



[2020] JMSC Civ. 179

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2012 HCV 07133**

<b>BETWEEN</b>	<b>JOHN W. MORRIS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>RADIO JAMAICA LIMITED</b>	<b>1<sup>st</sup> DEFENDANT</b>
<b>AND</b>	<b>LATOYA JOHNSON</b>	<b>2<sup>nd</sup> DEFENDANT</b>

Miss Jean Williams for Claimant

Mrs. M. Georgia Gibson Henlin Q.C and Miss Kristen M. Fletcher instructed by Henlin Gibson Henlin for the Defendants

November 16, 17, 2016 & June 6, 19, 20, 2017 and August 19, 2020

**Defamation – Meaning of words - Ordinary and natural meaning – Defences – Justification -Truth - Reynolds Privilege - Public interest- Apology - Mitigation of Damages - Quantum of Damages- Interest on Damages - Costs - Defamation Act 2013, SS. 12 14, 15, 20, 23, 24, 30 - Evidence (Special Measures) Act, 2012 - Cross-Examination of Journalist by video link**

**DAYE, J.**

**Introduction**

[1] On the 18 December 2012, the claimant filed a claim against first the defendant radio station and the second defendant one of their reporters for causing injury to his reputation in that he was lowered in the estimation of right-thinking members of society

generally on Thursday, 17 December 2009 by a broadcast in breaking news on their 5:00 pm. Beyond The Headlines evening news edition. A transcript of the recording of the alleged offending publication is quoted below.

***“Senior cop being probed in Lottery scam” [sic]. Police today swarmed the offices of a Montego Bay business place said to belong to a former ranked policeman as the probe in the lottery scam continues. The cops seized computer and other equipment said to belong to Senior Superintendent John Morris.***

***And returning to an earlier story where police today swarmed the offices of a Montego Bay business place said to belong to former senior policeman senior superintendent John Morris...***

***Hugh I am standing across from the offices on Gloucester Avenue of John Morris and Associates Limited special investigators and security consultant where a special team from Kingston also including persons from the Caribbean Search Department have been carrying out a forensic search of not just the offices but vehicles. They have already seized several documents which they took out in plastics bags. They have been searching the premises since 9’ o’ clock this morning and it is not until minutes after 4’o clock that they emerged from the offices with Mr. Morris looking through his vehicle and they have been searching the vehicles since then. We are still here waiting to hear further what the latest on the situation is but we have been told that they will be taking him back to Kingston with them.”***

[2] The reporter of 14-year experience who knew the claimant personally and professionally was present with her team outside and across from the offices of the claimant on Gloucester Avenue, Montego Bay where an Assistant Commissioner of Police from headquarters in Kingston led a joint police/military operation with the Caribbean Search Division.

[3] By positioning herself with her team and describing this joint police-military operation step by step the reporter was in the midst of investigative journalism. What the reporter was describing was a criminal investigation in progress under the authority of several search warrants of a retired and former senior crime officer in the city of Montego Bay. This investigatory journalism called for professional due care and skill or in other words responsible journalism. It was also a publication to the world at large and required due care and skill. (per Harrison P. in **Edward Seaga v Leslie Harper**, SCCA 29/2004,

del. December 20, 2005, at p.22 applying the Privy Council decision **Basdeo Panday v. Kenneth Gordon, del.** October 5, 2005, and also para [5] and [6] **Edward Seaga v Leslie Harper** [2008] UKPC 9, del., January 30, 2008.

[4] The claimant retired from the Jamaica Constabulary Force as a Superintendent of Police from September 2007 after 36 years of loyal and dedicated service to law enforcement. Most of his years of service were in Western Jamaica and in Montego Bay where he resided. His career was mainly in criminal investigation and he was a crime officer responsible for the crime in the parishes of Western Jamaica and Central Jamaica for some years. In May 2008 he commenced private business as a special investigator and security consultant through a company John W, Morris, and Associates.

[5] The claimant claimed:

1. General Damages ( Fifteen Millions Dollars,\$15 M )
2. Aggravated and or Exemplary Damages
3. Interest pursuant to the Law Reform (Miscellaneous) Provision Act,1955
4. Costs
5. Attorney's costs

for this alleged libel. The Radio Station denied their broadcast was defamatory but if found to be so the claimant was only entitled to nominal damages as their publication was essentially true and correct and further they published an apology. The wide disparity between the parties on the quantum of damages contain an echo of the award of nominal damages of one penny substituted by the trial judge for zero awards of damages given by the jury to Prime Minister Reynolds against Times Newspaper whom the jury found libelled him in their publication that he wilfully and dishonestly misled the Irish Parliament and his Cabinet by suppressing important information vital to the interest of the state. (**Reynolds v The Times Newspaper Ltd** [1999] 4 All E R609, (1999) **BHRC** 289, HL, [2001] 2AC 127) "**Reynolds Privilege**" or **Responsible Journalism**.

[6] Further, it is not only the issue of damages that separate the parties but fundamentally the question of fault and liability and the applicability of the defence at common law of qualified privilege as extended by **Reynolds** (supra.). The common law and statutory defences of justification are also raised and are in issue. But it is the “**Reynolds Privilege**” or the defence of “Public Interest” as it was later called that is central to the determination of this claim. This is a publication by the media about a private individual who held public office to the world at large about a criminal investigation, not yet completed, into unlawful conduct.

### **Pleadings – Meaning of words**

[7] In an undated and unsigned twenty-three paragraphs Amended Particulars of Claim with the year 2016 typed on it the claimant added a new paragraph 15 to the Particulars of Claim filed 18 December 2012. The 1<sup>st</sup> Defendant appeared to accept this pleading was served on them as they filed an Amended Defence of thirteen paragraphs on the 16<sup>th</sup> November 2016 which the claimant acknowledged on the same date. This new paragraph sets out the defamatory meaning which the claimant alleges.

*“14. That the newscast suggests that the Claimant was involved in criminal activities that transcend international borders.*

*15. That the newscast suggested that the claimant was involved in criminal activities and that he was guilty of criminal activities.”*

[8] In response, the Defendant in their Amended Defence denied that the newscast suggested the claimant is guilty of any criminal activities but asserted that the imputation that he was suspected of being in criminal activities was true and this publication was not defamatory. They pleaded:

*“9. ... The fact of the search referred to ... suggest the claimant was suspected of being involved in criminal activities ...*

*The 1<sup>st</sup> Defendant denies that the words complained of bore or were understood to bear any defamatory meaning.*

*10. ... it is denied that the newscast suggested that the claimant was guilty of criminal activities...The 1<sup>st</sup> Defendant denies further the imputation regarding the suspicion of being involved in criminal activities are true in*

*that the searches were being conducted by police from Kingston pursuant to warrants issued ... “*

*11... the 1<sup>st</sup> Defendant says the [words] were published on an occasion of qualified privilege.[and the subject of a police probe was a matter of public interest ..that they had a duty to report and the public had an interest to receive.]*

## **The meaning of the words a matter of law for judge**

**[9]** The issue is whether the words which include the whole publication are capable of bearing the defamatory meanings the claimant alleges. The sting of a libel is not only in the words themselves but what the reasonable person infer from the words. It is the duty of the judge to rule in his or her opinion what is the natural and ordinary meaning of the words. The test is what is the meaning the words would convey to the ordinary reasonable man to whom it is published, and in this case to the reasonable listeners to whom it is broadcasted. Diplock.L.J.in **Slim v Daily Telegraph Ltd.[1968] 2Q.B.(C.A) 173 para E and p. 174 para D stated :**

*“What does matter is what the adjudicator at the trial thinks is the one and only meaning that the reader as reasonable men should have collectively understood the word to bear. That is the natural and ordinary meaning of words in an action for libel.”*

*“The decision as to the defamatory meanings which words are capable of bearing is reserved to the judge and for this reason and no other is called a question of law. The decision as to the particular defamatory meaning within that category that the words do bear is reserved to the jury and for this reason and no other is called a question of fact.”*

**[10]** In **Lewis v Daily Telegraph Ltd. sub. nom Rubber Improvement Ltd. and Anor. v Daily Telegraph Ltd. and Same v Associated Newspaper Ltd. [1964] A.C.234 H.L.(E)**, Lord Reid explained the duty of the judge in applying the test of the ordinary reasonable man.

*“There is no doubt that in actions for libel the question is what the words would convey to the ordinary reasonable man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by the ordinary rules of construction. So he can and does read in between the lines in light of his general knowledge and experience*

*of worldly affairs. I leave aside questions of innuendo where the reader has some special knowledge which might lead him to attribute a meaning to the words not apparent to those who do not have that knowledge.’(p.258, para.2)*

*“What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words.’(p.258, para 3)*

*“Ordinary men and women have different temperaments and outlook. Some are unusually suspicious and some are unusually naïve. One must try to envisage people between these two extremes and see what is the most damaging meaning they would put on the words in question.” (p.259 Para 3) and “What the ordinary man not avid for scandal would read into the words complained of must be a matter of impression.” (p.260, para 2).*

**[11]** On the facts of **Lewis** case (supra.) the House of Lords considered whether the publication on the front page of two national newspaper the words “Inquiry on firm by City Police” and “Fraud Squad Probe Firm” were capable of meaning the plaintiffs were guilty of or were suspected by the police of being guilty of fraud or dishonesty. The newspapers pleaded the defence of justification in that it was true the plaintiff’s company was being investigated by the police. Lord Reid found the words not capable of meaning that the company or its chairman was guilty of fraud. He left it open that words could mean the plaintiffs were suspected of fraud. (p.260 para 2 and 4). Held. The trial judge misdirected the jury by not directing them the words were not capable of imputing guilty of fraud and therefore ordered a retrial. In any event, he found the damages awarded were too high and must be set aside. The jury should have been directed that damages for the same libel would be awarded by another jury.

**[12]** Lord Morris, on the contrary, believed the words were capable of meaning that there was fraud or dishonesty and the trial judge was right to leave that meaning to the jury. (p.267-269). Lord Hudson was satisfied the words cannot reasonably be understood to impute guilt. He believed suspicion may be inferred from the fact of the enquiry. Lord Delvin held the words were capable of some defamatory meaning. It was not capable of meaning the company was guilty of fraud and dishonesty but it was capable of meaning the company was suspected of fraud. He did not agree that a statement of suspicion imputes guilt as a matter of law. His view was that a bare statement of suspicion may convey the impression that they are grounds for belief in guilt. It depends on the context

in which the words are used and the circumstances of the publication. (p.283-287) A bare statement that an enquiry is on foot may go further and may positively convey that there are grounds for the enquiry that is, that there is something to suspect. The learned judge also agreed the trial judge failed to direct the jury about what the words in issue were capable of meaning and this was misdirection and there should be a retrial. He also held the damages awarded should be set aside as it was too high.

[13] In the Privy council decision **Bonnick v. Morris and Others** [2002] UKPC31, (2002)12 BHRC558, [2002] 3 WLR820, [2002] AC 300, [2003] 1LRC663 at 889, **para 9**, Lord Nicholls accepted Sir Thomas Bingham MR convenient summary of what is defamatory words stated in **Skuse v Granada Television Ltd.** [1996] EMLR278 at 285-287:

*“... the court should give the article the natural and ordinary meaning it would convey to the ordinary reasonable reader of the Sunday Gleaner, reading the article once,”*

[14] The ordinary reasonable reader is not naïve; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other non-defamatory meanings are available. The court must read the article as a whole and eschew over-elaborate analyses and also too literal an approach. The intention of the publisher is not relevant an appellate court should not disturb the trial judge’s conclusion unless satisfied he was wrong.

[15] The judge is required to determine whether words of a publication is capable of being defamatory on an application to strike out a statement of claim on the grounds that it has no reasonable prospect of success ( **Rule 26.3[1](c) CPR 2002** and sometimes upon an application for summary judgment (**Rule15.2 CPR 2002**). The same principles or tests as to the ordinary and natural meaning are applicable as summarised in **Bonnick’s** case (supra.) The decision of **Drummond-Jackson v British Medical Association and Others** [1970]1All ER 1094 held, on an application to strike out (which is a summary remedy which is only applicable in the plain and obvious cases) a statement of claim as disclosing no reasonable cause of action on the ground that the words published in the article were incapable of any defamatory meaning against the plaintiff,

[16] By a majority that the words published in a medical journal about the plaintiff's technique of dentistry were capable of being defamatory and ought to be submitted to the jury. In **Careif Ltd. v Anthony Tharpe and Jamaica Observer Ltd.** [2013] JMSC Civ.108, Straw, J, as she then was, ruled [27] that certain paragraphs of the Particulars of Claim were capable of being defamatory on an application to strike out and summary judgment were one of the controversies was whether words published about the claimants' company was capable of being defamatory. (see also **Khemlani Mart Limited and Kaymart Ltd. v Radio Jamaica Ltd.** CL. 2007 HCV 03326 per. McDonald-Bishop, J.(Ag.), as she then was an application to determine the defamatory words under Rule 69.4 CPR 2002. And Campbell J. in **Jasper Bernard v. The Jamaica Observer**, Suit No.CL 2002/B-048, del. January 21, 2006, granted an application to strike out a defence under R.26.3(c) as it disclosed no reasonable grounds for defending the claim. The defendant published in Portland that the claimant was arrested for possession for counterfeit notes when he was not arrested he was only taken to the police station for questioning.

[17] In **Bonnick** (supra) Lord Nichols affirmed that the law attributes to the words whose meaning is alleged to be defamatory one meaning, although different readers are likely to read the words in a different sense. He said this "single meaning" rule was artificial but was a fair and workable method for deciding whether words under consideration should be treated as defamatory.

[18] The issue of the different meanings of words alleged to be defamatory is somewhat interrelated to the aspect of Reynolds' **privilege** whether the journalist acted reasonably in the defamatory article to be published. In other words, if the words or article has more than one meaning should a responsible journalist disregard the less offensive meaning and publish the more offensive meaning. Lord Nichols found the journalist Margurett Morris could reasonably have believed the article published concerning Mr. Bonnick did not bear a defamatory meaning. In the end, Lord Nichols held the "single meaning" rule was not applicable when considering the conduct of the journalist under the **Reynolds'** privilege defence. (para [20] – [24] **Bonnick** ). Lord Scott of Foscote at (para [136] in **Jameel Mohammed and others v Wall Street Journal Europe Sprl** [2006] UKHL 44.

[2006] 4 All ER 1279, [2007] 1 AC 359 indicated that this approach which was flexible in assessing the conduct of the journalist should be confirmed by the House of Lords.

[19] The circumstances where the words published in an article relating to publication alleging police investigation into the conduct of a claimant and may possibly have more than one meaning and where the issue is raised whether the article bear a defamatory meaning came before the Court of Appeal and Wales in **Flood v Times Newspaper Limited** [2012] UKSC 11. There Lord Philips who delivered the first judgment adopted the useful shorthand approach., to determine the defamatory meaning or sting to be derived from an article when read as a whole, by Brooke LJ in **Chase v News Group Newspapers LTD.** [2002] EWCA Civ. 1772; [2003] EMLR 2018 . The “Chase level 1” meaning is that the claimant was guilty. The “Chase level 2” meaning is there were reasonable grounds to suspect that the claimant was guilty. The “Chase level 3 “meaning is that there were grounds for investigating whether the claimant was guilty. The claimant, Detective Sgt. Flood in **Floods’** case pleaded a Chase 2 meaning that there were reasonable grounds to suspect he corruptly accepted bribes. While the TNL pleaded a Chase 3 meaning for the purposes of a plea of justification.

[20] In the instant trial Retired Superintendent John Morris plead a Chase 1 meaning that the news broadcasted imputed he was guilty of engaging in criminal activity. The defendant, RJR, plead a Chase 2 meaning in their defence that the broadcast only imputed that there were grounds to suspect that the claimant was involved in criminal activities and the imputations are true.

[21] I now consider the words of this broadcast in the context of the broadcast as a whole and ask myself what broad impression it would convey to the ordinary reasonable reader listening to the 5’0 clock news on Thursday the 17<sup>th</sup> December 2009. It is the ordinary reader who is not easily ready to give the worst meaning to this broadcast about retired Supt. John Morris or the ordinary reader who is not naïve. It is the ordinary reader who read between the lines taking into account his general knowledge and experience of day to day affairs in the city of Montego Bay and crime in Jamaica.

[22] The first words that would attract his attention are the opening sentence “**A SENIOR COP BEING PROBED IN THE LOTTERY SCAM**” and the name ‘**SENIOR SUPERINTENDENT JOHN MORRIS**’ The words Lottery Scam is not found in any dictionary but the ordinary reader or listener in and from Jamaica and in the city of Montego Bay from general knowledge would be aware that this was a new fraudulent activity involving obtaining large sums of money from vulnerable victims particularly from the USA. The ordinary person knew the equipment and means to commit this unlawful activity were items cell phones and laptop computers and magic jack instruments and names and addresses and telephone numbers of residents abroad. Not even the interpretation **Section 2 of the Law Reform (Fraudulent Transactions) (Special Provisions) Act of 2013** contains a definition of the words lottery scam. But the legislation proceeded on the premise that fraudulent activity involving transferring sums of money from outside or within Jamaica was the mischief the Act was aimed at. The interpretation section defines “unlawful activity” as any conduct that constitutes an offence against the Act. In short, the claimant’s name was broadcasted to the world at large as associated with known serious criminal activity in Jamaica that he had first responsibility to deter and prosecute

[23] The next section or paragraph of the broadcast was descriptive. It gives a narrative or a summary of the search and seizure of items taken from the claimants’ office and also a search of the claimant’s motor car outside his office. Standing by itself it is capable of bearing a defamatory meaning against the claimant. However, the last three sentences of the broadcast must be considered along with the previous sentences and paragraphs. They are:

*And they have been searching the vehicles since then. We are still here waiting to hear further what the latest on the situation is, but we have been told that they are taking him back to Kingston with them.*

[24] When looked at or listened to as whole or as one news item this broadcast is capable of conveying to the ordinary reasonable listener here and abroad that the police team has found the proof of lottery scam against the claimant and he will be taking, both man and evidence, back to Kingston. In other words, the claimant was guilty of the unlawful criminal activity lottery scam. This is the single meaning I find the broadcast is capable of

meaning. It seems to me that the journalist adopted and endorsed these last three sentences quoted above. Whether the news item was in fact, defamatory to the claimant is a question of fact which this court in its fact-finding function will have to decide.

### **Plea or Defence of Justification**

**[25]** Although the court rule what is the single meaning that the broadcast is capable of meaning that is not the end of all issues on the possible meanings as the 1<sup>st</sup> defendant contends in their further pleading the publication of the fact of the search suggested that the Claimant was suspected of being involved in criminal activities (para 9 of Particulars of Claim).

**[26]** And they plead further that this suggestion was true in that searches were being conducted by the police from Kingston pursuant to search warrants ( Exhibit 2) issued under :

- a. The Dangerous Drugs Act:
- b. The Forgery Act ;
- c. The Unlawful Possession of Property Act ;
- d. The Firearms Act

**[27]** In a searching cross-examination of the claimant by counsel for the defendant she elicited the following:

- a. That there was a raid of his offices and he was issued search warrants above.
- b. That the subject of the warrant would be investigated due to suspicion of being involved in criminal activities relative to the legislation under which the warrant was issued.

- c. That he would have been suspected of criminal activities and the raid caused persons to suspect him to be involved in criminal activities.
- d. There was a link between possession of guns and drugs and lottery scamming and these crimes transcend national borders.
- e. That prior to the 2013 Act was passed the Anti – Lottery Scam Task Force would conduct raids and charge persons under the Unlawful Possession of Property Act.
- f. That decent person would not want to associate with persons in the drug trade or suspected of being involved in the drug trade. (see pp. 14-40 Transcript of evidence and para 78-89 1<sup>st</sup> Defendant Submission on trial )

**[28]** Both witnesses for the claimant Charles Scarlett and Orgille Scarlett also agreed that someone investigated under the respective legislation under which the warrants were issued would have been suspected of being involved in criminal activities.

### **Submission**

**[29]** Based on the evidence referred to in the paragraph above the defendant submitted they have established the broadcast of the raid of the claimant office means he was suspected of being involved in criminal activities and they have established the truth of this. As a result, they contend the claimant was not defamed. In addition, they argue the investigation of lottery scam was not materially different from investigation under the legislations by which the claimant's office was searched In each investigation the claimant would be suspected of being involved in criminal activities. His witnesses testified they would hold the same anger and resentment against him. Therefore, Counsel submits the claimant reputation was not lowered in the eyes of well-thinking men by the publication of the broadcast that he was being probed in the lottery scam. (para 70- 90 of 1<sup>st</sup> Defendant's Submission, dated, June, 19, 2017.)

[30] This submission is attractive but not sound in principle for the publication expressly asserted that the claimant was being investigated for lottery scam and this assertion was not true. Lottery scam had a clear defamatory meaning separate and apart from other offences. The sting of the publication is to link the retired senior officer to this type of criminal activity. In any event, the publication went further to convey the impression that the claimant was caught after an intensive search and was therefore guilty. I do not find the defendant has proved the substantial truth of the meaning I attribute to the broadcast and they have not thereby established the defence of justification. My understanding of the Court of Appeal decision **The Jamaica Observer v Chong** [2016] JMCA Civ. 35 (24 June, 2016) was whether the defence of fair comment was made out on the facts. The appeal court found it was the defence of fair comment does not arise in this trial.

### **Qualified Privilege or Responsible Journalism**

[31] Apart from the plea of justification the defendant pleads the broadcast was published on an occasion of privilege if the court found the publication was capable of having a defamatory meaning. (see para [7] above. Lord Nichols stated in **Reynolds** that it was body independent of the media who should determine whether a publication satisfies the standard of responsible journalism and that the court is that body. It is the court who must decide if the defence of qualified privilege is established. In **Flood** had to decide the preliminary issue whether qualified privilege or TNL exercised responsible journalism in their publication of the criminal investigation of Sgt. Flood.

There are two elements of the defence of qualified privilege or responsible journalism:

- a. Public interest, and
- b. Whether the defendant behaved fairly and responsible in gathering and publishing the information (standard of conduct of journalist or editor).

[32] The court recognises and has stated repeatedly that what the public is interested in is not always of public interest. The benefit to the public of the information should be

evaluated The public has a right to know and it is broadcast of public interest to receive information that concerns the welfare of the community and matters affecting the administration of an area of government. Equally, it is of public interest that the reputation of individuals is not wrongly damaged in an orderly society.

[33] The starting point of considering the public interest is the subject matter of the publication. This broadcast concerns the State effort to fight crime and allegations that a former senior law enforcement officer is involved in the same criminal activities. This is a matter of high public interest and concern. The defendant has a duty to publish information on this subject and the public have a right to know about this matter and receive this communication. Public interest may be limited to the fact that there is an investigation into allegation of criminal conduct without more. The publisher is entitled to publish this information even if the information is not true and in the absence of verification without the risk of being liable for defaming the individual. This is referred to as reportage and Lord Phillips in **Flood** observed this was the approach adopted in **Jameel and** applied to the facts of that case. The other aspect of the public interest of information is the content of the information. This requires the journalist to consider the probability the information is true in order to discharge the duty of responsible journalism. In the instant trial, the journalist adopted the fact that the claimant would be taken back to Kingston after the search and seizure from his office and I hold the imputation by implication that the claimant was guilty of being involved in criminal activities which were related to the lottery scam. This would warrant verification that the allegation was true and this was not done. But this is venturing into the standard of conduct of the journalist. On the matter of public interest, the claimant agreed in cross-examination that the report of an investigation of allegations against him being involved in criminal activities was a matter of public interest. He agreed other media such as The Gleaner, The Observer (Exhibit 1), The Mirror, and Nationwide News published this raid. However, neither The Observer nor The Gleaner publication makes any assertion or imputation that the search of the claimant office concern lottery scam or that the claimant was taken back to Kingston after the search.

[34] The next consideration is the steps taken to gather and publish the information. The journalist attended the scene or office of the claimant where this joint military operation was conducted, that was fair. She described what she saw of items taken from the office and the search of the claimant's motor car, that also was fair to the individual whose reputation could be damaged. She went on to report a material fact that was defamatory based not on her personal knowledge but what was told to her. The truth of this latter information was critical to the reputation of the claimant. Fairness demanded that she did more she published the information to the world at large. Lord Nichols set out ten illustrative factors that the court should consider and which are guidelines to determine whether the journalist or editor practised responsible journalism.

(1) **The seriousness of the allegation.** *These were very serious allegations against the claimant that could severely damage his character. The journalist who knew the claimant personally and professionally appear not to consider treated with insufficient care before she filed her report.*

(2) **The nature of the information and the extent to which the subject matter is a matter of public concern.** *She gave disproportionate emphasis to this matter to the expense of the individual. This is her evidence in cross-examination:*

*“A breaking story if it cuts into the news the story was a breaking story because of the person to whom it relates and because of the nature of the issue these story would be considered breaking.”*

*The journalist considered the status of the individual and the nature of the information but not necessarily how the publication may damage the claimant reputation if it is not true. This was not fair to the claimant.*

(3) **The source of the information.** *The defendant source remains confidential. In the circumstances this source was not as reliable as expected. She placed over-reliance on her source.*

(4) **The steps taken to verify the information.** *The journalist was so confident in her source that she took no steps to verify if the allegation is true. Lord Phillips in **Flood** explained in Chase 1 meaning imputation that alleges the claimant is guilty the publisher should reasonably consider the probability the information may not be true and take steps to verify the truth. Neither the journalist nor the editor took any such step.*

(5) *The status of the information the journalist was present and was in a position to obtain first hand information of material facts to avoid any mistake or misstatement of facts that may be defamatory.*

- (6) *The urgency of the matter. Where a pressing concern in a matter exists or an emergency arises in some circumstances a publication to the public may be privileged. This is illustrated in **Blackshaw v Lord** [1983] 2 All ER 311 at 327*

*“There may be extreme case where the urgency of communicating a warning is so great, or the source of the information so reliable, that publication of suspicion or speculation is justified: for example where there is danger to the public from a suspected terrorist or the distribution of contaminated food or drug“*

There are no circumstances of the nature surrounding the instant broadcast comparable to the ones described in the above passage, the only urgency was to broadcast this investigation to the public at the prime time 5 o'clock news. Again there was insufficient regard for the reputation of the individual.

- (7) **Whether comment was sought from the plaintiff. (claimant).** *One has to take into account the practical reality of this search. It was a high profile search under strong joint military security. There would be no opportunity to obtain a comment from the claimant until after the search. The journalist was cross-examined what she did after the search. There is conflict on the evidence whether the claimant or the journalist first contacted the other by cell phone after the search. I accept the claimant first phoned the journalist because he was rightly angry about this broadcast. The journalist had already filed her report without any comment. She did not appear to have in mind that it was fair to get a comment in gathering and publishing the information in her report.*
- (8) **Whether the article contained the gist of the plaintiff's side of the story.** *It did not. There was no effort taken to do so and this was unfair to the claimant.*
- (9) **The tone of the article.** *This broadcast adopted the allegation that the claimant was taken back to Kingston as a statement of fact. This carried the defamatory implication already discussed.*
- (10) **The circumstance of the publication, including the timing.** *This factor has to be combined with whether there was any urgency to broadcast the information on the 5 o'clock news and as a breaking news. This item of news could fairly and accurately be published at the available 6 o'clock news.*

[35] The journalist explained in evidence she submitted all information to and obtained the approval of her boss, the editor. **Reynolds** advises the judge to accord deference and due weight to editorial discretion and judgment. **Flood** applied this proposition to the facts of that case; I too take this into account. However, I hold this publication was not a neutral investigative report of a serious allegation of criminal conduct against a former senior police officer. It was moreover the line and into being sensational the weight of this publication tilts in favour of fairness to the reputation of the individual. Also, I do hold the

weight of the meaning the defendant ascribe to the broadcast, that, the publication truly and accurately suggested the claimant was suspected of being involved in criminal activities, does not carry force in the light the meaning attributed to the publication by the court when looked as a whole. The defence of **Reynolds privilege** is not established and the defendant is liable to the claimant for this defamatory publication. The claimant is entitled to compensation for the injuries caused to him.

## **Assessment of Damages**

### ***General Damages***

[36] The principle governing an award of damages for the tort of defamation was conveniently summarised by Carberry .J.A. in **The Gleaner Company Ltd. v. Richard Small** (1981) 18 JLR 147 at p. 375, para C-I and p. 376, para A-E. In **Bonnick** the Privy Council approved this statement of principle as correct and the same as the common law of England.

*“It is not perhaps easy to summarize the effects of the seven speeches in Cassell’s case but the main propositions that are relevant to our own case emerge clearly from the 5 to 2 majority; such differences as existed turned largely on the question of whether the trial judge had in fact directed the jury adequately as to the applicable law. The majority decided that he had. Apart from Viscount Dilhorne and Lord Wilberforce there was no serious issue as to what the principles of the law should be or were and I attempt to summarise them in so far as they affect the instant case. Omitting the problem of joint publishers the B net results of **Rookes v. Barnard and Cassell & Co. Ltd. v. Broome** appears to be:*

- 1) *The object of damages in the law of torts generally, and in the law relating to defamation in particular, is to compensate the plaintiff for the injury that he has received, not to punish the defendant for any offence he has committed. (Punishment belongs to the criminal law).*
- 2) *In the result exemplary or punitive damages ought not to be awarded in actions in ton (or contract).*
- 3) *There were however certain cases in which the award of such damages had been permitted by the common law for so long a period that they had to be recognised or accepted as exceptions, or anomalies not covered by the basic rule that damages are compensatory only.*

- 4) *Following on Lord Devlin's analysis of these cases, these exceptions were narrowed down to two or possible three categories:*
- a. *cases of oppressive, arbitrary or unconstitutional conduct by government servants;*
  - b. *cases where the defendant's conduct had been calculated to make a profit for himself which probably would exceed any liability in damages that he might incur to the plaintiff;*
  - c. *cases, if any, in which the recovery of exemplary damages had been authorised by statute law*
- 5) *The categorizing of the exceptions in paragraph 4 above was not meant to extend their range, or the range of tons to which the exceptions could be applied.*
- 6) *The boundaries or limits of the exceptions in paragraph 4 remain to be worked out:*
- as to (a): it is not necessarily limited to government servants in the narrow sense of the word; it can conceivably be extended to persons having or exercising governmental authority, and just possibly to corporations so large G or powerful as to be considered to be endowed with "state authority".*
- as to (b): it is not necessary to show that a defendant actually made this mathematical calculation; (such evidence might be impossible to obtain). It would be enough to show from the nature of the situations and the defendant's knowledge that it is a reasonable inference from the evidence that he did so. H It might for example cover the case of a landlord harassing a tenant protected by the Rent Acts so as to secure possession in order to embark on new developments on the land.*
- 7) *Where damages are awarded as compensatory, it is realised that compensation may have to cover both pecuniary and non-pecuniary loss, or loss that is subjective and not easily measured in money terms*
- 8) *In some of these cases, the courts have fixed nominal or arbitrary limits to measure the immeasurable, e.g., for loss of expectation of life (see **Benham v. Gambling** (1941 AC. 157)).*
- 9) *In most other cases the attempt to measure subjective loss still has to be made.*
- 10) *In cases of defamation the true meaning of damages is compensatory only; exemplary or punitive damages can be recovered only in the rare cases falling under paragraph 4.*

*Primarily what is recoverable by the plaintiff is:*

- a. actual pecuniary loss, and anticipated pecuniary loss;*
- b. compensation for any social disadvantages that result or may result, caused by the changed attitude towards him of the people as a result of the defamation;*
- c. compensation for injury to plaintiffs feelings, which may be increased by the high handed, oppressive or insulting behaviour of the defendant, which may affect the plaintiff's pride and self-confidence (aggravated damages, but these are compensatory, not punitive. They are not intended to let in exemplary or punitive damages by the back door.)*

*11) If exemplary damages are awarded under a case falling within clause 4, it is to be awarded only where the compensatory damages (including any aggravated damages awarded under 10 (c)) are deemed inadequate; (they might for example still leave the defendant making a net profit as a result of his conduct). Such exemplary damages as are awarded should be moderate. If such damages are to be claimed, the plaintiff should specifically so plead (though at the time of **Cassell v. Broone** pleading such damage was not mandatory).*

*12) Exemplary damages need not be separately awarded, though if awarded, it may be desirable to indicate this.*

*13) So far as defamation and newspapers are concerned seeing that they normally provide news items etc. in the normal course of their business, they would not normally be regarded as falling under clause 4 (b) above, unless perhaps the item was a 'special' issue on its own, in which the intention to make a profit from the particular items—come what may—can be more readily seen and determined."*

### **Claimant's evidence of injury - Compensatory**

**[37]** In his witness statement, filed February 2015, the complainant's evidence of his injury is stated:

*"40. That I have since lost my Office Manager and several other employees after the publication of this news item."*

*"41. That the publication of this news item have caused me and my family great embarrassment, stress and pain.*

*"42. That since the publication my business has lost a number of clients,"*

*“44. That as a result of the airing of this broadcast I have suffered embarrassment, humiliation, hurt to my feelings, mental trauma, injury to my reputation, I have been shunned and cursed at by persons close to me and I have loss business opportunities loss of staff members.”*

*“45. That I am aware the 1<sup>st</sup> Defendant, Radio Jamaica Limited issued an apology after my Attorney-at-law contacted the office. However, that did not make me feel any better about myself as a person. I still suffered the same hurt to my feelings, injury to my reputation, embarrassment and humiliation.”*

*“46. That I was still shunned by persons so much that I stopped going to my hangout spot and basically stayed home as I was afraid of getting more insults. I became very depressed and as a result I was quite withdrawn. I could not even relate to my wife and children. I have suffered loss and damage as a result of this publication of this newscast.”*

[38] This evidence was not challenged by the defendant in cross-examination. Any assertion by the defendant of matters relating to his reputation was met in the defendant's pleading by the response it is neither admitted nor denied. The defendant submitted that the claimant has not suffered any injury to his reputation based on his two witnesses' response that they would have shunned the claimant if was involved in other criminal activities such as possession of guns and firearms apart from lottery scam. In the end, I am obliged to accept that the claimant has suffered a serious injury to his feelings and reputation and for the length of time he described. The injury goes to the core attributes of his personality such as his integrity and honour. It is left to determine the amount of compensation to award him for this loss. An award of damage must be sufficient to vindicate the claimant's reputation to the public and in the circumstances where the defendant made no apology.

[39] Although the claimant testified his business suffered the loss of his office manager and staff and client he did not claim this loss as that of John W. Morris and Associates Limited nor was this company a separate party to this claim. **Jameel** a claim was filed for the claimant's company as a trading company and this was allowed without proof of financial loss. I regard the instant claimant evidence of the loss of staff and client not as proof of financial loss but as examples of how persons close to him shunned or disassociated themselves from him after the publication of this news item. In **The Gleaner Co. Ltd. and another v. Abrahams** [2004] 1 AC 628 the claimant proved actual financial

loss and injury to health. This is not the position of the instant claimant, his case rest substantially on the injury to his feelings and distress caused to the injury to his reputation.

## **Mitigation of Damages**

### **Apology**

[40] The claimant in his witness statement accepts that three days after on December 20, 2009, in the 5.00 pm news broadcast the defendant published an apology for the defamatory news item. However, he says, he still felt injury to his feelings. There is no other complaint about the apology such as it was not adequate. The terms of the apology are :

*“On an editorial note, last Thursday a story was carried on a police raid of offices operated by a former senior superintendent of police in Montego Bay, John Morris, intimated that the raid may have been associated with investigation with the illegal lottery scam. RJR news has since ascertained that this is not the case and apologise for any discomfiture which may have been caused by Mr. Morris.”*

[41] Counsel for the defendant submitted that **Section 14 of the Defamation Act, 2013** provides a defendant may offer or make an apology before or after an action is commenced in mitigation of damages. Further, she submitted an apology is not an admission of fault or liability. (Section **15 of the Defamation Act, 2013**). These are correct statements of the law and I duly take them into account on the issue of compensation of damages for the claimant. (c/f **Section 13 of Act**). It is also relevant to the issue of indemnity costs (Section **30 (a) and (b) Defamation Act, 2013, and Section 12(3) – (7)**), which I will discuss. In an expanded submission, dated in 2016 Counsel for the claimant challenged the content and terms of the apology. She contends it was not satisfactory. Counsel did not bring it to the attention of the defendant from April 21, 2009. The defendant response to any such challenge would indicate clearly if their conduct was insincere.

### **Aggravated Damages**

[42] I am guided by the principle that Aggravated Damages is compensatory. It relates to how the defendant behaved in publishing the defamatory publication. It focuses on the defendant's conduct and it is different from exemplary or punitive damages.

### **Website**

[43] A primary issue of fact was raised on the pleadings about the publication of this newscast on a web site. In my view, it is relevant to a claim of aggravated damages. The claimant at para 13 of his Particulars of Claim asserted the 5 o'clock newscast is broadcasted internationally and is accessible by the internet. At para 8 the defendant's Defence they deny they operate a website on the world wide web.

[44] In **Khemlani Mart Limited** counsel who now appears for the defendant appeared for RJR in that case and raised also the issue that the defendants do not operate a website. This was not decided then but was reserved for trial as the court was dealing with a preliminary application. The issue now reappear.

[45] In his witness statement, the claimant says the RJR news is broadcasted at [www.rjr.94.com](http://www.rjr.94.com) and that he listens for the RJR 5.00 pm news when one is abroad by the internet. His witness Charles Scarlett testified he heard the 17 December 2009, 5 0' clock news on the RJR website. In cross examination, he says he heard this news on the radio and he can't say with certainty if this news was available on RJR website. Orgille Scarlett who resides in New Jersey says he heard this 5 0' clock news on the RJR website. The journalist Latoya Johnson testifies RJR website is RJR FM 94.com. A person can access the news outside of Jamaica on this website, she says. Also, she says if you place a search for a subject on the internet you would be prompted to various links.

[46] I find that it is not established that RJR has the specific website [www.rjr.94.com](http://www.rjr.94.com) But the broadcast of RJR's 5 o'clock news was accessible by other links on the internet. Orgille Scarlett access one of these links on the 17 December 2009 in New Jersey, USA. The real issue is not the ownership of a website but the access to and publication to the world at large. I agree with Counsel for the claimant on this aspect in para 25 of her expanded submission. This is what Harrison P. described as "the indeterminate width of

the publication“ in the Court of Appeal decision of **Edward Seaga v. Leslie Harper** (supra p. 22, para 2) and what Lord Nichols called “mass” publication. They all agreed to this means of communication requires due care before a publication is made. In **Percival James Patterson v. Cliff Hughes and Nationwide News Network Ltd.** [2014] JMSC Civ. 167. The defendant did not complain about the publication of the report by radio had access to a business website of the defendant to which other internet providers worldwide had a link. No award of aggravated damages was made in this case though it was pleaded. The Court of Appeal of Jamaica in **Seaga v Harper** reduced the award of damage by the trial judge of \$3.5 million to \$1.5 million and expressed some concern that aggravated damage was included in the initial award.

[47] The Court of Appeal of England and Wales in **Flood** reserved their decision on the point, until full arguments, on the consequence of the publication about the claimant remaining on the website of the defendant after they were informed that Sgt. Flood was cleared of all allegations of unlawful conduct by an internal enquiry. In the circumstances of this case where the defendant tendered an early apology in accordance with the law in my view, this is evidence of sincere conduct’ this should not be meted with an award of aggravated damage nor exemplary damages which is punitive damage.

### **Quantum of Damages**

[48] An award of damages should bear an appropriate and rational relationship between the injury or damage and the sum awarded, (the rational relationship test). **Section 24 and 25 of The Defamation Act, 2013.** I turn to the corpus of case law as a guide as to the range of awards. In **Abrahams**, Forte, P. in the Court of Appeal in Jamaica stated the court should use the corpus of appellate decisions. In the absence of a substantial body of such decisions from the Court of Appeal I also refer to some relevant awards of the Supreme Court:

1. **Abrahams**, the Court of Appeal on July 31, 2000 reduce from JA\$80.7 million to JA\$35 million a jury award of damages for the plaintiff on the 17<sup>th</sup> July 1996. The Privy Council did not interfere with this award.
2. On the 15<sup>th</sup> April 2011 the Court of Appeal in **The Jamaica Observer Ltd. v Orville Mattis** [2011] JMCA Civ. 13 did not interfere with an award of damages by a jury of JA\$1 million made on the 11<sup>th</sup> February 2008 updated to \$ 2,227,160.00 using CPI for December 2019.
3. On the 11<sup>th</sup> of November 2006, the Court of Appeal in **CVM Television v Fabian Tewarie** SCCA No. 46/2003 reduced an award of General Damages by a jury from JA\$20 million made in June, 2003 to JA\$3,500 million. Updated to \$13,876 million, using CPI December 2019.
4. Morrison JA in **the Jamaica Observer Ltd. v Paget de Freitas and Gladstone Wright** [2014] JMCA Civ. 18 for the Court of Appeal reduced a JA\$20 million award of General Damages by the jury made in May 2008 to \$6.m. He said a JA\$10 million award for exemplary damages was wrong and set it aside. The appellant published by the bank manager of the Montego Bay branch of Bank of Nova Scotia at the time “BNS probe \$94 million exposure Bank Manager sent home.” It was not correct that the Bank Manager was relieved of his post. This sum is updated to \$12,702,160.00 using CPI December 2019.
5. On October 30, 2014, the Supreme Court awarded \$12 million general damages to the claimant **Percival James Patterson**, no aggravated damages awarded. Neither was commercial interest awarded. This is updated to \$15 million, using CPI, December 2019. There are some similar features between this case and the present claimant. Both are former public officeholders. The former Prime Minister office may be higher but both were the subject of defamatory publication that was not true and strike at the core of their integrity and honour. A comparable sum should be awarded to vindicate the claimant’s reputation. In my view, the starting sum should be JA\$15m. This sum should

be discounted by thirty-five percent (35%) to reflect the apology. The award of General Damages is JA\$9.5 million.

6. An updated award of \$5.5 m. general damages were accepted by Counsel for the claimant in her written final address in 2016. This was based on an award of \$4,371,310.34 general damages made by Sykes. J, as he then was, in August 2014 in Joseph **M. Matalon and others. V. Jamaica Observer Ltd.** CI. No. 2009 HCV 00070. He relied on the reduced award of \$1,500.000 made by the Court of Appeal of a December 2003 award of \$3,500.000 in **Seaga v. Harper**. The learned Judge on the facts he found held the libel of the claimant was on the lower end of the scale of gravity. He found the claimant did not suffer much harm or loss after the publication.
7. An updated award of general damages of **Seaga v. Harper** using CPI December 2019. Is \$5,488,843.00. This case also may be regarded in the middle or lower end of the scale. **Patterson** and the instant claimant are at the higher end of the scale.
8. In May 12, 2011, Roy Anderson J, in **E. C. Karl Blythe v. Gleaner Co. Ltd. , CI.2004 HCV 167**, awarded the claimant \$6,000.000 general damages also relying on **Seaga v. Harper**. This sum is updated using the CPI, December 2019 to \$ 9,623,445.00.
9. On January 27, 2011, Roy Anderson J. in **Jamaica for Justice and Carolyn Gomes. V. News media Communications Ltd.** and others. HCV 00280 of 2006 awarded the claimant \$4,500.00 general damages. This is updated using CPI, December 2019 to \$7,264.895.00.
10. In May 2012, the 1<sup>st</sup> claimant was awarded \$8,500.000 general damages in **Easton Douglas and Dr. Conrad Douglas and Environment Science and Technology Ltd. v. Jamaica Observer and John Maxwell [2012] JMISC Civ. 101**. This sum is updated using the CPI for December 2019 to \$12,596,553.

11. In May 2012, the 2<sup>nd</sup> claimant was awarded \$7,000,000 general damages. This sum is updated using the CPI for December, 2019 to \$ 9,375,632.00. There was no appeal by the parties of these awards.

12. After a review of these ranges of awards, my view remains that the present starting point of the award of damages for this claimant is \$15 M. This sum should be discounted by thirty-five percent to give an award of \$9.5 M.

## **Interest**

[49] The claimant claims interest under The **Law Reform (Miscellaneous Provision) Act, 1955. Section 3 provides (insert 1<sup>st</sup> para of section 3)**. This section confers a statutory discretion on the court to award interest on any debt or damages. Interest may not be pleaded but it is desirable in practice to do so. Andrew Rattray J. discussed this practice, relying on Carey J.A.'s opinion in **Long Young (Pte) Ltd. v. Forbes Manufacturing & Marketing Ltd. (1986) 40 WIR 229 at 232- 234**. (See Award of Interest in Commercial Cases by the Hon. Mr. Justice A Rattray. October 26, 2002).

[50] The judge commented further that the claim for damages included both liquidated and unliquidated sums. Rowe P. in **Central Soya of Jamaica Ltd. v. Junior Freeman** SCCA 16/84 (8.3. 85), which was a claim for damages for personal injury for negligence, among other things, held that interest on damages included pecuniary and non-pecuniary loss.

Some counsel at the civil bar was of the

view that interest was not permissible on an award of damages in defamation cases. Such a submission was advanced by defence counsel before the Court of Appeal in **Gladstone Wright** (supra) based on **McPhilemy v. The Times Newspaper Ltd. [2001] EWCA Civ. 933, [2002] 1WLR 934**. Morrison, J.A. (as he then was) delivering the judgment of the court settled the issue. He ruled that an award of interest on damages in a defamation case was entirely in the judge's discretion. He did observe that it may involve an element of double compensation. The trial judge did exercise his discretion to award interest of 3 percent per annum from the date of publication of the defamatory

article to date of judgment. This was a trial by jury and the jury gave their verdict and award of damages the same day at the end of the trial.

[51] I, therefore, order payment of interest of 3 % per annum on the award of damages of \$9.5 million from the date of publication of the defamatory broadcast, December 17, 2009, to the date of reserve judgment 19th June 2017.

### **Costs and Attorney's costs**

[52] Attorney's cost is pleaded in addition to costs. The civil practitioner would be aware that this form of drafting means the claimant is claiming separately for indemnity costs. There was no specific submission by counsel for the parties on this area of the claim. However, it is before the court and I am obliged to consider the principles of this exceptional area of costs before giving a decision on it.

[53] Like interest the power to award costs is discretionary. **The Judicature (Supreme Court) Act, 1880, Section 47(1)** provides:

*47(1) In the absence of express provision to the contrary the costs of and incident to every proceeding in the Supreme Court shall be in the discretion of the Court, but nothing herein contained shall deprive a trustee, mortgagee or other people of any right to costs out of a particular estate or fund to which he would be entitled according to the rules acted upon in Courts of Equity before the commencement of this Act:*

*Provided that where any action or issue is tried by a jury costs shall follow the event unless upon application made, the Judge at the trial or the Court, for special cause shown and mentioned in the order, otherwise directs.*

*Any order of a Judge as to such last-mentioned costs may be appealed from, and maybe discharged or varied by the Court of Appeal.*

*No costs shall be recoverable until they have been taxed by the Registrar or his deputy.*

Then in Section 28E of the Act, Parliament by an amendment in 2003 repeated that the award of costs is at the discretion of the judge and went on to enumerate the different types of costs that a judge can make.

*28E(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all civil proceedings in the Supreme Court shall be in the discretion of the Court.*

*(2) Without prejudice to any general power to make rules of court, the Rules Committee of the Supreme Court may make provision for regulating matters relating to the costs of civil proceedings including, in particular prescribing-*

*(a) scales of costs to be paid-*

*(i) as between party and party;*

*(ii) the circumstances in which a person may be ordered to pay the costs of any other person; and*

*(b) the manner in which the amount of any costs payable to the person or to any attorney shall be determined.*

And yet again Parliament visited the matter of costs specifically in 2013 under **Section 12 and 30 of The Defamation Act**, whereby it permitted indemnity costs for defamation claims. Brooks J, as he then was, in **Michael Distant and Charmaine Distant-Minot v Nicroja Ltd. and Nicholas Grant and Roxburgh Management Services Limited**, CL. No. 2010 HCV 1276. del. March 8, 2011, decided on an application for indemnity costs and a special costs certificate. He commented there was no mention of the word indemnity costs in the existing legislation, or in the rules but such costs were permitted under the law. He refused the application for indemnity costs. However, he granted a special cost certificate. On the facts of that case, this issue that this court will have to address. Mangatal, J. granted a special cost certificate in Raziel **Ofer v George Thomas and others** [2012] JMSC Civ. 184.

**[54]** There are some useful statements of principle on costs from other jurisdictions. Digby J. in the Supreme Court of Victoria in **Robby Gordon Entertainment v Confederation of Motor Sports** [2019] VSC167 (15 March 2019) at para 13 and 14 stated that the standard basis of costs allows for all costs reasonably incurred and of a reasonable amount. Further, he said that “ whether to award costs to a party other than the usual basis, that is on an indemnity basis is at the discretion of the court. However, the exercise of the court’s discretion to award costs other than on a standard basis is exceptional and is generally reserved for cases such as where the losing party has

engaged in unmeritorious or deliberate high handed or other improper conduct such as to warrant the court's disapproval and concomitantly, so as to prevent the successful party from being kept out of pocket.

[55] There is another statement that the court's discretion to award indemnity costs should not be regarded as a penalty but as a means of achieving a fairer result for the payee (**Petzograde Inc. v. Texaco Ltd.** [2002] 1 WLR 947 para 63-64 and **Brighton Gold Ltd. v. Metal Wells Development Ltd.** [2019] HKLRD 868. These principles are consistent with those of our jurisdiction of Jamaica as applied to our legislation and rules. (c/f Brooks. J, pp 4-8 in **Distant**)

[56] There is a trilogy of cases on indemnity costs addressed by our courts in recent times. The first was by Jones, J. as he then was, in **Norman Washington Manley Bowen v Shahine Robinson**, Civ. No. 2007 HCV 03783 (8<sup>th</sup> October 2010) he ordered indemnity costs against the defendant based on the Election Petition Act, the Supreme Court Act and Rule 64 and 65 of the Civil Procedure Rules, 2002 on the ground she deliberately misled the court in her affidavit that she did not have USA citizenship when she was nominated for election to the House of Representative.

[57] The second case was between the same parties before Campbell J. [2013] JMSC Civ. 198. This was an appeal from the taxing officer, who was the Registrar of the Supreme Court, who assessed the bill of costs submitted arising from Jones, J 's order. Costs were not recovered unless taxed.

[58] The third case the Court of Appeal decision on Campbell's J. order on taxation, in which the judgment was delivered by Dukharan, J. [2015] JMCA Civ. 57. The learned judge examined the difference between standard costs and indemnity costs and the principle that govern how they are assessed [64]. He held on the UK authorities the receiving party can only recover costs awarded on the indemnity basis that were reasonably and incurred or reasonable in amount and the burden of proving that the costs claimed are not unreasonable is on the paying party. Also, the receiving party would only be entitled to recover costs that he or she was obliged to pay.

**[59]** Having looked at the fundamental principles involved in the award of costs I do not find the defendant, RJR engaged in the conduct of the trial in a manner that was unmeritorious. I bear in mind the submission of counsel for the claimant that the defendant does not respond to their letter of demand for damages. And I see there is a principle that the failure to beat a favourable settlement offer can attract an award of indemnity costs. But it is difficult in light of the court's decision that the apology of the defendant was sincere to give an award for indemnity costs. It would be inconsistent with the court's opinion already formed. The defendants were entitled to advance their defence of Justification and Qualified Privilege. They did not admit liability even though they apologised. No indemnity costs are granted to the claimant which is Attorney's costs claimed. But the basic or standard cost is granted as this follows the event.

**[60]** It is my view that the trial involves the application of complex issues, it also required the use of several authorities and skeleton submissions. In the circumstances, I grant the claimant a special cost certificate.

**[61]** Conclusion

1. Judgment for the Claimant
2. Damages awarded \$9.5m
3. No award Aggravated Damages or Exemplary Damages
4. No award Special Damages – No proof.
5. Interest on General Damages at 3% per annum from date of publication, December 17, 2009 to 1<sup>st</sup> date of reserved judgment, June 19, 2017.
6. Cost for the Claimant to be agreed or taxed.
7. Attorney's cost (Indemnity cost) not granted.
8. Special cost certificate granted.