

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION

CLAIM NO. 2004 HCV 2353

BETWEEN MAJOR HERMAN DOUGLAS CLAIMANT
AND JAMAICA OBSERVER LTD. 1ST DEFENDANT
AND DENZIL KERR 2ND DEFENDANT

Mr. Raphael Codlin instructed by Raphael Codlin & Co. for the Claimant.

Mr. Charles Piper and Miss Kanika Tomlinson for the 1st Defendant

Mr. Bert Samuels, Miss Akilah Anderson and Mr. Franklyn Halliburton
instructed by Knight, Junor and Samuels for the 2nd Defendant.

28th, 29th July 2008 and 18th June 2009

Defamation – Words published concerning competence of a public officer in carrying out his duties – Whether defamatory – Whether defences of justification, qualified privilege and/or fair comment made out – Whether publisher actuated by malice -Whether newspaper acted reasonably and prudently in reporting the issue (Reynolds defence)

BROOKS, J.

Major Herman Douglas was, on the 22nd March 2004, the Chief Technical Officer of The Jamaica Fire Brigade. On that day, the Daily Observer, a nationally circulated newspaper, published an article which included words which were critical of Major Douglas' performance of his duties. The words included quotes from Senior Deputy Superintendent Denzil Kerr. Major Douglas alleges that the article constituted a defamation

of his character and he has brought this action against the defendants, Jamaica Observer Ltd. (the publisher of the newspaper) and SDSP Kerr to recover damages for libel.

The defendants have mounted varying defences to the claim. They do not deny that the words were used or that they referred to Major Douglas. They say, however, that the criticisms were justified, constituted fair comment and were published on an occasion of qualified privilege. Jamaica Observer also asserts that it acted responsibly in publishing the article.

In determining whether Major Douglas should succeed in this claim, I shall make the following assessments:

- (a) what was Major Douglas' position?
- (b) what is the meaning of the words used by SDSP Kerr and were they defamatory of Major Douglas?
- (c) was SDSP Kerr justified in using those words?
- (d) was the occasion one of qualified privilege?
- (e) did SDSP Kerr's words constitute fair comment in the circumstances?
- (f) if none of the defences succeeds, to what relief if any, is Major Douglas entitled?

What was Major Douglas' position?

Major Douglas had a distinguished career in the Jamaica Defence Force. He rose through the ranks from a private soldier to being a commissioned officer, first as Lieutenant and finally as Major. He spent 36 years in the JDF before he was seconded to the Jamaica Fire Brigade.

It was Major Hevol Benson who was then the Brigade's Commissioner who recruited Major Douglas. Major Benson was impressed with Major Douglas' knowledge, professionalism and efficiency and was of the view that Major Douglas would enhance the Fire Brigade.

It seems that that the Maintenance Section of the Fire Brigade should have been headed by a Superintendent, but Major Douglas had held the rank and was being paid the salary of, a Deputy Commissioner. Although there was a dispute concerning that aspect, what is clear is that the post of CTO, held by Major Douglas, was a senior post in the Brigade.

What is the meaning of the words used by SDSP Kerr and were they defamatory of Major Douglas?

In assessing the meaning of the words attributed to SDSP Kerr, it is necessary to quote from the Observer's article. His words were:

"Those who now hold the post in charge of maintenance, dem a quashie, they don't have a clue about maintaining fire brigades."

"The Jamaica Fire Brigade is suffering from a shortage of fire units because the head of section, the chief technical officer, don't (sic) have a clue about the maintenance programme necessary to keep the fleet in a state of

preparedness. I think the blame should be laid squarely at the feet of **Major Douglas.**”

“My experience with the **CTO** with his role with the water boat in Ocho Rios tells me he does not know what he is doing. **His *modus operandi* is very *ad hoc* and he lacks professionalism**”

“The problem that we now encounter, if [Assistant Commissioner Rudolph Sommerville] was still heading the section, we would not be in this dilemma...relative to the brigades and maintaining the fleet. Up to Tuesday night... [AC Sommerville] succeeded in addressing the braking problem with [a] unit...that could not be successfully addressed by the mechanics staff and the CTO in Kingston...” (Emphasis supplied)

Do those words refer to Major Douglas? SDSP Kerr insists that he did not refer to Major Douglas by name. There is, however, no doubt that he was referring to the Major. The references to the “Chief Technical Officer”, the “CTO” and “those who now hold the post in charge of maintenance”, would have made it clear to the members of the Fire Brigade and to those with knowledge of its hierarchy, that the reference was to Major Douglas.

Are those words capable of bearing a defamatory meaning? Carey, J.A. in *Gleaner Co. Ltd. v Small* (1981) 18 J.L.R. 347, at page 377 H, explained the duty of a trial judge when answering this aspect of the issue:

“...the judge must put himself in the place of a reasonable fair-minded person to see whether the words suggest disparagement, that is, would injure the plaintiff’s reputation, or would tend to make people think the worse of him.”

Since I am not sitting with a jury I am also to decide whether the words used do in fact, bear a defamatory meaning. Hamel-Smith, J.A. sitting in the Court of Appeal of Trinidad and Tobago, approved of this

approach. He said, in *Basdeo Panday v Kenneth Gordon* (Civil Appeal No. 175 of 2000 [2003] TTCA 25 (31 October 2003)):

“The trial judge must first determine whether the words are capable of a defamatory meaning and if they are then he must resolve whether an *ordinary, intelligent and unbiased person reading the words would understand them as terms of disparagement...*” (Paragraph 25)

Major Douglas has pleaded that in their natural and ordinary meaning, the words meant and were understood to mean:-

(a) That the claimant was incompetent and not fit to be trusted or employed to carry out any public work.

(b) That the claimant had failed to perform his professional duties as Chief Technical Officer, while in the employ of the Jamaica Fire Brigade.

(c) That the Claimant was ignorant of his duties as the Chief Technical Officer.

(d) That due to the claimant’s incompetence, ignorance and lack of professionalism, the claimant should be replaced by another competent officer.

(e) That the claimant kept and maintained a poor maintenance programme because of his incompetence and ignorance of his professional duties.”

Jamaica Observer and SDSP Kerr have denied those pleaded interpretations.

The relevant evidence must now be assessed.

Exhibit 2 is a note of an official interview of SDSP Kerr, conducted after the publication of the article. It records that when SDSP Kerr was asked what the term “quashie” meant, he said that it meant “fool, fool”. The term “fool fool” is used in Jamaica to mean, at its most charitable, “foolish”.

The term “quashie”, as used in Jamaica, according to Olive Senior in her *Encyclopaedia of Jamaican Heritage* has “acquired derogatory overtones”. She continues:

“...centuries before, at the time of Edward Long (1774) quashie was being used to refer to a country bumpkin or someone stupid.”

Senior is not alone in that view. Richard Allsop, in his *Dictionary of Caribbean English Usage* gives the Jamaican usage of the term as:

“A Black man who is considered to be gullible or stupid, esp such a person who is not familiar with city-life; [by extension] any Black person who is considered to be of no importance.”

From that assessment, I find that the use of the term “quashie” in reference to an individual is capable of a defamatory meaning. Other words said to have been used by SDSP Kerr, are also plainly capable of a defamatory meaning. The sting was also in the portions of his statement which allege that the CTO didn’t have a clue about his job and that he lacked professionalism.

Assessing the statements attributed to SDSP Kerr as a whole, it is in my view, self-evident, that the term “quashie” and the assertions concerning the CTO, were derogatory references to Major Douglas, in the way of his office. I find, therefore, that the words used in the article, were capable of the meanings pleaded by Major Douglas and were **in fact** defamatory of him, in his office of Chief Technical Officer of the Jamaica Fire Brigade.

Was SDSP Kerr justified in using those words?

The finding just made, is not the end of the matter. It now must be considered whether SDSP Kerr was justified in using those caustic comments. In this context, the burden of proof shifts to SDSP Kerr. Jamaica Observer had not pleaded justification. SDSP Kerr must, in essence, prove that his statements are substantially true. In *Gleaner Co. Ltd v Wright* (1979) 16 J.L.R. 352 Carberry J.A. said at page 357:

“Since the law presumes that every man is of good repute until the contrary is proved, it is for the Defendant to plead and prove affirmatively that the defamatory words are true or substantially true.”

Lord Denning pointed out the care which should be taken in considering the defence of justification. In *Associated Leisure v Associated Newspapers* [1970] 2 All E.R. 754 he cited, with approval, the principle that:

“A defendant should never place a plea of justification on the record unless he has clear and sufficient evidence of the truth of the imputation, for failure to establish this defence at the trial *may* properly be taken in aggravation of damages.”

Having cited the basic law on this issue, I shall now examine the relevant evidence. SDSP Kerr recounted a number of instances which, he said, exemplified the inefficiency of Major Douglas' department. These were, for the most part, drawn from what he said were his experiences in the parish of Saint Ann, where he was the Divisional Head. Specifically SDSP Kerr spoke about a fire-boat, which he said the CTO and his department failed to repair, despite many requests being made directly to Major

Douglas. The failure resulted in the boat being disabled for extended periods, causing the postponement of two simulation exercises. SDSP Kerr's view of Major Douglas' performance was solidified when, according to him, AC Sommerville easily fixed the boat and at a paltry cost of \$250.00.

SDSP Kerr reported a similar experience with a specialized fire-truck; a unit bearing a ladder on a turn-table. According to SDSP Kerr, the hydraulics for the ladder malfunctioned and as a result the vehicle was out of service for an extended period, despite his speaking "repeatedly to Mr. Douglas about its state of disrepair" (paragraph 13 of his witness statement).

At paragraph 14 of his witness statement, SDSP Kerr said that the Maintenance Department's attitude toward the maintenance of fire-fighting units extended to the other three fire-trucks in his division; all of which were in various states of disrepair. He said that as a result, on several occasions, his division was "unable to respond to distress calls and instead had to seek assistance from the Manchester, St. Mary and Trelawny Divisions".

SDSP Kerr testified that the problem did not only affect his division. He testified about matters occurring in nearby St. Mary, but I shall not consider that evidence as it was plainly hearsay. He did, however, testify that at senior-level meetings, Major Douglas was the target of many

complaints. He exhibited the minutes of one of those meetings. An excerpt from that document assists in the current assessment.

“Many questions were directed to Major Douglas about the status of various units. Superintendent L.A. Williams enquired of Major Douglas the progress of the #45 water tanker. The answers were not straightforward. This sparked an intense and sometimes confrontational discussion. There were accusations and counter accusations about the general maintenance of the fire units....”

“Senior Deputy Superintendent D. Kerr asked Deputy Commissioner White to inform the meeting about the competence of the Maintenance Section. His response was “I wrote to the Ministry for funds to fix the units and was promised five million dollars (\$5m) but has (sic) not received any of that money.” Senior Deputy Superintendent R.B. Johnson insisted that he should answer the question asked by Senior Deputy Superintendent Kerr. His reply was “based on what I am hearing and what is said, the section is not competent.””

I have attempted a summary of the essence of SDSP Kerr’s evidence.

A number of documents were put in evidence through him. Some of these were dated after the publication of the newspaper article. They emanated from the Saint Ann Division and many were penned by SDSP Kerr. I shall not take them into account as, coming as they do, after the abovementioned disciplinary interview, they could have been written for purely self-serving purposes.

Other witnesses for the defence bolstered SDSP Kerr’s evidence. Deputy Superintendent Irvin, who is the officer in charge of the Saint Mary Division of the Fire Brigade, spoke to problems with vehicles in his division. He said at paragraph 3 of his witness statement that he found Major Douglas’ leadership of the Maintenance Division, wanting.

DSP Irvin was not challenged in cross-examination. He exhibited a number of documents which indicated that problems with fire-unit # 38 had been brought to Major Douglas' attention in vain. DSP Irvin wrote to his Area Assistant Commissioner concerning the repair of the unit. The allegations made therein, can be fairly summarized as a charge of bungling by the Maintenance Division.

SDSP Kerr's last witness was Assistant Commissioner Sommerville, who was mentioned in the offending article. He also testified as to incidents which, he said, made him form the opinion that "Major Douglas was indeed lacking in efficiency and competence and that his performance had nothing from [his] observations to do with lack of funds". AC Sommerville had once been in charge of the Maintenance Unit and therefore had some technical expertise. It was he, whom Major Douglas succeeded.

From these witnesses, there was exhibited a copious amount of documentary evidence supporting the complaints said to have been made, to and about, the Maintenance Department. This was over the course of at least two years prior to the publication of the offending publication.

I now turn to Major Douglas' evidence. He was not an impressive witness. His witness statement laid great stress on his achievements in the military and in the early part of his stint as the Chief Technical Officer of the

Fire Brigade. Thereafter, he complained about the absence of funding from central government. In it, he did not seek to address in any specific way, the criticisms contained in the article published in the Observer.

In cross-examination, when he was tackled on the deficiencies of specific units and complaints made about them, Major Douglas denied a number of suggestions made to him. Unlike the case for SDSP Kerr, there was a stark absence of documentary evidence supporting Major Douglas' stance, concerning the efficiency of his division.

It could, perhaps, be said that since Major Douglas had demitted office in August 2004, that he did not have ready access to the information. I find, however, that with Major Benson, the former Commissioner, supporting him in this case, Major Douglas should not have had much difficulty securing the relevant documents from the Brigade. That is, at least up to the time of Major Benson's departure (31st March 2005), which was after this claim and the original defences were filed.

On a few occasions, Major Douglas was simply not credible. Specifically, when he was quizzed about difficulties with the steering on the Ocho Rios fire-boat, Major Douglas at first denied, and then later admitted, that a problem was solved by merely adding oil to the reservoir of the

steering mechanism. When asked about the inconsistency, his unconvincing explanation was that he was speaking about different incidents.

His testimony, that the reason for the deficiencies of his department was the lack of adequate funding, was supported by Major Benson. The importance of Major Benson's testimony is that he, unlike any of the other witnesses, had an overall picture of the Brigade and its problems. SDSP Kerr's witnesses were focussed on their localities. It is true that AC Sommerville, SDSP Kerr and DSP Irvin would attend senior level meetings where various issues affecting the Fire Brigade, as a whole, were discussed. Those discussions could not, however, have had the same impact as would Major Benson's experiences with the Brigade as a whole, and its interaction with the government Ministry, under which jurisdiction it fell.

Major Benson made it clear that there were other problems with the Brigade's fleet. He outlined those at paragraph 7 of his witness statement:

"...the challenges to keep the fleet going was (sic) indeed great – the fleet was old, poorly maintained, overworked and the Government's allocations for fleet maintenance, spare parts, petrol, oil and lubricants, was paltry..."

In cross examination he said:

"The Maintenance Unit never got a chance to be efficient because the things that we needed, we never had and never had funding to get it (sic)."

His stance was not new. He quoted from a report which he had submitted to the Board of Directors of the Brigade and the Ministry of Local Government (the Brigade's governing Ministry) in December, 2002. That

report made it clear that the Brigade was woefully under-funded and that the situation was affecting the readiness of the equipment. Section 8 of the Fire Brigade Act requires the Commissioner to submit annual reports to the Minister about, among other things, the condition of that equipment.

I found Major Benson a credible, candid witness. Whilst he supported Major Douglas in respect of the claim that funding was a major problem for the maintenance of the fleet, Major Benson did not totally exculpate Major Douglas. He testified in cross-examination that he was also a critic of Major Douglas. He said, "I criticized him because of how he dealt with some of the maintenance issues".

On the question of the fire-boat, Major Benson shattered the defence's contention that the fire-boat had one problem which was ignored or misdiagnosed by the Maintenance Division and was repaired by simply adding oil to the steering gear's reservoir. Major Benson said, "[t]he fire boat has many problems and they were fixed from time to time."

There was a glaring discrepancy between the testimonies of Majors Douglas and Benson. Major Douglas testified that it was only in the last two years of his tenure that the funding problem affected the efficiency of the Maintenance Department. Major Benson identified it as a permanent feature of the Brigade for the duration of his (Major Benson's) tenure. I find that

Major Benson's testimony on this point is to be preferred. It is more consistent with the documentary evidence and is supported (as to the state of inefficiency) by the evidence of the defence witnesses.

In considering the evidence placed before me on this issue, I find that Major Douglas' division was less than efficient. It was tardy in addressing defect-reports made to it; it duplicated repair efforts; it left obvious defects unresolved and it failed to communicate with the officers having charge of the units requiring repair. Some of that inefficiency must be laid at Major Douglas' door. To say, however, as SDSP Kerr does, that the poor state of the fleet was solely due to Major Douglas' inefficiency, would not be true.

The following quotations make SDSP Kerr's stance clear:

"I think the blame should be laid squarely at the feet of Major Douglas."

"The problem that we now encounter, if [Assistant Commissioner Rudolph Sommerville] was still heading the section, we would not be in this dilemma...relative to the brigades and maintaining the fleet..."

I find that SDSP Kerr knew that funding was a major issue affecting the ability of the Brigade to keep its fleet in a state of readiness. The previously mentioned quote from the meeting of senior officers, in which the issue of the Maintenance Division was discussed, reveals that funding had been identified as a major obstacle to efficiency. SDSP Kerr was present for and active in, that discussion. He, however, chose to ignore the point in his statements to Jamaica Observer's reporters.

I therefore reject the submission that SDSP Kerr was justified in making the offending statements. The defence of justification fails.

Although section 7 of the Defamation Act was not pleaded or made the subject of Defence Counsel's submissions, I find that it does not assist SDSP Kerr. My reason for so finding is that even though there was valid criticism of Major Douglas' efficiency, the aspects which have not been proved to be true, do in fact "materially injure the plaintiff's reputation".

Was the occasion one of qualified privilege?

The second defence to be considered is that of qualified privilege. In considering this defence, it must be established by the defendant that he not only had a duty to disclose the defamatory information to his audience, but also that his audience had a corresponding right or duty to receive it. (*Adam v. Ward* (1916 – 17) ALL E.R. Rep 157 at p. 170)

In light of the fact that there are two defendants whose positions are not identical, I shall first consider whether the public had a right or duty to receive the information contained in the article.

The right or duty of the public to receive information concerning the status of the Fire Brigade

The evidence is that the ability of the Fire Brigade to provide proper service to citizens was the topic of previous newspaper articles. Major Benson made that clear at paragraph 8 of his witness statement. The state of

the equipment in the hands of the Fire Brigade was therefore, an issue which was in the public domain. It concerned the public. Major Benson reinforced the point when he said in cross-examination:

“I consider and considered the fire service as an important part of the service of the government....I think the maintenance of the fleet of vehicles is of vital importance to the public....If the maintenance of the fleet of vehicles is not being done to a high standard that would be of importance to the public.”

In examining this question, it is important to note that it was an issue which also concerned the Brigade itself. Major Douglas discloses that concern at paragraph 23 of his witness statement. His evidence at point also discloses that there were problems with the operations of the Brigade.

At paragraph 15 of his witness statement Major Douglas puts the importance to the public, of the issue, beyond any doubt.

“In managing a department like the Fire Brigade, it is of cardinal importance that the equipment islandwide are (sic) repaired maintained and are (sic) kept in the best of order. If that is not done, serious consequences could follow, in that, a vehicle that is required to attend the scene of a fire, could either break down, fail to start or in any other way fail to function. Such a situation may not only put fire fighting as such at risk but may also endanger the lives of personnel who are engaged in fire fighting.”

He extended that position in cross-examination when he said that the situation would also put the public at risk and that it was entitled to know of the decline in the number of fire units in service.

I find that the bits of evidence just mentioned, make it clear that the public had a right and a duty to hear of the status of the Fire Brigade and its

ability to perform the services expected of it. It does not follow inevitably, however, that SDSP Kerr had a duty to inform the public of that status and ability, or lack thereof. I now address that issue.

The duty of SDSP Kerr to bring the information to the attention of the public

Major Douglas, at paragraph 24 of his witness statement gives the impression that the official position of the Fire Brigade ought to have been disseminated by the Commissioner's office. He said:

"As far as I am aware, press releases were always made by the Office of the Commissioner of the Fire Brigade but there have been many press reports which damnified the Brigade itself and which did not originate from the Commissioner."

The Commissioner himself only obliquely addressed the protocol issue in his witness statement. He said, at paragraph 19:

"Denzil Kerr was always a very outspoken person and the subject episode with the Observer was not the first time that he was going public with issues affecting the Brigade- **contrary to the Brigade's principles for engagement with the media.**" (Emphasis supplied)

In cross-examination he stated that the "policy was that there was a certain chain of command that you had to go to and you did not willy-nilly speak to the press". Major Benson did not point to any regulation or document which supported his statement.

In contrast SDSP Kerr testified in cross-examination that he knew of no regulation which spoke to who was able to give interviews to the press.

He said, “[a]ll of us as senior officers had the right to give interviews and say whatever we want to the media”.

SDSP Kerr was a senior officer. On the date of the article, he was the head of the Saint Ann Division of the Fire Brigade. He had responsibility for the fire stations and the fire fighting equipment within that parish.

What, therefore, was the relevant policy if any? Although SDSP Kerr was called to a disciplinary interview in respect of his part in the offending article, the thrust of the indictment against him was the attack on Major Douglas. It was not because his contact with the media was in breach of protocol. In his note of the interview (Exhibit 2), Major Benson said:

“In summary, I faulted Mr. Kerr for his language, stance and attitude, the personal attack and his unbalanced summation of all the factors contributing to the problem. I told him that these short-comings were being brought to his attention in this forum as a reprimand and as a warning against a recurrence of such un-Officerlike (sic) behaviour in the future.”

Major Douglas admitted in cross-examination that he was not disciplined for speaking to the press with respect to the publication of the offending article. With respect to SDSP Kerr’s encounter with the press, Major Benson said in cross-examination:

“Generally speaking, I wouldn’t have a problem if the comment were truthful.”

Major Benson said, in respect of Major Douglas’ exposé:

“[It was] not part of my problem that he spoke to the press.”

“It didn’t bother me that he said [that] we had a funding problem”

It seems, therefore, that the Brigade did have a general policy concerning engagement of the press, but there was very lax enforcement of that policy. I find, however, that whereas SDSP Kerr may have had the privilege, with some restrictions, of speaking to the press about the state of the Brigade, it does not seem that he had a **duty** so to do. That duty if any, I find, was the job of the Commissioner. For that reason, SDSP Kerr's defence of qualified privilege must fail.

The duty of Jamaica Observer to bring the information to the attention of the public

The position of Jamaica Observer, on the issue of qualified privilege, is not identical to that of SDSP Kerr. The law concerning qualified privilege has so evolved that news media receive different treatment from the average individual. The main authority which outlines the manner in which this defence is to be assessed, with respect to reporters and the other elements in the media, is *Reynolds vs. Times Newspaper Ltd.* [1999] 4 ALL ER 609. In explaining the impact of *Reynolds*, their Lordships in *Edward Seaga v Leslie Harper* (P.C.A 90/06 (delivered January 30, 2008)) stated at paragraph 10:

“What is significant is that it is plain in their Lordships’ opinion that the *Reynolds* decision was based...on a “liberalising intention”. It was intended to give, and in their Lordships’ view has given, a wider ambit of qualified privilege to certain types of communication to the public in general than would have been afforded by the traditional rules of law.”

Seaga v Harper was a case on appeal from this jurisdiction.

In *Reynolds*, Lord Nicholls expressed the view, at p 626 of the report, that in considering whether qualified privilege attached to publication by news media, the matters to be taken into account included the following:

- (1) The seriousness of the allegation.
- (2) The nature of the information, and the extent to which the subject matter is a matter of public concern.
- (3) The source of the information.
- (4) The steps taken to verify the information.
- (5) The status of the information.
- (6) The urgency of the matter.
- (7) Whether comment was sought from the plaintiff.
- (8) Whether the article contained the gist of the plaintiff's side of the story.
- (9) The tone of the article.
- (10) The circumstances of the publication, including the timing.

This list was cited with approval by their Lordships in *Seaga v Harper* but they made it clear that the elements of the list:

“...are not like a statute, nor are they a series of conditions each of which has to be satisfied or tests which the publication has to pass....The standard of conduct required of the publisher of the material must be applied in a practical manner and have regard to practical realities...The material should...be looked at as a whole, not dissected or assessed piece by piece, without regard to the whole context.”

Examining the *Reynolds* elements individually, but briefly, it can be seen, especially after reviewing the evidence of Jamaica Observer's reporters, that:

1. the allegation that the major defects in the equipment used by the Fire Brigade were as a result of Major Douglas' attitude and

inefficiency, was a significant one. It would give the wrong impression to the members of the Brigade and of the public if it were incorrect or inaccurate;

2. as already explained, the subject matter was of a serious nature;
3. the sources of the information and opinions were ostensibly highly qualified. They were identified and quoted;
4. the steps taken to verify the information included visiting fire stations, reading articles speaking to the issue and discussing the matter with the Permanent Secretary for the relevant government ministry;
5. information was already in the public domain about the failings of the Fire Brigade;
6. there is nothing to indicate that the matter was a particularly urgent one, but there is no allegation that there was a rush to have the article published;
7. Major Douglas' views were sought. In answer to the court, Major Douglas testified that the reporter, in seeking his views, did bring to his attention, SDSP Kerr's words;
8. Major Douglas' opinions and answers to the criticisms were obtained and included in the article;

9. there is no element of the article which indicates that Jamaica Observer prefers or supports one side over the other; the issues are raised and left for the judgment of the reader. The article makes its intention clear from the outset:

“How did the island’s fire service descend into its present severe state of disrepair and who is to blame?
The answer depends on whom you are listening to.”

10. the publication came when the Fire Brigade was the subject of many adverse comments but there is nothing about the timing of the article which is unfair or opportunistic.

With the exception of the reference to Major Douglas as “a quashie”, this article read as a whole, comes across as a balanced piece, with the authors endorsing neither one side nor the other, but placing both contending positions before the public for its judgment. The question must be asked, however, whether the reference to Major Douglas as “a quashie” can fairly be said to fall within the context of qualified privilege. The term, as interpreted by “a reasonable fair-minded person” has already been demonstrated to be of a disparaging nature. Can Jamaica Observer show that it had a duty to publicize this categorization by SDSP Kerr? Can it show that the public had a right to “hear” this view? I think that the answer

to both questions must be in the negative. In my opinion, the inclusion of that portion of SDSP Kerr's statement was gratuitous sensationalism.

I must then ask whether sensationalism was the dominant motive of Jamaica Observer in publishing the article. In *Horrocks v Lowe* [1975] A.C. 135, Lord Diplock, at page 149 of the report addressed the issue of motive:

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

I believe that I have said enough about this article to have made it clear that I do not believe that the dominant motive was to injure. Major Douglas has not proved malice as being Jamaica Observer's dominant aim. He has not alleged anything which could be deemed malicious on its part.

I find that Jamaica Observer has succeeded in its defence of qualified privilege. Its article was a responsible balanced bit of journalism on a matter which the public had an interest and duty to receive and which, as a media-house, it had a corresponding duty to publicly expose.

Did SDSP Kerr's words constitute fair comment in the circumstances?

I must now turn to the third ground of defence raised. The defendants aver that the article and the words used therein represent fair comment upon a matter of public interest. The essence of this defence is that the statements made in the article were not statements of fact but, instead, constituted comment, which each citizen is entitled to make of the conduct of another.

In considering the defence of fair comment, I gratefully adopt a concise explanation of the relevant law by Lord Nicholls of Birkenhead N.P.J. This he gave, whilst sitting in the Court of Final Appeal of Hong Kong, in *Albert Cheng v Tse Wai Chun Paul and anor.* [2000] HKCFA 86; 13th November 2000. Lord Nicholls said:

“...the ingredients of this defence... are well established. They are fivefold. First, the comment must be on a matter of public interest. Public interest is not to be confined within narrow limits today...

Second, the comment must be recognisable as comment, as distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege. Much learning has grown up around the distinction between fact and comment. For present purposes it is sufficient to note that a statement may be one or the other, depending on the context....

Third, 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 privilege occasion, the defence of fair comment is not available.

Next, the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded.

Finally, the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views...It must be germane to the subject matter criticised. Dislike of an artist's style would not justify an attack upon his morals or manners. But a critic need not be mealy-mouthed in denouncing what he disagrees with. He is entitled to dip his pen in gall for the purposes of legitimate criticism...

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

Malice

That is not the end of the matter. Even when a defendant has brought his case within these limits, he will not necessarily succeed. The plaintiff may still defeat ('rebut') the defence by proving that when he made his comment the defendant was, in the time-hallowed expression, 'actuated by malice'....

On [the meaning of malice in the context of fair comment], two matters are clear. First, unlike the outer limits (as I have called them) of the defence of fair comment, which are objective, malice is subjective. It looks to the defendant's state of mind. Second, malice covers the case of the defendant who does not genuinely hold the view he expressed. In other words, when making the defamatory comment the defendant acted dishonestly. He put forward as his view something which, in truth, was not his view. It was a pretence. The law does not protect such statements. Within the objective limits mentioned above, the law protects the freedom to express opinions, not vituperative make-believe."

In his conclusion on the law, given toward the end of his judgment,

Lord Nicholls said:

"...a comment which falls within the objective limits of the defence of fair comment can lose its immunity only by proof that the defendant did not genuinely hold the view he expressed. Honesty of belief is the touchstone. Actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation, whatever it may be, even if it is the dominant or sole motive, does not of itself defeat the defence. However, proof of such motivation may be evidence, sometimes compelling evidence, from which lack of genuine belief in the view expressed may be inferred. Proof of motivation may also be relevant on other issues in the action, such as damages."

I shall address SDSP Kerr's statement, using Lord Nicholls' categories as a guide.

Is the matter one of public interest?

The issue of whether the state of the Fire Brigade's equipment was a matter of public interest, has already been assessed under the heading of qualified privilege. The conclusion was in the affirmative.

Are the words used recognisable as comment, as distinct from an imputation of fact?

Although it is not obvious that SDSP Kerr is in fact making a comment, the context of the article would seem to suggest that that is so. Words such as "dem a quashie, they don't have a clue about maintaining fire brigades", and "the chief technical officer, don't (sic) have a clue about the maintenance programme necessary to keep the fleet in a state of preparedness", would seem to me to be conveying an opinion. The average reader would have determined that Major Douglas, being the CTO would have had some qualification to entitle him to hold the post. To say therefore that he does not "have a clue" in that regard would not have been taken as a statement of fact, but perhaps more of an exaggeration for emphasis.

Is the comment based on facts which are true or protected by privilege?

I have already concluded that Major Douglas was indeed guilty of overseeing some of the inefficiency of his department. In this regard there would be some truth to the basis on which the comments are made. I have

not ignored my earlier finding that there were other factors affecting the efficiency. I shall, however, examine them later, but in the context of whether SDSP Kerr's comment was honestly made.

Does the comment explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made?

The statements attributed to SDSP Kerr as well as those said to have been made by Mr. Winston Dear, are said to have been made in the context of a shortage of fire units available to the Fire Brigade. Facts, both specific (as in the case of the fire-boat and repairs being done by private individuals), and general, are given as the bases for the comment.

Were the comments honestly made?

SDSP Kerr insisted that he made the comments in the best interest of the Fire Brigade. In addition AC Sommerville stated that SDSP Kerr "would speak his mind on any issue regarding any member of the Brigade including the Commissioner and his Deputy", but always in the best interest of the Fire Brigade. That SDSP Kerr's terms were strident, even aggressive, is clear. Lord Nicholls has, however, said that if the other elements are satisfied and the comment is relevant to the issue at hand, then aggression and stridency are not fatal to the defence.

My finding that SDSP Kerr knew of the difficulties with funding, does not, in my view, mean that his negative view of Major Douglas' efficiency

was not honestly held. The issues are not identical when considered in the context of justification as opposed to fair comment. In *London Artists Ltd. v Little* [1969] 2 Q.B. 375 at p. 391-2 Lord Denning explains the difference between the two defences in this context:

“If in his original article [the defendant] sets out basic facts which are themselves defamatory of the plaintiff, then he must prove them true...It is indeed the whole difference between a plea of fair comment and a plea of justification. In fair comment he need only prove the basic facts to be true. In justification he must prove also that the comments and inferences are true also.”

In the instant case the justification defence failed because the inference was that Major Douglas was identified as the sole problem behind the Brigade's equipment woes. That inference was found to be false, although it was accepted that Major Douglas was a part of the problem. Fair comment in this case, allows the probability that SDSP Kerr honestly held a particular view of Major Douglas' competence.

It is therefore for Major Douglas to prove that SDSP Kerr was motivated by malice in making his statements.

Is there any evidence that the publication of the words was motivated by malice?

Major Douglas has pleaded that both defendants were actuated by malice. At paragraph 9 of his Particulars of Claim, he asserted:

“That [SDSP Kerr] uttered the defamatory words out of malevolence and spite towards the claimant recklessly and/or carelessly not caring whether or not there was any truth to the statements he uttered and without giving any thought that what he said was likely to injure the claimant in his profession and/or calling.”

At paragraph 10, he addressed Jamaica Observer's motivation:

"Further, the first defendant published the said words out of malevolence or spite towards the claimant."

In his testimony, Major Douglas advanced three basic grounds for asserting that SDSP Kerr did not honestly hold the views which he expressed. Firstly, Major Douglas intimated that SDSP Kerr and others were antagonistic to army personnel becoming members of the Brigade. I find that there was nothing advanced by way of proof of that assertion. Indeed, the person who eventually succeeded Major Douglas as CTO, (a Mr. Ruel Archer) is also a former member of the JDF, and the evidence is that there has been no general criticism of him. AC Sommerville, in cross-examination, said of Mr. Archer, "[h]e was one of the efficient ones".

Secondly, Major Douglas said that SDSP Kerr, "wanted his boss Mr. Summerville (sic) to be the Chief Technical Officer and as such he fought the Commissioner and myself at every level" (paragraph 6). It is true that SDSP Kerr is quoted in the article as having expressed such a view. I do not find, however, that there is anything other than conjecture to support Major Douglas's assertion. AC Sommerville indicated that the post of CTO was to have been filled by a rank which was junior to his. Although he did fill the post immediately after the departure of Major Douglas, he did not apply for the job. In his view, "[i]t would have been a demotion".

The third basis for Major Douglas' assertion of malice is to be found in his evidence on cross-examination. He testified that SDSP Kerr "criticized me all the time on the job. Mr. Kerr's criticism was a wilful and personal attack on me".

I do not accept that Major Douglas has established that the criticisms levelled at him by SDSP Kerr were other than in relation to the performance of his duties. At one point in cross-examination, when addressing the issue of the senior officers meeting, at which he was a guest, Major Douglas accepted that "many questions were directed at me... They were talking about the 45 unit". He sought to say that it was only SDSP Kerr who criticized how he maintained the units. A reading of the minutes of that meeting makes it clear that that was not so. Senior Officers Williams and Johnson were also critical of Major Douglas.

Finally, it may be asked whether the term "quashie", used by SDSP Kerr, is not by itself evidence of malice. Lord Nicholls said in *Cheng (supra)* that proof of actuation "by spite, animosity, intent to injure, intent to arouse controversy or other motivation...may be evidence...from which lack of genuine belief in the view expressed may be inferred". He also said "a critic need not be mealy-mouthed in denouncing what he disagrees with. He is entitled to dip his pen in gall for the purposes of legitimate criticism".

The use of the term “quashie” may said to be unprofessional and in poor taste, but I would answer in the negative. In my view, Major Douglas has not proved spite or such other motivation mentioned by Lord Nicholls.

Conclusion on the issue of fair comment

I find, as a result of this analysis, that Major Douglas has not proved malice in SDSP Kerr’s motivation; he has not proved that the views expressed were not honestly held. In the circumstances the defence of fair comment should succeed.

To what relief, if any, is Major Douglas entitled?

In light of my finding that Jamaica Observer has established the defence of qualified privilege, and that SDSP Kerr has established the defence of fair comment, Major Douglas’ claim must fail. I therefore, need not consider the question of damages.

Conclusion

The article in question was derogatory in nature and since it referred to Major Douglas in the capacity of his office of Chief Technical Officer of the Jamaica Fire Brigade, was defamatory of him in relation to his office. It was for the defendants to establish that they were either justified in publishing the words used or that the words constituted fair comment or were published on an occasion of qualified privilege.

The defendants did not show that **both** the basic facts and the inferences contained in the article were true, but succeeded in demonstrating that the status of the equipment used for fire-fighting was a matter of public interest and that the public had a duty to hear views on the issues involved.

SDSP Kerr also established, in his defence, that there were failings on the part of Major Douglas in the execution of his duty and as such his statements were fair comment on that matter. Major Douglas, for his part, has not shown that the views expressed were not honestly held by the maker.

Jamaica Observer, in relying on the defence of qualified privilege, has demonstrated that the public was entitled to be informed of the various contending views concerning the state of the Brigade. It has also shown that, as a nationally circulated newspaper, it had a duty to expose those views to the public. An analysis along the lines set out in *Reynolds vs. Times Newspaper Ltd. (supra)* demonstrates that the article was a responsible piece of journalism, despite the inclusion of an uncalled-for personal categorization of Major Douglas.

Judgment shall therefore be for the Defendants with costs to be taxed if not agreed.