



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION

CLAIM NO. HCV 03612 OF 2006

BETWEEN	EASTON DOUGLAS	1 ST CLAIMANT
A NO	DR. CONRAD DOUGLAS	2 ND CLAIMANT
AND	ENVIRONMENT SCIENCE AND TECHNOLOGY LTO.	3 RD CLAIMANT
AND	THE JAMAICA OBSERVER LTD.	1 ST DEFENDANT
A NO	JOHN MAXWELL	2 ND DEFENDANT

Lord Anthony Gifford, Q.C. and Miss Carol Davis instructed by Carol Davis and Company for the Claimants.

Charles Piper and Miss K. Tomlinson for 1st Defendant

Heard: December 13-15, 2010. February 7 & 11, 2011 and May 18, 2012

**DEFAMATORY IMPUTATIONS BY PUBLISHER – MEANING OF WORDS AND
ARTICLE PUBLISHED – IMPLICATIONS INNUENDO PHOTOGRAPHS –
APOLOGY- DEFENCE- QUALIFIED PRIVILEGE- FAIR COMMENT- DAMAGES
– PRINCIPLE OF COMPENSATION TO AN INDIVIDUAL CLAIMANT – A
COMPANY**

Daye, J.

1. The Jamaica Observer Ltd. published on July 9, 2006 an article entitled "By Order, Management" in the Sunday Observer, a national newspaper.
2. The author of the article was Mr. John Maxwell a veteran and sometimes controversial journalist in the print and electronic media. He is now deceased. He died the week prior to the commencement of the trial of this action. One of Mr. Maxwell's interests and passion is the protection of the environment of the island of Jamaica for the ordinary people.

3. This article contained in Exhibit 3 was published on page 3 of the Sunday Observer under a current affairs section described as "The Agenda" to which Mr. John Maxwell was a regular contributor up to the time of publication.

4. The article which occupied the full page 3 and the section "The Agenda" depicts a large photograph in colour, about one-third and in the center of the page, of a former Minister of Government Mr. Easton Douglas. At the bottom of this photograph is the caption:

"DOUGLASformer Minister of the Environment, and his brother are partners in ESTECH"

5. The article consists of three sections: The first without any caption, the second captioned "By Order, Management 1," the third captioned, "By Order Management II."

6. Under paragraphs 15-18 of the last named caption Mr. John Maxwell writes the following:

"Environmental Impact Assessments are, in the real world, examinations made on behalf of the public but paid for by developers. They are supposed to allow a national discussion of whether any development should be allowed and if so, how it should be regulated. It is clear that the NRCA exists solely to rubber stamp EIAs submitted in support of the development, thus eliminating the public interest from the start. Most of these EIA's are done by ESTECH, in which a former Minister of Environment, Easton Douglas and his brother are partners".

7. He further writes:-

"The character of EIAs may be gathered from the following quotation:

Previous EIAs reviewed have been notoriously negligent in the review of impact associated with drainage, particularly impact resulting from development, changes that will be imposed on previously undeveloped land and impacts associated with building-layout in flood prone areas."

"I don't have space for the rest of the quotation but basically the NRCA is telling ESTECH: "Look chaps, give us a plausible reason for approving this without further question, ok?"

8. This quotation is from section 3 captioned, "Drainage and Sedimentation" of Addendum to the Environment Impact Assessment for Grand Palladium Lady Hamilton Resort and Spa at Point, Hanover, prepared by Environment Science Technology Limited (ESTECH) in February 2006. Dr. Conrad Douglas, the brother of Easton Douglas is the principal of ESTECH.
9. The quotation was one of several comments raised by National Environment Protection Authority (NEPA) about the Grand Palladium Hotel development for which it sought answer from ESTECH. ESTECH responded to this serious concern about apparent failure in professional standard of work about its EIA.

ESTECH's answer which Mr. Maxwell omitted is:

"the northern portion of the site has three areas of natural drainage that effectively drains the site in the sea. This drainage will be preserved in the Resort and has been incorporated into the new design (See Figures 1-13 of submitted EIA) changes to drainage due to the construction of the structures will be negligible since the buildings are being spaced with natural vegetation and landscaped areas between. Runoff, where it occurs, will be channeled to the (atural drains which will be imposed during construction".

10. The article expressly refers to Mr. Easton Douglas as a former Minister of Environment and his brother as partners in ESTECH two times. In the body of caption two, it associates all three (3) claimants with NRCA and NEPA, two government regulatory bodies whose duties and function regarding the environment the author describes adversely. Mr. Maxwell in the other paragraph describes other statutory bodies and government agencies in relation to their duties as stewards of the environment.

Mr. Easton Douglas, Dr. Conrad Douglas and ESTECH the first, second and third claimants complained that the words and photograph published in this article made defamatory imputations against each of them respectively.

11. The foundation of the defamatory imputation or the sting of the libel the claimants assert lies in the imputation that Mr. Easton Douglas, during his tenure as Minister of the Environment, was a partner in a private company with Dr. Conrad Douglas his brother, which was engaged in the business of the environment and they disregarded and manipulated the rules and regulations for the protection of the environment of Jamaica. They contend that the Sunday Observer published a serious misstatement of fact against them respectively. They say it caused them individually and separately pain, distress, embarrassment and loss and damage.

MISSTATEMENT OF FACT

12. It was not true that Mr. Easton Douglas a former Minister of Environment was a partner in the firm ESTECH with his brother Dr. Conrad Douglas.

Mr. John Maxwell wrote this statement in an article captioned "Stealing from our children" from as long ago as January 14, 2001 which the Sunday Observer had published. He was then criticizing ESTECH's response to NRCA of the proposed development of Long Mountain Country Club, St. Andrew, which was a housing development. His view was that such a housing development would destroy the natural environment: water, hills, plant and animal species of the area.

13. Dr. Conrad Douglas pointed out this error in a reply to Mr. John Maxwell's article which was published by The Daily Observer on February 1, 2001. Further, Dr. Douglas pointed out that certain assertions about the document "Questions and Response" concerning the effect of Long Mountain Country Club development was potentially defamatory to the technical staff of NRCA.

- 14.. Notwithstanding Dr. Conrad Douglas' reply Mr. John Maxwell did repeat this misstatement on the 6th July, 2006 and the Sunday Observer repeated the publication of this misstatement yet again.

Apology

15. The Claimants through their attorney demanded on July 14, 2006 anllpo1ogy for this misstatement and the defamatory imputation of the article.

The Jamaica Observer Ltd responded on the 30th July, 2006. They published in "The Agenda" section of the Sunday Observer a similar photograph in colour of Mr. Easton Douglas which was smaller than the size of the original photograph. It was published in the center of page and had the caption "CORRECTION". Then they published the material words:-

"..... we recognize that Mr. Easton Douglas is not a partner in ESTECH and we apologize for our error".

The Claimants were not satisfied that this was a full apology as the newspaper did not accept that the article bore any defamatory imputation to them.

16. Under section 6(3) (a) of the Defamation Act [1963] it provides that if a publisher published words innocently against a person i.e. did not knowingly intend to publish the word or the words are not on their face defamatory the publisher can offer amends. This mean the publisher can publish a suitable correction of the words and a sufficient apology to the party aggrieved in respect of those words. In the instant action the only amends the newspaper gave was a correction but no apology. The reason the newspaper stopped short of an apology is that they contended the words which are in the article did not bear any defamatory meaning to any of the claimants notwithstanding the misstatement of fact. Section 6 (5) (b) the said Act requires the publisher to establish that it has used reasonable care in the publication in order to benefit from an offer to make amends.

17. Under section 11 of the Libel and Slander Act a defendant may plead an apology was offered in mitigation of damages.

Defamatory Meaning/Imputation Pleaded

18. Mr. Easton Douglas the 1st Claimant, pleaded the words by themselves and together with his photograph bear the defamatory meaning that:

1. He corruptly used his status as a former Minister of the Environment and Housing to control or influence a system of granting development approvals from which he benefited financially as a partner in the Third Claimant.
2. He was a partner in a business which acted illegally in its handling of Environmental Impact Assessments (EIAs)
3. He was a partner in a business which carried out EIA's in a negligent and unprofessional manner.
4. He treated the environment of Jamaica and the interest of the Jamaican people therein with contempt. (See Particulars of Claim)

19. Dr. Conrad Douglas pleaded the words of this article bear the following defamatory imputation towards him.

1. He was carrying out EIAs illegally and in breach of relevant regulations.
2. He was negligent and unprofessional in preparing EIAs.
3. He corruptly produced EIAs which were biased in favour of developers.
4. He treated the environment of Jamaica and the interest of the Jamaican people with contempt (See Particulars of Claim).

ESTECH pleaded the article defamed them by imputing that:

1. They prepared EIAs illegally and in breach of the rules.
2. They were negligent and unprofessional in preparing EIAs.

3. They corruptly produced EIAs biased towards the developers.
 4. They treated the environment of Jamaica and the people's interest in the environment with contempt.
20. The Jamaica Observer Ltd. admits it used the words in the article complained about but it contended the words were a criticism of the statutory organization and executive agencies which were not vigilant in exercising their duty to protect and preserve the natural resources and environment. Thus they deny each and every defamatory imputation asserted by the claimants. The words they contend are true or substantially true. (See Particulars of Defence)

The test of meaning of words/single meaning rule

21. It is my duty as a matter of law to give the article the natural and ordinary meaning it would have conveyed to the ordinary reader of the Sunday Observer reading the article once. Lord Nicholls of Burkenhead explained in the Privy Council decision *Bannick v. Morris and Ors.*[2003] 1AC 300 at pages 306-307, para 9 that this test was conveniently summarized by Sir Thomas Bingham MR in *Skuse v. Granada Television Ltd.*[1996] EMLR 278, 285-287.

Lord Nicholls then identified the ordinary reasonable reader had the following characteristics.

"The ordinary reasonable reader is not naive, he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other non-defamatory meanings are available. The Court must read the article as a whole and eschew over elaborate analysis and, also, too literal an approach. The intention of the publisher is not relevant."

Claimant's Submission on Meaning

- 22.. Lord Gifford Q.C. submits with reference to Gatley on Libel and Slander, 11¹_h edition paragraphs 3.15, 3.16 and 3.17 that:

"The rule in defamation is that words have only one single "right" meaning."

"The natural and ordinary meaning may also include implications or inferences. A defamatory imputation may be conveyed by direct words or by suggestion and the latter may be more mischievous."

"It is the imputation contained in the words which had to be justified, not the literal truth of the words, nor some other similar charges not contained in the words".

23. The essence of Lord Gifford's Q.C. submission is that each of the three (3) Claimants is relying on defamatory imputation by implication. He concludes that this article 'By Order, Management' bears separately the defamatory meaning alleged in the respective particulars of claim.

First Defendant's Submission on Meaning

24. Mr. Piper submitted the test or the principle that a Court ought to apply whether words are capable of defamatory meaning was enunciated by Lord Reid in the House of Lords in **Rubber Improvement Ltd. v. Daily Telegraph and Associated Newspaper Ltd.** [1964] A.C. 234 at 258 para.

3:

"What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But the expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves where the plaintiff is called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them and that is also regarded as part of their natural and ordinary meaning".

25. Lord Morris of Borth-Y-Gest addressed the issue whether an innuendo was pleaded on the facts of the case. He said that a plaintiff may plead an innuendo. This means, he says, that the plaintiff may establish that "because there are extrinsic facts which were known to the readers of the

words, such readers would be reasonably induced to understand the words in a defamatory sense which went beyond or which altered their natural and ordinary meaning, and which would be regarded as secondary or an extended meaning. (ibid. Page 264, para. 2).

He went on further to explain the nature of an innuendo. He said the following:-

"A defamatory meaning which derives no support from extrinsic facts but which is said to be implied from the words which are used is not a true innuendo".

He found on the facts the plaintiff did not really allege that the words were used in a defamatory sense other than in their ordinary meaning.

26. The observation of the House of Lords about innuendo is akin to Mr. Piper's submission. He noted, after reciting the Claimants' Particulars of Claim that they do not contain any specific plea of innuendo. He further submitted the pleadings to not plead any extrinsic facts on which they rely to support an innuendo and the claimant has not called any witnesses to state the meaning in which they understood the words.
27. Mr. Piper contended that the meaning the claimants urge regarding the words of the article could not have been borne without special knowledge. In other words, his view is that an ordinary, reasonable reader would not understand the article to convey the meaning the claimants claim without special knowledge.
28. The Court must then ensure that as it considers what is the natural and ordinary meaning of this article that it does not lose sight of the distinction between defamatory imputation by implication and an innuendo.
29. Mr. Piper also submitted that the article does not as a whole or in any part of it impute to the Claimants negligence and any unprofessional conduct. In **Drummond-Jackson v. British Medical Association and Ors.** [1970] 1 All ER 1094 at pages 1001, 1103 and 1106 the English Court of Appeal had to consider on an application to strike out claim for defamation whether the

article published in the British Medical Journal about a technique of anesthesia that the plaintiff used in his practice of dentistry was capable of defamatory meaning.

30. By a majority, Denning MR, dissenting, the Court found the words in the article defamatory. Sir George Willman approached the matter by applying the test 'would the words tend to lower the plaintiff in the estimation of right thinking members of society generally?' He also said it was important for the Court to consider the person or class of persons whose reaction to the publication should be the test of the wrongful character of the words used. The article in question was dealing with technical and scientific information relating to dentistry and the public. The judge found the article which reported the technique was dangerous to health and life of patients and not based on prior investigation was of defamatory meaning. As the issue involved the practice of a profession of dentistry Lord Pearson referred to the principle that:

"Words may be defamatory of a trader or businessman or professional man, although they do not impute any moral fault or defect of personal character. They may be defamatory to him if they impute lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of trade or business or professional activity".

31. Dr. Conrad Douglas and ESTECH allege the article would convey the meaning to a reasonable reader that they did not perform their job and business with skill, capacity and judgment. Mr. Piper rejects the article bears any such meanings without special knowledge. Equally, Mr. Easton Douglas alleges that the article means he did not exercise care, skill and judgment in his job as a Minister of Government.
32. Mr. Piper appears to be demanding that the claimants prove an innuendo when they did not plea this as part of their case. An innuendo like a defamatory imputation by implication is based on what the ordinary

reasonable reader imply or infer from the words. The first is based on special knowledge the ordinary reasonable reader possesses while second is based on the general knowledge the ordinary reasonable reader possesses.

33: Mr. Piper elicited in his cross-examination of both Mr. Easton Douglas and Dr. Conrad Douglas that the first part of the article "By Order, Management" which is not captioned, which consisted of twelve (12) paragraphs and the second part which is captioned "By Order, Management 1" which consists of 9 paragraphs does not expressly refer to either of them.

34. Then he took each claimant through the several paragraphs of this part "By Order, Management 1" whereupon they agreed none of the paragraphs expressly referred to them. They agree it refers to criticism of some statutory organization and executive agencies. But they claim the article on a whole linked them personally with these bodies, in a manner that is untrue, misleading and defamatory to them.

Both Mr. Easton Douglas and Dr. Conrad Douglas agree that it is only paragraph 15 of 21 paragraphs of the part of the article "By Order Management 1" that refers to them expressly.

35. This line of cross-examination by Mr. Piper was clinical and quantitative. The effect is, in my view, to show that while the claimants are contending the words or article impute defamatory meaning to them it did not expressly do so and therefore could not impliedly do so. This is not an entirely correct position. The qualitative effect of the article is what is relevant.

36. They relied on the tone of the article, the context, the misstatement of fact about their relationship to ESTECH and the manner Mr. Easton Douglas,

Photograph

37'. In **Charleston and Anor. (Appellants) v. Newsgroup Newspaper Limited and Anor. (Respondent) [1995] 2 AC 65** the claimant complained that the

newspaper publication of an article with a headline and photos was defamatory to them even though the accompanying text may neutralize the potential defamatory headline and photo. Lord Nichols held the context of the article and the layout of the photo and headline will determine if the article is defamatory. On the facts of the case the Court found the accompanying text was effective to cure the defamatory imputation of the headline and photo.

In this action Mr. Easton Douglas and Dr. Conrad Douglas claim that the large publication of his photograph in a column in the centre of the article with the headline "By Order, Management" and the caption at the bottom of the paragraph. "Douglas.....former Minister of Environment, and his brother are partners in ESTECH" must all be considered in deciding what is the meaning of the words and the article.

38. Section 2 of the interpretation clause of the Defamation Act, 1963 provides that:

"Words shall be construed as including a reference to pictures, visual images, gestures and other methods of signifying meaning".

Hence statute allows one to take into account photographs when considering whether the words or an article has a defamatory meaning. Even without this specific provision of the Defamation Act, the ordinary reasonable reader in Jamaica of the Sunday Observer would be familiar with the adage "one picture speaks a thousand words".

Mr. Easton Douglas in cross-examination testifies of the harmful effect on him of the size, colour, caption and headline associated with his photograph in the middle of the text of the article. He testify that even though the photograph is a true photograph of him and the caption beneath it that he was a former Minister of Government is true, he found it "offensive" and "devastating" because:

"the manner in which my photograph is embossed in vivid colour in an article that goes on to speak to something that I am not"

And

".....the photograph linked with the third part of the article completely is offensive."

Dr. Conrad Douglas testifies that the photograph in the paper in the article was offensive because:

"the manner in which it was displayed and the captioned below it'.

He answered Mr. Piper in cross-examination that the captioned words below photograph:

"and his brother are partners in ESTECH" was offensive and incorrect"

39. The claimants' contention about the photograph, caption, headlines and article is stronger than that of the claimants in **Charleston** case (supra). In **Charleston** case the text was separate from the photograph and caption. In addition, the text presented a different position from the headline and photograph. The headline, photograph of Mr. Easton Douglas in the centre of page of the Sunday Observer, with caption "DouglasFormer Minister of the Environment and his brother are partners in ESTECH" which is not true and the accompanying text, particularly the part By Order, Management 11" is capable of conveying the defamatory meanings alleged to the ordinary reasonable reader of the Sunday Observer. It had the effect of naming and shaming the former Minister of Environment, his brother Mr. Conrad Douglas and his company about abuse of the environment which could not be fairly attributed to them.

APPLICATION OF THE LAW

40" I am mindful that Mr. Piper argued consistently that the article does not bear any defamatory mean. One way Mr. Piper seek to support the position of

the defendant newspaper was to call evidence that the article is capable of another or different innocent meaning than what the claimants allege.

Miss Diana McCaulay an environmental advocate testified for the defendant newspaper that the article bore the meaning below:

"12. I generally read Mr. John Maxwell's column and I would usually read matters concerning the environment. I have had occasions because of these proceedings, to review Mr. Maxwell's article published in Sunday Observer of July 9, 2006. Broadly the concerns he raises about conflicts of interest to be found in the EIA process is legitimately a matter with which the public is concerned because it strike at the heart of objectivity of these important studies....." (para. 12 of witness statement).

She went on to express the opinion that:

"15to identify a real or perceived conflict of interest in carrying out an EIA is not the same thing as saying there is any impropriety, negligence, illegality or corruption..."

and

"8.....there may be insufficient arm length between the EIA Consultant and the Developer, who may or may not be a Government Agency. An Example of this is where a Minister of Environment's brother is also an Environmental Impact Consultant."

41. This aspect of the evidence relates to an aspect of the single meaning rule which is that an article may have different meaning to different reader. But in the end it is the meaning it conveys to the ordinary, reasonable reader of the newspaper that must prevail. So it does not follow if the article is capable of two or more meanings one defamatory and one non-defamatory it cannot be libellous.

Single Meaning Rule

Lord Nicholls restated the test that should be applied to determine if the meaning of words are defamatory. He said as follows:

"The law adopts a single standard for whether a newspaper article is defamatory... the ordinary reader of that newspaper".

The second meaning of an article, if possible, may be relevant to the defence of qualified privilege which a defendant newspaper many times raise where they publish an article about important public concern. The Jamaica Observer Ltd. has pleaded qualified privilege.

Lord Nicholls addressed this aspect of the single meaning rule in **Bonnick v. Morris** (supra) where he discussed the application of **Reynold's** privilege.

42. He asked the question whether the law should take into account that different readers may form different views on the meaning of the words of an article when applying the objective standard of responsible journalism or apply the single meaning attributed to the offending words, regardless of how reasonable it would be for a journalist or editor to read the words in a non-defamatory sense (p. 21 *ibid*)

His answer was that:

"If the words are ambiguous to an extent that they may really convey a different meaning to an ordinary reasonable reader, a Court may properly take this other meaning into account when considering whether the **Reynolds** privilege is available as a defence"

JUDGE ACTING AS JURY

43. I will therefore consider Miss Diana McCaulay's evidence in light of this proposition. As to whether the article bears a defamatory or non-

defamatory meaning I take into account the identities of the claimants against the tone and background of the entire article.

44. Taking into account that Mr. Easton Douglas was:-

- (a) A Minister of Government of different Ministries between 1989 and 2000 but they included responsibilities for the environment.
- (b) That he had responsibilities for the statutory body, Natural Resources Conservation and the Executive Agency, National Environment Planning Agency.
- (c) That the Minister of Environment is required to give directions of general policy relating to the management, development and care of the environment and national parks, protecting area at public recreational facilities and natural resources.
- (d) He had a long career in the public service relating to land, town planning and environment.
- (e) He had senior executive responsibility such as permanent secretary in the public service that required implementing and complying with the law and regulations on the environment.
- (f) He was not a partner in ESTECH which was brought to the attention of the defendant newspaper five (5) years before the article was published
- (g) His photograph was positioned in the article in the size and colour and caption as described under paragraph dealing with photograph.
- (h) The text of the article asserts breaches and complicity of various breaches of statutory bodies for which he had portfolio responsibility.
- (i) The Minister took an oath of office that in all things he would be true and faithful and execute his duties impartially.

4ö. It is my view that the article would convey to the ordinary reasonable reader the meanings alleged. It is defamatory by implication. There is just one reservation I have and that is the claim that the former Minister acted "corruptly" and "illegally" is an allegation in the strongest terms. To say the Minister acted improperly would be sufficient to lower him in the esteem of right thinking man.

Taking into account that the 2"d claimant Dr. Conrad Douglas

- (a) Has graduate and post graduate degree and qualifications including a doctorate degree in natural science from an internationally recognized institution, University of the West Indies.
- (b) Is an associate professor in Chemistry of the University of the West Indies.
- (c) Published several articles relating to the environment particularly about the bauxite and aluminum industry.
- (d) Served as a director some twenty (20) years as a member of national organizations such as Scientific Research Council and the National Commission on Science.
- (e) Has been a member of international organizations concerned with the environment and industrial development such as United Nations Environment Program (UNEP) committee from the 1980s.
- (f) Was employed to a multi-national bauxite company in Jamaica to develop its scientific process in the 1970s.
- (g) Was employed to the United Nations Industrial Development Organization (UNIDO) as Project Manager to develop the Scientific and Technical capacity of the Jamaica Bauxite Institute in 1980's.
- (h) Is a consultant locally, regionally and internationally on scientific and environmental development of the bauxite aluminum industry.

- (i) Is the principal shareholder and director of the private company ESTECH, the 3rd named claimant which provides technical, scientific services on the environment.
 - (j) Has responsibility for preparing Environmental Impact Assessment Report on project and development in the island to ensure that they are environmentally sound and sustainable.
 - (k) Environmental Impact Assessment Report is an international system and method developed in 1974 to ensure international standards for development and the environment.
 - (l) Is principal of his companies Conrad Douglas and Associate from 1989 and ESETECH formed in 1996, has prepared several EIA's for NEPA.
 - (m) Dr. Conrad Douglas and Mr. Easton Douglas a former Minister of Environment are brothers.
 - (n) That NEPA and NRCA the body that the law entrust to obtain EIA's were at some time under the portfolio Minister Easton Douglas.
 - (o) Minister Easton Douglas was not a shareholder or director of ESTECH.
 - (p) ESTECH did not do most of the EIA's for the development named in the article "By Order, Management"
 - (q) Dr. Conrad Douglas wrote from 2001 to the 2nd Defendant Jamaica Observer Ltd. advising that Minister Douglas was not a partner in ESTECH.
46. It is my view that the article would convey to ordinary reasonable reader the meanings he alleged in his Particulars of Claim. The article is therefore defamatory by implication to Dr. Conrad Douglas particularly of his professional competence.
47. ESTECH is a subsidiary of the parent company Conrad Douglas and Associates. It specializes in preparing technical and scientific report on the projects and developments that affect the environment. Any characterization of the work and service of this company that is not true and fair does affect its competence and professional capacity. The association of this private

company with a former Minister of Government of environment and the association that it produces EIAs that NEPA "Rubber stamp" would or could convey to the ordinary, reasonable reader the defamatory meanings pleaded.

QUALIFIED PRIVILEGE

48. In view of the fact that the Court finds the article "By Order Management" dated July 9, 2006 bears a defamatory meaning by implication to the 1st , 2nd and 3rd Claimants respectively and it is based on misstatements of fact, the issue now arises whether the 2nd Defendant newspaper The Jamaica Observer Limited can claim or rely on the defence of qualified privilege.

The 2nd Defendant pleaded in paragraph 3 of their Defence dated 21st November 2006 that:

"the publication of the said article was without malice, of an occasion of privilege."

49. The 2nd Defendant newspaper, The Jamaica Observer Limited also pleaded statutory qualified privilege under Section 9 of the Defamation Act. They are contending they made a fair and accurate report of publication of a document or report issued by and on behalf of the government by a government body. The principles of the common law of qualified privilege are the same principles that are applicable to the statutory qualified privilege.

50. The present authority defining the common law on qualified privilege is the House of Lords decision **Reynolds v. Time Newspaper Ltd. & Ors.** [2001] 2 AC 127. The brief facts are that the claimant had resigned as Prime Minister of the coalition government of Ireland in 1996 and leader of his party due to inaccurate information he gave to the Parliament about the Attorney General handling of extradition request and his recommendation that his former Attorney General be appointed as President of the High Court. The Prime Minister brought a suit against The Times Ltd, the publisher of "The Sunday Times" for an article it published in the British Mainland Sunday

edition. The article reported and commented on the events surrounding the resignation of the Prime Minister and the collapse of his coalition government.

51. Former Prime Minister Reynolds complained the article defamed him in that it would convey the meaning that he had misled the Parliament by withholding information he had about the recommendation of his candidate to the post President of the High Court. He also claimed the article meant he had misinformed the coalition members of government about the information and he was therefore deceptive. He pleaded the article failed to report his explanation that he gave in Parliament about when he obtained the information about the Attorney General that he was recommending.
52. The Times Newspaper pleaded a number of defences including qualified privilege. It contended the Newspaper publication on political discussion which was information and opinion about government and matters of public concern, ought to be privileged in the absence of express or implied malice so long as it was published bonafide. In other words it was seeking a special qualified privilege for publication at large due to its subject matter i.e matters of public concern.
53. Lord Nicholls who delivered the judgment of the House of Lords observed that the issue under consideration was to balance the conflicting interest of the public in freedom of expression which the media exercised and the protection of the individual's right to reputation. He said the Court had to determine what restriction must be placed on the right to reputation in the public interest where information is disseminated about political or matters of public concern.

PRIVILEGE OCCASION -THE DUTY OF JUDGE

54. It is the duty of Judge to determine whether the occasion upon which the defendant publishes the defamatory matter gives rise to privilege. The House of Lords was clear that there was no blanket or "generic" privilege for

publication of defamatory words by the media based on the subject matter i.e political discussion. Neither did they accept that the burden of proof was on the claimant, i.e to establish the defamatory falsehood was published by defendant with knowledge of its falsehood or with reckless disregard whether it is false or not. The rule which established these requirements is the U.S.A. Supreme Court's decision in **New York Times Co. v. Sullivan** 376 US 245.

THE TEST OF PRIVILEGE OCCASION

55. Lord Nicholls accepted and applied Lord Atkinson's statement of the test of privilege occasion in **Adam v. Ward** [1971] AC 309, 344 that:

"A privileged occasion isan occasion where the person who makes a publication has an interest or duty, legal, social or moral, to make to the person 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."

He described this test as the duty-interest test. He preferred to describe this test alternatively as the right of the public to know the particular information or the "right to know" test. (**Reynolds**, ibid pages 194 & 195).

This test the Court signaled is based on whether the publication is in the public interest. This it says depends upon the circumstances which include the nature of the subject matter published, its source, its status and the social condition at the time.

Lord Nicholls then established a list of guidelines which was not exhaustive, which must be taken into account (ibid page 205, paras a-d)

RESPONSIBLE JOURNALISM

56. The guidelines incorporate the objective standard of responsible journalism which must be met in order for defendant company to obtain the benefit of qualified privilege. Lord Nicholls expressed this thus:

'The common law does not seek to set a higher standard than that of reasonable journalism, a standard the media themselves espouse. An incursion into press freedom which goes no further than this would not seem to be excessive or disproportionate. The investigative journalist has adequate protection":

57. As Judge of Law I find the ordinary resident or citizen of Jamaica is more conscious of matters concerning the environment and development. The fisherman is aware of pollution of the water by industrial waste and land-based material on his livelihood.

So too is the farmer aware that bad farming practice affects the land he plants on and his production. Coastal sea town residents feel the effect of beach erosion due to the destruction of the coral reef by discharge of sewage in the sea and on their employment in the hotel sector. Urban resident also realize that the clearing of large tracks of lands can destroy the eco-system that contribute to global warming and climate change that sometimes result in flooding, hurricane that damage the physical resources.

58. Jamaica is a signatory to many international conventions and treaties and protocol on the environment, viz, protection of forest, marine waters, wetland, and bio-diversity. Jamaica is also a participant in United Nations Framework Convention on Climate Change that is seeking to reform the Kyoto Protocol the last binding treaty on the environment. Therefore the publication of statements on the environment by the Sunday Observer is of public interest. There is a duty to communicate about this subject to the ordinary Jamaican reader who has an interest to receive it. The ordinary Jamaican reader has a right to know this particular information from the newspaper. It means that the occasion of the publication of the article "By Order, Management" meet the qualified privilege test.

APPLICATION OF LAW- JUDGE ACTING AS JURY

59. As Judge acting as jury I now examine the guidelines to see if the author and publisher of this article abused their privilege. These are the guidelines:
1. The seriousness of the allegation - (a) The allegation is the claimants disregarded the interest of the environment (b) the 1st, 2nd, & 3rd claimants failed to exercise care and skill in the preparation and use of Environmental Impact Assessments, (c) the 1st, 2nd & 3rd claimants acted improperly and corruptly in obtaining the approval of E.I.As. These are serious, and the more the public was misinformed the more claimants were harmed.
 2. The nature of the information. It is a matter of public concern nationally and internationally.
 3. The source of information: The author is an informed person who served and chaired the National Resource Conservation Authority (NRCA). He knows the claimants personally. He had access to NEPA's written public request of the E.I.As.
 4. The steps taken to verify the information: The author with his experience and access to information chose not to check his statement of fact that 1st and 2nd claimants are partners in ESTECH. He could have checked the Ministry Paper tabled in Parliament to find out the reason for the merger of NRCA, Town Planning Department and Land Utilization Commission. The managing editor did not check the accuracy of the article. He relied unduly on the author's status as a veteran journalist.
 5. The status of the information, the information was known: Five (5) years prior to July 2006 both the author and the Observer Ltd. were informed that it was a misstatement of fact that Easton Douglas and Conrad Douglas were partners in ESTECH.
 6. The urgency of the matter. The information about the regulatory agency structure and system was not perishable information. There was no urgency that required dissemination of this information to the public at that time. The public issues raised were of past events.

7. Whether comment was sought from the plaintiff:

No comment was sought by the author. He deliberately disregarded the means of information that would confirm or disconfirm his misstatement of fact and the implication of it. In **Bonnick v. Morris** the newspaper did not seek comment from Mr. Bonnick about the reason for his dismissal from the state agency. The Privy Council felt this was a borderline case so the failure to obtain a comment did not weigh heavily in the context of the whole article.

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

In **Reynolds'** case (supra), the court found the failure to include Prime Minister Reynolds' explanation in Parliament about his knowledge, of the conduct about extradition requests made to his appointee to the presidency of the High Court weighed heavily against the Sunday Times publication of the article in its mainland edition when its Irish edition did carry his response.

In **Bonnick's** case the court did not feel the omission to carry Mr. Bonnick's explanation or the failure to obtain a comment weighed against the objective standard of responsible journalism.

In the instant case, in my view the failure to obtain a comment, plus to obtain verification and carry the claimants' side was unfair and irresponsible journalism.

The Managing Editor Mr. Vernon Davidson testified he did not think it necessary to verify any fact in the article because he was in effect relying on the experience and standing of Mr. John Maxwell on the subject of the environment. Even when dealing with an experienced journalist, the editor and publisher still has a duty to verify facts and exercise due diligence. The law requires this to protect the reputation of individuals.

9. The tone of the article:

The article was attacking and accusing the management and named person having responsibility for protection of the island natural resources and environment by law of abusing their trust and promoting personal gain at the at the expense of the public.

It was deliberately selective in relation to the claimants. It was unfair and unbalanced to the claimants. The 1st claimant was the only person named in the article under the captioned "By Order, Management 11". He is the only person whose photograph was inserted. His office was specifically singled out. The only other person named in the article was in the introduction section.

10. The circumstances of the publication, including the timing. There was no urgency in the publication of the subject matter. There was no project or development that was about to be approved or was approved that was causing harm. It was not published to invoke the precautionary principle about decisions or action about the environment. The only urgency about the article's publication was that the managing editor wanted it to meet the Sunday Publication. These were private and commercial interests.

I now look at the factor of the second meaning of conflict of interest that Miss Diana McCaulay advanced for the newspaper. I am unable to say that the article is ambiguous to such an extent that it readily conveyed a different meaning to an ordinary reasonable reader to have the benefit of qualified privilege. I attach little weight to the second meaning advanced as I find the defamatory imputation to the 1st, 2nd and 3rd claimants were serious and the imputations were not readily ambiguous.

I find the author Mr. John Maxwell abused the occasion of privilege. I also find the Jamaica Observer also abused the occasion of privilege for the reason I identified. Thus the 2nd Defendant defence of qualified privilege is not established.

Fair Comment

60. The Jamaica Observer also relied on the common law defence of fair comment as well as the statutory defence of fair comment under section 8 of the Defamation Act.

In *Cheng Albert and Anor. V Tse Wai Chun Paul* (2000) 10 BHRC 525 Lord Nicholls sitting in the final Court of Appeal for Hong Kong sets out the ingredients of the defence of fair comment.

They are as follows:-

- (1) The comment must be a matter of public interest which means it is a matter that affects 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 (*Denning, MR. London Artists Ltd v Littler*[1969] 2 All ER. 193
 - (2) The comment must be recognizable as comment, as distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege.
 - (3) The comment must be based on facts which are true or protected by privilege. If the facts on which the comment purports to be founded are not proved to be true or published on a privileged occasion, the defence of fair comment is not available.
 - (4) The comment must explicitly or implicitly indicate at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded.
 - (5) The comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views.
61. The burden of proving the scope of the defence is on the defendant. He further explained that a comment which falls within the objective limits of the defence can lose its immunity only by proof that the defendant did not genuinely hold the view he expressed.
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62. Lord Phillip (P) in **Spiller and Anor v. Joseph and Anor**. [2010] UKSC 53 expressed reservation about Lord Nicholls fourth proposition in **Cheng Albert's** case (supra). He said it would rob the defence of fair comment of much of its efficacy. He preferred to re-write this fourth proposition to read ".....the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based".

The Claimant's Closing Submission

63. Lord Gifford Q.C. submitted that in order for a Defendant to succeed in a defence of fair comment the comments must be based on facts that are true or protected by privilege. He relied on the proposition in **Hunt v. Star Newspaper** [1908] 2 K.B 309 that "If the facts on which the comment is made do not exist the foundation of the pleas fails".

64. He emphasized the statement in **London Artists v. N. Litter** [1969] 2 All E.R. 193 that "In order to be fair the commentator must get his basic facts right. The basic facts are those which go to the pith and substance of the matter. They are the facts on which the comments are based or from which the inferences are drawn – as distinct from the comments or inferences themselves."

He then submitted at page 71 para 16:

"In the present case the writer stated a number of facts which the 1st Defendant had not sought to prove to be true. Further it is admitted that they were untrue, in particular:

- 1) It was not true that the 1st claimant was a partner in ESTECH.
- 2) It was not true that ESTECH did most of the EtA's referred to in the article.
- 3) It was not true that ESTECH was accused of being notoriously negligent.

- 4) It is not true that the claimants had been involved in bending the rules or otherwise acted illegally or corruptly.

First Defendant Closing Submission

65. Mr. Piper submitted that if the words used are accepted as having the general meaning contended for by the 1st Defendant, they are the writer's statement of his opinion and his comment on matters of public interest and fall well within the defence of fair comment.

He further submitted that certain meaning or inferences cannot be drawn from the words of the article:

1. "..... none of the comments made by Mr. Maxwell are directed to any particular politician or to politicians in general. All of the comments are directed at government departments statutory bodies and/or executive agencies. There is no allegation or inference that any politician or group of politicians are corrupt....."(p.8,11,12)
2. The quotation from the addendum to Environmental Impact Assessment for Grand Palladium commencing:-

".....previous EIA's reviewed have been notoriously negligent in review of impact associated with drainage ..."
is a general statement and not referable to any particular company or person or the claimant.
3.the quotation does not give rise to any inference that the claimants individually were negligent or lacked professional integrity(p.14 (iv)).
4. There was no series of falsehood made in the article. There was only one error that Mr. Easton Douglas and his brother were partners in ESTECH. He submitted that newspaper acknowledged corrected and apologized for their error (p 5)
5. The statement in the Article that most EIA's are done by ESTECH if not true is substantially true (p 13 (viii))

6. There is no inference in the Article that 1st and 2^d claimants were acting together to subvert the laws for the protection of the environment.
7. No inference in the Article that Mr. Easton Douglas managed the implementation of the merger of the bodies that formed NEPA for his own benefit or his brother's benefit.

66. **Now what are the Facts?**

The facts published in the Article below are true:

- a) Mr. Easton Douglas is a former Minister of Government
- b) Dr. Conrad Douglas is his brother.
- c) ESTECH is a private company that produces EIA reports
- d) EIA reports are usually requested by developers.
- e) The developers who request EIA reports pay for them.
- f) Dr. Conrad Douglas is the principal shareholder and director of ESTECH.
- g) ESTECH was/is a subsidiary of Conrad Douglas and Associates which was formed in 1996.
- h) NEPA approved EIA reports which is a condition for the grant of permits or licence for certain developments.
- i) It was reported by NEPA that previous EIA's were negligent.
- j) Mr. Easton Douglas between 1989 to 2000 had ministerial responsibility for different Ministries all of which had environment under its portfolio Mr. Easton Douglas initiated the merger of three statutory body- National Resource Conservation Authority, Town Planning Department and Land Utilization Commission into one agency NEPA.
- k) EIA Reports are required by law under section 10(1) (b) of the National Resources Conservation Act where any development or enterprises may have adverse affect on the environment.
- l) The NRCA is responsible for the effective management of the physical environment so as to ensure conservation, protection and proper use of its natural resources.

m) The Minister responsible for environment gives general policy directions to the NRCA about its duties as necessary in the public's interest.

n) Public consultations are held sometimes before EIA's are approved.

o) NEPA has protocols on submissions of EIA's and public consultations.

67. The following statements asserted in the article are not true:-

a) Mr. Easton Douglas, a former Minister of Environment and his brother are partners in ESTECH.

b) That ESTECH was responsible for most of the EIA's at the time of the article. Dr. Conrad Douglas' evidence was other companies did EIA's at the time.

c) That EIA's were only discussed in private meetings. NRCA exists solely to rubber stamp EIA's.

The following comment or opinions in the articles are recognizable as comments.

(a) The Port Authority, the Urban Development Corporation (UDC), the Jamaica Promotion Corporation (JAMPRO) and the National Environmental Planning Agency (NEPA) are reducing Jamaican human rights.

(b) The merger of Town Planning Department and (TPD) and National Resource Conservation Authority (NRCA) produces a limitation of the protection provided by the laws creating these bodies.

(c) The TPD recommendations are not taken seriously.

d) NRCA believes its function is to get out of the way of development.

e) NRCA colludes with JAMPRO to allow protected natural resources for Jamaica to pass to foreign developers.

Application of the Law

- 68.. I had reservation about the statements:
- a) NRCA got around the rules by only taking into account small population nearest to a development, **and**
 - b) NRCA is telling ESTECH "look, chapter 1 gives us a plausible reason for approving this without question o.k.?"

Whether these were comments or imputation of facts. My view is that they are imputation of facts and are not true. Mr. Maxwell asserts that NRCA deliberately breached the laws and regulations for the protection of the environment. It goes beyond pointing out weaknesses in the regulatory frame-work of the statutory body.

69. Then he singles out ESTECH as a willing and compliant company who produces EIAs even though they do not meet the standard for protection of the environment. It is my view that the basic fact on which Mr. Maxwell based his comments about the duties, functions and work and relationship of the claimants with the statutory bodies he identified and compared them are not true. I have already found these were imputation of facts which were not made on a privileged occasion.

The defence of fair comment or honest comment cannot be sustained. This is so even though the comments on the environment are matters of public interest and the source of some of the facts are referred to expressly and implied in a general way.

70. The article failed to establish the truth of the basic facts. The foundation of the article which includes the photograph and captions is based on a misstatement of fact which the author and the publisher were indifferent to whether it was true or not. The correction of the error is not curative of the comments which flow from them.

Damages

71. The jury in Reynold's case awarded him zero damages against Times Newspaper Ltd having found that article that they published in the Sunday Time Mainland was defamatory to him. The trial judge substituted an award of 1P. The Court of Appeal approved the judge's ruling and affirmed that a plaintiff who is successful in a libel action must be awarded some damages, even though it is no more than the smallest coin of the country.
72. The Privy Council in the Gleaner Co. Ltd and Dudley Stokes v. Eric Anthony Abraham [2003] UKPC 55; 3 WLR 1038, [2004] 1 AC 628 examined the principle upon which general damages for libel rest.
73. The court held that award of damages from libel should be a conventional figure. Further the court showed that an award of damages is compensation in the tort of defamation for loss or harm and is capable of having some deterrent or exemplary effect because it is an intentional tort and the defendant conduct is capable of aggravating the damages.
74. The court is entitled to take into account these factors: the seriousness of the defamatory imputation, the prominence of the article in the newspaper, the evidence of the distress and hurt and humiliation caused to the claimant, whether any apology was offered and published. In addition, a judge should give a jury guidance as to the amount of award by directing them to consider the purchasing power of money which relates to the amount of interest a capital sum will earn if invested. In England the practice was that there should be no reference to previous libel awards of trial courts but to the corpus of cases in the Court of Appeal. In Jamaica the corpus of cases or awards for defamation in the Court of Appeal is limited. But authority is still available and there is no restriction to refer to any such awards. The Court of Appeal of Jamaica and the Privy Council did not find it permissible to consider the personal injury awards.

75. The jury's award of \$80M for the libel in Abraham's case was reduced to \$35M by the Court of Appeal and approved by the Privy Council. The court found the injury to Mr. Abraham included financial loss and injury to health.

The Court of Appeal found the award was at the upper limit of the scale in CVM Television v. Fabian Tewari SSCA 46/2003 and reduced the jury's award of \$20M to \$3.5M in this case.

In Edward Seaga v Leslie Harper SCCA 70/2004 delivered December 20, 2005 the Court of Appeal reduced the award of \$3.5 million awarded to the plaintiff to \$1.5 million.

76. Anderson J, in E.C. Karl Blythe v. Gleaner Co. Ltd. Claim 2004 HCV167 delivered May 12, 2011 awarded a former Minister of Government \$6 million against the Gleaner Co. Ltd. They published an article that he was a shareholder in a company borrowing millions of dollars from a statutory body while he had portfolio responsibility for that body and that the statutory company had to sue his company for the loan it did not repay.

Defendants Submission - Damages

77. Mr. Piper submitted briefly that there is nothing about the defendant newspaper conduct that warrants any award of damages or aggravated damages. He asked the court to take into account the defendant published a correction and gave an apology. He submitted the claimants should be awarded nominal damages.

Claimant Submission - Damages

78. Lord A. Gifford Q.C. submitted that based on the Jamaica Court of Appeal decision of Abrahams and Tewarie, Mr. Easton Douglas should be awarded \$15 million damages. Dr. Conrad Douglas should be awarded

\$12M damages and ESTECH he submitted should be awarded \$1 million damages.

Application of Law

79. Applying the principles of the cases reviewed to this publication "By Order Management" in the Sunday Observer July 9, 2006 in relation to 1st claimant Easton Douglas I hold:

- (i) The article was prominently displayed with Mr. Easton Douglas' photograph in the centre of the page in colour. The Observer had a readership of at least 32,000 at the time. The photograph would attract more readership than normal with the captions.
- (ii) There was a correction but no real apology.
- (iii) The misstatement of fact at the bottom of the photograph was in the domain of the author and publisher from 2001.
- (iv) The defendant newspaper repeated the misstatement of fact.
- (v) This is an aggravated factor
- (vi) There were serious allegations of corruption and illegal behaviour, un-professional conduct, and willful disregarding of the public interest in the protection of the environment.
- (vii) Mr. Easton Douglas has suffered genuine distress, hurt and harm as a person as a result of this publication.
- (viii) Mr. Easton Douglas' office as a Minister of Environment and his personal career in the field of land and planning development has earned him an international reputation which was damaged by this article.
- (ix) He has not suffered any financial loss or injury to health.
- (x) He continues to work as a private practitioner in his career.

80. Based on these factors I find he has established his claim on a balance of probability and I award him \$8.5M general damages which take account of the compensation and deterrent element of this tort.

Based on the following factors relative to Dr. Conrad Douglas I find:

- (i) He is highly qualified in the academic field of natural science and lectures in this area.
- (ii) He has specialist working experience and expertise in developing the bauxite industry in Jamaica.
- (iii) He is a member of scientific bodies committed to the development of Jamaica.
- (iv) He is a member of international bodies on the environment and development.
- (v) He is a consultant who provide private and public bodies on science and technology and development.
- (vi) He engages his skill and service in private practice through his companies Conrad Douglas and Associate and ESTECH.
- (vii) EIAs which he produces are technical scientific work.
- (viii) That he wrote to the defendant newspaper to correct the misstatement of fact that his brother Mr. Easton Douglas is not a partner in ESTECH.
- (ix) That Dr. Conrad Douglas warned the defendant newspaper that the untrue publication could be libelous.
- (x) That the failure of the defendant's newspaper to heed the warning is an aggravated factor.
- (xi) That serious allegations about the professional capacity and integrity were made against Dr. Conrad Douglas.
- (xii) That he is a specialist who works with foreign multinational companies in the bauxite aluminum industry and holds membership with United Nations Organizations on the environment. He has earned an international reputation.
- (xiii) He has suffered genuine distress and harm.

81. I hold that he has established his claim on a balance of probability is entitled to the sum of \$7M which is a reasonable and proportioned sum to compensate him for the damage he has suffered.

Damages for a Corporation or Company

82. His company ESTECH professional reputation has been injured. He is the principal and sole shareholder of this company. He has claimed the company has suffered loss but has not offered any evidence of this loss. Nevertheless his company is entitled to general damages. As this is a one-man company any substantial award above nominal damages would amount to duplication in compensation.

I therefore award a modest sum of \$250,000.00.

83. I do not believe that this award is contrary to the principle in **Jameel v Wall Street Journal** [2007] AC 359 where a majority of the House of Lords restated a trading company which is defamed by a false statement is entitled to maintain an action without proof of special damages. Lord Bingham of Cornhill added that:

"where the trading corporation has suffered no actual financial loss any damage awarded should be kept strictly within modest bound."

Conclusion

Judgment for the 1st claimant against the 1st defendant.

1st claimant awarded \$8.5M general damages.

Cost to the 1st claimant to be agreed or taxed

Judgment for the 2nd claimant against the 1st defendant

2nd claimant awarded \$7M general damages

Cost to 2nd claimant to be agreed or taxed

Judgment on the 3rd claimant against the 1st defendant

3rd claimant awarded \$250,000.00 general damages

Cost to 3rd claimant to be agreed or taxed.

Stayed granted to 1st defendant for 42 days pending appeal