co. Limited, No. 780 of 2010, Hgh. Ct. B'dos, decision dated 24 May 2013** at para. [17]).

[41] In the **Marshall** case a newspaper article inferred that the Claimant was part of a gang of ten men implicated in a series of robberies. The Claimant was not so charged, but he appeared in court charged in a different matter. Worrell J. opined that

> "[18] …Such a statement would not be defamatory if persons bore in mind the 'golden rule' of law, that a person is innocent until proven guilty. However, the reality…is that among right thinking persons of society such a statement will probably….lower the claimant in their estimation.
>
> [19] I also agree with the position of Lord Devlin that "a statement of suspicion may convey this impression that there are grounds for belief in guilt"."

[42] In this case the words were spoken on the employer's premises, and directed to the Claimant by a senior supervisor. Mr. Holder was there on behalf of the Defendant to investigate alleged suspicious activity by an employee. He was an emissary sent forth with an investigative mandate involving the Claimant and the truck assigned to her.

[43] The Court finds that Mr. Holder was boisterous and indiscreet as he interacted with the Claimant. He spoke loudly about his directive and his intention. He was heard quarrelling and fretting with the Claimant and insisting that he needed to check her van. He was also observed "flaring off his hands". The Claimant was asked to open the truck, which she did, and Mr. Holder searched the cold storage section. In fact, she was accompanied by Mr. Holder from the security gate to the truck, with the lamb necks in her possession. This would have been in view of Vembe Johnson and her passenger.

[44] What then would the ordinary man have understood, given the immediate circumstance in which the words were spoken? What would have been the broad impression conveyed to the ordinary man? The Court is of the view that the information conveyed to the ordinary man by Mr. Holder's words, actions, and gestures, was that the Claimant was being investigated because there was good reason to believe that she was engaged in the removal of

meat from the Defendant's premises without permission. It was also implied that the Claimant was caught in the act of stealing from the Defendant. Another reasonable imputation was that the Claimant was an untrustworthy and dishonest van sales representative.

[45] Larceny and attempted larceny are criminal offences in Barbados. The imputation of a criminal offence, or an attempted criminal offence, is usually defamatory. (See "Clerk & Lindsel On Torts", 22nd ed, at para. 22-34. At fn. 173 the learned authors cite **Chase v. News Group Newspapers Ltd [2002] EWCA Civ 1772** at para.[45], where the Court of Appeal stated that "The sting of a libel may be capable of meaning that a claimant has in fact committed some serious act, such as murder. Alternatively it may be suggested that the words mean that there are reasonable grounds to suspect that he/she has committed such an act. A third possibility is that they may mean that there are grounds for investigating whether he/she has been responsible for such an act". It is the considered view of the authors that all three tiers mentioned in **Chase** would be defamatory.).

[46] In this case, the imputation of larceny by the Claimant from her employer is defamatory. And the Claimant is not required to prove special damage. Section 3 (3) of the Act provides that:

> "Subject to sections 22(1) and 25 (3), in an action for defamation it shall not be necessary for the [claimant] to prove special damage".

Sections 22 (1) and 25(3) have no bearing on these proceedings.

[47] Clerk and Lindsel posit further that:

> "Statements may be defamatory of a person with reference to his profession or employment on the ground that they disparage him in his office. Statements may be defamatory, though they are not necessarily so, if they tend to injure the claimant in his calling or office, even though they are not provocative of "hatred, ridicule or contempt". To be defamatory, however, the words must involve a reflection on the personal character, or on the official, professional or trading reputation of the claimant". (Supra para. [45] at para.22-38).

[48] The Court is in no doubt that the words and actions of the Defendant's agent disparaged the Claimant in her employment as a van sales representative. Further, the imputation of unlawful conduct in the exercise of her employment is actionable without proof of special damage.

<u>Identification of the Claimant</u>

[49] Mr. Holder did not identify the Claimant by name. Steele J. opined in **Mouammar v. Bruner (1978), 84 D.L.R. (3d) 121**, that:

> "It is not necessary that the words should refer to the plaintiff by name, provided that the words would be understood by reasonable people to refer to the plaintiff". (P.123).

[50] When the words were spoken, the Claimant was accompanied by Mr. Holder; he was observed remonstrating with her; she spoke with him; she opened the cold storage section of the van to allow him access thereto; she returned the meat to the van; and she closed the van. Therefore, the Claimant is undoubtedly the individual against whom the imputations were made by Mr. Holder. It was obvious, in the particular circumstances in which the imputations were made, that Mr. Holder was referring to the Claimant.

Publication

[51] An action for defamation cannot succeed unless the words complained of are published. Alistair Mullis puts it this way:

> "The law of defamation is concerned with the protection of a person's reputation. As a person's reputation is the estimation in which he is held by others, and not the opinion he holds of himself, it follows that unless a statement is communicated to a person other than the claimant no action will lie. This communication is called 'publication'. A defamatory statement communicated to the claimant may injure his self-esteem but it does not, in the absence of publication to a third person, damage his reputation. Thus, it is the publication of the defamatory statement that is the foundation or gist of the action; until the statement is published, the cause of action for [defamation] is not complete". (In "Carter-Ruck On Libel And Privacy", 6th ed., 2010 LexisNexis at p. 93).

[52] Publication need not be to more than one person. In **Capital and Countries**

Bank Ltd. v. George Henty & Sons (1882) 7 App Cas. 741 (HL), Lord Pengance stated that:

> "A person is entitled to the esteem of a single individual as he or she is to the esteem of the entire world". (P. 756. See also **Ayangma v. NAV Canaga (2000) Nfld., & P.E.I.R. 65** at 77-88).

[53] In this case the Claimant alleges that Mr. Holder made the offending statement "in the presence of other persons." (See para. 3 of the Statement of Claim at para. [6] supra). The statement was heard by Vembe Johnson as she sat in the passenger seat of a car. A friend of Ms. Johnson, Dorian Jordan, was also in the car. This car was parked next to the Claimant's van, and the security guard's hut was nearby.

[54] Mr. Donowa's evidence is that at least one security guard was by the security hut, and that it was a security guard at the front gate who "mentioned that there was a situation at the front gate involving one of our vehicles and the possibility of a stock situation". Given the loudness of Mr. Holder's statement, and the energy with which he carried out his investigation from the security gate to the truck, it is reasonable to conclude that both Jordan, her passenger and the security guard saw and/or heard what transpired.

[55] The first inspection of the Claimant's vehicle occurred in the afternoon. Ms. Johnson arrived at the Defendant's premises "about 4 or after 4." Mr. Holder

received his instructions from Mr. Donowa to investigate between 3:30 p.m. and 4:30 p.m. He said that this was the time when the general office would have been closing off. Mr. Holder also told the Court that the Claimant was seen with the meat after the close of business.

[56] Mr. Donowa spoke about the events occurring in the "late afternoon after 4 p.m.". The Court accepts that Mr. Holder spoke to the Claimant around closing time and near to the exit of the Defendant's compound. Although there is no direct evidence that other employees were present and in a position to see and hear Mr. Holder, the Court cannot discount the very real possibility that other employees who were leaving work became aware of the defamatory circumstances either by the words and/or actions of the Defendant's agent.

[57] Counsel for the Claimant suggested to Mr. Holder that other persons were present. Mr. Holder replied that:

> "I would not be able to say if other persons were present or in hearing range. All I remember is myself and the Claimant".

This response does not discount the possibility of other employees hearing and observing the proceedings as they approached or passed Mr. Holder and the Claimant on their way off the Defendant's compound. The Court is satisfied that the events by the Defendant's gate, on the evening of 12 June

2013, were seen and/or heard by at least three other persons, Ms. Johnson, her passenger Dorian Johnson, and a security guard.

Was There Further Defamatory Conduct by the Defendant?

[58] The Claimant has also relied on the placing of security ties on the truck, and the conducting of a stock search of the vehicle, as part of the defamatory context. (See para.4 of Statement of Claim at para. [11 supra). Mr. Donawa gave the instructions for the security ties to be placed on the vehicle on the evening of 12 June 2013, after the Claimant had left the Defendant's premises. The stock search was carried out the next day.

[59] The Court accepts that the security ties were not immediately visible. However, the ties were attached by the same security division that was responsible for the initial report to Mr. Donawa. This was all part of a continuing investigative process on behalf of the Defendant at its workplace.

[60] It was on the morning of 13 June 2013, when the Claimant returned to work, that the security division instructed her not to touch or move the truck until management came. Soon after that, a random stock check was conducted on the contents of the van's cold storage bin, while it remained parked by the exit to the premises. The stock check was also carried out on the instructions of management at the Defendant company.

[61] After the random stock check, it was confirmed that all the stock on the van was accounted for. Nevertheless, the Claimant was sent home until the following day. She returned to work on 14 June 2013 and spoke with Mr. Donawa. He informed the Claimant that her services were no longer required, and she was separated from the Defendant.

[62] These events unfolded on the Defendant's premises between 12 and 14 June 2013. The question for the Court is whether these actions, executed through agents of the Defendant, were also defamatory. It will be recalled that under the Act defamatory matter is not confined to the use of words. It includes "gestures and other methods of signifying meaning". (See paras. [19] and [21] supra).

[63] Prior to the enactment of the defamation legislation in Barbados, the law recognised a distinction between libel and slander. K. Duodu commented that:

> "Slander consists of a defamatory imputation in some non-permanent form by spoken words, or other sounds, or by gestures". (See "Clerk & Lindsell On Torts", supra para. [45] at para. 22 – 43, and **Gutsole v. Mathers (1836) 1 M. & W. 495**, 501 per Lord Abinger).

[64] Carter-Ruck also tells us that:

> "Where a defamatory imputation is conveyed in a transitory form, it is actionable only as a slander. Thus, the spoken word and sounds or noises such as "hooting,

> hissing and groaning', are actionable, if at all as slanders. It may appear from these examples that as well as being transitory in nature, slander is that which is conveyed to the ear, while libel is permanent in form and conveyed to the eye. Such a view cannot, however, be correct as it would be inconsistent with several decisions that have held that physical gestures are slander". (See para. [51] supra, at para. 3.6, **Gutsole** supra at para. [63], and **Gregory v. Duke of Brunswick and Vallance (1844) 6 Man & G 953**).

[65] "Duncan And Neil On Defamation" offers the following general view on slander:

> "In general terms slander is defined as the publication of defamatory matter by word of mouth. Defamatory gestures and defamatory sounds such as hissing are also slanders. In addition there may be occasions where the defendant conducts himself in such a way as to convey defamatory meaning about the claimant to a third person and thus provides the foundation for an action for slander". (2015, Lexis Nexis at para. 3.05).

[66] The Duncan And Neil treatise also refers to the case of **Foster v. Customs and Excise Comrs, The Times, 27–31 July 1993**. In that case a dignitary sued for damages for slander by conduct. She had been stopped at Heathrow Airport and her bags searched. She was then "marched publicly through the airport's concourses in a manner which would have meant to anybody that [her arrest] was for a serious offence". (Supra para. [65] at para. 3.05; although this case was tried by a jury that failed to agree).

[67] To be clear, in the scenario now being considered by this Court, the Claimant

cannot rely on the defamatory words and actions of Mr. Holder as heard and observed by Vembe Johnson and her companion. This scenario begins with the securing of the vehicle, and progresses to the separation of the Claimant from the Defendant. Neither Vembe Johnson nor her passenger witnessed these events. If the Defendant's actions in these circumstances were defamatory, there was no publication to these two individuals.

[68] Counsel for the parties were invited to make further written submissions available to the Court with respect to the events of the second and third day. Counsel for the Claimant argued that there was clear evidence that the defamatory acts complained of took place over the first and second day, and that publication took place on each of these days. Mr. Sue made no submissions with respect to the third day.

[69] Counsel for the Defendant pointed out that the pleadings contained no claim or allegations with respect to the third day. Therefore, this day could not be included as part of any defamatory context. And, in relation to the second day, there was no publication of any defamatory matter to either customers of the Defendant or to any of its employees. No defamatory inferences could be drawn from the conduct of the Defendant's agents.

[70] The Court agrees that it cannot consider the events of the third day in a determination of whether the Claimant was defamed. Although the

Claimant mentions day three in paragraph 18 of her witness statement, there is no reference to any events on this day in her Statement of Claim. But the events of the first and second day included the interaction between the Claimant and Mr. Holder; his expressive body language; his inspection of the contents of the truck; the Claimant's return of the lamb necks to the cold storage bin; the placing of security ties on the vehicle; the inability of the Claimant to access the vehicle when she returned to work; the removal of the security ties from the vehicle followed by a procedure inside the cold storage bin; the presence of the Claimant and her assistant outside the truck while the procedure was in progress; the completion of the procedure; the Claimant's meeting with Mr. Holder after the procedure was completed; the Claimant's immediate exit from the premises without working on the truck for the remainder of the day.

[71] All the events of these two days, beginning late in the evening of 12 June 2013, were centred on the Claimant as an employee of the Defendant, and on the vehicle she drove on behalf of the Defendant. The events unfolded at the Claimant's workplace. And the procedures involving the truck were carried out at the front of the premises for all to see. What inferences could be drawn in these circumstances by the ordinary reasonable man?

[72] The ordinary reasonable man does not have special knowledge or back-

ground knowledge of the situation. (**Chakravarti v. Advertiser Newspapers Limited [1998] HCA 37** at para. [134], and **Haddon v. Forsyth [2011] NSWSC 123** at para.[17]**).** But it is irrelevant if the audience is different from the ordinary reasonable man. In the **Haddon** case, Simpson J observed that:

> "In the circumstances of the present case, the exercise has a degree of artificiality…the emails in this case were published to an extraordinarily limited number of recipients, each of whom had a close association with the environment in which they were published, and in which the events with which they were concerned took place. Most, if not all, had at least some prior knowledge of the relevant facts and circumstances. It might therefore be expected, that they would read the emails differently from the "ordinarily reasonable reader" or "hypothetical referee" who did not have that inside knowledge.
>
> However, the law is plain, and my duty is to approach the determination of whether or not any imputation pleaded was conveyed by reference to the "ordinary reasonable reader" or the hypo-thetical referee", as though the email had been picked up off the street by a casual passer-by who had the attributes I have outlined above". (At paras. [17]-[18]).

[73] What inferences would an ordinary reasonable man have drawn, after observing the treatment of the Claimant and her vehicle, over the critical two day period? To the ordinary reasonable man observing these developments,

the unavoidable imputation was that the Claimant was caught stealing from the Defendant. The ordinary reasonable man would not have known that nothing untoward was discovered after the stock search. The juxtaposition of the initial search, the truck's lockdown, the stock procedure and the Claimant's immediate exit from the premises after meeting with management, enforced this inference. She left the premises for the remainder of the day, and she did not drive her truck that day as a van sales representative.

[74] The defamation was about the Claimant, and publication was in her workplace to her coworkers. It will be recalled that Mr. Donawa conceded that "…in a small society it was possible for employees and other persons to know that [the Claimant's] truck was under a random stock check". Likewise, there were employees who became aware of the lockdown of the vehicle, and the random stock check, but who were not aware that there was no stock or money unaccounted for. And so the *coup de grâce* of the defamation was sending the Claimant home immediately after the stock check and her meeting with management.

[75] The Court is of the considered opinion that the Defendant's agents conducted themselves in such a way as to convey and signify defamatory meanings about the Claimant to third parties. (See Duncan and Neil supra

at para.[65] and the statutory definition, supra at paras. [19] and [21]). The defamatory meanings were that the Claimant stole stock from the Defendant, and that she was a dishonest and untrustworthy employee. She was also disparaged as a van sales representative.

The Statutory Defences Raised

[76] Counsel for the Defendant argued that if the Court found that Mr. Holder had used the words alleged, those words were justified because the Claimant's conduct provided reasonable grounds for suspicion. Counsel referred to **Bennett v. News Group Newspapers Ltd. [2002] E.M.L.R. 39,** and **Chase v. News Group Newspapers Ltd. [2002] EWCA (Civ.) 1772.** In these cases it was held that an allegation of reasonable grounds to suspect a claimant of discreditable conduct may be protected by a plea of privilege or justification.

[77] There are no pleas of privilege or truth (justification) in the defence. In addition, the Defendant's witnesses acknowledged that the Claimant had done nothing wrong; and that she was not in breach of any of the terms of her contract of employment. Mr. Holder verified that the lamb necks were accounted for, and that any invoice or cash for the meat was due on the following day.

[78] Mr. Donawa admitted that the time for the Claimant to produce an invoice and cash for the meat had not yet come. He was unable to find any section in the employee manuals that required the Claimant to generate an invoice for the lamb necks before delivery to Vembe Johnson. And there is no evidence that any meat products were delivered by the Claimant to Johnson on the evening of 12 June 2013. Therefore, a reasonable suspicion could not be based on Mr. Donawa's error of judgment.

[79] Even if the Court assumed reasonable grounds for suspicion, Mr. Holder's words and actions conveyed to at least two hearers and observers that he had caught an employee redhanded, and in the act of stealing, or attempting to steal from the Defendant. A discreet inquiry, rather than a public broadcast, would have protected the Defendant from this aspect of the defamation action. What further compounded the situation was the sending home of the Claimant in the face of exculpatory evidence. These actions gave rise to negative inferences about the Claimant.

Triviality

[80] The only statutory defence pleaded is that of triviality. Section 6 of the Act provides that:

> "It is a defence in an action for defamation that the circumstances of the publication of the matter

> complained of were such that the person defamed was not likely to suffer harm to his reputation".

This defence comes into play after a claimant has established defamation.

[81] Section 6 is similar to provisions in Australia's uniform defamation laws. (See for example section 33 in the 2005 Defamation Act of New South Wales, Queensland, Tasmania and Western Australia). The Australian provision states that:

> "It is a defence to the publication of defamatory matter if the defendant proves that the circumstance of publication were such that the [claimant] is unlikely to suffer any harm".

[82] The Australian legislation does not define "harm". Therefore, the question has arisen as to whether "harm" included injury to feelings. (See Phoebe J. Galbally, "A 'serious' response to trivial defamation claims…", (2015) 20 MALR 213 at p. 226**;** also **Smith v Lucht [2017] 2 Qd R489;** and **Jones v. Sutton [2004] NSWCA 439 (26 November 2004).** The Barbados provision has avoided this confusion by stating precisely that the harm is to the Claimant's reputation.

[83] Despite the essential difference between the Barbados and the Australia legislation, the Australia case law does offer some guidance with respect to the principles relevant to a triviality defence. These principles are as follows:

1. The Court having found that the Claimant was defamed, there is now a presumption of damage to her reputation. (See **Manefield v. Association of Quality Child Care Centres of NSW Inc [2010] NSWSC 1420** at para.185).

2. The burden of proof is on the Defendant to establish that the Claimant was not likely to suffer harm to her reputation in the circumstances of the publication of the defamation. One author describes the Defendant's task as a "high onus". (See Galbally, supra para.[82] at p.224, and the cases cited at fn.219).

3. In considering the circumstances of publication, no reliance may be placed on the facts arising before or after publication. The circumstances are considered at the time of publication. (See **Chappell v. Mirror Newspapers Ltd. (1984) Aust. Tort Rep 80-691,** per Moffitt P; **Smith,** supra para.[82] at para. [33]**,** per Flanagan J; **Marshall,** supra at para.[40]**,** per Worrell J at paras. [30]–[33]. See also David Rolph, "Triviality, proportionality and the minimum threshold of seriousness in defamation law", (2019) 23 MALR 280, 281-282).

4. The likelihood of reputational harm is viewed prospectively, that is, from the time of publication. In **Chappel**, Moffitt J. explained that the defence of triviality:

> "…places a significant burden on the defendant: he must negative not merely that there would be great or substantial harm, but that there be "harm"

> at all". (Supra para.[83] 3 at para. [309]. See also **Morosi v. Mirror Newspapers Ltd [1977] 2 NSWLR 749,** 799).

[84] This Court is not persuaded that the Defendant in this case should have the benefit of the triviality defence. The defamatory statement, and the actions associated with that statement, were arguably limited to few individuals. One of those individuals knew the Claimant, and the circumstances under which the lamb necks were removed from the vehicle. Nevertheless, another individual was present who heard and saw the defamation, and who was not connected to the Claimant.

[85] The publication of other defamatory actions was made to the Claimant's coworkers. It is a serious matter to defame an individual in her workplace, and about the execution of her duties at that workplace. The defamatory words and actions were neither light hearted, nor jocular, nor said in a private place as occurred in the **Smith** case. (Supra. at para.[82]). The odour of larceny in the work place is lingering and all pervading. The Claimant's reputation was savaged in the eyes of other employees who were not aware that the stock check did not reveal any wrongdoing by the Claimant. It is unlikely that such employees would have volunteered evidence against their employer the Defendant.

[86] The Defendant has not discharged its heavy burden of proof that the Claimant suffered no harm to her reputation. The Court also noted that the major players in the defamation were members of management; authority figures in the general scheme of things.

Disposal

[87] Judgment is entered in favour of the Claimant, with damages and costs to be agreed or determined by the Court.

Sonia L. Richards
Judge of the High Court