[2023] JMSC Civ. 98

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012HCV01524

BETWEEN	**DALE AUSTIN**	**CLAIMANT**
AND	**THE PUBLIC SERVICE COMMISSION**	**1ST DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**

IN OPEN COURT

Miss Judith Clarke and Miss Jamila Thomas instructed by Judith M. Clarke & Co. appeared for the Claimant (who now appears in person by way of Notice of Acting and Change of Attorney-at-Law filed on the 4th April 2022)

Mr. Garth McBean, KC and Miss Dian Johnson instructed by Garth McBean & Co. appeared for the 1st and 2nd Defendants.

Heard: 22nd May and 5th June 2019

Delivered: 7th July 2023

Defamation – Assessment of Damages – Aggravated Damages – Exemplary Damages – Special Damages – Interest – Admissibility of Evidence

L. PUSEY J

[1] This judgement concerns the Defamation proceedings. Unforeseen circumstances created challenges which prevented the timely delivery of this judgement. The Court regrets this inordinate delay and sincerely apologizes.

[2] The Parties were requested to file and exchange written submissions in relation to this matter. Both parties' submissions were received and considered by the Court.

BACKGROUND

[3] Mr. Dale Austin, the Claimant, was a temporary employee in the Attorney General's Chambers as an Assistant Crown Counsel. Upon the expiration of his probationary period on March 4, 2012, Mr. Austin received a letter on March 6, 2012 which stated that his employment was to be terminated with immediate effect.

[4] A meeting was arranged between the Claimant and the Chief Personnel Officer, Dr. Lois Parkes, with the Claimant's Attorney-at-Law, Mr. Ian Wilkinson, on the 7th of March 2012. However, the Claimant's Attorney-at-Law was unavailable for that date and asked, by way of a letter, for the meeting to be rescheduled to the 14th of March 2012 and for the termination letter to be withdrawn. The Chief Personnel Officer declined the proposals by the Claimant's Attorney-at-Law and moved forward with the termination.

[5] The Claimant initiated proceedings against the Defendants by way of Fixed Date Claim Form and Affidavit in Support seeking orders inter alia for Judicial Review of their decision to terminate his employment, damages in respect of same and costs. The Claim was filed on the 28th day of March 2012.

[6] The Claimant later filed a Further Further Amended Fixed Date Claim Form, on the 27th day of November 2014, seeking various reliefs in respect of defamation which arose out of the circumstances surrounding his dismissal. The Court is mindful of the alleged defamation and its alleged effects on the Claimant and will attempt not to unnecessarily rehash the details of same. The Claimant sought general damages, special damages, aggravated damages, and exemplary damages in relation to the defamation claim.

[7] The Defendants, having not filed a Defence within twenty-one (21) days per a Court Order to the further allegations made in the Further Further Amended Fixed Date Claim Form, filed an Application for Court Orders on the 29th of July 2015 for an extension of time to file a Defence. The Order was granted and the Defence

was filed on the 27th day of October 2015. Additionally, The Defendants filed a Notice of Application for Court Orders to have the Judicial Review hearing separated from the Defamation proceedings on the 7th of October 2015 and the order was granted.

[8] Unless orders for specific disclosure were made by Batts J and Pettigrew-Collins J (Ag), as she then was, which if not complied with would result in the Defendants' Statement of Case, in relation to the defamation allegations, being struck out. The Defendants failed to comply with these unless orders and on the 15th of January 2018, the Claimant filed a Notice of Application for Court Orders for the unless orders to be enforced. The Application was considered and granted by K. Anderson J on the 26th day of February 2018 and the Defendants' Statement of Case was struck out.

[9] Subsequently, the Defendants applied for relief from these sanctions on the 25th of January 2018 and the 8th of March 2018. The Applications were refused by M. Gayle J (as he then was) on the 29th of June 2018. Consequently, the matter was set for Assessment of Damages. The Defendants applied to be heard in the hearing and the Parties filed submissions in relation to same. On the 15th of November 2018, K. Anderson J ruled in the Defendants' favour and made orders which permitted them to cross-examine witnesses called by the Claimant, testify in the Assessment of Damages hearing and make submissions on the quantum to be awarded.

THE EVIDENCE

[10] The Claimant's evidence was contained in –

(i) The witness statement of Dale Jodrell Austin filed on September 29, 2017;

(ii) The supplemental witness statement of Dale J. Austin filed on December 19, 2017;

(iii) The further supplemental witness statement of Dale Jodrell Austin filed on October 31, 2018;

(iv) The various Notice of Intentions to Tender into Evidence Hearsay Statements;

which the Court has duly considered in delivering this judgement. The Defendants had no such affidavits or witness statements to rely on for evidence which was a consequence of their failure to comply with the unless orders and its subsequent enforcement. The contents of the evidence will only be referred to as is necessary to explain the position of the Court on a particular issue.

CLAIMANT'S SUBMISSIONS

[11] Counsel for the Claimant begun their submissions relying on the authors of **Gatley on Libel and Slander**. Counsel stated that defamatory words should be considered both in their ordinary sense and by the imputations arising from the words used.

[12] Counsel submitted that the Defendants should not be allowed to give any evidence in relation to the National Intelligence Bureau ("NIB") database as it is deemed an admission of fact since it was never challenged prior to the Defendant's Statement of Case being struck out. Counsel relied on the case of **Anwar Wright v The AG of Jamaica** (unreported) Supreme Court of Jamaica, Claim No. 2009HCV2875 (delivered on the 26th of November 2010). In the aforesaid case it was held that if the Defendant fails to deal with particular allegations, he may be taken to have admitted them.

[13] Counsel submitted that the measure of damages is to put Mr. Austin back in the position he would have been in but for the tort and to include further constituent amounts to vindicate Mr. Austin's reputation. Counsel argued that there are three principles which apply, those are:

(i) Damage is presumed without proof of actual damage.

(ii) Compensation is tri-partite – damages awarded for injury to reputation and feelings and as vindication.

(iii) The Court is at large in awarding the damages.

[14] Counsel relied on the case of **Cassell v Broome** [1972] 1 All ER 801 which was endorsed and relied upon in the case of **The Gleaner Company Limited and Dudley Stokes v Eric Anthony Abrahams** [2004] AC 628 **("Abrahams Case")**, in support of the second principle. In this case the learned judge stated that a person is compensated for two (2) things – as a vindication of the Claimant to the public and as consolation to the Claimant for a wrong done. Counsel further relied on the case of **Cassell v Broome (supra)** in support of the third principle whereby the learned judge indicated that there is no limit to the extent of the damages to be awarded nor is it limited by the pecuniary losses that can be proved.

[15] Counsel submitted that the damage suffered by Mr. Austin as a result of the defamation was both profound and substantial and therefore the sum awarded must be proportionate to the substantial damage sustained and that an appropriate case in assessing damages is the **Abrahams Case**. Counsel indicated that Mr. Austin and the Claimant in **Abrahams Case** sustained similar damage in that they both had mental and psychiatric damage/injuries, financial losses, career losses, public opprobrium, humiliation, distress, hurt feelings and anxiety over the years.

Gravity of the Libel

[16] Counsel submitted that the defamatory imputations in this matter are at the top end of the gravity scale. Counsel argued that the defamation went to the core of Mr. Austin's personal and professional character. He further argued that the endorsement of the letter by the NIB already had grave implications, but it was further underscored by the purported statements that suggested that Mr. Austin was dishonest.

[17] Counsel further argued that the implicit and explicit imputations made from the defamatory statement would inarguably affect Mr. Austin's livelihood and future as an Attorney-at-Law. Counsel stated that the libel was published to Mr. Austin's employer, his colleagues, his offices, other agencies and ministries within the public service, social media and on two databases.

[18] Counsel submitted that the defamatory imputations in the supporting case of **Abrahams (supra)** and in the case at bar are similar in gravity as both imputations suggested criminal conduct.

High Degree of Credence Given to the Defamatory Material

[19] Counsel submitted that the defamatory material coming from NIB and the 1st Defendant would be accepted at face value and this was further supplemented by the dissemination of the defamatory material by the 1st Defendant who is charged with maintaining, at the highest level, integrity, impartiality, accountability, and leadership across the government sector. Therefore, on the face, the material was immediately thought of as potent and credible.

Scope and Magnitude of the Defamatory Publications

[20] Counsel submitted that even though the defamatory material was not published in a national newspaper, the extent and scope of the publication and subsequent republication was just as damaging. Counsel placed reliance on paragraph 25 of the **4th edition of Duncan & Neil on Defamation**.

[21] Further, Counsel urged the Court to bear in mind that the scope and magnitude of the defamatory publication was not the most important factor, but the gravity of the defamation. Nonetheless, Counsel argued that the defamatory material was published to an unquantifiable number of persons due to the extensive publication and republication of the defamatory material.

[22] Counsel further argued that the publication was far reaching giving the example of a former lecturer of Mr. Austin who indicated that she can no longer provide him with letters of recommendation due to shocking reports being circulated about his dishonesty and financial impropriety. Further examples were provided where co-workers and friends in St. Kitts and Nevis addressed him in relation to the defamatory materials.

Continuous and Sustained Humiliation and Devastating Injury to Mr. Austin's Feelings

[23] Counsel submitted that the actions of the 1st Defendant heightened the distress and increased the injury caused to Mr. Austin as they published the defamatory material throughout the public service after Mr. Austin had already advised them that it was false. Further, that:

(i) Mr. Austin was taunted at work which caused him incalculable humiliation and stress.

(ii) Mr. Austin was humiliated by another Attorney-at-Law at the Supreme Court Buildings.

(iii) Mr. Austin remained the lowest paid Attorney and remained in the same position because of these proceedings and constantly had to watch his juniors leapfrog over him.

[24] Counsel submitted that the conduct of the Defendants further added to Mr. Austin's injury as they took no steps to alleviate/ameliorate the distress caused to Mr. Austin, but instead took steps which aggravated Mr. Austin's distress.

Reputational Sensitivity of the Profession in which Mr. Austin Practices

[25] Counsel submitted that the defamatory material had severe consequences in a profession with reputational sensitivity. Counsel argued that the defamatory material affected Mr. Austin's view by other Attorneys and prospective clients. Further, that prospects for upward mobility in his profession were tarnished and his career pursuits were and still are compromised.

Vindication of Mr. Austin's Reputation

[26] Counsel submitted that Mr. Austin just started his career when he was defamed and as such he continues to be deprived of the opportunity to establish himself as a leader in the profession. Counsel argued that it is not insignificant that the Defendants have yet to apologize to Mr. Austin for the defamation. Counsel made it abundantly clear, that the reputational damage in the case at bar and that seen

in the **Abrahams Case** is not comparable, as in the latter case the damage to the Claimant was much more significant because he was a prominent figure who was more intensely and/or seriously set back by the defamation.

Career Losses

[27] Counsel submitted that Mr. Austin has remained in the same position for, at the time of their submissions, the last eight (8) years and that it must have some impact on his ability to compete fairly and evenly. Counsel argues that this has clearly substantially affected Mr. Austin's career prospects, which but for the defamatory publications showed every indication of being a successful one.

Financial Losses

[28] Counsel submitted that the evidence being given in relation to this heading is not for special damages but to assist in the determination of general damages and relies on the judgement in the **Abrahams Case** in support. Counsel argues that Mr. Austin's financial losses are substantial as he was unable to publish, as he usually would, causing him to lose approximately **Six Million Dollars** ($6,000,000.00) per year and further that his stagnation in the profession has caused him to possibly lose out on approximately **Fourteen Million Dollars** ($14,000,000.00) per year. Counsel further submitted that it would take some time for Mr. Austin to re-establish his reputation.

Quantum of Damages to be Awarded

[29] Counsel submitted the quantum of damages to be awarded shall only be assessed utilizing case law arising from the Jamaican Court of Appeal (see: **Abrahams Case**, paras 44-49). Counsel submitted that the **Abrahams Case** is the most appropriate authority for providing guidance on the quantum of damages to be awarded in the case at bar. Counsel highlighted that the aforesaid case is compelling as it was unqualifiedly endorsed by the Privy Council and is the leading authority in Jamaica on assessment of damages in defamation suits.

Aggravated Damages

[30] Counsel outlined the similarities and difference between the **Abrahams Case** and the case at bar. Counsel submitted:

> *136. The following comparable factors and features shared by the present case and the Eric Anthony Abrahams case, we submit, offer useful points of comparison:*
>
> *The gravity of the libels involved and specifically the defamatory imputations suggested that attacked the honesty and character of the victims;*
>
> *The maintenance of a (concealed) pleas of justification for years and/or repetition of the libel in various forms during the course of the proceedings.*
>
> *The absence of an apology, even long after it was evident the defendants had no proof to support their position and even after judgement was entered against them.*
>
> *The extent of the mental and psychiatric damages sustained by the Claimant as a result of the defamatory publications (which included in Mr. Austin's case a period of Hospitalisation).*
>
> *The extent of financial loss and social damage sustained by the Claimant.*
>
> *The length of the proceedings involved, and the aggressive procedural efforts pursued by the defendants to delay and convolute the proceedings.*
>
> *The loss of promotion prospects and professional career as a result of the defamation publication.'*
>
> *The level of mental stress, physical ill-health and serious hurt to Mr. Austin's feelings.*
>
> *The destruction and or termination of professional or business relations which compromise the claimant's ability to practice in the discipline/career of his choice and deprive him of economic benefits.*
>
> *The potential for the libels resurfacing and the high degree of credence enjoyed by the publishers of the libels who have refused to back down from their allegations*
>
> *137. However, we acknowledge the following distinctions: -*
>
> *(1) Mr. Abrahams was a Minister of Government and a well-known public figure both locally and internationally and would therefore have had a higher public profile than Mr. Austin.*

(2) The defamation was published in a national newspaper (However, please note our prior submissions with respect to the potentially wider reach of electronic publication in these modern times.)

[31] Considering the similarities and the differences between the case at bar and the **Abrahams Case**, Counsel submitted that this case is an appropriate reference point. Further, that the updated award in the aforesaid case be discounted by 50% and such amount to be awarded to Mr. Austin as compensatory aggravated damages. Counsel further submitted that while the award is substantial it is warranted due to the terrible ordeal Mr. Austin endured as a result of the publication of the defamatory material.

[32] Counsel submitted that there should be no further discount of the amount being sought for aggravated compensatory damages as the right of judicial authority to disseminate information through media is not a right to disseminate misinformation. Counsel placed reliance on the case of **Reynolds v Times Newspaper Limited** [2000] EMLR 1 at 63 where Lord Hobhouse was in support of this position.

[33] Counsel submitted that this is an appropriate case in which aggravated damages should be considered as there is an abundance of evidence which suggests that there was conduct on behalf of the Defendants which was *"highhanded and oppressive and characterized by arrogance, malevolence and persistence in the wrongs complained of…"* (see: **Cassell v Broome** supra). Counsel suggested that the following factors establishes the quote firmly:

(i) The republication of the libel by the Defendants;

(ii) The concealed plea of justification by the Defendants;

(iii) The repetition of the libel in various forms throughout the proceedings by the Defendants;

(iv) There is evidence of malice;

(v) The conduct of the Defendants in prolonging the proceedings by constantly flouting the Court's orders; and

(vi) The Defendants' refusal to issue an apology to the Claimant.

Exemplary Damages

[34] Counsel submitted that the case at bar falls in one of the two circumstances in which exemplary damages are awarded. Counsel argued that the decision of the Defendants was arbitrary and that the following principles outlined in **Kuddus v Chief of Constable of Leicestershire Constabulary** [2001] UKHL 29, 3 All ER 93 should be considered in arriving at an award for exemplary damages which Counsel avers amounts to **Twelve Million Dollars** ($12,000,000.00):

(i) Question as to whether exemplary damages should be awarded is determined by reference to the nature of the behaviour complained of.

(ii) Where the behaviour complained of causes a sense of outrage then this compels judicial consideration favouring an award of exemplary damages.

(iii) Exemplary damages may exceed the amount to be awarded for compensatory damages.

[35] Consequently, the Claimant claims the following:

(a) General Damages which include:
  (i) Aggravated Compensatory Damages in the sum of $84,987,179.11;
  (ii) Exemplary Damages in the sum of $12,000,000;

(b) Special Damages in the sum of $566,000;

(c) Interest on General Damages from March 28, 2012 to date of judgement at 3% per annum; and

(d) Interest on Special Damages from March 6, 2012 to date of judgement at 3% per annum.

DEFENDANT'S SUBMISSIONS

[36] Counsel for the Defendants submitted that witnesses must not give oral evidence about the contents of documents that have not been admitted into evidence in order to prove the truth of the contents of the documents. Counsel argues that, where the original document is not in evidence, secondary evidence may be

given, but shall only be allowed in exceptional circumstances where a good explanation is provided.

[37] Counsel relied on the text **Phipson on Evidence**, 19th edition (para 41) under the heading "Proof by secondary evidence" and **Murphy on Evidence**, 15th edition (page 25) wherein he utilizes various quotes to define and explain secondary evidence, the circumstances in which it is admissible and the weight to be attached to them.

Publication

[38] Counsel submitted that the extent of the publication will affect the level of damages awarded and further that where the Defendant is not the original author it is regarded as a less damaging act. Counsel relied on the text, **Gatley on Libel and Slander**, 11th Edition to support their position. Counsel further relied on the text to explain that where defamatory material is published on the internet there is no presumption that it would have been downloaded by a significant number of persons or even anyone.

[39] Counsel further submitted that there are various publications of the alleged defamatory statements that the Claimant confirms were not seen and read by him such as:

(i) the publication to his friend in St. Kitts;

(ii) the 1st Defendant's offices and staff therein which Counsel argues was sent under a confidential cover causing an inescapable inference that it was not published to the persons alleged by the Claimant;

(iii) the publication to his family members and former classmates; and

(iv) publication to church members which Counsel argues was not pleaded, and which Counsel claims the Claimant admitted to in cross-examination.

[40] Counsel submits that these are inadmissible and should not be accepted as they are secondary evidence which do not fall within the scope of the exceptional circumstances for which secondary evidence should be used.

[41] Counsel further submits that the various publication that the Claimant alleges to have seen and gave secondary evidence on, does not fall within the exceptional circumstances for secondary evidence to be admissible and further that the Claimant has not provided a copy of the publication to the Court. Counsel listed these publications as relating to:

(i) The publication of the defamatory material that the Claimant alleges to have seen on the NIB database that was shown to him by officers at NIB.
(ii) The publication of the defamatory material on Instagram.
(iii) The publication of the defamatory material on the HRMIS database which the Claimant explains as having been removed, the effect of which Counsel submits should mitigate damages if accepted as a publication.

[42] Considering the foregoing, Counsel submits that the extent of the publication of the defamatory statement which is admissible is far less than the Claimant alleges and should mitigate the damages.

Malice

[43] Counsel submitted that there is an absence of malice in the instant case which may go towards the mitigation of the damages and relied on the text **Gatley on Libel and Slander** (supra)**.** Further, that the Defendant may rely on any facts which shows an honest or reasonable belief in what was published. The text made clear however, that these were not a Defence, and should be treated as mitigation to the award of damages.

[44] Counsel argued that the malice which the Claimant contends to have been involved was the Claimant's own perception and is insufficient to prove malice as it is speculation and requests that the Court finds the same.

[45] Counsel further submits that **rule 69.2(c) of the CPR** requires that the particulars of claim in a defamation claim must, wherein the Claimant alleges that the Defendant maliciously published the words or matter, give particulars in support of the allegation. Counsel further relied on the case of **Michael Burgess v J Wray**

& Nephew Limited [2014] JMSC Civ. 43 where Sykes J (as he then was) stated that the pleadings must state what the publication contained and what was the meaning which the Claimant states that the publication conveyed.

Quantum of Damages

[46] Counsel submitted various cases which should be considered for the quantum of damages but argued that the case of **CVM Television v Fabian Tewarie** (unreported) Court of Appeal of Jamaica, SCCA No. 46/2003 (delivered May 11, 2005) is most similar to the instant case wherein the Court of Appeal set aside damages of **Twenty Million Dollars** ($20,000,000.00) and reduced it to **Three Million Five Hundred Thousand Dollars** ($3,500,000.00). Counsel argued that in **CVM v Tewarie** (supra), the Court of Appeal gave due regard to:

(a) The seriousness of allegation (murder);
(b) The extent of the publication (1 publication);
(c) The unchallenged evidence of the impact of the libel on immediate prospects in the job market;
(d) The extent of Respondent's medical injury (headaches and stress);
(e) The fact that the Respondent continued to be remunerated;
(f) That although there was no promotion, the Respondent had lost no status in the police force and received commendations for his work on a regular basis; and
(g) The Respondent had not lost friends as a result of the publication.

[47] Counsel submitted that the Claimant continues to be remunerated for his post, lost no status, and has received good performance evaluation during his tenure, all of which should operate as mitigation for the loss suffered. Counsel further submitted that the award should be discounted, in so far as publication, as in the cases cited the publication of the defamatory material was more wide scale since they were published in newspapers distributed both locally and internationally. Counsel argued that this differs from the instant case where the publications that are admissible were restricted and limited in the circumstances.

[48] Counsel submits that an award close to what was given in the case of **Edward Seaga v Leslie Harper** (unreported) Court of Appeal of Jamaica, SCCA No. 29/204 (delivered December 20, 2005)**,** where the Court of Appeal awarded **One Million Five Hundred Thousand Dollars** ($1,500,000.00), should be proffered. Counsel stated that the following factors were considered:

(a) The seriousness of the allegation;

(b) The scope of the publication (island wide)

(c) Independent witness who gave evidence as to the injury to personal reputation; and

(d) No evidence presented for prejudice to prospect of advancement/ promotion.

[49] Counsel stated that the case at bar and the **Abrahams Case** should be distinguished because there are many aggravating factors of that case which spans over several years with detailed evidence of substantial economic loss and reputational injury. Additionally, Counsel argued that the status of the Respondent, the nature of the libel, the extent and effect of the publication far exceeded that which is present in the case at bar. Further, in the case at bar, the evidence against the Defendants re the publications and the loss of job prospects is merely speculative and conjecture at best, and as such the **Abrahams Case** would not offer any useful assistance to the award of damages.

Aggravated and Exemplary Damages

[50] Counsel submitted that there is no basis for an award of aggravated and exemplary damages in the instant case. Counsel relied on the **Abrahams Case** where the Privy Council stated that these damages are only awarded where:

(a) the compensatory damages are not enough to punish the Defendant for their conduct;

(b) the Defendant’s conduct toward the plaintiff aggravates the situation;

(c) to deter the Defendant from repeating this conduct; and

(d) to mark disapproval of the Defendant’s conduct

[51] Counsel further relied on **Gatley on Libel and Slander** (supra) to highlight the circumstances in which Aggravated and Exemplary Damages are awarded which they believe do not apply in the case at bar.

Interest

[52] Counsel submits that it is recognized practice to not grant interest in matters involving a defamation claim. Counsel relied on the case of **Jamaica Observer Limited and Paget deFreitas v Gladstone Wright** [2014] JMCA Civ. 18 (see: paras 119 – 123) where the learned judge indicated that in a variety of cases no order was mentioned or included for interest which suggests that the Court's view is that interest on the award granted might be deemed as double compensation.

LAW AND ANALYSIS

[53] Section 24 of the **Defamation Act** states that:

> "In determining the amount of damages to be awarded in any defamation proceedings, the court shall ensure that there is an appropriate and rational relationship between the harm sustained by the claimant and the amount of damages awarded."

[54] The case of **Jamaica Observer Limited v Orville Mattis** [2011] JMCA Civ 13 supports Counsel for the Claimant's submission that the purpose of an award for damages is three-fold. At paragraph 25 of the aforesaid case Harris JA stated that the purposes are:

> "a. To console for personal distress and hurt
>
> b. To provide reparation for harm done to one's reputation; and
>
> c. To vindicate one's reputation."

[55] Further, section 25(1) of the **Defamation Act** outlines a non-exhausting list of factors to be considered in mitigation of the sum to be awarded for damages. It states:

> "(1) Evidence is admissible on behalf of the defendant, in mitigation of damages for the publication of defamatory matter, that –
>
> (a) the claimant has suffered no harm and is unlikely to suffer harm;

(b) the defendant has made an apology to the claimant about the publication of the defamatory matter pursuant to section 14

(c) the defendant has published a correction of the defamatory matter

(d) …"

[56] Counsel for the Claimant submitted that damages are at large in defamation cases. Nonetheless, the Court is guided by its principles in the case of **Collin Innis v Kingsley Thomas** (unreported) Supreme Court of Jamaica, Claim No. CL 2003 I-053 (delivered on April 20, 2005) whereby the following factors in assessing damages were considered:

(a) the gravity of the libel;
(b) the standing of the claimant;
(c) the scope of the publication; and
(d) the conduct of the defence and the defendant in the course of the litigation and at trial.

[57] The Court will consider each factor in turn and thereafter it will consider whether any award is to be made for aggravated and/or exemplary damages, special damages, whether there is any mitigation of damages in the circumstances and whether interest should be awarded on the damages awarded.

The Gravity of the Defamation

[58] In the case **John v MGN Ltd** [1997] QB 586, Sir Thomas Bingham MR stated that gravity of the libel is the most significant factor in assessing the appropriate damages for injury to reputation. He further stated that the more closely the gravity of the libel touches the person's integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious the libel is likely to be.

[59] Counsel for the Claimant submitted that the defamation in this matter is at the top end of the scale of the gravity as it went to the core of Claimant's personal and professional character which purported that the Claimant was being pursued legally and thus acted dishonestly and illegally. The Claimant believes the

circumstances of **Abrahams** (supra) was similar to the case at bar in terms of the gravity of the defamation.

[60] Counsel for the Defendants believed that the circumstances of the case at bar is not comparable to **Abrahams** (supra) because of the stature of the Claimant in that case, the implications of the defamation and the crimes he was alleged to have committed.

[61] At this juncture, the Court finds it necessary to briefly look at the circumstances of **Abrahams** (supra). The case of **Pryce (Dane) v Attorney General of Jamaica** [2017] JMCA Civ. 36 summarizes **Abrahams** (supra) as follows –

> [153] Mr Abrahams was a man of considerable national and international stature. He had held high governmental office in this country. He was accused of taking bribe while he was Minister of Tourism. The libel was published both locally and overseas where he was hitherto well known and respected. In fact he was also charged criminally overseas.
>
> [154] He was consequently ostracised and humiliated. His flourishing business ceased to earn causing him to abandon it and to seek alternate means of earning a living. He suffered the indignity of being ejected from the office of a potential client and subjected to the ignominy of being searched by a security guard. Mr Abrahams lost his livelihood as a consequence of the libel.
>
> [155] He developed a phobia of facing the public, insomnia, stress related obesity; type two diabetes, chest cramps, emotional distress. Dr Aggrey Irons, consultant psychiatrist, testified about the effects of the libel on Mr Abrahams but conceded under cross-examination his inability to say that the publications were the sole reason for his state.
>
> [156] It was also Dr Irons' evidence that the slur on his character transformed Mr Abrahams from "a high drive, high functioning, self-motivated and relatively successful" man into being:
>
> > *"(1) Severely reduced self-esteem and self perception.*
> >
> > *(2) Severe anxiety with what we call phobic response avoidance particularly avoiding public appearance and interaction.*
> >
> > *(3) Depression with hypersomnia (i.e. excessive feelings of sleepfulness, lack of energy etc.) Rebound oral dependent behaviour leading to severe weight control problems.*
> >
> > *(4) Social withdrawal and isolation secondary to the phenomena mentioned in 1, 2 and 3 above."*

The doctor opined that:

> *"It was my opinion at the time and still is that Mr. Abraham's self-image, public image and personality have been damaged to an extent requiring an ongoing psychotherapeutic intervention which would involve both psychoanalysis and pharmacologic intervention over the next 2 years at least for the next 2 years. Pharmacologic i.e. medication which he had already begun."*

He continued:

> *"It would follow that if verbal accusations or written accusations were being consistently applied to the various aspects of his profession-it would have a serious impact on him and his ability to perform. It is very clear that that sequence of events would lead to the situation I have earlier described."*

[62] While the Court agrees with Counsel that an imputation which questions an Attorney's integrity may be damaging to their professional and personal reputation, the Claimant in the instant case was a first year Attorney-at-Law who had not begun to carve out a distinct path in the profession. It is the Court's view that with the passage of time the defamatory statements and the effects thereof would be forgotten.

[63] However, Counsel indicated that the defamation had affected the prospects of the Claimant and has continuously deprived him of the opportunity to establish himself as a leader in the profession especially coming from the 1st Defendant with endorsement from NIB. Undoubtedly, the effects of having his career seemingly halted after five (5) years of studies must have been disappointing. Nonetheless, the Claimant being young, vibrant, ambitious and intelligent continued to receive glowing performance reviews which indicated that his superiors and/or peers saw him in a positive light, professionally.

[64] Therefore, unlike Mr. Abrahams, the Claimant may recover from the damage dealt to his reputation. Further, the damages to Mr. Abrahams was crippling and did not subside meanwhile in this matter, it is a possibility that the Claimant may get on with his life, both personally and professionally. Notwithstanding, the Court cannot ignore the effects of the alleged defamation on the Claimant which caused, as the Claimant submits, hospitalisation, mental stress, humiliation and social damage.

[65] At this juncture, the Court finds it useful to outline the summary of findings by Dr. Clayton Sewell of the psychological and emotional state of the Claimant following the defamation –

> - Mr. Austin reports false allegations being circulated about him in 2012.
> - He reported experiencing emotional and interpersonal challenges since having that experience.
> - In my opinion, his experience has served as a stressor resulting in him developing a psychopathology (Major Depressive Disorder with Anxiety Features) with moderate impact on his emotional and physical functioning.
> - The disability that Mr. Austin is currently experiencing is amenable to repair, provided effective pharmacological and psychological treatment is maintained.
> - He is currently functioning at approximately sixty (60) percent of normal emotional levels. This represents a **ten percent** (10%) residual Mental and Behavioural Disorder impairment based on the American Medical Association's Guides to the Evaluation of Permanent Impairment, Sixth Edition.
> - Initial treatment should include pharmacological treatment and psychotherapy to help his depressive and anxious symptoms to abate.
> - The monthly estimated cost of these therapeutic interventions, which would be required for approximately twelve (12) months, is:
>   - *Eight thousand dollars ($8,000) per month for medication.*
>   - *Ten thousand dollars ($10,000) per session for psychotherapy.*
>   - *Totaling: $216,000*
> - The successful implementation of therapy should result in a return to his premorbid level of functioning in a period of approximately twelve months.

[66] Dr. Sewell further indicated that the Claimant was hospitalised for four (4) days due to the defamation and that the entire ordeal was a significant life event which has affected his emotional state. Further, that the current legal matter was a stressor for his Major Depressive Disorder with Anxiety Features with a moderate impairment to his social and/or occupational functioning.

[67] Counsel for the Defendants submitted that this case is more similar to the case of **CVM v Tewarie** (supra). The case of **Pryce (Dane) v Attorney General of Jamaica** (supra) particularizes this case as follows –

> [164] … In that case the respondent was a police officer against whom the television station had embellished a report of a fatal shooting by the respondent which conveyed the impression that Mr Tewarie had committed murder. Panton P at pages 8- 10 outlined the effects of the libel on the respondent as follows:
>
> > "The jury awarded the respondent the significant sum of twenty million dollars ($20,000,000.00) as general damages. The respondent had told the jury that when he heard the news broadcast and the role he was alleged to have played in the activity being reported, he felt as if someone had hit him in his head with something heavy. He subsequently had to seek medical help for persistent headaches and stress. He ceased visiting the community in which the killing had taken place, due to fear for his safety. Since the broadcast, he has continued to receive his remuneration and although he has not been promoted, he has received commendations on a regular basis. It is also obvious that he has not lost his friends as a result of the publication.
> >
> > ...
> >
> > Lord Hoffman [in **Abrahams**] reminded that an award of damages "ought to be a sum reasonably required to protect the plaintiff's reputation". The damages must show that the plaintiff's reputation has been vindicated.
> >
> > The **Abrahams** case was extra-ordinary. Evidence of loss of good health and earning as a result of the libel were clearly proved. In addition, there have been aggravated circumstances with the deliberate repetition of the libel and the refusal to apologize. Abrahams had to live with the consequences for several years. The libel continued even before the Privy Council. In the instant situation the libel was not devastating."
>
> [165] The learned President, with whom the court agreed, found that in those circumstances an award of $3,500,000.00 was adequate.

[68] Like Mr. Tewarie, the Claimant has not submitted evidence of losing friends because of the alleged defamation, he continues to be remunerated for his post, and though he has not been promoted, he has been commended in several performance reviews for doing an excellent job and exceeding expectations. However, in **CVM v Tewarie (supra)** the defamatory material was published on a local news network and in this case there was no such publication. The Court believes that the case of **CVM v Tewarie (supra)** while displaying similar circumstances to the case at bar, are not similar in terms of the gravity of the libel.

[69] Therefore, the Court disagrees with Counsel for the Defendants on the comparison of the cases and with the Claimant's submission that the defamation in this matter is at the higher end of the gravity scale. The Court believes that the instances of this case falls closer to the lower end of the gravity scale.

The Standing of the Claimant

[70] Counsel for the Defendants argued that the Court ought not to accept the Claimant's reliance on **Abrahams** (supra) because the standing of those men in the community are not comparable to that of the Claimant in the case at bar. Further that the injuries and losses suffered as a result of the defamation were more significant than those suffered by the Claimant.

[71] Mr. Abrahams was of a higher standing than the Claimant in this case and the extent of the loss and/or injuries suffered by Mr. Abrahams was significant. In fact, Counsel for the Claimant themselves have seemingly conceded to this point. However, by virtue of his profession the Claimant would be held to a higher standard than that of ordinary citizens and any imputation of wrong doing may affect his standing, not only in the profession but in the community and the church which the Claimant attended. The Court can say however, that the standing of the Claimant is somewhat higher than the standing of Mr. Tewarie who was a police officer. However, like Mr. Tewarie, Mr. Austin is someone who the public would hold to a higher standard by virtue of his profession and any imputation of wrong doing could potentially damage his reputation.

The Scope of the Publication

[72] There is a real dispute as to the extent of the publication and/or republication of the defamation. Counsel for the Defendants has suggested that the alleged seen and/or unseen publications of the defamatory material are inadmissible secondary evidence as they do not fall in the circumstances that the secondary evidence ought to be used. Further, that where defamation is published on social media

there is no presumption that it was downloaded by a significant number of persons or even anyone.

[73] Counsel for the Claimant reminded the Court that this is not the most important factor, but that the publication was extensive and far-reaching so much so that the Claimants church members, co-workers and friends from St. Kitts and Nevis knew of the defamation. Further, that the Claimant's usual character reference and previous lecturer has indicated that she can no longer support and/or provide references for him.

[74] Before the Court considers the submissions of Counsel on the extent of the publication, it must indicate that it agrees with Counsel for the Defendants on witnesses giving evidence as to the truth of the contents of a document in the absence of the document itself. However, the purpose of the Claimant giving evidence on the contents of documents, is not in relation to the truth of the contents within the document but rather that such a document was published which may or may not have contained the alleged defamation which, for all intents and purposes, contained false statements made about the Claimant.

[75] The Court must determine whether the evidence outlined by the Claimant is admissible without documentary proof and the weight to be given to the scope of the publication on the award of damages. Counsel for the Defendants is advancing the principles relating to best evidence rule which outlines that there must be documentary proof of the publication and in the absence of such proof an explanation is required before any other evidence relating to the publication is admissible. However, the best evidence rule has been modified. The position taken in the case of **Director of Public Prosecutions v Sugden** [2018] EWHC 54 is that:

> 18… It is well settled that secondary evidence of what a document contains is admissible where the original cannot be produced, provided some account is available to the court of why the original cannot be produced. In *R. v. Albert Patrick Collins* (1960) 44 Cr App R 170, the Court of Criminal Appeal, applying the proviso to section

4(1) of the Criminal Appeal Act 1907, upheld a conviction for obtaining money by false pretences based on a letter admitted below incriminating the defendant.

19. The secondary evidence of the letter was not a copy of the original but, as Lord Parker LCJ put it, “a document which we are told was a copy of the carbon [copy]”, although there is no clear evidence that it was. The court found it unnecessary to express a final conclusion on the issue whether secondary evidence of a document must be a copy of the original document rather than a copy of a copy, but:

> “as at present advised…can see no objection to a copy of a copy being produced, provided that somebody is called who can verify not only that the copy produced is a true copy of the original copy, but also that it is in the same terms as the original.”

20. The court held that the document ought not to have been admitted, because the prosecution had not called evidence that the witness producing the copy of a copy had checked that it was in the same terms as the carbon copy of the original, and therefore in the same terms as the original itself.

…

22. Later, in *Kajala v. Noble* (1982) 75 Cr App R 149, … Ackner LJ, sitting with Woolf J (as he then was) and giving the judgment of the court, said at page 152:

> “The old rule, that a party must produce the best evidence that the nature of the case will allow, and that any less good evidence is to be excluded, has gone by the board long ago. The only remaining instance of it is that, if an original document is available in one's hands, one must produce it; that one cannot give secondary evidence by producing a copy. Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility: *Garton v. Hunter* [1969] 1 All E.R. 451, per Lord Denning M.R. at 453e; see also Archbold, Criminal Pleading, Evidence and Practice (40th ed.), para. 1001. In our judgment, the old rule is limited and confined to written documents in the strict sense of the term, and has no relevance to tapes or films.”

23. In the current (2018) edition of Archbold, the law is expressed as follows, at paragraph 9-98, which I would endorse:

> "The old rule that only the "best" evidence is admissible now survives only in the rule that secondary evidence of the contents of a private document cannot be given without accounting for the non-production of the original. Otherwise all admissible evidence is in general equally accepted, though its weight may be a matter of comment: see *Kajala v. Noble"*
>
> 24. In similar vein, the current (2018) edition of Blackstone's Criminal Practice at paragraph F1.31 describes the best evidence rule as "all but defunct"; see also paragraphs F8.2 and F8.3 on the admissibility of a copy where the original is not available and the proposition repeated in at least two cases that "there are no degrees of secondary evidence."

[76] Therefore, in the absence of an explanation for the non-production documentary evidence of the publication of the defamation on social media and the failure by the Claimant to call witnesses to whom the defamation was published or republished to, the Court agrees with Counsel for the Defendants that all such evidence should not be considered in the assessment of damages as they may have otherwise been inadmissible. The Court reminds Counsel that even though the matter has proceeded in default of the Defendants, not all evidence before it will be accepted.

[77] Additionally, even if the Court were to accept these, it is not reasonable that the Defendants would have been liable for these publication. The law indicates that a person cannot be held liable for the repetition of the defamation where they have no control over the third-party who is republishing it and in these circumstances it would constitute a "novus actus interveniens" breaking the chain of causation for the damage to the Claimant's reputation (see: **McManus & Others v Beckham** [2002] 1 WLR 2982). Furthermore, the Court supports the submission of Counsel for the Defendants that there is no presumption that the alleged defamation has been published on a social media website and was viewed or downloaded by anyone without direct proof or inference (see: **Al Amoudi v Brisard** [2007] 1 WLR 113 (QB**)**.

[78] The inference that the alleged defamation was published when it was sent via letter under a confidential cover is rejected. In the case of **Huth v Huth** [1915] 3

KB 32, a butler had opened a letter in an unsealed, ungummed enveloped addressed to his employer. His employer, had brought an action for defamation on the basis that the contents of the letter were published to the butler and persons at the Post Office. Lord Reading CJ, as he then was, in giving the leading judgement stated that:

> With regard to the first point, that is the publication to the butler, I am clearly of opinion that there is no evidence of any such publication to the butler upon the point merely whether the fact that the butler opened the letter and read it because he was curious, would make it publication by the defendant. Fortunately, it is no part of a butler's duty to open the letters that come to the house of his master or mistress addressed to the master or mistress; and in this case there is nothing exceptional in it except that his curiosity was excited by reason of the lady being addressed by her maiden name. No one can help a man's curiosity being excited, but it does not justify him in opening a letter, and it could not make the defendant liable for the publication to the butler of the contents of the envelope, because it must of course be borne in mind that, however insulting and offensive the matters may have been which the husband wrote to his wife, they were addressed to the wife and only intended for the wife, and she alone saw them, no action for libel could be brought by her. An action for libel can only be brought if there is publication to some third person. The publication to the butler in this case is not sufficient.
>
> … It has been laid down, and I think rightly, that the court will take judicial notice of the nature of the document, which is the postcard, and will presume, in the absence of evidence to the contrary, that others besides the person to whom it is addressed will read and have read what is written thereon. In this way the presumption of law based on the authorities arises. If, of course, even in such a case as that, the defendant could establish that the postcard never was read by a single person - if it were possible to establish such a state of things, although it is very difficult to conceive - he would, notwithstanding the presumption, succeed in the action, because he would have proved that there was no publication. But of course he cannot, and does not. The fact that it is practically impossible to prove that anyone did read the postcard is the very reason why the law takes judicial notice of the nature of the document, and says the mere fact that it is written on a postcard which is posted must be taken as some evidence that a third person will read it, or has read it. Now, that is clear law, and is quite beyond dispute.

> ... It is not right, in my opinion, to treat a letter sent in an envelope with a halfpenny stamp, and which is ungummed, as though it were an open letter. Before the document can be abstracted from the envelope and read there must be some act in the nature of the opening of the letter which is ungummed by the person who has it in his hand, and I do not think that the court could presume that letters would be opened in the ordinary course of business, or that they might be opened if sent in this fashion. I do not think that that is a presumption to be drawn. It is quite true to say, and here I think counsel for the plaintiffs pressed the point very closely and very nearly home when he said that the Post Office have the right to examine the document which is in the letter stamped with a halfpenny stamp. It is part of their duty to see that that which is sent under cover of a halfpenny stamp is matter which should properly be sent for a halfpenny stamp and does not require a penny stamp. But that is not sufficient to carry the plaintiffs in this case. If they could have called a postman who said, "Yes, I did do this," or a postmaster or some official who said, "Yes, I examined this document and read it in order to see whether it was a thing which could properly go under a halfpenny stamp," then would arise a state of things which I think counsel for the plaintiffs would be justified in saying amounted to evidence of publication by the defendant. But that is where he falls in this case. No such person can be called.
>
> I cannot think that the court is entitled to presume, merely because the envelope went through the post, that it would be opened. I suppose what is said with regard to these letters is true of every package which is sent through the Post Office. It is true of every parcel which is sent through the Post Office, and in certain circumstances it may be true also of other documents, even though they may be sealed; but that does not justify the presumption to which counsel for the plaintiffs is driven in this case - that is, that such a letter in an envelope which is ungummed is to be treated just as a postcard. I think that that point fails, and that there is therefore no evidence of publication in this case…

[79] Therefore, it is presumed that a letter being sent under a confidential cover is only intended for and would be published to and read by the person to whom it is addressed, unless it can be proven by the Claimant through a witness that the letter was read or opened by another person in the ordinary course of their duties. The curiosity of others in reading the letter, is insufficient for publication in defamation matters. Hence, the publication of the alleged defamation by way of

the letter under a confidential cover to anyone except those it was addressed to is not considered as a part of the scope of the publication.

[80] Notwithstanding, the Court accepts the secondary evidence for the publication of the defamation on the databases and to all person who had access to and the ability to view all such information on these databases. The Court is mindful that we are proceeding in default of the Defendants by virtue of their own failure to disclose the particulars of this database in relation to this matter pursuant to the unless orders made for specific disclosure. This means, that the Claimant had sought to obtain the primary documentary evidence needed in this regard, but was barred from doing so by virtue of the Defendants' failure to disclose same. Consequently, the extent of the scope of the publication may be wide-reaching as the Court is not appraised of the information as to who had access to the databases.

[81] Therefore, the Court is empowered only to accept the publication of the defamation on the database, as there is no evidence to suggest that the alleged defamation was downloaded or seen when published on social media or that the letter containing the alleged defamation was read by anyone except who it was intended for. Further, the Court is satisfied that 1st Defendant published the defamation to the recipients of that letter out of duty rather than malicious intent.

The Conduct of the Defence and the Defendant in Litigation

[82] Section 14 of the **Defamation Act** provides that:

> In any action for defamation, the defendant, in mitigation of damages, may make, or offer, an apology to the claimant for the defamation –
> (a) before the commencement of the action;
> (b) where the action was commenced before there was an opportunity of making or offering the apology, as soon after the commencement of the action as he had an opportunity of doing so.

[83] The Court takes notice of the fact that there was no apology issued by the Defendants in this matter, from the genesis of the defamation claim up to the commencement of its hearing. Instead, the Defendants maintain that there was

an honest and reasonable belief in the alleged defamation being published which the Claimant contends is a concealed defence of Justification and the Defendants contend as being an act in mitigation.

[84] Panton P in the case of **Mattis** (supra) stated that:

> Persons who publish libellous statements would do well to publish an appropriate apology in an equally prominent manner so soon as they become aware of their tortuous conduct. They should not await the prompting of the injured party. 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.

[85] There is no indication from the Defendants that they are/were willing to apologize. Further, there is no evidence that the Defendants sought to correct the contents of alleged defamation as published. However, the Claimant suggests that the defamation was removed from the databases shortly after it was posted or brought to their attention. The Court accepts that an honest and reasonable belief in the defamation published is not a concealed defence of justification, but an act which goes towards mitigation. However, the Court is not swayed that the 1st Defendant had an honest belief in the publication of the alleged defamation on the databases as these publications happened after the Claimant notified the Defendants of the falsity of the information.

[86] Therefore, while the removal of the alleged defamation from the databases would go towards the mitigation of the damage, the Court does not accept that there was an honest and reasonable belief in the defamation published on the part of the 1st Defendant which should mitigate the damage.

Aggravated Damages and Malice

[87] The Parties significantly disagree on whether aggravated damages should be awarded. The Parties argue that an award for aggravated damages depends on whether the 1st Defendant was malicious in their publication of the defamation. Counsel for the Defendants submissions indicated that there was no malice and that there was an honest belief in the defamation which was published which

should act as mitigation. Counsel for the Defendants argued that malice is not proven by the Claimants own perception of the events and that the CPR and the case of **Michael Burgess v J Wray & Nephew Limited (supra)** requires that the pleadings must state what the publication contained and what was the meaning which the Claimant states that the publication conveyed.

[88] The authors of **Gatley on Libel and Slander 8th edition** have indicated that when damages are at large, the judge of fact –

> "…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 [judge] can take into account in assessing the appropriate compensation."

[89] In the case of **Ainsley Lowe v Michael Ricketts** [2022] JMSC Civ 1, Mott Tulloch-Reid, J (Ag), as she then was, discussed malice in the following way –

> [37] Professor Gilbert Kodilinye in the 5th edition of Commonwealth Caribbean Tort Law at page 309 defines malice as
>
> > "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…"
>
> Malice can be extrinsic or intrinsic. Intrinsic malice is found in the words themselves. Extrinsic malice is found in external circumstances not connected with the publication itself. If the defendant knew at the time he published the words that they were false or was indifferent to their truth or falsity, then malice is extrinsic. If he merely uttered the words in a careless manner that is not evidence of malice but if there is proof of bad relations between the claimant and the defendant before the making of the statement, that may be proof of extrinsic malice. I am of the view that when he uttered the words about the Claimant, the Defendant was motivated by malice. The words themselves given in that context are to my mind malicious and that coupled with what was going on at the time between the parties with respect to the breakdown of their once friendly relationship leads me to be of the view that the Defendant when he uttered the words did not do so out of a sense of duty but acted for an improper purpose.

[90] In the case at bar, the Claimant has satisfied the requirement of the CPR to outline the words of the defamation and indicate their intended meaning. While the Court agrees with Counsel for the Defendants that one's own perception is not proof of malice, the Court is satisfied that the publication of the alleged defamation on the databases by the 1st Defendant was done with malice and not from a sense of duty. The state of affairs between the parties at the time of the publishing of the alleged defamation on the databases was contentious as the Claimant had initiated proceedings against the Defendants. Further, the Claimant having indicated that the information was false and initiating proceedings to have his termination reviewed should have prompted the 1st Defendant not to allow the publication or republication of the alleged defamation in any medium or by any person directly under their control.

Quantum of Damages

[91] The Court bears in mind that an award of damages should consider the appropriate and rational relationship between the injury or damage and the sum awarded. This is known as the rational relationship test. The Court considers the evidence from the various witness statements of Mr. Dale Austin, the Medical Report of Dr. Sewell and the answers of Dr. Sewell in response to questions asked by Counsel for the Defendants.

[92] Additionally, the Court refers to the relevant awards considered in similar cases pursuant to the submissions of counsel in the matter:

(1) In the **Abrahams Case**, the Court of Appeal on July 31, 2000 reduced the jury award of $80,700,000.00 to $35,000,000.00 for the plaintiff damages on the 17th day of July 1996. The Privy Council did not interfere with this award which updates to $214,688,995 using a most recent CPI of 128.2 for May 2023. Counsel for the Claimants submits that this award as updated at the time of their submissions discounted by 50% is an appropriate award for the aggravated compensatory damages.

(2) Counsel for the Defendants disagrees and states that the case of **The Jamaica Observer Ltd. v Orville Mattis** where the Jamaican Court of Appeal did not interfere with an award of damages by a jury of $1,000,000.00 made on the 11th day of February 2008 updated to $2,756,989.25 using CPI for May 2023 is more appropriate.

(3) Further, Counsel for the Defendants indicated that on the 11th day of November 2006, the Court of Appeal in **CVM Television v Fabian Tewarie** (supra) reduced an award of General Damages by a jury from $20,000,000 made in June, 2003 to $3,500,000.00 which updates to $11,746,073.30 using CPI for May 2023.

(4) Counsel for the Defendants also asked that the court considers the case of **Jamaica Observer Ltd. and Paget de Freitas v Gladstone Wright** (supra) where the Court of Appeal reduced a jury award of $20,000,000 in General Damages made in May 2008 to $6,000,000. In this case, the Appellant published about the bank manager of the Montego Bay branch of Bank of Nova Scotia at the time "BNS probe $94 million exposure Bank Manager sent home." It was not correct and the Bank Manager was relieved of his post. This sum is updated to $15,730,061.30 using the CPI for May 2023.

(5) The Jamaican Court of Appeal in the case of **Seaga v Harper** delivered on the 20th of December 2005 made a reduced award of $1,500,000.00 in general damages in December 2003. This case also may be regarded in the middle or lower end of the scale. The award updates to $5,280,065.90 using the CPI for May 2023.

(6) On January 27, 2011, Roy Anderson J. in **Jamaica for Justice and Carolyn Gomes v News Media Communications Ltd. & Ors** (unreported) Supreme Court of Jamaica, Claim No. 2006HCV0028 (delivered January 19, 2011), also relied on by the Defendants' Counsel, awarded the Claimant $4,500,000.00 in general damages. This is updated using the CPI for May 2023 to $8,972,006.22

[93] Considering the foregoing, the Court believes an appropriate starting point for general damages is **Four Million Five Hundred Thousand Dollars** ($4,500,000.00). This was mitigated by the Defendant's removal of the alleged defamation from the databases and was discounted by 10%, the final award for general damages being **Four Million, Fifty Thousand Dollars** ($4,050,000.00). The Court also makes an award for aggravated damages in the sum of **Four Hundred and Fifty Thousand Dollars** ($450,000.00).

Exemplary Damages

[94] Counsel for the Claimant contends that an award for exemplary damages is necessary because the decision of the 1st Defendant was arbitrary. Counsel for the Defendants submits the same arguments made against the award for aggravated damages, that the case at bar does not fall within the circumstances for exemplary damages.

[95] The Claimant has plead for exemplary damages as required by the CPR and as such is not disentitled from an award such as this. Forte P, in the **Abrahams** case (supra), said that the award for exemplary damages should be –

> "sufficient to achieve the purpose of punishing the [respondents] and deterring others from behaving in the manner in which the [respondents] acted in this case."

[96] However, exemplary damages are only awarded in exceptional cases as the compensatory damages to be awarded may act in a punitive, deterrent or exemplary way especially in cases involving defamation as it is an intentional tort capable of aggravating the damages. Therefore, exemplary damages ought to be awarded in circumstances where, as Lord Delvin in **Rookes v Barnard** [1964] AC 1129 put it –

> "… the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the Plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum."

[97] Lord Hoffman in endorsing Forte P's statement on exemplary damages in the **Abrahams** case stated that compensatory damages may be sufficient to deter as–

> "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."

[98] The Court is guided by the authorities on exemplary damages and understands that they need not award it unless they are sure that the compensatory damages to be awarded would be insufficient to punish for the alleged defamation and/or deter the Defendants from acting in such a manner in the future. In this case, the award of compensatory damages is appropriate in the circumstance to serve a dual purpose which is to compensate and to deter or punish the Defendants. Therefore, the Court is not of the view that it would be appropriate in the circumstance to utilize its discretion to grant a further award of exemplary damages in the case at bar.

Special Damages

[99] The general rule in relation to special damages is that it must be specifically pleaded and proven as it represents the actual quantifiable loss suffered by the Claimant as a result of the tort which was committed. However, there is an exception to this rule which Anderson J in **Robert Minott v South East Regional Health Authority & Anor** [2017] JMSC Civ 218 explains –

> [5] … in some circumstances, to insist on strict proof of each and every item of special damages, by means of documentation in particular, would be, as has been stated in at least one reported judgment, 'the vainest form of pedantry.' See: *Desmond Walters v Carlene Mitchell* – [1992] 29 JLR 173; and McGregor on Damages, 12th ed. at paragraph 1528; and *Radcliffe v Evans* – [1892] 2 QB 524.
>
> [6] That general rule therefore, must to my mind, give way to common-sense, in circumstances wherein, items of special damages are not particularized, but yet the claimant, during trial, seeks to recover for those alleged losses and the defendant agrees to permit recovery for same. In circumstances such as that, for all of those

> items of special damages that the claimant is seeking recovery of, by means of an award of damages, since the defendant has consented to the claimant's recovery of same, then, even though some of those items were not particularized in the claimant's particulars of claim, the claimant ought to be and will be able to recover for same. If the absence of notice does not perturb the opposing party and thus, the failure to particularize does not perturb that party and in addition, the opposing party consents to claims for items of special damages which either could or ought to have been particularized, but which were not, then the trial court should award same to the claimant.

[100] The case of **Edwards v Jamaica Beverages Limited** [2017] JMSC Civ 76 discussed awarding special damages in cases where there is not proven. The Court stated that –

> [95] It is well settled law that a claimant is entitled to recover losses and expenses incurred arising directly from the negligent conduct of the tortfeasor. It is equally a well established principle of law that a claim for special damages must be pleaded and proved strictly. In **Walters v Mitchell**, supra, the Court of Appeal of Jamaica adjusted the principle to take account of the fact that in Jamaica, some claimants, by virtue of their station in life, do not keep records at all. In these instances, the trial court uses its best judgment and makes an award. However the court has to be satisfied that the claimant incurred or suffered the loss or incurred the expense.
>
> [96] In the case of **Myrtle Daley & Anor. v The Attorney General & Anor**, the trial judge, Mangatal, J considered previous decisions on the issue of proof of special damages including **Hepburn Harris v Carlton Walker** and **Murphy v. Mills**. In doing so Her Ladyship noted that "special damages must be specifically proved", and that "there must be some reasonable evidentiary basis on which the court can act."
>
> [97] In **Attorney General of Jamaica v. Tanya Clarke (nee Tyrell**), the Court of Appeal relaxed the principle that special damages must be specifically proved and accepted that in certain circumstances where there is the absence of strict proof, justice demands that an award should be made.

[101] In this case the Claimant claims special damages amounting to **Five Hundred and Sixty-Six Thousand Dollars** ($566,000.00) which are particularized as follows –

(a) Doctor visits and psychiatric and mental assessments amounting to **Twenty-Five Thousand Dollars** ($25,000.00);

(b) Preparation of medical report by Dr. Sewell amounting to **Sixty Thousand Dollars** ($60,000.00);

(c) Addendum to medical report and written responses to questionnaire submitted to Dr. Sewell by the Defendants' Attorneys amounting to **Forty Thousand Dollars** ($40,000.00);

(d) Future medical costs amounting to **Two Hundred and Eighteen Thousand Dollars** ($218,000.00)

(e) Hospitalisation Fees amounting to **One Hundred and Thirty-Three Thousand Dollars** ($133,000.00); and

(f) Travel/Transportation Fees amounting to **Ninety Thousand Dollars** ($90,000.00)

[102] The evidentiary proof for the Doctor visits and psychiatric and mental assessments amounting to **Twenty-Five Thousand Dollars** ($25,000.00) and preparation of medical report by Dr. Sewell amounting to **Sixty Thousand Dollars** ($60,000.00) was indicated by Mr. Austin to be exhibited in his Notice of Intention to Tender into Evidence Hearsay Statement made in a Document filed on the 19th of December 2017. However, due to some inadvertence of either Counsel or the Court, this exhibit was not attached to the Court's copy of the document. Further, Counsel filed a Judge's Bundle on the 19th of January 2018 which included a copy of the said document and the said exhibit was not attached to same despite being listed as an exhibit.

[103] The Court cannot deny that the Claimant did visit the doctor, had assessments and that a medical report was prepared by Dr. Sewell. There must have been some cost associated with these, and as such an award for these sums would be justified. However, specifically as it relates to the doctor visits and assessment, the Court is not abreast of the amount of doctor visits that the Claimant had prior to or during his hospitalisation and, the Medical Report of Dr. Sewell only mentions two (2) occasions when he met with and assessed Mr. Austin. It is not clear

whether these are the doctor visits and assessment which the Claimant refers to and is seeking reimbursement for. In light of this, the Court would have to speculate in order to make a fair award in relation to the special damages plead for the doctor visits and assessment and as such declines to make an award in this regard without documentary evidence.

[104] The Court is of the considered opinion that considering the length and depth of the medical report, that the amount claimed for same is reasonable in the circumstances and consistent with the cost usually associated with the production of same. Therefore, the court will award the **Sixty Thousand Dollars** ($60,000.00) for special damages for the production of the medical report by Dr. Sewell.

[105] For the addendum to medical report and written responses to questionnaire submitted to Dr. Sewell by the Defendants' Attorneys, the Claimant Claims **Forty Thousand Dollars** ($40,000.00). However, in his Amended Further Notice of Intention to Tender into Evidence Hearsay Statement made in a Document filed on the 31st of October 2018, the Claimant exhibited Receipt No. 44 dated January 12, 2008 to which he made a payment in the sum of **Thirty-Five Thousand Dollars** ($35,000.00) to Dr. Clayton Sewell for the production of the addendum report and response to questions from the Attorneys for the Defense. There is no further document which proves that **Forty Thousand Dollars** ($40,000.00) was paid or that an extra **Five Thousand Dollars** ($5,000.00) was paid for the production of the addendum to the medical report and written responses to questionnaire submitted to Dr. Sewell by the Defendants' Attorneys. Therefore, the Court awards **Thirty-Five Thousand Dollars** ($35,000.00) in this regard.

[106] The Claimant has provided no proof for the sum of **One Hundred and Thirty-Three Thousand Dollars** ($133,000.00) claimed for Hospitalisation Fees. There is no doubt that the Claimant was hospitalised as it is indicated in the Medical Report of Dr. Sewel which stated that Mr. Austin was hospitalised for four (4) days. Therefore, the Court finds that, though there is no documentary proof of payment

of these fees, an award for this expense is justified. The sole question then is whether the sum of **One Hundred and Thirty-Three Thousand Dollars** ($133,000.00) should be awarded. Considering the hospital at which the Claimant was hospitalised, the Court is of the considered opinion that this amount is reasonable for the duration of which the Claimant was hospitalised and as such awards the full amount claimed.

[107] The Claimant alleges at paragraph 4 of his Supplemental Affidavit in Support of the Fixed Date Claim Form that his car was stolen with several receipts relating to transportation that he intended to provide to the Court. The Claimant exhibited to the affidavit proof of a police report made regarding his car was stolen. At the time the car was stolen, the Claimant had only claimed (so far) **Thirty Thousand Dollars** ($30,000.00) in relation to transportation fees. The Claimant was in a position to continue to store and save all receipts relation to transportation thereafter. However, the Claimant has failed to do so and as such there is no proof in relation to the remaining **Sixty Thousand Dollars** ($60,000.00) plead for the transportation fees.

[108] The Court understands that in some circumstances, proof is not always available in the form of receipts for transportation. Further, the Court is satisfied that the Claimant, over the years, has incurred travelling expenses in relation to these proceedings. However, the Court cannot speculate and will not award the full travelling expenses claimed without documentary proof of the actual cost. It is not lost on the Court that the Claimant stored documentary evidence in relation to transportation prior to his car being stolen. The Court is unaware of the reason why the Claimant did not maintain his records regarding transportation after his car was stolen, but without any evidence regarding the Claimant's travel history after the records were stolen with his car i.e. how often he travelled for this case, where he travelled to, why he travelled, how much he paid per trip etc… the Court will not award the full amount claimed.

[109] At the time of his car being stolen, the Claimant had only claimed **Thirty Thousand Dollars** ($30,000.00) for Transportation Expenses, the Court will award this amount as it accepts that the proof in relation to these travelling expenses was in the car when it was stolen. Consequently, the total award being made for special damages is **Two Hundred and Fifty-Eight Thousand Dollars** ($258,000.00).

[110] The Claimant has claimed for future medical care as a part of their special damages. It is not usual practice for this amount to be amalgamated or considered as part of the special damages since this amount represents a cost that has not yet been incurred. The Court will deal with the award to be made for it at this time, but it will not be added to the total to award for special damages.

[111] The Claimant has provided proof by way of the medical report of Dr. Sewell that he would need future medical treatment which amounts to **Two Hundred and Sixteen Thousand Dollars** ($216,000.00). The Claimant has plead for **Two Hundred and Eighteen Thousand Dollars** ($218,000.00) in relation to this which the Court considers to be an honest mistake on the Claimant's part since no further evidence was provided to suggest that this cost was increased by **Two Thousand Dollars** ($2,000.00). Therefore, the Court will award damages for the future medical treatment in the amount of **Two Hundred and Sixteen Thousand Dollars** ($216,000.00).

Interest

[112] The Claimant claims interest under **The Law Reform (Miscellaneous Provision) Act**. Section 3 provides –

> "(1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment..."

[113] This section confers a statutory discretion on the Court to award interest on any debt or damages. In **McPhilemy v. The Times Newspaper Ltd** [2002] 1WLR 934**,** Morrison, J.A. (as he then was) delivering the judgment of the Court settled the issue as to whether interest ought to be paid on damages awarded in defamation cases. He ruled that an award of interest on damages in a defamation case was entirely dependent on the judge's discretion.

[114] Therefore, the Court will not consider the payment of interest in this matter on the general and aggravated damages awarded due, in part, to the inordinate delay in the delivery of this judgement, though no fault of either party. Further, granting interest on this substantial sum would, in the Court's view, amount to double compensation and would arguably result in prejudice to the Defendants. This is especially so because the amount to be awarded for general and aggravated damages was made taking into account inflation and is not in respect to monies lost by the Claimant over the course of the proceedings.

[115] Further, as is usual practice, the Court will not award any interest on the award made for future medical costs. However, the Court will award interest on the sum for special damages at a rate of 3% per annum from March 6, 2012 to the date of this judgment as interest on this sum does not, in the Court's view, prejudice the Defendants but would prejudice the Claimant if not awarded. The Claimant should be able to recoup money lost that was already due to him taking into account inflation.

CONCLUSION

[116] The Court makes the following orders:

1. The Claimant is awarded Damages in the amount of **Four Million, Five Hundred Thousand Dollars** ($4,500,000.00) with no award for interest thereon.

2. The Claimant's Claim for Exemplary Damages fails;

3. The Claimant is awarded the sum of **Two Hundred and Sixteen Thousand Dollars** ($216,000.00) for future medical care with no award for interest thereon.

4. The Claimant is awarded the sum of **Two Hundred and Fifty-Eight Thousand Dollars** ($258,000.00) for Special Damages with interest thereon at a rate of 3% per annum from March 6, 2012 to the date of this judgment (July 7, 2023); and

5. Costs awarded to the Claimant to be taxed if not agreed.

……..…….

The Hon. Mr. Justice Leighton Pusey