JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 29/2004

BEFORE: **THE HON. MR. JUSTICE HARRISON, J.A.**
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A. (AG.)

BETWEEN	**EDWARD SEAGA**	**APPELLANT**
AND	**LESLIE HARPER**	**RESPONDENT**

R.N.A. Henriques, Q.C. and Raymond Clough instructed by Clough, Long & Co., for Appellant

Lord Anthony Gifford, Q.C. and Miss Candice Hamilton instructed by Gifford, Thompson & Bright for Respondent

31st January, 1st 2nd 3rd, 4th, February & 20th December 2005

HARRISON, P:

This is an appeal from the judgment of Brooks, J on 11th December 2003 giving judgment for Leslie Harper ("respondent") against Edward Seaga ("appellant") in the sum of Three Million Five Hundred Thousand Dollars ($3,500,000.00) for slander.

The relevant facts are that on 6th March 1996 the Jamaica Labour Party organized a meeting at the Wyndham Hotel, Knutsford Boulevard in the parish of St. Andrew. The appellant, the Leader of the Opposition and Member of

Parliament, was then the leader of the said Party. Several persons were in attendance. Present also were representatives of the broadcasting media, printed and electronic, including a television unit, all enjoying nationwide circulation.

The appellant spoke and published to all present, the words following, in relation to the respondent:

> "Part of the strategy is to get rid of the present Commissioner of Police, and to put in place someone whose credentials as a PNP activist are impeccable, reliable, solidly supported – a distinguished supporter of the PNP. The only difference being that he is in uniform.
>
> Mr. Harper who is considered to be the person to replace Trevor McMillan is someone who we cannot and never will be able to support, because it is re-creating the conditions of 1993 when a similar type of Commissioner was in the post who did everything to turn a blind eye in that election."

Significant portions of this speech were published in the media, namely by, the Jamaica Herald newspaper, the RJR radio station and the CVM television station between the 7th and 10th days of March 1996.

The respondent was then a Deputy Commissioner of Police in the Jamaica Constabulary Force and an attorney-at-law.

The respondent contended in his statement of claim filed, that the words were spoken of him falsely and maliciously in the way of his office and calculated to disparage him in the said office and calling. In the natural and ordinary meaning, the words were meant and understood to mean that the respondent

was unable to carry out his duties as a senior police officer with impartiality, was motivated by political bias and partisanship and as a consequence was unfit to hold the office of Commissioner of Police.

In his defence filed, the appellant admitted that he used the words and did so on the occasion alleged, but maintained that they were spoken on an occasion of qualified privilege. He said:

> "The integrity, impartiality and independence from political influence of the police force, particularly its leadership and the conduct of the Plaintiff, a senior police officer and one of its leaders as also the importance to the holding of free and fair elections under the Constitution of vigilant and impartial enforcement of the law by the leadership of the police force including the Plaintiff, are matters of general public interest upon which the Defendant, as a Member of Parliament, Leader of the Opposition and Leader of the Jamaica Labour Party, had an interest or duty in making communication to the general public and on which members of the public had a corresponding interest in receiving communication."

In his reply the respondent stated that, on the contrary, the words were not spoken on an occasion of qualified privilege.

The appellant filed his answers to interrogatories dated 12th August 2000. He answered that he believed that the words complained of were true and his belief was derived from his personal observation of the conduct of the respondent prior to 6th March 1996, "as a citizen of this Island, a member of Parliament, the Leader of the Jamaica Labour Party and as Leader of the Parliament Opposition." His belief was also derived from information he received in a similar capacity on a consistent and continuing basis prior to 6th March 1996

from members and supporters of the Jamaica Labour Party and members of the public generally, that the respondent was biased towards the People's National Party. Before he published the said words, the appellant made no enquiry of the respondent nor of the Commissioner nor effected any investigation to verify whether the said words were true. Prior to speaking the said words the appellant made no report relating to the respondent, to the Police Services Commission, nor to the Office of Professional Responsibility nor to the Police Public Complaints Authority nor to any other authority or official. When he spoke the words on 6th March 1996 at the Wyndham Hotel he knew that representatives of the press, radio broadcasting and television media were present.

In his witness statement dated 3rd April 2003 the appellant, inter alia stated:

> "2. For many years, I have been on record for advocating the establishment of an Independent Police Services Commission free from political bias.
>
> 3. It is a strongly held view in political circles that the Police Services Commission appointed by the Prime Minister, has exhibited political bias in determining promotions, disciplinary action and transfers of men and women in the police force.
>
> 4. This has resulted in members of the force being de-motivated and de-moralized as political connections rather than ones record of merit was perceived to determine their career in the force.

5. Against the background of a politically compliant Police Services Commission a biased Police Commissioner would have no problem in effecting political promotions, discipline and transfers in the Police Force on a political basis.

6. Consequently, when I heard that consideration was being given by the political directorate to appoint Mr. Leslie Harper to the post of Commissioner of Police, someone, I believe, and many persons in my political party believe, to be a strong supporter of the People's National Party, I was genuinely fearful that his presence as Commissioner would subvert the system as had happened in the past.

7. I decided it was my duty to issue a political warning as Leader of the Opposition in the national interest.

8. I firmly believed, and still do believe that Mr. Harper is a strong supporter of the People's National Party.

9. As Leader of the Opposition I considered it my duty to tell the people of Jamaica of my fears in that regard, and I had every reason to believe that the people of this country were interested in receiving that information."

Brooks, J heard the oral evidence and examined the evidence as contained in the witnesses' statements. Relying on the decision of the House of Lords in ***Reynolds v. Times Newspapers Ltd and others*** [1999] 4 All E.R. 609, the learned trial judge applied the test laid down to be applied to the media in order to determine whether or not the defence of qualified privilege existed. He found for the respondent. At page 76[A] of the record, he said:

> "... I find that the occasion, on which Mr. Seaga made his comments about Mr. Harper, was not one of qualified privilege.
>
> I have reasoned the issues on the basis that this was a case akin to publication by a newspaper such as in the ***Reynolds*** case. I recognize that the situations are not identical, but as I have already stated, my view is that they are materially indistinguishable."

The learned trial judge stated his finding in the alternative. He continued:

> "In the event that I am wrong in that premise, I am still of the view, based on the facts as I have found them, that the 'information' did not rise above the level of rumour and so there was no duty to report those allegations to the Jamaican public at the time which Mr. Seaga did so, and, those allegations, to quote the words of Lord Nicholls above; 'were not information the public had a right to know.'
>
> Even if this was not an occasion requiring a ***Reynolds*** privilege type of assessment I find that this was not an occasion of qualified privilege."

He found in favour of the respondent, hence this appeal.

The grounds of appeal read:

> "(a) That the Learned Trial Judge failed to apply the proper test relating to qualified privilege namely, whether the Defendant had a duty to make the statement complained of and whether the people of Jamaica had an interest in receiving the statement.
>
> (b) That having found at page 10 of his judgment that the Leader of the Opposition in Jamaica has a duty to inform the public of any governmental proposals which he opposes and the reason for his stance and having found at page 11 of his judgment that the public does have a interest in being told of any

development or situation which could or does affect the ability of the police force and its leadership to carry out its mandate to the Jamaican society, the Learned Trial Judge failed to find that the occasion on which the statement complained of was an occasion of qualified privilege.

(c) The occasion on which the statement complained of was made, was one of qualified privilege because the Leader of the Opposition as the communicator and the people of Jamaica as the communicatee are in an existing relationship established by the Constitution of Jamaica. The Defendant will rely on the judgment of Simon Brown, LJ in the case of ***Kearns v. Bar Council*** [2003] 2 All ER 535.

(d) The Learned Trial Judge failed to recognize that the question of whether or not the Leader of the Opposition had sufficiently verified his facts before making the statement complained of, went to the question of malice and not the question of whether or not the occasion was one of qualified privilege.

(e) That the Claimant did not allege malice in his pleadings nor did he make any charge of malice in his evidence. At page 26 of his judgment the Learned Trial Judge's judgment found that the Defendant was not guilty of malice.

(f) The Learned Trial Judge erred in applying to this case the judgment in the ***Reynolds v. Times Newspaper Ltd.*** [1999] 4 All ER 609 which relates solely to media publications on the erroneous ground that on the occasion when the statement was made, representatives of the media was present. In this instant, the Defendant will rely on the judgment of the Court of Appeal in England in the case of ***Pittard v. Oliver*** L.R. 1 Q.B.D. 474.

(g) The award of $3,500,000.00 for general damages was inordinately excessive in light of the failure of the Defendant to show that he had suffered any damages. Further, having regard the evidence of the Claimant and his witnesses in this case, the Learned Trial Judge erred in determining that the damages were aggravated by the extent of the publicity given to the speech of the Defendant and the nature of the cross-examination by the Defendant's Attorney-at-law."

Mr. Henriques, Q.C. for the respondent argued that the learned trial judge erred in finding that the occasion was not one of qualified privilege. He said no verification was required to be effected by the respondent because malice was not alleged. Nor did the approach by the House of Lords in ***Reynolds v. Times Newspapers Ltd and others*** (supra) apply, because the appellant's statement was not akin to a media publication. He submitted that the duty-interest test applied and qualified privilege attached to the statement, whether it turned out to be true or false, because the respondent as Leader of the Parliamentary Opposition had a duty to make the communication and the Jamaican people had an interest in receiving it. The appellant was advocating for the appointment of a "new type" of Police Commissioner who could command bipartisan support and was not motivated by political bias, that is, someone who could "move the Constabulary Force forward." He submitted further that the presence of the media did not make the words a media publication and thereby attract the ***Reynolds*** test, because the respondent did not cause the publication by the media nor was there any specific evidence thereof. In respect of media

publications, the journalist is required to act responsibly. The respondent had a duty to communicate to an island-wide audience and if regarded as "to the world at large" it was not too wide. He concluded that assuming that liability exists on the appellant's part; the damages awarded are inordinately high and manifestly excessive. The respondent has proven very little to show that his reputation was affected and aggravated damages, which was not pleaded as required, was wrongly included by the learned trial judge.

Lord Gifford, Q.C. for the respondent submitted that the principles governing the law as it related to qualified privilege had the same application to publication by individuals as well as publication by the media. The learned trial judge was correct to find that ***Reynolds v. Times Newspapers Ltd and others*** (supra) applied. He regarded the dictum of Simon Brown, LJ in ***Kearns & others v. General Council of the Bar*** [2003] 2 All ER 534 to the contrary, as obiter. Although the House of Lords in the ***Reynolds*** (supra) case refused to recognize a special category of "political information" which attracted qualified privilege, it held that the standard and test enunciated were applicable to both media and individual publications. The Court should look at the circumstances in order to determine whether the occasion was privileged. A publication made by an individual and intended to be disseminated to all the world by the media is a publication which the individual is required to take prior steps to verify its accuracy and sources. The dissemination by the appellant of what was "mere rumour" served no public interest. On the evidence the award of $3,500,000.00

was justified. He concluded that the learned trial judge was entitled to consider the wide circulation in the media as well as the aggravating feature effected through the cross-examination by counsel for the appellant.

The law of defamation at common law represents the delicate balance between a person's right not to have his reputation disparaged by another and the latter's right to freedom of expression. This conflict on occasion results in the ascendancy of the public interest over the individual's right to his reputation or vice versa. Such occasions may be described as privileged, and may be absolute or qualified.

A statement made by a member in Parliament is a form of absolute privilege. The importance of being able to speak freely in Parliament, even if the statement is outrageous or untrue, is recognized and elevated above the individual's right to his reputation as a matter of public policy. This was settled as far back as 1688 by the Bill of Rights.

There are several instances of defamatory statements made on occasions of qualified privilege. Of particular relevance is a defamatory statement made in circumstances where the maker is regarded as having a duty to make it and the person to whom the statement is made has a corresponding duty to receive it. Lord Atkinson, in ***Adam v Ward*** [1916-17] All E.R. 157 defining the defence of qualified privilege, at page 170, said:

> "... a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is

> made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

This requirement of reciprocity, regarded as the duty-interest test, in order to attract the defence of qualified privilege was clarified in ***Watt v. Longsdon*** [1930] 1 K.B. 130. The defendant a director of a company received a letter from an employee containing gross charges of immoral conduct, dishonesty and drunkenness of the plaintiff, himself, an employee. The defendant replied by letter requesting confirmation of the allegations. Prior to the receipt of the information the defendant communicated the employee's report to the chairman of the company and also to the plaintiff's wife. The allegations were untrue. The plaintiff sued for libel in respect of, (1) the defendant's letter to the employee (2) the employee's letter communicated to the chairman and (3) the employee's letter communicated to the plaintiff's wife. The defendant pleaded qualified privilege. In the Court of Appeal it was held that the communications by the defendant to the employee and to the chairman were protected by qualified privilege. All parties had a common interest in the affairs of the company and the conduct of its employees and a corresponding duty to communicate such information. The Court held that the communication to the plaintiff's wife was not protected by the defence. Although in some circumstances, a moral duty may arise and an interest may exist in a wife to receive information of the conduct of her husband, in this case, however, the

communication to the plaintiff's wife was outside the ambit of the duty-interest test.

In ***Chapman v. Ellesmere*** [1932] 2 KB 431, the stewards of the Jockey Club, who owe a duty to all persons interested in racing to inform them of the conduct of trainers and others involved in the conduct of racing, published a statement in the racing calendar in respect of the conduct of such trainers and persons. It was held that the stewards had qualified privilege to make the publication in the racing calendar, in keeping with the agreed rules. However, publication in the newspapers was not so covered. The racing community was properly informed by the use of the racing calendar. The medium of communication must be a proper one. It was unnecessary to make such a publication to the general public.

A dictation to one's typist in the normal course of business, of a letter libellous of the plaintiff, is privileged. The letter was the means of communication. (***Osborn v. Boulter*** [1930] 2 K.B. 226). Defamatory statements made by persons of the plaintiff during the course of investigations into criminal activities are also protected by qualified privilege. (***Force v. Warren*** (1864) 15 CBNS 806).

The fact that the complaint published is in relation to a public official does not necessarily make a publication to the world at large an occasion of qualified privilege. The publication must be made to the proper authorities who would be able to address the grievance. In ***Harrison v. Bush*** [1855] 5 E & B 344, 348 a

complaint to the Home Secretary that a local magistrate had incited people to break the peace and therefore should be removed from office was held to be correctly sent, although the power of such removal resided in the Lord Chancellor. The complaint was regarded as covered by qualified privilege, because it was in effect made to the Crown who would direct the Home Secretary to enquire into the complaint and the results would be acted upon by the Lord Chancellor. The Court of Queen's Bench held that:

> "A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without this privilege, would be slanderous and actionable."

The duty-interest concept which involves the legal, social or moral reciprocal duties, envisages, traditionally, communication to a limited audience, peculiarly circumscribed, depending on the circumstances of the case, in order to attract the defence of qualified privilege. That privilege may fail however if it goes beyond the requirements of the occasion or is unnecessarily wide.

In ***Adam v. Ward*** (supra), the plaintiff Adam a former army officer had made an accusation, in the House of Commons, defamatory of one General Scobell, his superior officer. The latter requested an enquiry by the Army Council. The subsequent enquiry exonerated the general of any unworthy conduct, found that he was particularly helpful to the career of the plaintiff who had been asked to resign from the army due to adverse reports and that the

plaintiff's accusation was unfounded. This decision by the Army Council was communicated to General Scobell in a letter written by the defendant Ward, the Council's secretary, but the communication was also sent to the press. The House of Lords, agreeing with the decision of the Court of Appeal which reversed the decision of the trial judge, rejected the complaint that the communication was unnecessarily wide, having been made to the world at large, and held that it was made on a privileged occasion.

Of this publication, Lord Dunedin, at page 165-166 said:

> "It is said, first, that the publication here was to an unduly wide public – that there was no duty to publish to every one, but only to those who were likely to have become aware of the accusation, and that to make such a wide publication as was here made was in accordance with no duty or right. I think that a man who makes a statement on the floor of the House of Commons makes it to the world. True it never reaches every person in the world. In some cases, if the orator is unknown to fame, and the statement intrinsically unexciting, it may not reach very many. But no one knows whom it may reach, and it was only, I think, plain justice to General Scobell that the ambit of the contradiction should be spread so wide as if possible to meet the false accusation wherever it went. Do what you will the stern chase after a lie that has got the start is apt to be a long one. As a matter of fact the Army Council instructed their secretary, the defendant, to send the communication to the channels to which they ordinarily send all official communications. The list is a long one and the ambit of influence is wide; but, in my judgment, the list was not longer or the ambit wider than was demanded by justice to General Scobell."

Lord Atkinson at page 174 said:

> The next point urged on behalf of the appellant was that the publication of the libel was unnecessarily wide; that it extended over too vast an area; that neither the Army Council nor the appellant had any interest or duty to publish it to people inhabiting the remote parts of the Empire which the libel might reach; that the latter had no corresponding interest or duty in receiving the communication; and that either the occasion of the publication was, therefore, not a privileged occasion, or that the wide publication was evidence of actual malice. He (HIS LORDSHIP) could not agree. It might be laid down as a general proposition that where a man through the medium of HANSARD'S reports of the proceedings in Parliament, published to the world vile slanders of a civil, naval, or military servant of the Crown in relation to the discharge by that servant of the duties of his office, he selected the world as his audience, and that it was the duty of the heads of the service to which the servant belonged, if on investigation they found the imputation against him groundless, to publish his vindication to the same audience to which his traducer addressed himself. The Army Council would have failed in their duty to General Scobell personally, and to the great service which they in a certain sense governed and controlled if they had not given the widest circulation to the announcement of the general's vindication."

Publication to the world at large being to a wider horizon is of a distinctly different dimension from the usual circumscribed group in the duty-interest class which attracts qualified privilege, in the absence of malice. Although made to a wider audience, it may still be similarly protected, as long as the person who makes the statement has the legal, social or moral duty to make it and the public has the corresponding interest in the subject.

In ***Cox v. Feeney*** [1863] 4 F & F 13, 176 E.R. 445, Cockburn, C.J., accepting that publication to the world at large in some circumstances is

privileged as stated by Lord Tenterden, C.J. , "A man has a right to publish, for the purpose of giving the public information, that which it is proper for the public to know," went on, at page 19, to say:

> "... if you are of opinion that this was matter which it concerned the public to know, did the defendant publish it with a view to afford information upon matter in which the public were interested; did he do it in the honest desire to afford that information, or with a sinister motive? Now, according as you shall take the one or the other view of this question, you will find your verdict for the plaintiff or the defendant."

Where a pressing concern in a matter exists or an emergency arises in some circumstances, a publication to the public may be privileged. Stephenson, L.J. in ***Blackshaw v. Lord*** [1983] 2 All E.R. 311 was of that view. At page 327, referring to the prohibition against publishing what may be called "rumours" which were still being investigated, he said:

> "There may be extreme cases where the urgency of communicating a warning is so great, or the source of the information so reliable, that publication of suspicion or speculation is justified; for example, where there is danger to the public from a suspected terrorist or the distribution of contaminated food or drugs; but there is nothing of that sort here. So Mr. Lord took the risk of the defamatory matter, which he derived from what he said were Mr. Smith's statements and assumptions, turning out untrue."

In that case the appellant journalist published an article in his newspaper defamatory of the respondent who was the public officer in charge of a department of government which had allegedly incompetently overpaid millions

of pounds in a scheme to provide financing to companies developing oil and gas resources in the North Sea. An earlier press conference in the House of Commons, attended by the said appellant, had revealed that a committee of the House from its investigations found that there were irregularities, inefficiency and inadequate staffing and disbursement outside established guidelines but no fraud was involved. A senior official in the government department had been dismissed. Having been told subsequently by a press officer in the department that the respondent had been head of the said department, that he had left to a position of equal rank in another division of the department and then resigned for personal reasons to pursue a career in writing, the appellant wrongly assumed that it was the respondent who had been dismissed and published the said article, without stating that the respondent left for personal reasons. Although later editions published the respondent's explanations, the appellants refused to publish an apology. The respondent sued the journalist and the newspaper in libel. Malice was not alleged. The appellants pleaded that it was a fair and accurate report of what the press officer had said therefore the defence of qualified privilege applied by statute and at common law. The jury found that the article was defamatory of the respondent, it was not a fair and accurate report and accordingly not the subject of qualified privilege. The appellants' appeal was dismissed. Dunn, L.J. at page 334, said:

> "... (a) review of the authorities shows that, save where the publication is of a report which falls into one of the recognized privileged categories, the court must look at the circumstances of the case before it in order to

> ascertain whether the occasion of the publication was privileged. It is not enough that the publication should be of general interest to the public. The public must have a legitimate interest in receiving the information contained in it, and there must be a correlative duty in the publisher to publish, which depends also on the status of the information which he receives, at any rate where the information is being made public for the first time. Different considerations may arise in cases such as ***Adam v Ward*** (1915) 31 TLR 299; *affd* [1917] AC 309, [1916-17] All ER Rep 157 and ***Dunford Publicity Studios Ltd v News Media Ownership Ltd*** [1971] NZLR 961, where the matter has already been made public, and the publication in question is by way of defence to a public charge, or correction of a mistake made in a previous publication."

Discussing the interest of the public in the publication, the learned judge at page 327, said:

> "Public interest and public benefit are necessary (cf/s7(3) of the 1952 Act), but not enough without more. There must be a duty to publish to the public at large and an interest in the public at large to receive the publication; and a section of the public is not enough.
> The subject matter must be of public interest; its publication must be in the public interest. That nature of the matter published and its source and the position or status of the publisher distributing the information must be such as to create the duty to publish the information to the intended recipients, in this case the readers of the Daily Telegraph. Where damaging facts have been ascertained to be true, or been made the subject of a report, there may be a duty to report them (see eg ***Cox v Feeney*** (1863) 4 F & F 13, 176 ER 445, ***Perera v Peiris*** [1949] AC 1 and ***Dunford Publicity Studios Ltd v. News Media Ownership Ltd*** [1971] NZLR 961), provided the public interest is wide enough (***Chapman v Lord Ellesmere*** [1932] 2 KB 431, [1932] All ER Rep 221). But where damaging allegations or charges have been made and

> are still under investigation (***Purcell v Solwer*** (1877) 2 CPD 215), or have been authoritatively refuted (***Adam v Ward*** (1915) 31 TLR 299; affd [1917] AC 308, [1916-17] All ER Rep 157), there can be no duty to report them to the public."

Although the issue arose in the context of the publication by the journalist Lord in his newspaper, to which qualified privilege is available, publications by an individual must equally withstand the scrutiny of whether or not it is in the public interest.

The necessary reciprocity which exists in the conventional duty-interest cases in order that the defence of qualified privilege will attach, in the absence of malice, is not that apparent in communications to a wider audience. This fact was borne out in ***De Buse and Others v. McCarty and Stepney Borough Council*** [1942] 1 All E.R. 19, when the defendant town clerk sent out a notice of a meeting to be held by the Borough Council to discuss a report of investigations by a committee of the loss of petrol from its depot. Attached to the notice which was posted in the town hall and other public places was the report. The defendant, in answer to the plaintiff's claim that the publication defamed them pleaded that it was made on a privileged occasion because there was a common interest between the council and the ratepayers in the subject matter. On appeal from the judgment in favour of the defendant, the Court of Appeal held that the defence failed. Lord Greene, M.R. after referring to the famous dictum of Lord Atkinson in ***Adam v. Ward,*** (supra), at page 23 said:

> "... I cannot myself see that at that stage in the operation of the machinery of the borough's administration there was any duty whatsoever to tell the ratepayers how the wheels were going round. There may well have been a duty of the council, or, if not a duty, at any rate an interest in the council, to inform the ratepayers of the result of its own deliberations.
> ...
> It is perfectly true - and, indeed, - obvious that the committee itself had both an interest and a duty to make a report to the council, but there could be no common interest, as far as I can see, between the council and the ratepayers to have what, in the circumstances, was only a preliminary stage in the investigation communicated to the ratepayers in the form in which it was communicated."

In ***Kearns v. General Council of the Bar*** (supra) 534, a circular letter was sent by the Bar Council's head of ***Professional Standards and Legal Services Department*** to "all heads of chambers, senior clerks and practice managers," libellous of the claimants, solicitors. The letter mistakenly stated that the claimants were not solicitors although operating as such. In proceedings for defamation, malice was not pleaded. On the application of the defendant Bar Council, the trial judge dismissed the claim on the ground that the occasion of publication was one of qualified privilege based on an existing established relationship and a common and corresponding interest. In dismissing the appeal, the Court of Appeal held that qualified privilege attached because of the existence of an established relationship. Such privilege would attach more readily to such relationship than a communication to strangers and that was a more helpful classification for the determination of such privilege than the

distinction between "common interest" and "duty-interest" cases. Simon Brown, L.J. dismissing the classification of the cases at page 547 said:

> "The argument, as it seems to me, has been much bedevilled by the use of the terms 'common interest' and 'duty-interest for all the world as if these are clear-cut categories and any particular case is instantly recognizable as falling within one or other of them. It also seems to me surprising and unsatisfactory that privilege should be thought to attach more readily to communications made in the service of one's own interests than in the discharge of a duty - as at first blush this distinction would suggest. To my mind an altogether more helpful categorization is to be found by distinguishing between on the one hand cases where the communicator and the communicatee are in an existing and established relationship (irrespective of whether within that relationship the communications between them relate to reciprocal interests or reciprocal duties or a mixture of both) and on the other hand cases where no such relationship has been established and the communication is between strangers (or at any rate is volunteered otherwise than by reference to their relationship). This distinction I can readily understand and it seems to me no less supportable on the authorities than that for which Mr. Caldecott contends. Once the distinction is made in this way, moreover, it becomes to my mind understandable that the law should attach privilege more readily to communications within an existing relationship than to those between strangers. The latter present particular problems. I find it unsurprising that many of the cases where the court has been divided or where the defence has been held to fail have been cases of communications by strangers. ***Coxhead v. Richards*** (1846) 2 CB 569, 135 ER 1069 was just such a case. As Coltman J, one of those who held that privilege did not attach, observed:
>
> > 'The duty of not slandering your neighbour on insufficient grounds, is so clear, that a violation of

> that duty ought not to be sanctioned *in the case of voluntary communications,* except under circumstances of great urgency and gravity'."
> (Emphasis added)

The defence of qualified privilege therefore, within the duty-interest concept, with the attendant established relationship is likely to succeed more readily because of its distinctly circumscribed group. On the other hand publication to the world at large, indicative of communication to strangers is of necessity, inimical to such a concept of interest. In the latter case, because of the indeterminate width of the publication, some degree of caution must attend the conduct of the publisher.

A recent decision of the Judicial Committee of the Privy Council is of some assistance. In ***Basdeo Panday v. Kenneth Gordon*** Privy Council Appeal No. 35 of 2004 delivered on 5th October 2005, clearly after the arguments heard by us in the instant case, their Lordships considered a defence of a constitutional bar under section 4(e) of the Constitution of Trinidad and Tobago justifying defamatory words used by way of a political comment in respect of a public figure. Commenting on the common law as it relates to qualified privilege, their Lordships (per Lord Nicholls) at paragraphs 13 and 14 observed:

> "13. In recent years it has become apparent that in today's conditions this traditional approach of the common law to statements of fact is not wholly satisfactory in respect of the widespread dissemination of political views and other matters of public concern. For some time there has been an increasing awareness that the strict common law rule can have an undue 'chilling' effect. At the same time there has been an increasing awareness that to accord qualified privilege, as traditionally understood,

> to every occasion when matters of public concern are published to the world at large would be to go too far. In today's conditions publication of a defamatory statement at large can cause immense and lasting damage, much more so than with publications to one person, such as a prospective employer, or a limited group of people.
>
> 14. In common law countries courts have therefore sought to adapt the common law so as best to accommodate these conflicting considerations which have emerged in recent years. What is needed, in the interests of freedom of expression on matters of public interest, is some relaxation of the strict common law rule. Publication on these occasions should be regarded as privileged. But on these occasions the interests of those whose reputations are being impugned call for more protection than that traditionally afforded by the subjective ***Horrocks v Lowe*** malice limitation. What is needed is that the area of privilege should be extended but, as a counter-balance, those who make statements at large on matters of public concern and seek to avail themselves of this extended area of privilege, in addition to acting honestly, should exercise a degree of care. This objective requirement should be elastic, enabling a court to have due regard to all the circumstances, including the importance of the subject matter of the statement, the gravity of the allegation, and the context in which it is made."
> (Emphasis added)

Publication to the world at large therefore because of its contrast to the traditional established relationship grouping, cannot be viewed generally to qualify, without more, under the umbrella of the duty-interest mould. Such publication being of wider dissemination must be subject to its own intrinsic restraints and caution – the publisher must act honestly and exercise a degree of care.

In the instant case Brooks, J found that the publication by the appellant was to the world at large. At page 12 of the Supplemental record he said:

> "It is my view that in this context the publication is to the world at large. The national coverage afforded by media with island-wide circulation takes the occasion of this communication out of the realm of communication between persons in a specific relationship.
>
> Mr. Seaga was no longer speaking just to members of his party or to members of the public who had attended the meeting; he was addressing through the media, at least an island-wide audience."

The learned trial judge then went on to indicate the test that he applied, and his reasons for doing so. He continued on page 13:

> "In this context it may be that a special approach is required (**see *Kearns & others v. General Council of the Bar*** [2003] 2 All ER 534. This approach is outlined in the case of ***Reynolds v. Times Newspapers Ltd*** [1999] 4 All ER 609.
>
> The ***Reynolds*** case dealt with a publication by a newspaper. In the ***Kearns*** case Simon Brown L.J. at page 536 asserted that the ***Reynolds*** case applies only to media publications. I find however, that the ***Reynolds*** case does apply to the instant case bearing in mind the presence in the audience of the media and Mr. Seaga's realized expectation that his utterances were more than likely to be quoted to the public by the media."

In this regard on page 26 he concluded:

> "I have reasoned the issues on the basis that this was a case akin to publication by a newspaper such as in the ***Reynolds*** case. I recognize that the situations are not identical, but as I have already stated, my view is that they are materially indistinguishable."

The learned trial judge dutifully applied the several tests formulated in the ***Reynolds*** case referrable to media responsibility. Lord Gifford, Q.C. for the respondent supported the approach of the learned trial judge in this regard. Mr. Henriques, Q.C. for the appellant argued that applying the ***Reynolds*** case (supra) test was inappropriate to the instant case, the former being applicable to media publication only. I am of the view that learned Queen's Counsel for the appellant is correct.

In the case of ***Reynolds v. Times Newspapers Ltd and others*** (supra) a libellous publication was issued by the appellant media concerning the respondent who had resigned as prime minister of Ireland and leader of his party. There had been a political crisis and it aroused considerable public interest. The publication by the media did not contain an explanation given by the respondent. The appellant media claimed that the publication was covered by qualified privilege and argued that "any libellous statement made in the course of political discussion was free from liability if published in good faith." The media was therefore seeking to extend the common law by asking the court to recognize a category of qualified privilege in the area of publication of political discussions. Their Lordships dismissed the appeal, but Lord Nicholls formulated the test, listing the course of conduct to be followed in order to maintain media responsibility which may attract the protection. In rejecting the media's attempt to introduce this special category of protection to political information, Lord Nicholls, at page 625 said:

> "My conclusion is that the established common law approach to misstatements of fact remains essentially sound. The common law should not develop 'political information' as a new 'subject matter' category of qualified privilege, whereby the publication of all such information would attract qualified privilege, whatever the circumstances. That would not provide adequate protection for reputation. Moreover, it would be unsound in principle to distinguish political discussion from discussion of other matters of serious public concern. The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern."

The entire approach of the appellant before their Lordships was in the context of the media seeking the recognition of this special category referrable to political information. Lord Steyn described this new direction as "a generic qualified privilege." At page 630 he said:

> "Counsel submitted that the House should recognise a qualified privilege extending to the publication by a newspaper to the public at large of factual information, opinions and arguments concerning government and political matters that affect the people of the United Kingdom. For convenience, I will call this a generic qualified privilege of political speech. A distinctive feature of political speech published by a newspaper is that it is communicated to a large audience. And this characteristic must be kept in mind in weighing the arguments in the present case. It is further essential not to lose sight of the factual framework in which the question arises, namely a defamatory and factually incorrect statement which the newspaper believed to be true."

The appellant media in ***Reynolds*** case (supra) seemed to desire an expansion of the common law to embrace the American principle in ***New York Times Co., v Sullivan*** [1964] 376 US 254, US SC in which, based on the First Amendment rights of all, inclusive of the fourth estate, the media, a public official cannot recover damages consequent on a statement libellous of him published in the media, unless he proves actual malice.

Their Lordships rejected the appellant media's argument. The ***Reynolds*** case (supra) therefore did not in any way purport to modify or expand the general common law as it applied to qualified privilege. The common law remained unchanged. The media however, in order to rely on the defence of qualified privilege was required to follow the approved test and thereby show itself as practising responsible journalism.

Simon Brown, L.J. in ***Kearns v. General Council of the Bar,*** (supra), observed:

> "***Reynolds***' case, however, applies only to media publications."

See also ***Loutchansky v. Times Newspapers Ltd*** (Nos. 2-5) [2002] Q.B. 783, in which Lord Phillips, M.R. at page 806 agreed that:

> "***Reynolds*** privilege (as we shall call it), although built upon an orthodox foundation, is in reality sui generis. ... ***Reynolds*** privilege is recognized, ... as a different jurisprudential creature from the traditional form of privilege from which it sprang, ..."

The ***Reynolds*** case (supra) is therefore inapplicable to the instant case. Brooks, J was in error to apply the ***Reynolds*** test. He was equally wrong to seek to do so by designating the case as "akin to publication by a newspaper."

The cause of action in the instant case is slander by the appellant. Although the media was present and re-published the appellant's words they were not parties to the suit. This was undoubtedly a publication to the world at large and it must therefore be examined in all the circumstances of the case in order to determine whether or not the occasion was protected by qualified privilege. Lord Nicholls in the ***Reynolds*** case (supra), commenting on privilege and publication to the world at large, at page 617 said:

> "Frequently a privileged occasion encompasses publication to one person only or to a limited group of people. Publication more widely, to persons who lack the requisite interest in receiving the information, is not privileged. But the common law has recognised there are occasions when the public interest requires that publication to the world at large should be privileged. In **C*ox v Feeney*** (1863) 4 F & F 13 at 19, 176 ER 445 at 448 Cockburn CJ approved an earlier statement by Lord Tenterden CJ that 'a man has a right to publish, for the purpose of giving the public information, that which it is proper for the public to know'. Whether the public interest so requires depends upon an evaluation of the particular information in the circumstances of its publication. Through the cases runs the strain that, when determining whether the public at large had a right to know the particular information, the court has regard to all the circumstances. The court is concerned to assess whether the information was of sufficient value to the public that, in the public interest, it should be protected by privilege in the absence of malice."

The appellant in the instant case, stated that he received the information in respect of the respondent from different sources. The learned trial judge at pages 17-18 of the supplemental record, said:

> "Mr. Seaga testified that the information came to him from several persons. Firstly he says that the information came, on many occasions, from the former Opposition Spokesman on National Security. Secondly, it came from the current Opposition Spokesman on National Security and thirdly, from the current chairman of the Jamaica Labour Party. In addition to those sources, he heard from people whom he would meet and persons whom he had 'asked to check out the conduct of Mr. Harper.'
>
> None of Mr. Seaga's allegations against Mr. Harper resulted from his personal observation. He further testified that the persons who gave him information about Mr. Harper's conduct were relaying what was told to them by other persons. Some of those other persons he says would have been police officers. He says that he believed such police officers would have been of very high rank. His belief was based on the fact that his informants were persons who were 'accustomed to speaking to persons of very high rank in the police force, not lower rank.' He did not ask for the ranks of those police officers. ...
>
> Mr. Seaga at one point in cross-examination did say that his informants 'were telling me what other persons said to them and what they observed themselves'. He however asked none of his informants for an instance of political bias in Mr. Harper. He says that he asked them only for their findings based on the information they had. I cannot accept that these persons were basing their respective conclusions on personal observation without revealing any instance of what they had each observed."

The Learned Trial Judge found that the information "... did not rise above mere rumour."

As the Leader of the Opposition and a Member of Parliament, the learned trial judge was correct to find that the appellant did have a duty to disclose to the public information which was in the public interest and which the public had the right to receive.

However, it was necessary, in order to be protected by the defence of qualified privilege for the appellant to show that he had a honest belief in the information he received and in addition, that he exercised due care.

It is worthy of note that there was no evidence from the appellant that he received any information of an example of an utterance or statement by the respondent to support the accusation of political bias. Nor did he receive any report of any conduct of the respondent or of close association with anyone to support the allegation of political partisanship. None of the appellant's informants sought to give even an instance of any behaviour or words by the respondent to support the allegation. Nor did the appellant experience, on his own, any such instance. The second and third interrogatories that were put in evidence in the cross-examination of the appellant on page 13 of the record read:

> "2. To the second interrogatory, namely 'if you believed the said words to be true, was your belief derived from direct personal observation or from information derived from another person or persons, or from both?'

> that my belief was derived from information from other persons as well as personal observation.
>
> 3. To the third interrogatory, namely, 'if your belief was derived wholly or in part from direct personal observation:
>
> i) what did you observe which caused you to believe that the words were true?' that I observed the conduct of the Plaintiff.
>
> ii) when and in what circumstances did you make such an observation? that the observation was made prior to 6th March, 1996 by me as a citizen of this Island, a member of Parliament, the Leader of the Jamaica Labour Party and as Leader of the Parliamentary Opposition." (Emphasis added)

Curiously, in the said cross-examination, the appellant explained:

> "The information I receive personally is what I refer to as personal observation."

The common feature of each report which the appellant said that he received concerning the bias of the respondent is the absence of any specificity as to words spoken or conduct on the part of the respondent to demonstrate such bias. Consequently, the duty arose in the appellant to take care before communicating that information as facts to his island-wide audience. It was not a publication in the public interest. Nor was there any urgency to publish the words. The incumbent Commissioner of Police was not due to retire until three months thereafter.

The conduct of public officials is in the public domain and is always subject to the most intense and constant scrutiny. He is expected to exhibit the highest degree of honesty and unbiased behaviour in the conduct of public affairs. Any lowering of those standards will attract public criticism. This is proper and should be expected. Like Caesar's wife he must be "above reproach".

However, such officials should not be subject to the risk of having their characters defamed by mere rumours or nebulous charges. Rumour, it is said, indeed has wings. It should not be aided in its flight. The good character of an individual is his greatest, and at times, his sole asset.

In the instant case, one may accept that the honest belief claimed by the appellant as required by the long list of authorities starting from ***Adams v. Ward*** (supra) to the ***Kearns*** case existed. However, in order to make the publication made to the island-wide audience, one made on a privileged occasion in pursuance of his duty to the public in addition, he had to show that he exercised care. The requisite degree of care was not shown by him. (See ***Panday v. Gordon***, supra) Although the public has a right to be concerned that the post of Commissioner of Police is occupied by an individual of the highest integrity and free from partisan political taint, it is not the electorate of Jamaica which selects the Commissioner of Police nor does it have any direct input in the selection of the individual for that post. The appellant made no attempt to advise the Police Services Commission, nor the incumbent

Commissioner of Police nor the relevant Minister of Government of the information he had received in respect of the respondent. If he had done so, that may have demonstrated, somewhat, the degree of care required.

The appellant, as Leader of the Opposition abandoned the absolute privilege he had, to make his statement in Parliament in respect of the appellant, and embraced instead the risk of a slanderous publication to the world at large. Verification, contrary to the finding of the learned trial judge, was not required to be done by the appellant in order to avail himself of the defence of qualified privilege. Verification is relevant to malice which was not pleaded in this case.

The learned trial judge, with reference to the ***Reynolds*** defence , said:

> "In the event that I am wrong in that premise, I am still of the view, based on the facts as I have found them, that the 'information' did not rise above the level of rumour and so there was no duty to report those allegations to the Jamaican public at the time which Mr. Seaga did so, and, those allegations, to quote the word of Lord Nicholls above; 'were not information the public had a right to know'."

For the reasons I have expressed above, I agree with the decision of the learned trial judge, that the publication was not made on an occasion of qualified privilege.

The appellant also complained that the award of $3,500,000.00 for damages was excessive.

Although an appellate court will be slow to disturb an award of damages in a trial by jury, it will do so if it was an award made on a wrong principle, and also more readily in a trial before a judge alone. The learned trial judge made

an award for aggravated damages, although it was not pleaded and particularized as it should. (See Gatley on Libel & Slander, 10th Edition (2004) paragraph 26.28). The aspect of "the conduct of the defence in the case," considered by the learned trial judge would not have been evident when pleading. Although the slander was actionable per se, the respondent did not claim to have suffered in his post as Deputy Commissioner of Police, because of the slander by the appellant. In all the circumstances, the damages are excessive (See ***The Gleaner Co Ltd v. Abrahams*** [2003] UK PC 55) I would reduce the damages to $1,500,000.00.

I would dismiss the appeal with 75% costs to the respondent.

SMITH, J.A:

This is an appeal against the judgment of Brooks J who ordered that the appellant pay $3,500,000.00 to the respondent for defamation.

Background Facts

The appellant was the Leader of the Opposition at the material time. The respondent was then a Deputy Commissioner of Police. The contract of the Commissioner of Police was due to expire in three months

time. The respondent was one of the persons considered as eligible to succeed the Commissioner.

On March 6, 1996, the appellant made a speech at the Wyndham Hotel, New Kingston, in which he accused the respondent of being an activist of the People's National Party. The speech was made at a public meeting to which the media were invited.

The respondent brought an action for damages for slander. The appellant admitted that he spoke the words but claimed that they were spoken on an occasion of qualified privilege. The judge held the words of the appellant to be defamatory. He ordered that the appellant pay the respondent the sum of $3,500,000.00 in damages. The appellant now asks this Court to set aside the order of Brooks J.

Grounds of Appeal

1. That the learned trial judge failed to apply the proper test relating to qualified privilege namely, whether the Defendant had a duty to make the statement complained of and whether the people of Jamaica had an interest in receiving the statement.
2. That having found at page 10 of his judgment that the Leader of the Opposition in Jamaica has a duty to inform the public of any governmental proposals which he opposes and the reason for this

stance and having found at page 11 of this judgment that the public have an interest in being told of any development or situation which could or does affect the ability of the police force and its leadership to carry out its mandate to the Jamaican society, the Learned Trial Judge failed to find that the occasion on which the statement complained of was an occasion of qualified privilege.

3. The occasion on which the statement complained of was made, was one of qualified privilege because the Leader of Opposition as the communicator and the people of Jamaica as the communicatee are in an existing relationship established by the Constitution of Jamaica. The Defendant will rely on the judgment of Simon Brown, L.J. in the case of ***Kearns and Others v General Council of the Bar*** [2003] 2 All ER 534.
4. The Learned Trial Judge failed to recognize that the question of whether or not the Leader of the Opposition had sufficiently verified his facts before making the statement complained of, went to the question of malice and not the question of whether or not the occasion was one of qualified privilege.
5. That the Claimant did not allege malice in his pleadings nor did he make any charge of malice in his evidence. At page 26 of his

judgment the Learned Trial Judge's judgment found that the Defendant was not guilty of malice.

6. The Learned Trial Judge erred in applying to this case the judgment in the ***Reynolds v Times Newspaper Ltd.*** [1999] 4 All ER 609 which relates solely to media publications on the erroneous ground that on the occasion when the statement was made, representatives of the media were present. In this instant, the Defendant will rely on the judgment of the Court of Appeal in England in the case of ***Pittard v Oliver*** [1891] L.R. 1 Q.B.D.474.
7. The award of $3,500,000.00 for general damages was inordinately excessive in light of the failure of the Defendant to show that he had suffered any damages. Further, having regard to the evidence of the Claimant and his witnesses in this case, the Learned Trial Judge erred in determining that the damages were aggravated by the extent of the publicity given to the speech of the Defendant and the nature of the cross examination by the Defendant's Attorney-at-law."

Three issues are identifiable in these grounds.

(1) Grounds 1, 2, 3 and 6 concern the issue as to whether or not the appellant's speech was made on a privileged occasion and in particular whether the decision in ***Reynolds v Times Newspaper Ltd*** [1999] 4 All ER 609 applies.

(2) Grounds 4 and 5 raise the question as to whether verification is relevant in determining whether or not the appellant's communication is protected by qualified privilege.

(3) Ground 7 of course concerns the issue of quantum of damages.

Was the Occasion Privileged?

The locus classicus on qualified privilege is ***Adam v Ward*** [1916-17] All ER 157 and [1917] A.C. 309. In that case Lord Atkinson said (p. 334):

> "It was not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

Brooks, J, accepted this statement of the law and thereafter embarked on an exercise to determine whether the appellant had a duty, legal, social or moral, to make the statement complained of. In this regard he first examined the constitutional status and responsibility of the appellant as Leader of the Opposition. He accepted the submissions of counsel on both sides that, as Leader of the Opposition, the appellant had a duty to inform the public of any Governmental proposals, which he opposed, and the reasons for his stance. However, the question is – Did this duty arise in the instant case?

The learned judge then proceeded to consider whether the people of Jamaica had an interest in receiving the concerns of the

appellant. He readily accepted the submissions of both parties that the people of Jamaica had an interest in the conduct of the police force and the propriety of its leadership. He acknowledged that the Jamaican public had an interest in receiving information on any "development or situation which could affect the ability of the police force and its leadership to carry out its mandate to the Jamaican society." He referred to dicta of Rowe, J.A. in the ***Gleaner Company Ltd and Sibblies v Smart*** [1990] 27 JLR 577 at 584E and concluded that if there are politically biased senior police officers who are undermining the safety of the nation the public had an absolute right to know who they are.

Having made these important statements Brooks J moved to consider what Lord Gifford Q.C. suggested and he accepted was the essential issue, namely whether the appellant had a duty in the circumstances of this case to speak to the public "in the language he used, based on the state of his knowledge which he then had and without making any further enquiry of anyone."

It was the view of the learned trial judge that in the circumstances of this case the publication was made to the world at large and that in this context the special approach outlined in ***Reynolds v Times Newspaper Ltd.*** (supra) was required. He applied the ***Reynolds*** privilege type of assessment and found that the occasion on which the appellant

made the comments about the respondent was not one of qualified privilege.

Mr. Henriques Q.C. submitted on behalf of the appellant that the learned trial judge erred in holding that ***Reynolds*** applied to this case. It is his contention that ***Reynolds*** (supra) applies only to media publications of libel and not to cases of slander.

Lord Gifford Q.C. for the respondent submitted that the principles underlying the law on qualified privilege have the same application to publications by individuals as to the publications by the media. He contends that it is clear that the House of Lords in ***Reynolds*** (supra) was laying down general principles applicable to the defence of qualified privilege.

The authorities do not seem to support the contention of Lord Gifford Q.C. The ***Reynolds*** (supra) case concerns the publication of an article in a national newspaper which was defamatory of R without R's explanation of the events. The House of Lords per Lord Nicholls of Birkenhead held, inter alia, that in considering whether allegations made in the press attracted qualified privilege, the matters to be taken into account, depending on the circumstances included:

> "(1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. (2) The nature of the information and the extent to which the subject matter is a matter of public concern. (3) The

> source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. (4) The steps taken to verify the information. (5) The status of the information. The allegation may have already been the subject of an investigation which commands respect. (6) The urgency of the matter. News is often a perishable commodity. (7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. (8) Whether the article contained the gist of the plaintiff's side of the story. (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. (10) The circumstances of the publication, including the timing."

I am inclined to accept the submissions of Mr. Henriques Q.C. that the decision in ***Reynolds*** case (supra), in so far as the duty interest test for qualified privilege is concerned, applies to media publications only. This view is supported by the decision of the English Court of Appeal in ***Kearns and Others v General Council of the Bar*** [2003]2 All ER 534. That case involves statements, defamatory of the claimants, which were contained in a circular letter from the General Council of the Bar to all heads of chambers, senior clerks and practice managers. The headnote indicates that the claimant did not plead malice and the Bar Council applied for summary dismissal of the claim. The judge granted the application holding that the case was a classic one of qualified privilege based on an existing relationship between the writer and the recipients of

the letter and on a common and corresponding interest in the subject matter of the letter. And that in such cases it was not necessary to evaluate the quality of the information. On appeal the claimants contended that the question whether qualified privilege attached to any particular occasion or communication always depended on the facts. They relied in particular on the Bar Council's failure to verify the information.

In dismissing the appeal the English Court of Appeal held that in the context of communications between those in an established relationship the question whether a defamatory publication had been adequately investigated or verified went to the issue of malice and not to the issue of whether the occasion of the communication had been privileged. Simon Brown LJ, with whom the other Lord Justices agreed, was clear that the ***Reynolds*** privilege applies only to media publications. It was said that the ***Reynolds*** privilege although built upon an orthodox foundation, is in reality **sui generis.** Towards the end of his judgment Simon Brown LJ said (p551 para. 42):

> "... Were this to have been a media publication and ***Reynolds v Times Newspaper Ltd.*** [1999] 4 All ER 609, [2001]2AC127 therefore to apply, there could be no question of qualified privilege attaching. And the ***Reynolds*** approach, one reflects attaches on occasion to publications circulating no more widely and hardly more generally than in the present case... The law with regard to non-media publications, however, is different. Here, as Lord Diplock observed in

> ***Horrocks v Lowe*** [1974] 1All ER 662 at 668-669, [1975]AC 135 at 150, a man's right to 'vindicate his reputation against calumny' gives way to the 'competing public interest in permitting men to communicate frankly and freely with one another... if they had acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest' and in these cases 'the law demands no more' than that the defendant shall have honestly believed what he said. With regard to these duty or interest cases the law has decided that 'the common convenience and welfare of society' is better served by allowing full and frank communication than by requiring the communicator to act responsibly (see ***Toogood v Spyring*** (1834) 1Cr.M&R 181 at 193, [1824-43] All ER Rep. 735 at 738). The media publisher, by contrast, has above all to act responsibly."(emphasis mine)

The above passage clearly demonstrates that the ***Reynolds*** privilege does not apply to non-media publication of defamatory statements such as the publication in the instant case.

The issue of Verification

The question here is whether those who make statements at large on matters of public concern, in addition to acting honestly should exercise some degree of care, for example, by taking steps to verify the statement.

Mr. Henriques Q.C. submitted, in his usually persuasive manner, that at common law there is no duty to check or verify once the defendant

honestly believes in the truth of what he published He relied on ***Horrocks v Lowe*** [1974] 2 WLR 282 among others. The case of ***Horrocks v Lowe*** (supra) involves a defamatory statement made in the course of a speech at an open meeting of the Bolton Borough Council, London, England. That eminent English jurist, Lord Diplock, said at p. 290:

> "My Lords, as a general rule English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction: if he cannot prove that defamatory matter which he published was true, he is liable in damages to whomever he has defamed, except where the publication is oral only, causes no damage and falls outside the categories of slander actionable per se. The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters with respect to which the law recognizes that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue. With some exceptions which are irrelevant to the instant appeal, the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused. For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit - the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he

> uses the occasion for some other reason he loses the protection of the privilege.
>
> So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. 'Express malice' is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests."

After stating that anyone who publishes untrue defamatory matter recklessly, is treated in law, as if he knew it to be false, Lord Diplock continued:

> "But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of legitimate interest the law must take them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts

> ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training , their intelligence they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognize the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be 'honest', that is, a positive belief that the conclusions they have reached are true. The law demands no more."

Mr. Henriques Q.C. submitted that the position is accurately stated by David Price and Korieh Duodu in **Defamation Law Procedure and Practice** (3rd edn. 2004) p.99 para 12-09:

> "There is no obligation on the defendant to prove that he took reasonable care in relation to the publication. Provided that the relevant duties and/or interests exists, the defence will not be lost merely because the defendant was negligent. For example, the failure to verify a defamatory allegation before disseminating it to other legitimately interested parties will not generally deprive the defendant from claiming qualified privilege, if it turns out that the allegation is untrue. This is to be contrasted with ***Reynolds*** qualified privilege [Ch.13]which has an in-built requirement to behave reasonably and responsibly in order to come within the defence."

What is clear from the authorities is that "matters going to malice and those going to the existence of the privilege" are distinct. What is also clear to my mind, is that where qualified privilege is raised and the communications were made between persons in an established

relationship which involves reciprocal interests, verification is only relevant in deciding whether the communicator has been guilty of actual malice and thus not protected by qualified privilege - see ***Kearns v General Council of the Bar*** (supra). However, what is not so clear, in my judgment, is whether qualified privilege attaches to a defamatory statement made to the world at large, regardless of the circumstances, once the maker honestly believed that it is was true.

In this regard, arguments were canvassed in ***Kearns v General Council of the Bar*** (supra). We have seen that in ***Kearns'*** case (supra) the communication was between those in an established relationship. In that case it was argued on behalf of the Bar Council that the common interest cases and the duty-interest cases, were quite distinct. Communications in the "common interest" cases it was argued, attract privilege on a wide and generous basis. Whereas, communications in the "duty-interest" category have to be much more closely scrutinized on the facts. Whereas, the argument goes, attempts at verification and the like may well be relevant to the "duty-interest" category of cases, they will not be relevant to the "common interest" category unless the issue of malice is raised.

On the other hand, counsel for the claimants contended that there was no distinction between the various cases and the question of

whether qualified privilege attaches to any particular occasion or communication must always depend on the facts.

Those arguments did not find favour with Simon Brown L.J. He rejected them both and said at para. 30:

> "... To my mind an altogether more helpful categorization is to be found by distinguishing between on the one hand cases where the communicator and the communicatee are in an existing and established relationship (irrespective of whether within that relationship the communications between them relate to reciprocal interests or reciprocal duties or a mixture of both) and on the other hand cases where no such relationship has been established and the communication is between strangers (or at any rate is volunteered otherwise than by reference to their relationship). This distinction I can readily understand and it seems to me no less supportable on the authorities than that for which Mr. Caldecott (counsel for the Bar Council) contends. Once the distinction is made in this way, moreover, it becomes to my mind understandable that the law should attach privilege more readily to communications within an existing relationship than to those between strangers. The latter present particular problems. I find it unsurprising that many of the cases where the court has been divided or where the defence has been held to fail have been cases of communications by strangers."

The learned Lord Justice was clear that "it has long been the policy of the law to protect persons in certain kinds of relationships with one another and indeed to encourage in such cases free and frank communications in what is perceived to be the general interest of society". Liability would only arise where malice could be established.

However, where the communication is made to the world at large, "particular problems" arise as to the circumstances when the communicator is under a moral or social duty to do so. It seems that the question as to whether or not there is such a duty "must depend on the circumstances of each case, the nature of the information and the relation of speaker and recipient" - see ***Watt v Longsdon*** [1930] 1KB at 149-150 which was referred to with approval in ***Kearns*** (supra) at para. 31.

A recent decision of the Judicial Committee of the Privy Council is instructive. The case is ***Basdeo Panday v Kenneth Gordon*** (Trinidad and Tobago) [2005] UKPC 36 (5th October, 2005]. It concerns defamatory statements made by Mr. Panday in a speech to a large audience. The speech was carried on television and all four of the national daily newspapers carried reports.

Mr. Panday was then the Prime Minister of Trinidad and Tobago. Mr. Gordon was and is a well known businessman. Their Lordships' Board made some general observations on the law of defamation and in particular the traditional approach of the common law to the defence of qualified privilege.

In addressing the strict common law rule on qualified privilege as traditionally understood, their Lordships said:

> "13. In recent years it has become apparent that in today's conditions this traditional approach of the common law to statements of fact is not wholly satisfactory in respect of the

widespread dissemination of political views and other matters of public concern. For some time there has been an increasing awareness that the strict common law rule can have an undue "chilling" effect. At the same time there has been an increasing awareness that to accord qualified privilege, as traditionally understood, to every occasion when matters of public concern are published to the world at large would be to go too far. In today's conditions publication of a defamatory statement at large can cause immense and lasting damage, much more so than with publications to one person, such as a prospective employer, or a limited group of people.

14. In common law countries courts have therefore sought to adapt the common law so as best to accommodate these conflicting considerations which have emerged in recent years. What is needed, in the interests of freedom of expression on matters of public interest, is some relaxation of the strict common law rule. Publication on these occasions should be regarded as privileged. But on these occasions the interests of those whose reputations are being impugned call for more protection than that traditionally afforded by the subjective ***Horrocks v Lowe*** malice limitation. What is needed is that the area of privilege should be extended but, as counter-balance, those who make statements at large on matters of public concern and seek to avail themselves of this extended area of privilege, in addition to acting honestly, should exercise a degree of care. This objective requirement should be elastic, enabling a court to have due regard to all the circumstances including the importance of the subject matter of the statement, the gravity of the allegation, and the context in which it is made."

As I understand it, their Lordships were expressing the view that in order to hold a balance between freedom of speech and the right to reputation, the area of qualified privilege should be extended to cover defamatory statements made at large on matters of public concern but as a counter-balance those who make such statements should be required, in addition to acting honestly, to exercise a degree of care.

It is clear that their Lordships were not confining their comments to the publication at large of political views. Indeed, in para. 15 their Lordships referred to the decisions of the courts in various common law countries where they have sought to have due regard to all the circumstances, including the importance of the subject matter of the statement, the gravity of the allegation and the context in which it is made.

Their Lordships by their general observations have given approval to the development of the common law along the lines mentioned in ***Watt v Longsdon*** (supra) and by Simon Brown L.J. in ***Kearns v General Council of the Bar Council*** (supra) at para. 30 – 31. In concluding this aspect I will repeat the following dicta: (1) The law should attach privilege more readily to communications within an existing relationship than to those between strangers – per Simon Brown LJ.

(2) Those who make statements at large on matters of public interest and seek to avail themselves of this extended area of privilege, in addition

to acting honestly should exercise a degree of care. - ***Panday v Gordon*** (supra).

Liability

We have seen that in the context of media publication the standard required of the maker of a defamatory statement is that of responsible journalism –see ***Reynolds v Times Newspapers Ltd.*** (supra). I have already expressed the view that the learned trial judge erred in applying the ***Reynolds*** tests to the instant case. However, the learned trial judge after concluding that the appellant was liable based on the ***Reynolds*** test, said (pg. 27):

> "Even if this was not an occasion requiring a ***Reynolds*** privilege type of assessment I find that this was not an occasion of qualified privilege."

It was his view that the "information" did not rise above the level of rumor and so there was no duty to report the allegations to the Jamaican public at the time. The allegations, he said, "were not information the public had a right to know". He founded his conclusion that there could be no common interest between the appellant and the Jamaican public to have what, based on the appellant's evidence, was mere rumor communicated to the Jamaican public, on the authority of ***De Buse v McCarty*** [1942] 1All ER 19.

Mr. Henriques Q.C. contends that the learned trial judge erred in finding that the appellant's statement was not made on an occasion of

qualified privilege. It is his contention that the appellant had a duty to make the communication and the Jamaican people had a corresponding interest in receiving it.

The authorities show that with regard to non-media publications within an existing relationship, once qualified privilege is established and actual malice is not pleaded the defence is bound to succeed.

The authorities also show that in the context of an established relationship the question whether the information is investigated goes to malice rather than whether the communication is privileged. Further, as earlier mentioned it has been said that the law should attach privilege more readily to communications within an existing relationship than to those made to the world at large or between strangers. And their Lordships have observed ***Panday v Gordon*** (supra) that those who make defamatory statements at large and claim qualified privilege must not only act honestly but should exercise care.

In the instant case the publication was undoubtedly made to the Jamaican public at large. The defence is one of qualified privilege. Actual malice has not been pleaded therefore the appellant is presumed to have acted honestly. The question now is whether the objective requirement for a degree of care has been met. Their Lordships, in the ***Panday*** case (supra), observed that the objective requirement "should be elastic, enabling the court to have due regard to

all the circumstances including the importance of the subject matter of the statement, the gravity of the allegation and the context in which it was made."

I turn to the evidence. The appellant's evidence is to the effect that in March, 1996 it was in circulation that the then Commissioner of Police was having difficulty with the Minister of Justice and that the respondent would have succeeded the Commissioner. He said that many people called him and warned him to be careful and asked him not to give his consent because the appointment of the respondent, who they said was a supporter of the PNP, would result in disaster. The appellant had not asked for or been told of any instance in which the respondent had shown political bias. The appellant did not report his concerns about the respondent to the Police Services Commission or to Parliament. None of the appellant's allegations resulted from his personal observations. His evidence is that he relied on informants who "were telling me what other persons said to them and what they observed themselves". The learned judge found that he asked none of his informants for an instance of political bias in the respondent. The learned judge stated:

> "I cannot accept that these persons were basing their respective conclusions on personal observation without revealing any instance of what they had each observed."

The learned judge found that the appellant was unaware of the source of information being passed on to him through his informants.

Further, the trial judge found that there was no official announcement or proposal that the respondent was to have been appointed or was being considered for appointment to the post of Commissioner of Police. Hence there was no urgency in making the publication to the public at large.

In the light of the foregoing, I am inclined to the view that the learned trial judge was correct in finding that the appellant acted on mere rumour. Even though he may have honestly believed what he was told he had failed to exercise the required degree of care referred to in the ***Panday*** case (supra) In those circumstances he had no legal, social or moral duty to make the publication complained of to the public and the public had no legitimate interest to receive it and therefore the occasion was not one of qualified privilege. Accordingly, it is my view that Brooks J, was correct in finding in favour of the respondent on the question of liability.

Damages

Mr. Henriques Q.C. complained that the award of damages is manifestly excessive for the following reasons:

(1) The judge erred in taking into account the coverage given to the speech by newspaper and other media.

(2) There is no evidence to justify the award of $3,500,000.00

(3) The judge erred in awarding aggravated damages.

One of the factors taken into account in awarding aggravated damages was the "publicity given to the speech". Counsel for the appellant submitted that there is no evidence that the appellant was responsible for or caused his speech to be published in the media. In my view the case of ***McManus and others v Beckham*** [2002] 1WLR 2982 is instructive. In that case Mrs. Beckham (B) spoke to persons in the claimants' shop advising them not to buy autographs from the shop as they were all fakes.

B's publication foreseeably led to extensive media coverage. The claimants suffered loss and damages including injury to their business and goodwill. In their particulars of claim the claimants stated, inter alia, that they would rely on the fact that B routinely courted publicity in all forms of the media in relation to her professional career and aspects of her private life and that B well knew and could and did forsee that her publication was likely to be given media coverage. On the application of B the said particulars of claim were struck out on the ground that they disclose no reasonable ground for bringing the claim.

On appeal it was held inter alia, that if a defendant was actually aware that what he said or did was likely to be reported and that if he slandered someone that slander was likely to be repeated in whole or in part, there was no injustice in him being held responsible for the damage that the slander caused by means of that publication. And that if a jury concluded that a reasonable person in the position of the defendant should have appreciated that there was a significant risk that what he said would be repeated in whole or in part in the press and that that would increase the damage caused by the slander it was not unjust that he should be liable for it.

I accept the decision in ***McManus and others v Beckham*** (supra) as a correct statement of the law.

In the instant case the learned judge found that it was the appellant's "realized expectation that his utterances were more than likely to be quoted to the public by the media". Thus there would be no injustice to hold the appellant responsible for the damage that the slander caused by means of the publication in the media.

It is the further contention of Mr. Henriques, Q.C. that none of the publications in the media was tendered or put in evidence. However, the Record of Appeal does not seem to support this contention. Mr. Lloyd Martin at para. 6 of his statement said that between the 7th and 10th

of March, 1996 he heard on radio and read in the newspaper the communication complained of .

An extract from the Herald Newspaper with the defamatory statement was tendered. – see p. 59 of the Record. A written version of the RJR report appears at p. 61.

I turn to the issue of aggravated damages. Aggravated damages was not pleaded. Nonetheless the learned judge held that the respondent was entitled to aggravated damages based on:

(i) the extent of the publicity given to the speech;

(ii) the effect that it would have had on members of the public and the respondent's colleagues; and

(iii) the conduct of the defence in the case.

The appellant complains that the learned trial judge should not have made such an award. He argues that it is a requirement that aggravated damages be pleaded. Reliance is placed on **Gatley on Libel and Slander** (9th Ed.1998) pp. 667-8 para. 26.28 where it is stated that a plaintiff is required to give details of any matters on which he will rely in aggravation of damages. Of course as to (iii) above the conduct of the defendant at trial cannot be pleaded. Nonetheless, in my view, the submission of Mr. Henriques, Q.C. in this regard, is well founded. Aggravated damages should not have been awarded since it was not pleaded.

Finally Mr. Henriques, Q.C. submitted that there is no evidence to justify the award of $3,500,000.00. Brooks J observed that the respondent had produced very little evidence in proof of injury to his reputation. No doubt this fact was reflected in the award made. However, the award of $3,500,000.00 included an amount for aggravated damages which was not in the circumstances permissible.

In my view, having regard to all the circumstances including the status of the respondent, the nature of the slander and the extent of the publicity given to it, an award of $1,500,000.00 would adequately compensate the respondent.

Conclusion

For the reasons given I would dismiss the appeal in regards to liability but reduce the quantum of damages to $1,500,000.00. I would make no order as to costs.

McCALLA, J.A. (Ag):

This is an appeal against the decision of Brooks J whereby he found against Edward Seaga (the appellant) for defamation and ordered him

to pay damages in the amount of Three Million Five Hundred Thousand Dollars ($3,500,000.00).

Briefly stated, the circumstances which gave rise to the claim arose out of statements made by the appellant at a meeting held on the 6th March 1996. The appellant was at that time a Member of Parliament and Leader of the Opposition, the Jamaica Labour Party. He used certain words that Leslie Harper (the respondent) says meant that he was politically biased in the conduct of his duties, he being at that time a Deputy Commissioner of Police. Brooks J summarized the circumstances in which the words were uttered as follows:

> "Mr. Harper up to the time of Mr. Seaga's statement, had spent thirty four years in the Jamaica Constabulary Force. He rose through the ranks to achieve the distinction of being appointed a Deputy Commissioner of Police. The contract of the then Commissioner of Police, Colonel Trevor McMillan, was to have expired within three months of the date of the statement and it seems to be common ground between the parties in this case, though not for an agreed reason, that Mr. Harper was one of the persons considered as eligible to succeed Col. McMillan."

The respondent admitted using the words complained of but contends that having regard to the nature of the information he had a duty to do so by virtue of his position and the interest of the people of Jamaica in being informed. The words complained of were as follows:

> "Part of the strategy is to get rid of the present Commissioner of Police and to put in place

> someone whose credentials as a PNP activist are impeccable, reliable, solidly supported – a distinguished supporter of the PNP. The only difference being that he is in uniform. Mr. Harper who is considered to be the person to replace Trevor McMillan is someone who we cannot and never will be able to support, because it is re-creating the conditions of 1993 when a similar type of Commissioner was in the post who did everything to turn a blind eye in that election."

The respondent had filed a Writ of summons claiming damages for slander in respect of the speech made by the appellant. The respondent alleged that the meeting was attended by the press and broadcasting media and the appellant well knew and intended that a report of his words would be published by the media throughout Jamaica. The appellant contends that the words were spoken on an occasion of qualified privilege, and the absence of malice, which was not pleaded, afforded him a complete defence.

Brooks J found that the words were defamatory of Mr. Harper in his office as Deputy Commissioner of Police and there is no issue on appeal with regard to the finding that the words were defamatory. The learned trial judge accepted the submissions that the Leader of the Opposition had a duty to inform the public of any government proposals, which he opposed, as well as the reasons for his stance. He also agreed that the people of Jamaica have an interest in the conduct of the police force and its leadership. At page 12 of the judgment, the learned trial judge states thus:

> "The scenario in which Mr. Seaga made his comments, that is, at a hotel, at a meeting open to the public and attended by the news media raises the question of the type of publication that it was. It is my view that in this context the publication is to the world at large. The national coverage afforded by media with island-wide circulation takes the occasion of this communication out of the realm of communication between persons in a specific relationship. Mr. Seaga was no longer speaking just to members of his party or to members of the public who had attended the meeting; he was addressing through the media, at least an island-wide audience."

The learned judge then considered and applied the principles laid down by Lord Nicholls in the case of ***Reynolds v The Times Newspapers Ltd.*** [1999] 4 ALL ER 609, a House of Lords decision which forms a part of our jurisprudence, having been followed by this court in previous decisions. The ***Reynolds*** case (supra) dealt with a libellous statement made in the course of political discussion which was published in a newspaper and the defendant sought, unsuccessfully, to rely on the defence of qualified privilege. In **Reynolds** (supra) the court had refused to develop a special category of "political information" which would attract qualified privilege. Brooks J went on to say:

> "I find however, that the ***Reynolds*** case does apply to the instant case bearing in mind the presence in the audience of the media and Mr. Seaga's realized expectation that his utterances were more than likely to be quoted to the public by the media".

The learned judge then examined the evidence in the context of the non-exhaustive list of matters to be considered when determining whether qualified privilege attached to statements by the media, stipulated by Lord Nicholls in the **Reynolds** case (supra) at 626. The list included the following:

(1) The seriousness of the allegation.

(2) The nature of the information and the extent to which the subject matter is a matter of public concern.

(3) The source of the information.

(4) The steps taken to verify the information.

(5) The status of the information.

(6) The urgency of the matter.

(7) Whether comment was sought from the plaintiff.

(8) Whether the article contained the gist of the plaintiff's side of the story.

(9) The tone of the article.

(10) The circumstances of the publication, including the timing.

Brooks J. having examined the evidence found that:

i. No official source provided the information;

ii. The information as brought to the appellant did not rise above rumour;

iii The appellant was unaware of the source of the information

being passed on to him through informants hence the court was unable to determine the reliability of his sources.

iv. The appellant took no steps to verify the information he received about the respondent.

v. The appellant had made no complaint of bias to the then Commissioner of Police, but the status of the information did not sway the matter one way or the other.

vi. There was no evidence to suggest that there was any urgency to provide the information to the Jamaican public, which precluded him from lodging his complaint through appropriate channels.

vii. No comment was sought from the respondent. The evidence revealed that the appellant knew of no specific instance of bias.

viii. Since no enquiry had been made of the respondent, clearly there could have been no comment as to his views.

ix. The tone of the article was, as the appellant testified, "to raise concerns by stating things as a fact and asking people to agree", rather than to state allegations and ask for investigation.

x. No malice was involved in the timing or method of publication and none was pleaded.

Based on the above findings, the learned judge concluded that the occasion on which the appellant made his comments was not one of qualified privilege. The appellant challenges the learned trial judge's findings of fact that:

> 1. There was no development prior to the date when the defendant uttered the words complained of by the claimant; that is to say that it was a mere rumour that the claimant was being considered for the post of Commissioner of Police.
>
> 2. That the claimant was defamed in this capacity as Deputy Commissioner of Police.

The findings of law challenged were as follows:

> 1. That the test for qualified privilege is "whether the Leader of the Opposition had the duty to speak in the circumstances of this case and in particular whether he had a duty to speak to the public in the language he used, based on the state of the knowledge which he then had without making further enquiry to anyone."
>
> 2. That ***Reynolds v Times Newspapers Ltd.*** [1999] 4 All ER 609 applied to the instant case while **Kearns & Others v General Council of the Bar** [2003] 2 All ER 534 did not.
>
> 3. That the presence of the media in the audience equated the Defendant's speech to that of a media publication.

The nine grounds of appeal filed may be summarized as follows:

> a) The occasion on which the defendant spoke was one of qualified privilege and the learned judge failed to apply the proper test having regard to his findings.

b) The learned trial judge failed to recognize that the question of whether or not the Leader of the Opposition had sufficiently verified his facts before making the statement complained of, went to the question of malice and not the question of whether or not the occasion was one of qualified privilege.

c) The Claimant did not allege malice in his pleadings and there was no evidence or finding of malice.

d) The learned judge erred in applying the judgment in the **Reynolds** case which relates solely to media publications on the erroneous ground that on the occasion when the statement was made representatives of the media were present.

(e) The award of $3,500,000.00 for general damages is inordinately excessive in light of the failure of the defendant to show that he had suffered any damage. Further, having regard to the evidence of the Claimant and his witnesses, the learned trial judge erred in determining that the damages were aggravated.

Mr. R.N.A. Henriques Q.C. took issue with the learned judge's approach and cited numerous authorities as to the principles which he urged ought to be applied when dealing with the defence of qualified privilege. He said that the learned judge erred in finding that that defence could not avail the appellant. The essence of the submissions he advanced on this point was on the question of whether the "duty/interest" test had been satisfied. He referred to the much quoted case of ***Adam v. Ward*** [1917] A.C 309 at 334 where Lord Atkinson defined a privileged occasion as:

> "An occasion where the person who makes a communication has an interest or a duty, legal social or moral, to make it to the person to whom it is made and the person to whom it is so

> made has a corresponding duty or interest to receive it."

Mr. Henriques Q.C. submitted that if qualified privilege attached to the appellant's statement, then unless the respondent can prove malice, the defamatory publication is protected irrespective of whether it turns out to be true or false. He said that since the learned judge accepted the existence of the "duty/interest" test in respect of the Leader of the Opposition and the Jamaican public, then, on that reasoning, he ought to have found that the occasion was one of qualified privilege. Counsel also contended that the ***Reynolds*** case (supra) is concerned only with publications made by the media. He cited numerous passages from **Reynolds** (supra) and other authorities in support of that submission. Mr. Henriques Q.C. argued forcefully that by applying the "Reynolds privilege" to the facts of the instant case the learned judge wrongly imposed on the appellant the duties of a "responsible journalist".

Lord Gifford Q.C. urged on behalf of the respondent that Brooks J on the binding authority of ***Reynolds,*** (supra) was, obliged to apply the principles applicable to a defamatory statement for which qualified privilege is claimed. He argued that the authorities show that regard must be had to all the circumstances in order to determine whether there was a duty to speak the words and a corresponding interest in the public at large in receiving them. The existence of a duty does not give rise to the publication of any and every defamatory statement made under the

cloak of qualified privilege. Lord Gifford Q.C. contended that there is no duty to publish what is not true and the public has no interest in being misinformed. He maintained that public statements are covered by ***Reynolds*** (supra) whether made by newspapers or individuals. He continued that ***Reynolds*** (supra) applied time old principles in considering the extent of the application of the defence of qualified privilege in the context of a media publication.

Lord Gifford Q.C. quoted from the judgment of Lord Hobhouse of Woodborough in **Reynolds** (supra) where the learned judge stated at page 658 paragraph c, that:

> "To attract privilege the report must have a qualitative content sufficient to justify the defence should the report turn out to have included some misstatement of fact. It is implicit in the law's insistence on taking account of the circumstances in which the publication, for which privilege is being claimed, was made that the circumstances include the character of that publication. Privilege does not attach, without more to the repetition of overheard gossip whether attributed or not; nor to speculation, however intelligent."

He made further reference to the statement of the learned judge on page 659 at paragraph f, to the effect that:

> "I agree with Lord Nicholls that the circumstances of publication have to be taken into account in determining whether any particular communication was privileged. This, as the authorities he cites show, is an established part of English law...."

The first issue to be determined by this Court is whether or not, in the circumstances of this case, the occasion on which the appellant uttered the words was protected by qualified privilege.

In ***Horrocks v Lowe*** [1975] A.C. 135 at 149 Lord Diplock made the following statement of law:

> "The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters with respect to which the law recognizes that they have a duty to perform or an interest to protect in doing so what is published in good faith on matters of these kinds is published on a privileged occasion."

Dealing with the question of privilege and communication to the world at large Lord Nichols at page 617 of ***Reynolds*** (supra) said:

> "... the common law has recognized there are occasions when the public interest requires that publication to the world at large should be privileged. ***In Cox v Feeney*** (1863) 4 F & F 13 at 19, 176 ER 445 at 448 Cockburn CJ approved an earlier statement by Lord Tenterden CJ that 'a man has a right to publish, for the purpose of giving the public information, that which it is proper for the public to know'. Whether the public interest so requires depends upon an evaluation of the particular information in the circumstance of its publication. Through the cases runs the strain that, when determining whether the public at large had a right to know the particular information, the court has regard to all the circumstances. The court is concerned to assess whether the information was of

> sufficient value to the public that, in the public interest, it should be protected by privilege in the absence of malice."

After reviewing several cases in the context of newspapers discharging their important function of reporting matters of public importance, he continued at page 618:

> "A claim to privilege must be more precisely focused. In order to be privileged, publication must be in the public interest. Whether a publication is in the public interest or in the conventional phraseology, whether there is a duty to publish to the intended recipients, there, the readers of the Daily Telegraph, depends upon the circumstances, including the nature of the matter published and its source or status."

Simon Brown LJ in ***Kearns*** (supra) at page 551 said :

> ... with regard to these duty interest cases the law has decided that the 'common convenience and welfare of society is better served by allowing full and frank communication than by requiring the communicator to act responsibly...the media publisher, by contrast, has above all to act responsibly ..."

In the present case Mr. Henriques, Q.C. says that the appellant is not a journalist or a member of the media. His duties as Leader of the Opposition are different from the duties of a journalist who must give a balanced account based on information that he has verified. He asserted that the appellant, as Leader of the Opposition, had a duty to ventilate his honestly held beliefs concerning alleged abuses or irregularities in government. The presence of the media even if invited, would not defeat

a claim that the statement was made on an occasion of qualified privilege but would only be relevant to the question of malice.

Mr. Henriques, Q.C. referred to the summary by David Price and Koriah Duodo in their work "**Defamation Law and Practice**" (3rd. Edition 2004). Page 99 of that edition reads:

> "There is no obligation on the defendant to prove that he took reasonable care in relation to the publication. Provided that the relevant duties and/or interests exist, the defence will not be lost merely because the defendant was negligent. For example, the failure to verify a defamatory allegation before disseminating it to other legitimately interested parties will not generally deprive the defendant from claiming qualified privilege, if it turns out that the allegation is untrue. This is to be contrasted with ***Reynolds*** qualified privilege [Ch. 15] which has an in-built requirement to behave reasonably and responsibly in order to come within the defence."

In the instant case the appellant admitted using the words complained of. Malice is not imputed to him. In the circumstances in which the appellant uttered the defamatory words, the learned trial judge found that he intended his communication to be received by at least an island-wide audience by publication through the media.

The appellant relied on the Canadian case of ***Parlett v Robinson*** [1986] 5 WWR 586 in respect of island-wide publication. That case concerned defamatory statements made to the media and on television by a federal Member of Parliament who was an official spokesperson for his party. The defendant in ***Parlett*** (supra) had received a report

suggesting impropriety on the part of the plaintiff. He communicated with the appropriate government official but having failed to persuade the minister to investigate the matter by way of a public enquiry, he published through the media, the statements complained of. The question was whether or not in the circumstances, the publication, which was "to the world", was too broad. The Court held that the communication could not be said to be unduly wide because the group that had a bona fide interest in the matter was the electorate of Canada. Hence the defence of qualified privilege was not lost.

In ***Kearns and others v General Council of the Bar*** [2003] 2 All E.R. 534, the court held that in the context of communications between those in an established relationship, the question whether a defamatory publication had been adequately investigated or verified went to the issue of malice, not to the issue of whether the occasion of the communication was privileged. There, it was held that on the conventional approach to common law qualified privilege, the respondent was bound to succeed.

In ***Kearns*** (supra) it is quite clear that if the statement had been published to the world at large before a ruling by the Bar Council, it would not have been protected by the defence of qualified privilege. At paragraph 42 of his judgment Simon Brown, LJ said:

> "... were this to have been a media publication and ***Reynolds v Times Newspapers Ltd***....

> therefore to apply, there could be no question of qualified privilege attaching..."

Simon Brown, LJ went on to say that:

> "The law with regard to non-media publications however, is different.... A man's right to 'vindicate his reputation against calumny' gives way to 'the competing public interest in permitting men to communicate frankly and freely... if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest' and in these cases 'the law demands no more' than that the defendant shall have honestly believed what he said."

The above restatement of the law with regard to conventional "duty/interest" cases was applicable to the circumstances of that case where although the communication was to a very wide audience it was nevertheless protected.

As Keene, LJ also stated in ***Kearns*** (supra) at paragraph 46:

> "The argument that publication to the 10,000 members of the bar warrants treating the present case as being half-way towards the situation with which the House of Lords was dealing in ***Reynolds v Times Newspapers Ltd***....has no legal force to it. ***Reynolds'*** case was dealing with a publication made to all the world, with the result that no pre-existing relationship was required in order to receive the communication"

In ***Kearns*** (supra) notwithstanding the wide publication, there was a pre-existing relationship which protected the publication.

In the circumstances of the instant case it must be determined whether or not the presence of the media and the finding that the appellant intended that his words be published, equate the appellant's speech to that of a media publication. Also, the Court must consider whether or not there is a fundamental difference in this case, as contended by the appellant, between statements made through the media and statements made by the media.

It seems to me that having regard to the findings of the learned judge concerning the circumstances of the publication and the application of the principles laid down in the ***Reynolds*** case (supra), the newspaper if sued, in all likelihood could not have escaped liability. Notwithstanding the appellant's intention or expectation that the media would publish his speech, and the fact that his expectation was realized, to my mind, the media had an option as to whether or not to publish the speech. In making the decision to publish, the journalist or editor must act in accordance with the principles laid down by Lord Nicholls in ***Reynolds*** (supra).

The appellant is not a journalist. The learned judge found that he intended, through the media, to publish his speech to at least an island-wide audience and that publication was to the world at large. However, I am of the view that the learned trial judge was not correct in applying the ***Reynolds*** principles. The appellant was sued for slander and

publication by the media ought not to have been attributed to him. The presence of the media, even if invited, would not defeat the defence provided that the statement was made on an occasion of qualified privilege.

I must now consider whether or not the learned judge was correct in his finding that the occasion was not privileged having regard to the appellant's challenge to the test that he applied, and the learned judge's finding that even if ***Reynolds*** privilege did not apply the occasion was not privileged.

Brooks J found:

a) That the Leader of the Opposition has a duty to inform the public of any government proposals which he opposes and the reasons for his stance.

b) That the Jamaican public does have an interest in being told of any development or situation which could or does affect the ability of the police force and its leadership to carry out its mandate to the Jamaican society.

c) That he was not prepared to say that there was any malice involved in the timing or method of communication and none was alleged.

On the above findings, ought Brooks J to have found that qualified privilege attached to the statement of the appellant? Having regard to

my view that ***Reynolds*** privilege ought not to have been applied in this case, the question now arises as to whether or not the learned judge was correct in finding that the appellant's statement was not made on an occasion of qualified privilege. In ***Horrocks v Lowe*** (supra) at page 150 Lord Diplock said:

> "The freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a vigorous search for all available evidence and a judicious assessment of its probative value. In greater or less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognize the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfections of the mental process by which the belief is arrived at it may still be "honest", that is, a positive belief that the conclusions they have reached are true. The law demands no more."

Lord Justice Keene in ***Kearns*** (supra) at page 551 paragraph 45 expressed himself thus:

> "**So long as the statement is fairly warranted by the occasion,** and is made in the absence of malice, it will be protected by qualified privilege, irrespective of the degree of investigation or verification carried out by the

> maker of the statement and irrespective of whether one categorizes the situation as one of common interest or of duty and corresponding interest. The need to act responsibly will not arise." (emphasis supplied)

In the ***Parlett*** case (supra) the libellous statements which were reported in newspapers and through the media were held not to have been unduly wide because the group that had a bona fide interest in the matter was the electorate of Canada. Hence the privilege was not lost. I think that the ***Parlett*** case is distinguishable from the instant case as in that case it was only after the defendant had failed to persuade the appropriate minister to investigate the matter that he took steps which he felt would result in exerting public pressure upon him to conduct an inquiry.

In the case at bar, the learned judge found that the information did not rise above the level of rumour. Having regard to the evidence adduced, I am unable to say that the learned judge was palpably wrong in making that finding. Consequently, there is no basis on which this Court could disturb his finding that there was no duty to report those allegations to the Jamaican public. In finding that the occasion was not privileged, the learned judge considered that the constitutional duty imposed on the appellant and the corresponding interest of the Jamaican public in being informed did not give rise to an occasion that afforded protection to him having regard to the state of the knowledge which he then had. In ***Reynolds*** (supra) the court emphasized that it was the occasion which

must be examined to see whether there was an interest or duty to make the statement and a corresponding duty or interest to receive it, having regard to the subject matter. The publisher must show that the communication was in the public interest and he does not do this by merely showing that the subject matter was of public interest. As Lord Hobhouse of Woodborough said in ***Reynolds*** (supra) at 657:

> "The liberty to communicate (and receive) information has a similar place in a free society but it is important always to remember that it is the communication of information, not misinformation, which is the subject of this liberty...No public interest is served by publishing or communicating misinformation...There is no duty to publish what is not true: There is no interest in being misinformed."

The law in relation to "duty/interest" cases is that verification is not relevant in determining whether qualified privilege attaches to a statement. However, in the instant case the learned judge found that there was no official investigation at all concerning Mr. Harper's alleged bias, neither was there an official pronouncement of his being considered for promotion as Commissioner and there was no "development" prior to the date of the appellant's speech; all that existed was rumour on both issues. The learned trial judge found that the communication was to the world at large and not to persons in a specific relationship. The appellant expected that more than likely his utterances would be quoted to the public by the media. In these circumstances Brooks J found that the

occasion was not privileged because of the nature of the information communicated. I see no conflict in this finding with the learned judge's acceptance of the duties imposed on the appellant and the corresponding interest of the Jamaican public in being informed of situations or developments which could affect the ability of the police force and its leadership to carry out its mandate to the Jamaican people.

I am of the opinion, that having regard to the finding by the learned judge that the appellant was unaware of the source of the information being passed on to him through his informants and that information did not rise above rumour, he was correct in concluding that the appellant had no duty to publish the statement in the circumstances in which he did. The publication was too wide. The absence of malice and the evidence of the appellant that he honestly believed it to be true must, it seems to me, be viewed in the context of whether or not the statement "was fairly warranted by the occasion."

I am of the view that in this case, having regard to the findings of fact by the learned judge, the statement was not fairly warranted by the occasion. In these circumstances the appellant's honest belief affords him no protection even in the absence of malice. In my opinion, the learned judge was correct in finding that the occasion was not privileged and the respondent was defamed in his capacity as Deputy Commissioner of police.

I must now consider whether or not the award of damages was manifestly excessive. My view is that publication by the media ought not to have been attributed to the appellant. However, the Court found that the appellant spoke at a public meeting attended by the news media and he expected that his speech would be published. Publication by the media was, it seems to me, in these circumstances, foreseeable. As Walker LJ said in ***McManus v Beckham*** [2002] 1 WLR 2982 at para. 32:

> "If a defendant is actually aware (1) that what she says or does is likely to be reported, and (2) that if she slanders someone that slander is likely to be repeated in whole or in part, there is no injustice in her being held responsible for the damage that the slander causes via that publication. I would suggest further that if a jury were to conclude that a reasonable person in the position of the defendant should have appreciated that there was a significant risk that what she said would be repeated in whole or in part in the press and that that would increase the damage caused by the slander, it is not unjust that the defendant should be liable for it."

The learned judge found that the respondent had produced little evidence of proof of his loss of reputation. Further, he awarded aggravated damages and this was not pleaded as required. (See Gatley on Libel and Slander (9th ed.1998), 667-8.)

In this case the respondent did not plead justification and therefore the repetition of the libellous statement in Court should not have been taken into account as an aggravating factor.

Brooks J did not specify the amount by which he increased the award after considering that an award of aggravated damages was appropriate. Further, he did not quantify the amount by which he increased the award for repetition of the libellous statement.

Having regard to the foregoing, I would dismiss the appeal as to liability. I would also reduce the award of damages by substituting an award of $1.5M dollars that I think would be appropriate in all the circumstances. I would also make an award of 75% costs to the respondent.

HARRISON, P:

ORDER:

The appeal is dismissed as to liability. Appeal allowed in respect of damages. Damages reduced to $1.5M dollars. 75% costs to the respondent to be agreed or taxed.