[2017] JMCA Civ 36

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 123/2011

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE EDWARDS (AG)

BETWEEN	**DANE ANTHONY PRYCE**	**APPELLANT**
AND	**THE ATTORNEY GENERAL**	**RESPONDENT**

Norman Hill QC and Miss Michelle Morrison instructed by Samuels and Samuels for the appellant

Miss Monique Harrison instructed by Director of State Proceedings for the respondent

30 May 2016 and 14 November 2017

MORRISON P

[1] I have read in draft the judgment of my sister Sinclair-Haynes JA and agree with her reasoning and conclusion. There is nothing I wish to add.

SINCLAIR-HAYNES JA

[2] The appellant's life's aspiration was to become a soldier. Consequent on a false publication that he was a convict, that dream was however snatched humiliatingly from him on 8 February 2006. Having completed two months of the required four months' training as a soldier with the First Battalion of the Jamaica Defence Force (JDF), he was dishonourably discharged from the army.

[3] His application to the British Army in an attempt to redeem that dream was unsuccessful, as a requirement was that he should first apply to the Jamaica Constabulary Force (JCF) for a police certificate. That application was refused. He applied to the JCF but was also rejected because of the conviction which was recorded against his name. His application to the Bermudian Police Service suffered the same fate.

[4] The appellant regards D McIntosh J's award of general damages in the sum $2,000,000.00 with interest at 3% from 26 March 2007 to 7 October 2011 for libel as inordinately low and has consequently appealed the said award challenging the following findings of fact:

> "a) That the monies expended by the Appellant in joining the Jamaica Defence Force were not recoverable.
>
> b) No award for Special damages
>
> c) No award for Aggravated Damages
>
> d) No award for Exemplary Damages."

Grounds of appeal

[5] The grounds of appeal are:

> "i. The Learned Trial Judge did not adequately take into consideration the gravity and devastating effect of the defamation orchestrated on the Appellant and the extent of the publication.
>
> ii. That the Learned Trial Judge erred in not awarding Special Damages to the Appellant, as they were expenses necessarily incurred [t]o join the Jamaica Defence Force and in the circumstances were recoverable.

iii. The amount awarded for the General Damages was inordinately low and was not adequate to compensate the Claimant and restore his reputation in respect of any damage which he could reasonably have sustained by the publication and loss of his career, bearing in mind the serious damage to the Claimant's Character and the effect the defamation had on his career.

iv. The Learned Trial Judge failed to take into consideration the ignominy of being dishonourably discharged from the army and that at the crucial time in his career, he would never because of the age factor be able again to join the army here in Jamaica or overseas.

v. The fact that the publication was a total fabrication on the part of the servant or agent of the Crown which the Respondent despite this fact being known to him, the Respondent persisted in pursuing the action right up to trial and judgement [sic].

vi. The Learned Trial Judge erred in not taking into consideration the rule in **Rookes v Barnard [1964] AC 1129** where when the action of the servants or agents of the state amounts to oppressive arbitrary and unconstitutional conduct, in such circumstances the award for Damages not being sufficient to punish the Respondent, his servants or agents, then exemplary damages must be awarded in addition, to deter the Respondent, his servants or agents from behaving in the manner they did.

vii. The Learned Trial Judge failed to take into account the evidence of the Appellant as to what he spent in order to comply with the regulations of the Jamaica Defence Force before he was dishonourably discharged."

The background

[6] In March 2004, the appellant was an employee of North Eastern Satellite Services Ltd. He and two other employees were sent on assignment at the Boscobel Beach Hotel. Having completed their assignment at Boscobel, they met a man who was installing a satellite dish. One of the employees with him, Laylor, was trained in the

installation of such dishes. Laylor went and spoke with the man while he (the appellant) and the other employee, Simms, remained by the car which was transporting them. Laylor returned to the vehicle and informed them that the man was not ready to install the dish.

[7] Upon their return to the office, the man to whom Laylor had spoken telephoned the office to speak with Laylor. Laylor spoke with the man and informed them that the man told him that a dish cord was missing. Laylor informed the man that they had seen no cord and that he was "free to report it to the Police".

[8] They were summoned to the Oracabessa Police Station where they were interrogated. Being ignorant of the allegations, the appellant informed the officers that he could not assist them. A Detective Constable Maxwell who led the interrogation remarked that he, the appellant, "was not saying anything". The appellant informed the officer that he knew nothing about the cord. Detective Constable Maxwell accused him of taking the cord because "he had nothing to say". Affronted by the accusation, the appellant told the officers that he was "going outside because [he knew] nothing about this whole affair".

[9] As he placed his hand on the handle of the door, the appellant was grabbed by the collar of his shirt by a policeman. The policeman pulled his shirt in a manner as if he was going to choke him, and punched him in his chest. He (the policeman) pushed the appellant into a sitting position. The appellant stood up and another policeman pulled a

baton from Detective Constable Maxwell's waist and attempted to hit the appellant, but Detective Constable Maxwell told that policeman "not to do it yet".

[10] Laylor and Simms were released the same day but the appellant was informed that he would sleep in jail. The policeman who had pulled the baton threateningly at the appellant told him that he should wait until night-fall and he would see what would happen, "since [he was] bad more [sic] than everybody else". After Laylor and Simms left, the policemen issued all manner of threats including a threat to shoot the appellant. He was informed by Detective Constable Maxwell that he had intended to release all three of them but he had changed his mind because he (the appellant) was a bad man.

[11] The appellant was left alone in the room and he called his parents. His parents attended the station with the manager of the company to which he was employed. They spoke with the senior police officer and he was released on bail. Whilst he was being released, Detective Constable Maxwell told him that he was lucky but it was not yet over. Detective Constable Maxwell also told him that he had meant to:

> "[F]ree up the other two men Simms and Laylor but leave [him] alone to face the charge, but since 'Sup' say if it was all three of us charged together, he could not just deal with [him] alone.

[12] They were charged for larceny of a dish cord which is a cord used in the receiver of a satellite dish. However on the occasions the matter was called in court, neither the complainant nor the police attended. The matter was consequently dismissed for want of prosecution.

[13] While the appellant was as aforesaid employed, he had applied, and was selected for training with the First Battalion of the Jamaica Defence Force. He found the two months' training not only instructive in a number of areas, but also enjoyable.

[14] In furtherance of fulfilling his inveterate ambition of becoming a soldier and utilising his training in telecommunications, he had made arrangements to enter the Telecommunications Department of the army. Whilst eagerly anticipating his participation in the graduation and passing-out parade, alas, that dream was shattered when the appellant was marched into the head office of the Army Intelligence Unit and accused of being a convict. It was said that he had been charged and convicted of possession of ganja in the Saint Mary Resident Magistrate Court (now Parish Court), and sentenced to pay a fine of $100.00 or 10 days' imprisonment and do 40 hours community service,. He denied having had any such conviction.

[15] At approximately 8:00 pm about seven days after, whilst he was in the barracks room, the appellant was informed that, on the Commanding Officer's order, he was to pack all his belongings and await the arrival of the Military Police. Soon afterwards, he was escorted by two military policemen to the Retaining Base, which was guarded by several military policemen. He was placed in a "secured" room where he was forced to spend the night.

[16] The walls of the "secured" room were impenetrable. They were constructed of concrete with a single steel door with its locking device on the outside. The only window was small and secured by steel bars.

[17] The following day, the appellant was marched to the office of the Commanding Officer of the First Battalion of the JDF, with two military policemen, one on either side of him. One of them was armed. Whilst in the said office, in the presence of the two military policemen and two other officers, the appellant was advised by the Commanding Officer at New Castle, Major Dillon Lobban (referred to in some documents as Lieutenant Colonel), that he was in receipt of his criminal record from the Criminal Records Office (CRO) of the JCF. Major Lobban read from the said document which stated that the appellant had been convicted of possession of ganja and sentenced as aforesaid.

[18] The appellant was informed that he had deceived the JDF by not disclosing that he was a convict and would consequently be dishonourably discharged. Although he denied having been convicted and sentenced, he was escorted later by two heavily armed military policemen to the Commanding Officer at Up Park Camp. There, he was again informed by the Commanding Officer, Lieutenant Colonel RR Meade (referred to in documents as "Neale", "Neil" and "Neade"), that the Intelligence Unit of the JDF was in receipt of his criminal record from the JCF and it was read aloud.

[19] In spite of his protests, he was told by the Commanding Officer that the fingerprints on the said record matched those which the army had taken. He was again accused of deceiving the army. Instructions were issued for his immediate discharge. He was stripped of his uniform and "all vestiges of army property". The document which sealed his dishonourable discharge was signed by the Commanding Officer.

[20] Ashamed, humiliated, depressed "and totally crest fallen" at the false accusation, the appellant returned to his family and district.

[21] Determined to prove that he had never been convicted of any offence, the appellant, accompanied by his father, went to the CRO in Kingston and requested his police record. His fingerprints were taken and upon, his return to the said office, the contents of the record which he was given were identical to that which had been read to him at New Castle and Up Park Camp.

[22] The appellant then went to the Port Maria Branch of the JCF, where he presented the officer in charge with the police record and requested that a search be conducted as to whether he was convicted and sentenced for the offence stated in the record. He also attended the Saint Mary Resident Magistrate's Court, where he presented the said police record and requested a similar search. At both places he was informed that there was no such record.

[23] He returned to the Criminal Investigation Branch in Port Maria and was sent to the CRO in Kingston. There, he presented the said criminal record and the Certificate of Discharge from the Saint Mary Resident Magistrate's Court. A handwriting expert was called who confirmed that the fingerprints and signature on his application for his criminal record were identical to those on his conviction record.

[24] Checks were made by the officer at CRO with the police officer at Port Maria Police Station who confirmed that there was no record of the appellant's conviction for possession of ganja. In 2006, eager to redeem his dream of becoming a member of the

armed forces, the appellant applied to the JCF and was successful in the entrance examination. At the interview, he was required to complete an application form on which he stated the circumstances of the criminal record. He was however informed that the interview could not continue without proof that he had no criminal record.

[25] The appellant eventually obtained a document from the CRO which confirmed that he had no record. At the continuation of the interview he was instructed to get a letter of recommendation from the Superintendent of Police at the Port Maria Police Station. He did not get the recommendation and was thus not accepted to the JCF. His subsequent applications to the Bermudian Police Force and the British Army were both rejected. In fact, the record for conviction for possession of ganja was sent to the British Army.

[26] He later discovered that CRO of the JCF had circulated the incorrect criminal record. In an effort to have the criminal record which he feared was being "circulated surreptitiously" destroyed by court order, he applied to the Supreme Court for an order to have it produced and destroyed. The application was met with stout resistance. The matter was heard and the application was refused by McDonald-Bishop J (as she then was), on the basis that the record which the CRO produced disclosed no conviction.

Mr Winston Laylor's evidence

[27] Mr Laylor supported the appellant's testimony in every material respect of what prompted their arrest and what transpired at the Port Maria Police Station and the Saint Mary Resident Magistrate's Court. He expressed the view that:

> "[T]he conduct of the Police at Oracabessa on the afternoon of that day we were interviewed there and the vehemence of their hostility towards Dane Anthony Pryce and they being thwarted of their intention to detain him at the Police Station that night in order to carry out their threat on him, their expressed intention to beat him and injure him could emerge in a conspiracy to destroy him by a frontal attack on Pryce's Finger Print Form.
>
> No mistake was made on the Finger Print Forms of the rest of us Nevon Simms and myself Winston Laylor."

Mr Stanley Pryce's evidence

[28] Mr Stanley Pryce, the appellant's father, testified that he believed that the conviction recorded against his son for possession of ganja was concocted by Detective Constable Maxwell and his colleagues at the Oracabessa Police Station because their plan to detain and brutalise him was thwarted. He formed that view from the events of that night, which began with a call from his son who informed him that he had been "roughed up badly by the police". The call, he said, "was as if [the appellant] was in a state of desperation". The appellant told him that although the police were investigating three of them, the others were offered bail but he had been denied bail. He said the appellant also informed him that the policeman told him that he thought he was a bad man and he would have "to pay for it tonight".

[29] Mr Pryce, his wife and the appellant's boss went to the Oracabessa Police Station. There, Detective Constable Maxwell spoke to them and took them to a room where Simms and Laylor were. Detective Constable Maxwell informed them that the appellant was locked up and could not be seen. The appellant's mother insisted on seeing her son and, if necessary, bailing him.

[30] Detective Constable Maxwell told them that he would have released all three without charging them, but the appellant "was bringing badmanship" to the police so he would not be granted bail. The appellant's mother became hysterical and demanded to see her son. Her behaviour attracted the attention of an officer who introduced herself as an inspector of police. This officer informed Detective Constable Maxwell that the matter could not be dealt with in that manner. It was either he release all three men without charging them or charge all three and place them on bail. Detective Constable Maxwell protested and issued threats as to what would happen to the appellant in jail that night. But the appellant was eventually released on bail.

[31] Mr Pryce's evidence was that he was puzzled as to reason why:

(1) of the three persons, the appellant was harassed; and

(2) the fingerprints of the other men were destroyed but his son's were retained.

The claim in the court below

[32] In his particulars of claim, the appellant claimed *inter alia* that:

> "41. ... in the circumstances, that a servant or agent of the Crown falsely and maliciously and without reasonable and probable cause wrote and inserted on the said document prepared for the Claimant at the time he was charged for Simple Larceny the words 'Offence, Possession of Ganja'.
>
> 42. ... a servant or agent of the Crown falsely and maliciously and without reasonable and probable cause wrote and inserted on the said document prepared for the Claimant at the time he was charged for Simple Larceny the

following words 'fined $100.00 or 10 days plus 40 hours of Community Service, date of conviction 2004/04/08, age of conviction 22 years old'.

43. ... that a servant or agent of the Crown falsely and maliciously and without reasonable and probable cause failed to destroy the Claimant's fingerprints after the Simple Larceny charge was disposed of in the Resident Magistrates Court for the parish of Saint Mary held at Port Maria and with intent to libel the Claimant falsely and maliciously and without reasonable and probable cause created the said document which revealed the Claimant to have committed the crime of possession of ganja.

...

51. ... by reason of these premises the Claimant has suffered loss and damage and incurred expenses of a special nature to comply with the requirements for his admission and entry in the First Battalion Jamaica Defence Force and upon being dishonourably discharged from the said Jamaica Defence Force has been handicapped in his obtaining employment by reason of this blemish on his character and has been rendered unemployable since being dishonourably discharged from the Jamaican Defence Force as aforesaid. The Claimant has thus suffered loss of earnings since.

52. ... by reason of the premises mentioned above and in particular those mentioned at paragraph 50 the servants or agents of the defendant in their conduct towards the Claimant [were] contemptuous, highhanded [,] oppressive, insulting and contumacious. The Claimant in the circumstances claims Aggravated Damages and will rely on such conduct as evidence of malice."

The defence

[33] The defence was generally a denial of the appellant's assertions. In its defence the respondent averred that Constable Damion Williams, who took the respondent's fingerprints, had mistakenly written the charge of possession of ganja instead of simple larceny on the CIB 4 Form. The said form was forwarded to Detective Corporal Cecile

Williams who was unaware of the error and therefore was not actuated by malice. The CRO would have had no reason to doubt its accuracy.

[34] The respondent denied having falsely, maliciously and without reasonable and probable cause, published to Major Lobban and Lieutenant Colonel RR Meade of the JDF, the false criminal record purporting to be that of the appellant. The respondent asserted that the document was published "on an occasion of qualified privilege".

[35] The crux of the respondent's amended defence was that the appellant was discharged from the army because he had falsely declared that he had never been arrested and charged when in fact he had been arrested and charged for simple larceny Majors Lobban and Shane Lawrence provided the court with witness statements which supported the defence.

The respondent's evidence

[36] Constable Damion Williams' evidence was that he was assigned to the Port Maria Resident Magistrate Court in Saint Mary and he was in charge of taking fingerprints at the relevant time. After the appellant's fingerprints were taken, Constable Williams completed the CIB 4 Form. The fingerprints and the CIB 4 Form were checked by sub-officer, Woman Detective Corporal Cecelia Williams, to ensure that the fingerprints were properly taken and that the form was properly completed as was required. She signed the documents attesting to their accuracy. The fingerprints were thereafter sent to the CRO for processing and recording.

[37] According to Constable Williams, in July 2006 Detective Corporal Williams informed him that the appellant claimed that he was given an incorrect certificate of conviction. He immediately checked his record and discovered that appellant had been charged for simple larceny but was not convicted. Constable Williams then realized that he had mistakenly written the wrong charge on the appellant's CIB 4 Form

[38] Constable Williams also realized that he had mistakenly written the wrong charge on someone else's form. He had no personal grievance or ill will towards the appellant whom he did not know before that day.

Detective Corporal Cecelia Williams

[39] Detective Corporal Williams supported Constable Williams that the wrong charge had been written on the appellant's CIB 4 Form inadvertently. According to her, the form was not signed out of malice but rather a genuine mistake by Constable Williams, and she could not have known whether the fingerprints were the appellant's.

Analysis

[40] For convenience, grounds i and iv will be dealt with together.

> **Ground i**
>
> "The Learned Trial Judge did not adequately take into consideration the gravity and devastating effect of the defamation orchestrated on the Appellant and the extent of the publication."
>
> **Ground iv**
>
> "The Learned Trial Judge failed to take into consideration the ignominy of being dishonourably discharged from the

army and that at the crucial time in his career, he would never because of the age factor be able again to join the army here in Jamaica or overseas."

[41] The judge was not impressed that the falsified record had impacted the appellant negatively and he expressed his views thus:

> "20. In this case there is no evidence which this court finds that the social life of the claimant was destroyed. **If anything it was enhanced by his going off to live in Kingston with his girlfriend at the expense of others.**
>
> 21. No medical evidence was adduced to show any adverse health issues arising from the defamation.
>
> 22. There was certainly no reduced status in life and no evidence of his social life being destroyed.
>
> 23. There is no evidence that he had a career that was destroyed. He prays in aid, the fact that he was discharged as a trainee from the army. The fact that he was a trainee does not mean he would have graduated as a soldier. He was only a trainee." (Emphasis added)

The submissions

[42] For the appellant, it was learned Queen's Counsel Mr Hill's submission that the judge did not adequately consider the gravity and devastating effect of the defamation orchestrated against the appellant and the extent of the publication. The evidence, he said, showed that the appellant's career prospects in the army were destroyed, which resulted in him losing his choice of career, his dream of becoming involved with the armed forces and has significantly impacted his life.

[43] The judge, he posited, failed to give sufficient weight to the evidence and did not adequately take the evidence into consideration. Queens's Counsel drew the court's attention to the effects of the appellant's dishonourable discharge because of the false conviction.

(a) His return to his hometown was met with disdain and disbelief as his erstwhile friends and relatives were convinced that he was kicked out of the army because it was discovered that he was a criminal.

(b) As a result of the hostility which confronted him, he fled to Kingston where he was not known. There he slipped into depression and frequently shed tears as he was unemployed and preoccupied with the calamity that had overtaken him.

(c) Although he eventually obtained employment, his depressive state affected his ability to function as he became withdrawn and experienced difficulty communicating with management and staff.

(d) The appellant's career prospects in the army were destroyed.

[44] Queen's Counsel submitted that, although there cannot be any certainty that the appellant would have graduated to the army, it was a strong probability which should have been considered. It was his further submission that if a substantial chance rather than a speculative one exists, the matter ought to have been resolved in the appellant's favour even if he was unable to show that the chance would have fallen in his favour. For that submission he relied on **Herring v Minister of Defence** [2003] EWCA Civ 528. Queen's Counsel contended further that the appellant having been accepted as a recruit would have striven to achieve his goal of graduating thus fulfilling his lifelong dream.

[45] Learned Queen's Counsel also pointed to the appellant's evidence that he was required by the British Army to first apply to the JDF before his application to the British Army could be considered. He was also denied a visa to enter England because of the record.

[46] An important consideration, learned Queen's Counsel posited, was that the appellant was dishonourably discharged from the army when he was close to attaining his 24th birthday, which brought closure to his applications to the JDF and the British Army. His application to the Bermudian Police Force met a similar fate as he was confronted with the question, "Have you ever been convicted of any offence (traffic or criminal)?" and this posed an insuperable hurdle. He was therefore thrust into unemployment with little education and without immediate prospects of survival.

[47] He submitted that the judge ought not to have accepted Major Lobban's evidence that the appellant was dismissed because he was charged for simple larceny as the evidence was that the army received information that he was convicted of possession of ganja. He postulated that the learned judge erred in finding that the appellant provided no evidence that he had applied to the British Army.

The respondent's submissions

[48] The respondent found it convenient to address grounds i, ii, iii and iv together. Counsel, in relying on the principle enunciated in **Flint v Lovell** [1935] 1 KB 354 which was cited with approval by this court in **Jamaica Observer Limited v Orville Mattis** [2011] JMCA Civ 13, and **Rodney Campbell v Jamaica Observer Limited and Chester Francis-Jackson** CL 2002/C-238 delivered 9 June 2005, submitted that an appellate court ought not to interfere with the quantum of an award of damages unless it is convinced that the amount awarded is so inordinately high or so very small as to make the judgment of the court an entirely erroneous estimate of the damages to which the appellant is entitled.

Was there evidence to support the appellant's claim in respect of the effect of defamation?

The appellant's evidence

[49] It was the appellant's evidence that it was his feelings of shame at what was being said in the district why he was forced "to abandon [his] district". Persons were saying that he must have done something terrible why he was "run out" of the army, for example he "was pretending to be decent" but was "a ganja dealer". Others said he

had become "stone mad" because he hid from them and whenever they confronted him, he sought a way of escape. It was his evidence that they held on to the fact that he had a criminal record to place every "conceivable crime on [him]".

[50] At the commencement of his training, he had just entered into a common law relationship with his girlfriend to whom he was engaged. He was able to contribute to the payment of the rent and their living expenses from the small emolument he received from the army. He had been employed for two years before he commenced his training with the army. After his discharge from the army, he was unemployed. His parents paid his rent for more than three years.

[51] His girlfriend was saddled with the burden of maintaining the household and as result became sulky. In a desperate effort to assist, he did "day's work" working as a mere helper in often demeaning jobs . He also worked with a plumber , "doing a little maintenance here and there".

[52] His inability to contribute to their household except for doing the domestic chores resulted in his girlfriend despising him openly. She stayed out late in the evenings and when questioned she told him she was tired of their "kind" of life and that she had her friends. She began speaking openly on the telephone with a policeman although she knew how devastating it was to him.

[53] She told him she was not concerned about his relationship with the police and told him to "go about [his] business" as she "had her own life to live". On one occasion,

she even handed him the telephone and a man who identified himself as a policeman taunted and threatened him.

[54] He obtained a job at Logic One Telecommunications and endeavoured to work on the relationship, but one night she handed him the telephone and he heard the voice of the said policeman with whom he had previously spoken on the telephone. The person taunted him and threatened to personally remove him from the house thus ending the 11 year relationship he had had with his girl friend.

[55] The job at Logic One Telecommunications also ended because of his performance. His boss became frustrated with him and verbally abused him. As a result, he resigned. He sought psychiatric help from Dr Franklin Ottey, a consultant psychiatrist.

Mr Laylor's evidence

[56] Mr Laylor told of the appellant's transformation from a "bright ambitious young man ever aspiring to go a far way in [t]elecommunications" expressing "this love for the Army" and certain "of what he could achieve in Telecommunication which the Army could provide", to a person who was "totally withdrawn and fearful...literally hiding from the district of Port Maria" and "worried about not being able to obtain any decent form of employment".

[57] On the occasions on which Mr Laylor saw the appellant, he (the appellant) sobbingly told him how he felt when he was stripped of his uniform and the army's paraphernalia. On those occasions, the appellant also spoke to him about his inability to

look his parents in their eyes and his inability to explain to persons how he found himself in that "position". The appellant, he said, blames the police force and attributes his misery to the incident at the police station at Oracabessa.

[58] It was also Mr Laylor's evidence that it was common talk in Port Maria that the appellant was "kicked out of the army like a dog" because he had committed some serious crime and that it was not only ganja he was "dealing with". As result of the talk among persons in the district that he was kicked out of the army because he had a criminal record and the fact that he and Nevon had also been accused of simple larceny, he and Nevon enquired if they too had criminal records but were assured that they did not.

[59] It was also Mr Laylor's evidence that, although he was certain that the appellant could not have been convicted on the allegation of simple larceny because they, (he, the appellant and Nevon) knew nothing about the cord for the satellite dish, it was difficult for him to accept that:

(1) "so reputable a place like Up Park Camp with all the means of checking out a man's character and reputation could make a mistake about [the appellant's] Criminal Record" ;

(2) The conviction for ganja was a mistake;

(3) The police did not destroy their finger prints which had been taken at the Port Maria Police Station; or

(4) His prints could match another which could cause the police to be mistaken as to his criminal record.

Although he sympathized with the appellant's inability to get a job, he was of the view that the appellant had a criminal record and felt he had been deceived by the appellant.

Mr Stanley Pryce's evidence

[60] The appellant's father, Mr Stanley Pryce's evidence was that even before his son entered high school, it was always his expressed desire to become a soldier. The appellant excelled in telecommunication networking in both high school and community college. Consequently at 24 years old, after a brief employment with a telecommunications business firm he joined the JDF. He was elated at his achievements, especially at the prospects which the army offered in the field of telecommunications networking. So elated was he that on the occasions he came home, he proudly visited friends and relatives in the community whilst wearing his uniform**.**

[61] On 16 February 2006, he and his family were awakened "at dead of night" by knocking on their door. Upon opening the door they beheld the appellant clad in civilian apparel, suitcase in hand, in tears. He told them what had befallen him.

[62] Mr Pryce explained his efforts to have the error corrected. His evidence was that the appellant became speechless upon being told by Superintendent Sancko that the only record was that the appellant had been convicted for was possession of ganja and he was sentenced to pay a fine and to do community service or one month's imprisonment.

[63] He described his son's transformation from the night of his dismissal to a broken man who shuns the neighbours and avoided even family members. The appellant, he said, told him that "everybody wanted explanations which he could not honestly give".

[64] He watched his son deteriorate physically and emotionally. His evidence was that he exhibited signs of depression. He said the appellant told him that he was not guilty and that the criminal record had blocked his future. He would not eat and as a result lost weight. He sobbed loudly and repeatedly stated that "it was the Police force that had brought all this on him". He complained that the criminal record had blocked his opportunity of entering the British Army, the Bermudian Police Force and the JCF.

[65] He told of the difficulties his son experienced on the job at Logic One Telecommunications because he had become withdrawn. He stated that the appellant told him about the nightmares he had in which he was being insulted and harassed by police. The family consequently decided to have him see a psychiatrist. The advice of a lawyer was sought. The lawyer recommended Dr Irons and Dr Ottey.

[66] It was also his evidence that the appellant's girlfriend complained to him that the appellant had become withdrawn and moody. The appellant became angry at the mention of police. They eventually separated because the appellant resented the fact that she had a friend who was a policeman.

[67] It was also his evidence that the appellant asked him "to save him by renting an apartment in Kingston". The appellant left his home about one month after his discharge.

[68] It was commonly spoken by some persons in the community that the appellant "used to walk with his head in the air" but "since they found out that he is a criminal and run him out of the army he cannot come back to Frontier Heights".

[69] Persons in the community were also saying "Imagine Dane had a Criminal Record even while he was attending High School". Having heard that he had a record, they have been describing him as a "criminal, a ganja dealer and a gunman in the quiet". Persons actually asked him what happened to his son's "soldier uniform, how the army [ripped] it off him when they discovered that he had a Criminal Record".

[70] His evidence was that initially he was convinced that the appellant was hiding something from him as it was difficult for him to accept that an institution such as the army could be mistaken or that the criminal record could be false in light of what he was told by Superintendent Sancko and the fact that no two persons have the same finger print.

Pastor Kermit Jones

[71] Mr Kermit Jones, a pastor and Justice of the Peace for the parish of Saint Mary, in his witness statement, stated that he had had a long relationship with the appellant's family. He knew the appellant "from he was of tender years". He described him as studious and of good behaviour even while he was at play. This was confirmed by Corporal Bennett and Lance Corporal Douglas on the army's "security questionnaire", which stated that the background checks conducted in the community revealed nothing "derogatory" against the appellant.

[72] He too told of the appellant's love for the army and the pride with which he wore his uniform. It was his evidence that the appellant spoke glowingly about what the training was doing for him and the fact that he could be promoted in telecommunications field which was his passion.

[73] It was his evidence that in 2006, while visiting the appellant's home, he did not see him coming home as usual. He then heard it being rumoured in the streets in Port Maria and the entire Frontier neighbourhood that the appellant had been behaving as if he was respectable and was a "top class soldier", but it was found out that he was a criminal and they "ran him out of the army like a dog".

[74] The appellant secluded himself and shunned his best friends and members of his family. The comments were so rampant that Pastor Jones spoke with the appellant, who was then unemployed. In tears, he told him about the incident with the police at Port Maria and of his dishonourable discharge from the army, the efforts he and his father made in attempting to clear his name and the difficulties they encountered.

[75] Pastor Jones was surprised at how reduced in size the appellant had become and the apparent depths of his depression. He described him as "a completely broken man both physically and emotionally" who appeared fearful, anxious and concerned about what persons knew and were saying about him. The appellant told him about the rejection of his application to the Bermudian Police, British Army and JCF because of the criminal record which he was certain the police had created to harm him.

[76] Although he held the appellant in high esteem, Pastor Jones could not accept that an institution as reputable as the army, with its "precision and resources to collect and to access information", could have been mistaken about his criminal record. He also considered that no two persons had the same fingerprint. He was therefore of the opinion that the appellant had a criminal record and was guilty of the offence stated in the criminal record. The appellant, he stated, had fallen in his "esteem" and he considered him to be "deceptious and false".

[77] As a Justice of the Peace, he said persons in the community come to him for advice and report matters which affect the community. Several persons enquired of him whether he knew that the appellant was a criminal "all along" but it was exposed when he joined the army and upon receipt of his record which revealed that he was a criminal, the army "run him out of the army like a dog".

[78] The appellant's discharge from the army was the topic of every meeting in the community, especially because he was the least likely young man in the community to whom any crime could have been imputed. The speculations as to crime he committed were scandalous.

[79] According to Pastor Jones, because he knew him very well, even before he entered high school and he appeared to be "a clean, honest and ambitious youngster who gave respect and demanded respect", he tried to see the appellant often to counsel and encourage him.

Retired Major Victor Beek OD

[80] Victor Beek, Justice of the Peace, retired Major of the Jamaica Combined Cadet Force, and an awardee of the Order of Distinction and a real estate valuator, in his witness statement, supported the appellant as to the benefits from military training. His evidence was that it was a "great tragedy for any young soldier particularly in training to be dishonourably discharged".

Analysis

[81] The learned judge's statement that there was no evidence that the appellant's social life was destroyed is baffling in light of the preponderance of evidence which was adduced in support of this claim. The evidence was entirely contrary to the judge's view that his social life "was enhanced" by having gone to Kingston to live with his girlfriend. Life for the appellant and his girlfriend was nowhere near the "bed of roses" as implied by the judge. Indeed there is not a scintilla of evidence which could have led the judge to arrive at that conclusion which has obviously influenced his award.

[82] On the uncontroverted evidence of, not only the appellant, but also Mr Laylor, Pastor Jones and the appellant's father, the appellant's social image and the quality of his life had reduced drastically. In light of the evidence, the judge's further finding that "there was certainly no reduced status in [the appellant's] life and no evidence of his social life being destroyed", is perplexing. It is my considered view that the judge failed to properly acquaint himself with the evidence. His following view is also not supported by the evidence.

> "A conviction for possession of ganja is so common among the young people in the country that one would have to show the nature or effect it had on his standing in his community."

[83] Whilst such a conviction might be common among some groups of young men, for a young man whose ways are seen as upright, it is not acceptable as demonstrated in the unchallenged evidence. On the evidence, persons were of the view at he had deceived them and that he really was not who held himself out to be.

The likelihood of the appellant graduating

[84] The judge also made the following finding:

> "There is no evidence that he had a career that was destroyed, He prays in aid, the fact that he was discharged as a trainee from the army. The fact that he was a trainee does not mean he would have graduated as a solider [sic]. He was only a trainee."

There is also no evidence that on a balance of probability he would not have graduated. In fact it was it was Major Shane Lawrence's evidence that he "was satisfied that he should be recruited". On the form entitled "Application for the discharge of a soldier" (exhibit 2), which was signed by both Majors Lobban and Lawrence, it was stated that the appellant's military conduct was good.

[85] To confirm his suitability as a member of the JDF, checks were made at the CRO and not at the court. Had the false conviction not emerged, it is unlikely that checks would have been made at the court house or the police station to discover if he had ever been charged.

[86] It was Major Lobban's evidence that the request was routinely made to the CRO. There is no evidence that the court or police station was routinely checked to discover whether persons were charged. On a balance of probabilities, enquires would not have been made at the court and the fact that he was charged might not have emerged.

[87] Assuming it was discovered that he had been charged for simple larceny but the matter was not pursued for want of evidence, in the light of the circumstances surrounding that charge, it is probable that the army might have exercised their discretion in his favour.

[88] The crucial consideration however is that he was not rejected because he was charged. He was dishonourably discharged from the JDF and his applications to the JCF, The British Army and the Bermudian Police Service were rejected because of the false conviction and false record. With an actual conviction for possession of ganja, the JCF, British Army or the Bermudian Police Force could not entertain his application.

The effect of his dishonourable discharge

[89] The appellant was 24 years old at the time of his dishonourable discharge. A requirement for acceptance into the JDF is that applicants must be below age 25 years.

[90] Were it not for the concocted record, on a balance of probabilities it is likely that the applicant would have been accepted to the JDF. The 24th birthday was therefore a crucial age for the appellant as this was his last opportunity for eligibility for entry into JDF. The complaint that the trial judge failed to consider the loss of his ability to ever become a member of the armed forces either in Jamaica or overseas is meritorious.

Aggravating features

Absence of medical evidence

[91] The learned judge's award was also affected by the absence of medical evidence to "show any adverse health issues arising from the defamation" (see paragraph 21 of the reasons for judgment). It was the appellant's evidence that his performance at Logic One Telecommunications and the poor relationship with his boss led him to seek psychiatric help from Dr Ottey and became his patient. His father, Mr Pryce's evidence as aforestated, supported his evidence that psychiatric help was sought.

[92] A notice of intention to tender evidence in hearsay statement made in documents was filed on 29 October 2010 to which there was no objection. The two medical reports were among the list of documents to be tendered. In the said notice of intention to tender in evidence hearsay statement made in documents was a further notice that that application was made pursuant to section 31E of the Evidence Act because of the unavailability of Dr Ottey at hearing. There is no record of any objection to the tendering of the medical certificates. Exhibited to the appellant's witness statement were two medical certificates dated 14 April 2008 and 12 March 2010.

The psychiatrist's report of 14 April 2008

> "....
>
> He then applied to Logic One Cable Company and is currently employed there as a Cable Technician. He has however been having problems with his employer and coping with his job. He said that he often had difficulty sleeping at nights and had dreams of failure and not accomplishing what he had set out to do. Because of this he often reaches work late and has not been able to explain to

his employer what he is going through. He has become very withdrawn, has cut off relationships with his friends and 3 months ago he broke up with his girlfriend with whom he had been living. He feels angry with the world, is short-tempered and irritable and is not eating well. He feels very nervous, his hands shake at times, he has pains at the back of his neck and shoulders and has recurrent headaches. At times he feels as if he would give up hope and sometimes breaks down in tears. He said that his mother is the only person who is able to encourage him. He has also lost interest in sexual activity and frequently loses his erection. He has not been concentrating well and is not performing his job efficiently.

All of these symptoms started after he was discharged from the Army. He had consulted a doctor in December 2007 who had told him that he was 'stressed out' and that his blood pressure had become elevated. He had prescribed treatment which had helped but he had not returned to see him recently.

He was born and grew up in Port Maria, St. Mary where his parents still live. He is the eldest of 3 siblings and had attended St. Mary High School and then Brown's Town Community College where he obtained a Certificate in Telecommunications from the City and Guilds. After leaving school he stared [sic] working as a Cable Technician with the Northeastern Satellite Service before joining the Army. He had been in good physical health and gave no history of previous psychiatric illness.

Mental Status Examination revealed an appropriately dressed young man who spoke freely and seemed very preoccupied with the symptoms described. He seemed clinically depressed and mildly anxious. He displayed no thought disorder and no evidence of hallucinations or delusional thinking. He was fully orientated and displayed no impairment of attention, concentration or memory. His intelligence seemed average.

In my opinion he is suffering from a Chronic Adjustment Disorder with Anxiety and Depressed Mood. The stressor which seems to have precipitated this was his sudden dishonourable discharge from the Army in February 2006.

I would assess his mental impairment on the Global Assessment of Functioning (GAF) Scale at 65 i.e. he is functioning at 65% of his full overall psychological functioning.

I understand my duty to the Court as set out in the Rule 32.3 and 32.4 and that the prepared report is unbiased, uninfluenced as to content and form by the demands of litigation.

..."

The report of 12 March 2010

"...

He said that since I had previously examined him things had not been going well for him. At that time he had been working with Logic One Cable Company but soon after he had run into problems with the Manager who had treated him disrespectfully in the presence of clients and co-workers. He therefore resigned from the job. While working he had been attending evening classes and had passed his examinations. He was therefore qualified to apply to Knox Community College to join their Nursing Programme which he did. He was accepted and started the course in September 2009. The course is Canadian based and is very intense because a 3 year course is compressed into 16 months. He at times has difficulty concentrating on his studies but has managed to pass his examinations so far and should complete the course in December 2010.

Because he will have to go to Canada to do practical training and the final examinations he was asked to complete an immigration form which required information as to whether he had ever been charged or convicted of a criminal offence. He has therefore had to try to clear up and give details of the events which occurred in 2006 and which were mentioned in my previous report.

He said that he had developed a fear of police officers and because his girlfriend was friendly with one he had a fight with her and ended the relationship. He had continued to be very short-tempered, irritable and sensitive to minor things that people said or did. He has also been withdrawn, feels

sad and anxious and still has pains in the back of his neck and shoulders when under stress. He has still been very preoccupied with thoughts of how his life has been adversely affected by the events in 2006 which were documented in my previous report. He had been receiving occasional treatment from his general practitioner in Port Maria, St. Mary.

Mental Status Examination revealed a well dressed young man who spoke freely and established good rapport. He was very preoccupied with his symptoms and how events had adversely affected his life situation. He seemed depressed and mildly anxious. He displayed no thought disorder and there was no evidence of hallucinations or delusional thinking. He was fully orientated and displayed no impairment of attention, concentration or memory. He seemed to be of average intelligence.

In my opinion he continues to suffer from a Chronic Adjustment Disorder with Anxiety and Depressed Mood. The stressors which seem to have precipitated this were his sudden dishonourable discharge from the army in February 2006 and subsequent related events.

I would assess his mental impairment on the Global Assessment of Functioning (GAF) Scale at 65 i.e. he is functioning at 65% of his full overall psychological functioning.

In view of the fact that his condition has not improved since he was previously examined I think he is in need of specialist psychiatric treatment which would involve psychotherapy and the prescription of antidepressant and anti anxiety medication. I would expect this treatment to last for at least one year and to cost approximately $250,000.00.

I understand my duty to the court as set out in Rule 32.3 and 32.4 and that the prepared report is unbiased, uninfluenced as to content form by the demands of litigation."

[93] Grounds i and iv in my view succeed.

[94] It is also convenient to deal with grounds v and vi with together.

Ground v

"The fact that the publication was a total fabrication on the part of the servant or agent of the Crown which the Respondent despite this fact being known to him, the Respondent persisted in pursuing the action right up to trial and judgement."

Ground vi

"The Learned Trial Judge erred in not taking into consideration the rule in **Rookes v Barnard [1964] AC 29** where when the action of the servants or agents of the state amounts to oppressive arbitrary and unconstitutional conduct, in such circumstances the award for Damages not being sufficient to punish the Respondent, his servants or agents, the exemplary damages must be awarded in addition, to deter the Respondent, his servants or agents from behaving in the manner they did."

It was the appellant's evidence that:

" 124. The Attorney General's Department has been particularly unfair to me and has persevered since the year 2006, although [he] was present in the Supreme Court on the 7th day of March 2007 when a judge advised the lawyers present from the Attorney General's Department to settle this claim.

125. Instead I have been made to suffer financially and emotionally from I was dishonourably discharged from the Jamaica Defence Force until this day and no doubt until this action is tried and determined in Court and I am satisfied that my Criminal Record for the charge, conviction and sentence for ganja is destroyed."

[95] The judge accepted that the charge for unlawful possession of ganja was indeed a fabrication. At paragraphs 10 to 16 of reasons he said:

"10. It is Damian Williams who concocted the false convictions/records. He had it certified by Cpl. Cecelia Williams. It is a bare assertion that he did so in error and that Corporal could not have reasonably detected the error.

To this court that evidence seems facile. When asked 'how he could have made the error he was unable to answer.'

11. It was Cpl. Cecelia Williams' duty to have ensured that the records she certified were correct. Her inability not to have picked up the "error" must be a blot or slur on her efficiency.

12. When one takes into account the unchallenged evidence relating to the incident at the Oracabessa Police station upon the arrest of the accused, the fact that the police communicates, the proximity of the stations and the purported intention of the police to 'fix his business properly,' this court is of the view that the conviction was deliberately manufactured and would therefore have been done maliciously and without reasonable and probable cause.

13. The defendant had in its possession records which could lay that inference to rest.

14. These include-

(a) Judge's court sheet

(b) Police Court sheet

(c) Prisoner's card

(d) Crime diary

(e) Prisoner's diary

15. These could have at least have demonstrated the possibility of error.

16. On the other hand when one considers the fundamental importance of the records kept by the Criminal Records Office, for use both nationally and internationally; if the two Williams were negligent, their negligent investigation amount to criminal negligence, which would equate to maliciousness and action without reasonable and probable cause.

See: *Hollywood Silver* Fox Farm Ltd. V. Emmett 1936 2 KB – 468; *Headley Bryce v. Hellier 1936 2 AER 575;* Winfield v. Polowich 15th Edition 1998 page 68."

The judge's findings that the criminal record for possession of ganja was "concocted" by Damion Williams cannot be impugned as that conclusion is supported by the evidence.

[96] Having found that it was Constable Williams who concocted the false record, the judge however accepted the reasons given by Major Lobban and Lieutenant Colonel Meade for his discharge from the army. He said:

> "24. This court accepted the evidence of Lieutenant Colonel's [sic] Lobban and Neale [sic] that he was discharged from the army because he had made false declarations on exhibits 2 and 3.
>
> 25. This view is supported by the evidence that the record from the Criminal Records Office was received by the army **in May 2005.** That would have been long after Claimant had been discharged from the army.
>
> 26. There is no evidence that Claimant's False Record got to the army before he was discharged." (Emphasis added)

[97] The facts, upon which the judge purported to find support for that view, belies the evidence. Indeed it was the (correct) 'record' which stated that the appellant was charged for simple larceny and that information would have been obtained "long after [the appellant] had been discharged from the army". The false record was obtained on 8 February 2005 whilst the appellant was a trainee and not in May 2005.

Majors Lawrence and Lobban's evidence

[98] It was Major Lawrence's and Major Lobban's evidence that the appellant was discharged from the army because in May 2005 his response to section 2 (of the

Application Form for Enlistment into the Jamaica Defence Force (the Enlistment Application Form) was in the negative to the following question:

> "Have you ever been arrested, charged or convicted for any offence or crime or found guilty of any offence including traffic offences or have been placed on probation ...action pending against you?"

[99] It was also Major Lawrence's evidence that the Jamaica Defence Force Security Questionnaire required the appellant to make the following declaration which he untruthfully made:

> "The above information requested by the Jamaica Defence Force, and supplied by me, is to the best of my knowledge and belief true, and I understand that the making/giving of any false statement/information, may lead to the withholding of any final acceptance to the Jamaica Defence Force, of my application."

[100] He was consequently discharged for having falsely declared that he had never been arrested or charged for any offence or crime. The 'Application for Discharge of a soldier' which both officers signed enumerated a number of reasons for the discharging a soldier. It is worthy of note that the reason given for his discharge was "Final approval of attestation withheld and "false answers on attestation".

[101] Major Lobban's evidence was that the appellant was discharged because contrary to what he had stated in response to section 61 of the Enlistment Application Form and question 61 of the Jamaica Defence Force's Security Questionnaire, his criminal record revealed that he was "arraigned before the Resident Magistrates' Court in Port Maria St Mary, for "Simple Larcency" in 2004".

[102] Under cross-examination, Major Lobban testified that the appellant's criminal record was requested and it was discovered that he had a criminal record for simple larceny. Major Shane Lawrence however accepted under cross-examination that the appellant's criminal record was not given to him when the appellant was discharged.

[103] Both distinguished officers have however themselves prevaricated concerning the reason for the appellant's dishonourable discharge. The appellant's evidence was that, on both occasions he was summoned in respect of his discharge, first before Major Lobban and later before the commanding officer Lieutenant Colonel R Meade, the following was read to him from a document:

> "The Jamaica Constabulary Force
>
> Office of the Commissioner
>
> P.O. Box 464
>
> Kinston
>
> Jamaica
>
> Re: Application- Police Certificate
>
> C.R.O. 2582-2004
>
> Name: Pryce, Dane Anthony
>
> Offence: Possession of Ganja, Port Maria R.M. Court, 2004/04/08 fined $100.00 or 10 days plus 40 hours community service,
>
> Date of first conviction-2004/04/08
>
> Age at first conviction-22 years old"

That document spoke of a conviction for possession of ganja, not a charge of simple larceny.

[104] The army received the information concerning the claimant's charge for simple larceny long after his discharge. Both the appellant's and his father's evidence detailed the difficulties which confronted them before they were eventually able to obtain the court's record in one year after his discharge. That record spoke to a charge for simple larceny.

Superintendent Terrence Sancko's evidence

[105] Superintendent Terrence Sancko's evidence was that in July 2006 Deputy Superintendent Robert White of the Saint Mary Division sent the appellant to his office concerning a police certificate. The appellant attended and explained that he was issued a conviction letter which stated that he had been convicted for possession of ganja on 8 April 2004. After enquires he discovered that the conviction had been erroneously sent to the CRO by personnel at the Saint Mary Division.

[106] A corrective letter which stated that there was no record of any conviction for ganja was issued on February 2007, one year after the appellant was discharged from the army. In fact, in response to counsel, Mr Samuels' enquiry of 18 February 2007 as to the reason the appellant was discharged, the Chief of Staff Major N A Stephens wrote that "Mr Pryce...was discharged when it was discovered that he had a civil conviction prior to joining the Force". Although he was charged and ought to have so

declared, that was not reason he was discharged. The judge was therefore under a serious misapprehension as to a crucial aspect of the evidence.

[107] The respondent, as a minister of justice, persisted in pursuing the action right up to trial and judgment. In fact, the respondent's act of amending its defence to include a false allegation as to the reason the appellant was discharged, which led to/allowed the very distinguished officers of the army to "add insult to injury" by testifying falsely against the appellant that he was discharged because he had falsely declared that he was never charged, is to be deplored. This ground in my view also succeeds.

Is the appellant entitled to exemplary damages?

Submissions

[108] Mr Hill argued that the conduct of the police in publishing the false record amounted to oppressive, arbitrary or unconstitutional action by a servant of the government. He relied on Lord Devlin's statement in **Rookes v Barnard** [1964] AC 1129 and the case of **Cassell & Co Ltd v Broome and another** [1972] AC 1027 in support of his contention that the appellant was entitled to exemplary damages. This case, Queen's Counsel contended, falls squarely within the categories enumerated by Lord Devlin. The highhanded, unconstitutional and malicious conduct of the respondent, he submitted, was so extreme as to warrant significant exemplary damages because the intention was not only to harm the appellant but to "bring him down in the eyes of others".

[109] He further urged the court to not only award exemplary damages but that the award ought to be substantial as the agents of the state were engaged in an exercise which was calculated to create and establish a false criminal record for the appellant. Their actions, he submitted were extraordinary. The award of damages must "proclaim the baselessness of the charge as one being processed by the lawful agents of the Crown with all the force and might of the law. A libel which is difficult to erase".

[110] It was Queen's Counsel's submission that the respondent is the chief law officer of the state which, by section 22 of its Constitution, guarantees the protection of the reputation of the appellant. He relied of Lord Hoffmann's statement in **The Gleaner Co Ltd and another v Eric Anthony Abrahams** [2003] UKPC 55, which this court adopted in **CVM Television v Fabian Tewari** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 46/2003, judgment delivered 8 November 2006, for the proposition that compensatory damages would be inadequate punishment for the outrageous conduct of the officers and to mark the court's disapproval and to deter any repetition of such conduct. The court's attention was also directed to the cases of **Scott v Sampson** [1881]-[1885] All ER Rep 628; and **Coxhead v Richards** 2 CB [1569] 1089. Learned Queen's Counsel also referred the court to the cases of **Huckle v Money** (1763) 2 Wils. 205 and **Sharon Greenwood Henry v The Attorney General**, Khan Recent Personal Injury Awards, volume 6 page 208.

[111] Learned Queen's Counsel in his submissions dealt with grounds iii, iv, and v together. It was his submission that in actions for libel and slander, damages are

awarded as compensation for injury to his reputation, and hurt to his feelings. Such damages he submitted are compensatory and are at large and operate/for the vindication of the appellant to the public and for his consolation for the wrong he endured. Queens's Counsel submitted that they are better viewed as a solatium rather than as monetary recompense for harm measurable in monetary terms.

[112] Queen's Counsel submitted that, in assessing compensation, regard must be had to the gravity of the libel and the extent of the publication. He posited that the aim of an award of damages in tort is to put the appellant in the position which he would have been had it not been for the publication. For that proposition, he relied on the work of the learned editors of Gatley on Libel and Slander 8th Edition at paragraph 1453; **Cassel and Co Ltd v Broome**; **Margaret Morris et al v Hugh Bonnick** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 21/1998, judgment delivered 14 April 2000; **CVM television v Fabian Tewari** and **The Gleaner Co Ltd v Abrahams**.

The respondent's submission

[113] In response to this claim, counsel placed reliance on rule 8.7(2) of the Civil Procedure Rules 2002 for the proposition that a claimant who seeks aggravated and/or exemplary damages must say so in the claim form. Such a claim was not pleaded, thus the learned judge was correct in not making an award for special damages.

[114] Counsel submitted that the appellant's statement that it was the court's responsibility to award exemplary damages once the defendant's conduct is oppressive,

arbitrary and unconstitutional is inaccurate. So too is his further submission that general damages are not sufficient to punish the defendant because the award of such damages is discretionary. She referred the court to Halsbury's Laws of England, Volume 32, paragraph 756. According to counsel, the behaviour of the Crown servants was neither arbitrary nor oppressive, nor was it unconstitutional.

Analysis/law

[115] Rule 8.7(2) of the Civil Procedure Rules 2002 states that:

> "A claimant who seeks aggravated damages and/or exemplary damages must say so **in the claim form**." (Emphasis added)

By way of his claim form dated 9 March 2007, the appellant claimed aggravated damages. Paragraph 4 states:

> "The Claimant claims Aggravated Damages by virtue of the particulars expressed in the Particulars of Claim which is served with this Claim Form particularly. [sic] Particular 52 of the Particular of Claim."

[116] The claim form did not refer to exemplary damages. However the particulars of claim, especially paragraphs 41-43 and 52-53 set out the basis of the claim for exemplary damages. It is necessary to quote these paragraphs.

> "41. That the Claimant says in the circumstances, that a servant or agent of the Crown falsely and maliciously and without reasonable and probable cause wrote and inserted on the said document prepared for the Claimant at the time he was charged for Simple Larceny the words 'Offence, Possession of Ganja'.
>
> 42. The Claimant says that a servant or agent of the Crown falsely and maliciously and without reasonable and probable

> cause wrote and inserted on the said document prepared for the Claimant at the time he was charged for Simple Larceny the following words 'fined $100.00 or 10 days plus 40 hours of Community Service, date of conviction 2004/04/08, age of conviction 22 years old.'
>
> 43. The Claimant says that a servant or agent of the Crown falsely and maliciously and without reasonable and probable cause failed to destroy the Claimant's fingerprints after the Simple Larceny charge was disposed of in the Resident Magistrates Court for the parish of Saint Mary held at Port Maria and with intent to libel the Claimant falsely and maliciously and without reasonable and probable cause created the said document which revealed the Claimant to have committed the crime of possession of ganja.
>
> ...
>
> 51. And further by reason of these premises the Claimant has suffered loss and damage and incurred expenses of a special nature to comply with the requirements for his admission and entry in the First Battalion Jamaica Defence Force and upon being dishonourably discharged from the said Jamaica Defence Force has been handicapped in his obtaining employment by reason of this blemish on his character and has been rendered unemployable since being dishonourably discharged from the Jamaica Defence Force as foresaid. The Claimant has thus suffered loss of earnings since.
>
> 52. And the Claimant by reason of the premises mentioned above and in particular those mentioned at paragraph 50 the servants or agents of the defendant in their conduct towards the Claimant was contemptuous, highhanded [,] oppressive insulting and contumacious. The Claimant in the circumstances claims Aggravated Damages and will rely on such conduct as evidence of malice."

[117] The trial judge's finding at paragraphs 10, 11 & 16 of his reasons justify such a claim as outlined in paragraph [94] herein.

[118] Also, the judge's acceptance that the record for possession of ganja was "deliberately manufactured" to "fix his business properly" is also an acceptance of the appellant's evidence as to why the charge for simple larceny would have been instituted although there was no evidence to substantiate such a charge. The appellant's evidence was that Detective Constable Maxwell's told him that "he was going to release all three of [them] but since [the appellant is] a bad man he would have to change up plans".

[119] A claim for exemplary damages is established on the evidence if not on the pleadings. The behaviour of the constables is captured by categories enumerated by Lord Devlin in **Rookes v Barnard**.

[120] The issue is whether the failure to have pleaded exemplary damages in the claim form disentitles the appellant from pursuing such an award? In light of the clear language of the CPR, in my view, it appears so.

The claim for aggravated damages

[121] The claim for aggravated damages has been properly pleaded and established by the evidence elicited. Undoubtedly there are several aggravating features. Not only was the conduct of Constable Williams and Detective Corporal Williams arbitrary, oppressive, unconstitutional, there is copious evidence of malice in the behaviour of Constable Williams towards the appellant which justifies an award of aggravated damages.

[122] A significant aggravating feature is the persistence of the respondent in defending the case up to trial especially in light of the court having urged a settlement. That factor was further compounded by the amendment to the defence to further

bolster its case by the introduction of falsehood. The aggravating circumstances were further exacerbated by the conduct of Superintendent Sancko.

Superintendent Sancko's behaviour

[123] At the instance of the appellant and his father, Deputy Superintendent Robert Whyte conducted investigations which revealed that the appellant had been charged for simple larceny but was not convicted. In the presence of the appellant and his father Deputy Superintendent Whyte spoke by way of telephone to someone at the CRO and he referred them to Superintendent Sancko.

[124] They attended the CRO and spoke with Superintendent Sancko, who was insistent that if the prints and the signature on the fingerprint form were the appellant's, the record had to be his also. Superintendent Sankco however told him that if there was no record for him at the Saint Mary Resident Magistrate's Court for a conviction of ganja, the record would be cleared and a "clean, new," record would be provided. Superintendent Sancko's evidence was that in August 2006 he personally shredded the said record.

[125] It was the appellant's evidence that having passed the entrance examination for the JCF, he gave a brief history of the conviction on the application form, as required. Whilst he was being interviewed, the subject of the conviction was discussed. He was instructed by the interviewer that in order to continue the interview he was required to provide proof that he had no criminal conviction.

[126] The appellant was given a document by Superintendent Sancko dated 23 June 2006 in furtherance of his application to the JCF which stated that his "record was cleared". That document seemed to be of no effect because the interviewer required a recommendation from the Superintendent of Police of the Port Maria Police Station that he had no criminal record. He was not accepted in the JCF because of his failure to obtain the recommendation.

[127] The pertinent and troubling question is why was the record not shredded when it was brought to Superintendent Sancko's attention that the appellant was not convicted for possession of ganja and that the record was false? Why was the record shredded in August 2006?

[128] The judge's observation that Superintendent Sancko "made no effort to retract the record from the Jamaica Defence Force or wherever published nor did he apologize publicly" is also a pivotal consideration. However Superintendent Sancko was not the only person who ought to have apologized. The evidence which the judge accepted was that Superintendent Sancko was sent the false record which was, as found by the judge, concocted by Constable Damion Williams and facilitated by the gross negligence of Detective Corporal Cecilia Williams.

[129] The appellant did not plead exemplary damages as required by the CPR and this disentitles him from an award under this head. That fact notwithstanding, the court is able to award a sum, as Forte P said in the **Abrahams** case and was endorsed by the Privy Council, which is "sufficient to achieve the purpose of punishing the [respondents]

and deterring others from behaving in the manner in which the [respondents] acted in this case." In endorsing Forte P's statement, Lord Hoffmann said

> "41. Lord Lester complains that this passage indicates that Forte P did not understand the distinction between punitive and compensatory damages and wrongly introduced a punitive element into his substituted award of J$35 million. Their Lordships reject this submission. In their opinion Forte P's observation reflects an entirely orthodox view of the dual function of compensatory damages. Ever since the distinction between compensatory and exemplary damages was formulated by Lord Devlin in **Rookes v Barnard** [1964] AC 1129 it has been recognised that compensatory damages may also have a punitive, deterrent or exemplary function.
>
> What distinguishes exemplary damages for the purpose of the **Rookes v Barnard** dichotomy is that they do not have a compensatory function. Lord Devlin made this clear when he said (at p 1228):
>
> > 'In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the Plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum.'
>
> 42. This passage has formed the basis of numerous similar statements in later cases (see, for example, Sir Thomas Bingham MR in John v MGN Ltd [1997] QB 586, 619). In the case of any tort, liability to pay damages as compensation for loss or harm is capable of having some deterrent or exemplary effect and this is particularly true of defamation; first, because it is an intentional tort and secondly because the conduct of the defendant is capable of aggravating the damages. It is true that in **Broome v Cassel & Co Ltd** [1972] AC 1027, 1077 Lord Hailsham of St Marylebone LC said that compensatory and exemplary damages were 'as incompatible as oil and vinegar' but most judges have accepted that in many cases the two purposes

> are inextricably mixed. The monetary value which a society places upon reputation and freedom from unjustified shame and humiliation is bound to be a conventional figure. The higher it is set, the greater the deterrence."

[130] The Privy Council considered the award of $35,000,000.00 as justified in the **Abrahams** case.

Ground iii

> "The amount awarded for the General Damages was inordinately low and was not adequate to compensate the Claimant and restore his reputation in respect of any damage which he could reasonably have sustained by the publication and loss of his career, bearing in mind the serious damage to the Claimant's character and the effect the defamation had on his career."

Is the award of $2,000,000.00 inadequate?

[131] Queen's Counsel argued that the award of $2,000,000.00 is inordinately low. The circumstances of this case, he submitted, required a substantial award. He posited that an award of $40,000,000.00 was appropriate in light the factors in this case. He submitted that damages are awarded in actions for libel and slander to compensate the appellant for the injury to his reputation and the hurt to his feelings. Such damages operate to vindicate the appellant to the public and to console him for the wrong done and are viewed as a solatium.

[132] He submitted that the aim of such an award is to put the appellant in the position which he would have been in were it not for the tort. For that proposition he directed the court's attention to paragraph 1453 Edition of Gatley on Slander the 8th Edition, where the learned author stated that:

> "Damages for defamation are intended to be compensation for the injury to reputation and for the natural injury to feelings, and the grief and distress caused by the publication."

[133] Queen's Counsel also referred the court to pages 593-594 of the work of the learned editors of Gatley on Libel and Slander 8th Edition which read:

> "Aggravated damages: The conduct of the defendant, his conduct of the case and his state of mind are thus all matters which the plaintiff may rely on as aggravating damages. Moreover, it is very well established that in cases where the damages are a large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation. **In awarding 'aggravated damages' the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous, rather than a more moderate award to provide an adequate solatium…that is because the injury to the plaintiff is actually greater, and as a result of the conduct exciting the indignation demands a more generous solatium.**" (Emphasis added)

He relied on Lord Hailsham's following statement in **Cassell & Co. Ltd v Broome** at paragraph 1071 that:

> "In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitutio in integrum has necessarily an even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must

> be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge."

He also placed reliance on **Margaret Morris et al v Hugh Bonnick**, a decision of this court, in which at page 22 Forte P dealt with the issue of damages thus:

> "In determining the quantum of damages to be awarded in a libel action such as this, the primary consideration must be the vindication of the plaintiff for the damage to his reputation which is man's most cherished asset. Consequently, consideration as to how serious the libel is, the degree of damages done to the plaintiff's reputation, the magnitude of the publication, any genuine apology offered including a declaration of the falsehood of the publication, and in some cases any injury to his mental health which is directly connected to the libel are some of the factors to be taken into account, this of course not being an exhaustive list, as each case has to be considered on its own facts."

[134] It was Queen's Counsel's submission that the defamatory statement alleged that the appellant was convicted and sentenced for a charge of possession of ganja which statement was calculated to cause in the minds of those who read them that the allegation was credible. He submitted that there was clear and abundant evidence that the libel significantly damaged the appellant's reputation and earning capacity.

[135] He submitted that damages awarded must reflect the importance placed on libellous articles in Jamaican society at both compensating the appellant and re-establishing his reputation

[136] He cited Panton P's statement in **CVM Television v Fabian Tewari** for the proposition that damages awarded for defamation reflects the importance placed on

libellous articles in the Jamaican society and that damages are aimed both at compensating the appellant and re-establishing his reputation.

[137] According to Queen's Counsel, that statement fully reflects the instant case. It was however his submission that the libel in the instant case was extra-ordinary as the appellant was ignominiously discharged with the description "Dishonourably" discharged forever etched on his memory and character. His dream in life was shattered; his career in the army had vanished and his hopes dashed leaving him a broken man. Queen's Counsel reminded the court of Major Beek's evidence as to the joy and fulfilment of being a part of the military which the appellant lost.

[138] Queen's Counsel submitted that, even in civilian life, the appellant's experience has been bitter in proving that he was not a convicted criminal. He was unable to complete an application form for a job as all forms require an answer to the question, "Have you ever been convicted of any Criminal offence?" Queen's Counsel also relied on the **Abrahams** case.

[139] He submitted that, like Mr Abrahams, the appellant's physical health declined. He relied on Dr Ottey's medical report, in which the doctor recommended specialist psychiatric treatment. He directed the court's attention to Lord Hoffmann's statement in the **Abrahams** case that:

> "The award ought to be of a sum reasonably required to protect the Claimant's reputation. The damages must show that the claimant's reputation has been vindicated."

[140] Queen's Counsel pointed out that an award of $35,000.000 was upheld by the Privy Council in the **Abrahams** matter and he submitted that the conduct of the respondent in the instant case is similar to that of the respondents in the **Abrahams** case. According to Queen's Counsel, the consequences are far more devastating to the appellant than they were in the **Abrahams** case. He pointed that in the **Abrahams** case the court found that there was ample evidence on which a jury could award aggravated damages.

[141] Queen's Counsel postulated that the libel against the appellant took away his career choice, in a humiliating, unlawful and unconstitutional manner at the point he had begun achieving his dream. He has had to change the course of his life and his career choice has been forever and entirely taken away from him. The award should therefore be no less that which was awarded to Mr Abrahams.

[142] He submitted that in making an award the court ought to take the following circumstances into account:

(a) The need to compensate and restore the appellant's respect bearing in mind the serious damage to his character and the effect the defamation had on his career.

(b) The highhandedness of the respondent.

(c) The absence of any apology.

(d) The persistence in prosecuting the matter over six years up to trial although on two occasions the court urged a settlement.

[143] Queen's Counsel also contends that the conduct of the respondent in the instant case has been contemptuous of the appellant's legal rights. In breach of the Finger Print Act, a criminal record was created, which wrecked his dreams and career, prevented him from applying for jobs and from travelling.

The respondent's submissions

[144] Counsel, Ms Harrison, argued that the appellant has failed to prove actual loss. The appellant had responded negatively to questions whether he had been arrested, charged or convicted. He was discharged from the army because of his false declaration. There was also no evidence of injury to his status in life or his health. Nor was there evidence that he had a career which was destroyed. The reason for his discharge was his untruthful declaration.

[145] The defamation was not the cause of his discharge and therefore could not have been the reason he was unable to join the British army thereafter. The court having found that the publication was to certain named members of the Jamaica Constabulary Force, the CRO, the JDF and a host of other persons, took into consideration the gravity and effect of the defamation and the extent of the publication based on the evidence.

[146] The respondent ought not to be punished by an increased award because it chose to defend the claim. The respondent admitted the publication and explained that it arose from an error. The respondent relied on a defence of qualified privilege.

[147] Superintendent Sancko's evidence that he made no effort to retract the record from the JDF and his failure to offer a public apology was taken into account in keeping with the pronouncements in **Rodney Campbell v Jamaica Observer Limited & Chester Francis-Jackson**, she submitted.

[148] The respondent's decision to defend without more cannot be regarded as an aggravating factor. In any event, she contended, there was no evidence that the issue was raised in the court below. Furthermore, she argued, the court was not bound to consider it as an aggravating factor.

[149] She submitted that there was no basis for interfering with the judge's award of $2,000,000.00. She referred the court to the case **Rodney Campbell v Jamaica Observer Limited & Chester Francis-Jackson** in which an award of $1,000,000.00 was made after the court considered the mitigating and the aggravating circumstances which included manner in which the defendant had conducted the litigation.

Analysis

The judge's findings

[150] By his findings the judge accepted the publication of defamatory material against the appellant and rejected the defence of qualified privilege. At paragraphs 17-18 he said:

> "17. Publication was first made by Damion Williams to Cecelia Williams and then to officers at the Criminal Records Office including Superintendent Sanko and to members of the Jamaica Defence Force including Lobban and Neale [sic] to Stanley Pryce and a host of other persons.
>
> 18. The words while undoubtedly defamatory and any defence of Qualified Privilege cannot be sustained because they were not true.
>
> **See: The Gleaner Company v. Abrahams 2003 3 WLR 1038 and CVM Television v. Tewani SCCA 46/2003**"

Te judge said earlier at paragraph 9:

> "9. The defence of Qualified Privilege raised by the Defendant is perhaps intellectually persuasive but does not accord with the peculiar facts of this case, nor with their ability to have demonstrated that the evidence of two of their witnesses Damian and Cecelia should be accepted on a balance of probabilities."

He however sought to diminish the impact on the appellant's reputation, social life and health as aforesaid.

[151] At this juncture it is necessary to point out that the learned judge also erred when he found that there was no evidence that the appellant applied to the British army. On 12 May 2006, in response to the British Army's request for the appellant's police certificate, the JCF refused to provide a police certificate "on the grounds" that he was convicted for the offence of possession of ganja and sentenced on 8 April 2004 to pay a fine of "$100.00 or 10 days plus 40 hours Community Service".

[152] The matters complained of against Constable Williams are indeed iniquitous. But would an award equivalent to that which was awarded Mr Abrahams be appropriate?

Although there are similarities, there are certain distinguishing features of the Abrahams case which must be taken into account.

The Abrahams case

[153] Mr Abrahams was a man of considerable national and international stature. He had held high governmental office in this country. He was accused of taking bribe while he was Minister of Tourism. The libel was published both locally and overseas where he was hitherto well known and respected. In fact he was also charged criminally overseas.

[154] He was consequently ostracised and humiliated. His flourishing business ceased to earn causing him to abandon it and to seek alternate means of earning a living. He suffered the indignity of being ejected from the office of a potential client and subjected to the ignominy of being searched by a security guard. Mr Abrahams lost his livelihood as a consequence of the libel.

[155] He developed a phobia of facing the public, insomnia, stress related obesity; type two diabetes, chest cramps, emotional distress. Dr Aggrey Irons, consultant psychiatrist, testified about the effects of the libel on Mr Abrahams but conceded under cross-examination his inability to say that the publications were the sole reason for his state.

[156] It was also Dr Irons' evidence that the slur on his character transformed Mr Abrahams from "a high drive, high functioning, self motivated and relatively successful" man into being:

> "(1) Severely reduced self esteem and self perception.
>
> (2) Severe anxiety with what we call phoebic response avoidance particularly avoiding public appearance and interaction.
>
> (3) Depression with hypersomnia (i.e. excessive feelings of sleepfulness, lack of energy etc.) Rebound oral dependent behaviour leading to severe weight control problems.
>
> (4) Social withdrawal and isolation secondary to the phenomena mentioned in 1, 2 and 3 above."

The doctor opined that:

> "It was my opinion at the time and still is that Mr. Abraham's self-image, public image and personality have been damaged to an extent requiring an ongoing psychotherapeutic intervention which would involve both psychoanalysis and pharmacologic intervention over the next 2 years at least for the next 2 years. Pharmacologic i.e. medication which he had already begun."

He continued:

> "It would follow that if verbal accusations or written accusations were being consistently applied to the various aspects of his profession-it would have a serious impact on him and his ability to perform. It is very clear that that sequence of events would lead to the situation I have earlier described."

[157] The appellant in the instant case was respected and well known in his community. He, however, was able to flee his relatively small community in Saint Mary to Kingston where he remained incognito for awhile before he sought refuge in the small town of Spalding.

[158] The appellant's, as submitted by counsel, "[D]ream in life had been shattered, his career in the army had vanished before his very eyes, his hopes dashed and left him

a broken man". Having just begun to achieve his dreams, it was snatched from him in a "humiliating, unlawful and unconstitutional manner".

[159] The effect on a young man having his dream which he worked towards achieving wrested from him in that manner is undoubtedly devastating. All was however not lost. The clearly ambitious and enterprising person he is has led him to pursue a career in nursing albeit in the remote district of Spalding. He, unlike Mr Abrahams, is young. With the passage of time memories might fade. Mr Abrahams did not have the luxury of time and youth to recover his hitherto illustrious standing locally and overseas.

[160] It cannot however be ignored that it was a part of the appellant's dream to work overseas. In an effort to mitigate and fulfil his desire of working overseas, he entered the Canadian Nursing Programme at the Knox College. However up to the filing of this appeal in 2014, he was unable to travel to Canada where he is required to do service because the application required him to provide answers to the criminal record. Although he provided the required written explanation the response was unfavourable.

[161] Like Mr Abrahams, the appellant became depressed and suffered. Mr Abrahams' suffering was more severe and did not assuage. The appellant however has been able to get on with his life. Mr Abrahams was not.

[162] The libel perpetrated against the appellant is undeniably egregious. Lord Hoffmann in delivering the decision of the Privy Council in the **Abrahams** case pointed out the differences between general damages and in personal injuries cases and defamation actions. One difference, he said:

> "55. …**is that the damages must be sufficient to demonstrate to the public that the plaintiff's reputation has been vindicated.** Particularly if the defendant has not apologised and withdrawn the defamatory allegations, the award must show that they have been publicly proclaimed to have inflicted a serious injury. As Lord Hailsham of St Marylebone LC said in **Broome v Cassel & Co Ltd** [1972] AC 1027, 1071, the plaintiff 'must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge'." (Emphasis added)

[163] The appellant endured much obloquy as a result of the libel. Any award must therefore be substantial enough to persuade his community, future employers and embassies that the charge was fabricated. Also in light of the painful and life altering effect of the libel, a substantial award is required which will not only vindicate his reputation but deter police officers from replicating such behaviour.

[164] In my view the circumstances of **CVM Television v Tewarie** are not as serious as the instant case. In that case the respondent was a police officer against whom the television station had embellished a report of a fatal shooting by the respondent which conveyed the impression that Mr Tewari had committed murder. Panton P at pages 8-10 outlined the effects of the libel on the respondent as follows:

> "The jury awarded the respondent the significant sum of twenty million dollars ($20,000,000.00) as general damages. The respondent had told the jury that when he heard the news broadcast and the role he was alleged to have played in the activity being reported, he felt as if someone had hit him in his head with something heavy. He subsequently had to seek medical help for persistent headaches and stress. He ceased visiting the community in which the killing had taken place, due to fear for his safety. Since the broadcast, he has continued to receive his remuneration and although he has not been promoted, he has received commendations

> on a regular basis. It is also obvious that he has not lost his friends as a result of the publication.
>
> ...
>
> Lord Hoffman [in **Abrahams**] reminded that an award of damages "ought to be a sum reasonably required to protect the plaintiffs reputation". The damages must show that the plaintiff's reputation has been vindicated.
>
> The **Abrahams** case was extra-ordinary. Evidence of loss of good health and earning as a result of the libel were clearly proved. In addition there have been aggravated circumstances with the deliberate repetition of the libel and the refusal to apologize. Abrahams had to live with the consequences for several years. The libel continued even before the Privy Council. In the instant situation the libel was not devastating."

[165] The learned President, with whom the court agreed, found that in those circumstances an award of $3,500,000.00 was adequate.

[166] The **Tewari** case lacked the aggravating features of the instant case which is more akin to those of the **Abrahams** case. As noted however, the impact of libel on Mr Abraham's life was more devastating.

[167] It is necessary find the present value of $35,000,000.00 which is calculated by dividing the Consumer Price Index(CPI) at November 2007 which was 114 by the CPI at July 2003,(the date the $35,000,000.00 was awarded) which was 69.50 and multiplying the quotient by $35,000,000.00 which today values $57,410,072.00. The circumstances of this case are more akin to the **Abrahams** case. However as noted, the impact of libel on Mr Abrahams life was more devastating.

[168] The case of **Jamaica Observer and Paget DeFreitas v Gladstone Wright** [2014] JMCA Civ 18, is also a helpful guide in determining an appropriate award. The Jamaica Observer Limited, (the Observer) a widely circulated newspaper, published the following defamatory statement in its 27 March 1998 edition:

> "BNS PROBES $90 MILLION EXPOSURE- Branch Manager sent home."

Mr Paget DeFreitas was the Observer's editor in chief.

Under that headline were the words:

> "Bank of Nova Scotia has been hit by a $94-million exposure to unauthorised credit, and has sent home a senior officer, Gladstone Wright, of the Montego Bay branch, while it deepens its probe into the irregularities.
>
> It is the first major case to surface at Scotiabank, cracking the apparent insularity of this institution to the wave of multimillion dollar scams and unauthorised credits which have haunted much of the sector within the past year.
>
> Scotia's managing director, Bill Clarke, declined to discuss the issue with the Observer, claiming that it was against the bank's policy to discuss the affairs of its employees or customers with the media.
>
> But authoritative sources inside Scotiabank confirmed that Wright was immediately sent on leave two weeks ago after inspectors from the bank's headquarters uncovered the irregular loans – involving advances which exceeded the limit of the branch, and loans and overdraft facilities for which there were woefully inadequate collateral.
>
> 'The bank stands to lose $94 million, and that is what has been discovered so far', the Observer source said. 'But there is a likelihood that the exposure will climb even further.'
>
> Sources say that Scotiabank is also investigating the recent acquisition of land in Westmoreland by Wright, and to

> establish if there is a connection with the 'indiscretion' at the branch."

[169] The respondent had been an employee of the Bank of Nova Scotia (BNS) in excess of 20 years. At the time of the publication he was a manager.

[170] Being aggrieved at words which he interpreted to be defamatory, he instituted proceeding against the bank. The matter was heard by Anderson J and a jury. He was awarded the sum of $10,000,00.00 as punitive or exemplary damages and the sum of $20,000,000.00 as general damages with interest at 3% until payment together with costs.

[171] In his statement of claim the respondent stated that the appellant had falsely and maliciously published and distributed the said words which defamed the appellant. He claimed that the natural and ordinary meaning of the words which followed the said head line "meant and were understood to mean that:

> (i) The Plaintiff had acquired land in the parish of Westmoreland.
>
> (ii) That the Plaintiff possibly acquired the alleged land fraudulently, dishonestly and/or through other unlawful means."

[172] It was also his claim that as a consequence of the said defamatory publication, his credit and reputation had been "severely injured" and had he "been brought into

scandal, odium and contempt, put to great distress and inconvenience and has suffered great loss and damage".

[173] The defamatory statement was repeated on the Breakfast Club, a then popular radio programme. It was the discussion on that programme which brought the publication in the newspapers to his attention. It was Mr Wright's evidence that he immediately began receiving telephone calls, not only from Jamaica, but also overseas.

[174] It was his evidence that he neither bought land nor sought to buy land in Westmoreland. He was devastated by the article which he eventually read. He was openly treated with contempt and words of reprobation were openly directed/hurled towards him. He gave the following examples:

> His own mother who resided overseas telephoned him after the publication. Despite his efforts to persuade her otherwise, she said:
>
> "I never know that I bring up a thief."
>
> His mother and relatives who resided overseas who often visited him, ceased.
>
> " On the road a few days after the publication of the article, a passing bus driver shouted out to him, "What happen to the Bank money??!!".
>
> "…[His] neighbour was smoking what [he] thought was ganja and when [he] asked him to at least close his door [his neighbour] responded by saying words to the effect that 'you a thief that's why they run you from the Bank'."

[175] He went home after the comment immediately returned to his house and did not leave. As a result, he received calls from persons who enquired if he was under house arrest.

[176] His friends shunned him and he was alienated by his colleagues. He was snubbed by a prominent member of parliament, a customer at the bank with whom he had developed a friendship. He was no longer welcomed in certain circles. Consequently he stopped attending the meetings of the service club. It was a few months after the publication before he was able "to face the world". It was his evidence that it took him months after the publication to do so. Feelings of shame prevented him from returning to Montego Bay. It was with difficulty that he attended the trial.

[177] It was his evidence that:

> "There are now some people who shunned me in the period following the publication with whom I have managed to repair the relationship to some degree. In some instances it took me in excess of 4 years. Despite regaining the friendship of some people, I have lost much of the social standing which I had enjoyed previous to the publication."

[178] He experienced difficulty in obtaining a job. He was only able to gain employment in or about October or November 1998. His daughter's studies at the university also suffered.

[179] Mr Wright was awarded the sum of $6,500,000.00 in May 2008. By dividing the CPI at October 2011, which was 127.8, by the CPI at May 2008, which was 215.7 and

multiplying the quotient by $6,500,000.00, we arrive at the present value, which is $8,987,089.00.

[180] In respect of the appellant, up to the point of the hearing of the appeal, he was unable to fulfil the requirements of the nursing course because of the record of conviction against him. Mr Wright had been able to obtain employment within months of the incident. A significant aggravating feature which is absent from all the authorities relied upon is that the appellant suffered the further ignominy of being incarcerated.

[181] An award of $12,000.000.00 is therefore reasonable in light of the aggravating features of this case to compensate the appellant for his suffering; loss of opportunity and income; and to vindicate his reputation.

Ground ii

> "That the learned trial judge erred in not awarding Special Damages to the Appellant, as they were expenses necessarily incurred to join the Jamaica Defence Force and in the circumstances were recoverable."

[182] The claim for special damages was as follows:

For Tattoo removal 4 times @ $12,000.00 each	$ 48,000.00
For Transportation to remove Tattoo 4 times @$600.00 each trip 2,400.00	$ 2,400.00
3 other visits @600.00 each	$ 1,800.00
For Costs of Items required for Training	$ 3,000.00
Costs for Physical Training Shoes	$ 4,500.00
Costs of Eye Glasses	$ 15,000.00

Consultant Fess Ophthalmologist		$ 2,500.00
Costs for confirmation as to condition of Glasses		$ 1,000.00
Dental Care for Admittance		$ 10,000.00
Chest X-ray Nuttall Hospital		$ 1,500.00
Subtotal		89,700.00
Loss of Earning:-		
Loss of earning @$27,496.00 per month to November 2007	$467,432.00	
Total	$646,832.00	

[183] The items claimed in relation to the expenses incurred prior to joining the army are not recoverable as special damages because they cannot be said to flow from the libel (see McGregor on Damages 17th Edition paragraph 1-031). The appellant is however entitled to recover the sum claimed for loss of income because of his dishonourable discharge, as this was a direct result of the libel.

[184] In light of the foregoing, I would make the following awards:

General damages

$12,000,000.00 with interest at the rate 3% per annum from the service of the writ to date of delivery.

Special damages

Special damages awarded in the sum of $467,432.00 with interest at the rate 3% per annum from 6 February 2006 to date of delivery.

EDWARDS JA (AG)

[184] I too have read the draft judgment of Sinclair-Haynes JA and I agree with her reasoning and conclusions.

MORRISON P

ORDER

1. The appeal is allowed in part.

2. The award for general damages is increased to $12,000,000.00 with interest at the rate 3% per annum from the service of the writ to 7 October 2011 (the date of delivery of the judgment in the court below).

3. Special damages awarded in the sum of $467,432.00 with interest at the rate 3% per annum from 6 February 2006 to 7 October 2011 (the date of delivery of the judgment in the court below).

4. Costs to the appellant to be agreed or taxed.