IN THE SUPREME COURT OF JUDICATURE

BEFORE : MR. JUSTICE BOYD CAREY

IN COMMON LAW

SUIT NO. 1763 of 1973

BETWEEN KENNETH N. GARRICK

AND LINDY DELAPENHA & ANOR.
ROY HYLTON (THIRD PARTY)

November 24, 26, 27, December 1, 1975
January 30, 1976

J U D G M E NT

Table-tennis is a very popular sport in this country, ranking as it does among the first four in public participation and interest. The organization and the promotion of the game is in the hands of the Jamaica Table Tennis Association (hereinafter referred to as JTTA) which is a voluntary body affiliated to the Caribbean Table Tennis Federation and also to the governing world body, the International Table Tennis Federation. From 1972 until the 23rd July, 1973, when he felt constrained to resign, the president of JTTA was the plaintiff, Mr. Kenneth Garrick. The secretary during his tenure, was Mr. Baz Freckleton, whose connection with JTTA extended over two decades. The relationship between these two principal officers was singularly unhappy; there was continuous friction. Mr. Garrick believed in the faithful observance of due form and order: Mr. Freckleton was not troubled by such nice considerations. He believed in l'audace, encore l'audace, toujours l'audace. He bestrode JTTA like a veritable colossus, a situation which the president thought he should alter. The clash of these personalities eventually set the stage for this action for libel.

The libel alleged was contained in a television broadcast. It was in the following form:

"Jamaica will be represented by 13 players at this year's Central American "and Caribbean Championships which will be held in Georgetown, Guyana.

"Team Captain is Donovan Anderson, who has represented Jamaica on several "occasions and the other members of the men's team are Desmond Duhaney, "Patrick Donaldson, Dennis Duncan and Christopher Chin.

"Monica DeSouza, winner of the Women's singles title on five occasions and "also winner of the mixed doubles title six times along with Yolande Hall, "Anita Belnavis and Sharon Spence make up the women's team.

"The boys' team Richard Stephenson, Michael Tenn, Eric Stultz and "Christopher Beauburn.

"The team leaves on Saturday and will return on August 15th.

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"Ken Garrick has acted out of order on the question of the selection of "Juergen Thiebach on the Jamaican team. We have had several foreigners "selected on our national side and I think we must be more liberal and not "worry whether or not the person is white, but whether he is good enough "and qualifies. We must avoid racial prejudice in sports."

At the instance of Mr. Garrick, a writ was issued against Mr. Lindy Delapenha who, it was alleged, read the impugned article, and the Jamaica Broadcasting Corporation who broadcasted and published it between 7:30 p.m. and 8:30 p.m. on the 26th July 1973 as part of the sports section of their major news programme.

Paragraph 1 of the statement of claim alleged :

"The plaintiff is and was at all material times a schoolmaster and the Pro- "prietor and Principal of Durham College of Commerce, 20 Camp Road, Kingston."

By paragraph 2, it was alleged:

"The plaintiff is and was at all material times President of the Lucas "Cricket Club and is well-known in sporting circles and to the public as a "sportsman and sports-administrator."

By paragraph 7, it was alleged that the words meant and were understood to mean that :

"The plaintiff was illiberal, motivated by racial prejudice, was colour "prejudiced in his treatment of and dealings with his fellowmen and/or had "been activated by racial prejudice in the pursuance of his duties as a "member of the Council of the Jamaica Table Tennis Association, and the "President of the Jamaica Table Tennis Association."

The defendants admitted paragraphs 1 and 2 (supra) and further admitted publication of the broadcast. By paragraph 3 of the defence, the defendants denied that :

"The said words bore or were understood to bear or capable of bearing any "meaning defamatory to the Plaintiff or were understood to bear any of the "meanings alleged in paragraph 7 of the statement of claim."

By paragraph 4 of the defence, the defendants averred :

"The said words are a fair comment on a matter of public interest, namely, "the resignation of the plaintiff as President of the Jamaica Table Tennis "Association and the reasons given by him for so doing."

Paragraph 5 comprised the "rolled-up" plea :

"In so far as the said words consist of statements of fact the said words "are true in substance and in fact; in so far as the said words consist of "expressions of opinion, they are fair comment made upon the said facts which "are a matter of public interest."

In the course of the hearing, the Court ordered the defendants to supply the particulars required by section 185A of the Judicature (Civil Procedure Code). They distinguished between 'fact' and 'comment' in this wise : As to the former, the entirety of the first five paragraphs; the first sentence of the sixth paragraph with the exception of the words "out of order"; the words - "we have had several foreigners selected on our national side" in the second sentence of the sixth paragraph. As to 'comment', the words "out of order" in the first sentence of the sixth paragraph of the broadcast, and

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the latter part of that paragraph commencing with "and I think" to "sports".

With respect to the facts and matters relied on in support of the allegation that the words were true, the defendants pleaded :

PARTICULARS

"The Plaintiff put forward as an objection to Mr. Thiebach's inclusion on the "team the fact that he was a white German and that a Jamaican should be chosen "in his stead."

By paragraph 6 of the Defence, it was alleged that :

"On the 26th July, 1973, the Jamaica Table Tennis Association which is an "association within the provisions of Clause 10(c) of Part III of the Schedule "of the Defamation Law, 1961 made and published and issued to the second "named Defendant for the purpose of publication a four page statement of "and concerning the Plaintiff who was a member and former President thereof, "a copy whereof is delivered herewith."

By paragraph 7 of the Defence, it was alleged that :

"The Defendants say that the said broadcast was a fair report of the censure "passed by the Jamaica Table Tennis Association on the plaintiff, or alter- "natively fair comment thereon."

By paragraph 10, the defendants averred that :

"The said publication is privileged by virtue of the provisions of Sections "9 and 11 of the Defamation Law 1961."

In paragraph 2 of his reply, the plaintiff averred :

"The Jamaica Table Tennis Association is not an association within the "provisions of clause 10(c) of Part III of the Schedule to the Defamation "Law, 1961 and further or alternatively the publication complained of does "not fall within the provisions of sections 9 and 11 of the said Law and/or "is not by virtue of those sections privileged."

The plaintiff subsequently abandoned the averment that the Jamaica Table Tennis Association was not an association within the provisions of Clause 10(c) of Part III of the Schedule to the Defamation Act.

Mr. Roy Hylton, the plaintiff's successor in office, was joined in the action at the instance of the defendants by way of third party proceedings claiming indemnity on the ground that the matter which was broadcast, had been derived from a press release issued by the third party in his capacity as acting president of JTTA, to the news media and intended for broadcast.

By paragraph 5 of the defendants' statement of claim against the third party it was alleged that :

"In reliance on the statements contained in the said Press release signed by "the third party as aforesaid the Defendants published by means of the second "Defendant's Television Station the words contained in paragraph 6 of the "Statement of Claim."

By paragraph 6 :

"In so far as the said words were defamatory of the plaintiff (which is denied) "and in so far as the plaintiff is entitled to recover damages therefor "against the first and second defendants (which is also denied) the first "and second Defendants claim that they are entitled to indemnity from the "third party on the ground that the third party in issuing the said news "release to the second Defendant did that for the express purpose of the

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"same being repeated and/or commented upon over the radio and/or television "services of the second Defendant and that the second Defendant was entitled "to rely on the truth of the statements made in the said press release for "the purpose of repeating and/or commenting fully thereon and that if any of "the said matters were untruthful or defamatory to the extent that the "Plaintiff is entitled to recover damages therefor the first and second "Defendants are entitled to indemnity from the third party."

Paragraph 3 of the defence to the third party claim averred :

"Save that the Third Party admits that he signed the Press release paragraph "4 is denied. The Third Party states that the Press release was issued by "the Jamaica Table Tennis Association and entitled 'STATEMENT FROM JAMAICA "TABLE TENNIS ASSOCIATION' 26/7/73."

Paragraph 5 alleged :

"The Third Party states that in so far as the matter complained of by the "Plaintiff are a fair and accurate report of the said Press release, which "is not admitted, the Third Party is entitled to and relies on sections 9 and "11 of the Defamation Act and on the provisions of Clause 10(c) of Part III "of the Schedule to the Defamation Act. The Third Party states that he at "all material times acted bona fide and without malice."

At the very outset, it is necessary to determine whether the words of the broadcast were capable of the defamatory meanings claimed by the plaintiff in paragraph 7 of his statement of claim, or any of them and then to say whether what was admittedly published, was in fact defamatory of the plaintiff. No attempt was made by the defendants, apart from the averment in their pleadings, to show that the words were not capable of a defamatory meaning. Mr. Henriques who appeared on behalf of the defendants, did not put this forward in any shape or form as part of his arguments. His contention was that assuming the words of the broadcast to be defamatory of the plaintiff, then, either the words amounted to fair comment or could be justified as being true, or that qualified privilege by virtue of sections 9 and 11 of the Defamation Act, could be prayed in aid. My first task is thus a matter of construing the impugned broadcast. The test to be applied, is what would the ordinary reasonable listener to television understand by the broadcast. In my view the whole text should be looked at, because words take their colour from the context in which they are used. The sting of the alleged libel was contained in the final paragraph. The first five paragraphs were unexceptionable as they listed the names of the selectees, gave a brief history of two of them, namely the team captain Donovan Anderson, and Monica DeSouza, and gave the dates for the departure and return of the team. The words taken as a whole would be understood by the reasonable listener as conveying that the national table tennis team had been selected, absent was Jurgen Thiebach, omitted because of the disgraceful action of Ken Garrick who had objected to his inclusion on the ground that Thiebach was white. Merit, not colour, should be the guiding principle in sports, and racial prejudice should be eschewed.

If this is the sense in which the broadcast could be understood, and I so find, it conveyed a libellous imputation. To impute race and colour prejudice to a teacher and sports administrator, was in my judgment, calculated to lower him in the eyes of right thinking members of society. I hold

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therefore that the words were defamatory of the plaintiff.

This, however, does not conclude the matter. The other defences pleaded on behalf of the defendants must now be considered in turn. It was claimed that the words of the broadcast constituted fair comment on a matter of public interest, namely, "the resignation of the plaintiff as president of the JTTA and the reason given by him for so doing." The defendants had, in response to a request for further and better particulars as to the date it was alleged that the plaintiff had given a reason for his resignation, whether it was given orally or in writing, and the mode of publication, stated that the date on which a reason had been given, was 24th July, that the reason was given orally to a sports-writer of the Daily News and published by that paper on 25th July.

In order to ascertain whether Delapenha was commenting on the topic suggested in this defence, some extrinsic facts might usefully be set out here. The plaintiff resigned by a letter dated 23rd July, but the first intimation the general public received with respect to this event, was a report in the "Daily News" of 25th July. (See Exhibit KG-Vll). A statement issued by the JTTA was published in the "Daily Gleaner" of 27th July. (See Exhibit KG-Vlll). A copy of this statement was seen by Delapenha. He read it prior to going on the air. It was a matter of some surprise to him that Thiebach's name did not appear in the team selected as he personally considered him to be a very fine player. His understanding of the JTTA statement was that Thiebach's non-inclusion had something to do with race and colour. He had not read the report in the "Daily News" with reference to Garrick's reason for resignation.

Given that state of mind and in light of his ignorance as to Garrick's reason for resignation, Delapenha could hardly be seen to be commenting either on Garrick's resignation or more so on the reason Garrick had given for his resignation. Indeed, Delapenha himself, did say that in the broadcast, he was dealing with the selection of the table tennis team 'plus comment'. That 'plus comment' could reasonably and fairly only be referrable to comment on the team selected, more precisely the exclusion of Thiebach from the team selected.

The script (Exhibit LD-Xlll) which Delapenha used in his broadcast was concerned exclusively with the composition of the team. The final paragraph of the broadcast did not appear in that script. What Delapenha said in that paragraph comprised an 'ad lib' on his part. That final paragraph of the broadcast appears to be so closely connected with the subject matter of the script, that it is quite impossible to conclude that Delapenha could have been commenting on the resignation of Garrick or his reason therefor, as this defence boldly asserts.

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On a plea of fair comment, a relevant question to be determined, is whether the subject matter has been indicated with sufficient clarity to justify comment being made. Kemsley v. Foote (1952) A.C. 345. A fair reading of the words of the broadcast, would suggest that the subject matter indicated was the team selected and the non-inclusion of Thiebach. In mentioning the plaintiff, no reference was made to his having demitted office. There is not the veriest suggestion in the words of the broadcast that Delapenha was evincing the slightest interest in the plaintiff's resignation as president of the JTTA, and calling his listeners attention to it. The substratum of fact stated or indicated in the words of the broadcast, I hold, was not that averred in this defence. Indeed, implicit in the defence of justification and fair comment (the rolled up plea) which was pleaded in paragraph 5 of the defendant's defence, was the suggestion that comment was being made on the facts, namely the team selection, a subject quite different from that averred in paragraph 4 of the Defence, and indeed wholly disimilar from the subject matter indicated in paragraph 7, to wit, that a fair report of the censure passed by the JTTA or alternatively, fair comment thereon. As a matter of pleading, it is no doubt technically possible to plead inconsistent defences. Nevertheless, in the circumstances of this case, such pleas do wear an air of unreality, and tend perhaps to suggest that the defences are devoid of merit.

The arguments deployed by Mr. Henriques in this regard, were predicated on the assumption that comment was being made on Garrick's resignation and his reason therefor, That averment, I have endeavoured to demonstrate, has not been established. Dr. Barnett, who appeared for the plaintiff, maintained that the question of "fair comment" was really of academic interest. The sting of the libel amounted to an imputation of racial prejudice on the part of the plaintiff, and that sting could only be met by a plea of justification. That approach is supportable. Broadway Approvals Ltd v. Odhams Press Ltd (1964) 2 Q.B. 683. I would not dissent from it.

With respect to the rolled-up plea, it was claimed that the basis for justification and comment, was the allegation that the plaintiff had objected to Thiebach's inclusion on the team on the ground that he was a white German and he would prefer a Jamaican. By an order of the court made in the course of the trial the defendants were required, pursuant to section 185A of the Judicature (Civil Procedure Code) to give particulars stating which of the words complained of, they alleged, were statements of fact and which they alleged to be comment. These particulars have already been set out. I make no quarrel with that distinction.

If the defendants are to succeed on the plea of justification, they must establish that the gist or sting of the libel was true. (Gatley on

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Libel, Sixth Edition, paragraph 1310). The gist or sting of the libel was that Thiebach had been excluded from the team on racial grounds by the plaintiff. If it were proved that the plaintiff had, in the selection of the team, excluded Thiebach on the ground of his colour, then the correctness of the commentwould also, have been proved. It would have been fair comment. The burden was therefore on the defendants to prove not only that the facts were truly stated, but also that any comment upon them was correct. (Per Lord Finlay in Sutherland v. Stopes (1925) A.C. at p. 62). It is in the sense that the jury understands the matter that the defendants must prove the matter true. Thus, to show that Mr. Garrick had expressed a preference for a Jamaican selectee, rather than a German national, would not per se, prove that he was colour prejudiced, or illiberal or motivated by racial or colour prejudice or had been activated by such improper motives in the discharge of his office as president of JTTA.

The evidence of the plaintiff and the third party, Mr. Hylton must now be noticed. On the 27th June 1973, a meeting of JTTA was scheduled. The plaintiff as president, having received a file from the secretary Freckleton, looked it over to make himself familiar with the agenda. In that file was a letter (Exhibit KG-1) written by the secretary to Jurgen Thiebach. The purport of that letter was that there were no rules precluding his inclusion on the team, it all depended on suitability in terms of skill, performance and attitudes as a sportsman. He should do everything possible to make his selection possible. The letter did contain one inaccuracy ; it stated the offical position of the writer as chairman of the selection committee, team manager and national coach. At that time he was none of these things. This letter was later presented to the meeting for consideration, as the plaintiff took exception to it, on the ground that a letter of that nature ought not to have been despatched without his knowledge and without the prior approval of the Council. As the minutes of that meeting (Exhibit KG-IV) duly recorded, he held the view that the letter assured Mr. Thiebach of a place on the national team. The matter was deferred to a meeting which convened on July 1. Prior to this meeting, however, the secretary wrote a letter to the plaintiff (Exhibit KG-II). It was somewhat lengthy, but it is sufficient to say, that it accused members of the council of JTTA of introducing race and colour at the meeting.

At the meeting of July 1, Freckleton was appointed chairman of the selection committee. The letter (Exhibit KG-II) which he had written to the plaintiff was placed before the meeting. The plaintiff refuted the suggestion that race and colour had been mentioned at any meeting on the Thiebach issue. The secretary was regretably absent from this meeting.

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Another meeting was scheduled for July 10. Again, before that meeting was held, the plaintiff was in receipt of another letter from the secretary, Freckleton. (Exhibit KG-III). In this letter, so far as colour was concerned, Freckleton accused the plaintiff of introducing the question of race, not in the course of any meeting, but in post-meeting discussions. The meeting of 10th July was duly held. The discussion (see Minutes Exhibit KG-VI) centered around the construction of the letter (Exhibit KG-I) written by Freckleton to Thiebach. The letters which Freckleton had written to the plaintiff, were also before the meeting. The plaintiff offered his resignation, but was persuaded to withdraw it. President and secretary eventually shook hands and undertook to work together in the interest of the game. The minutes of this meeting disclosed that none of the members agreed with the president's construction of the letter, and some appeared to have sided with the secretary as to the propriety of writing such a letter without JTTA council approval.

What emerged from all this evidence, was that the question of selection of Thiebach did not fall to be considered at any of these meetings. The plaintiff confirmed this in his evidence. He also stated that he had never offered any opinion as to the selection of Jurgen Thiebach at any meeting. It was the fact that Mr. Claude France, a council member, did enquire of him outside a meeting, what his attitude would be to the selection of Thiebach on the national team. His response was that he would prefer a young Jamaican, but as it was the apparent desire of other members of the council to have Thiebach selected so as to enhance Jamaica's winning chances, he would offer no opposition. He would not agree to his inclusion on the team to tour China, as that was a goodwill visit. Mr. Roy Hylton's evidence was that the plaintiff adopted a 'nationalistic' stand. This evidence was unchallenged. The plaintiff did not use the emotive word 'white,' as the defendants' particulars, averred.

Mr. Henriques, in his arguments which he developed with great skill and ingenuity, sought to show that in this country, race and colour are irretrievably intertwined, so that the average Jamaican regards a reference to 'German' as synonymous with 'white', and 'Jamaican' with 'black'. He maintained that the plaintiff's interpretation of the letter (Exhibit KG-I) was wholly unreasonable, so much so that his view was not concurred in by the rest of the council members. This attitude was explicable only on the ground of colour prejudice. The secretary's wrongful accusation that he had introduced race and colour into the matter, had not provoked him into a demand for an apology. When therefore, he expressed the opinion that he would prefer a Jamaican to a German national, he was showing colour prejudice.

Dr. Barnett contended that the defendants who had no personal knowledge of what the plaintiff had said, sought to establish this, by relying

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on letters written by Freckleton, although they were in possession of the minutes of the meetings as well. Freckleton's letters were not relevant to the plea, because he had later admitted that his allegations were false. Learned counsel was here adverting to the fact that Freckleton had apologized and withdrawn similar allegations which he had published in the Daily Gleaner of 29th July, 1973 (Exhibit KG-XI), and which had formed the basis of a libel action against Freckleton and the Gleaner Co. This action was eventually settled out of court. The source of the allegation as to colour or race prejudice, was in effect a muddied stream.

There was no evidence whatever that Garrick had 'acted' to exclude Thiebach. Responsibility for selection was in the selection committee, whose chairman was Freckleton. The plaintiff was not a member of that committee. There was no evidence either that he had influenced his non-inclusion. Mr. Delapenha testified that he intended to convey that Thiebach had been excluded on racial grounds by the plaintiff. Mr. Henriques faced a formidable hurdle in the light of this evidence.

I do not doubt that 'colour' and 'race' are used in an interchangeable connotation. An examination of the plaintiff's statement outside the meeting, shows that he was not objecting to Thiebach participating with Jamaicans, but to his representing Jamaica abroad in a non-competitive tournament. It was the fact that Thiebach had participated in and won major tournaments. Once there was unchallenged evidence that the plaintiff was not objecting to Thiebach's representing the country abroad, or to his participating in local tournaments, then the whole basis for the plea of justification was seriously eroded, if not completely destroyed.

When Delapenha testified that he intended to convey that Thiebach had been excluded on racial grounds by the plaintiff, he acknowledged that it would be unfair to comment, if in fact, the plaintiff had not participated in the selection. There was no evidence that the plaintiff had been involved in any selection. In order to comment fairly, the commentator must have the correct facts.

"In order to be fair, the commentator must get his basic facts right. The "basic facts are those which go to the pith and substance of the matter : "see Cunningham-Howie v. Dimbleby (1951) 1 K.B. 360, 364. They are the facts "on which the comments are based or from which the inferences are drawn - as "distinct from the comments or inferences themselves. The commentator need "not set out in his original article all the basic facts : see Kemsley v. "Foot (1952) A.C. 345 ; but he must get them right and be ready to prove "them to be true. He must indeed afterwards in legal proceedings, when "asked, give particulars of the basic facts : see Burton v. Board (1929) "1 K.B. 301 ; but he need not give particulars of the comments or inferences "to be drawn from those facts. If in his original article he sets out basic "facts which are themselves defamatory of the plaintiff, then he must prove "them to be true ; and this is the case just as much after section 6 of the "Defamation Act, as it was before. It was so held by the New Zealand Court "of Appeal in Truth (N.Z.) Ltd. v. Avery [1959] N.Z.L.R. 274, which was accepted "by this court in Broadway Approvals Ltd. v. Odhams Press Ltd. [1965] 1. W.L.R. "805. It is indeed the whole difference between a plea of fair comment and a "plea of justification. In fair comment he need only prove the basic facts to "be true. In justification he must prove also that the comments and inferences "are true also.

(Per Lord Denning M.R. in London Artists Ltd. v. Littler (1969) 2 Q.B. at 391, 392).

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Mr. Delapenha did not, I fear, get his basic facts right. As to the sting of the libel, therefore, although the words consisted of comment on a matter of public interest, namely, the team selected to represent Jamaica at the Central American and Caribbean Championships, the allegation that the plaintiff had, in selecting ~~the~~ that team, excluded Thiebach on colour or race grounds, was in respect to a basic fact, which was defamatory of the plaintiff, and the allegation was not reasonably capable of being considered comment. It had not been substantiated by the defendants. Alternatively, in the allegation that the plaintiff had acted to exclude Thiebach on the basis of colour or race they had made a defamatory imputation without any basis of fact to support it. In my judgment, this plea cannot be sustained.

The defendants further pleaded the statutory defence under the Defamation Act of qualified privilege of the media. The JTTA statement which was annexed to the defence must now be considered. This statement had been issued above the signature of the third-party, who had assumed the position of acting president, after the plaintiff had resigned and after an interview with the plaintiff with respect to the reasons for his resignation, had appeared in the 'Daily News' (Exhibit KG-VII).

The first question is whether this statement was within the ambit of paragraph 10(c) of Part III of the Schedule, more particularly, was it a finding or decision relating to a person who is a member of a sports association. The defendants described the press release by the JTTA, as a report of the censure on the plaintiff. That description is not inaccurate. The JTTA found or decided (inter alia) in regard to the plaintiff that :

(a) the plaintiff and other JTTA members had attempted to use race and colour in considering basic issues;

(b) the plaintiff did not agree that Thiebach satisfied all the rules and criteria;

(c) he never attended training sessions, and came but rarely to tournaments and trials;

(d) he had submitted his resignation, published it to the press at a time when the JTTA would not have been able to consider it, the regular monthly meeting being scheduled for the following day;

(e) he knew of the likely composition of the team to Guyana and to China as those had been discussed at meetings at which he had presided.

It amounted to a finding or decision relating to the plaintiff who remained a member of JTTA, despite his resignation, in virtue of his presidency of the Lucas Cricket Club. The statement also disclosed that Thiebach had not been available for selection, and had so advised the selectors. These findings which have been extracted were the result of a careful and detailed study of the document. No one would expect an announcer to subject the release to such scrutiny. But an announcer has an obligation to get his

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facts right, and to broadcast the facts so obtained. There was no finding in the release that the plaintiff had been instrumental in excluding Thiebach on racial grounds. The broadcast sought to convey and did convey that the plaintiff had excluded Thiebach on the ground that he was white. Dr. Barnett argued rightly that the JTTA release was concerned with giving an explanation of the plaintiff's resignation and criticising the timing and manner of the resignation as well as his non-acceptance of the majority view on the Thiebach issue. He did not agree that the JTTA release came within the category of a fair and accurate report of a finding or decision of the association. The broadcast did not purport to be such. It did not refer to the statement, nor did it seek to inform the public as to the findings of the JTTA.

Was the broadcast, a fair and accurate report of these findings? It was not, and for a number of reasons. A fair and accurate report meant, in my view, a balanced picture. It must not be one-sided ; it ought not to be slanted. The broadcast failed to mention that Thiebach was not available for selection. It conveyed to the listener that the plaintiff had participated in team selection and had excluded Thiebach. It was not therefore accurate. It highlighted the question of colour prejudice on the part of the plaintiff only, and omitted to indicate other matters set forth in the release. It was not a balanced picture. It was not fair.

Delapenha never at any time adverted to the JTTA release, though I found that he had read it. He did not refer to the JTTA either in his broadcast. The fact of the matter was, that he was dealing with the selection of the team and was concerned at the omission of Thiebach. He published to the listening public the words of the broadcast on the mistaken assumption that the plaintiff had been involved in the team selection. He was not reporting the findings of the JTTA, nor was he commenting on them. To constitute fair comment, the commentator must get his basic facts right. Delapenha did not.

The defendants also claimed an indemnity from the third party, who had signed the JTTA release. The burden was on them to prove that they had relied on the release in order to make the broadcast. Mr. Henriques for the defendants pointed to Delapenha's evidence that he had used the release to enable him to make the broadcast in those terms. When the JTTA statement recorded that 'it deplores any attempt by anyone, be he 'present member or recently resigned member, to use the insidious 'philosophy of prejudice on the grounds of race, colour or creed in 'considering basic issues,' that was a clear reference to the plaintiff. The theme of the release was colour and its use by the plaintiff. Delapenha was expressing no more than the release itself, disclosed. He was therefore entitled to comment as he eventually did.

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Mr. Muirhead who appeared on behalf of the third party asked the court to say that the material for the broadcast did not emanate from the JTTA statement, because, had Delapenha referred to that document, paragraph 6 (which contained the sting of the libel), could not properly, accurately or otherwise be extracted therefrom. The broadcast was contrary to the statement.

It was perfectly true that the release referred to race and colour prejudice and accused not only the former president, the plaintiff, of attempting to use these prejudices in considering basic issues, but incumbent members of the JTTA as well. I do not agree that the theme of the release was colour and its use by the plaintiff. The release was highly critical of the conduct of the plaintiff in several areas, and highlighted his many failings. But it never shewed that the plaintiff had excluded Thiebach from the team selected to go to Guyana because of colour. Mr. Delapenha stated on more than one occasion that he intended to convey precisely that imputation. He knew Thiebach to be white. It was by reason of his knowledge of Thiebach's skill and ~~powers~~ prowess, that his absence seemed to be curious. He had imported other facts into his broadcast which clearly were not extracted from the JTTA release, for example the number of times one of the selectees had represented Jamaica, and the number of occasions another had won various titles.

A careful reading of the release would not have disclosed that the plaintiff had participated in the team selection. Mr. Delapenha did not read the release carefully. He was negligent. It was pardonable, perhaps, but it could not be justified. If Delapenha relied on the statement for his facts, then he did not get his facts right. If he was relying on it to base the comment pleaded by the defendants, then the comment was not warranted on the facts. The commentator, Mr. Delapenha, was somewhat in the position of the defendant in London Artists Ltd. v. Littler (1969) 2 Q.B. 375 ; he did not wait long enough to check the facts and get them right. I hold therefore that the claim for contribution fails, and accordingly the third party is entitled to be dismissed from the suit.

And lastly damages fall to be assessed. I accept that compensation - not punishment should be the **object** of the exercise. The Court is in these circumstances attempting to ~~qualify~~ quantify in terms of money, the natural injury to feelings which any normal person would experience when he is defamed. As these damages are at large, the Court is obliged to consider all the circumstances of the case. First, the broadcast itself. The imputation of race and colour prejudice was a serious slur. No one has sought to say otherwise. It was especially so because of the position and standing of the plaintiff in the community. At the time of the publication of the broadcast, he was the proprietor of a

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Commercial College in Kingston which was attended by students of all colours and other nationalities. He was its principal, and taught accounts there. He held the position of President of the Lucas Cricket Club, a club with a noble history. He was of course an ex-president of JTTA. The cases support the proposition that the 'higher' the plaintiff's position, the heavier the damages. Dingle v. Associated Newspapers Ltd. (1961) 1 All E.R. 897 - a Town Clerk; Lincon v. Daniels The Times, 24th/25th June 1960 - a barrister. Then the mode and extent of the publication must be taken into account. The libel was published in a television broadcast in the sports section of the Corporation's major newscast. Mr. Henriques described it as defamation made actionable by statute. It took no time in the telling - a ~~spent~~ sped arrow. No evidence was adduced with regard to television coverage in the country. All that could be concluded was that the plaintiff was libelled to the general public over the solitary television station in the country.

No apology was made in respect of the libel, although a letter of demand (Exhibit KG-XII) was forwarded to the defendant corporation by the plaintiff's attorneys. The corporation did offer to make time available on the air to allow the plaintiff to give his side of the story, or to allow a prepared statement by him to be read, but this was declined. Where a person has been disparaged over the broadcasting media, for example, an offer to appear on the station, is not the same thing as an apology. It is not an 'amende honorable.' An apology is a full and frank withdrawal of the suggestions conveyed. (Per Cockburn C.J. in Risk Allah v. Johnstone (1868) LT. at p. 621). The absence of an apology may therefore properly be thrown into the scales.

The conduct of the defendants from the time of the publication to verdict is another relevant factor. The defendant Delapenha knew that Freckleton had apolized and withdrawn a similar imputation, which had been published in the Daily Gleaner. This knowledge must be imputed to his employers, the corporation. Notwithstanding this knowledge, no retraction was ever published. Indeed, the defendants pleaded justification, and attempted to establish it. That plea, I have endeavoured to demonstrate, has not been sustained. This constituted a persisting in the charge.

The defendants adduced evidence in virtue of section 14 of the Defamation Act, in mitigation of damages. There had been a settlement between the plaintiff on the one hand, and Baz Freckleton and the Gleaner Co., on the other hand, in an action for libel which had made similar imputations disparaging the plaintiff. An amount of $2,000.00 was paid at the instance of the plaintiff to the JTTA for the development of table tennis in rural areas. The plaintiff's costs were also paid. Dr. Barnett suggested that the payment of that sum, was a token payment, and not a realistic assessment by the parties as to damages. I consider $2,000.00 too substantial a sum to be categorised as a token or nominal payment. It was being argued

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on behalf of the plaintiff that the Gleaner Co. had made a contributation to the JTTA; the plaintiff had not agreed to receive, nor had he received damages. I cannot agree. Had that amount been paid directly to the plaintiff, it would necessarily be damages, or at any rate, 'compensation in respect of the publication,' which had been received. If the plaintiff chooses to require that the amount, which the parties have mutually agreed should be paid as compensation, should be paid to a third person, I am quite unable to understand what has transformed that payment into other than damages or compensation, which he has received. An employee none the less receives his pay, even if it is paid into his bank account, or is assigned to some third party. I was not persuaded that the settlement could not properly be urged as a factor in mitigation of damages. The extent of that mitigation, however, cannot be significant having regard to all the other considerations which tell in favour of heavy damages.

I do not leave out of consideration the state of Delapenha's mind. He intended to convey that the plaintiff had excluded Thiebach on the grounds of race and colour. But there was no malevolence; there was a want of care on his part.

Having taken all these matters into consideration, I consider the amount of $2,000.00 as fair and reasonable compensation for the injury done to the plaintiff's reputation.

Accordingly there will be judgment for the plaintiff in that amount with costs to be agreed or taxed. The claim against the third party is dismissed with costs.