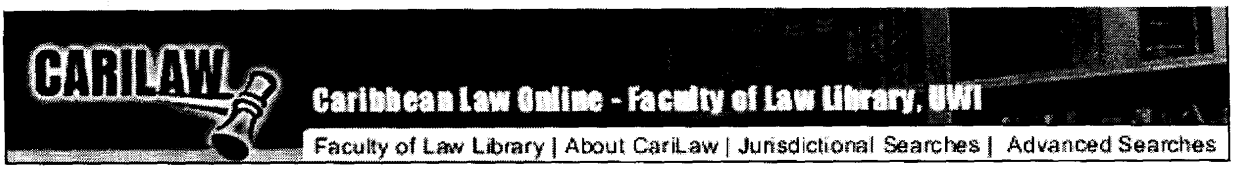

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BARUA ET AL v. BIRD ET AL

Citation # AG 2004 HC 24

Country Antigua and Barbuda

Court High Court

Judge Mitchell, J.

Subject Practice and procedure

Date January 15, 2004

Suit No. ANUHCV 0542 of 2002

Subsubject Costs - Claimants brought action against Prime Minister and others for damages for a series of torts - Claimants had since disappeared from the jurisdiction - No submission or argument on the question of costs of the application - Factors to be taken into account in awarding costs include amount of research undertaken by the parties - Court to order what seems reasonable.

Full Text Appearances:
Dennis Morrison QC, Ann Henry with him, for the respondents.
Anthony Astaphan SC, John Fuller with him, for the applicants

[1] MITCHELL, J.: **Lester Bird** and Beverly Percival (the applicants) apply to the Court under the provisions the Civil Procedure Rules 2000, Parts 64.8 and 64.9 for an order that Bernice Lake QC, Joyce Kentish, and Charlesworth Browne (the respondents), practising as attorneys at law and appearing as attorneys for the claimants in this case pay wasted costs. The respondents had acted as attorneys at law for the claimants in this case
[2] The facts necessary for this ruling can be short In about May 2002, there began to be circulated in Antigua and Barbuda a video tape of the 1st claimant being interviewed by journalists of the Daily Observer newspaper. In this interview, she made allegations that the 1st and 2nd defendants had sexually assaulted her and had induced her into illegal (end of page 1) drug use and drug trafficking during the years 1999 and 2000. She was born on 15 May 1987, so that at the time of the incidents described she was between 12 and 13 years old. The 1st defendant is the Prime Minister of the State. The 2nd defendant is his brother, the manager of a radio station. The 3rd defendant is the Prime Minister's private secretary. One of the allegations is that sexual activity took place in the Prime Minister's office while the 3rd defendant was present in her adjoining office. The Prime Minister has brought proceedings against the claimants, and various other persons whom he alleges took part in circulating the allegations, for libel. That case is yet to be tried. It has been ordered to await the outcome of this case.
[3] In October 2002, the claim form in this case was filed. It claimed against the

Prime Minister damages, exemplary damages, and aggravated damages for a series of alleged torts. These included sexual assault, sexual seduction, breach of duty of care by virtue of his constitutional obligations as holder of the office of Prime Minister, abduction, unlawful carnal knowledge and rape, conspiracy with Mrs. Percival for the facilitation of the commission of these torts, and malfeasance in public office. The claim against Mrs. Percival was for damages, exemplary damages and aggravated damages for conspiracy on her part to facilitate the commission of the statutory rape and unlawful carnal knowledge. The statement of claim set out detailed allegations of incidents of sexual intercourse and drugs trafficking escapades between Venezuela and Antigua. In due course, defences were filed by the defendants. The case was fast-tracked, and with the cooperation of counsel for both parties was made ready for trial in open Court on 27 October 2003.

[4] On 10 October the matter was called up in chambers on an application by the claimants for extension of time. At this point counsel for the claimants informed the Court and counsel for the defendants that she had learned that the claimants were not willing to return to Antigua for the trial, and that she had no choice but to apply to withdraw the claim. Leave was given to withdraw the claim, with costs against the claimants to the defendants to be assessed in chambers. In the normal course of events, the expectation would be that on 4 December after hearing counsel costs would be assessed against the claimants. The (end of page 2) claimants, a mother and teenage daughter, are of relatively humble background. They are not natives with family and property in Antigua, they were recent immigrants from Guyana. In any event, they have now disappeared from Antigua. Their present location is unknown to the defendants. They have left no assets in Antigua that are available to satisfy an order for costs. At the request of the applicants, the assessment was adjourned to 4 December, with leave to the applicants to file an application for wasted costs against the attorneys for the claimants.

[5] The matter of the assessment of the defendants' costs against the claimants came up for hearing on 4 December. Counsel for the defendants made no application for costs against the claimants. Instead, there was on file an application supported by affidavits for a wasted costs order against the respondents as counsel for the claimants. That was the application that was dealt with. The applicants do not reveal what costs they have incurred or what costs they ask the Court to order. They merely ask that the respondents "as the attorneys for the claimants do pay the applicants wasted costs incurred by them."

[6] The grounds of the application are that the respondents drafted, instituted and pursued the claims made in this case by the claimants against the applicants, which claims contained allegations of the most serious criminal nature, without any proper instructions from the claimants; that they did so without receiving, reviewing or being satisfied that there existed probative and credible evidence to substantiate the allegations made in the statement of claim; that they did so knowing that the allegations which had been made by the 1st claimant who was a minor were manifestly absurd or false and incapable of proof; and further that they drafted and pursued the very grave allegations of criminal conspiracy, abduction, fraud and lies when no such allegations were made against them by the claimants; and finally that they acted improperly, unreasonably, negligently and without due professional care and diligence when they did so.

[7] The application is supported by affidavits of the Prime Minister, Ms Percival, and of one Joyann Byers and her mother. The Prime Minister deposed to the actions he took upon learning of the allegations being made against him by the 1st claimant He urged that (end of page 3) none of the witness statements filed on behalf of the claimants contained relevant or admissible evidence and did not prove the several allegations raised against himself or Ms Percival. At paragraph 22 of his affidavit he referred to his having been sued some years previously by the brother of Ms Bernice Lake, QC. He did not expressly ask the Court to draw any conclusion from this event. Joyann Byers deposed that the claimants had filed her witness statement in the case without her permission.

[8] The application was opposed. There were two affidavits sworn by Ms Kentish.

She set out the circumstances surrounding her taking instructions from Ms Fiedtkou. She exhibited her letter of instructions signed by Ms Fiedtkou by which she gave her consent "for legal proceedings to be brought against those persons whom she [her daughter] has accused on the video tape of having sexually assaulted her or having induced her into use of illegal drugs and illegal drug trafficking." She ended, "...please accept this as your formal instruction to commence the necessary proceeding to recover damages." Ms Kentish's affidavit also included several exhibits. One was Ms Fiedtkou's next of kin authorisation to bring the proceedings in the name of her daughter, the 1st claimant Others were the several witness statements that would have constituted the evidence of the witnesses for the claimants at the trial. The witness statement of the 1st claimant was a short summary by which she adopted a transcript of her earlier video interview. A copy of the entire transcript was one of the affidavits. Another witness statement was that of Ms Kentish herself. In it she set out her meetings with the claimants and the circumstances surrounding the taking of instructions from them, commencing in November 2001. Finally, she deposed that the witness statements filed as exhibits do not reflect all of the information that was available to her at the time of the filing of the claim, but that much of the information was "clothed with legal professional privilege" and that she had not been authorised to produce it. Both parties filed written submissions for and against the application together with copies of the authorities on which they rely.

[9] Part 64.8 of CPR 2000 deals with wasted costs orders. It provides that in any proceedings the Court may by order direct the legal practitioner to pay the whole or part of any wasted costs. Wasted costs are there defined as any costs incurred by a party as a (end of page 4) result of any improper, unreasonable or negligent act or omission on the part of any legal practitioner which the Court considers it unreasonable to expect that party to pay. Part 64.9 deals with the procedure to be followed. It provides that in the event a party makes an application it must be on notice to the legal practitioner against whom the wasted costs order is sought and must be supported by an affidavit setting out the grounds on which the order is sought.

[10] Counsel for the applicants relied on a number of legal authorities. Associated Leisure Ltd (Phonographic Equipment Co Ltd) v. Associated Newspapers Ltd [1970] 2 Q.B. 450 was a libel case. It was an appeal to the English Court of Appeal against a judge's refusal to allow an amendment to a defence to plead justification. The Court of Appeal allowed the appeal holding that since justice required that the matters alleged in the amendment should be investigated in a Court of law and the plaintiffs could be compensated in money fix any hardship thereby caused to them, the proposed amendments would be allowed. Lord Denning noted that justification, like fraud, should not be pleaded unless there is clear evidence to support it.

[11] Gleanor Company Limited and Stokes v. Abrahams, PCA 86 or 2001 was a Jamaican libel case. A libel of Mr. Abrahams, a well known businessman and onetime minister of tourism in Jamaica, had been published in the Gleanor newspaper. The basis of the libellous article fell through when in other proceedings it was found not to be true. The Gleanor, however, publicly stated its intention to prove the truth of the allegations against Mr. Abrahams. Members of the public thought that it must have some convincing evidence. This was not surprising, as the Board found. The Gleanor is a reputable newspaper held in the highest respect. There was in fact no basis of truth in the libel. The judgment of the Privy Council referred to the rule of professional conduct that counsel should not make allegations of fraud or dishonesty unless he has before him "material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it": Medcalf v. Mardell [2003] 1 A.C. 120. The judgment did not otherwise deal with the duties of counsel in settling or filing pleadings. (end of page 5)

[12] Medcalf v. Mardell was a House of Lords case dealing with a wasted costs order. During the course of an appeal counsel, acting on instructions, made serious allegations of fraud against the claimant in a draft amended notice of appeal. Both the application to amend the notice of appeal and the substantive

appeal were dismissed. The claimant applied for a wasted costs order against counsel on the ground that he could not have had "reasonably credible material" before him which established a prima facie case of fraud, as required by the British Bar's Code of Conduct. The defendants declined to waive privilege, and consequently counsel was unable to place before the Court privileged and confidential material relating to their instructions so as to demonstrate that they had "reasonably credible material" which justified making the allegations. The Court of Appeal held that counsel's conduct had been improper, and that his inability to reveal privileged information did not make the hearing unfair, and making every assumption favourable to counsel on points where the Court did not have evidence before it, it was nevertheless just to exercise its discretion in favour of making the order to compensate the claimant for wasted costs caused by his misconduct. The appeal was allowed. Much of the decision relates to the provisions of the UK Supreme Court Act, 1981 and the Code of Conduct of the Bar of England and Wales, neither of which are in the same terms as ours. The case is authority for the point that since a wasted costs order has a penal effect, counsel is entitled to defend himself by placing before the Court, without restriction, all material which is relevant to the issue as to whether he had before him at the time of settling the impugned documents "reasonably credible material" which established a prima facie case of fraud. When due to legal professional privilege counsel was unable to defend his conduct of a case by revealing his instructions and other relevant material, the Court should not make the wasted costs order unless, proceeding with extreme care, the Court could say that it was satisfied that there was nothing that counsel could, if unconstrained, have said to resist the order, and that it was in all the circumstances fair to make the order. In the absence of the full facts, due to the defendants' refusal to waive privilege, the Court was not entitled to speculate and infer that there could not have been any material upon which counsel could have been justified in making the allegation of fraud, including an allegation of fraudulent interference with the Court transcript. Accordingly, the benefit of the doubt had to accrue to counsel and the wasted costs order was quashed. (end of page 6)

[13] Oldfield v. Keogh 41 SR 206 is the 1941 judgment of the Australian Court of Appeal in a libel case. It involved a charge made by one police officer against another and which defamed him. The charge was patently absurd. It suggested that an Inspector had substituted a forged report for the real document after the real document had passed through many hands, had been read by several people, and had been read aloud in the presence of six persons. In the course of his judgment, Jordan, C.J. remarked that it was difficult to speak with becoming moderation of the charge. There was not a tittle of evidence to support it He found it difficult to understand the frame of mind on the part of the plaintiff which could have lead to his making such a charge. He had still more difficulty in understanding how his legal advisers could have undertaken to formulate and press it He then repeated some observations of Lord Macmillan with respect to attacks on character under the rubric "The Ethics of Advocacy" in his Law and Other Things at pages 191-2. His Lordship pointed out that when such an attack is suggested, "counsel ... must insist upon being supplied with all the information which is thought by his client to justify the attack, and then he must decide for himself whether the charges made are such as can be justifiably made. In exercising his judgment in such a matter an advocate is fulfilling one of the most delicate duties to society which his profession casts upon him. It is no small responsibility which the state throws upon the lawyer in thus confiding to his discretion the reputation of the citizen. No enthusiasm for his client's case, no specious assurance from his client that the insertion of some strong allegations will coerce a favourable settlement, no desire to fortify the relevance of his client's case, entitles the advocate to trespass, in matters involving reputation, a hair's breadth beyond what the facts as laid before him and duly vouched and tested will justify. It will not do to say lightly that it is for the Court to decide the matter. It is for counsel to see that no man's good name is wantonly attacked." The judgment did not otherwise deal with the duties of counsel. It proceeded to deal with the contention before the Court that the defamatory statement in question having

admittedly been made on an occasion of qualified privilege, there was no evidence of express malice fit to be left to the jury. (end of page 7)
[14] The applicants also rely on the Legal Profession Act, 1997. This is the Act which now governs the admission, enrolment and status of attorneys-at-law. It provides rules of professional practice and conduct and for discipline. It contains the Code of Ethics. It provides that discipline is to be upheld by the Law Council established by the Act. The Law Council is to be appointed by the Governor-General after consultation with the Chief Justice. No Law Council has yet been appointed.
[15] Counsel for the applicants argued that in a case of an allegation of illegal sexual intercourse by an adult with a minor, it was incumbent on counsel to get evidence as to the circumstances. Counsel was obliged to ask a number of questions of the complainant How did she get to the place where she says the incident occurred? Who brought her there? Was it possible for her to have access to the Prime Minister without the knowledge of security and other staff? Could she accurately describe the Prime Minister's office. How many doors did it have? How do she get out of the office? Did anyone see her leave? Did she immediately make a complaint? Could she lead counsel to the house in Parham Village where she alleged other acts had occurred. Were inquiries made of the neighbours? Counsel had a duty to be satisfied that the allegation was not implausible. Merely to have accepted the allegations of a minor was, he submitted, a serious dereliction of duty. The same duties applied, he submitted, to the allegations of drug trafficking.
[16] In resisting the application, counsel for the respondents relied on a number of legal authorities. Ridehalgh v. Horsefield [1994] 2 A.C. 678 was an English Court of Appeal decision. It was a consolidated appeal. It dealt with a number of wasted costs orders made by judges against solicitors and counsel in respect of six different proceedings in Court. The question for the Court of Appeal in each of the six appeals was whether the conduct complained of in each case had been "improper, unreasonable or negligent" This is the same question before the Court in this case. In the following paragraphs I adopt and adapt the words of Sir Thomas Bingham, M.R., who handed down the judgment of the Court. (end of page 8)
[17] Our legal system rests on the principle that the interests of justice are on the whole best served if parties in dispute, each legally represented, take cases incapable of compromise to Court for decision by an independent and neutral judge, before whom their relationship is essentially antagonistic. Each is determined to win, and prepares his case so as to defeat his opponent and achieve a favourable result By the clash of competing evidence and argument, it is believed, the judge is best enabled to decide what happened, to formulate the relevant principles of law and to apply those principles to the facts of the case before him as he has found them.
[18] Experience has shown that certain safeguards are needed if this system is to function fairly and effectively in the interests of parties to litigation and of the public at large. Only some of them need be mentioned here. (1) Parties must be free to unburden themselves to their legal advisers without fearing that what they say may provide ammunition for their opponent To this end a cloak of confidence is thrown over communications between client and lawyer, usually removable only with the consent of the client (2) The party who substantially loses the case is ordinarily obliged to pay the legal costs necessarily incurred by the winner. Thus hopeless claims and defences are discouraged, a willingness to compromise is induced, and the winner keeps most of the fruits of victory. (3) The law imposes a duty on lawyers to exercise reasonable care and skill in conducting their client's affairs. This is a duty owed to and enforceable by the client, to protect him against loss caused by his lawyer's default But, it is not an absolute duty. Considerations of public policy require that in relation to proceedings in Court and work closely related to proceedings in Court advocates should be accorded immunity from claims for negligence by their clients: Rondel v. Worsley [1969] 1 A.C. 191; Saif Ali v. Sydney Mitchell & Co [1980] A.C. 198. (4) If attorneys at law fail to observe the standards of conduct required by the code of ethics they become liable to

disciplinary proceedings and to a range of penalties which include fines, suspension from practice, and expulsion from their profession. These sanctions exist not to compensate those who have suffered loss but to compel observance of prescribed standards of professional conduct (5) attorneys-at-law may in certain circumstances, defined by the rules of Court, be ordered to compensate a party to litigation other than the client for whom they act for costs incurred by that party as (end of page 9) a result of acts done or omitted by the attorneys in their conduct of the litigation. It is this last which is referred to as "the wasted costs jurisdiction" and the orders made under it as "wasted costs orders." This is the jurisdiction that is regulated by CPR 2000, Part 64.8 and 64.9. The conduct of the attorney at law must be improper, unreasonable or negligent

[19] "Improper" covers but is not confined to conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice, or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct Further, conduct which would be regarded as improper according to the consensus of professional and judicial opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.

[20] "Unreasonable" describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But, conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.

[21] "Negligence" is not limited to the situation where a duty of care is owed to the attorney's own client It denotes here a failure to act with the competence reasonably to be expected of ordinary members of the profession. An applicant under this head must prove advice, acts or omissions in the course of the attorney's professional work which no member of the profession who was reasonably well informed and competent would have given or done or omitted to do. The three terms are not specific and self contained. Conduct which is unreasonable may also be improper, and conduct which is negligent will very frequently be unreasonable. (end of page 10)

[22] Ridehalgh's case [supra] dealt at page 233 with the situation where counsel pursues a hopeless case. The rule is that a legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail. As Sir Thomas Bingham, M.R. said in that case, legal representatives will advise clients of the perceived weaknesses of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a Court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is for the judge and not the lawyers to judge it As Lord Pearce observed in Rondel v. Worsley [supra], it is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter. It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail. It is quite another to lend his assistance to proceedings which are an abuse of the process of the Court. Whether instructed or not, he is not entitled to use litigation for purposes for which they were not intended. He may not pursue a case known to be dishonest He is not entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on an application without notice, or knowingly conniving at incomplete disclosure of documents. It is sometimes not easy to distinguish between the hopeless case and that which is an abuse of the

process. In practice it is not hard to say which is which, and in case of doubt the legal representative is entitled to the benefit of it
[23] Raylee Patricia Harley v. Robert McDonald, PCA No 9 of 2000 was an appeal to the Privy Council from the Court of Appeal of New Zealand. It was consolidated with another similar case. They both dealt with wasted costs orders. In delivering the decision of the Board, Lord Hope of Craighead observed [at paragraph 49] that a costs order against one of its officers is a sanction imposed by the Court The inherent jurisdiction enables the Court to design its sanction for breach of duty in a way that will enable it to provide (end of page 11) compensation for the disadvantaged litigant. But a costs order is also punitive. Although it may be expressed in terms which are compensatory, its purpose is to punish the offending practitioner for a failure to fulfil his duty to the Court.
[24] As a general rule, allegations of breach of duty relating to the conduct of the case by an attorney with a view to the making of a costs order should be confined strictly to questions which are apt for summary disposal by the Court. Failures to appear, conduct which leads to an otherwise avoidable step in the proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples. The factual basis for the exercise of the jurisdiction in such circumstances is likely to be found in facts which are within judicial knowledge because the relevant events took place in Court or are facts that can easily be verified. Wasting the time of the Court or an abuse of its processes which result in excessive or unnecessary cost to litigants can thus be dealt with summarily on agreed facts or after a brief inquiry if the facts are not all agreed.
[25] Counsel for the applicants urged that the common law position that applies in Antigua and Barbuda imposes a far more stringent test than in the United Kingdom. The common law test that applied is that counsel ought not to plead serious allegations of criminality unless there is clear and compelling evidence which is capable of justifying and establishing the allegations pleaded. The receipt of instructions only was wholly insufficient: Oldfield v. Keogh. To have accepted the allegations of a minor without more had been a serious dereliction of duty to the Court. He urged that the legal professional privilege issue had been inserted to tailor their case to the authorities, as there was no evidence a waiver had been sought or refused. He urged the Court to examine the evidence as it appeared in the witness statements and to come to a finding whether or not the allegations were true. Such an examination would establish that they were not capable of justifying the allegations of conspiracy, abduction, fraud, and lies made against the applicants. In particular, the witness statements showed not a shred of evidence against Mrs. Percival. (end of page 12)
[26] Concerning the quantification of the costs being sought, counsel for the applicants submitted that an application under Rule 64.8 and 64.9 was one where liability was to be determined. Once liability was determined, the Court would at some later date turn to Rule 65 to quantify the amount of costs.
[27] Counsel for the respondents, relying on the authorities set out above, submitted that the suggestion that the Court should consider all the pleadings and documents filed in the case when they have not yet been entered into evidence and the case has not been determined was misconceived. The jurisdiction to make an order for wasted costs is a summary jurisdiction and the procedures involving cross-examining witnesses and leading evidence are inconsistent with such summary nature of the jurisdiction. Secondly, a legal practitioner is not to be placed at risk that he will face an order to pay wasted costs where on instructions he pursues a case which may be hopeless. Third, the evidence of Ms Kentish as to the lack of a waiver of legal professional privilege from her clients was a complete answer to the application. He urged that the Court should only make a wasted costs order in a case where it was satisfied that the conduct so characterised directly caused the wasted costs complained of. What is required is serious dereliction of duty as an attorney, an abuse of the process of the Court. In this case, even if the Court were to come to the conclusion that this was a hopeless case, there is no basis on which the Court could find that the respondents pursued an action which clearly amounted to an abuse of the

process of the Court. Counsel urged the Court to find that this application was itself an abuse of the Court and to award costs to the respondents.
[28] I prefer the submissions of counsel for the respondents. The application is dismissed for the following reasons:

(1) The nature of the jurisdiction being exercised is exceptional and summary. These are not disciplinary proceedings. The case is not being tried. The Court has no jurisdiction either to use the untested evidence available or to hold a trial and go into the evidence to determine whether, if the case had been tried, there might or might not have been evidence to support the claim. (end of page 13)
(2) The fact that the applicants are out of pocket in defending improbable and outrageous allegations against them now abandoned by indigent claimants who cannot be found even if they could have paid the costs does not give them the choice of claiming their legal costs against the attorneys who are closer at hand and presumably have deeper pockets. They were entitled to the normal costs order against the claimants who have now abandoned the suit.
(3) It is not part of counsel's duty to the Court, the State, or to society to conduct a kind of preliminary trial of a claimants case before putting it forward in pleadings. In any event, the fact that a case may on paper appear weak is no basis for concluding that it would be weak when subjected to testing.
(4) Counsel has a duty, when instructed in litigation to include an allegation of serious criminal misconduct or other attack on the character of the other party, to insist on being supplied with all the information which is thought by his client to justify the attack, and then he must decide for himself whether the charge can justifiably be made. Counsel may not venture beyond the evidence that his client will produce. Counsel may not attack the character of the other party in the absence of any such evidence. That said, there is no rule that in every case an allegation of serious criminality is made an attorney needs to go further than to take instructions from the client and proceed to plead the case on the basis of the applicable principles. When a lady claims, as in this case, that she has been abducted and sexually assaulted and then abandons the claim on the eve of trial, it is no part of the jurisdiction of the Court to conduct an examination of the witness statements to ascertain whether the attorney might have done more to test the truth of the allegations.
(5) Counsel in litigation is bound by legal professional privilege. Certain matters passing between the minor and her lawyer would have been covered by the privilege. The privilege is the clients that for public policy reasons only the client (end of page 14) can waive. Evidence on the Court file indicates that the client in this case has disappeared from the country and claims to be in hiding as she fears, however unjustified that may be, for her life and that of her child. There is no evidence that she waived the privilege that protects her communications with her attorney. There is no rule that in proceedings such as this the attorney is obliged to show that a request had been made of the client to waive the privilege and that the client had refused. Even if the Court had been satisfied that counsel had a case to answer (which it does not), the absence of a waiver by the client of her right of legal professional privilege, would entitle counsel to the benefit of any doubt that might exist.
(6) All of the complaints of the applicants relate to issues of credibility. This matter has not been tried. Neither of the positions put forward by the claimants or by the defendants has been tested by cross-examination and otherwise subjected to scrutiny. Even if an attorney was at liberty, assuming legal professional privilege had been waived, and had disclosed all her instructions, the Court does not exercise the jurisdiction given by Part 64.8 by going about a weighing of the evidence that has not been tested by cross-examination and observation of the demeanour of the witnesses.
(7) The applicant on an assessment of costs hearing, whether or not there is also a wasted costs application, is required to indicate either the formula or the amount at which he asks the Court to assess the costs. It is not sufficient to ask the Court to make a wasted costs order without any hint as to either of the amount of costs actually incurred or the amount being sought There was no reason, in the

absence of a direction to that effect, for the applicants to have concluded that the hearing would have been on the issue of liability only and that there would be a later hearing to quantify the amount.

[29] The respondents have asked for their costs on this application. Both the respondents and the applicants have brought to the assistance of their local counsel senior counsel who (end of page 15) reside overseas. The Court has found the respondents guiltless of any wrongdoing in their handling of this suit On the other hand, the applicants are smarting under the terrible loss to their reputations that these unsubstantiated charges have caused. There has been no submission or argument on the question of costs of this application. This was an application in chambers. The normal costs awarded by this Court recently has been $750.00 on a simple application and $2,500.00 on one requiring argument This application was the object of much research by the parties and they must all have incurred significant costs. The best that the Court can do is to make an order for costs in what it considers a reasonable amount The order will be that the costs of the application in the amount of $5,000.00 be paid by the applicants to the respondents.

Don Mitchell, QC
High Court Judge (end of page 16)

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