



[2023] JMSC Civ 42

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN CIVIL DIVISION  
CLAIM NO. 2016 HCV 05224**

**BETWEEN                      ROY K. ANDERSON                      CLAIMANT**  
**AND                              DWIGHT CLACKEN                      DEFENDANT**

**IN OPEN COURT**

**Mesdames Stephanie Williams and Ronece Simpson instructed by Henlin Gibson  
Henlin for the Claimant**

**The Defendant in person**

**Heard: January 30 and 31, February 2 and March 17, 2023**

**Defamation – Publication containing defamatory imputation against the claimant  
– Meaning of words published – Implications – Innuendo**

**Burden – Burden of proof – Standard – Standard of proof – Whether the intention  
of the defendant is relevant –**

**Defence – Defence of truth – Defence of fair comment**

**Damages – Principle of compensation to an individual claimant – The Defamation  
Act, 2013, sections 2, 3, 20(2), 20(3), 21(1), 30(1) and 30(2)**

## A. NEMBHARD J

### INTRODUCTION

*“The defence of reputation on the one hand and the defence of free speech on the other hand should be beset as little as possible with any complexity.”<sup>1</sup>*

- [1] This matter raises important considerations in relation to whether certain statements contained in the book entitled “No Justice in Jamaica – How the Jamaican Judicial System Destroyed My Life and My Business and How It Can Happen to You” (“the subject book”), which was authored by the Defendant, Dwight Clacken, are defamatory in nature. Specifically, the Court is being asked to determine whether certain statements made in the subject book contain defamatory imputations against the Claimant, Roy K. Anderson.
- [2] This matter was initiated by a Claim Form, which was filed on 15 December 2016. It is by virtue of that Claim Form that the Claimant, Roy K. Anderson, alleges that, in or around 2015, the Defendant, Dwight Clacken, authored the subject book and caused it to be published. Mr Anderson further alleges that, in certain impugned sections of the subject book, there are specific references to him, which call into question his conduct as a judicial officer.
- [3] Mr Anderson explicitly asserts that the references to him and to his conduct, in his capacity as a judicial officer, are false and were maliciously published by Mr Clacken. The words contained in the impugned sections of the subject book, Mr Anderson contends, when given their natural and ordinary meaning and, when read in the context of the subject book in its entirety, inclusive of its title as well as the graphics which appear on its cover, are defamatory of him.
- [4] As a consequence, Mr Anderson alleges that he suffered injuries, loss and damage.

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<sup>1</sup> See – **Jones v Skelton** [1963] 3 All ER 952 at page 960

## **THE ISSUES**

**[5]** The following issues are determinative of the Claim: -

- i. Whether the impugned statements contained in the subject book are defamatory in nature;
- ii. Whether the impugned statements contained in the subject book refer to the Claimant;
- iii. Whether the impugned statements contained in the subject book have been published to at least one (1) person other than the Claimant;
- iv. Whether the Defence of truth has been made out; and
- v. Whether the Defence of fair comment has been made out.

## **BACKGROUND**

### **The factual substratum**

**[6]** The Claim is made against the background that Mr Anderson is an Arbitrator and an Associate Tutor in the Faculty of Law, University of the West Indies, Mona Campus. He is admitted to the Bar in Jamaica, Grenada, New York as well as the United Kingdom. Mr Anderson is a retired Judge of the Supreme Court of Judicature of Jamaica and has served and is serving in various professional and representative roles, at the local, regional and international levels, to include: -

- i. Currently serving as a member of the Access to Information Appeals Tribunal which reviews appeals from the public in respect of the denial of requests for information by State or parastatal entities;

- ii. Serving as Chairman of the Strata Appeals Tribunal under the Registration (Strata Titles) Act, during the period 2013-2016;
- iii. Serving as Chairman of the Parole Board under the Parole Act, during the period 2013-2016;
- iv. Serving as the Supervisor of Insolvency under the new Insolvency Act 2014, in 2015;
- v. Serving as Puisne Judge and Judge of the Revenue Court of the Supreme Court of Judicature of Jamaica, during the period March 2001 to 2012;
- vi. Serving as a Consultant Attorney-at-Law at Myers Fletcher & Gordon, during the period January 1994 to February 2000. His main areas of specialization included Commercial Law, Financial Law and Regulation, Intellectual Property, Environmental Law and Tax Law;
- vii. Serving as a Business Development Consultant to the United States Agency for International Development ("USAID"), for The Organization of Eastern Caribbean States ("OECS"), during the period 1989 to 1990;
- viii. Serving as the North American Director of Jamaica Promotions Corporation ("JAMPRO") (formerly Jamaica National Investment Promotions ("JNIP")), during the period 1986 to 1989;
- ix. Serving as the Commercial Attaché to the Embassy of Jamaica, Washington D.C. and JNIP Representative for the Mid-Atlantic States, during the period 1982 to 1986;

- x. Serving as the Director of Legal Services – Jamaica National Investment Company (“JNIC”), and Special Counsel to Jamaica Bauxite Mining, Kingston, Jamaica, during the period 1979 – 1982;
- xi. Serving as the Commercial Attaché – Embassy of Jamaica, Washington D.C. and JNIP Representative for the Mid-Atlantic States, during the period 1982-1986;
- xii. Serving as Legal Counsel for the Jamaica Bauxite Mining Company, during the period 1977 to 1979;
- xiii. Serving as an Associate Tutor, Norman Manley Law School, in the area of Revenue Law.

**[7]** Additionally, Mr Anderson is a prolific author who has penned several legal articles and professional publications.

**[8]** Mr Anderson’s accomplishments have earned him national recognition. He was awarded the Order of Distinction, Commander Class (CD), in October 2015.

**[9]** It is during Mr Anderson’s tenure as a Judge of the Supreme Court of Judicature of Jamaica that he presided over the matter which was brought in Claim No. 2008 HCV 01834, Dwight Clacken & Anor vs Michael Causwell, Richard Causwell and Equipment Maintenance Limited.

**[10]** For his part, Mr Clacken asserts that the subject book is a narrative of his life experiences, including, although not limited to, his experience and encounters with the Jamaican Justice System. Mr Clacken asserts that the subject book was published and distributed by LMH Publishing Limited, in or around 2015 and that it remains available for purchase in hard copy (paperback) and electronically (Kindle and Kindle Unlimited), on Amazon, an international, e-commerce website.

**[11]** The title of the subject book is displayed on its cover, in a bold font in the colours of red and black. The cover of the subject book depicts a drawing of an octopus

which contains seven (7) words, one written on each of the octopus' seven (7) tentacles. These seven (7) words are as follows: -

- i. Extortion;
- ii. Fraud;
- iii. Kickbacks;
- iv. Corruption;
- v. Bribery;
- vi. Ponzi; and
- vii. Scam.

### **The impugned material**

[12] Mr Anderson contends that the following statements, which were written and were caused to be published by Mr Clacken, in the subject book, are defamatory of him [Mr Anderson]: -

*“After we had these 2002 financials examined by a chartered accountant they turned out to be unaudited and tampered with. In countries where justice prevails, this is called “fraud” and the consequence is a clear deterrent to those who might think of trying it. In Jamaica, the law calls it “fraud” and the court applies consequence depending on who did it and who the “connections are.”*

*“Being labelled as “audited”, could pass as an error. But the “doctor-ring” of the 2002 financial statements by making modifications under the signature of the professional who prepared it, seemed fraudulent. Those who knew and engineered it didn't seem to care.”*

*“Did I expect differently? Yes. Was I shocked? No. Not after more than three years of stalling. Disappointed in KPMG? Disappointed in the system? Yes. It was too blatant; it showed no fear of consequence. Such a flaunt (sic) in the face of justice! And there was no one available to even entertain a complaint...”*

*“The brazenness and impunity with which lies and manipulations were taking place was insulting to the system and to the professionals who tolerated it. So brazen, so flippant were they about the possibility of consequence as if sure of protection.”*

**[13]** Mr Anderson further contends that these words, when given their natural and ordinary meaning and when read in the context of the subject book as a whole, including its title and the graphics displayed on its cover, were understood to mean the following: -

- a. That the Claimant ignored that relevant accounts were fraudulently “doctored” despite these fraudulent accounts being practically thrown in the face of or being otherwise obvious to the Court;
- b. That the Petitioners tried to complain to the Claimant, as the presiding Judge, about the fraudulent accounts and that he improperly refused to entertain their complaints;
- c. That the Claimant acted corruptly or improperly or was biased against the Defendant;
- d. That the Claimant misconducted himself while holding judicial office;
- e. That the Claimant was not fit for judicial office;
- f. That the Claimant, as the presiding Judge, improperly tolerated lies and manipulation by the Respondents to the Petition;
- g. That the Claimant provided official protection from consequence to these offenders;

- h. That the Claimant facilitated the Respondents' corruption;
- i. That the Claimant was complicit with the alleged corrupt and dishonest behaviour of the Respondents.<sup>2</sup>

**[14]** Mr Anderson asserts that there are statements which are made at page 99 of the subject book which were falsely and maliciously published of and concerning him. These statements are set out below: -

*“Numerous adjournments continued to be the order of hearing dates. Documents regularly disappeared from the Registry, Judges adjourned cases nonchalantly and without care for the costs involved...”*

*“More shocking to me was that this was known by most at my level who had been to the courts. It was common knowledge that this was a widespread occurrence in the system. It was par for the course.”*

*“I never understood this. “Why do you lawyers permit this to happen” I would ask many Attorneys. “Why don’t you take a stand? Why do you tolerate the adjournments that push back cases for years? Have you reported these problems to the Chief Justice?”*

*“The typical response was one of surprise that I could ask such a silly question. ‘Are you crazy? From time to time, we have to go before the very people we are reporting!’”*

*“What a sad indictment on the integrity of officers of the Court. That statement is a stark admission that persecution of officers of the court is expected if one dared to take a stand against any injustice inside the courts. It is an untenable admission of injustice.”*

**[15]** Mr Anderson further asserts that these words, when given their natural and ordinary meaning, suggest that: -

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<sup>2</sup> See – Paragraph 9 of the Particulars of Claim, which was filed on 15 December 2016



- a. Judges, including and specifically the Claimant, are uncaring about the plight of litigants and in particular, the legal costs of adjourned proceedings;
- b. Judges, including and specifically the Claimant, took judicial decisions regarding adjournments in an arbitrary and unjust way and particularly as it related to the Defendant's winding up Petition;
- c. The Registry of the Supreme Court of Judicature of Jamaica was complicit with the Respondents to the Defendant's Petition in the unlawful destruction or deliberate disappearance of vital documents;
- d. Judges, in particular the Claimant, are aware of this conspiracy between some litigants and the Registry and make no effort to put a stop to it or to sanction it in any way;
- e. The corruption aforesaid in the Registry and the Judiciary, including the Claimant, almost permeated the entire system and every participant was involved;
- f. The Claimant was an active participant in these corrupt and improper practices;
- g. Judges, including the Claimant, deliberately maliciously and improperly persecute lawyers who make official reports about Judges' conduct and, by so doing, have kept lawyers in fear and thereby prevented or restricted the number of complaints;
- h. Judges, including the Claimant, have deliberately embarked on this path of dishonesty in order to protect themselves from legitimate

sanction and to perpetuate the lack of integrity with which they conduct their public duty; and

- i. The Claimant acted dishonestly in his judicial capacity.<sup>3</sup>

**[16]** Additionally, a complaint is made of the following statements, which may be found on page 100 of the subject book. Those statements are set out below: -

*“On March 18, 2005, we were advised that attempts were being made to settle. As a result, another hearing date was adjourned without resolution. This was a strange and unexpected occurrence. It appeared (to us) to be an initiative on the part of all the attorneys involved and more likely than possibly, including the Judge. We knew nothing about it beforehand, however later on the reasons and strategy behind involved would become clear.”*

*“And why would a Judge already sitting on this matter involve himself in negotiating a settlement in the matter? Why not leave that to someone else who was independent or unconnected?”*

**[17]** Mr Anderson asserts that these words, when given their natural and ordinary meaning, suggest: -

- a. That the Claimant and the attorneys involved in the case improperly conspired to adjourn the hearing against the wishes of the Petitioners;
- b. That the conspiracy was struck to further an improper personal agenda common to the lawyers and the Claimant;
- c. That the Claimant intervened in the conduct of the case by Counsel without invitation and did so because he was connected to the litigation;

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<sup>3</sup> See – Paragraph 13 of the Particulars of Claim, which was filed on 15 December 2016

- d. That the Claimant had a personal and improper motive for so inserting himself into the conduct of the case by counsel;
- e. That the Claimant interfered in the matter with the deliberate intention to influence the outcome and/or pervert the course of justice.<sup>4</sup>

**[18]** Mr Anderson specifically asserts that the following statements were defamatory of him: -

*“And why was Justice Anderson so expressively angry in our presence when we insisted on the indemnity? As he saw the settlement slipping away, and as he writhed around, groping at his head in an obvious impatient fit of temper, I couldn’t help but think how unbecoming it was for a Supreme Court Justice to behave this way. It seemed to impact more on him than on the partners. They knew a road to travel and he too must have needed our submission badly.”*

*“This also presented us with an additional concern. Justice Anderson had been part of the negotiations. Why? There was no need for the Judge to become involved in this way. Now he could not continue to sit on this case. How convenient... I will not speculate as to the circumstances that caused his withdrawal but it caused great damage to our case and has done nothing to boost my confidence in the administrative competence of the Jamaican Judiciary.”*

*“In a small Island like Jamaica, practically nothing is a secret and rumours persisted as to his reasons but I refuse to repeat them here. Before he took leave of the case, Justice Anderson, not to be outdone by his previous tirade of antics displaying disgust of our insisting on indemnity, played a parting shot by removing the injunction protecting the proceeds from one of EML’s real estate assets, effective within one month. This was an act that would force us to keep going to court to extend it; this was an act that would cost us millions in time and legal fees. This felt like an act of reprisal, an act that would lead to the improper removal of over J\$80 million in cash from an interest bearing US Dollar account.*

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<sup>4</sup> See – Paragraph 13 of the Particulars of Claim, which was filed on 15 December 2016

*This was an act that could be proven to be unjustified all the way through to the Appeal Court and to the Privy Council, the highest Courts available. This was an act carried out by a Judge who supposedly specialized in commercial cases; a judge whose job it was to sit on numerous such cases in Jamaica. If only few judges knew of the need for indemnity against improper movement of funds, it should include Justice Anderson.”*

**[19]** Mr Anderson maintains that the natural and ordinary meaning of the words used in these impugned statements communicate: -

- a. That the Claimant acted in a manner unbecoming of a Supreme Court Judge;
- b. That the Claimant allowed his personal feelings to overcome his professional objectivity as a Judge;
- c. That the Claimant acted more on behalf of the Petitioners' opponents in the case than as an objective adjudicator;
- d. That the Claimant acted out of a desire and expectation of personal gain;
- e. That the Claimant intended to convince the Petitioners to capitulate unnecessarily in order to further his own private ends;
- f. That the Claimant is a dishonest individual and a corrupt Judge;
- g. That the Claimant deliberately and improperly acted against the Petitioners' interest;
- h. That the Claimant deliberately discarded judicial objectivity in the case;

- i. That the Claimant is incompetent at best; corrupt at worst;
- j. That the Claimant tried to keep his personal and improper motive for his judicial decisions a secret but has been unable to keep them secret from the author;
- k. That the Claimant is unfit to be a Judge of the Supreme Court;
- l. That the Claimant decided to 'remove' an injunction as an act of reprisal against the Defendant and the other Petitioner because of his disagreement with their refusal of the settlement offer;
- m. That the Claimant acted unjustly towards the Petitioners, including the Defendant, and that this can be established in court;
- n. That the Claimant deliberately used his high judicial office to cause the Petitioners financial harm and succeeded in doing so to the tune of at least JMD\$80 Million;
- o. That the Claimant is a corrupt and incompetent Judge.

**[20]** As a consequence, Mr Anderson maintains that he suffered tremendous embarrassment and humiliation. He contends that he was severely injured in his credit and character and in his personal and professional reputation. Mr Anderson further contends that the subject book has brought his reputation into public scandal, odium and contempt.<sup>5</sup>

**[21]** Further, Mr Anderson asserts that Mr Clacken, in publishing the impugned statements, acted with improper motive(s) and that the publication was high-handed and contumelious. Mr Anderson asserts that Mr Clacken made no

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<sup>5</sup> See – Paragraphs 6-10, inclusive, of the Witness Statement of Christopher Malcolm, which was filed on 26 August 2022

attempt to contact him [Mr Anderson] for comment, prior to publishing the subject book. This, Mr Anderson maintains, was done either with the full knowledge that the impugned statements contained in the subject book were libellous of him, or, with a reckless disregard as to whether or not they were libellous. Mr Anderson asserts that Mr Clacken had the expectation that the salacious nature of the allegations made against him [Mr Anderson] would aid in increasing the sale of the subject book and the profits made from those sales, in excess of any amount that could be awarded to him [Mr Anderson] in a simple suit for damages.<sup>6</sup>

**[22]** For his part, Mr Clacken readily accepts that he authored the subject book and caused same to be published. It is equally accepted that it was Mr Clacken's intention to cause the subject book to be published to as wide an audience as possible, for the precise purpose of highlighting the deficiencies in the Jamaican Justice System and of drawing scrutiny to same. Mr Clacken asserts that the subject book is a narrative of the numerous experiences and encounters which he had with the Jamaican Justice System and that the accounts provided therein are as a result of his first-hand experience with and impressions of the Jamaican Justice System, which are honest and truthful.<sup>7 8</sup>

**[23]** Mr Clacken maintains that Mr Anderson is not the only Supreme Court Judge who was mentioned by name, in the subject book.<sup>9</sup> Where Mr Anderson was specifically mentioned by name, the statements made consist of allegations of fact and are true, in so far as they consist of expressions of opinions and are fair comments, made in good faith and without malice and are matters of public interest.<sup>10 11</sup>

**[24]** Mr Clacken maintains that any attempt to connect Mr Anderson to the words complained of would require elaborate analysis, which goes over and beyond the ordinary meaning and imputations of the words complained of and/or the

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<sup>6</sup> See – Paragraph 18 of the Particulars of Claim, which was filed on 15 December 2016

<sup>7</sup> See – Paragraph 6 of the Defence, which was filed on 1 February 2017

<sup>8</sup> See – Paragraph 17(A) of the Defence, which was filed on 1 February 2017

<sup>9</sup> See – Paragraph 6 of the Defence, which was filed on 1 February 2017

<sup>10</sup> See – Paragraph 6 of the Defence, which was filed on 1 February 2017

<sup>11</sup> See – Paragraph 17(B) of the Defence, which was filed on 1 February 2017

meanings understood by an ordinary, reasonable reader. The current theme of the subject book is that of remedying the various problems with which the Jamaican society is riddled. Mr Clacken reiterates that the statements contained in the subject book were not calculated to disparage Mr Anderson, in any capacity and that there was no intention to lower Mr Anderson in the estimation of anyone.

**[25]** Finally, Mr Clacken posits that Mr Anderson's reputation was not damaged nor was he brought into public scandal or odium. Mr Clacken maintains that Mr Anderson continues to hold those positions which he did, prior to the publishing of the subject book.

## **THE LAW**

### **The tort of defamation**

#### **The elements of the tort**

- [26]** In an action for defamation, it is necessary to prove the following: -
- i. that the words are defamatory;
  - ii. the falsity of any defamatory words is presumed and the burden of proving justification lies on the defendant;
  - iii. it is not necessary for the claimant, in order to establish a prima facie case, to prove that the defendant was actuated by malice;
  - iv. it is not necessary for the claimant to prove that he has suffered damage as damage is presumed;
  - v. a cause of action for defamation does not pass to the personal representatives of a deceased claimant.

## **'Defamatory' defined**

**[27]** Generally speaking, a statement is 'defamatory' of the person of whom it is published if it tends to lower him in the estimation of right-thinking members of society.<sup>12</sup> The classic definition of the word 'defamatory' is that of Parke B, where he defined it as: -

*"A publication...which is calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule."*<sup>13</sup>

**[28]** A person's reputation is not confined to his general character and standing but extends to his trade, business or profession and words will be defamatory if they impute a lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of his trade, business or professional activity. Consequently, a statement can also be deemed to be defamatory if it disparages a person in his office, profession, calling, trade or business.<sup>14</sup>

**[29]** It is also noteworthy that the tort of defamation is actionable without proof of special damage.<sup>15</sup>

## **The statutory framework**

### **The Defamation Act of 2013**

**[30]** The Defamation Act of 2013 ("the Act") repealed the earlier Defamation Act and the Libel and Slander Act. The new legislation abolished the distinction between slander and libel.<sup>16</sup> <sup>17</sup> The principal objectives of the new Defamation Act are set out below: -

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<sup>12</sup> See – **Sim v Stretch** [1936] 2 All ER 1237, at page 1240, per Lord Atkin

<sup>13</sup> See – **Parmiter v Coupland** (1840) 6 M & W 105 at page 108

<sup>14</sup> See – Volume 32 (2019) of the Halsbury's Laws of England, paragraph 543: Meaning of 'defamatory statement.'

<sup>15</sup> See – Section 9 of The Defamation Act, 2013.

<sup>16</sup> See – Section 6 of The Defamation Act, 2013. Further, in section 7 of The Defamation Act, criminal libel is abolished.

<sup>17</sup> See – Section 36 of The Defamation Act, 2013 which states that The Defamation Act and the Libel and Slander Act are repealed.



*“3. The principal objects of this Act are to –*

*(a) provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter;*

*(b) promote speedy and non-litigious methods of resolving disputes concerning the publication of defamatory matter; and*

*(c) ensure that the law relating to the tort of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of topics of public interest and importance.”*

### **The statutory definition of ‘defamatory matter’**

**[31]** The term “defamatory matter” is defined as any matter published by a person that may be, or is alleged to be, defamatory of another person.<sup>18</sup> Further, section 2 of the Defamation Act states that the term “matter” includes: -

*“2. “matter” includes –*

*(a) an article, report, advertisement or other thing communicated by means of a newspaper, magazine or other periodical;*

*(b) a programme, report, advertisement or other thing communicated by means of television, radio, the Internet or any other form of electronic communication;*

*(c) a letter, note or other writing;*

*(d) a picture or visual image;*

*(e) a word, gesture or oral utterance; and*

*(f) any other method of communicating information.”*

**[32]** The Act defines the term “publisher” as follows: -

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<sup>18</sup> See – Section 2 of The Defamation Act, 2013

*“publisher” means a person who has published a matter that is, may be, or is alleged to be defamatory of another person and “publish” and “publication”, in relation to a statement, subject to the provisions of this Act, have the meaning they have for the purposes of the law relating to the tort of defamation.”*<sup>19</sup>

### **The role of the court**

[33] Bollers J, in the authority of **Ramsahoye v Peter Taylor & Co Ltd.**,<sup>20</sup> made reference to the dicta of Camacho CJ in **Woolford v Bishop**,<sup>21</sup> who made the following pronouncements: -

*“On this aspect of the case, the single duty which devolves on this court in its dual role is to determine whether the words are capable of a defamatory meaning and given such capability, whether the words are in fact libellous of the [claimant]. If the court decides the first question in favour of the [claimant], the court must then determine whether an ordinary, intelligent and unbiased person reading the words would understand them as terms of disparagement, and an allegation of dishonest and dishonourable conduct. The court will not be astute to find subtle interpretations for plain words of obvious and invidious import.”*<sup>22</sup>

### **The ‘ordinary man’ test**

[34] Professor Gilbert Kodilinye, in the 5<sup>th</sup> edition of his text Commonwealth Caribbean Tort Law, posits that the standard is that of the average right-thinking member of the public. At page 251, Professor Kodilinye is quoted as follows: -

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<sup>19</sup> At common law, it is generally held that every repetition of a defamatory statement is a fresh publication and creates a ‘fresh’ cause of action. However, Section 8 of The Defamation Act also indicates that a person has a single cause of action for defamation in relation to the publication of defamatory matter about the person. This remains the case even if more than one defamatory imputation about the person is carried by the defamatory matter.

<sup>20</sup> [1964] LRBG 329, at 331

<sup>21</sup> [1940] LRBG 93, at 95

<sup>22</sup> Notably, where the words are clearly defamatory on their face, a finding that they are capable of being defamatory will almost inevitably lead to the conclusion that they are defamatory in the circumstances.

*“In assessing the standard of the average right-thinking member of the public, the court will:*

*... rule out on the one hand persons who are so lax or so cynical that they would think none the worse of a man whatever was imputed to him, and on the other hand those who are so censorious as to regard even trivial accusations (if they were true) as lowering another’s reputation, or who are so hasty as to infer the worst meaning from any ambiguous statement ... The ordinary citizen... is neither unusually suspicious nor unusually naïve, and he does not always interpret the meaning of words as would a lawyer, for he is not inhibited by a knowledge of the rules of construction.”<sup>23</sup>*

**[35]** In **Lewis v Daily Telegraph Ltd.**,<sup>24</sup> Lord Reid made the following pronouncement: -

*“There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction.”*

**[36]** Subsequently, in the authority of **Morgan v Odhams Press Ltd.**,<sup>25</sup> Lord Reid stated: -

*“If we are to follow Lewis’ case and take the ordinary man as our guide, then we must accept a certain amount of loose thinking. The ordinary reader does not formulate reasons in his own mind; he gets a general impression and one can expect him to look again before coming to a conclusion and acting on it. But formulated reasons are very often an afterthought.”*

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<sup>23</sup> See – Winfield and Jolowicz, n 19, p 398; **Lewis v Daily Telegraph Ltd** [1964] AC 234, at 258, per Lord Reid

<sup>24</sup> [1964] AC 234, at 258

<sup>25</sup> [1971] 1 WLR 1239, at 1245

[37] It is equally instructive to note the observation of Lord Halsbury LC in the older authority of **Lord William Nevill v The Fine Art and General Insurance Company, Limited**.<sup>26</sup> Lord Halsbury LC is quoted as follows: -

*“It is necessary to take into consideration, not only the actual words used, but the context of the words, and the persons to whom the communications were made.”*

### **The burden and standard of proof**

[38] It is a common doctrine in law that he who asserts must prove.<sup>27</sup> The same holds true in proceedings for defamation. In order for a claimant to succeed in his defamation action, the claimant is required to establish the following: -

- i. that the words or statements were defamatory;
- ii. that the words referred to him; and
- iii. that the purported words were published to at least one person other than the claimant himself.

### **The intention of the defendant**

[39] It is not a defence to a defamation action that the defendant did not intend to defame the claimant. Byron JA, in the Eastern Caribbean Court of Appeal decision of **Carasco v Cenac**,<sup>28</sup> held that it is irrelevant that the defendant did not intend the words he used to be understood in a defamatory sense. Further, the Appellate Court Judge also found that the intention of the defendant may be

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<sup>26</sup> [1897] AC 68, 72

<sup>27</sup> See – Chapter 11 page 150, paragraph 351 of Gatley on Libel and Slander, which states that the claimant establishes a *prima facie* cause of action as soon as he proves the publication of defamatory words.

<sup>28</sup> (1995) Court of Appeal, OECS, Civ App No 6 of 1994 (unreported)

material to the assessment of damages, but it is immaterial in determining whether the words were defamatory or not.<sup>29</sup>

## Defences

- [40] In defamation proceedings, defamatory statements are presumed to be untrue; but if the defendant can prove that his statement was true of the claimant, he will have a complete defence, for the claimant is not entitled to protect a reputation he does not really possess. Previously, this was more commonly known as the defence of justification, but is now known as the defence of 'truth'.<sup>30</sup>
- [41] The Defamation Act identifies four possible defences which a defendant may seek to rely on in order to defend himself against a defamation claim.<sup>31</sup> They include but are not limited to: the defence of truth, the defence of fair comment, the defence of innocent dissemination and the defence of qualified privilege.

## The defence of truth

- [42] Section 20(2) and (3) of the Act provides as follows: -

*“20(2) In proceedings for defamation based on only some of the matter contained in a publication, the defendant may allege and prove any facts contained in the whole of the publication.*

*(3) In proceedings for defamation, a defence of truth shall succeed if –*

*(a) the defendant proves that the imputations contained in the matter that is the subject of the proceedings were true, or not materially different from the truth; or*

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<sup>29</sup> The authority of **Bacchus v Bacchus** [1973] LRG 115 (High Court, Guyana) demonstrates that the court should also take into account the prevailing public attitudes in the particular jurisdiction.

<sup>30</sup> See – Page 252 of the Commonwealth Caribbean Tort Law, 5<sup>th</sup> Edition, authored by Gilbert Kodilinye.

<sup>31</sup> See – Section 19(1) of The Defamation Act, 2013 which states that: “A defence under this Part is additional to any other defence or exclusion of liability available to the defendant apart from this Act and does not of itself vitiate, limit or abrogate any other defence or exclusion of liability.”

*(b) where the proceedings are based on all or any of the matter contained in a publication, the defendant proves that the publication taken as a whole was in substance true, or was in substance not materially different from the truth, if the words not proven to be true do not materially injure the claimant's reputation having regard to the truth of the remaining imputations."*

[43] At common law, it is presumed that the statements are defamatory, in the claimant's favour.<sup>32</sup> However, if a defendant can prove the truth of the defamatory statements, then this will defeat the claimant's claim.<sup>33 34</sup>

### **The defence of fair comment**

[44] Section 21(1) of the Act reads: -

*"21. – (1) In an action for defamation in respect of words, including or consisting of expression of opinion, a defence of fair comment shall not fail only because the defendant has failed to prove the truth of every relevant assertion of fact relied on by him as a foundation for the opinion, provided that such of the assertions as are proved to be true are relevant and afford a foundation for the opinion."*

[45] At page 275 of his text, Professor Kodilinye provides the rationale and public policy for this defence.<sup>35</sup> He stated as follows: -

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<sup>32</sup> The law presumes that every man is of good repute until the contrary is proved; consequently, it is for the defendant to plead and prove that the defamatory words are true and substantially true.

<sup>33</sup> See – Winfield and Jolowicz, n 19, p 416

<sup>34</sup> See – Page 274 of the 5<sup>th</sup> edition of the Commonwealth Caribbean Tort Law. Mr Kodilinye states that at the common law, every material charge must be justified. He further states that if the defendant made four distinct allegations and only succeeds in proving the truth of three of them, then the defence will fail altogether. It should be noted, that these circumstances will likely be relevant in assessing damages.

<sup>35</sup> See – **Silkin v Beaverbrook Newspapers Ltd** [1958] 2 All ER 516, at 517 per Diplock J: *"Freedom of speech, like the other fundamental freedoms, is freedom under the law, and over the years the law has maintained a balance between, on the one hand, the right of the individual...whether he is in public life or not, to his unsullied reputation if he deserves it, and on the other hand, but equally important, the right of the public... to express their views honestly and fearlessly on matters of public interest, even though that involved strong criticism of the conduct of public people."*

*“It is important to preserve the fundamental right to freedom of expression, and the defence is available to all who comment ‘fairly’ (within the legal definition)<sup>36</sup> on all matters which may be said to be the legitimate concern of the public. Although the defence is particularly useful to publishers of newspapers, it is not the exclusive preserve of the press.”*

[46] At common law, it is recognized that the matter commented on must be one of public interest, including but not limited to the following, the affairs of government, the administration of justice, the public conduct of those who hold or seek public office or positions of public trust.<sup>37</sup>

[47] Importantly, in order to successfully rely on this defence, a defendant is required to prove the following: -

- i. that the statement is a comment or opinion and not an assertion of fact;
- ii. that the comment is based upon true facts;
- iii. that the comment is ‘honestly’ made;<sup>38</sup> and
- iv. that the comment is not actuated by malice.<sup>39</sup>

[48] The authorities demonstrate that it is a fine line of demarcation between comment and invective. The dicta of Lord Porter in the authority of **Turner v Metro-Goldwyn-Mayer Pictures Ltd.**<sup>40</sup> outlines the test that can be employed

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<sup>36</sup> The term ‘Fairly’ is defined in Black’s Law Dictionary as ‘justly, rightly, equitably’.

<sup>37</sup> See – Page 276 of the Commonwealth Caribbean Tort Law, 5<sup>th</sup> Edition by Gilbert Kodilinye

<sup>38</sup> See – Page 277 of the Commonwealth Caribbean Tort Law, 5<sup>th</sup> Edition by Gilbert Kodilinye. Mr Kodilinye states: *“‘Honest’ here means ‘genuinely held’. Provided that the defendant expresses his genuine opinion on the subject matter, he will have a defence, notwithstanding that his opinion may have been biased, prejudiced, exaggerated or irrational. But the Defendant is not entitled to cast defamatory aspersions on the personal character of the claimant, or to ascribe to him base, dishonest or corrupt motives. If he does so, he steps outside the boundaries of the defence.”*

<sup>39</sup> See – Page 277 of the Commonwealth Caribbean Tort Law, 5<sup>th</sup> Edition by Gilbert Kodilinye. Mr Kodilinye states: - *“The word ‘malice’ is used here in the sense of ‘a corrupt or wrong motive, or making use of the occasion for some indirect purpose’. The claimant has the onus of proving malice on the defendant’s part.”*

<sup>40</sup> [1950] 1 All ER 449, at 461

by the court in order to determine the honesty of the writer of purported defamatory matter. Lord Porter stated: -

*“... the question is not whether the comment is justified in the eyes of the judge or jury, but whether it is the honest expression of the commentator’s real view and not merely abuse or invective under the guise of criticism.”*

[49] Evidence of malice will defeat the defence of fair comment. Professor Kodilinye, in reference to the authority of **Chokolingo v Chokolingo**<sup>41</sup> states, at page 309 of his text, as follows: -

*“Actual malice’ does not necessarily mean personal spite or ill-will, and it may exist even though there is no spite or desire for vengeance in the ordinary sense. Malice here means any indirect motive other than a sense of duty to publish the material complained of and, in essence, it amounts to making use of the occasion for some improper purpose, such as where a defamatory statement is published in order to obtain a private advantage unconnected with the duty or the interest which constitutes the reason for the privilege.”*

[50] Professor Kodilinye further states: -

*“The onus of proving malice rests on the claimant. Evidence of malice may be either intrinsic (that is, found in the words themselves) or extrinsic (that is, found in external circumstances unconnected with the publication itself). There may be intrinsic evidence of malice where the language used by the defendant is violent, insulting or utterly disproportionate to the facts. However, it has been said that, when considering whether the actual expressions used can be treated as evidence of malice, ‘the law does not weigh words in a ‘hair balance’ and if, in the circumstances, the defendant might honestly and reasonably have believed that his words were true and necessary for his purpose, he will not lose the protection of privilege because he expressed himself in excessively strong or exaggerated language.”*

[51] In the authority of **Barrow v Caribbean Publishing Co. Ltd.**<sup>42</sup>, the claimant, the then Premier of Barbados, brought an action against the publishers and the

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<sup>41</sup> (2004) High Court, Trinidad and Tobago, No CV 2685 of 1992 (unreported)



editor of the defendant newspaper, seeking damages for an alleged libel. The proceedings centred on the publication dated 15 August 1965 and specifically, an article entitled “The White Lie” in the Barbados Sunday News.

**[52]** The content of the article was a commentary on the White Paper, “The Federal Negotiations 1962-65 and Constitutional Proposals for Barbados”, which was laid before the Legislature by order of the Cabinet and which was published by the authority of the Government of Barbados. The claimant argued that the article constituted personal abuse against him and abuse of the Government of Barbados and that it meant that he was not entitled to any reputation for honesty and integrity. The defendants denied that the article referred to the plaintiff or was defamatory. Their defence was based on that of fair comment on a matter of public interest. During the trial, the issues which the court determined included whether the article was actuated by malice and whether it constituted fair comment.

**[53]** Douglas CJ, at page 189, paragraphs F to H had the following to say: -

*“On the face of it, the article complained of is a critique of the White Paper and an expression of opinion on what it contains. There can be no doubt that the White Paper, dealing as it does with constitutional proposals for Barbados, is a matter of public interest.*

*The only issues are whether the article was actuated by malice and whether it constitutes fair comment in the sense of being honest comment on a matter of public interest.*

*On the first question, there is no evidence of personal animosity or aversion between the writer of the article, Mr Nigel Barrow, and the plaintiff, or between the second defendant and the plaintiff. In that state of the evidence, counsel asks the court to infer malice from the language of the article itself.”*

**[54]** Further, at page 191, paragraph B, Douglas CJ made the following observations:

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*“The onus of showing that the article is a fair comment on the White Paper in the sense of expressing views honestly held for which there is some foundation rests on the defence. In deciding whether this onus has been discharged, weight must be given to the fact that the article dealt with the matter of the greatest public importance; that it was the duty of the press to submit the White Paper proposals to the most careful scrutiny and that there were certain inaccurate and misleading statements in a document which is part of the recorded history of this country.”*

**[55]** At paragraphs D to E of page 191, Douglas CJ made the following pronouncements: -

*“On the whole, in my view, the article is severe, but honestly-held comment on a public document. It is only in the words complained of in sub-para. (ix) of para. 6 of the Statement of Claim, namely, “Truth and honesty are irrelevant considerations, if considerations at all”, that the writer has gone too far and crossed the line between fair comment and personal invective. These words are a serious imputation against the author of the White Paper taxing him in effect with cynical irresponsibility and conduct reprehensible in a man of his position. Up to that point, the writer was criticising the contents of the White Paper but he allowed himself to be carried away into attacking the personal character of its author.”*

**[56]** In the result, the court found that the claimant was entitled to damages against the defendants jointly and severally of a modest sum of Two Thousand Four Hundred Dollars.<sup>43</sup>

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<sup>43</sup> See also – *Joynt v Clyde Trade Publishing Company* [1904] 2 QB 292, at page 294, per Kennedy J

## SUMMARY OF SUBMISSIONS

### *The submissions advanced on behalf of the Claimant*

[57] Learned Counsel Ms Stephanie Williams, in her detailed and comprehensive written submissions, asserted that the statements made in the subject book, of which Mr Anderson complains, when given their ordinary and natural meaning, are defamatory of Mr Anderson. Ms Williams asserted further that the ordinary reader of the subject book would draw the conclusion that Mr Anderson was a corrupt, uncaring and incompetent judge. In an attempt to support these assertions, Ms Williams relied on the authority of **Easton Douglas, Dr. Conrad Douglas and Environment Science and Technology Ltd. v The Jamaica Observer Ltd. and John Maxwell**.<sup>44</sup>

[58] Ms Williams maintained that Mr Clacken has not complied with the statutory requirement to prove that the statements contained in the subject book are true and are true of Mr Anderson. As a consequence, Ms Williams submitted, the defences of truth and fair comment must, of necessity, fail.

[59] In this regard, the Court was referred to the authorities of **Cheng Albert and Anor v Tse Wai Chun Paul**<sup>45</sup> and **London Artists Ltd. v Littler**.<sup>46</sup>

### *The submissions advanced by the Defendant*

[60] At the commencement of the trial of the instant matter, Mr Clacken informed the Court that he was advised that his Counsel was unwell and was unable to attend the trial of the matter. Mr Clacken expressed a desire to proceed with the trial, in the present instance, in the absence of his Attorney-at-Law. The Court was careful to explain to Mr Clacken the implications and ramifications of his decision and enquired of him, whether he understood the effect of his decision to proceed as an unrepresented litigant. Mr Clacken indicated to the Court that he did, at which time, the Court commenced the trial of the matter.

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<sup>44</sup> [2012] JMSC Civ 101

<sup>45</sup> (2000) 10 BHRC 525

<sup>46</sup> [1969] 2 All E.R. 193 t

**[61]** Additionally, the Court Clerk placed several telephone calls to the Attorney-at-Law on record for Mr Clacken, prior to the commencement of and during the trial of this matter. The Court was advised that none of those telephone calls were answered and that, as at the date of the delivery of this Judgment, there has been no word from Counsel.

**[62]** At the conclusion of the reception of the evidence in the instant matter, Mr Clacken prepared a typed document entitled “Submissions”, which contains his assertions in respect of the issues to be determined by the Court. The main thrust of those submissions is set out below: -

- i. The cover, title, image and graphics of the subject book apply to the Justice System of Jamaica and is specifically a strong call to fix the system;
- ii. There was no attempt to disparage or defame anyone;
- iii. The subject book contains facts and truth and that where poor judgment was experienced, it was factually stated;
- iv. Specific critical reference to Mr Anderson is restricted to less than three (3) pages in the subject book, which contains a total of three hundred and fourteen (314) pages;
- v. In the paragraphs within the subject book, which contain a specific, critical reference to Mr Anderson and his conduct of the matter involving Mr Clacken as Petitioner, he [Mr Clacken] stands by those statements.

## **ANALYSIS**

### **Discussion and Findings**

- [63]** The starting point of any analysis of the considerations raised in the present instance, must be with a discussion of the following issues: -
- a. Whether the impugned statements are defamatory in nature;
  - b. Whether the impugned statements refer to Mr Anderson;
  - c. Whether the impugned statements have been published to at least one (1) person, other than Mr Anderson.
- [64]** The issue of whether the statements contained in the subject book, of which Mr Anderson complains, contain defamatory imputations of him, is not a complex one.
- [65]** The authorities are clear that a statement is 'defamatory' of the person of whom it is published if it tends to lower him in the estimation of right-thinking members of society. It is equally clear that a person's reputation is not confined to his general character and standing but extends to his trade, business or profession and that words will be defamatory if they impute a lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of his trade, business or professional activity. Consequently, a statement can also be deemed to be defamatory if it disparages a person in his office, profession, calling, trade or business.
- [66]** The Court finds that the statements contained in the subject book, of which Mr Anderson complains, are defamatory of him. The Court so finds for the reason that, the words contained in those impugned statements, when given their natural and ordinary meaning, tend to lower Mr Anderson in the estimation of right-thinking members of society. In coming to this finding, the Court also has regard to the subject book in its entirety, including its title and the words as well as the graphics displayed on its cover. The Court finds that the impugned material

ascribes a lack of skill, judgment and efficiency, on the part of Mr Anderson, in the discharge of his functions as a judicial officer.

**[67]** The Court also finds that the impugned material was published to at least one (1) person other than Mr Anderson. In this regard, the Court accepts the evidence of Mr Anderson, that he was alerted to the fact of the publication of the subject book by a telephone conversation which he had with a member of the legal fraternity. This evidence has not been challenged by Mr Clacken.

**[68]** Additionally, the Court accepts the evidence of Mr Clacken that he caused the subject book to be published and distributed by LMH Publishing Limited, in or around 2015 and that it remains available for purchase in hard copy (paperback), in local bookstores and electronically (Kindle and Kindle Unlimited), on Amazon, an international, e-commerce website, as well as other international e-commerce websites.

**[69]** The Court makes the following findings of fact: -

- a. That the subject book was authored by Mr Clacken who caused same to be published and distributed;
- b. That Mr Clacken caused the subject book to be published and distributed by LMH Distributors Limited;
- c. That the subject book was first published in hardcopy (Paperback format) and electronic format (on Kindle, Kindle Unlimited, Barnes & Noble and Amazon, international e-commerce websites), on or about 22 November 2015;
- d. That the intent of Mr Clacken was to have the subject book published worldwide;
- e. That the subject book was published to at least one (1) person other than Mr Anderson;
- f. That the statements of which Mr Anderson complains were published in the subject book;

- g. That the statements of which Mr Anderson complains are defamatory in nature;
- h. That the statements of which Mr Anderson complains constitute defamatory imputations of him;
- i. That in some instances Mr Anderson was specifically named in the subject book;
- j. That the statements of which Mr Anderson complains disparaged him in his capacity as a Judge of the Supreme Court of Judicature of Jamaica, as a retired Judge of the Supreme Court of Judicature of Jamaica and as an Attorney-at-Law;
- k. That the effect of the words used in the statements of which Mr Anderson complains, when given their natural and ordinary meaning, was to lower him in the estimation of right-thinking members of society;
- l. That Mr Anderson presided over the matter brought in Claim No. 2008 HCV 01834, in the Revenue Division of the Supreme Court of Judicature of Jamaica, between Dwight Clacken and Lynne Clacken vs Michael Causwell, Richard Causwell and Equipment Maintenance Limited (EML);
- m. That the statements of which Mr Anderson complains were made in relation to his handling of the matter brought in Claim No. 2008 HCV 01834, in his capacity as a judicial officer;
- n. That, as a part of his handling of the matter brought in Claim No. 2008 HCV 01834, Mr Anderson, at the request of the parties' respective Attorneys-at-Law, sought to assist the parties in arriving at a settlement agreement, by facilitating negotiations among them;
- o. That the parties were unable to arrive at a settlement;
- p. That, when it became clear that the matter brought in Claim No. 2008 HCV 01834 could not be resolved, Mr Anderson reverted the matter to case management and made an Order that the matter be

fixed for a Case Management Conference Hearing, before another judge;

- q. That the words used in the impugned statements which are made on pages 97 and 98 of the subject book, when given their natural and ordinary meaning and in the context of the subject book in its entirety, including its title as well as the graphics displayed on its cover, mean that Mr Anderson, in his capacity as a judicial officer:
- i. refused to entertain the Clackens' complaints;
  - ii. acted corruptly or improperly or was biased against Mr Clacken;
  - iii. misconducted himself while holding judicial office;
  - iv. was not fit for judicial office;
  - v. improperly tolerated lies and manipulations by the respondents to the petition;
  - vi. provided official protection from consequence to these offenders;
  - vii. acted throughout the proceedings as a facilitator of the alleged corruption on the part of the respondents to the petition;
  - viii. was complicit with the alleged corrupt and dishonest behaviour of the respondents.
- r. That the words used in the impugned statements which are made on page 99 of the subject book, when given their natural and ordinary meaning and in the context of the subject book in its entirety, including its title as well as the graphics displayed on its cover, mean:
- i. that Mr Anderson, in his capacity as a judicial officer, was uncaring about the plight of litigants and in particular, about the legal costs of adjourned proceedings;



- ii. that Mr Anderson, in his capacity as a judicial officer, made decisions regarding adjournments in an arbitrary and unjust manner and in particular, as it related to Mr Clacken's petition;
  - iii. that Mr Anderson, in his capacity as a judicial officer, was aware of a conspiracy between some litigants and the registry of the Supreme Court of Judicature of Jamaica and made no effort to put a stop to it or to sanction it in any way;
  - iv. that this corruption within the registry and the judiciary, to include Mr Anderson, almost permeated the entire Jamaican Justice System and that every participant was involved;
  - v. that Mr Anderson was an active participant in these corrupt and improper practices;
  - vi. that Mr Anderson acted dishonestly in his judicial capacity.
- s. That the words used in the impugned statements which are made on page 100 of the subject book, when given their natural and ordinary meaning and in the context of the subject book in its entirety, including its title as well as the graphics displayed on its cover, mean that Mr Anderson, in his capacity as a judicial officer:
- i. was involved with the Attorneys-at-Law in conspiring to adjourn the hearing of the matter against the wishes of the Clackens;
  - ii. struck this conspiracy to further an improper personal agenda common to the lawyers and himself;
  - iii. intervened in counsel's conduct of their respective cases, without invitation and did so because he was connected to the litigation;

- iv. had a personal and improper motive for inserting himself into the conduct of the case by counsel;
  - v. interfered in the matter with the specific intention of influencing the outcome and/or perverting the course of justice.
- t. That the words used in the impugned statements which are made on pages 101 and 102 of the subject book, when given their natural and ordinary meaning and in the context of the subject book in its entirety, including its title as well as the graphics displayed on its cover, mean that Mr Anderson, in his capacity as a judicial officer:
- i. acted in a manner unbecoming of a Supreme Court Judge;
  - ii. allowed his personal feelings to overcome his professional objectivity as a judge;
  - iii. acted more on behalf of the Clackens' opponents in the case than as an objective adjudicator;
  - iv. acted out of a desire and expectation of personal gain;
  - v. intended to convince the Clackens to capitulate unnecessarily, in order to further his own private ends;
  - vi. is dishonest as an individual and is a corrupt judge;
  - vii. deliberately and improperly acted against the Clackens' interest;
  - viii. was incompetent at best and corrupt at worst;
  - ix. was unfit to be a judge of the Supreme Court;
  - x. chose to 'remove' an injunction as an act of reprisal against Mr Clacken and the other claimant because of his disagreement with their refusal of the settlement offer;

- xi. acted unjustly towards the petitioners, including Mr Clacken;
- xii. deliberately used his judicial office to cause the Clackens harm and succeeded in doing so to the tune of at least JMD\$ 80 Million.

**[70]** The Court also finds as a fact the following: -

- a. that Mr Anderson was sent a package from a member of the legal fraternity containing several pages from the subject book;
- b. that as a result, Mr Anderson purchased a copy of the subject book;
- c. that Mr Anderson was not contacted by Mr Clacken for a comment on the allegations and assertions contained in the subject book neither before the book was published nor at any time thereafter;
- d. that Mr Anderson instructed his Attorneys-at-Law to send a letter of demand, dated 31 May 2016, to Mr Clacken, demanding that he [Mr Clacken] retracts the defamatory material and/or publicly apologizes to him [Mr Anderson];
- e. that Mr Clacken refused to retract the defamatory material, to publicly apologize to Mr Anderson and/or to offer Mr Anderson any form of legitimate or sufficient amends.

**[71]** Regrettably, the Court finds that Mr Clacken has met neither the evidential burden nor the legal burden, in respect of the defences of truth and of fair comment, which he has raised. The Court finds that Mr Clacken has not established his defence of truth for the reasons that: -

- a. he has not proven, on a preponderance of the evidence, that the imputations contained in the subject book are true or are not materially different from the truth;

- b. he has not proven, on a preponderance of the evidence, that the subject book, taken as a whole, was in substance true, or, was, in substance, not materially different from the truth.

**[72]** In order to successfully rely on the defence of fair comment, Mr Clacken is required to prove that the statements made in the subject book are comments or opinions and not assertions of fact on matters of public interest; and that the comments are based on true facts and are honestly made. Further, Mr Clacken is required to prove that the statements made in the subject book were not actuated by malice.

**[73]** The authorities make it clear that the onus is on Mr Anderson to successfully prove that Mr Clacken's comments were actuated by malice. The Court finds that Mr Anderson has successfully proven that the statements made in relation to his handling of the matter which was brought in Claim No. 2008 HCV 01834 and which were published in the subject book, were actuated by malice, in that, they were published with an indirect motive.

**[74]** The Court finds that Mr Anderson has successfully proven malice on the part of Mr Clacken for the reasons that: -

- a. The defamatory statements about Mr Anderson's handling of the matter which was brought in Claim No. 2008 HCV 01834, were published by Mr Clacken with an indirect motive, that is, other than a duty to publish material of public interest regarding the administration of justice;
- b. Evidence of intrinsic malice can be detected in the words and statements themselves, as the language used by Mr Clacken is disproportionate to the facts;
- c. Evidence of extrinsic malice can be derived from the external circumstances unconnected with the publication itself.

**[75]** The Court finds that Mr Clacken has not established his defence of fair comment for the reasons that: -

- a. The statements contained in the subject book were not honestly made, as they cast defamatory aspersions on the personal character of Mr Anderson, though that may not have been Mr Clacken's intended effect;
- b. The statements contained in the subject book ascribed to Mr Anderson, base, dishonest or corrupt motives in his handling of the matter which was brought in Claim No. 2008 HCV 01834, which goes outside of the boundaries prescribed by the authorities in respect of this defence;
- c. Mr Clacken's comments were not based on a true representation of the facts;
- d. Mr Clacken's comments were actuated by malice.

**[76]** In the result, the Court finds for Mr Anderson on the issue of liability.

### **Assessment of Damages**

#### **The approach of the court**

**[77]** The statutory remedies, as outlined in the Act, which are available to a claimant in an action for defamation are Damages, a Declaration and/or a Correction.

**[78]** Where an award of damages is found to be appropriate, the court must ensure that there is an appropriate and rational relationship between the harm sustained by the claimant and the amount of damages awarded.<sup>47</sup> The judge may assess damages in a single sum, if the court finds for the claimant as to more than one

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<sup>47</sup> As defamation is a tort, the remoteness of damage ought to be considered by the court as well; the damage complained of as a result of a defamatory statement must not be too remote. The claimant may only recover compensation for those consequences of the defendant's defamatory statements which were foreseeable.

cause of action.<sup>48</sup> Importantly, there are mitigation factors that the court can consider when contemplating an award of damages.<sup>49</sup>

[79] Panton P in the Court of Appeal authority of **The Jamaica Observer Ltd v Orville Mattis**,<sup>50</sup> stated the position thus: -

*“17. It takes years to build a good name and reputation. On the other hand, it takes only a few reckless lines in a newspaper to destroy or seriously damage that name or reputation. The damage usually remains for a good while. Section 22 of the Constitution gives a right to free speech, but it does not permit defamation of one’s good character. When such damage has been proven, adequate compensation should follow.”*

[80] The aim of an award of damages in defamation proceedings includes: - <sup>51</sup>

*“...the natural injury to his feelings, the natural grief and distress which he may have felt at having been spoken of in defamatory terms, and, if there has been any kind of high-handed, oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering caused by the defamation and may constitute injury to the [claimant’s] pride and self-confidence, these are proper elements to be taken into account.”* <sup>52</sup>

[81] Lord Hoffman in delivering the decision of the Board of the Privy Council, in the authority of **The Gleaner Company Ltd and Dudley Stokes v Eric Abrahams**,<sup>53</sup> explained that: -

*“In addition, as this case amply illustrates, there are other differences between general damages in personal injury cases and general damages in defamation actions. One is that the damages must be sufficient to demonstrate to the public that the plaintiff’s reputation has been vindicated. Particularly if the defendant has not apologised and withdrawn the defamatory allegations, the award must show that they have been publicly proclaimed to have inflicted a serious injury. As Lord*

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<sup>48</sup> See – Section 26 of The Defamation Act, 2013.

<sup>49</sup> See – Section 25(1) of The Defamation Act, 2013.

<sup>50</sup> JM 2011 CA 32

<sup>51</sup> See – **Rantzen v Mirror Group Newspapers Ltd and Others** [1994] QB 670, at page 695.

<sup>52</sup> See – **McCarey v Associated Newspapers Ltd (No. 2)** [1965] 2 KB 86, at 104 per Pearson LJ

<sup>53</sup> [2003] UKPC 55 (14 July 2003)

*Hailsham of St Marylebone LC said in Broome v Cassel & Co Ltd [1972] AC 1027, 1071, the plaintiff ‘must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge.’”*

- [82] The authorities suggest that there is a wide bracket within which damages in defamatory proceedings may fall. In the authority of **Cassell & Co. Ltd. v Broome**,<sup>54</sup> Lord Reid made it plain that: -

*“Damages for any tort are or ought to be fixed at a sum which will compensate the plaintiff, so far as money can do it, for all the injury which he has suffered. Where the injury is material and has been ascertained it is generally possible to assess damages with some precision. **But that is not so where he has been caused mental distress or where his reputation has been attacked – where to use the traditional phrase he has been held up to hatred, ridicule or contempt. Not only is it impossible to ascertain how far other people’s minds have been affected, it is almost impossible to equate the damage to a sum of money. Any one person trying to fix a sum as compensation will probably find in his mind a wide bracket within which any sum could be regarded by him as not unreasonable – and different people will come to different conclusions. So in the end there will probably be a wide gap between the sum which on an objective view could be regarded as the least and the sum which could be regarded as the most to which the plaintiff is entitled as compensation.**”*

*[Emphasis supplied]*

- [83] Notably, Sir Thomas Bingham MR made the following pronouncements in the authority of **John v MGN Ltd.**: -<sup>55</sup>

*“In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff’s personal*

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<sup>54</sup> [1972] 1 All ER 801 at page 836

<sup>55</sup> [1997] Q.B. 586 at page 607

*integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be.”*<sup>56</sup>

[84] In the authority of **Emanuel v Lawrence**,<sup>57</sup> Harriprashad-Charles J (Ag.) (as she then was), identified six factors which are to be taken into account in awarding damage in defamation proceedings: -

*“(1) the conduct of the plaintiff; ”*<sup>58</sup>

*(2) his position and standing; ”*<sup>59</sup>

*(3) the nature of the libel; ”*<sup>60</sup>

*(4) the mode and extent of the publication; ”*<sup>61</sup>

*(5) injury to the plaintiff(s) feeling, including aggravating factors; ”*<sup>62 63</sup> and

*(6) mitigating factors”.*<sup>64</sup>

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<sup>56</sup> This case was referenced by the Board of the Privy Council in the authority of **The Gleaner and Dudley Stokes v Eric Abrahams**. The Board stated: *“In the case of any tort, liability to pay damages as compensation for loss or harm is capable of having some deterrent or exemplary effect and this is particularly true of defamation; first, because it is an intentional tort and secondly because the conduct of the defendant is capable of aggravating the damages. It is true that in Broome v Cassel & Co Ltd [1972] AC 1027, 1077 Lord Hailsham of St Marylebone LC said that compensatory and exemplary damages were ‘as incompatible as oil and vinegar’ but most judges have accepted that in many cases the two purposes are inextricably mixed. The monetary value which a society places upon reputation and freedom from unjustified shame and humiliation is bound to be a conventional figure. The higher it is set, the greater the deterrence.”*

<sup>57</sup> Civil Suit No. 448 of 1995

<sup>58</sup> This is to the extent that the plaintiff may have contributed to the publication of the defamation or damage to his reputation.

<sup>59</sup> This also includes the social or professional status of the claimant.

<sup>60</sup> This includes the extent of the publication, the extent of the circulation of a newspaper or book in which the defamatory matter was published.

<sup>61</sup> The court may also consider the influence that the particular newspaper, magazine, book or broadcast programme has on the minds of the reasonable reader or viewer.

<sup>62</sup> Notably, at common law, if the defendant pursues a plea of justification or truth and during the course of the trial, this defence fails, then the judge ought to take this into account, when assessing damages. The judge also ought to consider whether the defamatory matter was published deliberately and wilfully, or merely by mistake or carelessness. Additionally, if the trial judge makes a finding that there was express malice on the defendant’s part, then this is also a factor that can be taken into consideration by the trial judge when assessing damages.

<sup>63</sup> Importantly, where the plaintiff can show actual damage to his reputation, this is a factor which will also be taken into consideration by the court.

<sup>64</sup> An example of a mitigating factor taken into consideration is whether the defendant made an apology to the claimant.



## Aggravated Damages

[85] In defamation proceedings, an award of aggravated damages may be on the basis of the defendant's malice, persistence in an ill-founded plea of truth, failure to make an apology, among other factors.

[86] Lord Devlin in **Rookes v Barnard** outlined the parameters for an award of aggravated damages. At page 1221, he stated: -

*"It is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation."*

[87] In the present instance, the claim for aggravated damages is supported by the following: -

- a. That the subject book was published with a sensational and eye catching cover which depicts words such as "fraud", "extortion", "kickbacks", "corruption", "scam", "bribery" and "Ponzi";
- b. That notwithstanding the seriousness of the allegations made against Mr Anderson, Mr Clacken made no attempt to contact the former, prior to the publication of the subject book. Mr Anderson invites the Court to infer that this was because Mr Clacken suspected the allegations were untrue, but did not want to take any steps which would turn suspicion into certainty;
- c. That in the premises, Mr Clacken published the impugned statements contained in the subject book, knowing that they were false, or recklessly not caring whether they were true or false, in the hope and expectation that the prospect of financial gain outweighed the risk of paying any or any substantial damages to Mr Anderson;

d. That the subject book is being sold via the internet notwithstanding notification to Mr Clacken of the defamatory material which it contains.

[88] In this regard, Ms Williams submitted that the subject book has been distributed in Jamaica and worldwide by way of the internet and, importantly, that it was the intention of Mr Clacken to publish the subject book worldwide.<sup>65</sup>

[89] It was further submitted that Mr Clacken received a letter of demand, dated 31 May 2016, which was sent to him by electronic mail (“email”) to his email address. Subsequently, Mr Clacken retained Counsel who made contact with Mr Anderson’s legal team. During that time and to present, Mr Clacken has failed or refused to retract the statements of which Mr Anderson complains or to publicly apologize to him [Mr Anderson] or to offer any form of legitimate or sufficient amends to him [Mr Anderson].

[90] Ms Williams relied on the Court of Appeal authority of **The Gleaner Company Limited and Dudley Stokes v Eric Anthony Abrahams**.<sup>66</sup> Ms Williams indicated to the Court that, although the award which was made in the authority of **Eric Anthony Abrahams**, of JMD\$35 Million, updates to Two Hundred and Eleven Million Nine Hundred and Ninety Thousand Five Hundred and Twenty-One Dollars (JMD\$211,990,521.00),<sup>67</sup> in February 2023, Mr Anderson seeks an award of JMD\$100 Million.

[91] The Court observes that the circumstances in the present instance can readily be distinguished from those which existed in the **Eric Anthony Abrahams** authority. The Court makes the following observations: -

a. Mr Abrahams was the Minister of Tourism for Jamaica, a Rhodes Scholar and past President of both the West Indies Society and the Oxford Union, a debating society;

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<sup>65</sup> See – Paragraphs 19 and 20 of the Particulars of Claim, which was filed on 15 December 2016.

<sup>66</sup> Supreme Court Civil Appeal No. 70/96 Neutral Citation: JM 2000 CA 25

<sup>67</sup> Using the CPI of 127.8 and dividing that sum by 21.1, the applicable CPI in July 2000 when the judgment of the Court of Appeal was delivered.

- b. Mr Abrahams was a past Chairman of the Jamaica Tourist Board. He owned his own private tourism consultancy business and worked with the Organization of American States (OAS), the Governments of El Salvador, Grenada, St. Lucia, Haiti and Bolivia as well as Eastern Airlines;
- c. Mr Abrahams was a Member of Parliament;
- d. The defamatory statements alleged that Mr Abrahams was receiving bribes and/or kickbacks from contracts awarded by the Jamaica Tourist Board, in the 1980s;
- e. The effect of the defamatory publications caused Mr Abrahams to be treated universally, with hostility and contempt and he found himself at the receiving end of public taunting and name-calling;
- f. Mr Abrahams was socially ostracized and no one would conduct business with him. As a result, Mr Abrahams became depressed, withdrawn and prone to weeping;
- g. Mr Abrahams' tourism consultancy business collapsed and apart from his salary as a Member of Parliament, he had no income;<sup>68</sup>
- h. Mr Abrahams was unable to obtain employment for a period of five (5) years.<sup>69 70</sup>

[92] In contrast, there is no evidence before the Court which indicates that: -

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<sup>68</sup> See – Paragraphs 26 and 27 of **The Gleaner Company Limited & Dudley Stokes v Eric Abrahams** [2003] UKPC 55. Mr Abrahams was offered a position as a radio talk show host with Power 106, a company affiliated with The Gleaner Company in 1992. However, he refused this opportunity.

<sup>69</sup> See – Lord Hoffman in delivering the judgment of the Board of the Privy Council made reference to the test for deciding whether an award is excessive, as propounded by Neill LJ in the authority of **Rantzen**.

<sup>70</sup> See also – **Television New Zealand Ltd. v Quinn** [1996] 3 NZLR 24, 37. In the Court of Appeal judgment, Forté P rephrased the test and stated it as follows: “*Could a reasonable jury have thought that this award was one which was reasonable to compensate the plaintiff and to re-establish his reputation?*”

- a. Mr Anderson suffered any pecuniary or specific losses as a consequence of the publication of the defamatory material;
- b. Mr Anderson has lost any of the positions which he has held or currently holds, as a consequence of the publication of the defamatory material;
- c. Mr Anderson's ability to obtain future employment has been or would be negatively affected by the publication of the defamatory material;
- d. Mr Anderson has been stripped of any awards, accolades or achievements which he has attained, as a consequence of the publication of the defamatory material.

**[93]** For those reasons, this Court is of the view that the award of damages which has been claimed ought properly to be adjusted downwards and that an award in the sum of JMD\$80 Million would be appropriate in all the circumstances.

**[94]** Additionally, for the same reasons outlined at paragraph **[92]** above, this Court also finds that the circumstances do not warrant the grant of a separate award of Aggravated Damages.

**[95]** Finally, Ms Williams indicated to the Court that the claim for Exemplary Damages is being withdrawn. For that reason, the Court makes no award of Exemplary Damages.

## **DISPOSITION**

**[96]** It is hereby ordered as follows: -

1. Judgment for the Claimant, Roy K. Anderson;
2. General Damages are assessed and awarded to the Claimant, Roy K. Anderson, against the Defendant, Dwight Clacken, in the sum of

Eighty Million Dollars (\$80,000,000.00), with interest thereon at the rate of three percent (3%) per annum, from 22 November 2015 to the date hereof;

3. The Court makes no award in relation to the claim for Aggravated and/or Exemplary Damages;
4. Costs are awarded to the Claimant, Roy K. Anderson against the Defendant, Dwight Clacken and are to be taxed if not sooner agreed;
5. The Claimant's Attorneys-at-Law are to prepare, file and serve these Orders.