

Defence – Defence of fair comment – Defence of qualified privilege**Damages – Principle of compensation to an individual claimant – The Defamation Act, 2013, sections 2, 3, 20(2), 20(3), 21(1), 30(1) and 30(2)****A. NEMBHARD J****INTRODUCTION**

- [1] This matter concerns the alleged defamatory imputations which arose from the publication of a Press Release, on or about 5 May 2020, by the 1st and 2nd Defendants and which was disseminated to various local media houses. This Press Release contained the words: “*Dishonest, Unethical and Lacking in Integrity – Police Federation Chides INDECOM Boss*”, and it is these words which were understood by the Claimant, Mr Terrence Williams, who was at the material time the Commissioner of the Independent Commission of Investigations (“INDECOM”), as referring to him. Specifically, this Court is asked to determine whether these words referred to Mr Williams and if so, whether they were defamatory of him. Mr Williams contends that the Press Release and its content were not expressions of the Defendants’ honest opinions and were calculated to disparage him personally, professionally and in his public office as the Commissioner of INDECOM.
- [2] The 1st and 2nd Defendants, Detective Sergeant Patrae Rowe and Detective Constable Tameca Thomas, were the then Chairman and the General Secretary of the Jamaica Police Federation, respectively. The Jamaica Police Federation is the organization which represents members of the Jamaica Constabulary Force. Detective Sergeant Patrae Rowe and Detective Constable Tameca Thomas are sued in their representative capacity for and on behalf of the Jamaica Police Federation, the entity which caused to be issued the Press Release of 5 May 2020. The 3rd Defendant, Detective Sergeant Patrae Rowe, is sued in his personal capacity in these proceedings.

[3] Mr Williams further contends that because of this publication, his reputation was seriously injured and that he suffered considerable distress, anxiety, humiliation and public embarrassment. By way of his Amended Claim Form, which was filed on Mr Williams claims damages for libel, exemplary and aggravated damages and costs.

THE ISSUES

[4] The following issues are determinative of the Claim: -

- i. Whether the Claimant has proven his case on a balance of probabilities.
- ii. Whether the 1st, 2nd and 3rd Defendants have discredited the Claimant.

[5] To determine the issues identified above, the following sub-issues must also be resolved: -

- a. Whether the heading and content of the Press Release, dated 5 May 2020, and which was caused to be published by the 1st and 2nd Defendants, refer to the Claimant and are defamatory in nature, lowering the Claimant in the estimation of right-thinking members of society.
- b. Whether the heading and the content of the Press Release dated 5 May 2020 has been published to at least one (1) person other than the Claimant.
- c. Whether the defences of fair comment and qualified privilege have been made out.

BACKGROUND

- [6] Prior to his employment as the Commissioner of INDECOM, Mr Williams practised as an Attorney-at-Law, having been admitted to the Jamaican Bar in 1990 and then later to the Bars of the British Virgin Islands and Anguilla. Mr Williams held senior public positions in these territories including an appointment as the first Director of Public Prosecutions in the British Virgin Islands.¹ Additionally, Mr Williams also served as a Course Director and Tutor at the Norman Manley Law School in Jamaica.
- [7] In 2010, Mr Williams returned to Jamaica and in or around August 2010, was appointed as INDECOM's first Commissioner. INDECOM is the body authorized and empowered under the Independent Commission and Investigations Act, to investigate the actions by members of the police, military, correctional services and other agents of the State which resulted in killings and breaches of fundamental rights. This authority bestowed upon INDECOM includes the power to compel answers to questions and primacy at the scenes of incidents.
- [8] The interpretation of certain provisions of the INDECOM Act has been in contention among the members of the security forces and the Jamaica Police Federation. One notable area of dispute includes the powers of INDECOM officers to prosecute, arrest and charge. In 2011, INDECOM caused a report to be tabled in Parliament, which touched and concerned the issues in the establishment of INDECOM and proposed reforms to the INDECOM Act to prevent further contention. A Joint Select Committee of Parliament was established in 2013² to review the functions of INDECOM.³

¹ See – Paragraphs 1-4, inclusive, of the Amended Witness Statement of Terrence Williams, which was filed on 21 June 2023

² See – Exhibit 2, which contains Minutes of the Meeting of the Joint Select Committee to consider and report on the Operation of an Act shortly entitled “The Independent Commission of Investigations Act” held on 27 June 2013

³ See – Paragraphs 15 – 17 inclusive of the Amended Witness Statement of Terrence Williams, which was filed on 21 June 2023. The Joint Select Committee of Parliament issued its report in October 2015. See also, exhibit 4, which contains the Report of the Joint Select Committee of Parliament on the Review of the Independent Commission of Investigations Act dated October 2015.

- [9] The issues concerned with INDECOM's powers to prosecute, arrest and charge state actors formed the subject of the decision of the Full Court, delivered on 30 July 2013 and which was later appealed to the Court of Appeal. On 16 March 2018, the appeal was allowed and leave to appeal to Her Majesty in Council was granted. The Board of the Judicial Committee of the Privy Council, in handing down its decision on 4 May 2020, determined that the INDECOM Act did not permit the summoning of INDECOM personnel outside of prosecutions for breaches of the Act or prosecutions brought by the Director of Public Prosecutions; INDECOM's power to prosecute was limited to section 25 offences.⁴
- [10] Subsequent to the release of the Privy Council decision, INDECOM issued a press release. The following day, on 5 May 2020, the 1st and 2nd Defendants caused to be issued the Press Release, with the heading set in bold typeface, with full capital letters and in sensational terms to attract greater attention to itself: **'DISHONEST, UNETHICAL AND LACKING IN INTEGRITY – POLICE FEDERATION CHIDES INDECOM BOSS'**.⁵ Mr Williams contends that the body of this Press Release intentionally misstates and misrepresents his position in pursuing legal action to have the court's determination of the powers granted to INDECOM under the INDECOM Act. The content of this Press Release, in Mr Williams' view, did not accurately state the facts surrounding the exercise of a power of arrest and charge by INDECOM and the pursuit of legal proceedings to clarify and state the full extent of INDECOM's powers under the Independent Commission of Investigations Act, though it was fully known and appreciated by Defendants. The Claimant states that the inference that can be drawn from this title is that he was dishonest, unethical and lacking in integrity in that he knew all along that INDECOM did not have any such powers.
- [11] Mr Williams contends that this Press Release was delivered to various media houses, including the RJR Communications Group and Nationwide News

⁴ See – Paragraphs 5 – 13 inclusive of the Amended Witness Statement of Terrence Williams, which was filed on 21 June 2023

⁵ See – Exhibit 5, which contains the Press Release issued by the Jamaica Police Federation, dated 5 May 2020

Network and news articles referring to the Press Release bearing titles: “Police Federation Wants INDECOM Boss to Resign” (The Jamaica Gleaner Website, 5 May 2020)⁶, “Police Federation Head Calls for INDECOM Boss to “Immediately Step Aside” (Nationwide Radio JM Website, 5 May 2020)⁷, “Police Federation says INDECOM Boss to Step Aside” (Jamaica Today Website, 6 May 2020)⁸, “Police Federation to seek compensation for cops prosecuted by INDECOM” (Loop Jamaica Website, 6 May 2020)⁹. It is Mr Williams’ case that each of these internet news platforms has extensive reach globally.¹⁰

- [12]** Mr Williams alleges that the Press Release coincided with his announcement that he would be retiring at the end of his term in August 2020. This timing concerned him, as he was of the view that the Federation’s Press Release would give the impression that he was leaving INDECOM “under a cloud”. Mr Williams asserts that in the days following the Press Release, he received many calls and messages which made it clear to him that the Press Release and other public statements made by the 3rd Defendant had indeed created the very impression which he feared.
- [13]** Mr Williams instructed his attorneys-at-law to write to the Defendants requesting a retraction of the Press Release, which was refused and shortly thereafter, he initiated these proceedings. Mr Williams alleges that, despite this refusal, the 3rd Defendant, Detective Sergeant Patrae Rowe, was interviewed on “Cliff Hughes Online”, a popular radio programme.^{11 12} Mr Williams contends that his [Detective

⁶ See – Exhibit 7, which contains The Jamaica Gleaner Article dated 5 May 2020, titled “Police Federation Wants INDECOM Boss to Resign”

⁷ See – Exhibit 6, which contains Nationwide News Network Article dated 5 May 2020, and titled “Police Federation Head Calls for INDECOM Boss to ‘Immediately Step Aside’”.

⁸ See – Exhibit 8, which contains Jamaica Today Article dated 6 May 2020, titled “Police Federation says INDECOM Boss to Step Aside”

⁹ See – Exhibit 9, which contains Loopjamaica.com Article dated 6 May 2020, captioned “Police Federation to seek compensation for cops prosecuted by INDECOM”

¹⁰ See – Paragraphs 27 – 33 inclusive of the Amended Witness Statement of Terrence Williams, which was filed on 21 June 2023

¹¹ See – Exhibit 10, which contains an Audio Recording of the Interview of Detective Sergeant Patrae Rowe with Cliff Hughes on 6 May 2020 on Nationwide News Network talk show programme, “Cliff Hughes Online”.

¹² See – Exhibit 13, which contains a Transcript of the Audio Recording of the Interview of Detective Inspector/Sup Patrae Rowe with Cliff Hughes on 6 May 2020 on Nationwide News Network talk show programme, “Cliff Hughes Online”.

Sergeant Patrae Rowe's] statements and actions made it clear that the words used in the Press Release were deliberate and made with no belief in the truth of the allegations against his character and that it was not an expression of the Defendants' honest opinion and were calculated to disparage him personally, in his professional capacity as an attorney-at-law and in his public office as the Commissioner of INDECOM.

[14] Mr Williams acted as a judge of the Eastern Caribbean Court of Appeal, sitting in Montserrat and following that acting appointment, he was interviewed by the Judicial and Legal Services Commission ("JLSC"). He received a letter¹³ advising him of conditional approval to be appointed to that bench. Mr Williams maintains that even though the letter stated, 'conditional approval', the JLSC was eager for him to take the post as soon as possible, however, he informed them that he would have to complete his term at INDECOM, which would end in July 2022. It is the Claimant's case that the request by the JLSC of the Eastern Caribbean Supreme Court that the Claimant's appointment was a virtual certainty or at minimum was highly favoured.

[15] After the publication of the Press Release and the initiation of these proceedings, Mr Williams advised the Chief Justice of the Eastern Caribbean Supreme Court and the JLSC of the Defendants' Press Release. The JLSC requested copies of the documents filed in the Claim. By way of letter dated 20 August 2020, Mr Williams received notification from the JLSC deferring the conditional offer of appointment as Justice of Appeal until the conclusion of the court proceedings.¹⁴ At that time, Mr Williams had retired from the post of Commissioner of INDECOM and had refused other offers which had been made to him with the expectation that he would have been taking up a permanent position as a judge of appeal. Mr Williams asserts that he was placed in a position where he had to consider and put in place a career plan that was quite different to what he had envisioned and

¹³ See – Exhibit 12, which contains Letter dated 19 August 2020 from the Judicial and Legal Services Commission of the Eastern Caribbean Supreme Court and addressed to Mr Terrence Williams

¹⁴ See – Exhibit 12, which contains Letter dated 19 August 2020 from the Judicial and Legal Services Commission of the Eastern Caribbean Supreme Court and addressed to Mr Terrence Williams

prepared for leading up to his retirement from two terms as the first Commissioner of INDECOM.

- [16] In early 2022, Mr Williams was shortlisted for the post of Director of Public Prosecutions for the Cayman Islands and in his interview, disclosed the matter based on propriety and integrity. Mr Williams asserts that although his application was favoured by being shortlisted, he was not offered the post. Mr Williams contends that the Court may reasonably infer that the instant matter and more particularly, the allegations made by the Defendants may have led to his not being chosen for the position.

The Defence

- [17] The Defendants contend that the words contained in the Press Release were fair comments on a matter of public interest, namely whether the Claimant or his agents had the statutory power to prosecute and or arrest any member of the Jamaica Constabulary Force and further whether the Claimant or his agents had purported to and did arrest any member of the Jamaica Constabulary Force and under statutory authority.¹⁵ The Defendants further contend that as the Commissioner, the Claimant knew or ought reasonably to have known that he did not have the function or authority under the Independent Commission of Investigations Act to prosecute members of the Jamaica Constabulary Force, as this duty and right to prosecute is vested in the Director of Public Prosecutions by virtue of a provision in the Constitution of Jamaica.
- [18] The Defendants maintain that they acted responsibly in publishing the words complained of and further that there was no malice on their part in issuing the Press Release. In particular, the Defendants contend that they had a professional, moral and social duty to comment on and impart their views on any matter touching and concerning the welfare and conduct of the members of the Jamaica Constabulary Force. The Defendants further assert that the public has

¹⁵ See – Paragraph 3 of the Defence of the 1st, 2nd and 3rd Defendants, which was filed on 16 July 2020

an interest in how the Jamaica Constabulary Force is held accountable for the actions of its members.¹⁶

- [19]** It is the Defendants' case is that the Jamaica Police Federation is empowered by law to represent the interests of the members of the Federation and to keep them abreast of any policy or statute which may affect them in the performance of their functions. The Defendants maintain that the public has a legitimate and reasonable interest in the functions and powers of the Claimant and how the said functions are administered, and the powers exercised to hold members of the Jamaica Police Federation accountable in the execution of their duties. Further, it is the Defendants' case that the words complained of were published in the ordinary course of their duties and responsibilities and consequently, in the circumstances, the publication is protected by qualified privilege as pleaded.¹⁷
- [20]** The Defendants deny that the Claimant is entitled to damages, aggravated damages and exemplary damages as they maintain that the Claimant has not been defamed or in any other way injured. The Defendants further contend that they are under no obligation to retract their statement, but however offered to issue a clarification in relation to the statement as it related to the words complained of in the Particulars of Claim. The Defendants also deny that the Claimant is entitled to interest.¹⁸
- [21]** Regrettably, the 1st, 2nd and 3rd Defendants failed to comply with an Order of the court for the filing and exchanging of the parties' witness statements. An Application for Relief from Sanctions, along with an affidavit in support, was filed on 16 June 2023 and 19 June 2023, respectively. The application for relief from sanctions was refused and the trial proceeded based on Mr Williams' evidence and the Defendants' Statement of Case.

¹⁶ See – Paragraphs 12 and 13 of the Defence of the 1st, 2nd and 3rd Defendants, which was filed on 16 July 2020

¹⁷ See – Paragraphs 13 and 14 of the Defence of the 1st, 2nd and 3rd Defendants, which was filed on 16 July 2020

¹⁸ See – Paragraphs 14 and 15 of the Defence of the 1st, 2nd and 3rd Defendants, which was filed on 16 July 2020

THE LAW

The tort of defamation

The elements of the tort

- [22] In an action for defamation, it is necessary to prove the following: -
- i. that the words are defamatory.
 - ii. the falsity of any defamatory words is presumed and the burden of proving justification lies on the defendant.
 - iii. it is not necessary for the claimant, to establish a prima facie case, to prove that the defendant was actuated by malice.
 - iv. it is not necessary for the claimant to prove that he has suffered damage as damage is presumed.
 - v. a cause of action for defamation does not pass to the personal representatives of a deceased claimant.

'Defamatory' defined

- [23] Generally speaking, a statement is 'defamatory' of the person of whom it is published if it tends to lower him in the estimation of right-thinking members of society.¹⁹ The classic definition of the word 'defamatory' is that of Parke B, where he defined it as: -

*"A publication...which is calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule."*²⁰

- [24] A person's reputation is not confined to his general character and standing but extends to his trade, business or profession and words will be defamatory if they impute a lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of his trade, business or professional activity. Consequently, a

¹⁹ See – **Sim v Stretch** [1936] 2 All ER 1237, at page 1240, per Lord Atkin

²⁰ See – **Parmiter v Coupland** (1840) 6 M & W 105 at page 108

statement can also be deemed to be defamatory if it disparages a person in his office, profession, calling, trade or business.²¹

- [25] It is also noteworthy that the tort of defamation is actionable without proof of special damage.²²

The statutory framework

The Defamation Act of 2013

- [26] The Defamation Act of 2013 (“the Act”) repealed the earlier Defamation Act and the Libel and Slander Act. The new legislation abolished the distinction between slander and libel.²³ ²⁴ The principal objectives of the new Defamation Act are set out below: -

“3. The principal objects of this Act are to –

(a) provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter;

(b) promote speedy and non-litigious methods of resolving disputes concerning the publication of defamatory matter; and

(c) ensure that the law relating to the tort of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of topics of public interest and importance.”

²¹ See – Volume 32 (2019) of the Halsbury’s Laws of England, paragraph 543: Meaning of ‘defamatory statement.’

²² See – Section 9 of The Defamation Act, 2013.

²³ See – Section 6 of The Defamation Act, 2013. Further, in section 7 of The Defamation Act, criminal libel is abolished.

²⁴ See – Section 36 of The Defamation Act, 2013 which states that The Defamation Act and the Libel and Slander Act are repealed.

The statutory definition of ‘defamatory matter’

[27] The term “defamatory matter” is defined as any matter published by a person that may be, or is alleged to be, defamatory of another person.²⁵ Further, section 2 of the Defamation Act states that the term “matter” includes: -

“2. “matter” includes –

(a) an article, report, advertisement or other thing communicated by means of a newspaper, magazine or other periodical;

(b) a programme, report, advertisement or other thing communicated by means of television, radio, the Internet or any other form of electronic communication;

(c) a letter, note or other writing;

(d) a picture or visual image;

(e) a word, gesture or oral utterance; and

(f) any other method of communicating information.”

[28] The Act defines the term “publisher” as follows: -

*“publisher” means a person who has published a matter that is, may be, or is alleged to be defamatory of another person and “publish” and “publication”, in relation to a statement, subject to the provisions of this Act, have the meaning they have for the purposes of the law relating to the tort of defamation.”*²⁶

²⁵ See – Section 2 of The Defamation Act, 2013

²⁶ At common law, it is generally held that every repetition of a defamatory statement is a fresh publication and creates a ‘fresh’ cause of action. However, Section 8 of The Defamation Act also indicates that a person has a single cause of action for defamation in relation to the publication of defamatory matter about the person. This remains the case even if more than one defamatory imputation about the person is carried by the defamatory matter.

The role of the court

- [29] Bollers J, in the authority of **Ramsahoye v Peter Taylor & Co Ltd.**,²⁷ referred to the dicta of Camacho CJ in **Woolford v Bishop**,²⁸ who made the following pronouncements: -

*“On this aspect of the case, the single duty which devolves on this court in its dual role is to determine whether the words are capable of a defamatory meaning and given such capability, whether the words are in fact libellous of the [claimant]. If the court decides the first question in favour of the [claimant], the court must then determine whether an ordinary, intelligent and unbiased person reading the words would understand them as terms of disparagement, and an allegation of dishonest and dishonourable conduct. The court will not be astute to find subtle interpretations for plain words of obvious and invidious import.”*²⁹

The ‘ordinary man’ test

- [30] Professor Gilbert Kodilinye, in the 5th edition of his text Commonwealth Caribbean Tort Law, posits that the standard is that of the average right-thinking member of the public. At page 251, Professor Kodilinye is quoted as follows: -

“In assessing the standard of the average right-thinking member of the public, the court will:

... rule out on the one hand persons who are so lax or so cynical that they would think none the worse of a man whatever was imputed to him, and on the other hand those who are so censorious as to regard even trivial accusations (if they were true) as lowering another’s reputation, or who are so hasty as to infer the worst meaning from any ambiguous statement ... The ordinary citizen... is neither unusually suspicious nor unusually naïve, and he does not always interpret the meaning of words as would a

²⁷ [1964] LRBG 329, at 331

²⁸ [1940] LRBG 93, at 95

²⁹ Notably, where the words are clearly defamatory on their face, a finding that they are capable of being defamatory will almost inevitably lead to the conclusion that they are defamatory in the circumstances.

lawyer, for he is not inhibited by a knowledge of the rules of construction.”³⁰

[31] In **Lewis v Daily Telegraph Ltd.**,³¹ Lord Reid made the following pronouncement: -

“There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not of construction in the legal sense. The ordinary man does not live in an ivory tower, and he is not inhibited by a knowledge of the rules of construction.”

[32] Subsequently, in the authority of **Morgan v Odhams Press Ltd.**,³² Lord Reid stated: -

“If we are to follow Lewis’ case and take the ordinary man as our guide, then we must accept a certain amount of loose thinking. The ordinary reader does not formulate reasons in his own mind; he gets a general impression and one can expect him to look again before coming to a conclusion and acting on it. But formulated reasons are very often an afterthought.”

[33] It is equally instructive to note the observation of Lord Halsbury LC in the older authority of **Lord William Nevill v The Fine Art and General Insurance Company, Limited.**³³ Lord Halsbury LC is quoted as follows: -

“It is necessary to take into consideration, not only the actual words used, but the context of the words, and the persons to whom the communications were made.”

The burden and standard of proof

[34] It is a common doctrine in law that he who asserts must prove.³⁴ The same holds true in proceedings for defamation. For a claimant to succeed in his defamation action, the claimant is required to establish the following: -

³⁰ See – Winfield and Jolowicz, n 19, p 398; **Lewis v Daily Telegraph Ltd** [1964] AC 234, at 258, per Lord Reid

³¹ [1964] AC 234, at 258

³² [1971] 1 WLR 1239, at 1245

³³ [1897] AC 68, 72

- i. that the words or statements were defamatory.
- ii. that the words referred to him; and
- iii. that the purported words were published to at least one person other than the claimant himself.

The intention of the defendant

[35] It is not a defence to a defamation action that the defendant did not intend to defame the claimant. Byron JA, in the Eastern Caribbean Court of Appeal decision of **Carasco v Cenac**,³⁵ held that it is irrelevant that the defendant did not intend the words he used to be understood in a defamatory sense. Further, the Appellate Court Judge also found that the intention of the defendant may be material to the assessment of damages, but it is immaterial in determining whether the words were defamatory or not.³⁶

Defences

[36] In defamation proceedings, defamatory statements are presumed to be untrue; but if the defendant can prove that his statement was true of the claimant, he will have a complete defence, for the claimant is not entitled to protect a reputation he does not really possess. Previously, this was more commonly known as the defence of justification but is now known as the defence of 'truth'.³⁷

³⁴ See – Chapter 11 page 150, paragraph 351 of Gatley on Libel and Slander, which states that the claimant establishes a *prima facie* cause of action as soon as he proves the publication of defamatory words.

³⁵ (1995) Court of Appeal, OECS, Civ App No 6 of 1994 (unreported)

³⁶ The authority of **Bacchus v Bacchus** [1973] LRG 115 (High Court, Guyana) demonstrates that the court should also consider the prevailing public attitudes in the jurisdiction.

³⁷ See – Page 252 of the Commonwealth Caribbean Tort Law, 5th Edition, authored by Gilbert Kodilinye.

[37] The Defamation Act identifies four possible defences which a defendant may seek to rely on to defend himself against a defamation claim.³⁸ They include but are not limited to: the defence of truth, the defence of fair comment, the defence of innocent dissemination and the defence of qualified privilege.

The defence of fair comment

[38] Section 21(1) of the Act reads: -

“21. – (1) In an action for defamation in respect of words, including or consisting of expression of opinion, a defence of fair comment shall not fail only because the defendant has failed to prove the truth of every relevant assertion of fact relied on by him as a foundation for the opinion, provided that such of the assertions as are proved to be true are relevant and afford a foundation for the opinion.”

[39] At page 275 of his text, Professor Kodilinye provides the rationale and public policy for this defence.³⁹ He stated as follows: -

“It is important to preserve the fundamental right to freedom of expression, and the defence is available to all who comment ‘fairly’ (within the legal definition)⁴⁰ on all matters which may be said to be the legitimate concern of the public. Although the defence is particularly useful to publishers of newspapers, it is not the exclusive preserve of the press.”

[40] At common law, it is recognized that the matter commented on must be one of public interest, including but not limited to the following, the affairs of

³⁸ See – Section 19(1) of The Defamation Act, 2013 which states that: “A defence under this Part is additional to any other defence or exclusion of liability available to the defendant apart from this Act and does not of itself vitiate, limit or abrogate any other defence or exclusion of liability.”

³⁹ See – **Silkin v Beaverbrook Newspapers Ltd** [1958] 2 All ER 516, at 517 per Diplock J: “Freedom of speech, like the other fundamental freedoms, is freedom under the law, and over the years the law has maintained a balance between, on the one hand, the right of the individual...whether he is in public life or not, to his unsullied reputation if he deserves it, and on the other hand, but equally important, the right of the public... to express their views honestly and fearlessly on matters of public interest, even though that involved strong criticism of the conduct of public people.”

⁴⁰ The term ‘Fairly’ is defined in Black’s Law Dictionary as ‘justly, rightly, equitably’.

government, the administration of justice, the public conduct of those who hold or seek public office or positions of public trust.^{41 42}

[41] Importantly, to successfully rely on this defence, a defendant is required to prove the following: -

- i. that the statement is a comment or opinion and not an assertion of fact.
- ii. that the comment is based upon true facts.
- iii. that the comment is 'honestly' made;⁴³ and
- iv. that the comment is not actuated by malice.⁴⁴

[42] The authorities demonstrate that it is a fine line of demarcation between comment and invective. The dicta of Lord Porter in the authority of **Turner v Metro-Goldwyn-Mayer Pictures Ltd.**⁴⁵ outlines the test that can be employed by the court to determine the honesty of the writer of purported defamatory matter. Lord Porter stated: -

"... the question is not whether the comment is justified in the eyes of the judge or jury, but whether it is the honest expression of the commentator's real view and not merely abuse or invective under the guise of criticism."

⁴¹ See – Page 276 of the Commonwealth Caribbean Tort Law, 5th Edition by Gilbert Kodilinye

⁴² The defence of fair comment, is often referred to as honest comment in some authorities.

⁴³ See – Page 277 of the Commonwealth Caribbean Tort Law, 5th Edition by Gilbert Kodilinye. Mr Kodilinye states: *"'Honest' here means 'genuinely held'. Provided that the defendant expresses his genuine opinion on the subject matter, he will have a defence, notwithstanding that his opinion may have been biased, prejudiced, exaggerated or irrational. But the Defendant is not entitled to cast defamatory aspersions on the personal character of the claimant, or to ascribe to him base, dishonest or corrupt motives. If he does so, he steps outside the boundaries of the defence."*

⁴⁴ See – Page 277 of the Commonwealth Caribbean Tort Law, 5th Edition by Gilbert Kodilinye. Mr Kodilinye states: - *"The word 'malice' is used here in the sense of 'a corrupt or wrong motive or making use of the occasion for some indirect purpose'. The claimant has the onus of proving malice on the defendant's part."*

⁴⁵ [1950] 1 All ER 449, at 461

[43] Evidence of malice will defeat the defence of fair comment. Professor Kodilinye, in reference to the authority of **Chokolingo v Chokolingo**⁴⁶ states, at page 309 of his text, as follows: -

“Actual malice’ does not necessarily mean personal spite or ill-will, and it may exist even though there is no spite or desire for vengeance in the ordinary sense. Malice here means any indirect motive other than a sense of duty to publish the material complained of and, in essence, it amounts to making use of the occasion for some improper purpose, such as where a defamatory statement is published in order to obtain a private advantage unconnected with the duty or the interest which constitutes the reason for the privilege.”

[44] Professor Kodilinye further states: -

“The onus of proving malice rests on the claimant. Evidence of malice may be either intrinsic (that is, found in the words themselves) or extrinsic (that is, found in external circumstances unconnected with the publication itself). There may be intrinsic evidence of malice where the language used by the defendant is violent, insulting or utterly disproportionate to the facts. However, it has been said that, when considering whether the actual expressions used can be treated as evidence of malice, ‘the law does not weigh words in a ‘hair balance’ and if, in the circumstances, the defendant might honestly and reasonably have believed that his words were true and necessary for his purpose, he will not lose the protection of privilege because he expressed himself in excessively strong or exaggerated language.”

[45] In the authority of **Barrow v Caribbean Publishing Co. Ltd.**,⁴⁷ the claimant, the then Premier of Barbados, brought an action against the publishers and the editor of the defendant newspaper, seeking damages for an alleged libel. The proceedings centred on the publication dated 15 August 1965 and specifically, an article entitled “The White Lie” in the Barbados Sunday News.

[46] The content of the article was a commentary on the White Paper, “The Federal Negotiations 1962-65 and Constitutional Proposals for Barbados”, which was laid

⁴⁶ (2004) High Court, Trinidad and Tobago, No CV 2685 of 1992 (unreported)

⁴⁷ (1971) 17 WIR 182 (High Court, Barbados)

before the Legislature by order of the Cabinet, and which was published by the authority of the Government of Barbados. The claimant argued that the article constituted personal abuse against him and abuse of the Government of Barbados and that it meant that he was not entitled to any reputation for honesty and integrity. The defendants denied that the article referred to the plaintiff or was defamatory. Their defence was based on that of fair comment on a matter of public interest. During the trial, the issues which the court determined included whether the article was actuated by malice and whether it constituted fair comment.

[47] Douglas CJ, at page 189, paragraphs F to H had the following to say: -

“On the face of it, the article complained of is a critique of the White Paper and an expression of opinion on what it contains. There can be no doubt that the White Paper, dealing as it does with constitutional proposals for Barbados, is a matter of public interest.

The only issues are whether the article was actuated by malice and whether it constitutes fair comment in the sense of being honest comment on a matter of public interest.

On the first question, there is no evidence of personal animosity or aversion between the writer of the article, Mr Nigel Barrow, and the plaintiff, or between the second defendant and the plaintiff. In that state of the evidence, counsel asks the court to infer malice from the language of the article itself.”

[48] Further, at page 191, paragraph B, Douglas CJ made the following observations:

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“The onus of showing that the article is a fair comment on the White Paper in the sense of expressing views honestly held for which there is some foundation rests on the defence. In deciding whether this onus has been discharged, weight must be given to the fact that the article dealt with the matter of the greatest public importance; that it was the duty of the press to submit the White Paper proposals to the most careful scrutiny and that there were certain inaccurate and

misleading statements in a document which is part of the recorded history of this country.”

[49] At paragraphs D to E of page 191, Douglas CJ made the following pronouncements: -

“On the whole, in my view, the article is severe, but honestly-held comment on a public document. It is only in the words complained of in sub-para. (ix) of para. 6 of the Statement of Claim, namely, “Truth and honesty are irrelevant considerations, if considerations at all”, that the writer has gone too far and crossed the line between fair comment and personal invective. These words are a serious imputation against the author of the White Paper taxing him in effect with cynical irresponsibility and conduct reprehensible in a man of his position. Up to that point, the writer was criticising the contents of the White Paper but he allowed himself to be carried away into attacking the personal character of its author.”

[50] In the result, the court found that the claimant was entitled to damages against the defendants jointly and severally of a modest sum of Two Thousand Four Hundred Dollars (\$2,400.00).⁴⁸

The defence of qualified privilege

[51] Section 23(1)(2) and (3) of the Act reads: -

“23.- (1) Unless the publication is proved to be made with malice, subject to the provisions of this section, the publication in a news medium of any report or other matter mentioned in the First Schedule⁴⁹ shall be privileged.

(2) In an action for defamation in respect of the publication of any report or matter mentioned in Part II of the First Schedule, the provisions of this section shall not be a defence if it is proved that the defendant has been requested by the claimant to publish in the news medium in which the original publication was made a reasonable letter or statement by way of explanation or contradiction,

⁴⁸ See also – **Joynt v Clyde Trade Publishing Company** [1904] 2 QB 292, at page 294, per Kennedy J

⁴⁹ The First Schedule of the Act is segmented into Part I, Part II and Part III which deal with ‘Statements privileged without need for Publication of Explanation or Contradiction’, ‘Statements privileged subject to publication of explanation or contradiction’ and ‘Interpretation’ respectively.

and has refused or neglected to do so, or has done so in a manner that is not adequate or not reasonable having regard to all the circumstances.

(3) This section is not construed as –

(a) protecting the publication of any matter the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit; or

(b) limiting or abridging any privilege subsisting before the date of commencement of this Act (otherwise than by virtue of any enactment repealed by section 37 of this Act).”

[52] In the authority of **Reynolds v Times Newspapers Ltd.**,⁵⁰ Lord Bingham of Cornhill CJ referred to the 2nd Edition of the text of Duncan & Neill on Defamation and stated: -

“From the broad general principle that certain communications should be protected by qualified privilege in ‘the general interest of society’, the courts have developed the concept that there must exist between the publisher and the publishee some duty or interest in the making of the communication. In 1855 in **Harrison v Bush** (1855) 5 E&B 344 at 348, Lord Campbell CJ stated the law as follows: ‘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 contains criminatory matter which, without this privilege, would be slanderous and actionable.’ And in **Pullman v Hill & Co.** [1891] 1 QB 524 AT 528, Lord Esher MR said: ‘**An occasion is privileged when the person who makes the communication has a moral duty to make it to the person to whom he does make it, and he person who receives it has an interest in hearing it. Both these conditions must exist in order that the occasion may be privileged.**’ In **Adam v Ward** [1917] AC 309 at 334 Lord Atkinson emphasised the importance of reciprocity in the following words: ‘**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 the communication**

⁵⁰ [2001] 2 AC

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.’

And in **Watt v Longsdon** [1930] 1 KB 130 at 147, Scrutton LJ, after considering the earlier cases, restated the law in terms which (with one important exception), are generally accepted as authoritative. He expressed the opinion that qualified privilege existed where there was either: **‘(1) A duty to communicate information believed to be true to a person who has a material interest in receiving the information, or (2) an interest in the speaker to be protected by communicating information, if true, relevant to that interest, to a person (honestly believed to have) a duty to protect that interest, or (3) a common interest in and reciprocal duty in respect of the subject matter of the communication between speaker and recipient.’**”

[Emphasis added]

[53] The pronouncements of Lord Nicholls of Birkenhead are also apt with regard to the defences of fair comment and qualified privilege. Lord Nicholls of Birkenhead emphasised the importance of seeking to balance the right to freedom of expression, for people to be able to speak and write freely, as well as the right one has to the protection of his reputation. At page 193, he espoused: -

*“One established exception is the defence of comment on a matter of public interest. This defence is available to everyone and is of particular importance to the media... Public interest has never been defined, but in **London Artists Ltd v Little** [1969] 2 QB 375, 391, Lord Denning MR rightly said that it is not to be confined within narrow limits. He continued:*

‘Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make fair comment.’

Traditionally one of the ingredients of this defence is that the comment must be fair, fairness being judged by the objective standard of whether any fair-minded person could honestly express the opinion in question. Judges have emphasised

*the latitude to be applied in interpreting this standard. So much so, that the time has come to recognise that in this context the epithet "fair" is now meaningless and misleading. Comment must be relevant to the facts to which it is address. It cannot be used as a cloak for mere invective. But the basis of our public life is that the crank, the enthusiast, may say what he honestly thinks as much as the reasonable person who sits on a jury. The true test is whether the opinion, however exaggerated, obstinate or prejudiced, was honestly held by the person expressing it: see Diplock J in **Silkin v Beaverbrook Newspapers Ltd.** [1958] 1 WLR 743, 747.*

It is important to keep in mind that this defence is concerned with the protection of comment, not imputations of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere. Further, to be within this defence the comment must be recognisable as comment, as distinct from an imputation of fact. The comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made...

One constraint does exist upon this defence. The comment must represent the honest belief of its author. If the plaintiff proves he was actuated by malice, this ground of defence will fail.

...

The requirement that both the maker of the statement and the recipient must have an interest or duty draws attention to the need to have regard to the position of both parties when deciding whether an occasion is privileged. But this should not be allowed to obscure the rationale of the underlying public interest on which privilege is founded. The essence of this defence lies in the law's recognition of the need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source. That is the end the law is concerned to attain. The protection is afforded to the maker of, the statement is the means by which the law seeks to achieve that end. Thus, the court has to assess whether, in the public interest, the publication should be protected in the absence of malice.

In determining whether an occasion is regarded as privileged the court has regard to all the circumstances: see, for example, the explicit statement of Lord

*Buckmaster LC in **London Association for Protection of Trade v Greenlands Ltd** [1916] 2 AC 15, 23 (“every circumstance associated with the origin and publication of the defamatory matter”). And circumstances must be viewed with today’s eyes. The circumstances in which the public interest requires a communication to be protected in the absence of malice depend upon current social conditions. The requirements at the close of the twentieth century may not be the same as those of earlier centuries or earlier decades of this century.”*

[54] Lord Nicholls of Birkenhead concludes: -

“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.

Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. 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.

This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the

admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury.”

[55] In the authority of **Jamaica Observer Limited v Joseph Matalon**,⁵¹ Morrison P JA explored the parameters of the defence of qualified privilege by examining legal pronouncements in the authorities of **Reynolds**⁵² and **Bonnick v Morris & Others**.⁵³ Morrison P JA stated: -

“[118] The law of defamation has traditionally accorded qualified privilege to statements which, although defamatory, were made pursuant to a public or private interest or duty (whether legal, social or moral) to give certain kinds of information to a person who has a corresponding interest or duty to receive such information.⁵⁴ The privilege is qualified because, in a proper case, it can be defeated by proof of malice. Classic instances of statements in this category which have traditionally attracted qualified privilege include information given by a former employer to a prospective employer and complaints made or information given to the police or appropriate authorities regarding suspected crimes.⁵⁵

[119] However, the law did not recognise any generic privilege extending to publications in the press on matters of public interest. A strong attempt to change that position failed in Reynolds, but the case was a landmark because it extended the scope of qualified privilege by recognising that publication of information on a matter of genuine public interest may in a proper case attract the privilege, providing that the publisher acts responsibly. Delivering the leading judgment in the case, Lord Nicholls set out⁵⁶ a non-exhaustive list of the various matters which might be taken into account in assessing the question whether the standard of responsible journalism has been met. Among the questions for consideration are (i) the seriousness of the allegation; (ii) the nature of the

⁵¹ [2019] JMCA Civ 38

⁵² *supra*

⁵³ At para. 23

⁵⁴ See – Street on Torts, 12th edn, pages 555-562

⁵⁵ **Reynolds**, per Lord Nicholls at page 616

⁵⁶ At page 626

information, and the extent to which the subject-matter is a matter of public concern; (iii) the source of the information; (iv) the steps taken to verify the information; (v) the status of the information; (vi) the urgency of the matter; (vii) whether comment was sought from the claimant; (viii) whether the article contained the gist of the claimant's side of the story; (ix) the tone of the article; and (x) the circumstances of the publication, including the timing.

[120] But Lord Nicholls was careful to observe that this list is not exhaustive and that the weight to be given to the factors set out in it and any other relevant factors would vary from case to case.

[121] Returning to the question in **Bonnick v Morris & Others**⁵⁷ (in a passage to which the judge also referred), Lord Nicholls explained that the notion of responsible journalism lies at the heart of Reynolds privilege:

“Stated shortly, the Reynolds privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of the standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege. If they are to have the benefit of the privilege journalists must exercise due professional skill and care.”

[122] ...

[125] **Jameel** makes it clear that the development of Reynolds privilege did not involve a rejection of the traditional duty/interest approach in determining whether an occasion of qualified privilege has arisen. As Lord Bingham explained⁵⁸, “Lord Nicholls [in **Reynolds**] considered that matters relating to the nature and source of the information were matters to be taken into account in determining whether the duty-interest test was satisfied or, as he preferred to say ‘in a simpler and more direct way, whether the public was entitled to know the particular information’”.

⁵⁷ At para. 23

⁵⁸ At para. 30

[126] *But, as Lord Hoffman also pointed out⁵⁹, the classic duty/interest test might no longer need to be applied in the traditional way, given the development of the Reynolds privilege:*

“...The Reynolds defence was developed from the traditional form of privilege by a generalisation that in matters of public interest, there can be said to be a professional duty on the part of journalists to impart the information and an interest in the public in receiving it. The House having made this generalisation, it should in my opinion be regarded as a proposition of law and not decided each time as a question of fact. If the publication is in the public interest, the duty and interest are taken to exist. ...”.

[127] *To generally similar effect, Baroness Hale added this⁶⁰:*

“It should by now be entirely clear that the Reynolds defence is a ‘different jurisprudential creature’ from the law of privilege, although it is a natural development of that law. It springs from the general obligation of the press, media and other publishes to communicate important information upon matters of general public interest and the general right of the public to receive such information. It is not helpful to analyse the particular case in terms of a specific duty and a specific right to know. That can, as experience since Reynolds has shown, very easily lead to a narrow and rigid approach which defeats its object. In truth, it is a defence of publication in the public interest.”

THE SUBMISSIONS

The submissions advanced on behalf of the Claimant

[56] Learned Kings Counsel Mrs Tana’ania Small Davis, in her detailed and comprehensive written submissions on behalf of Mr Williams, asserted that a claimant must establish three (3) things to succeed on a claim for defamation.

⁵⁹ At para. 50

⁶⁰ At para. 146

[57] These elements are as follows: -

- a. that the words were defamatory.
- b. that the words referred to the claimant; and
- c. that the words were published to at least one other person other than the claimant himself.

[58] To buttress this submission the Court was referred to the authority of **Percival James Patterson v Cliff Hughes and Nationwide News Network**.⁶¹

[59] Mrs Small Davis submitted that there can be no denying that the words contained in the Press Release, of which Mr Williams complains, referred to him. Nor can it be denied that those words were published to at least one other person other than Williams.

The natural and ordinary meaning of the words contained in the Press Release

[60] It was further submitted that to determine the meaning of the words contained in the Press Release is largely a matter of the impression made by the words used. The natural and ordinary meaning of the words 'dishonest, unethical and lacking integrity' are self-evident, require no interpretation and are incapable of bearing any other meaning. Mrs Small Davis maintained that the natural and ordinary meaning of the words contained in the Press Release, of which Mr Williams complains, must be that he was dishonest, unethical and lacking in integrity, in that he knew that INDECOM did not have the statutory power to arrest and prosecute.

[61] Mrs Small Davis relied on the authority of **Sim v Stretch**,⁶² for the submission that the words contained in the Press Release, of which Mr Williams complains are defamatory because they convey a defamatory imputation, lowering him [Mr

⁶¹ [2014] JMSC Civ 167, per Williams J (as she then was), at paragraph 28

⁶² [1936] 2 All ER 1237, at page 1240, per Lord Atkin

Williams] in the estimation of right-thinking members of society, or, because the discredit him [Mr Williams] in his trade, profession or calling.

- [62] Mrs Small Davis submitted that the Press Release, particularly its title, was plainly likely to damage Mr Williams' reputation. It was further submitted that to infer dishonesty and a lack of integrity and unethical behaviour on the part of Mr Williams, a person who, at the time, held the public office of the Commissioner of INDECOM, was clearly done to lower him in the estimation of others, in that, persons would think less of his general character. This is supported by the fact that the content of the Press Release misstated and misrepresented Mr Williams' position in relation to the reason for pursuing legal action to have the court's determination of the powers granted to INDECOM under the INDECOM Act and failed to provide the full context of the decision of the Judicial Committee of the Privy Council as well as the consideration of the issue before the Joint Select Committee of Parliament.

The defences of fair comment and qualified privilege

Fair comment (Honest comment)

- [63] Mrs Small Davis maintained that the Defendants have not established the defences of fair comment and qualified privilege. For the defence of fair comment (or honest comment) to succeed, it must be proved that the statement is in fact a comment and not purporting to be a fact; that the comment has a sufficient factual basis, that is, must be based on facts which are themselves substantially true and it must be a comment which an honest person could hold. In this regard, the Court was referred to the dicta of Sykes J (as he then was) in the authority of **Matalon v Jamaica Observer**,⁶³ as well as the authority of **Branson v Bower**,⁶⁴

⁶³ [2014] JMSC Civ 127, at paragraphs 43-51

⁶⁴ [2002] QB 737

and the judicial pronouncements of Daye J in **Easton Douglas et al v Jamaica Observer Ltd et al**.⁶⁵

Qualified privilege

[64] For the defence of fair comment to be established, the following requirements must be met: -

- a. That the matters commented on must be of public interest.
- b. That the statement must be a comment or opinion and not an assertion of fact.
- c. That the comment must be based upon true facts.
- d. That the full facts relied upon to make the comment must be stated.
- e. That the comment must be 'honestly' made.
- f. That the comment must not be actuated by malice.

[65] In the present instance, Mrs Small Davis asserted, the Defendants' position is that the words of which Mr Williams complains were fair comment on a matter of public interest, that is, whether he [Mr Williams] or his agent(s) had the statutory authority to prosecute and/or arrest any member of the Jamaica Constabulary Force and whether Mr Williams knew or ought reasonably to have known that he was not vested with that authority under the INDECOM Act. It was further asserted that the Defendants failed to establish the defence of fair comment because there was no or no sufficient factual basis for the statement 'dishonest, unethical and lacking in integrity'.

⁶⁵ [2012] JMSC Civ 101, at paragraph 60

- [66] Mrs Small Davis maintained that the Defendants were aware of the facts surrounding this issue, their having been involved in the litigation at the various levels of the court, between 2011 and 2020, and their having participated in the hearings before the Joint Select Committee Parliament between 2013 and 2015.
- [67] Equally, the Defendants have failed to establish the defence of qualified privilege. Qualified privilege is a defence which “forgives” defamatory statements where the circumstances are such that it is desirable for people to speak their minds honestly, without fear of being sued for defamation, if they get it wrong. Mrs Small Davis submitted that the defence of qualified privilege protects the mistaken but honest publisher. For the defence to succeed there must be a duty on the publisher (legal, moral or social) to make the statement to the person to whom it is made, and the receiver must have a corresponding duty to receive it. To substantiate this submission, Ms Small Davis relied on the authorities of **Watt v Longsdon**,⁶⁶ **Adam v Ward**,⁶⁷ **Reynolds v Times Newspapers Ltd.**⁶⁸ and **Jameel and Ors v Wall Street Journal Europe SPRL.**⁶⁹
- [68] It was submitted that the malicious defendant is not protected if he knows that what he has published is false. It was also submitted that the absence of honest belief in the truth of the comments is evidence of malice and consequently, that the defence of qualified privilege must fail. Ms Small Davis maintained that the actions of the Defendants after the publication in the media and throughout the court process, including their failure to apologize to Mr Williams and perpetuating their defence in the absence of any evidence of prove it, is further proof of malice.

⁶⁶ [1930] 1 KB 130

⁶⁷ [1971] A.C. 309

⁶⁸ [2001] 2 AC 127

⁶⁹ [2006] UKHL 44

Quantum of Damages

[69] In this regard, Mrs Small Davis submitted that the law of defamation presumes that a person has a good reputation until the contrary is proven. She maintained that Mr Williams is entitled to Damages. The Court was referred to the authority of **Rudolph Wallace v Vivian Cohen**⁷⁰ and the text of Gatley on Libel and Slander, 11th Edition, paragraph 9.2.

[70] Mrs Small Davis maintained that the award of Damages should be sufficient to vindicate Mr Williams' reputation, having regard to the gravity of the defamation, the range of publication and the extent to which the Defendants have persisted with the charge. The Court was urged to have regard to the following: -

- a. Mr Williams' high standing in society, having occupied the important public position of the Commissioner of INDECOM and being a senior Attorney-at-Law.
- b. The words contained in the Press Release which was caused to be written and published by the Defendants questioned Mr Williams' character and integrity.
- c. The continuing, irreparable damage to Mr Williams' reputation.
- d. The wide circulation of the Press Release.
- e. The Defendants' refusal to retract their statements and/or apologize for them. The 3rd Defendant later acknowledged that the purpose of going to court was to obtain a judicial determination of the issue of INDECOM's power to arrest and charge, thereby admitting that he knew full well that the statements made in the Press Release were false.
- f. The 3rd Defendant admitted that he held Mr Williams in high regard.

⁷⁰ [2012] JMCA Civ 60, per Dukharan JA

- g. The disregard with which the Defendants have treated the proceedings, including, failing to file any witness statements, in breach of Orders of the court and failing to offer any legitimate bases for this failure.

[71] Mrs Small Davis contended that, having regard to the unusual circumstances of this case, an award should be made for the damage to Mr Williams' reputation and on the higher end of the scale. Mrs Small Davis relied on the authority of **The Gleaner Company Limited et al v Eric Anthony Abrahams**,⁷¹ an authority in which the Judicial Committee of the Privy Council upheld an award of Thirty-Five Million Dollars (\$35,000,000.00). This sum updates to Two Hundred and Twelve Million One Hundred and Fifty-Six Thousand Three Hundred and Ninety-Eight Dollars and Ten cents (\$212,156,398.10). Additionally, the Court was referred to the authorities of **Percival James Patterson v Cliff Hughes and Nationwide News Network**⁷² and **Roy Anderson v Dwight Clacken**.⁷³

[72] Finally, Mrs Small Davis submitted that the award made to Mr Williams under this head ought properly to be somewhere between the award made in the authority of **Percival James Patterson** and that which was made in the authority of **Eric Anthony Abrahams** and should be no less than Twenty Million Dollars (\$20,000,000.00).

The submissions advanced on behalf of the Defendant

[73] Learned Counsel Ms Althea Grant in her expansive written submissions on behalf of the 1st, 2nd and 3rd Defendants maintained that, on based on Mr Williams' Statement of Case, the words of which he complains are those contained in the heading of the Press Release, "Dishonest, Unethical and Lacking Integrity – Police Federation, Chides INDECOM Boss".

⁷¹ [2003] UKPC 55

⁷² Supra

⁷³ [2023] JMISC Civ 42

- [74] Ms Grant asserted that Mr Williams has failed to attribute a meaning (negative or otherwise) to the words of which he complains.
- [75] It was further asserted that a court tasked with making a decision pursuant to rule 69.4 of the Civil Procedure Rules, 2002, as amended, would be hampered in so doing because Mr Williams does not ascribe a meaning (negative or otherwise) to the words of which he complains. To substantiate this submission Ms Grant relied on the authorities of **Television Jamaica Limited v Constable Cecil Wright-Anderson**,⁷⁴ **Mapp v News Group Newspaper Ltd.**,⁷⁵ **Charvis v Radio Jamaica Ltd.**⁷⁶ and **Deandra Chung v Future Service International Limited and Yaneek Page.**⁷⁷
- [76] The Defendants denied that the words used in the Press Release were defamatory of Mr Williams. The Defendants maintained that they sought to question the actions of INDECOM's agents and further, that the Press Release was a comment or opinion. While the words 'dishonest actions' are contained in the Press Release, none of the articles to which Mr Williams refers attribute those words to him. Ms Grant asserted that Mr Williams maintained that the words complained of were defamatory of him and that the Press Release (being heading and content) was defamatory of him. On a strict interpretation of the Press Release, the words complained of or the dishonest actions that were explained in paragraph one (1) of the Press Release were always attributable to INDECOM only. To support this submission, Ms Grant relied on the authority of **Knuppfer v London Express Newspapers.**⁷⁸
- [77] Ms Grant further submitted that Mr Williams has failed to prove that the words complained of lowered his reputation in the minds of right-thinking members of society. Ms Grant maintained that the Press Release was published only to the

⁷⁴ Supreme Court Civil Appeal No. 76/2008

⁷⁵ (1998) Q.B. 520 at 523

⁷⁶ Claim No. HCV 0989/2003, judgment delivered 28 September 2004

⁷⁷ [2014] JMSC Civ 21, Supreme Court Civil Appeal No. 104/2012

⁷⁸ [1944] AC 116

media houses RJR Communications Group and Nationwide News Network and not to Loop News/Loop Jamaica as Mr Williams contends.

- [78] Equally, there is no evidence that Mr Williams' reputation was lowered in the minds of right-thinking members of society who either saw the Press Release or a summary of it.
- [79] Additionally, Ms Grant asserted that an assessment of whether the publishing of the purportedly defamatory words was actuated by malice is a question of fact and is one which must be determined by a consideration of the peculiar facts in each case. In the present instance, Ms Grant maintained, there is nothing to suggest that the 1st, 2nd and 3rd Defendants were motivated by malice.
- [80] It was further submitted that, in an interview by the 1st Defendant in his capacity as Chairman of the Jamaica Police Federation (one day after the publication of the Press Release), he maintained that he enjoyed an excellent relationship with INDECOM, that he held Mr Williams in high regard and believed that he was a strong leader and public servant who was capable of effecting change. Ms Grant maintained that what was expressed in the Press Release was not an expression of an issue with Mr Williams' reputation, integrity or personhood.
- [81] Ms Grant asserted that the 1st, 2nd and 3rd Defendants rely on the defence of fair comment, which is often referred to as honest opinion, and qualified privilege. Both defences, Ms Grant maintained, require a distillation of whether the publication treats with a matter of public interest. The issue is whether the publication treats with a matter of public interest and not whether it is in the public interest. To determine whether the impugned publication treats with a matter of public interest, it is necessary to consider the publication in its entirety. The Court was referred to the authorities of **Reynolds v Times Newspapers**,⁷⁹ **Blackshaw v Lord**,⁸⁰ **Adam v Ward**,⁸¹ **Watt v Longsdon**⁸² and **Cox v Feeney**.⁸³

⁷⁹ [2001] 2 AC 127, paragraphs 48, 49 and 51

⁸⁰ [1983] 2 All ER 311, at page 327

⁸¹ [1916-17] All E.R. 157

⁸² [1930] 1 K.B. 130

[82] It was further asserted that: -

- a. The issue between INDECOM and the Jamaica Police Federation was explored in the various courts of the land. The Defendants maintain that, if the public were not advised or was for any reason misinformed on the current position of the Law, then clarity should be offered by INDECOM.
- b. The matter was one of great public interest as it raised issues concerning two (2) statutory bodies and the extent of their remit or statutory authority.
- c. The source of the information stemmed from the issues which were ventilated during the court proceedings as well as from the judgment of the Judicial Committee of the Privy Council.
- d. The Jamaica Police Federation was intimately involved in the legal proceedings and had first-hand knowledge of the information involved.
- e. The status of the matter was that it had been fully ventilated in the courts of the land before the Press Release was made. All 'investigations' or 'inquiries' were completed.
- f. Comment was sought of Mr Williams. This was evidenced in the body of the Press Release.
- g. The Press Release attempted to represent the Jamaica Police Federation's understanding of and opinion on Mr Williams' perspective and sought to clarify and to provide possible resolutions of the issues.
- h. The tone of the Press Release was that of confusion and concern.

⁸³ [1863] 4 F & F13 176 ER 445

Quantum of Damages

- [83] Ms Grant referred to sections 24 and 25 of the Defamation Act, 2013 and asserted that there is an appropriate and rational relationship between the harm sustained by a claimant and the quantum of Damages awarded. It was submitted that the publication of the words contained in the Press Release, of which Mr Williams complains, did not cause him irreparable harm, having regard to the scope and reach of the publication.
- [84] Finally, Ms Grant submitted that Mr Williams has failed to prove actual loss and that any award of Damages which may be made to him should be nominal.

ANALYSIS

Discussion and Findings

- [85] Regrettably, the 1st, 2nd and 3rd Defendants failed to comply with an Order of the court for the filing and exchanging of the parties' witness statements. An Application for Relief from Sanctions, along with an affidavit in support, was filed on 16 June 2023 and 19 June 2023, respectively. That application for relief from sanctions was refused and the trial proceeded based on Mr Williams' evidence and the Defendants' Statement of Case.
- [86] The starting point of any analysis of the considerations raised in the present instance, must be with a discussion of the following issues: -
- a. Whether the impugned statements are defamatory in nature.
 - b. Whether the impugned statements refer to Mr Williams.
 - c. Whether the impugned statements have been published to at least one (1) person, other than Mr Williams.
- [87] The issue of whether the statements contained in the Press Release, of which Mr Williams complains, contain defamatory imputations of him, is not a complex one.

- [88] The authorities are clear that a statement is 'defamatory' of the person of whom it is published if it tends to lower him in the estimation of right-thinking members of society. It is equally clear that a person's reputation is not confined to his general character and standing but extends to his trade, business or profession and that words will be defamatory if they impute a lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of his trade, business or professional activity. Consequently, a statement can also be deemed to be defamatory if it disparages a person in his office, profession, calling, trade or business.
- [89] The Court finds that the statements contained in the Press Release, of which Mr Williams complains, are defamatory of him. The Court so finds for the reason that, the words contained in those impugned statements, when given their natural and ordinary meaning, tend to lower Mr Williams in the estimation of right-thinking members of society. The Court finds that the impugned material ascribes to Mr Williams a lack of honesty and integrity in the discharge of his functions as the Commissioner of INDECOM.
- [90] The Court also finds that the impugned material was published to at least one (1) person other than Mr Williams.
- [91] The Court makes the following findings of fact: -
- a. On 5 May 2020, the Defendants caused to be written and published the following words contained in a typewritten Press Release: **DISHONEST, UNETHICAL AND LACKING IN INTEGRITY – POLICE FEDERATION CHIDES INDECOM BOSS.**
 - b. The Press Release was issued under the authority of the 1st and 2nd Defendants in their representative capacity for and on behalf of the Jamaica Police Federation.
 - c. The Press Release was delivered to various media houses, including RJR Communications Group and Nationwide News Network. News articles

referring to the Press Release were published on 5 May 2020 by Jamaica-Gleaner.com, under the caption “Police Federation Wants INDECOM Boss to Resign”, nationwideradiojm.com, under the caption “Police Federation Head calls for INDECOM Boss to “Immediately Step Aside”, and on 6 May 2020 by jamaicatoday.com, under the caption “Police Federation says INDECOM Boss to Step Aside”, and loopjamaica.com, under the caption "Police Federation to seek compensation for cops prosecuted by INDECOM”.

- d. The natural and ordinary meaning of the words “**DISHONEST, UNETHICAL and LACKING IN INTEGRITY**” ascribe to Mr Williams that he is untruthful, corrupt and lacking in integrity in his personal capacity as well as in the discharge of his functions as the Commissioner of INDECOM.
- e. These words ascribed to Mr Williams in the Press Release were disparaging of him personally and professionally, both as an Attorney-at-Law as well as in his capacity as the Commissioner of INDECOM.
- f. The words ascribed to Mr Williams in the Press Release were defamatory of him.
- g. The words ascribed to Mr Williams in the Press Release would cause average right-thinking members of the public to form the view that Mr Williams is untruthful, corrupt and lacking in integrity.

[92] Regrettably, the Court is constrained to find that the Defendants have met neither the evidential burden nor the legal burden, in respect of the defences of fair comment and qualified privilege for the reasons that: -

- a. The Defendants have failed to prove that the comments made are opinions and not assertions of fact on matters of public interest.
- b. The Defendants have failed to prove that the comments made are based on true facts and are honestly made.

- c. The Defendants have failed to prove that the comments made were not actuated by malice.
- d. The Defendants have failed to prove that the statements contained in the Press Release constitute the communication of information, which is believed to be true, to a person who has a material interest in receiving that information.

[93] In order to successfully rely on the defence of fair comment, the Defendants are required to prove that the statements made in the Press Release are comments or opinions and not assertions of fact on matters of public interest; and that the comments are based on true facts and are honestly made. Further, the Defendants are required to prove that the statements made in the Press Release were not actuated by malice.

[94] The authorities make it clear that the onus is on Mr Williams to successfully prove that the Defendants' comments were actuated by malice. The Court finds that Mr Williams has successfully proven that the statements made in relation to the discharge of his functions and that of the persons whom he instructs, in his capacity as the Commissioner of INDECOM, were actuated by malice, in that, they were published with an indirect motive.

[95] The Court finds that Mr Williams has successfully proven malice on the part of the Defendants for the reasons that: -

- a. The defamatory statements about Mr Williams in his professional capacity were published with an indirect motive, that is, other than a duty to publish material of public interest regarding the administration of justice.
- b. Evidence of intrinsic malice can be detected in the words and statements themselves, as the Press Release contains inaccurate representations in relation to the ongoing debate in the public domain regarding the powers of INDECOM.

- c. Evidence of extrinsic malice can be derived from the external circumstances unconnected with the publication itself.

[96] The Court finds that the Defendants have not established the defence of fair comment for the reasons that: -

- a. The statements contained in the Press Release were not honestly made, as they cast defamatory aspersions on Mr Williams in his professional capacity as the Commissioner of INDECOM, though that may not have been their intended effect.
- b. The statements contained in the Press Release ascribed to Mr Williams, base, dishonest or corrupt motives in the discharge of his functions in his capacity as the Commissioner of INDECOM, which goes outside of the parameters prescribed by the authorities in respect of this defence.
- c. The Defendants' comments were not based on a true representation of the facts.
- d. The Defendants' comments were actuated by malice.

[97] In relation to the 3rd Defendant, the Court makes a specific finding that the utterances made by Detective Sergeant Patrae Rowe in the radio interview which he had with Mr Cliff Hughes on Nationwide News Network ascribe to Mr Williams a lack of honesty and integrity in relation to the accuracy of the information which he afforded the members of the public, in his capacity as the Commissioner of INDECOM.

[98] In the result, the Court finds for Mr Williams on the issue of liability.

Assessment of Damages

The approach of the court

[99] The statutory remedies, as outlined in the Act, which are available to a claimant in an action for defamation are Damages, a Declaration and/or a Correction.

[100] Where an award of damages is found to be appropriate, the court must ensure that there is an appropriate and rational relationship between the harm sustained by the claimant and the amount of damages awarded.⁸⁴ The judge may assess damages in a single sum, if the court finds for the claimant as to more than one cause of action.⁸⁵ Importantly, there are mitigation factors that the court can consider when contemplating an award of damages.⁸⁶

[101] Panton P in the Court of Appeal authority of **The Jamaica Observer Ltd v Orville Mattis**,⁸⁷ stated the position thus: -

“17. It takes years to build a good name and reputation. On the other hand, it takes only a few reckless lines in a newspaper to destroy or seriously damage that name or reputation. The damage usually remains for a good while. Section 22 of the Constitution gives a right to free speech, but it does not permit defamation of one’s good character. When such damage has been proven, adequate compensation should follow.”

[102] The aim of an award of damages in defamation proceedings includes: - ⁸⁸

“...the natural injury to his feelings, the natural grief and distress which he may have felt at having been spoken of in defamatory terms, and, if there has been any kind of high-handed, oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering caused by the

⁸⁴ As defamation is a tort, the remoteness of damage ought to be considered by the court as well; the damage complained of as a result of a defamatory statement must not be too remote. The claimant may only recover compensation for those consequences of the defendant’s defamatory statements which were foreseeable.

⁸⁵ See – Section 26 of The Defamation Act, 2013.

⁸⁶ See – Section 25(1) of The Defamation Act, 2013.

⁸⁷ JM 2011 CA 32

⁸⁸ See – **Rantzen v Mirror Group Newspapers Ltd and Others** [1994] QB 670, at page 695.

*defamation and may constitute injury to the [claimant's] pride and self-confidence, these are proper elements to be taken into account.”*⁸⁹

[103] Lord Hoffman in delivering the decision of the Board of the Privy Council, in the authority of **The Gleaner Company Ltd and Dudley Stokes v Eric Abrahams**,⁹⁰ explained that: -

*“In addition, as this case amply illustrates, there are other differences between general damages in personal injury cases and general damages in defamation actions. One is that the damages must be sufficient to demonstrate to the public that the plaintiff's reputation has been vindicated. Particularly if the defendant has not apologised and withdrawn the defamatory allegations, the award must show that they have been publicly proclaimed to have inflicted a serious injury. As Lord Hailsham of St Marylebone LC said in *Broome v Cassel & Co Ltd* [1972] AC 1027, 1071, the plaintiff ‘must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge.’”*

[104] The authorities suggest that there is a wide bracket within which damages in defamatory proceedings may fall. In the authority of **Cassell & Co. Ltd. v Broome**,⁹¹ Lord Reid made it plain that: -

*“Damages for any tort are or ought to be fixed at a sum which will compensate the plaintiff, so far as money can do it, for all the injury which he has suffered. Where the injury is material and has been ascertained it is generally possible to assess damages with some precision. **But that is not so where he has been caused mental distress or where his reputation has been attacked – where to use the traditional phrase he has been held up to hatred, ridicule or contempt. Not only is it impossible to ascertain how far other people's minds have been affected, it is almost impossible to equate the damage to a sum of money. Any one person trying to fix a sum as compensation will probably find in his mind a wide bracket within which any sum could be regarded by him as not unreasonable – and different people will come to different conclusions. So in the end there will probably be a wide gap***

⁸⁹ See – **McCarey v Associated Newspapers Ltd (No. 2)** [1965] 2 KB 86, at 104 per Pearson LJ

⁹⁰ [2003] UKPC 55 (14 July 2003)

⁹¹ [1972] 1 All ER 801 at page 836

between the sum which on an objective view could be regarded as the least and the sum which could be regarded as the most to which the plaintiff is entitled as compensation.

[Emphasis added]

[105] Notably, Sir Thomas Bingham MR made the following pronouncements in the authority of **John v MGN Ltd.**: - ⁹²

“In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff’s personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be.” ⁹³

[106] In the authority of **Emanuel v Lawrence**,⁹⁴ Harriprashad-Charles J (Ag.) (as she then was), identified six factors which are to be considered in awarding damage in defamation proceedings: -

“(1) the conduct of the plaintiff;” ⁹⁵

(2) his position and standing;” ⁹⁶

(3) the nature of the libel;” ⁹⁷

(4) the mode and extent of the publication;” ⁹⁸

⁹² [1997] Q.B. 586 at page 607

⁹³ This case was referenced by the Board of the Privy Council in the authority of **The Gleaner and Dudley Stokes v Eric Abrahams**. The Board stated: *“In the case of any tort, liability to pay damages as compensation for loss or harm is capable of having some deterrent or exemplary effect and this is particularly true of defamation; first, because it is an intentional tort and secondly because the conduct of the defendant is capable of aggravating the damages. It is true that in Broome v Cassel & Co Ltd [1972] AC 1027, 1077 Lord Hailsham of St Marylebone LC said that compensatory and exemplary damages were ‘as incompatible as oil and vinegar’ but most judges have accepted that in many cases the two purposes are inextricably mixed. The monetary value which a society places upon reputation and freedom from unjustified shame and humiliation is bound to be a conventional figure. The higher it is set, the greater the deterrence.”*

⁹⁴ Civil Suit No. 448 of 1995

⁹⁵ This is to the extent that the plaintiff may have contributed to the publication of the defamation or damage to his reputation.

⁹⁶ This also includes the social or professional status of the claimant.

⁹⁷ This includes the extent of the publication, the extent of the circulation of a newspaper or book in which the defamatory matter was published.

⁹⁸ The court may also consider the influence that the particular newspaper, magazine, book or broadcast programme has on the minds of the reasonable reader or viewer.

- (5) *injury to the plaintiff(s) feeling, including aggravating factors;*^{99 100} and
 (6) *mitigating factors*".¹⁰¹

[107] In this regard, section 25(1) of the Act states: -

"25.- (1) Evidence is admissible on behalf of the defendant, in mitigation of damages for the publication of defamatory matter, that -

- (a) the claimant has suffered no harm and is unlikely to suffer harm;*
- (b) the defendant has made an apology to the claimant about the publication of the defamatory matter pursuant to section 14;*
- (c) the defendant has published a correction of the defamatory matter;*
- (d) the claimant has already recovered damages for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter;*
- (e) the claimant has recovered damages, or has brought actions for damages, for defamation in respect of the publication of the defamatory matter to the same effect as the defamatory matter on which the action is founded, or has received or agreed to receive compensation in respect of the publication; or*
- (f) the claimant has received or agreed to receive compensation for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter."*

[108] The aim of an award of damages in defamation proceedings includes: -¹⁰²

⁹⁹ Notably, at common law, if the defendant pursues a plea of justification or truth and during the course of the trial, this defence fails, then the judge ought to take this into account, when assessing damages. The judge also ought to consider whether the defamatory matter was published deliberately and wilfully, or merely by mistake or carelessness. Additionally, if the trial judge makes a finding that there was express malice on the defendant's part, then this is also a factor that can be taken into consideration by the trial judge when assessing damages.

¹⁰⁰ Importantly, where the plaintiff can show actual damage to his reputation, this is a factor which will also be taken into consideration by the court.

¹⁰¹ An example of a mitigating factor taken into consideration is whether the defendant made an apology to the claimant.

¹⁰² See – **Rantzen v Mirror Group Newspapers Ltd and Others** [1994] QB 670, at page 695.

*“...the natural injury to his feelings, the natural grief and distress which he may have felt at having been spoken of in defamatory terms, and, if there has been any kind of high-handed, oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering caused by the defamation and may constitute injury to the [claimant’s] pride and self-confidence, these are proper elements to be taken into account.”*¹⁰³

[109] The authority of **Collin Innis v Kingsley Thomas**¹⁰⁴, outlines the following factors in assessing damages that ought to be considered by the court: -

- a) *The gravity of the libel.*
- b) *The standing of the claimant.*
- c) *The scope of the publication; and*
- d) *The conduct of the defence and the defendant in the course of the litigation and at trial.*

Aggravated Damages

[110] In defamation proceedings, an award of aggravated damages may be based on the defendant’s malice, persistence in an ill-founded plea of truth, failure to make an apology, among other factors.

[111] Lord Devlin in **Rookes v Barnard** outlined the parameters for an award of aggravated damages. At page 1221, he stated: -

“It is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff’s proper feelings of dignity and pride. These are

¹⁰³ See – **McCarey v Associated Newspapers Ltd (No. 2)** [1965] 2 KB 86, at 104, per Pearson LJ

¹⁰⁴ Supreme Court of Jamaica, unreported, Claim No. CL 2003 I-053 (judgment delivered on April 20, 2005)

matters which the jury can take into account in assessing the appropriate compensation.”

Exemplary Damages

[112] Exemplary Damages are typically only awarded in exceptional circumstances as the purpose of exemplary damages is to “punish and deter”. These exceptional circumstances ought to fall under either of the three categories as stipulated by Lord Devlin in the *locus classicus* authority of **Rookes v Barnard**.¹⁰⁵ These categories are: -

- i. Where there has been oppressive, arbitrary or unconstitutional action by the servants of the Government.
- ii. Where the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the claimant.
- iii. Cases where the statute expressly provides for exemplary damages.

[113] Exemplary damages must be specifically pleaded, and the pleadings must demonstrate on which of the categories the claim for exemplary damages is based. P Morrison JA in the authority of **Attorney General for Jamaica, Superintendent Clinton Laing and Corporal Horace Fitzgerald v Roderick Cunningham**¹⁰⁶ explores a plethora of authorities in this regard. Of note, at paragraph [20], Morrison JA (as he then was) is quoted as follows: -

“[20] Lord Devlin also stated three considerations to be borne in mind when awards for exemplary damages are being considered¹⁰⁷:

¹⁰⁵ [1964] A.C. 1129

¹⁰⁶ [2020] JMCA Civ 34

¹⁰⁷ Supra, at page 411

“...First, the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. The anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence. Secondly, the power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty ... can also be used against liberty. Some of the awards that juries have made in the past seem to me to amount to a greater punishment than would be likely to be incurred if the conduct were criminal; and moreover, a punishment imposed without the safeguard which the criminal law gives to an offender. I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with restraint... Thirdly, the means of the parties, irrelevant in the assessment of exemplary damages. Everything which aggravates or mitigates the defendant’s conduct is relevant.”

...

[22] ... In the course of a detailed review of the entire law on the subject, Lord Hailsham LC specifically adopted¹⁰⁸ Lord Devlin’s emphasis on the consideration that there should be no award for exemplary damages unless “[the jury] are satisfied that the punitive or exemplary element is not sufficiently met with the figure which they have arrived at for the plaintiff’s solatium...”

...

[25] Turning now to cases in this jurisdiction, I should mention first, without dwelling on it, **Douglas v Bowen**¹⁰⁹, in which this court accepted and applied Lord Devlin’s categorization of exemplary damages in **Rookes v Barnard**.

...

...

¹⁰⁸ [1972] 1 All ER 801, at page 833

¹⁰⁹ (1974) 22 WIR 333

[36] *These cases all recognize and proclaim the court's power to award exemplary damages in deserving cases, as a valuable means of punishing and deterring outrageous and contumelious disregard by servants or agents of the state of the rights of persons in Jamaica. However, following the steer given by Lord Devlin in **Rookes v Barnard**, the cases all say that **exemplary damages should only be awarded in cases in which the court considers the level of compensation afforded by an award of basic and aggravated damages to be insufficient in the circumstances of the particular case to punish the defendant and deter others.***¹¹⁰ *And further, the cases all urge moderation in the amounts awarded for exemplary damages.*

[Emphasis added]

[114] The Court accepts the submission of Mrs Small Davis that any award of Damages should be sufficient to vindicate Mr Williams' reputation, having regard to the gravity of the defamation, the range of publication and the extent to which the Defendants have persisted with the charge.

[115] In determining the quantum of Damages in the present instance, the Court has regard to the following: -

- a. Mr Williams' high standing in society, having occupied the important public position of the Commissioner of INDECOM and being a senior Attorney-at-Law.
- b. The words contained in the Press Release, which were caused to be written and published by the Defendants, questioned Mr Williams' character and integrity.
- c. The continuing, irreparable damage to Mr Williams' reputation.
- d. The wide circulation of the Press Release.

¹¹⁰ In addition to those cited in this judgment, examples of recognition of this principle by this court may also be found in, among others, **The Attorney General and another v Gravesandy** (1982) 19 JLR 501, per White JA at page 504; and **John Crossfield v The Attorney General of Jamaica and another** [2016] JMCA Civ 40, per Morrison P at paras [48]- [50].

- e. The Defendants' refusal to retract their statements and/or apologize for them.
- f. The disregard with which the Defendants have treated the proceedings, including, failing to file any witness statements, in breach of Orders of the court and failing to offer any legitimate bases for this failure.

[116] In all the circumstances and having regard to the principles of law to which the Court has referred in this Judgment, the Court finds that an award of Damages in the sum of Fifty Million Dollars (\$50,000,000.00), is appropriate.

[117] The Court makes no award in respect of Exemplary and/or Aggravated Damages.

[118] The Court makes no award of interest.

DISPOSITION

[119] It is hereby ordered as follows: -

1. Judgment for the Claimant against the 1st, 2nd and 3rd Defendants on the issue of liability.
2. General Damages are assessed and awarded to the Claimant against the 1st, 2nd and 3rd Defendants in the sum of Fifty Million Dollars (\$50,000,000.00).
3. The Court makes no award in respect of Exemplary and/or Aggravated Damages.
4. Costs are awarded to the Claimant against the 1st, 2nd and 3rd Defendants and are to be taxed if not sooner agreed.
5. Messrs. Livingston, Alexander & Levy are to prepare, file and serve these Orders.