

ORAL JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 00280HCV of 2006

BETWEEN	JAMAICANS FOR JUSTICE	FIRST CLAIMANT
AND	CAROLYN GOMES	SECOND CLAIMANT
AND	NEW MEDIA COMMUNICATIONS LIMITED	1ST DEFENDANT
AND	GARNETT ROPER	2ND DEFENDANT
AND	CHRISTINE KING	3RD DEFENDANT

Defamation; Two defendants having settled, 2nd defendant pleads Fair Comment; Ingredients of Defence and whether satisfied; United Kingdom Supreme Court decision in Spiller v Joseph; new defence in UK of "honest comment"; damages.

Mr. William Panton and Ms. Sabrina Cross instructed by Dun Cox for the Claimants and the Defendant in Person.

Heard January 17, 18 and 19, 2011

ANDERSON J.

1. This is a singularly unfortunate case which, given the evidence as it has emerged in the last couple of days, might and ought to have been avoided. The Claimants in this case, Jamaicans for Justice and Dr. Carolyn Gomes are well-known names in contemporary Jamaica where they operate advocates for human rights. Dr. Gomes who has emerged as the face of the organization is its chief executive officer and Executive Director. In her witness statement she describes the institution as "a non-governmental, non-partisan citizen's rights

organization". Its vision "was and still is 'a Jamaica where the rights of all are ensured, where there is equal opportunity for citizens to realize their full potential and enjoy a sense of well-being, and where our culture is enhanced and respect shared'".

2. The 2nd defendant who is the only extant defendant in these proceedings, the 1st and 3rd defendants having entered into a consent judgment whereby the matter was terminated against them is, according to his witness statement, a "minister of religion and a journalist". He has since 1997 written a weekly column in the Sunday Herald Newspaper, one of the three Sunday papers in Jamaica. That paper is published by the 1st defendant. The column is entitled "Roper's Perspective".
3. The claimants complain that certain articles written by the 2nd defendant have defamed them and they have brought as suit alleging Libel. The articles which are at issue were published in the papers of December 25-31, 2005 (entitled "Crawle's Course of Justice"), and January 8-14, 2006 (entitled "Social Sickness"). Also relevant is the article published in the Sunday Herald edition of June 25 to July 1, 2006, (entitled "Spraying Society with imaginary bullets"). I shall refer to them as Article 1, Article 2 and Article 3.
4. The articles contained the following words which are alleged by the Claimants to be defamatory of them:
Article 1.
"Dr. Gomes is anxious to see justice done in Jamaica. She believes she speaks for the voiceless, defenceless and the powerless. She has developed the view that the Jamaican

Justice system is incapable of delivering justice for its people. She has portrayed Jamaica as a basket case where the protection of human rights is concerned. To that end JFJ has received generous support from international human rights organizations including pro-Nazi, right-wing organizations from Germany."

Article 2.

"Jamaicans for Justice is understandably upset at the reference by this column of the generous support from pro Nazi right wing sources in Germany. However, JFJ executive director, Dr. Carolyn Gomes, has received an award on behalf of the JFJ from the City of Weimar. The City of Weimar is located in North Eastern Germany. Near the city centre is the infamous extermination camp of Buchenwald where thousands were killed including women and children who were incinerated. It was here at the entrance to the camp of horrors that Adolf Hitler erected the infamous gate with the words "Arbeit macht frei" "Work makes you free" through which millions of persons were herded like cattle and worked to death. Jamaicans for Justice needs to explain what it is that connects JFJ to the city of Weimar – the gateway to the holocaust."

5. There is no dispute about the words in question or of its publication in the newspapers. Indeed, the 1st and 3rd defendants have entered a consent judgment in favour of the claimants which included an apology and an acknowledgement of the fact that the "assertions/implications made in the said columns were without any factual foundations".

6. Dr. Gomes in her evidence averred that based upon calls she had received from persons who had read the article, there had been a negative fall out. Indeed, while it could not be proven to have been the result of the article, JFJ had experienced reduced financial from domestic sources while at least four (4) proposals submitted for funding had been denied. She did acknowledge that the organization had recently received major funding from the European Community in the sum of Thirty Four Million Jamaican Dollars. She had suffered personal embarrassment and a question from an attorney friend as to whether JFJ did receive funding from neo-Nazi groups, raised the spectre that others may have been led to believe the allegations in the article. Both herself and JFJ have been deeply angered and affected by the article. It is feared that persons who would wish to support JFJ may have seen the article and concluded they ought not to support an organization which may have neo-Nazi connections.
7. In his evidence and submissions, the 2nd defendant denied that the words were libelous in either their natural and ordinary meaning or by way of innuendo. While his pleadings claim a defence of Fair Comment, he also sought in opening and closing submissions to suggest that had made an error in Article 1 but had sought to correct it in Article 2. In particular, it was his evidence that he had written the first article late at night and had not then been able to verify some details, including the name of the organizations to which he referred as "pro-Nazi right wing organizations from Germany". He said it was only later that he recalled the name Weimar and that, accordingly, he had in writing the first article used the general, and generic term "organizations".

8. It should also be noted that the 2nd defendant also stated that his motive was not to cause harm. Rather, in his first article, he had been incensed at the alleged behaviour of Dr. Gomes in a case being tried before then Chief Justice Wolfe, as that had been reported in the local news media. He also posited that his motive, at least in the second article, was to encourage the Claimants to consider the nature of their connections with the city of Weimar. He also said that he was offended by the terms of Dr. Gomes address on the occasion when she received the award from Weimar on behalf of the JFJ as he saw it as putting Jamaica in a bad light, offence which gave rise to his comments and the invitation that the claimants should explain the nature of the connection with the city of Weimar.
9. The Claimants claim that they have been libeled and have suffered embarrassment, loss of reputation and damage and ask the Court to so find and award them damages. It is pleaded that the defendant carelessly, recklessly, falsely and maliciously wrote, printed and published the article, and that this was done "knowing the same to be false and without belief in its truth. It is claimed that subsequently Article 2, far from clarifying Article 1 as claimed by the 2nd defendant, aggravated the injury to the Claimants reputations. The claimants aver that the words are libelous both in their natural and ordinary meaning and by way of innuendo.
10. As to the meaning, it was submitted for the Claimants that in considering the meaning of the words complained of, the court should adopt the approach favoured by the Judicial Committee of the Privy Council in **Bonnick v Morris and the Gleaner Company Limited**, [2002] UKPC 31. In that case, Lord Nichols stated:

"As to meaning, the approach to be adopted by a court is not in doubt. The principles were conveniently summarized by Sir Thomas Bingham M.R. in ***Skuse v Granada Television Ltd.*** [1996] E.M.L.R. 278, 285-287. In short, the court should give the article the natural and ordinary meaning it would have conveyed to the ordinary reasonable reader of the Sunday Gleaner reading the article once. The ordinary reasonable reader is not naïve; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other, non-defamatory meanings are available. The court must read the article as a whole, and eschew over-elaborate analysis and also, too literal an approach.

11. In considering the words, the court must be cognizant of the fact that the words "Nazi" and "Nazism" have become synonymous with the holocaust and overwhelming evil. I accept that the terms "Pro-Nazi" and "neo-Nazi" have become distinctly pejorative and negative and I hold that, not only are they capable of being defamatory, which must be shown, but they must also be shown in fact to be defamatory. I hold that the words are in fact defamatory.

12. **FAIR COMMENT**

The 2nd defendant as noted above pleads that the defence of fair comment is available in relation to his article. The law on the defence of fair comment is correctly summarized in the Claimants' submissions and may be succinctly stated as follows:

1. the comment must be on a matter of public interest;
 2. the comment, though it can consist of or include the inferences of fact, must be recognized as comment, as distinct from an imputation of fact;
 3. to this end, it is generally necessary that the words complained of should explicitly indicate, at least in general terms, the factual basis for the comment;
 4. the comment must be based on facts which are true or protected by privilege; and
 5. The comment must be one which an honest person could have made on the proved facts.
13. The defendant in seeking to rely on this defence must satisfy the criteria set out above. With respect to the question of meaning, also raised by the 2nd defendant, it is to be noted that the meaning intended by the defendant is irrelevant. In fact, at Common Law, the defendant is liable even though he did not intend to refer to the plaintiff, or to any living person, or had no reason to know that his words were defamatory". (See Gatley on Libel and Slander Ninth Edition.)
14. The recent case in the United Kingdom Supreme Court **Spiller and Another v Joseph and Others UKSC** [2010] UKSC 53 which has renamed the defence of Fair Comment as "Honest Comment" in the United Kingdom, has reinforced the law as it relates to the defence of Fair Comment. I have found the judgment of Lord Phillips to be extremely instructive. There the court accepted the propositions of Lord Nichols of Birkenhead, in a case in the Court of Final Appeal of Hong

Kong in **Tse Wai Chun Paul v Albert Cheng** [2001] EMLR 777, [2000] HKFCA 35.

15. His lordship was concerned with the ingredients of malice that can defeat the defence of fair comment. Before considering that question he set out at paras 16-21, under the heading "Fair Comment: The Objective Limits" what he optimistically described as five "non-controversial matters", which were "well established" in relation to the defence of fair comment:

"16. ... First, the comment must be on a matter of public interest. Public interest is not to be confined within narrow limits today: see Lord Denning in *London Artists Ltd v Littler* [1969] 2 QB 375, 391.

17. Second, the comment must be recognisable as comment, as distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege. Much learning has grown up around the distinction between fact and comment. For present purposes it is sufficient to note that a statement may be one or the other, depending on the context. Ferguson J gave a simple example in the New South Wales case of *Myerson v Smith's Weekly* (1923) 24 SR (NSW) 20, 26: 'To say that a man's conduct was dishonourable is not comment, it is a statement of fact. To say that he did certain specific things and that his conduct was dishonourable is a statement of fact coupled with a comment.'

18. Third, the comment must be based on facts which are true or protected by privilege: see, for instance, *London Artists Ltd v Littler* [1969] 2 QB 375, 395. If the facts on which the comment purports to be founded are not proved to be true or published on a privilege occasion, the defence of fair comment is not available.

19. Next, the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer

should be in a position to judge for himself how far the comment was well founded.

20. Finally, the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views: see Lord Porter in *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449, 461, commenting on an observation of Lord Esher MR in *Merivale v Carson* (1888) 20 QBD 275, 281. It must be germane to the subject-matter criticised. Dislike of an artist's style would not justify an attack upon his morals or manners. But a critic need not be mealy-mouthed in denouncing what he disagrees with. He is entitled to dip his pen in gall for the purposes of legitimate criticism: see Jordan CJ in *Gardiner v Fairfax* (1942) 42 SR (NSW) 171, 174.

21. These are the outer limits of the defence. The burden of establishing that a comment falls within these limits, and hence within the scope of the defence, lies upon the defendant who wishes to rely upon the defence."

16. These five propositions relate to elements of the defence of fair comment in respect of which the burden of proof is on the defendant. **Cheng** was primarily concerned with a sixth element – absence of malice. A defendant is not entitled to rely on the defence of fair comment if the comment was made maliciously. The onus of proving malice lies on the claimant.
17. In *Spiller*, the learned President of the Court, Lord Phillips cited the decision of Lord Esher M.R. in **Merivale v Carson** 1887 20 QBD 275, where he adopted the dictum of Crompton J in *Campbell v Spottiswode* and then addressed the question of what was meant by Fair Comment.
18. There the learned Master of the Rolls said:

"What is the meaning of a 'fair comment'? I think the meaning is this: is the article in the opinion of the jury beyond that which any fair man, however prejudiced or

however strong his opinion may be, would say *of the work in question*? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work... .

Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this – would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said *of the work which is criticised*? If it goes beyond that, then you must find for the plaintiff; if you are not satisfied that it does, then it falls within the allowed limit, and there is no libel at all."

19. Fletcher Moulton in the case *Hunt v The Star Newspaper Co. Ltd* 1908 2 KB 309, in considering the defence of fair comment also had this to say, words which I endorse and adopt.

"The law as to fair comment, so far as is material to the present case, stands as follows: In the first place, comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment: see *Andrews v Chapman* (1853) 3 C & K 286. The justice of this rule is obvious. *If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negated by the reader seeing the grounds upon which the unfavourable inference is based.* But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case it merely points to the existence of extrinsic

facts which the writer considers to warrant the language he uses.

20. Any matter, therefore, which does not indicate with a reasonable clearness that it purports to be comment, and not statement of fact, cannot be protected by the plea of fair comment. In the next place, in order to give room for the plea of fair comment *the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails.*

Finally, comment must not convey imputations of an evil sort except so far as the facts truly stated warrant the imputation.... To allege a criminal intention or a disreputable motive as actuating an individual is to make an allegation of fact which must be supported by adequate evidence. I agree that an allegation of fact may be justified by its being an inference from other facts truly stated, but ... in order to warrant it the jury must be satisfied that such inference ought to be drawn from those facts."

I especially adopt the words of the last paragraph as they are relevant to the question of association or connection with a group as widely regarded as evil as "Nazis" or "pro-Nazis".

21. Lord Phillips stated in Spiller that in his view the fourth proposition of Lord Nicholls should be restated in the following terms: "Next the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based."
22. It is clear that even where this new formulation is accepted, the comment, if it is such, must explicitly or implicitly indicate at least in general terms, the facts upon which it is based. I would hold that Article 1 did not state any such facts and Article 2 cannot be taken to have provided for the shortcomings in that regard. Further, I accept the submission of the claimants' attorney at law that far from providing an explanation to soften the sting of the earlier allegations in Article 1,

Article 2 exacerbated the damage by seeking to justify those allegations.

23. It is trite that the defence is available where it is "comment" that is at issue and that comment is "fair". In that regard it is instructive to note the dicta of Lord Denning in *London Artists Ltd v Little* [1969] 2 QB 375, 391 to the following effect:

"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 KB 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] AC 345; but he must get them right and be ready to prove them to be true."

24. The 2nd defendant has submitted and it is true as Lord Phillips said in *Spiller* that:

"The right of fair comment has been said to be "one of the fundamental rights of free speech and writing" – per Scott LJ in *Lyon v The Daily Telegraph Ltd* [1943] 1 KB 746, 753. Lord Denning MR echoed that comment in *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, adding that the right must not be whittled down by legal refinements. He described the right of fair comment in terms which emphasised the importance of the subjective appreciation of the writer. The concept was a simple one. The writer had to be expressing *his* honest opinion on a matter of public interest. He had to get *his* facts right. The area of inquiry was relatively limited. What were the facts on which the writer had made his comment? Were they matters of public interest? Were they accurate?"

25. Applying those tests to the instant case, I would hold that based upon the evidence as it has emerged here, it cannot be said that the

statement that "JFJ has received generous support from international human rights organizations including pro-Nazi, right-wing organizations from Germany" is mere comment. There has been no evidence led to support this and the defendant himself now seems to admit that that statement is inaccurate. Nor, even if this were considered comment rather than statement of fact, is there any explicit or implicit statement of facts upon which such a comment is based. Indeed, the "facts" about Weimar upon which the defendant seeks to rely to authenticate his defence of fair comment, are facts which related to a brief part of its considerable and impressive history and had no application to the present.

26. In considering the need to protect free speech by the defence of fair comment, it should be noted that in Spiller Lord Nicholls cited Lord Nicholls in the case of *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 201 where he said:

"Freedom of speech does not embrace freedom to make defamatory statements out of personal spite or without having a positive belief in their truth".

27. **Malice**

Even where the defendant otherwise establishes the defence of Fair Comment, the defence will be defeated if it can be shown that the defendant did not genuinely believe in the opinion he expressed. As Lord Nicholls said in *Tse*:

"A comment which falls within the objective test of the defence of fair comment can lose its immunity only by proof that the defendant did not genuinely hold the view expressed. Actuation by spite, animosity, intent to injure,

intent to arouse controversy or other motivation, whatever it may be, even if it is the dominant or sole motive, does not itself defeat the defence. However, proof of such motivation may be evidence, sometimes compelling evidence, from which lack of genuine belief in the view expressed may be inferred".

28. Further, as Lord Nicholls said in *Tse* in a passage adopted by the Lord Phillips, President of the UKSC:

"Proof of malice is the means whereby a plaintiff can defeat a defence of fair comment where a defendant is abusing the defence. Abuse consists of using the defence for a purpose other than that for which it exists. The purpose for which the defence of fair comment exists is to facilitate freedom of expression by commenting on matters of public interest. This accords with the constitutional guarantee of freedom of expression. And it is in the public interest that everyone should be free to express his own, honestly held views on such matters, subject always to the safeguards provided by the objective limits mentioned above. These safeguards ensure that defamatory comments can be seen for what they are, namely, comments as distinct from statements of fact. *They also ensure that those reading the comments have the material enabling them to make up their own minds on whether they agree or disagree.*"

29. It was also submitted and I accept the submission, that the deliberate or reckless mis-statement of the facts upon which the comment purports to be based, might constitute evidence from which it may be inferred that the defendant did not hold the opinion he expressed. In this regard, it is clear from the defendant's own evidence that he wished to express his displeasure at what he thought, based upon a newspaper article, was the inappropriate behaviour of Dr. Gomes in a local court.

He was also further incensed by Dr. Gomes discussing in her acceptance speech when she received the award from the city of Weimar in Germany, matters which he felt should not be discussed in that forum. In my view, these were not proper motives. Gatley, (supra) in discussing malice as improper or indirect motive states:

The plaintiff will succeed in proving the existence of express malice if he can show that the defendant was not using the occasion honestly for the purpose for which the law gives protection but was actuated by some indirect motive not connected with the privilege. Thus, as Lord Diplock said in *Horrocks v Lowe* [1975] A.C. 135:

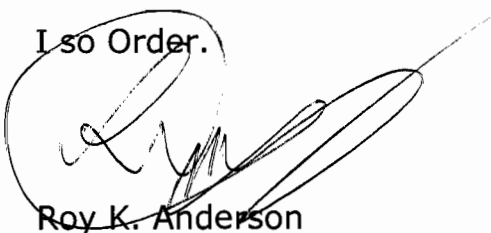
"The defendant is only entitled to the protection privilege if he uses the occasion in accordance with the purpose for which the occasion arose. He is not entitled to the protection of the privilege if he uses the occasion for some indirect or wrong motive".

30. Given my finding on these matters, it is clear and I so hold, that no public interest was being served by the article and the defence of Fair Comment must fail at the first hurdle of being made "in the public interest". I need hardly add that the fact that the defendant believes that his statement is in the public interest, does not make it so.
31. I wish to make only passing reference to the Article #3 in which the 2nd defendant purports to apologise to the German Ambassador in Jamaica and through him to the people of the City of Weimar. He also asserts that this article also constituted an apology to Dr. Gomes and JFJ. It is clear that pursuant to section 2 of the Libel and Slander Act, the words contained in Article do not comply with the Act. It is not therefore for the purposes of this action an apology. Indeed, the assertion that this

was an apology, albeit to the people of Weimar, raises the question why an appropriate apology could not have been extended to JFJ and Dr. Gomes. The question arises whether this is a further indication of malice and whether, as the 2nd defendant suggested in his opening statement, this would represent to him "groveling" which he was not prepared to do.

32. In the circumstances of the above analysis, I give judgment for the Claimants on the claim.
33. In so far as damages are concerned, I am of the view that the Claimants are entitled to damages of four million five hundred thousand dollars (\$4,500,000.00) for the damage to their reputations occasioned by the libel. I award that sum to the defendants and I also award costs to the Claimants, to be taxed if not agreed. Since the claimants have already been awarded damages to a total value of three million dollars, (\$3,000,000.00) the 2nd defendant will now have to pay the difference of one point five million dollars (\$1,500,000.00).

I so Order.


Roy K. Anderson

January 19, 2011

SCANNED