JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 70/96

COR: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN	**THE GLEANER COMPANY LIMITED** **DUDLEY STOKES**	**DEFENDANTS/ APPELLANTS**
AND	**ERIC ANTHONY ABRAHAMS**	**PLAINTIFF/ RESPONDENT**

Emil George, Q.C., with Garth McBean & Yoland Whitely
Instructed by **Richard Ashenheim of Dunn, Cox, Orrett & Ashenheim**
for Appellants

Winston Spaulding, Q.C., Gayle Nelson, Mrs. Nancy Tulloch-Darby, Mrs. Crislyn Beecher-Bravo & Marina Sakhno instructed by **Gayle Nelson & Co for Respondent**

October 25, 26, 27, 28, 29 November 1, 2, 3,4, 5, 1999
January 31, February 1, 2, & July 31, 2000

FORTE, P:

The respondent is a gentleman of solid background and a son of a well respected family in Jamaica. As a result, he was the beneficiary of a good education, received at two of the leading high schools in Jamaica from where he moved on to the University College of the West Indies. Taking advantage of these opportunities he excelled not only in academics, but also in sports and in other extra curricular activities,

Barbados to head the O.A.S. Regional office, and while there through the OAS he did consultancies with the Governments of Barbados, Grenada, St. Lucia, Haiti and Bolivia.

In 1980, he came home and contested the general elections, this time being successful. Thereafter he was appointed Minister of Tourism. In the 1983 elections, not contested by the opposition party he was returned unopposed, and thereafter continued as Minister of Tourism until 1984, when he resigned as Minister, but remained in Parliament. During this time, the respondent testified, he had the opportunity to further increase contacts, "press contacts, trade contacts, public relations contacts, government contacts both regional and international."

After his resignation, the respondent went back to his private consultancy business, and made available to the Jamaica Hotel and Tourist Association, and the government of Jamaica, his advice and contacts. The respondent at this time, if he were believed, had established himself as having vast experience in the tourism industry and considerable knowledge in respect of the same, and also a lot of contacts both regionally and internationally.

He was a person respected for his knowledge and experience, not only at home but internationally having done consultancies for various countries. He was at this time enjoying a good reputation, and success in his consultancy business, though, handicapped so far as international organizations were concerned, by his continuing as a Member of Parliament, as those organizations did not "favour" active politicians.

It was at this time that the Articles, the subject of the appeal, were published by the defendants. The respondent had had an introduction to the allegations to be made against him on the day before the first of these publications took place. On that day, he received a call from a Miss Lisa Marie Peterson, from the Associated Press in Stanford Connecticut. She read to him what appears to have been an Article which she proposed to publish. The respondent testified that the Article she read sounded exactly to the word

business executives paid kickbacks to Jamaican officials for lucrative tourism promotion contracts.

'All I can say is I suspected the Minister of Tourism was exacting a toll,' the writer, Robin Moore of Westport, told **the Advocate** of Stamford in a copyright story published Tuesday.

'Call it a bribe, call it anything you want,' said Moore, the author of '**The French Connection**', a novel on drug smuggling.

The Advocate reported Sunday that Federal authorities in Connecticut are investigating public relations and advertising executives suspected of paying Jamaican officials one million dollars for contracts worth $40 million from 1981-1985.

The Advocate, quoting anonymous sources close to the probe has said five or six executives of the public relations firm Ruder Finn and Rotman and the advertising firm Young and Rubicam are the focus of the investigation.

Officials of both firms have denied any wrongdoing and said they are co-operating with investigators.

KEY FIGURE

Moore said Monday that his files helped lead Federal agents to suspect that Anthony Abrahams, Jamaica's former Tourism Minister was being paid by American businessmen for the multi-million dollar tourism contracts.

Sources close to the federal grand jury have said Abrahams is a key figure in the investigation, the newspaper said, Abrahams, however, has not testified before the grand jury empannelled in New Haven, **The Advocate** reported.

The newspaper said efforts to reach Abrahams and his successor, Hugh Hart, during the past two weeks were unsuccessful, and Hart didn't return telephone calls to his office on Monday.

Moore 61, said the notes in his diary are impressions of what was going on between Abrahams and the United States companies. The subjects also appeared in letters between him and friends in Jamaica.

' I have no definitive proof that this ever happened – it was just a suspicion of mine,' Moore said. 'People were

"Abrahams: Has never accepted 'kickback'

MR. ANTHONY ABRAHAMS, M.P. and former JLP Minister of Tourism (1981-84) has issued a statement in response to an associated press (AP) story appearing in the **Star** last Thursday (17.9.87) and the **Daily Gleaner** last Friday (18.9.87) refuting the inferences made in the article. Mr. Abrahams stated that – at no time in his entire career, including the period 1981-84 when he was Minister of Tourism, has he ever accepted any 'kickback' 'toll' or bribe to award or influence the award of any contract.

That I need at all to make such a statement for the first time after 20 years in public life is due to reports in your paper over the past months about an officially unconfirmed U.S. inquiry into alleged 'kickbacks' to Government officials in Jamaica and culminating in a statement in your paper attributed to Mr. Robin Moore.

'Moore's statement,' Abrahams said 'was damaging in the extreme to my reputation in Jamaica and internationally and though couched as a 'suspicion' about which he had no 'evidence', is tantamount to a blatant lie.

'Accordingly, I have instructed attorneys in Jamaica and overseas to take legal action against Moore's libel. I also take the opportunity of, for the record, stating that I have not been approached by any agent or servant of the United States Government and asked my question, or invited to give evidence before any Grand Jury Inquiry by that Government.'

'I state further that a (sic) no time have I received any payment from any executive of Ruder Finn and Rotman. Young and Rubican or any agent of theirs to at any time do, or commit, any improper act of wrong doing.'

'I also wish to state that neither I, nor any company owned by me, has, or ever has had any bank account in the Cayman Islands and that in fact, anyone knowing of any account of any bank in Cayman under suspicion and alleged to be mine can rely on any co-operation that I could provide for any investigation in such account. I must repeat that I have no bank account in Cayman'...".

The respondent however filed a writ and Statement of Claim in libel on the 24th September, 1987 based on the articles published in the Star Newspaper on the 17th

> of the publication outweighed the prospect of material loss."

The appellants entered an appearance on the 2nd October, 1987, but having failed to file a defence within the required period, interlocutory judgment in default of defence was entered against them on the 23rd October, 1987, the respondent thereby earning the right to proceed to an assessment of damages. The appellants' subsequent application to set aside this judgment was refused, but on appeal, this court set aside the default judgment and granted the appellants leave to file a defence within 14 days.

A defence was thereafter filed pleading justification and qualified privilege. Subsequently, the respondent sought further and better particulars with respect to both those issues raised in defence. This summons was dismissed on the 13th October, 1992, but on appeal, this Court concluding that on the pleadings there was no defence, in the exercise of its inherent jurisdiction, ordered the defence to be struck out and remitted the case to the Court below to be proceeded with as if there was no defence. The case thereafter proceeded to an assessment of damages before the learned judge and a jury where it was adjudged:

> "that there be judgment for the Plaintiff against the Defendants in the sum of $80,700,000 for General Damages and costs to be taxed if not agreed."

It should be noted that in answering the questions asked of them after they had returned from retiring, the jury made it clear that the damages of $80.7m were in relation to compensatory damages only and that they had awarded no damages in respect to exemplary damages which had been claimed in the Statement of Claim.

It is from this judgment that this appeal now comes before us.

(d) evidence of aggravation through numerous articles published in the defendants' newspaper subsequent to the libel complained of.

In addition and in the alternative the appellants complain that the learned trial judge misdirected the jury in relation to the evidence. I will treat with (a) to (d) separately.

1. Pecuniary Loss

In cases of libel a plaintiff can recover pecuniary loss as general damages but can only do so in respect of specific pecuniary loss e.g. loss of a particular contract or loss of employment, if such loss is specially pleaded. In ***Evans v. Harries*** [1856] 1 H & N 251, in an action for slander of the plaintiff in his business of an inn keeper, the plaintiff recovered for a general falling off of custom and in ***Harrison v. Pearce*** [1859] 32 L.T. (O.S.) 298, in an action for libel upon the proprietress of a newspaper, damages were awarded in respect of the resulting general decline in the newspaper's circulation. Thus, a plaintiff can give evidence that the words complained of are likely to cause him pecuniary loss in support of a claim for general damages (***Calvet & Tomicies*** [1963] 1 W.L.R. 1397).

Evidence of actual loss, whether it be general loss of business or profits, or loss of particular earnings, customers, clients or patients, can only be received in evidence if the details have been pleaded in the Statement of Claim. However, evidence may be given of specific losses, not with a view to recovering damages for such specific losses as such, but in order to assist the court in assessing the general damages.

What is the evidence complained of as being evidence of unpleaded special damages? It must be understood that in so far as pecuniary loss is concerned, the respondent gave evidence of the prospects he had of increasing his business when the

> specific losses as such, but in order to assist you in assessing the general damages.
>
> So, as I tried to explain on Friday, if a mention is made of a particular amount, you can't say we are going to find this amount because no special damages are claimed, but that may assist you when you come to deal with the general damages, general loss of business and so on, assist you in making your award."

In my view the above is a correct statement of the law and adequate directions by the learned judge as to how to treat with the evidence.

Complaint was also made on the same ground in respect of evidence given by Marcella Martinez, on the respondent's behalf and which is as follows:

> "... is a career that can earn easily US$200,000 per annum; it can be more, than US$200,000. As a new consultant not even Abrahams begin at the top but certainly with the potential to reach the top which could be ½ m U.S. dollars. I would grade plaintiff above average with high potential to reach the top."

After rehearsing that evidence for the benefit of the jury the learned judge directed them how to treat with it in relation to damages when he said:

> "Remember you can't look at half a million and say I must award this or two hundred and say I must do this, this is just evidence to help you in assessing the general loss of business.
> Remember I told you that there is no special claim for damages, no specific damages claimed, therefore you can't pick out a particular amount and say I must grant this, this is only to assist you as you seek to find the appropriate award in respect of the general loss in issue."

The jury were therefore adequately assisted as to how to treat with the evidence relating to specific monetary figures named by the appellant and his witness as to his earning capacity, and directed specifically not to regard it as amounts being claimed under the heading of special damages. The evidence which fell from the respondent in this regard was given in the context of demonstrating to the Court, the adverse effect that the publication of the libel had on his business resulting in pecuniary losses which

and to aid the jury in assessing general damages by giving some idea of possible earnings by a person in his discipline. The appellants relied on the case of ***Tilk v Parsons*** [1825] 2 Car. & P. 201; 172 E.R. "where it was held that a baker should bring persons to testify that they refused to buy his bread because of the libel." This case was a case dealing with the hearsay rule as is readily ascertained in a reading of the short report of the case The following extract demonstrates:

> "... having proved that certain persons whom he was in the habit of serving with the plaintiff's bread, refused to purchase it any longer –
>
> The plaintiff's counsel wished to ask him whether they assigned any and what reason for such refusal.
>
> Best C.J. – That question cannot be asked. You might call these customers, who are named in the declaration, and might ask them on their oaths, what was the reason of their not continuing to buy the plaintiff's bread; but I am clearly of opinion, that what they said to the salesman is not evidence."

And so it was not – because it would have infringed the hearsay rule. In any event in that case "the declaration alleged as special damage that several persons (naming them) discontinued to take his bread." The plaintiff had therefore to prove the special damage alleged, and he could only do so by calling those persons to give evidence as to their reasons for discontinuing the purchase of his bread.

In the instant case, there was no allegation of specific losses, and as I have already stated, the evidence given in that regard was assistance to the jury in its assessment of general damages, and the learned judge was correct to have treated with it in that way.

2. Injury to Plaintiff's Health

The appellant contended on this aspect of the ground, that evidence of the respondent suffering injury to health was not admissible for the reason that it was not pleaded. The question which arises is whether a plaintiff who is the victim of a

> if special damage results. But that special damage must be the natural or necessary result, not depending on the peculiarities of the particular individual. In the absence of all authority it is the sounder way of dealing with this matter to hold that the action is not maintainable."

And Bramwell B:

> "I am of the same opinion. The question seems to me one of some difficulty, because a wrong is done to the female plaintiff who becomes ill and therefore there is damage alleged to be flowing from the wrong; and I think it did in fact so flow. But I am struck by what has been said as to the novelty of this declaration, that no such special damage ever was heard of as a ground of action. If it were so I am at a loss to see why mental suffering should not be so likewise. It is often adverted to in aggravation of damages, as well as pain of body. But if so, all slanderous words would be actionable. Therefore, unless there is a distinction between the suffering of mind and the suffering of body, this special damage does not afford any ground of action. There is certainly no precedent for such an action, probably because the law holds that bodily illness is not the natural nor the ordinary consequence of the speaking of slanderous words. Therefore, on the ground that the damage here alleged is not the natural consequence of the words spoken by the defendant, I think that this action will not lie."

The case of ***Wheeler v. Somerfield & Others*** [1966] 2 QBD 94 was however a case of libel. At the trial with a jury the plaintiff sought leave to amend [further] to claim that by reason of the libel he had been injured in his health as well as in his reputation, and to call medical evidence to support that claim. The application was refused. On appeal it was held that even if a claim for damages for injury to health was sustainable in an action for damage to reputation, it had rightly been excluded in that case. Here is how Lord Denning MR dealt with this issue at page 104:

> "Then the plaintiff had this other point. He wanted to give evidence of his ill health. He suffers severely from cataract in the eyes. He sought to give evidence of it before the jury. First, on the ground that the cataract was aggravated, if not caused, by the libel. Secondly, that it was relevant on damages to show that he was a man who, if ruined by the libel, could not get work elsewhere. I have never heard of a case (and counsel told us they have not found any) where a man has been allowed to claim damages in a libel action for

> All the emotional distress before the indictment (for 2 years before indictment) were caused by the defendants. Then there were 7 months of the indictment and since that 5 years of the prestigeous Gleaner Company claims and maintaining and reporting in 1991 that I am guilty."

The respondent also called as a witness Dr. Aggrey Benjamin Irons, a Consultant Psychiatrist who as of July 1995 started seeing the respondent "for an intensive assessment of his psychiatric state." He carried out mental status examination and began psycho-therapeutic intervention.

I set out hereunder, his findings as given in evidence:

> "I found Mr. Abrahams to be someone who was previously high drive, high functioning, self motivated and relatively successful. These are areas I thought were directly and negatively affected by severely internalised trauma arising from a slur on his character. The following are my findings:
>
> (1) Severely reduced self esteem and self perception.
>
> (2) Severe anxiety with what we call phoebic 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.
>
> 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 on going psychotherapeutic intervention which would involve both psychoanalysis and pharmocologic intervention over the next 2 years at least for the next 2 years. Pharmacologic i.e. medication which he had already begun."

The doctor thereafter offered the following opinion which seems to connect the respondent's condition with the libel:

> "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

He directed thus:

> "Now, we are going to look at injury to health; injury to health. Members of the jury, you may take into consideration in assessing damages, any mental distress, any mental distress or illness caused to the Plaintiff as a result of the publication. You cannot take into consideration mental suffering or illness caused not to the Plaintiff, but to his family; any member of his family as a result of the publication, nor mental distress caused to the Plaintiff by sympathy for the suffering endured by others. You may take into consideration in assessing damages, any mental distress or illness caused to the Plaintiff himself as a result of the publication. ... but you cannot take into consideration mental suffering or illness caused not to the Plaintiff, but to members of his family. ...
> I mention too, members of the jury, injury to feelings. This is generally assumed. If your good name had been sullied, then the law will assume injury to feelings. You may award damages for the mental suffering arising from the apprehension of the consequences of the publication. The apprehension of the consequences of the publication. If there has been any kind of highhanded, oppressive, insulting or contumelious behaviour by the Defendants which increases the mental pain and suffering caused by the defamation which may constitute injury to the Plaintiff's pride and self-confidence, these are proper elements to take into account, ..."

The learned trial judge thereafter literally took away from the jury any consideration as to an award of damages in relation to the physical injuries testified to by the respondent. He directed them thus:

> "Now, it would seem to me that you would need medical evidence from a doctor to say that the obesity caused the diabetes. You heard from Dr. Irons, the psychiatrist, and he couldn't tell you that, so what you have is from Mr. Abrahams that diabetes sets in. It would seem to me, members of the jury, that would not be evidence, you would need evidence from a doctor to satisfy the balance of probability that the publication caused the stress which caused over-eating, which caused diabetes."

After summarizing the evidence of Dr. Irons, and assisting the jury how to treat with the evidence of an expert the learned judge directed them further as follows:

> "So what you have to do is to look carefully at his (Dr. Irons') evidence and see whether on his evidence you are

4. Aggravation of damages

Under this head the appellant, impliedly accepting that there was an abundance of evidence which could go to aggravation of damages, made a challenge merely to the fact that the evidence of publication in articles subsequent to the subject articles was inadmissible without being pleaded and if not the learned judge did not specifically direct the jury that no damages could be awarded in respect of those publications.

The subsequent articles were however admitted to show malice in the appellants in keeping the whole question of the respondent's conduct in relation to the kick-backs continuously in the public's eyes. The appellants however maintained that having admitted them, the learned judge failed to direct the jury that no damages could be awarded in respect of the content of those articles. For this proposition the appellants relied on the cases of (I) ***Pearson v. Lemaitre*** 5 MAN & G 718 reported in [1843] 134 E.R. 742 (2) ***Darby v. Ouseley*** [1856] 156 E.R. 1093 and ***Anderson v. Calvert*** [1908] 24 T.L.R. 399.

In ***Pearson v. Lemaitre*** (supra) Tindal C.J. at page 749 stated:

> "And this appears to us to be the correct rule, viz that either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter; but that, if the evidence given for that purpose, establishes another cause of action, the jury should be cautioned against giving any damages in respect of it."

This case establishes the correctness in respect of the admissibility of such evidence to establish malicious motive in the appellants. In so far as the directions by the learned judge as to damages in respect of the other articles, there was never any issue in the case in respect of this, the learned judge confining himself by reference to the Statement of Claim, to the articles upon the content of which, the respondent founded his claim.

(ii) The lateness of the apology, this being published on the 9th and 10th July, 1995 nearly eight (8) years after the publication.

(iii) The wording of the apology which the jury could have concluded was not sincere. It reads as follows:

> "In September 1987, the story of which complaint is made concerning Mr. Anthony Abrahams, former Minister of Tourism of Jamaica, came from the Associated Press of the United States, in the ordinary regular course of business. At the time, we honestly believed the information to be true and accurate considering the usually reliable source from which it came. This agency has supplied us with material suitable for publication over a number of years, and is responsible and reputable.
> Accordingly, we published the information in the issue of this newspaper on the 17th of September, 1987. We were sued by Mr. Abrahams in libel and in our defence we pleaded justification and qualified privilege, sincerely and innocently believing that we could obtain evidence to support these defences. As it turned out the Court of Appeal dismissed these defences since the evidence was not forthcoming. We now realise that we cannot sustain these allegations. Accordingly, we hereby withdraw the allegations.
> In the circumstances we tender our sincere apologies to Mr. Abrahams and are very sorry for any embarrassment or discomfort arising from the article."

It is an apology which in its very words denotes that it was being offered not because the allegations were false but because the evidence to prove it was not available. The jury certainly could have viewed it in that regard and finding that it was not sincere use that as an element in determining whether aggravated damages should have been awarded. Indeed counsel for the appellants, at trial, as the learned judge told the jury in his directions, submitted that the apology "is a wholly honest apology with no hypocrisy whatever" and then stated:

> "We apologised because we can't prove it. We made allegations and we could not get the evidence we hoped to get. To pretend we did not believe would be to tell a pack of lies.

In order to explain the contention of the appellants it is necessary to set out Section 22 of the Constitution, also Article 10:

> "**22.** – (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence and other means of communication.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –
>
> (a) which is reasonably required -
>
> (i) in the interests of defence, public safety, public order, public morality or public health; or
>
> (ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibitions or public entertainments; or
>
> (b) which imposes restrictions upon public officers, police officers or upon members of a defence force." [Emphasis mine]

Article 10 states:

> "**1.** Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> **2.** The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic

by juries, but also to substitute another award in any case where the damages awarded by the jury were "excessive". The Court of Appeal in the ***Rantzen*** case held that these provisions "should be construed in a manner which was not inconsistent with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It also held that an almost unlimited discretion in a jury to award damages for defamation did not provide a satisfactory measurement for deciding what was a necessary restriction in a democratic society in the exercise of the right to freedom of expression under Article 10 to protect the reputation of others. The common law therefore required that large awards of damages by a jury should be more closely scrutinized by the Court of Appeal than hitherto and that in the circumstances the sum of £250,000 awarded by the jury was excessive because it was not proportionate to damages suffered by the plaintiff and would be reduced to £110,000.

In coming to this conclusion, Neil L.J. relied upon the dicta of Lord Goff in his speech in the House of Lords in the case of ***Attorney-General v. Guardian Newspaper Ltd*** (No. 2) [1990] 1 A.C. 109, 283-284. He quoted the following dicta of Lord Goff:

> "The exercise of the right to freedom of expression under article 10 may be subject to restrictions (as are prescribed by law and are necessary in a democratic society) in relation to certain prescribed matters, which include 'the interest of national security and preventing the disclosure of information received in confidence'. It is established in the jurisprudence of the European Court of Human Rights that the words 'necessary' in this context implies the existence of a pressing social need, and that interference with freedom of expression should be no more than is proportionate to the legitimate aim pursued. I have no reason to believe that English law, as applied in the Courts, leads to any different conclusion."

Neil, L.J. then concluded, on this point:

> "If one applies these words it seems to us that the grant of an almost limitless discretion to a jury fails to provide a

Though using the test adumbrated in the ***Rantzen*** case (supra) Mr. George, Q.C. for the appellants invited the Court to look at varying issues concerning the award of damages in defamation cases. These as I understand him relate to:

(i) a comparison with the award of damages in other defamation cases;
(ii) a comparison with awards in personal injuries cases;
(iii) a general review of the damages awarded by the jury on the basis that in the particular circumstances no reasonable jury would award such excessive damages.

Awards in other Defamation cases

Mr. George, Q.C. contended that counsel in defamation cases ought to be allowed in addressing the jury in such cases to make them aware of the level of awards made in previously decided cases. In my view defamation cases are subjective to the character and circumstances of the defamed person, and the effect of the libel on him/her. They necessitate consideration of the particulars surrounding the publication of the defamatory matter together with the conduct of the publisher, and any degree of malice exhibited by him/her. All these create a great deal of variables which are not conducive to making worthwhile comparisons one with the other. It is for those reasons that I would be reluctant to accept the submission of the appellant on this issue.

Neil, L.J. however, in the ***Rantzen*** case (supra) was of the opinion that in order to give weight to the provisions of Article 10 which gave the protection against freedom of expression where the protection of reputation was prescribed by law [that] juries could be told about previously decided cases in which awards had been made or confirmed by the Court of Appeal. Here is what he said:

> "We are not persuaded that at the present time it would be right to allow references to be made to awards by juries in previous cases. Until very recently it had not been the practice to give juries other than minimal guidance as to how they should approach their task of awarding damages and in these circumstances previous awards cannot be regarded as establishing a norm or standard to which

the right of freedom of expression enjoyed by the appellants by virtue of Section 22 of the constitution. This point can be dealt with by summarily expressing the view that the cases cited bear no worthwhile comparison to the circumstances of this case, which disclosed a serious libel and a profound effect upon the respondent, who was kept under the shadow of the allegations for a long period of time. I need only repeat what I said in the case of ***Margaret Morris et al v. Hugh Bonnick*** S.C.C.A. 21/98 delivered on the 14th April, 2000 (at page 23) [unreported] –

> "In my view it is difficult given the nature of libel and its effects which must have direct bearing on the particular circumstances, including the person defamed as also the occasion and magnitude of the publication, to be guided by another case in which different circumstances existed."

The cases cited, in my opinion would therefore be of no assistance in determining the reasonableness of the award in this case.

Personal Injuries Cases

This case is perhaps the first in our jurisdiction where it has been proposed that damages in libel cases should be compared with decided cases in relation to quantum of damages in personal injury cases, in order to come to a proper assessment. As I have said earlier, there have been very few jury trials in defamation cases in recent times, and indeed my memory suggests that this has been one of only two such cases in the last ten years, the other still pending on appeal. There have been some cases which have been tried by judges alone which in my view are so far removed from the depth, seriousness and circumstances of the libel in the instant case, that no useful comparisons can be made with them. In the English jurisdiction the recent trend of high awards by juries has brought into focus the question of whether the awards are so high, that the Court of Appeal ought to find these awards unreasonable, given of course the circumstances of each particular case. As a result the learned Law Lords, have been stressing the cautious scrutiny that ought to be given to such awards. Hence, the dicta

> apology – or the plaintiff badly, as for instance by provoking the defendant, or defaming him in return."

Lord Hailsham was here expressing the view that the nature, circumstances, and method for assessing damages in defamation cases, were such that may make it unfair to the plaintiff in a particular case to determine the quantum of damages he deserved, by comparison with damages awarded in previous personal injuries cases. Then in ***Rantzen v. Mirror Group Newspaper*** [1986] Ltd (supra) Neil L.J. having reviewed the authorities on this issue said:

> "We have come to the conclusion, however, that there is no satisfactory way in which the conventional awards in actions for damages for personal injuries can be used to provide guidance for an award in an action for defamation. Despite Mr. Gray's submissions to the contrary it seems to us that damages for defamation are intended at least in part as a vindication of the plaintiff to the public. ... We therefore feel bound to reject the proposal that the jury should be referred to awards made in actions involving serious personal injuries. It is to be hoped that in the course of time a series of decisions of the Court of Appeal will establish some standards as to what are, in the terms of section 8 of the Act of 1990, 'proper' awards. In the meantime the jury should be invited to consider the purchasing power of any award they make."

So that up to the time of the ***Rantzen*** case (supra) the Courts in England, were not prepared to sanction any comparison with personal injuries cases. One of the factors of defamation which distinguishes it from the personal injuries cases is the fact that the plaintiff is entitled in the former case to vindication to the public. This being so, he may sometime in the future, after the case has been laid to rest, find that in some way the defamatory matter is raised to the surface again. In those circumstances, in order to protect his reputation, he would have to be able to demonstrate to the public that in so far as that libel is concerned, he was awarded a sum sufficient to vindicate his reputation. These and other factors, such as have already been described, are in my view good reasons why such comparison ought not to be made. But in the case of

defamation cases. His dicta suggests that juries in a general sense could be asked to say whether damages given to vindicate one's reputation should be higher than damages awarded in for example a personal injury case in which the injuries are serious and a conventional figure has already been set in previous cases.

Should we follow the English trend in our jurisdiction? As Lord Diplock said in ***McCarey v. Associated Newspapers Ltd*** (no. 2) [1965] 2 Q.B 86 at 109, the comparison seems to be a legitimate aid in considering whether the award of damages by a jury is so large that no reasonable jury could have arrived at that figure. In doing so one would expect a jury having been exposed to the degree of damages awarded in serious personal injury cases, such as a person made a cripple or losing an eye to ask themselves whether the figure to be awarded would be reasonable having regard to those cases.

However, I am of the view that although those cases can be used as a general guide one must also in coming to a conclusion on damages in a defamation case consider what is reasonable to protect a person's reputation given all the factors already referred to in this judgment. None of the cases cited in relation to personal injury cases, can inspite of the suffering and pain consequent on personal injury quite equate with prolonged mental agony and the subjection to the contempt of the public and his friends which the respondent suffered as a result of the libel and the related subsequent conduct of the appellants.

Review of Damages – are the Damages Reasonable?

As I have concluded earlier, the reasonableness of the award must be related to whether it is an amount too excessive to be considered an amount reasonable to vindicate the respondent's reputation given the provisions of Section 22 of the Constitution as it relates to the appellants' right to freedom of expression. There were several circumstances in this case which make it reasonable for the jury to have

million is in excess of an amount which is reasonably required by law to protect the reputation of the respondent, given the provisions of Section 22 of the Constitution. Nevertheless, what is a reasonable award must relate to all those matters, and consequently damages must be of a high level in order to vindicate the respondent's reputation. By virtue of the consent of the parties, I would set aside the award of $80.7m for compensatory damages and substitute therefore the sum of $35m.

Exemplary Damages

I come now to the Respondent's Notice the complaint in which reads as follows:

> "The jury erred in refraining from awarding any sum for exemplary damages when there was every justification to do so in the evidence before the Court despite the level of compensatory damages awarded."

In this ground the respondent contends that there was abundant evidence to show that "the evident intention was not only to harm the plaintiff/respondent but also to be sensational, to stir up public interest, and to profit thereby from the sale of their papers."

In the alternative we are asked to vary the damages to include an award for exemplary damages in the event that we reduce the award for compensatory damages awarded by the jury. The basis for this proposition is the fact that the learned judge directed the jury that if their award for compensatory damages was in their view sufficiently high, then they need not consider an award of exemplary damages.

Before exemplary damages can be awarded there must be proof that the defendant had no general belief in the truth of what he had published and had been motivated by a "cynical calculation" that publication was to his necessary advantage. See the ***Rantzen*** case (supra) in which it was held that such an award "was only appropriate where those conditions were met, and where the sum awarded by way of compensatory damages was insufficient to achieve the punitive and deterrent purpose

HARRISON, J.A.:

This is an appeal by the defendants/appellants from an award of $80,700,000 and costs for damages for libel, assessed before Smith, J., with a jury, on July 17, 1996.

The libel complained of, and recited in the statement of claim, was contained in the first of three published newspaper articles. The first publication appeared in the respondent ***Gleaner***-owned ***Star*** newspaper on September 17, 1987. It reads in paragraph 3 of the statement of claim:

> "AUTHOR Robin Moore says his personal diary and files contributed to Federal Investigators suspicions that New York business executives paid kickbacks to Jamaican officials for lucrative tourism promotion contracts.
>
> 'All I can say is I suspected the Minister of Tourism was exacting a toll.' The writer, Robin Moore of Westport, told the Advocate of Stamford in a copyright story published Tuesday.
>
> 'Call it a bribe, call it anything you want,' said Moore, the author of **'The French Connection'**, a novel on drug smuggling.
>
> The Advocate reported Sunday that Federal authorities in Connecticut are investigating public relations and advertising executives suspected of paying Jamaican officials one million dollars for contracts worth $40 million from 1981 – 1985.
>
> The Advocate, quoting anonymous sources close to the probe has said five or six executives of the public relations firm Ruder Finn and Rotman and the advertising firm Young and Rubicam are the focus of the investigation.
>
> Officials of both firms have denied any wrongdoing and said they are co-operating with investigators.

> nothing to do with any kickbacks, if indeed they did happen.'
>
> U.S. attorney Stanley Twardy Jr., has refused to confirm or deny the existence of the kickbacks investigation."

The second publication in the respondent ***Gleaner*** on September 18, 1987, was in similar terms, with one deletion.

The third publication also appeared in the respondent's newspaper on September 19, 1987 and reads, as recorded in paragraph 5 of the statement of claim:

> "Absolutely no reference was made, or intended to be made, to the current Minister of Tourism in the headline: 'Robin Moore: I suspected Jamaica Tourism Minister,' in the second paragraph of the Associated Press (AP) story, 'All I can say is I suspected the Minister of Tourism was exacting a toll, the writer Robin Moore of Westport, told the Advocate of Stanford...' which was published on page 2 of yesterday's Gleaner Sept. 18, 1987."

The respondent issued his writ on September 22, 1987, appearance to which was entered on October 2, 1987. Thereafter, no defence having been filed, interlocutory judgment was entered in default of defence. An application by the appellant to set aside the said judgment was refused by Edwards, J., who was reversed on appeal, and defence was ordered to be filed. An application for further and better particulars was refused by Bingham, J. who was reversed by the Court of Appeal, which in addition, struck out the defence of justification on the basis of the absence of "...clear and sufficient evidence of the truth..." of the said publication. Consequently, the matter proceeded to assessment of damages on July 17, 1996, before Smith, J., with a jury.

charges against the respondent, had been dismissed previously from his post of Director of Tourism by the respondent who was then the Minister of Tourism. In addition, Young and Rubicam, a public relations firm in the USA, had pleaded guilty to the offences relating to the "kickbacks", the bribes, in February 1990, and asserted that the respondent had nothing to do with any "kickbacks". This resulted in the said withdrawal of the indictment before the grand jury. The appellants were aware of all this. The appellants did not publish an apology to the respondent until July 9 and 10, 1995.

At the hearing before us, the parties consented to the exercise of the power of the court under Rule 19(4)(a) of the Court of Appeal Rules, 1962, where in the event that the Court is of the view that the damages awarded by them were excessive or inadequate was empowered to:

> "...substitute for the sum awarded by the jury such sum as appears to the Court to be proper."

In addition, the respondent filed a respondent's notice under the provisions of Rule 14(1) of the said Rules, seeking the award of exemplary damages by this court.

Mr. George, Q.C., for the appellant, in support of his grounds of appeal, argued that the damages awarded were manifestly excessive, and no reasonable jury would have made such an award and that the learned trial judge failed to warn the jury that there was no evidence of loss in the consultancy business of the respondent, no award should be made for injury to the respondent's health as opposed to his hurt feelings and no evidence should have been led of the distress of the respondent's son. The publications in the appellants' newspapers

Because of the injury to his reputation, his hurt feelings, the negative effect on his earning capability, the aggravating factors resulting from the "sham" apology, the continuation of the defence, and the conduct of the appellants, the respondent is entitled to substantial damages. It was not appropriate to direct the jury on the obligation to pay tax, in the circumstances, but if it was a requirement this court could make an adjustment in the award. He concluded that the jury erred in not awarding exemplary damages when, on the evidence, the extreme persistence of the appellants warranted it, and this court should make such an award.

The measure of damages in the tort of libel is, as a general rule, restitutio in integrum, to restore the person libelled to the position he would have been in, if the tort had not been committed, as far as money can do so. The law thereby seeks to compensate the plaintiff for the injury to the reputation he previously enjoyed, and for his hurt feelings. Such damages are said to be "at large". This is not a licence to juries to award astronomical sums.

In ***Cassell & Co. Ltd. v. Broome*** [1972] 1 All E.R. 801, Lord Hailsham examined the principle of damages being "at large", and the inadvisability of referring to damages in personal injury awards when awarding damages in defamation cases. His Lordship said at page 824:

> "In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitutio in integrum has necessarily an even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel driven underground, emerges from its lurking place at some

> [1964] AC at 1221, when he defines the phrase as meaning all cases where 'the award is not limited to the pecuniary loss that can be specifically proved'."

Damage is presumed when libel is proved but evidence of actual injury to the respondent's reputation or actual loss suffered is admissible.

The author of ***McGregor on Damages***, 16th Edition, in respect of the proof of damages in libel said, at paragraph 1900:

> "General damage does not have to be pleaded by the plaintiff. As to its proof, he starts off with a presumption of damage operating in his favour which entitles the court to award substantial damages for injury to his reputation although he has produced no proof of such injury."

A party libelled may recover a general loss of trade, custom or earning; whereas, a particular loss or specific contract may have to be specifically pleaded. As to such damages in general in defamation cases, Mahoney, J.A. in ***Andrews v. Fairfax & Sons Ltd.*** [1980] 2 NSWLR 225, said at page 255:

> "Damages for injury to reputation as such are, in my opinion, different in nature from, and are calculated upon a different basis (and require different evidence) from damages for the other kinds of injuries caused by defamatory material. Damages for injury to reputation as such are in the nature of a solatium; they are not, in the ordinary sense, restitution, I would, with respect, adopt as correct the statement of the law made in this regard by Windeyer J in ***Uren v John Fairfax & Sons Pty Ltd***. His Honour said: 'When it is said that in an action for defamation damages are given for an injury to the plaintiff's reputation, what is meant? A man's reputation, his good name, the estimation in which he is held in the opinion of others, is not a possession of his as a chattel is. Damage to it cannot be measured as harm to a tangible thing is measured. Apart from special damages strictly so called and damages for a loss of

In ***John v MGN Ltd.*** [1997] Q.B. 586, the Court of Appeal endorsed the practice of referring to previous awards in defamation cases. It said (per Sir Thomas Bingham, M.R.) at page 612:

> "We agree with the ruling in the ***Rantzen*** case that reference may be made to awards approved or made by the Court of Appeal. ... It is true that awards in this category are subject to the same objection that time can be spent by the parties on pointing to similarities and differences. But, if used with discretion, awards which have been subjected to scrutiny in the Court of Appeal should be able to provide *some* guidance to a jury called upon to fix an award in a later case."

Furthermore, the court was of the new view that awards in personal injury cases could then be looked at in making awards in defamation cases not for the purpose of equating such awards but:

> "...as a check on the reasonableness of a proposed award of damages for defamation."

I am also of the view that no rational assistance can be obtained from looking at awards in personal injury cases, as a guide to awards in defamation cases. The loss of a limb or major body functions, on the one hand, contrasted with the loss of one's reputation and hurt to dignity, on the other hand, although each would amount to a major deprivation and lessening of one's quality of life, will not necessarily relate to each other to attract comparable awards. By the same method that the courts have developed the practice of utilizing previous comparable awards in personal injury case in making awards, this court could well now develop its own measure in seeking to provide a future guide in the compensation of persons defamed causing hurt to their reputation and feelings, and the consequent distress and taint to their integrity. In order, therefore, to

engaged on September 19, 1987, when the libellous article was published in the ***Star***.

The respondent was, therefore, both a high level public figure and an experienced and well-known personality in the field of tourism.

The respondent said, in cross-examination, that in 1987 he earned US$146,000 and the lowest earning he had as a tourism marketing consultant was US$70,000.

The evidence of the respondent's witness Marcella Martinez, the proprietor of a company, itself a consultant in tourism market, was summarized by Smith, J. to the jury at page 90 in his summing up:

> "She told you that Mr. Abrahams, being successful, commanded a lot of loyalty and affection. He was dynamic in leadership and was charismatic. And remember she told you that Jamaica enjoyed successive years of record tourism growth in the early Seventies when the Plaintiff was Director; as a result she told you that when he ceased being Director of Tourism, he was quickly hired by the OAS to work as a high level consultant of tourism based in the Eastern Caribbean, and he revolutionized the work of Jamaica Tourist Board and took the first major step that she was aware of to increase the involvement of all categories of Jamaicans in the tourism industry. Because of the Plaintiff's long-standing contacts and friendship with leaders of the North American, Canadian private sector tourism industry, he was able to travel there, meet personally with and get them committed to help Jamaica come back."

The respondent's evidence was that after the publication of the libel, "...everywhere (he) went people were talking about (him)..." He described how he was called a thief by a real estate man in a supermarket and also by a businessman who, in addition, had him searched and also being taunted on the

> "But there has never been a case in England where damages have been recovered for injury to health."

The learned trial judge quite properly directed the jury that there was no medical evidence available for them to consider that "...the publication caused the stress which caused overeating, which caused obesity."

The jury was directed to the evidence of Dr. Irons for the respondent. Dr. Irons had said that he found that the publication caused to the respondent: (1) severely reduced self-esteem and self-perception, (2) severe anxiety with phobic response avoidance, (3) depression with hypersomnia, and (4) social withdrawal and isolation, as a consequence. The jury was then directed [at page 31 of the summation]:

> "Dr. Irons went on to tell you that before July 1995, coming back to what Mr. Spaulding says, he was seeing him too for weight reduction. He told you that before Mr. Abrahams came to him, he was able to detect a social withdrawal, and you remember he told you that he was invited to some Breakfast Club and he noticed that and so on. And he told you members of the jury, that he had no way of saying the Plaintiff's health was due solely to the publication.
>
> So here again, you have to look; remember Mr. George's argument as to what really caused the state of his health. If you accept it and Mr. Spaulding's argument too, I am not going to re-ash (sic) those, members of the jury, I don't think I need to go into any more at this point, but later on if I see fit I will remind you of any other thing that I think can assist you in dealing with the issues in the case as I go along. So that is the evidence of Dr. Irons, you must say what you make of it, members of the jury."

The evidence of Dr. Irons, in particular the finding that the respondent was suffering from "depression", refers to a specific mental illness. This should have

his statement would be published and that there would be no republication of the libellous article in the ***Gleaner***. Despite this, there was a publication in the ***Gleaner*** on the 18th with one omission, and a further publication with a "clarification" on the 19th . The learned trial judge directed the jury further:

> "Dr. Stokes, if you are satisfied that what went before was Abrahams speaking to him, telling him about the talk that he had with Miss Marie Peterson and the grounds that he gave Miss Peterson to show that what was in the 'Star' couldn't be true, and Miss Peterson promised to amend the statement and so on, if you believe Mr. Abrahams that he told Dr. Stokes this and you conclude that Dr. Stokes knew that the article was libellous or was reckless, whether his action in publishing it was wrong or not, this, members of the jury, may aggravate damages."

This was the proper direction to give to the jury on the manner in which they should treat the subsequent publication. I see no basis to fault the learned trial judge in this respect.

Lack of an apology or an inadequate apology is evidence of malice which may aggravate damages. The appellants complain that the learned trial judge erred in inviting the jury to view the conduct as persistence in the libel, and the jury should have viewed the apology as an honest one. The appellant, Dr. Stokes, said in evidence of the apology, published on July 10, 1995, eight years after the libel:

> "I did not think an apology was necessary since he had sent me a statement denying it."

The apology was in these terms:

> course, it may go to aggravate damages, make it worse. So we look at that, members of the jury, and when we come to deal with mitigation, I will tell you what to find."

The learned trial judge correctly left this issue of the persistence in the libel and the apology to the jury. It was for the jury to determine whether or not the apology was full and complete, genuine and honest in the circumstances. It seems to me that the jury may well have thought that the manner in which the "apology" was drafted was unorthodox and less than sincere but moreso "tongue-in-cheek", causing greater hurt.

The loss of earnings on which the respondent bases his claim would be subject to tax, if he had in fact so earned it. The rule in ***British Transport Commission v. Gourley*** [1956] A.C. 185, which was specifically referable to a case of personal injuries, is that an award for loss of earnings is subject to the tax the person would have paid if he had earned it. In considering the incidence of the payment of tax on earnings, in the context of the general loss of earnings in a claim of libel, Lord Reid in ***Lewis v. Daily Telegraph Ltd.*** [1964] A.C. 234 said at page 262:

> "There can be no difference in principle between loss of income caused by negligence and loss of income caused by a libel.
>
> ...
>
> But damages for libel have to be assessed by a jury, and juries are not expected to make mathematical calculations, so they can only deal with this matter on broad lines. I think that a jury ought to be directed to the effect that if they think that the plaintiff company has proved that it has suffered or will suffer loss of profit as a result of the libel they must bear in mind that the company would have had to pay income tax at the standard rate out of that

of civil law. Our courts have acknowledged the power of juries to award exemplary damages. In the instant case, the learned trial judge left to the jury the fact that they could award exemplary damages, but only where they were of the view that the award for compensatory damages was insufficient. He said: [see page 135 of the summation]

> "So, members of the jury, if having come to a figure for your compensatory damages, inclusive of aggravated damages if you think that this is sufficient, then you need not award, or go to consider exemplary damages. If you think that is sufficient, when you look at the compensatory, inclusive of aggravatory damages, if you think it is sufficient then I don't have to go to exemplary damages."

In the light of such a direction, which in my view correctly stated the law, I see no basis to find that the decision of the jury not to award exemplary damages was unreasonable. In ***John v. MGN*** (supra) the court cautioned, at page 619:

> "It is plain on the authorities that it is only where the conditions for awarding an exemplary award are satisfied, and only when the sum awarded to the plaintiff as compensatory damages is not itself sufficient to punish the defendant, show that tort does not pay and deter others from acting summarily, that an award of exemplary damages should be added to the award of compensatory damages."

A man's reputation is a valuable asset. It is all that some men possess, or wish to possess to take them successfully and contentedly through life. Some men, on the other hand, spend their early life accumulating wealth by questionable and dubious means and then desperately grope around seeking to "buy back" with such wealth their "lost integrity" and good name, in vain. A man's integrity, once tainted, is almost invariably lost forever. The freedom of

In respect of the quantum of awards, juries may now be referred to previous awards in libel cases, as is done in personal injury cases [***John v. MGN***, (supra)]. I respectfully embrace this view. However, there are no awards of this court in libel actions, in recent times, to which we could refer for guidance in considering the level of this award. The rationale that one may look at personal injury awards, not for assistance as to a comparable quantum, but as an indication of a ceiling, seems to be a paradox and, is in practical terms, unhelpful. As I indicated previously, both may not necessarily correlate. Furthermore, although medical prognosis can determine, with reasonable certainty, the long-term psychological and physical effect of a personal injury, I greatly doubt that a sum of money can comfortably erase the stigma and recurring hurt attaching to a person, wrongly and unjustifiably libelled.

In view of the misdirections that arose, and in all the circumstances of this case, I find that the award of the jury, being excessive, an award of $35M is appropriate, with costs to the appellant, to be agreed or taxed.

Jamaica, both of which have wide circulation throughout Jamaica and both enjoy circulation in the Caribbean, North America and the United Kingdom.

The action was filed on 24th September, 1987 in relation to articles published in the **Star Newspaper** of 17th September, 1987 and the **Gleaner** of 18th and 19th September, 1987. An appearance was entered on 2nd October, 1987 but no defence was filed. The failure to file a defence within the required time caused the respondent Abrahams to enter judgment in default on 23rd October, 1987. As a sequel to this the appellants brough: interlocutory proceedings to set aside the default judgment but on the 14th December, 1988 Edwards J. refused the application. This Court on 11th December, 1991 set aside the Order of Edwards J. and gave the appellants leave to file a defence. The respondent Abrahams then sought leave to appeal to Her Majesty in Council to restore the default judgment but the application was refused on the 18th February, 1992. The appellants by then had filed their defence and the respondent Abrahams sought "further and better particulars" with respect to the issues of justification and qualified privilege . The summons for further and better particulars was dismissed on 13th October, 1992 and from this order the appellants appealed. This court comprising (Wright, Downer, Patterson (Ag.) JJA on January 24, 1994 allowed the appeal and ordered the defence to be struck out and the case remitted to the Court below to be proceeded with on the basis that there was no defence.

KEY FIGURE

Moore said Monday that his files helped lead Federal agents to suspect that Anthony Abrahams, Jamaica's former Tourism Minister was being paid by American businessmen for the multi-million-dollar tourism contracts.

Sources close to a federal grand jury have said Abrahams is a key figure in the investigation, the newspaper said. Abrahams, however, has not testified before the grand jury empanelled in New Haven, the Advocate reported. The newspaper said efforts to reach Abrahams and his successor, Hugh Hart, during the past two weeks were unsuccessful, and Hart didn't return telephone calls to his office on Monday.

Moore, 61, said the notes in his diary are impressions of what was going on between Abrahams and the United States companies. The subjects also appeared in letters between him and friends in Jamaica.

'I have no definitive proof that this ever happened - it was just a suspicion of mine', Moore said. 'People were talking. There were certain things everybody know. There was no secret about the situation with the (former) Minister of Tourism'.

Moore said IRS agents seized his diary and other documents in June, 1983, when he was being investigated for his part in phony literary tax shelters. Moore is now awaiting sentencing on his 1986 conviction of evading taxes.

Moore, who has lived in Jamaica periodically for the past 27 years, said that in 1981, he volunteered his services to the Jamaican government to find advertising and public relations companies that would help the country's tourist trade.

'I was sort of a self-appointed liaison although I asked to help. I said, 'Let's try to do something about the image here, which is very bad at the

The Gleaner did not deny the publication of these articles. There was no prior apology. It denied any defamatory meanings and pleaded qualified privilege and justification. Great reliance was placed on the affidavit evidence of John Gentles which is conveniently summarised in the record at page 23 as follows:

> "I served as Director of Tourism in Jamaica from about December, 1980 until February, 1983. In about the month of April 1981 I was also appointed Chairman of the Jamaica Tourist Board.
>
> I have read the words set out in paragraphs 3,4 and 5 of the Statement of Claim herein.
>
> The words set out in each of those paragraphs are true in substance and in fact. New York business executives in fact paid kickbacks to Jamaican officials for lucrative tourism promotion contracts. Included among these payments were cheques either made payable to the Plaintiff or negotiated to the Plaintiff and received by the Plaintiff and further negotiated by him.
>
> It is true that the United States of America federal authorities in Connecticut are investigating public relations and advertising executives suspected of making payments to Jamaican Government officials for the award of contracts by Jamaican Government agencies to the firms of those executives.
>
> The matters involved are currently being investigated by a Federal Grand Jury in Connecticut aforesaid and I have given evidence before the said Grand Jury. I was asked to identify a number of documents and the signatures therein and these included public relations and advertising contracts and cheques either drawn by or made payable to the plaintiff or negotiated to the plaintiff and on which the plaintiff's signature appeared. I identified the plaintiff's signature on those cheques".

Gentles said on oath. There was obviously no clearing of the plaintiff's name by the apology.

The following passage in the judgment of Nourse L.J in ***Sutcliffe v Pressdram Ltd.*** [1991] 1 Q.B 153, 184; is apposite:

> "The conduct of a defendant which may often be regarded as aggravating the injury to the plaintiff's feelings, so as to support a claim for aggravated damages, includes a failure to make any or any sufficient apology and withdrawal..."

THE TRIAL

At the trial before the jury, the counsel for the plaintiff referred to the interlocutory judgments of the Court of Appeal and in particular criticised counsel for the defendants on the basis that justification should not have been pleaded unless the "defendants had clear and sufficient evidence of the truth of the imputation". However, in the case of ***McDonald's Corp. and Another v Steel & Ors*** [1995] 3 All E.R. 615 the English Court of Appeal held that a plea of justification was not required to be supported by clear and sufficient evidence before being properly placed on the record since such a test would impose an unfair burden on a defendant. Nevertheless, a defendant was warned that before pleading he should have reasonable evidence to support the plea or reasonable grounds to suppose that sufficient evidence to prove the allegation would be available at the trial. When one considers that this plea of justification came after the Prosecutor and Court in the United States of America had dismissed charges against Abrahams, then there could be no basis of obtaining

He told you that he never felt so badly before. Closest he told you he had ever come to having heart attack. You remember he gave you too, some other occasions. He said stoplight or stop signs, bad place for him, people would be jeering and taunting him. Well, let me continue about this businessman, he said the businessman sent his security guard to search him. He went on to tell you that people were avoiding him and it was then he told you about the stress caused the asthma to return. Remember I told you about that already. Jobs that he was negotiating did not materialize. So he was negotiating jobs and they did not materialize. Remember we looked at the general loss of business. His resources were run down and so financial problems set in. He said he was not exactly starving because of the generosity of his fiancee. That is in terms of basic necessities, he told you, and he said his divorced wife took care of the children, but he told you that that was really humiliating to him. He continued by saying there was a general impact on his marketing career and he said he asked himself who wants a thief.

He told us that part of the duty as tourism consultant was to advise clients how much of the tourism budget to spend on advertising, and he asked, would someone seek such advice from a person who has a habit of taking kickbacks? You see, this he said, was the real dilemma that he faced in his career, nobody wanted him, he was avoided by people who he thought were good friends. Invitation to parties and functions and weddings, et cetera, dried up, stopped. He felt ostracized...

I mentioned about the Taste of Jamaica affairs, that includes a particular person, and based on that Mr. Gentles was dismissed. Gentles was immediately hired by the General Manager of 'the Gleaner' at the time. Let me just mention this, he says, referring back, I should say, to this businessman, he said it was the closest he had ever come- I mentioned that already, I am sure I did. Gas station incident, the heart attack incident, I am quite sure I did.

He said even some people refused to accept telephone calls from him and he told you about job opportunities in

done in court before the indictment was lifted and he mentioned that in spite of all this, 'The Gleaner' was still persisting in the charge that he was guilty, and you remember he complained about articles, members of the jury, the decision of the Court of Appeal which had – I think it is Exhibit 17, you remember members of the jury, this was a report in the 'Gleaner' of the Court of Appeal's judgment, and this was December 24, 1991, which he referred to, and it is said the effect of this was that 'The Gleaner' was telling all its readers that the appeal was saying that they had entered a plea of justification and it was true that the publication was true. So you can look at it, because this is really the judgment of the court, but looking at this case you see that this is purely editorial, it is true and the effect was to let everybody know what the 'Gleaner' was saying and so on.

Remember he said – well I mentioned the apology, what his views were on that and I won't go back to that, members of the jury.

He told you by the end of 1991 he had given up getting a job. He was not going out, socializing and he told you that what clothes he had could not fit him. And he mentioned this and the effect on him. He had gone to a party, the judgment, I think, the Court of Appeal had already given the judgment, but it was not published in 'The Gleaner', but people were talking about it and then after this Christmas party now, this came out and everybody was talking about it. And here again, he said he nearly gave up and deep despair set in. He told you that he had witnessed, or he was in the Court of Appeal when there was the appeal by his attorneys for Further and Better Particulars and he mentioned what Mr. George said and the effect it had on him, and I don't need to go through that. He said that Mr. George stood up and said in court that reason why we were objecting was because I did not want the Grand Jury evidence to be opened up, because I was afraid of what would come out of the Grand Jury evidence and I had to sit there and hear it..."

them. There was no malice towards Abrahams. A significant aspect of his evidence at the trial is when he said "up until now he regarded Mr. Abrahams as being guilty, just that they cannot get the evidence".

An analysis of the facts clearly shows that the Gleaner had not been prepared to check the facts as to the allegation of the kick-backs which was removed after the Grand Jury hearing. There was therefore no foundation for linking the plaintiff with the fraud.

The threat of proceedings by the plaintiff had no inhibiting effect on the Gleaner's decision to proceed with its own view of the guilt of the plaintiff of the fraud. Mr. Abrahams was portrayed as one who was involved with fraud. The Gleaner pleaded justification. Having regard to these outrageous features this case was in a "class by itself".

Against this background the jury may well have accepted that a substantial award was necessary, not to inhibit responsible investigative journalism but to have an enormous impact on what they may well have thought to be a baseless way of defending an indefensible position.

SUMMING UP AND VERDICT

The main issues in the judge's summation to the jury are (a) Compensatory damages, (b) Aggravated Damages, (c) Exemplary Damages. The issue of Compensatory and Exemplary Damages were considered separately by the judge. He directed them that should they come to a figure for compensatory damages inclusive of aggravated damages which they considered

(3) That the award of General Damages by the jury represents a wrong measure of damages and is so manifestly unreasonable and excessive, and cannot represent a true measure of any damage the Plaintiff/Respondent may have sustained as a consequence of the Defendants/Appellants action.

(4) That the award of the jury contravenes Section 22 of the Jamaica Constitution which guarantees to the Defendant/Appellants the right to freedom of expression and the right to hold opinions and to receive and impart ideas without interference.

(5) The Learned Trial judge erred in failing to direct the jury that they should take into account awards in personal injury cases in this jurisdiction".

There were supplementary grounds of appeal which may be summarised as follows: Evidence was to be put before the jury which had not been pleaded and which could only have been put to the jury if specifically pleaded and particularized; the judge should not have permitted evidence to be put to the jury of the effect of the libel complained of on the physical health of the plaintiff's son, in that such alleged damage was too remote; failure to point out to jury that there was no evidence to connect any loss of income, arising from his tourism consultancy to the publication of the libel; failure to give jury warning about subsequent statements which may lead to aggravated

> (a) with the consent of all parties concerned, substitute for the sum awarded by the jury such sum as appears to the Court to be proper;
>
> (b) with the consent of the party entitled to receive or liable to pay the damages, as the case may be, reduce or increase the sum awarded by the jury by such amount as appears to the Court to be proper in respect of any distinct head of damages erroneously included in or excluded from the sum so awarded;
>
> but except as aforesaid the Court shall not have power to reduce or increase the damages awarded by a jury".

Both appellants and respondent have given consent to this Court to exercise the power under the rule to substitute its own award in lieu of ordering a new trial of the assessment of damages without prejudice to any further appeal to the Privy Council.

DAMAGES- PRINCIPLES OF LAW IN DEFAMATION

Compensatory Damages

The aim of an award of damages in tort is to put the claimant in the position which he would have been in had the wrong not been committed. The damages are at large.

In **Gatley on Libel and Slander 8th Edition** at paragraph 1453 the learned author said that "Damages for defamation are intended to be compensation for the injury to reputation and for the natural injury to feelings, and the grief and distress caused by the publication".

his income by his fiancee, his father and amicable arrangements with his former wife concerning the children.

However, the judge correctly encouraged the jury to be reasonable in making the award for compensatory damages.

On the subject of general damages, I have examined the defamatory statement, the extent and circumstances of its publication and its effect on Anthony Abrahams. On any view the false statements amounted to allegations of fraud calculated to cause in the minds of those who read them that they were credible. Accordingly, a substantial award of general damages by the jury would be justified to compensate Mr. Abrahams for damage to his reputation and injury to his feelings.

AGGRAVATED DAMAGES

In relation to Aggravated damages the factors to be taken into account in assessing damages are clearly set out in ***Gatley on Libel and Slander*** 8th Edition. At pages 593 –94 where this appears :

> "1452 **Aggravated damages**: The conduct of the defendant, his conduct of the case and his state of mind are thus all matters which the plaintiff may rely on as aggravating damages. Moreover, it is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation. In awarding 'aggravated damages' the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a

Mr. Emil George Q.C. submitted that judges should be required to address juries on the conventional compensatory scales of damages awarded in personal injury actions not as a precise correlation but as a check on the reasonableness of their proposed award. It was further submitted that indications by counsel, and the judge as to the sum or award appropriate to the particular case should be given so as to avoid excessive awards. Reference was made to ***John v MGN Ltd.*** [1997] QB 586 and ***McCarey v Associated Newspaper Ltd.*** (No. 2 [1965] 2 QB 86 at 109.

It is of significance that apart from the previously cited cases the courts in England have rejected the comparison of libel and personal injury cases. In this regard reference must be made to ***Cassell & Co v Broome*** [1972] 1 All ER 801 (HL) at p.824, ***Blackshaw v Lord*** [1983] 2 All ER 311 (C.A) at pp. 337, 340; ***Suttcliffe v Pressdrum Ltd*** [1990] 1 All ER 269 (C.A) at pp. 281-82, 289; and ***Rantzen v Mirror Group Newspapers*** [1986] Ltd. [1994] Q.B. 670. In the latter case it was said that there is no satisfactory way in which conventional awards in personal injury actions could be used to provide guidance for an award in a libel action. Personal injuries would not be relied on as any exact guide but juries might properly be asked to consider whether the injury to reputation of which the plaintiff complained should fairly justify any greater compensation than conventional awards for loss of a limb or of sight or for quadriplegia. The Court said it was rightly offensive to public opinion that a defamation plaintiff should recover damages for injury to reputation greater, perhaps by a significant factor than if that same plaintiff had been rendered a quadriplegia.

> compensation; the word is compensation, and to re-establish his reputation, vindicate his good name and take account of the distress, the hurt and the humiliation which the defamatory publication with which you are here concerned have caused. You must decide whether it caused these things, and if you so decide, you take it into account. You take into account too, that the Plaintiff was a public figure, a man with an international reputation in the field of tourism, if you accept that. Probably every reader of the newspapers knew to whom the article referred".

EXEMPLARY DAMAGES

There was consent between the parties to argue this ground.

Mr. Spauldings Q.C. in a respondent's notice in relation to exemplary damages submitted that the conduct of the appellant in this case is so extreme as to warrant significant exemplary damages. He argued that the malice was extreme and the evident intention was not only to harm the respondent but also to be sensational, to stir up public interest, and to profit thereby from the sale of the newspapers. Smith, J in his definition of exemplary damages directed the jury thus:

> "Exemplary damages can only be awarded if the plaintiff proves that the defendant when they made the publication knew that they were committing a tort , that is a civil wrong, or were reckless whether their action was tortious or not and decided to publish because the prospects of material advantage outweighed the prospect of material loss".

Exemplary damages are available where the defendant's conduct has been high-handed to an extent calling for punishment beyond that inflicted by an award of compensatory damages including aggravated damages.

Pecuniary Loss

The evidence disclosed that the plaintiff's business had dried up in 1987 after the publication of the libel two years before the indictment was preferred in the USA. Within months Young and Rubicam stated they had not in fact bribed the plaintiff and there was no evidence that the plaintiff received any "kick-back". The harm to the plaintiff commenced in 1987 and continued for two years before the indictment was preferred in 1989. The indictment was withdrawn in 1990 within a year of its being preferred.

The learned author of **McGregor on Damages**, 16th Edition, paragraph 1900 at page 1230 states:

> "General damages does not have to be pleaded by the plaintiff. As to its proof he starts off with presumption of damage operating in his favour which entitles the Court to award substantial damages for injury to his reputation although he has produced no proof of such injury. However, there will usually be evidence given in support of the plaintiff's claim's for general damages, since a plaintiff offering no evidence of damage at all may find himself awarded small or nominal damages only. As to what evidence is admissible in proof of general damage, this should normally consist of evidence of general losses, such as the general falling off of the plaintiff's custom or the general decline in the circulation of the plaintiffs' newspaper".

Evidence of particular transactions lost or particular customers lost cannot be given with a view to showing specific loss as part of the general damage. However, it may be possible to give evidence of specific losses, even where these have occurred after the issue of the writ in the action, not with a view to

The Learned Trial Judge was unduly generous to the defendant when he advised the jurors that they could not take into account the injury to the plaintiff's feelings due to the noticeable effect of the libel on his children.

The judge correctly told the jury that there was no medical evidence to link the asthma , obesity and diabetes to the libel and he gave adequate directions to the jury in relation to the injury to the plaintiff's feelings.

INCOME TAX

Learned Counsel for the appellant submitted that the trial judge failed to direct the jury that they ought to make allowances for the obligation to pay income tax out of the income had it been earned.

The trial judge went out of his way to caution the jury that this was not a case in which special damages had been claimed. It is trite law that in cases in which there is an award of damages based on a quantifiable basis there can be a specific figure to apply such tax considerations.

In the instant case there is no specific award for loss of income. Consequently there is no identifiable sum in the award which could attract tax considerations. It even becomes more difficult when one considers the variable features of this case including damages for loss of reputation, injury to feelings damage to income earning potential and other aggravating factors involved in this case.

In such circumstances the more prudent course in my view in order to avoid any risk of injustice would be for the plaintiff to receive the full sum, leaving

"**22.** – (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence and other means of communication.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

(a) which is reasonably required –

(i) in the interests of defence, public safety, public order, public morality or public health; or

(ii) for the purposes of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibition or public entertainment; or

(b) which imposes restrictions upon public officers, police officers or upon members of a defence force ".(emphasis supplied).

Article 10 of the European Convention of Human Right is similar to Section 22 of the Constitution of Jamaica in so far as they both protect the reputable rights and freedoms of other persons This article is set out hereunder:

"**10.2** - The exercise of these freedoms since it carries with it duties and responsibility, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial

Headmaster of Winchester College (one of England's most prestigious public schools), of having committed serious war crimes involving deaths of many innocent people when he was Brigadier Toby Low, Chief of Staff to a certain General during World War II. The plaintiff was subsequently enobled and became Baron Aldington. He later became Chairman of a very large insurance company. This case was taken before the European Court by the defendant in a libel action after having gone before the English Court where the plaintiff was awarded £1.5Million, which is approximately equivalent to J$90Million. The European Court for Human Rights examined the relevant law and came to the conclusion that the award of £1.5Million was disproportionately large and was in violation of the defendant's rights under Article 10 of the Convention.

Freedom of speech is a cherished constitutional right and this court will always seek to ensure its protection to the citizens of Jamaica. Obviously it can be abused and this is clearly illustrated by the publication in the newspaper by the appellants.

This Court must always bear in mind that there are the competing underlying value of the protection of a person's reputation on the one hand and freedom of expression on the other. In balancing these competing interests the Court ought to consider whether a manifestly excessive award is reasonably required for the purpose of protecting the reputation, rights and freedoms of other persons as is stated in Section 22 of the Constitution.

In ***Reynolds v Times Newspapers Ltd.*** [1999] 4 All ER 609 Lord Nicholls who delivered the leading speech had this to say at p. 621:

enjoyment of the general fundamental rights and freedoms of the individual must be subject to the rights and freedoms of others and also for the public interest. See section 13 of the Constitution.

In my judgment this Court applying the objective standards of proportionality and reasonable compensation or what is "reasonably required' should reduce the award of $80.7M to $35M. In my view this award will ensure that justice is done to both sides and the 'public interest' under the Constitution will be secured.

Accordingly, the appeal should be allowed in part with the award to the respondent reduced to $35M. The appellant should pay half the cost of the appeal to be taxed if not agreed.

ORDER:

FORTE, P:

The appeal is allowed in part. Order of the Court below varied to substitute for a sum of $80M awarded a sum of $35M. Half costs to the appellants to be taxed if not agreed.