JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 70/96

COR: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN	**THE GLEANER COMPANY LIMITED** **DUDLEY STOKES**	**DEFENDANTS/ APPELLANTS**
AND	**ERIC ANTHONY ABRAHAMS**	**PLAINTIFF/ RESPONDENT**

Emil George, Q.C., with Garth McBean & Yoland Whitely
Instructed by **Richard Ashenheim of Dunn, Cox, Orrett & Ashenheim**
for Appellants

Winston Spaulding, Q.C., Gayle Nelson, Mrs. Nancy Tulloch-Darby, Mrs. Crislyn Beecher-Bravo & Marina Sakhno instructed by
Gayle Nelson & Co for Respondent

October 25, 26, 27, 28, 29 November 1, 2, 3,4, 5, 1999
January 31, February 1, 2, & July 31, 2000

FORTE, P:

The respondent is a gentleman of solid background and a son of a well respected family in Jamaica. As a result, he was the beneficiary of a good education, received at two of the leading high schools in Jamaica from where he moved on to the University College of the West Indies. Taking advantage of these opportunities he excelled not only in academics, but also in sports and in other extra curricular activities,

particularly that of debating in which he represented the University in international competitions. His qualifications were good enough to earn him the coveted Rhodes Scholarship, which allowed him the honour of attending the prestigious University of Oxford in England. At Oxford, he became President of the West Indies Society and President of the Oxford Union a debating Society. The respondent, however soon fell into problems at Oxford which led to his being sent down. In his evidence he gives an explanation, which suggests that the reason for this, was the stand he took in relation to the visit of a South African Ambassador to the University during the times when the Apartheid regime existed in South Africa. He had planned a massive demonstration against the Ambassador, which turned sour as the Ambassador "got a little roughed up." The demonstration it seemed, also coincided with the arrest of Nelson Mandela. He became a television reporter for the British Broadcasting Corporation rising from the lowest rank as a production assistant to become a director and then a television reporter. In 1965/66 he resigned to return to his native land as Assistant to the Director of Tourism. Two years later, at the age of 28, he was appointed Chairman, and Director of Tourism. In that job, he studied "a lot about tourism". He took the opportunity to learn and understand the foreign tour operators and travel agents and to develop contacts with them. He developed a lot of friends in the tourist industry, and his background at the University College of the West Indies and in England gave him access to a lot of persons in the industry who had been his fellow students in those days. In 1974, he resigned as Director of Tourism, and entered business as a tourism consultant. He did some valuable work including consultancies with the Organization of American States (O.A.S.) the Government of El Salvador and Eastern Airlines.

He unsuccessfully contested the national elections in Jamaica in 1976 after which he was appointed a member of the Senate. Having served a year he went to

Barbados to head the O.A.S. Regional office, and while there through the OAS he did consultancies with the Governments of Barbados, Grenada, St. Lucia, Haiti and Bolivia.

In 1980, he came home and contested the general elections, this time being successful. Thereafter he was appointed Minister of Tourism. In the 1983 elections, not contested by the opposition party he was returned unopposed, and thereafter continued as Minister of Tourism until 1984, when he resigned as Minister, but remained in Parliament. During this time, the respondent testified, he had the opportunity to further increase contacts, "press contacts, trade contacts, public relations contacts, government contacts both regional and international."

After his resignation, the respondent went back to his private consultancy business, and made available to the Jamaica Hotel and Tourist Association, and the government of Jamaica, his advice and contacts. The respondent at this time, if he were believed, had established himself as having vast experience in the tourism industry and considerable knowledge in respect of the same, and also a lot of contacts both regionally and internationally.

He was a person respected for his knowledge and experience, not only at home but internationally having done consultancies for various countries. He was at this time enjoying a good reputation, and success in his consultancy business, though, handicapped so far as international organizations were concerned, by his continuing as a Member of Parliament, as those organizations did not "favour" active politicians.

It was at this time that the Articles, the subject of the appeal, were published by the defendants. The respondent had had an introduction to the allegations to be made against him on the day before the first of these publications took place. On that day, he received a call from a Miss Lisa Marie Peterson, from the Associated Press in Stanford Connecticut. She read to him what appears to have been an Article which she proposed to publish. The respondent testified that the Article she read sounded exactly to the word

like the Article he was to see in the Star Newspaper the following day. He got angry, threatened to sue if the Article was published in that form and gave her three reasons why the Article was not true. She agreed to amend the Article. The following day, he received a call from his Attorney who read the Article in the Star Newspaper to him. As a result he went to the Attorney's office and read the Article. He decided to rectify it, by calling the second defendant/appellant and giving him the same information he had given to Miss Peterson. When he got the second defendant/appellant on the phone, he told him of the content of the conversation with Miss Peterson and told him he would write "a (clarification) denial, and that he would be obliged if he could carry it in the following day's Star". Mr. Stokes at that time had no knowledge he said, of the Article that had been published in the Star. He wrote the denial and took it to the Gleaner Company that same evening, but it was not published in the Star of the following day. Instead, on the following morning, the same Article, with one part excluded, was published in the Daily Gleaner, without any of the denials contained in his "clarification" taken to the appellants' offices on the evening before. The respondent consequently called the second defendant/appellant, and complained "bitterly" about not publishing his correction in the Star. In answer, the second defendant/appellant stated that he had been overruled and that he knew it was going to cause trouble. The article in the Star Newspaper of the 17th September, 1987 referred to above, and the subject matter of the case is as hereunder:

It is headlined as follows:

> **"Author says his diary sparked kickbacks investigation"**

Then it reads:

> **"STAMFORD, Connecticut:**
>
> Author Robin Moore says his personal diary and files contributed to Federal authorities suspicions that New York

business executives paid kickbacks to Jamaican officials for lucrative tourism promotion contracts.

'All I can say is I suspected the Minister of Tourism was exacting a toll,' the writer, Robin Moore of Westport, told **the Advocate** of Stamford in a copyright story published Tuesday.

'Call it a bribe, call it anything you want,' said Moore, the author of '**The French Connection**', a novel on drug smuggling.

The Advocate reported Sunday that Federal authorities in Connecticut are investigating public relations and advertising executives suspected of paying Jamaican officials one million dollars for contracts worth $40 million from 1981-1985.

The Advocate, quoting anonymous sources close to the probe has said five or six executives of the public relations firm Ruder Finn and Rotman and the advertising firm Young and Rubicam are the focus of the investigation.

Officials of both firms have denied any wrongdoing and said they are co-operating with investigators.

KEY FIGURE

Moore said Monday that his files helped lead Federal agents to suspect that Anthony Abrahams, Jamaica's former Tourism Minister was being paid by American businessmen for the multi-million dollar tourism contracts.

Sources close to the federal grand jury have said Abrahams is a key figure in the investigation, the newspaper said, Abrahams, however, has not testified before the grand jury empannelled in New Haven, **The Advocate** reported.

The newspaper said efforts to reach Abrahams and his successor, Hugh Hart, during the past two weeks were unsuccessful, and Hart didn't return telephone calls to his office on Monday.

Moore 61, said the notes in his diary are impressions of what was going on between Abrahams and the United States companies. The subjects also appeared in letters between him and friends in Jamaica.

' I have no definitive proof that this ever happened – it was just a suspicion of mine,' Moore said. 'People were

> talking. There were certain things everybody know. There was no secret about the situation with the (former) Minister of Tourism'.
>
> Moore said IRS agents seized his diary and other documents in June 1983, when he was being investigated for his part in phony literary tax shelters. Moore is now awaiting sentencing on his 1986 conviction of evading taxes.
>
> Moore, who has lived in Jamaica periodically for the past 27 years, said that in 1981, he volunteered his services to the Jamaican government to find advertising and public relations companies that would help the country's tourist trade.
>
> I was sort of a self-appointed liasion, although I asked to help. I said, 'Let's try to do something about the image here, which is very bad at the moment'. 'I did, indeed help introduce the advertising agency of Young and Rubicam to Jamaica, but I certainly had nothing to do with any kickbacks, if indeed they did happen.'
>
> U.S. attorney Stanley Twardy Jr., has refused to confirm or deny the existence of the kickbacks investigation."

Then on the 18th September, 1987 the Article was repeated in the Daily Gleaner word for word except for the following paragraph:

> "People were talking. There were certain things everybody know. There was no secret about the situation with the (former) Minister of Tourism."

Of relevance also is an item entitled "Clarification" published in the Daily Gleaner of the 19th September, 1987 which reads as follows:

> "Absolutely no reference was made or intended to be made, to the current Minister of Tourism in the headline: 'Robin Moore: I suspected Jamaica tourist Minister,' in the second paragraph of the Associated Press (AP) story, 'All I can say is I suspected the Minister of Tourism was exacting a toll, the writer Robin Moore of West Port told the Advocate of Stanford' ... which was published on page 2 of yesterday's Gleaner September 18, 1987."

The appellants eventually published the respondent's rebuttal in the Sunday Gleaner of 20th September, 1987 which reads as follows:

"Abrahams: Has never accepted 'kickback'

MR. ANTHONY ABRAHAMS, M.P. and former JLP Minister of Tourism (1981-84) has issued a statement in response to an associated press (AP) story appearing in the **Star** last Thursday (17.9.87) and the **Daily Gleaner** last Friday (18.9.87) refuting the inferences made in the article. Mr. Abrahams stated that – at no time in his entire career, including the period 1981-84 when he was Minister of Tourism, has he ever accepted any 'kickback' 'toll' or bribe to award or influence the award of any contract.

That I need at all to make such a statement for the first time after 20 years in public life is due to reports in your paper over the past months about an officially unconfirmed U.S. inquiry into alleged 'kickbacks' to Government officials in Jamaica and culminating in a statement in your paper attributed to Mr. Robin Moore.

'Moore's statement,' Abrahams said 'was damaging in the extreme to my reputation in Jamaica and internationally and though couched as a 'suspicion' about which he had no 'evidence', is tantamount to a blatant lie.

'Accordingly, I have instructed attorneys in Jamaica and overseas to take legal action against Moore's libel. I also take the opportunity of, for the record, stating that I have not been approached by any agent or servant of the United States Government and asked my question, or invited to give evidence before any Grand Jury Inquiry by that Government.'

'I state further that a (sic) no time have I received any payment from any executive of Ruder Finn and Rotman. Young and Rubican or any agent of theirs to at any time do, or commit, any improper act of wrong doing.'

'I also wish to state that neither I, nor any company owned by me, has, or ever has had any bank account in the Cayman Islands and that in fact, anyone knowing of any account of any bank in Cayman under suspicion and alleged to be mine can rely on any co-operation that I could provide for any investigation in such account. I must repeat that I have no bank account in Cayman'...".

The respondent however filed a writ and Statement of Claim in libel on the 24th September, 1987 based on the articles published in the Star Newspaper on the 17th

September, 1987 and in the Daily Gleaner on the 18th September, 1987, and incorporating the "Clarification" published in the Daily Gleaner on the 19th September, 1987. In his Statement of Claim the respondent alleged the following:

> "7. The said words referred to in paragraphs 3, 4 and 5 in their natural and ordinary meaning meant or were reasonably understood to mean that the Plaintiff had committed criminal offences:
>
> 1. contrary to the Corruption Prevention Act, and;
>
> 2. contrary to Common Law,
>
> and by so doing the Plaintiff was not a fit and proper person to hold public office.
>
> 8. By reason of the publication of the aforesaid words the Plaintiff has been gravely injured in his character, credit and reputation and as a businessman, tourism and marketing consultant and Member of Parliament, and has been brought to public scandal, odium and contempt."

The respondent also claimed exemplary damages relying on the following:

I. "The Plaintiff on September 17, 1987, after the publication of the libel complained of in paragraph 3, spoke to the Second Defendant, and at the Second Defendant's request sent to the Defendants a statement denying the allegation. The Defendants neglected and refused to publish the said statement in breach of the undertaking of the Second Defendant to do so in the Star newspaper of September 18. 1987.

II. The Defendants published the libel complained of in paragraph 4 after the Second Defendant gave the Plaintiff an undertaking that it would not be published in the Daily Gleaner.

III. The Court will be asked to infer that the Defendants published the said words complained of in paragraphs 3, 4 and 5:

(a) With the knowledge that they were libelous and or with reckless disregard as to whether or not they were libelous;

(b) Having established that the prospect of material advantage to themselves by reason

> of the publication outweighed the prospect of material loss."

The appellants entered an appearance on the 2nd October, 1987, but having failed to file a defence within the required period, interlocutory judgment in default of defence was entered against them on the 23rd October, 1987, the respondent thereby earning the right to proceed to an assessment of damages. The appellants' subsequent application to set aside this judgment was refused, but on appeal, this court set aside the default judgment and granted the appellants leave to file a defence within 14 days.

A defence was thereafter filed pleading justification and qualified privilege. Subsequently, the respondent sought further and better particulars with respect to both those issues raised in defence. This summons was dismissed on the 13th October, 1992, but on appeal, this Court concluding that on the pleadings there was no defence, in the exercise of its inherent jurisdiction, ordered the defence to be struck out and remitted the case to the Court below to be proceeded with as if there was no defence. The case thereafter proceeded to an assessment of damages before the learned judge and a jury where it was adjudged:

> "that there be judgment for the Plaintiff against the Defendants in the sum of $80,700,000 for General Damages and costs to be taxed if not agreed."

It should be noted that in answering the questions asked of them after they had returned from retiring, the jury made it clear that the damages of $80.7m were in relation to compensatory damages only and that they had awarded no damages in respect to exemplary damages which had been claimed in the Statement of Claim.

It is from this judgment that this appeal now comes before us.

Before going into the merits of the appeal it should be noted that before the commencement of the arguments, a document was filed, indicating that the parties had consented as follows:

> "Pursuant to Rule 19(4)(a) and (b) of the Court of Appeal rules, the parties to this appeal namely: the Gleaner Co Ltd and Dr. Dudley Stokes First and Second named Defendants/Appellants respectfully and Eric Anthony Abrahams, Plaintiff/Respondent hereby consent to this Honourable Court having the jurisdiction, in lieu of ordering a new trial to substitute for the sum of $80,700,000 awarded by the jury on the 17th July, 1996 in this action, such other sum, as appears to the Court to be appropriate whether greater or lesser.
> The consent of the parties herein is given without prejudice to the right of either party to further appeal to the Privy Council against any sum which may be substituted by this Honourable Court."

In addition, and also by consent the respondent was allowed to file a respondent's notice, seeking a variation of the trial court's order so as to include an amount for exemplary damages. The grounds upon which this complaint is made will be considered later in this judgment.

I turn now to the grounds of appeal upon which the appellants contended that the damages awarded should be varied downwards.

The first four grounds of appeal are based on allegations that the learned judge wrongfully permitted evidence to be put before the judge which before being allowed, had to be specially pleaded, and which were not so pleaded. The evidence complained of related to the following –

(a) evidence of pecuniary loss in the plaintiff's business;

(b) evidence of injury to the plaintiff's health;

(c) evidence of the effect of the libel complained of on the plaintiff's son;

(d) evidence of aggravation through numerous articles published in the defendants' newspaper subsequent to the libel complained of.

In addition and in the alternative the appellants complain that the learned trial judge misdirected the jury in relation to the evidence. I will treat with (a) to (d) separately.

1. Pecuniary Loss

In cases of libel a plaintiff can recover pecuniary loss as general damages but can only do so in respect of specific pecuniary loss e.g. loss of a particular contract or loss of employment, if such loss is specially pleaded. In ***Evans v. Harries*** [1856] 1 H & N 251, in an action for slander of the plaintiff in his business of an inn keeper, the plaintiff recovered for a general falling off of custom and in ***Harrison v. Pearce*** [1859] 32 L.T. (O.S.) 298, in an action for libel upon the proprietress of a newspaper, damages were awarded in respect of the resulting general decline in the newspaper's circulation. Thus, a plaintiff can give evidence that the words complained of are likely to cause him pecuniary loss in support of a claim for general damages (***Calvet & Tomicies*** [1963] 1 W.L.R. 1397).

Evidence of actual loss, whether it be general loss of business or profits, or loss of particular earnings, customers, clients or patients, can only be received in evidence if the details have been pleaded in the Statement of Claim. However, evidence may be given of specific losses, not with a view to recovering damages for such specific losses as such, but in order to assist the court in assessing the general damages.

What is the evidence complained of as being evidence of unpleaded special damages? It must be understood that in so far as pecuniary loss is concerned, the respondent gave evidence of the prospects he had of increasing his business when the

libel was published, and the effect it had on his business of a tourism consultant. In this context he testified as follows:

> "I was really set to make some real good money for the first time in my life. Maybe in that 5 year 6 year period I could have earned $1 ½ m U.S. Miss Martinez earned about U.S. $250.000.
>
> I am just speaking generally what I thought I could earn what my prospects were. If last year working part-time I made US$100,000, this indicates something."

This certainly could not be understood by the jury to be evidence upon which they were being asked to award e.g. $US100,000 p.a. as damages. It was indeed evidence as described by the witness i.e. a general assessment of the witness' worth, in the discipline in which he earned his living – a matter which the jury could certainly take into account in assessing general damages.

Indeed, this was how the learned judge left that evidence to be considered by the jury:

> "I will move from that now, members of the jury, and I will look at damages to business. Now, this is a consequence of the attitude adopted to the Plaintiff by others. People didn't want to do business with him, he says, because they felt he was a thief, he was corrupt, couldn't trust him to deal with money business. Now, you must remember, members of the jury, that general loss of business, it is not special damages. Remember I told you last week what special damages are; it is general damages resulting from the kind of injury the Plaintiff has sustained. You have to estimate the general damages which the law presumes without proof; that is general damages, as I said, like say damages that the law presumes without proof. In other words, when you plead general damages you don't have to set out an amount or set out to prove one dollar or two dollars, the law presumes that without proof, but evidence of general loss of business is given to help you to do so. You cannot make an award for general damages in respect of any loss of particular earning, particular customers, particular clients, particular transactions. However, evidence of specific losses is admissible, not with a view to recovering damages for such

> specific losses as such, but in order to assist you in assessing the general damages.
>
> So, as I tried to explain on Friday, if a mention is made of a particular amount, you can't say we are going to find this amount because no special damages are claimed, but that may assist you when you come to deal with the general damages, general loss of business and so on, assist you in making your award."

In my view the above is a correct statement of the law and adequate directions by the learned judge as to how to treat with the evidence.

Complaint was also made on the same ground in respect of evidence given by Marcella Martinez, on the respondent's behalf and which is as follows:

> "... is a career that can earn easily US$200,000 per annum; it can be more, than US$200,000. As a new consultant not even Abrahams begin at the top but certainly with the potential to reach the top which could be ½ m U.S. dollars. I would grade plaintiff above average with high potential to reach the top."

After rehearsing that evidence for the benefit of the jury the learned judge directed them how to treat with it in relation to damages when he said:

> "Remember you can't look at half a million and say I must award this or two hundred and say I must do this, this is just evidence to help you in assessing the general loss of business.
> Remember I told you that there is no special claim for damages, no specific damages claimed, therefore you can't pick out a particular amount and say I must grant this, this is only to assist you as you seek to find the appropriate award in respect of the general loss in issue."

The jury were therefore adequately assisted as to how to treat with the evidence relating to specific monetary figures named by the appellant and his witness as to his earning capacity, and directed specifically not to regard it as amounts being claimed under the heading of special damages. The evidence which fell from the respondent in this regard was given in the context of demonstrating to the Court, the adverse effect that the publication of the libel had on his business resulting in pecuniary losses which

had him once again dependent upon his father and preventing him from meeting the expenses of his children which he correctly felt was his responsibility.

The appellant however also contended that there was no evidence of the success or failure of the respondent's business as a consultant between 1984 and 1987, this being the period between the time when he returned to the consultancy business and the date of the publication of the libellous article. Nor the appellants say, was there any evidence that his business failed to take off because of the libel. They contended that it did not follow that because he was alleged to have been suspected of taking "kickbacks" as a Tourism Minister that he would not be an acceptable or competent tourism consultant. The respondent should therefore, the argument continues, prove a connection between his failure to take off and the libel, in order to receive damages for not taking off as a tourism consultant. This latter submission only has to be repeated to disclose the weakness inherent in it. The libel was an allegation of possible criminal behaviour on the part of the respondent, and consequently an attack on his integrity and honesty, not only as a Minister of Government, but on his whole person. In addition, it related to the portfolio of tourism and consequently would have a direct bearing on his subsequent professional activities in that area. It was indeed an allegation which would naturally affect his professional and wage-earning capacity, as it must be a natural consequence that persons in the industry would be reluctant to deal with a person tainted with dishonesty and lack of integrity having been involved in criminal activity directly related to the tourism industry. The appellants are nevertheless correct in their assertion that there was no evidence from anyone to the effect that they refrained from giving business to the respondent as a result of the libel. But as I understand the respondent's case, he did not set out to do so but instead to relate evidence of the treatment of him by prior potential clients after the publication of the article, (e.g. the hostility towards him and the manner in which he was shunned)

and to aid the jury in assessing general damages by giving some idea of possible earnings by a person in his discipline. The appellants relied on the case of ***Tilk v Parsons*** [1825] 2 Car. & P. 201; 172 E.R. "where it was held that a baker should bring persons to testify that they refused to buy his bread because of the libel." This case was a case dealing with the hearsay rule as is readily ascertained in a reading of the short report of the case The following extract demonstrates:

> "... having proved that certain persons whom he was in the habit of serving with the plaintiff's bread, refused to purchase it any longer –
>
> The plaintiff's counsel wished to ask him whether they assigned any and what reason for such refusal.
>
> Best C.J. – That question cannot be asked. You might call these customers, who are named in the declaration, and might ask them on their oaths, what was the reason of their not continuing to buy the plaintiff's bread; but I am clearly of opinion, that what they said to the salesman is not evidence."

And so it was not – because it would have infringed the hearsay rule. In any event in that case "the declaration alleged as special damage that several persons (naming them) discontinued to take his bread." The plaintiff had therefore to prove the special damage alleged, and he could only do so by calling those persons to give evidence as to their reasons for discontinuing the purchase of his bread.

In the instant case, there was no allegation of specific losses, and as I have already stated, the evidence given in that regard was assistance to the jury in its assessment of general damages, and the learned judge was correct to have treated with it in that way.

2. Injury to Plaintiff's Health

The appellant contended on this aspect of the ground, that evidence of the respondent suffering injury to health was not admissible for the reason that it was not pleaded. The question which arises is whether a plaintiff who is the victim of a

defamatory publication can recover damages for injury to his health caused by the publication.

In my view, quite apart from damage to reputation, a plaintiff can recover for mental stress which he develops as a result of the attack on his character which brings him into riducle and cause the society particularly his friends to lower their estimation of him and as a result avoid his company. The earliest case which makes some reference to this issue is ***Goslin v. Corry*** in 1841 7 Man & G. 341 but reported in 135 English Reports 143. In delivering his judgment in the case Tindale, C.J. made what could be a passing reference and this is in the following words:

> "Taken in connection with the rest of the summing-up, that amounts to no more than this, that the jury were to give the plaintiff such measure of damages as they thought him entitled to for the publication of the libel and for the mental suffering arising from the application of the consequences of the publication." [Emphasis added]

The appellants relied on the case of ***Allsopp v. Allsopp*** 5 H & N 534 reported in 157 E. R. 1292 which was a case in slander, the defendant having uttered slanderous words concerning the female plaintiff the wife of the 1st plaintiff causing the wife "by reason of the committing of the grievance" to become "ill and unwell for a long time and unable to attend to her necessary affairs and business."

This was however a case of slander, and the dicta of Martin B and Bramwell B upon which the appellants rely would in my view be inapplicable in a case of libel, the former not being actionable per se whereas the latter is so actionable.

The words of the learned Barons demonstrate that they were speaking to the issue as it is relevant to cases of slander. Here are their words:

> "Martin, B. I am of the same opinion. The words are not actionable in themselves. The law is jealous as to actions for mere words, and therefore stringent rules have been laid down on the subject, to which we ought to adhere. Words which, if written, would be the foundation of an action of libel, in many instances only, afford a ground of action in slander

> if special damage results. But that special damage must be the natural or necessary result, not depending on the peculiarities of the particular individual. In the absence of all authority it is the sounder way of dealing with this matter to hold that the action is not maintainable."

And Bramwell B:

> "I am of the same opinion. The question seems to me one of some difficulty, because a wrong is done to the female plaintiff who becomes ill and therefore there is damage alleged to be flowing from the wrong; and I think it did in fact so flow. But I am struck by what has been said as to the novelty of this declaration, that no such special damage ever was heard of as a ground of action. If it were so I am at a loss to see why mental suffering should not be so likewise. It is often adverted to in aggravation of damages, as well as pain of body. But if so, all slanderous words would be actionable. Therefore, unless there is a distinction between the suffering of mind and the suffering of body, this special damage does not afford any ground of action. There is certainly no precedent for such an action, probably because the law holds that bodily illness is not the natural nor the ordinary consequence of the speaking of slanderous words. Therefore, on the ground that the damage here alleged is not the natural consequence of the words spoken by the defendant, I think that this action will not lie."

The case of ***Wheeler v. Somerfield & Others*** [1966] 2 QBD 94 was however a case of libel. At the trial with a jury the plaintiff sought leave to amend [further] to claim that by reason of the libel he had been injured in his health as well as in his reputation, and to call medical evidence to support that claim. The application was refused. On appeal it was held that even if a claim for damages for injury to health was sustainable in an action for damage to reputation, it had rightly been excluded in that case. Here is how Lord Denning MR dealt with this issue at page 104:

> "Then the plaintiff had this other point. He wanted to give evidence of his ill health. He suffers severely from cataract in the eyes. He sought to give evidence of it before the jury. First, on the ground that the cataract was aggravated, if not caused, by the libel. Secondly, that it was relevant on damages to show that he was a man who, if ruined by the libel, could not get work elsewhere. I have never heard of a case (and counsel told us they have not found any) where a man has been allowed to claim damages in a libel action for

> injury to his health. A libel action concerns injury to reputation and not injury to health. I can imagine that there might be cases in which a libel might cause injury to health. I would not exclude the possibility of such an action. But none as yet has ever appeared in the books. And this will not be the first. The plaintiff before us had to admit that his own medical evidence might not have proved that the cataract was due to the libel. So on the facts this point fails."

In this cited case Lord Denning recognized the possibility of a claim for damages for ill-health arising in an action for libel. In my view whether the injury alleged relates to mental or bodily injury there must be evidence which establish that the injury is the natural or necessary result of the libel before a plaintiff can recover damages for same. The libel must be proven to be the cause of the illness claimed.

What was the illness alleged in this case, and how did the learned judge treat with it in directing the Jury.

Evidence

The respondent testified as follows:

> **1.** "Between 1987 and 1989 I kept assuring people that this would all soon be over.
> Basically no work – all my work had fallen aside. I was very isolated. I became very depressed. Almost everyone had deserted me. ...
> I started breaking down a lot – crying ... I became obsessive. People would tell me I had to snap out of it. I could not sleep some nights. I found that I would eat, sleep, eat. As a result I got fat and developed diabetes. ...
>
> **2.** I developed obesity – stress related obesity. From that it went to diabetes – obesity related diabetes, they call it "type two". The diabetes has led to severe cramps, to avoid going into those cramps in Court I have to drink large quantities of gatorade or something that keeps back the salts. Otherwise I would get cramps when I get cramps in the chest it is frightening. ...
>
> **3.** I am seeking to divide emotional distress. I have suffered emotional distress for 4 years after indictment was lifted and will only end when this case and the one in U.S. end.

> All the emotional distress before the indictment (for 2 years before indictment) were caused by the defendants. Then there were 7 months of the indictment and since that 5 years of the prestigeous Gleaner Company claims and maintaining and reporting in 1991 that I am guilty."

The respondent also called as a witness Dr. Aggrey Benjamin Irons, a Consultant Psychiatrist who as of July 1995 started seeing the respondent "for an intensive assessment of his psychiatric state." He carried out mental status examination and began psycho-therapeutic intervention.

I set out hereunder, his findings as given in evidence:

> "I found Mr. Abrahams to be someone who was previously high drive, high functioning, self motivated and relatively successful. These are areas I thought were directly and negatively affected by severely internalised trauma arising from a slur on his character. The following are my findings:
>
> (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.
>
> 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 on going psychotherapeutic intervention which would involve both psychoanalysis and pharmocologic intervention over the next 2 years at least for the next 2 years. Pharmacologic i.e. medication which he had already begun."

The doctor thereafter offered the following opinion which seems to connect the respondent's condition with the libel:

> "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."

Then the doctor in cross-examination concedes that he had no way of saying that the state of the respondent was due solely to the publications.

As can be gleaned from the above review of the evidence on this issue, most of the illness complained of by the respondent relates not to physical injury such as the obesity and diabetes, but to the effect the publications had on his mental capacity to function and to do so in such a way that exuded confidence and trust in his own judgments. In short, he became depressed, drew into his shell, avoided his friends and society and lost confidence in himself and garnered unto himself a low self-esteem. In my view those are matters which the jury could correctly take into consideration when determining the amount of compensatory damages that should be awarded to the respondent. This however depended upon whether the jury found that the condition as described by Dr. Irons was a natural cause of the publications. The doctor's inability to connect the condition solely to the publication must of course have been also relevant to the jury's consideration. The respondent came under his treatment in 1995, a period of approximately eight years after the publication. During that period, the appellant had been indicted in the United States of America on charges arising out of the same subject matter contained in the publication. However the indictment had long been withdrawn at the time of the treatment of the respondent by Dr. Irons The appellants had however at that stage continued in their allegation neither having withdrawn, nor apologised for, the libel committed upon him. In those circumstances, the jury could in spite of the intervening indictment, nevertheless placed the sole cause of the respondent's condition upon the publication and the persistence as to its truth by the appellant. As allegations have been made as to misdirection by the learned judge on this aspect an examination of those directions are appropriate.

He directed thus:

> "Now, we are going to look at injury to health; injury to health. Members of the jury, you may take into consideration in assessing damages, any mental distress, any mental distress or illness caused to the Plaintiff as a result of the publication. You cannot take into consideration mental suffering or illness caused not to the Plaintiff, but to his family; any member of his family as a result of the publication, nor mental distress caused to the Plaintiff by sympathy for the suffering endured by others. You may take into consideration in assessing damages, any mental distress or illness caused to the Plaintiff himself as a result of the publication. ... but you cannot take into consideration mental suffering or illness caused not to the Plaintiff, but to members of his family. ...
> I mention too, members of the jury, injury to feelings. This is generally assumed. If your good name had been sullied, then the law will assume injury to feelings. You may award damages for the mental suffering arising from the apprehension of the consequences of the publication. The apprehension of the consequences of the publication. If there has been any kind of highhanded, oppressive, insulting or contumelious behaviour by the Defendants which increases the mental pain and suffering caused by the defamation which may constitute injury to the Plaintiff's pride and self-confidence, these are proper elements to take into account, ..."

The learned trial judge thereafter literally took away from the jury any consideration as to an award of damages in relation to the physical injuries testified to by the respondent. He directed them thus:

> "Now, it would seem to me that you would need medical evidence from a doctor to say that the obesity caused the diabetes. You heard from Dr. Irons, the psychiatrist, and he couldn't tell you that, so what you have is from Mr. Abrahams that diabetes sets in. It would seem to me, members of the jury, that would not be evidence, you would need evidence from a doctor to satisfy the balance of probability that the publication caused the stress which caused over-eating, which caused diabetes."

After summarizing the evidence of Dr. Irons, and assisting the jury how to treat with the evidence of an expert the learned judge directed them further as follows:

> "So what you have to do is to look carefully at his (Dr. Irons') evidence and see whether on his evidence you are

> satisfied on the balance of probabilities that what he outlined to you here was caused by the libellous publications, because that is key, you must say whether the libellous publication caused what the doctor had given to you here. And if you are not satisfied again on the balance of probabilities, then you can't act on it; but if you are satisfied on the balance of probabilities, of course, you may act on it."

The learned judge later in his summing-up reminded the jury of Dr. Iron's evidence that he had no way of saying the respondent's health was due solely to the publication. The passages cited above demonstrate that the learned judge directed the jury correctly as to the law, leaving for their consideration the evidence of mental stress, loss of self-esteem, depression and all the other mental conditions testified to and withdrew from their deliberations the question of any physical injury suffered by the respondent. He was also careful to inform them that the mental condition described by the doctor and the respondent himself could only enter into their deliberation if they found on a balance of probabilities that the cause of the condition was the defamatory material in the publication. In my view the learned judge was correct and I see no reason to fault his directions on this aspect of the case.

3. Effect on son

The appellants next challenged the admissibility into evidence of the respondent's allegation that his son was very distressed as a result of the publication of the libel. In my view this contention lost any merit it may have had when the learned judge directed the jury not to consider that evidence in the passage cited above. For convenience, I repeat it hereunder:

> "You cannot take into consideration mental suffering or illness caused not to the Plaintiff, but to his family; any member of his family as a result of the publication, not mental distress caused to the Plaintiff by sympathy for the suffering endured by others."

This complaint has no merit.

4. Aggravation of damages

Under this head the appellant, impliedly accepting that there was an abundance of evidence which could go to aggravation of damages, made a challenge merely to the fact that the evidence of publication in articles subsequent to the subject articles was inadmissible without being pleaded and if not the learned judge did not specifically direct the jury that no damages could be awarded in respect of those publications.

The subsequent articles were however admitted to show malice in the appellants in keeping the whole question of the respondent's conduct in relation to the kick-backs continuously in the public's eyes. The appellants however maintained that having admitted them, the learned judge failed to direct the jury that no damages could be awarded in respect of the content of those articles. For this proposition the appellants relied on the cases of (I) ***Pearson v. Lemaitre*** 5 MAN & G 718 reported in [1843] 134 E.R. 742 (2) ***Darby v. Ouseley*** [1856] 156 E.R. 1093 and ***Anderson v. Calvert*** [1908] 24 T.L.R. 399.

In ***Pearson v. Lemaitre*** (supra) Tindal C.J. at page 749 stated:

> "And this appears to us to be the correct rule, viz that either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter; but that, if the evidence given for that purpose, establishes another cause of action, the jury should be cautioned against giving any damages in respect of it."

This case establishes the correctness in respect of the admissibility of such evidence to establish malicious motive in the appellants. In so far as the directions by the learned judge as to damages in respect of the other articles, there was never any issue in the case in respect of this, the learned judge confining himself by reference to the Statement of Claim, to the articles upon the content of which, the respondent founded his claim.

In the case of ***Anderson v. Calvert*** (supra) Cozens-Hardy, M.R. in delivering the judgment of the Court approving ***Pearson v. Lemaitre*** (supra) had this to say:

> "But it was urged that the damages awarded were excessive and that the learned Judge misdirected the jury by directing that they were entitled to take into consideration all the facts laid before them which the jury thought ought to be relied on for the purpose of assessing damages. In his Lordship's opinion this contention ought not to prevail. It was well settled that in an action for defamation the jury, in whose province the assessment of damages specially lay, were not limited in any way by the amount of pecuniary loss actually proved. They might give punitive damages and, where justification had been pleaded and malice had been proved, they were entitled to have regard to all the conduct of the defendant down to the time they gave their verdict ***'Praed v. Graham'*** (24 Q.B.53). Circumstances going to prove malice could not be excluded, whether those circumstances were before or after the publication of the libel sued upon – ***'Pearson v. Lemaitre'*** But the jury ought not to treat such prior or subsequent circumstances as giving a separate and independent right to damages."

In the instant case there was an abundance of evidence which if accepted, would demonstrate the justification for an award of aggravated damages.

The learned judge was careful in taking the jury through not only that evidence but also the evidence which if accepted would mitigate the damages. There being no real challenge to the direction of the learned judge in respect of the evidence from which the jury could award aggravated damages, there is no need to examine that evidence in any detail. It is necessary only to point summarily to the following evidence:

(i) The persistence of the appellants in the plea of justification, up to the time of the trial and this in spite of the fact that that defence had been struck out by this Court in the light of the appellants' admission that they were not in possession of the evidence to support that plea, and the unlikelihood of any such evidence becoming available at a reasonable time. Noteworthy also is the appellants' persistence in the plea even after the respondent had been dismissed on a charge arising out of the same allegation made in the United States of America.

(ii) The lateness of the apology, this being published on the 9th and 10th July, 1995 nearly eight (8) years after the publication.

(iii) The wording of the apology which the jury could have concluded was not sincere. It reads as follows:

> "In September 1987, the story of which complaint is made concerning Mr. Anthony Abrahams, former Minister of Tourism of Jamaica, came from the Associated Press of the United States, in the ordinary regular course of business. At the time, we honestly believed the information to be true and accurate considering the usually reliable source from which it came. This agency has supplied us with material suitable for publication over a number of years, and is responsible and reputable.
> Accordingly, we published the information in the issue of this newspaper on the 17th of September, 1987. We were sued by Mr. Abrahams in libel and in our defence we pleaded justification and qualified privilege, sincerely and innocently believing that we could obtain evidence to support these defences. As it turned out the Court of Appeal dismissed these defences since the evidence was not forthcoming. We now realise that we cannot sustain these allegations. Accordingly, we hereby withdraw the allegations.
> In the circumstances we tender our sincere apologies to Mr. Abrahams and are very sorry for any embarrassment or discomfort arising from the article."

It is an apology which in its very words denotes that it was being offered not because the allegations were false but because the evidence to prove it was not available. The jury certainly could have viewed it in that regard and finding that it was not sincere use that as an element in determining whether aggravated damages should have been awarded. Indeed counsel for the appellants, at trial, as the learned judge told the jury in his directions, submitted that the apology "is a wholly honest apology with no hypocrisy whatever" and then stated:

> "We apologised because we can't prove it. We made allegations and we could not get the evidence we hoped to get. To pretend we did not believe would be to tell a pack of lies.

(iv) The fact that on the evening of the first publication, the respondent spoke to the Editor of the appellants' daily newspaper, and denied the content of the defamatory article and offered his denial in writing. By agreement he took the denial on that very afternoon to the appellant's office; the Editor having promised to publish his denial on the following day in the appellants' evening paper in which the libel had been published. Instead the appellants again published the article in its Daily Newspaper with the omission of one section already referred to in this judgment. The denial of the respondent was not published until sometime after, not in the appellants' Daily or Evening paper but its Sunday Newspaper.

(v) The subsequent offer by the Managing Director of the appellant/company to the respondent of a job at a radio station and telling him that his best bet was to take the contract with the station, and in those circumstances he would get an apology but he must not expect any damages and if he persisted it will be five years before he will see the end of the matter.

Those inter alia were matters which the jury could have considered in their determination of whether the appellant acted with malicious motive and whether they had any genuine sorrow or regrets at having published defamatory matters concerning the respondent. On those matters the jury received adequate and correct directions from the learned judge, and consequently the award cannot be interfered with on this ground.

Violation of Section 22 of the Jamaica Constitution

The appellants next argued, using interpretations given to Article 10 of the European Convention on Human Rights ("Article 10") on the basis of its similarity with Section 22 of the Constitution ,("Section 22") that the award of $80.7m to the respondent by the jury is in breach of the provisions of Section 22.

In order to explain the contention of the appellants it is necessary to set out Section 22 of the Constitution, also Article 10:

> "**22.** – (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence and other means of communication.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –
>
> (a) which is reasonably required -
>
> (i) in the interests of defence, public safety, public order, public morality or public health; or
>
> (ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibitions or public entertainments; or
>
> (b) which imposes restrictions upon public officers, police officers or upon members of a defence force."
> [Emphasis mine]

Article 10 states:

> "**1.** Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> **2.** The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic

> society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing and disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." [Emphasis added]

Both provisions recognize the right of individuals to freedom of expression but set up conditions to those rights as are provided for by law. In this context law means either Statute or common law. The provisions therefore recognize that an individual does not have an unrestricted freedom to expression, such freedom having to be balanced against another individual's right not to have his reputation tarnished by expressions founded in falsity, without foundation and enhanced by the malice of the communicator. The law in our jurisdiction does make provisions in relation to defamation, and consequently the right to freedom of expression would be subject to those laws.

An apparent difference exists, however between Section 22 and Article 10 and this is demonstrated in the underlined words of the provisions as set out above. Whereas Section 22 speaks of the law making provisions which are "reasonably required", Article 10 speaks to prescribed laws and which are "necessary in a democratic society". As the case relied on by the appellants was based on the wording of Article 10, it is necessary to determine whether the dicta in that case would nevertheless be applicable in our jurisdiction given the apparent difference in the provisions. The case relied on is ***Rantzen v. Mirror Group Newspaper Ltd and Others*** [1994] Q.B.D. 670. This case was cited for more than one proposition but for the moment I will deal with the approach taken in respect to the application of Article 10 to English Law, the case being from the English Court of Appeal. It is not necessary to set out the facts. Section 8 of the Courts and Legal Services Act 1990 permitted the Court of Appeal for the first time not only to order a new trial in defamation cases tried

by juries, but also to substitute another award in any case where the damages awarded by the jury were "excessive". The Court of Appeal in the ***Rantzen*** case held that these provisions "should be construed in a manner which was not inconsistent with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It also held that an almost unlimited discretion in a jury to award damages for defamation did not provide a satisfactory measurement for deciding what was a necessary restriction in a democratic society in the exercise of the right to freedom of expression under Article 10 to protect the reputation of others. The common law therefore required that large awards of damages by a jury should be more closely scrutinized by the Court of Appeal than hitherto and that in the circumstances the sum of £250,000 awarded by the jury was excessive because it was not proportionate to damages suffered by the plaintiff and would be reduced to £110,000.

In coming to this conclusion, Neil L.J. relied upon the dicta of Lord Goff in his speech in the House of Lords in the case of ***Attorney-General v. Guardian Newspaper Ltd*** (No. 2) [1990] 1 A.C. 109, 283-284. He quoted the following dicta of Lord Goff:

> "The exercise of the right to freedom of expression under article 10 may be subject to restrictions (as are prescribed by law and are necessary in a democratic society) in relation to certain prescribed matters, which include 'the interest of national security and preventing the disclosure of information received in confidence'. It is established in the jurisprudence of the European Court of Human Rights that the words 'necessary' in this context implies the existence of a pressing social need, and that interference with freedom of expression should be no more than is proportionate to the legitimate aim pursued. I have no reason to believe that English law, as applied in the Courts, leads to any different conclusion."

Neil, L.J. then concluded, on this point:

> "If one applies these words it seems to us that the grant of an almost limitless discretion to a jury fails to provide a

> satisfactory measurement for deciding, what is 'necessary in a democratic society' or 'justified by pressing social need'. We consider therefore that the common law if properly understood requires the courts to subject large awards of damages to a more searching scrutiny than has been customary in the past. It follows that what has been regarded as the barrier against intervention should be lowered. The question becomes: 'Could a reasonable jury have thought that this award was necessary to compensate the plaintiff and to reestablish his reputation'."

This dicta, it would seem ended the restriction in the Court of Appeal in England to interfere with excessive awards of juries only if they were so high that no sensible persons would have given such an award.

Neil, L.J. as was Lord Goff in the ***Guardian Newspaper*** case (No. 2) was declaring what was the common law of England in such an issue, equating it with the terms of Article 10. In our jurisdiction, we must look to the provisions of our Constitution to see whether the approach adumbrated by Neil, L.J. would be applicable to such cases. There is no provision in our Constitution which speaks to the provision of law being "necessary" thereby implying "a pressing social need." I am however in agreement with the approach adopted by the English Court of Appeal, and consequently would bring a similar approach to the interpretation of Section 22 of the Constitution. Without placing any limits on awards made by juries in defamation cases, I would nevertheless conclude that an award which exceeds an amount (given the circumstances of a particular case), which is reasonably required for the protection of the plaintiff's reputation, could be subject to interference by this Court, either by the making of an order for a new trial or as in this case by consent, a variation of the amount of damages awarded.

I would therefore rephrase the question posed by Neil, L.J. to read as follows:

> Could a reasonable jury have thought that this award was one which was reasonable to compensate the plaintiff and to re-establish his reputation?

Though using the test adumbrated in the ***Rantzen*** case (supra) Mr. George, Q.C. for the appellants invited the Court to look at varying issues concerning the award of damages in defamation cases. These as I understand him relate to:

(i) a comparison with the award of damages in other defamation cases;
(ii) a comparison with awards in personal injuries cases;
(iii) a general review of the damages awarded by the jury on the basis that in the particular circumstances no reasonable jury would award such excessive damages.

Awards in other Defamation cases

Mr. George, Q.C. contended that counsel in defamation cases ought to be allowed in addressing the jury in such cases to make them aware of the level of awards made in previously decided cases. In my view defamation cases are subjective to the character and circumstances of the defamed person, and the effect of the libel on him/her. They necessitate consideration of the particulars surrounding the publication of the defamatory matter together with the conduct of the publisher, and any degree of malice exhibited by him/her. All these create a great deal of variables which are not conducive to making worthwhile comparisons one with the other. It is for those reasons that I would be reluctant to accept the submission of the appellant on this issue.

Neil, L.J. however, in the ***Rantzen*** case (supra) was of the opinion that in order to give weight to the provisions of Article 10 which gave the protection against freedom of expression where the protection of reputation was prescribed by law [that] juries could be told about previously decided cases in which awards had been made or confirmed by the Court of Appeal. Here is what he said:

> "We are not persuaded that at the present time it would be right to allow references to be made to awards by juries in previous cases. Until very recently it had not been the practice to give juries other than minimal guidance as to how they should approach their task of awarding damages and in these circumstances previous awards cannot be regarded as establishing a norm or standard to which

> reference can be made in the future. Awards made by the Court of Appeal in the exercise of its powers under section 8 of the Act of 1990 and Ord. 59, r. 11(4) stand on a different footing. It seems to us that it must have been the intention of the framers of the Act of 1990 that over a period of time the awards made by the Court of Appeal would provide a corpus to which reference could be made in subsequent cases. Any risk of over citation would have to be controlled by the trial judge, but to prevent reference to such awards would seem to us to conflict with the principle that restrictions on freedom of expression should be 'prescribed by law.' The decisions of the Court of Appeal could be relied upon as establishing the prescribed norm."

In our jurisdiction there is no provision for the reassessment of a jury's award except by consent of the parties. There are however few cases in defamation decided by judges sitting alone, the damages in some of which have either been affirmed or varied by the Court of Appeal. The trial by jury of defamation cases are in fact in a minority, and consequently this case offers the first opportunity in a long time for the Court of Appeal to determine the correctness of a jury award in such cases. I agree however that we, like the English Courts, could begin to develop a reservoir of such cases which could become a prescribed norm from which a jury could get some assistance in deciding an award in the particular circumstances of the case over which they preside. I do however place on this approach the qualification with which I commenced my treatment of this issue. Juries and judges would have to approach such comparison with utmost care given the variables that exist on a subjective assessment of damages in a particular case. In the instant case there was no complaint either here or below of the judge's "omission" to direct the jury in respect of existing precedents or any restriction by the learned judge of counse attempting to do so. Instead the appellants invited this Court to make the comparisons with cited cases in determining the reasonableness of the award on the basis that the respondent is only entitled to damages which is reasonably required to protect his reputation from abuse of

the right of freedom of expression enjoyed by the appellants by virtue of Section 22 of the constitution. This point can be dealt with by summarily expressing the view that the cases cited bear no worthwhile comparison to the circumstances of this case, which disclosed a serious libel and a profound effect upon the respondent, who was kept under the shadow of the allegations for a long period of time. I need only repeat what I said in the case of ***Margaret Morris et al v. Hugh Bonnick*** S.C.C.A. 21/98 delivered on the 14th April, 2000 (at page 23) [unreported] –

> "In my view it is difficult given the nature of libel and its effects which must have direct bearing on the particular circumstances, including the person defamed as also the occasion and magnitude of the publication, to be guided by another case in which different circumstances existed."

The cases cited, in my opinion would therefore be of no assistance in determining the reasonableness of the award in this case.

Personal Injuries Cases

This case is perhaps the first in our jurisdiction where it has been proposed that damages in libel cases should be compared with decided cases in relation to quantum of damages in personal injury cases, in order to come to a proper assessment. As I have said earlier, there have been very few jury trials in defamation cases in recent times, and indeed my memory suggests that this has been one of only two such cases in the last ten years, the other still pending on appeal. There have been some cases which have been tried by judges alone which in my view are so far removed from the depth, seriousness and circumstances of the libel in the instant case, that no useful comparisons can be made with them. In the English jurisdiction the recent trend of high awards by juries has brought into focus the question of whether the awards are so high, that the Court of Appeal ought to find these awards unreasonable, given of course the circumstances of each particular case. As a result the learned Law Lords, have been stressing the cautious scrutiny that ought to be given to such awards. Hence, the dicta

arising in the ***Rantzen*** case (supra) in relation to the effect of Article 10 (supra), as also the contention by some lawyers that juries ought to be addressed, in relation to precedents in cases in which the Court of Appeal, has either confirmed or substituted the quantum of damages in other libel cases. A further contention also goes to the question now under consideration.

In 1972 in the case of ***Cassells & Co Ltd v. Broome and Another*** [1972] A.C. 1027, at pages 1071-72, Lord Hailsham of St. Marylebone, L.C., rejected such a comparison when he said:

> "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. As Windeyer J. well said in ***Uren v. John Fairfax & Sons Pty. Ltd.,*** 117 C.L.R. 115, 150:
>
> > 'It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.'
>
> That is why it is not necessarily fair to compare awards of damages in this field with damages for personal injuries. ... What is awarded is [thus] a figure which cannot be arrived at by any purely objective computation. This is what is meant when the damages in defamation are described as being 'at large'. In a sense, too, these damages are of their nature punitive or exemplary in the loose sense in which the terms were used before 1964, because they inflict an added burden on the defendant proportionate to his conduct, just as they can be reduced if the defendant has behaved well – as for instance by a handsome

> apology – or the plaintiff badly, as for instance by provoking the defendant, or defaming him in return."

Lord Hailsham was here expressing the view that the nature, circumstances, and method for assessing damages in defamation cases, were such that may make it unfair to the plaintiff in a particular case to determine the quantum of damages he deserved, by comparison with damages awarded in previous personal injuries cases. Then in ***Rantzen v. Mirror Group Newspaper*** [1986] Ltd (supra) Neil L.J. having reviewed the authorities on this issue said:

> "We have come to the conclusion, however, that there is no satisfactory way in which the conventional awards in actions for damages for personal injuries can be used to provide guidance for an award in an action for defamation. Despite Mr. Gray's submissions to the contrary it seems to us that damages for defamation are intended at least in part as a vindication of the plaintiff to the public. ... We therefore feel bound to reject the proposal that the jury should be referred to awards made in actions involving serious personal injuries. It is to be hoped that in the course of time a series of decisions of the Court of Appeal will establish some standards as to what are, in the terms of section 8 of the Act of 1990, 'proper' awards. In the meantime the jury should be invited to consider the purchasing power of any award they make."

So that up to the time of the ***Rantzen*** case (supra) the Courts in England, were not prepared to sanction any comparison with personal injuries cases. One of the factors of defamation which distinguishes it from the personal injuries cases is the fact that the plaintiff is entitled in the former case to vindication to the public. This being so, he may sometime in the future, after the case has been laid to rest, find that in some way the defamatory matter is raised to the surface again. In those circumstances, in order to protect his reputation, he would have to be able to demonstrate to the public that in so far as that libel is concerned, he was awarded a sum sufficient to vindicate his reputation. These and other factors, such as have already been described, are in my view good reasons why such comparison ought not to be made. But in the case of

John v. M.G.N. Ltd [1997] Q.B. 586 the English Court of Appeal per Sir Thomas Bingham M.R. after an examination of previous authorities, including the cases cited heretofore, expressed the following opinion:

> "It has often and rightly been said that there can be no precise correlation between a personal injury and a sum of money. The same is true, perhaps even more true, of injury to reputation. There is force in the argument that to permit reference in libel cases to conventional levels of award in personal injury cases is simply to admit yet another incommensurable into the field of consideration. There is also weight in the argument, often heard, that conventional levels of award in personal injury cases are too low, and therefore provide an uncertain guide. But these awards would not be relied on as any exact guide, and of course there can be no precise correlation between loss of a limb, or of sight, or quadriplegia, and damage to reputation. But if these personal injuries respectively command conventional awards of, at most, about £52,000, £90,000 and £125,000 for pain and suffering and loss of amenity (of course excluding claims based on loss of earnings, the cost of care and other specific financial claims), juries may properly be asked to consider whether the injury to his reputation of which the plaintiff complains should fairly justify any greater compensation. The conventional compensatory scales in personal injury cases must be taken to represent fair compensation in such cases unless and until those scales are amended by the courts or by Parliament. It is in our view offensive to public opinion, and rightly so, that a defamation plaintiff should recover damages for injury to reputation greater, perhaps by a significant factor, than if that same plaintiff had been rendered a helpless cripple or an insensate vegetable. The time has in our view come when judges, and counsel, should be free to draw the attention of juries to these comparisons."

The appellants rely on this cited passage, not in an attempt to attack the learned judge's summing-up in this regard, nor as a complaint for not having been allowed to address the jury in this regard, but by way of an invitation to this Court to accept those principles in determining whether the award by the jury was reasonable.

Lord Bingham in the ***John*** case (supra) was careful to acknowledge that the awards in personal injury cases could never be used as an exact guide for awards in

defamation cases. His dicta suggests that juries in a general sense could be asked to say whether damages given to vindicate one's reputation should be higher than damages awarded in for example a personal injury case in which the injuries are serious and a conventional figure has already been set in previous cases.

Should we follow the English trend in our jurisdiction? As Lord Diplock said in ***McCarey v. Associated Newspapers Ltd*** (no. 2) [1965] 2 Q.B 86 at 109, the comparison seems to be a legitimate aid in considering whether the award of damages by a jury is so large that no reasonable jury could have arrived at that figure. In doing so one would expect a jury having been exposed to the degree of damages awarded in serious personal injury cases, such as a person made a cripple or losing an eye to ask themselves whether the figure to be awarded would be reasonable having regard to those cases.

However, I am of the view that although those cases can be used as a general guide one must also in coming to a conclusion on damages in a defamation case consider what is reasonable to protect a person's reputation given all the factors already referred to in this judgment. None of the cases cited in relation to personal injury cases, can inspite of the suffering and pain consequent on personal injury quite equate with prolonged mental agony and the subjection to the contempt of the public and his friends which the respondent suffered as a result of the libel and the related subsequent conduct of the appellants.

Review of Damages – are the Damages Reasonable?

As I have concluded earlier, the reasonableness of the award must be related to whether it is an amount too excessive to be considered an amount reasonable to vindicate the respondent's reputation given the provisions of Section 22 of the Constitution as it relates to the appellants' right to freedom of expression. There were several circumstances in this case which make it reasonable for the jury to have

awarded aggravated damages. Firstly, the libel itself contained serious allegations concerning the respondent. In spite of an account denying any involvement in the alleged "kick-backs" allegations given to the appellants' newspaper, it failed to publish the respondent's denial but instead subsequently published the Article in its Daily Newspaper, albeit with the omission of a particular part. The respondent's denial was never published until a few days after.

Secondly, the appellants insisted on the plea of justification throughout the process and up until the trial of the issues always taking the stand that it was the inability to get the evidence which made them unable to prove the truth of the allegations.

Thirdly, there was no apology until some eight years after and that apology clearly indicated that it was being offered purely because the evidence to prove the truth of the allegation was not available.

In addition, the award must have included, as it could in law, damages which took into account the pecuniary loss to the respondent, as also the mental stress and the serious hurt to the respondent's feeling.

I would conclude that the circumstances of this case entitled the respondent to a high level of damages in order to vindicate his reputation which was nearly almost destroyed by the libel published of him. However, the damages of $80,700.000 awarded in the context of previous awards in either personal injury cases, or other awards either affirmed or varied by this Court in defamation cases, could be described as phenomenal and are multiple times any award ever granted in Jamaica in these types of cases.

I am therefore of the view that in spite of the grievous nature of the publications the abundant evidence of malice in the appellants' qualified apology offered so long after the publication and the persistence in the plea of justification, the award of $80

million is in excess of an amount which is reasonably required by law to protect the reputation of the respondent, given the provisions of Section 22 of the Constitution. Nevertheless, what is a reasonable award must relate to all those matters, and consequently damages must be of a high level in order to vindicate the respondent's reputation. By virtue of the consent of the parties, I would set aside the award of $80.7m for compensatory damages and substitute therefore the sum of $35m.

Exemplary Damages

I come now to the Respondent's Notice the complaint in which reads as follows:

> "The jury erred in refraining from awarding any sum for exemplary damages when there was every justification to do so in the evidence before the Court despite the level of compensatory damages awarded."

In this ground the respondent contends that there was abundant evidence to show that "the evident intention was not only to harm the plaintiff/respondent but also to be sensational, to stir up public interest, and to profit thereby from the sale of their papers."

In the alternative we are asked to vary the damages to include an award for exemplary damages in the event that we reduce the award for compensatory damages awarded by the jury. The basis for this proposition is the fact that the learned judge directed the jury that if their award for compensatory damages was in their view sufficiently high, then they need not consider an award of exemplary damages.

Before exemplary damages can be awarded there must be proof that the defendant had no general belief in the truth of what he had published and had been motivated by a "cynical calculation" that publication was to his necessary advantage. See the ***Rantzen*** case (supra) in which it was held that such an award "was only appropriate where those conditions were met, and where the sum awarded by way of compensatory damages was insufficient to achieve the punitive and deterrent purpose

underlying exemplary damages and should not exceed the minimum necessary to achieve that purpose. Both conditions must be proved. In the instant case the learned judge directed the jury adequately on the principles applicable in respect of exemplary damages, and indeed no complaint has been made in that regard. The jury made no award of exemplary damages, either because in following the learned judge's directions they came to the conclusion that the sum of $80.7m they awarded for compensatory damages was sufficient to punish the appellants and to deter others from similar conduct, or because they came to the conclusion that the evidence did not establish the two necessary elements.

Consequently, the question of whether such damages can be awarded is open for this Court's decision. Although there is sufficient evidence upon which the jury could have found that the appellant had no genuine belief in the truth of the content of the Article, there was in my opinion no evidence upon which the jury could have concluded that the appellants were motivated by monetary gain in publishing the Article. On that ground I would refrain from making any award for exemplary damages. Nevertheless, I should add that the sum of $35m which I would substitute for the jury's award is in my view sufficient to achieve the purpose of punishing the appellants and deterring others from behaving in the manner in which the appellants acted in this case.

Taxation

I have read in draft the reasons given by Langrin, J.A. for not accepting the arguments of the appellants, in this regard, and need say nothing more than that I agree with his conclusion therein.

I would allow the appeal, set aside the award of $80.7m and substitute therefor an award of $35m.

HARRISON, J.A.:

This is an appeal by the defendants/appellants from an award of $80,700,000 and costs for damages for libel, assessed before Smith, J., with a jury, on July 17, 1996.

The libel complained of, and recited in the statement of claim, was contained in the first of three published newspaper articles. The first publication appeared in the respondent ***Gleaner***-owned ***Star*** newspaper on September 17, 1987. It reads in paragraph 3 of the statement of claim:

> "AUTHOR Robin Moore says his personal diary and files contributed to Federal Investigators suspicions that New York business executives paid kickbacks to Jamaican officials for lucrative tourism promotion contracts.
>
> 'All I can say is I suspected the Minister of Tourism was exacting a toll.' The writer, Robin Moore of Westport, told the Advocate of Stamford in a copyright story published Tuesday.
>
> 'Call it a bribe, call it anything you want,' said Moore, the author of **'The French Connection'**, a novel on drug smuggling.
>
> The Advocate reported Sunday that Federal authorities in Connecticut are investigating public relations and advertising executives suspected of paying Jamaican officials one million dollars for contracts worth $40 million from 1981 – 1985.
>
> The Advocate, quoting anonymous sources close to the probe has said five or six executives of the public relations firm Ruder Finn and Rotman and the advertising firm Young and Rubicam are the focus of the investigation.
>
> Officials of both firms have denied any wrongdoing and said they are co-operating with investigators.

KEY FIGURE

Moore said Monday that his files helped lead Federal agents to suspect that Anthony Abrahams, Jamaica's former Tourism Minister was being paid by American businessmen for the multi-million-dollar tourism contracts.

Sources close to a federal grand jury have said Abrahams is a key figure in the investigation, the newspaper said. Abrahams, however, has not testified before the grand jury in New Haven, The Advocate reported.

The newspaper said efforts to reach Abrahams and his successor, Hugh Hart, during the past two weeks were unsuccessful, and Hart didn't return telephone calls to his office on Monday. Moore, 61, said the notes in his diary are impressions of what was going on between Abrahams and the United States companies. The subjects also appeared in letters between him and friends in Jamaica.

'I have no definitive proof that this ever happened – it was just a suspicion of mine,' Moore said. 'People were talking. There were certain things everybody know. There was no secret about the situation with the (former) Minister of Tourism.'

Moore said IRS agents seized his diary and other documents in June 1983, when he was being investigated for his part in phony literary tax shelters. Moore is now awaiting sentencing on his 1986 conviction of evading taxes.

Moore, who has lived in Jamaica periodically for the past 27 years, said that in 1981, he volunteered his services to the Jamaican government to find advertising and public relations companies that would help the country's tourist trade.

'I was sort of a self-appointed liaison, although I asked to help. I said, "Let's try to do something about the image here, which is very bad at the moment". I did, indeed help introduce the advertising agency of Young and Rubicam to Jamaica, but I certainly had

> nothing to do with any kickbacks, if indeed they did happen.'
>
> U.S. attorney Stanley Twardy Jr., has refused to confirm or deny the existence of the kickbacks investigation."

The second publication in the respondent ***Gleaner*** on September 18, 1987, was in similar terms, with one deletion.

The third publication also appeared in the respondent's newspaper on September 19, 1987 and reads, as recorded in paragraph 5 of the statement of claim:

> "Absolutely no reference was made, or intended to be made, to the current Minister of Tourism in the headline: 'Robin Moore: I suspected Jamaica Tourism Minister,' in the second paragraph of the Associated Press (AP) story, 'All I can say is I suspected the Minister of Tourism was exacting a toll, the writer Robin Moore of Westport, told the Advocate of Stanford...' which was published on page 2 of yesterday's Gleaner Sept. 18, 1987."

The respondent issued his writ on September 22, 1987, appearance to which was entered on October 2, 1987. Thereafter, no defence having been filed, interlocutory judgment was entered in default of defence. An application by the appellant to set aside the said judgment was refused by Edwards, J., who was reversed on appeal, and defence was ordered to be filed. An application for further and better particulars was refused by Bingham, J. who was reversed by the Court of Appeal, which in addition, struck out the defence of justification on the basis of the absence of "...clear and sufficient evidence of the truth..." of the said publication. Consequently, the matter proceeded to assessment of damages on July 17, 1996, before Smith, J., with a jury.

Further, relevant facts are that previously when the respondent Abrahams had on September 17, 1987, become aware of the first publication in the ***Star*** newspaper, he telephoned the editor of the ***Gleaner***, the second appellant Dr. Stokes, denying the allegation. The second appellant agreed to publish the respondent's statement of denial in the said ***Star*** newspaper. The statement was handed to the second appellant by the respondent on September 17, 1987. Contrary to this agreement, the said article was published in the ***Gleaner*** of September 18, 1987, and another publication appeared on September 20, 1987, under the heading "Clarification". The statement of denial was published in the ***Sunday Gleaner*** of September 20, 1987, and the ***Star*** newspaper on September 22, 1987. The respondent's evidence at the trial was, that after the second publication he telephoned the second appellant and complained, and the second appellant explained that he was "overruled", and consequently the article was re-published. The second appellant, in contradiction, stated that he had said that he gave the statement and instructions to Mr. Proute, the editor on duty, to publish the statement in the ***Star*** and the statement and the article in the ***Gleaner*** the next day, the 18th, but his instructions were not carried out. Subsequently, on September 24, 1987, the respondent issued his writ. The respondent had been indicted before the grand jury in the United States of America (USA) in respect of the charges of receiving bribes, but after hearing evidence, including that of one John Gentles, the indictment against the respondent was dismissed in October 1990. The appellants were aware of this. The said John Gentles, on whose affidavit the appellants were relying to base their contention of justification of the

charges against the respondent, had been dismissed previously from his post of Director of Tourism by the respondent who was then the Minister of Tourism. In addition, Young and Rubicam, a public relations firm in the USA, had pleaded guilty to the offences relating to the "kickbacks", the bribes, in February 1990, and asserted that the respondent had nothing to do with any "kickbacks". This resulted in the said withdrawal of the indictment before the grand jury. The appellants were aware of all this. The appellants did not publish an apology to the respondent until July 9 and 10, 1995.

At the hearing before us, the parties consented to the exercise of the power of the court under Rule 19(4)(a) of the Court of Appeal Rules, 1962, where in the event that the Court is of the view that the damages awarded by them were excessive or inadequate was empowered to:

> "...substitute for the sum awarded by the jury such sum as appears to the Court to be proper."

In addition, the respondent filed a respondent's notice under the provisions of Rule 14(1) of the said Rules, seeking the award of exemplary damages by this court.

Mr. George, Q.C., for the appellant, in support of his grounds of appeal, argued that the damages awarded were manifestly excessive, and no reasonable jury would have made such an award and that the learned trial judge failed to warn the jury that there was no evidence of loss in the consultancy business of the respondent, no award should be made for injury to the respondent's health as opposed to his hurt feelings and no evidence should have been led of the distress of the respondent's son. The publications in the appellants' newspapers

subsequent to that of September 17, 1987, should not attract additional damages and could only result in proof of malice and aggravated damages and the learned trial judge failed to so warn the jury. The learned trial judge was in error in inviting the jury to view as malice the persistence of the appellants in the belief of the guilt of the respondent, and the jury should have accepted the apology as a sincere and honest one. The size of the award was in breach of the rights of the appellants to freedom of expression and from interference to communicate as confirmed by section 22 of the Constitution. He concluded that the learned trial judge was at fault in declining to advise the jury to consider awards in personal injury cases, as a means of limiting their said award.

Mr. Spaulding, Q.C., for the respondent submitted that the learned trial judge properly directed the jury on the recklessness of the appellants, incorrectly withdrew from the jury's consideration the effect the suffering of the respondent's son had on the hurt feelings of the respondent, and properly directed them that injury to the respondent's health was to be considered in the context of mental illness and hurt feelings. Section 14 of the Defamation Act could not assist the appellants because there was no other suit by the respondent concerning the libellous words as alleged in the instant appeal. The conduct of the appellants subsequent to the publication of the libel, namely, the persistence in the belief of the guilt of the respondent, among other acts, was correctly left by the learned trial judge for consideration by the jury. The respondent, a high achiever, high earner in his consultancy business, with the potential for future expansion and having both international and regional influence, was severely injured by the libel.

Because of the injury to his reputation, his hurt feelings, the negative effect on his earning capability, the aggravating factors resulting from the "sham" apology, the continuation of the defence, and the conduct of the appellants, the respondent is entitled to substantial damages. It was not appropriate to direct the jury on the obligation to pay tax, in the circumstances, but if it was a requirement this court could make an adjustment in the award. He concluded that the jury erred in not awarding exemplary damages when, on the evidence, the extreme persistence of the appellants warranted it, and this court should make such an award.

The measure of damages in the tort of libel is, as a general rule, restitutio in integrum, to restore the person libelled to the position he would have been in, if the tort had not been committed, as far as money can do so. The law thereby seeks to compensate the plaintiff for the injury to the reputation he previously enjoyed, and for his hurt feelings. Such damages are said to be "at large". This is not a licence to juries to award astronomical sums.

In ***Cassell & Co. Ltd. v. Broome*** [1972] 1 All E.R. 801, Lord Hailsham examined the principle of damages being "at large", and the inadvisability of referring to damages in personal injury awards when awarding damages in defamation cases. His Lordship said at page 824:

> "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. As Windeyer J well said in ***Uren v John Fairfax & Sons Pty Ltd*** (1967) 117 CLR 118 at 150:

> 'It seems to me that, properly speaking, a man defamed does not get compensation *for* his damaged reputation. He gets damages *because* he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public, and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.'

This is why it is not necessarily fair to compare awards of damages in this field with damages for personal injuries. Quite obviously, the award must include factors for injury to the feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology, or the reaffirmation of the truth of the matters complained of, or the malice of the defendant. The bad conduct of the plaintiff himself may also enter into the matter, where he has provoked the libel, or where perhaps he has libelled the defendant in reply. What is awarded is thus a figure which cannot be arrived at by any purely objective computation. This is what is meant when the damages in defamation are described as being 'at large'."

and at page 826:

> "The expression 'at large' should be used in general to cover all cases where awards of damages may include elements for loss of reputation, injured feelings, bad or good conduct by either party, or punishment, and where in consequence no precise limit can be set in extent. It would be convenient if, as the appellants' counsel did at the hearing, it could be extended to include damages for pain and suffering or loss of amenity. Lord Devlin uses the term in this sense in ***Rookes v. Barnard*** [1964] 1 All ER at 407,

> [1964] AC at 1221, when he defines the phrase as meaning all cases where 'the award is not limited to the pecuniary loss that can be specifically proved'."

Damage is presumed when libel is proved but evidence of actual injury to the respondent's reputation or actual loss suffered is admissible.

The author of ***McGregor on Damages***, 16th Edition, in respect of the proof of damages in libel said, at paragraph 1900:

> "General damage does not have to be pleaded by the plaintiff. As to its proof, he starts off with a presumption of damage operating in his favour which entitles the court to award substantial damages for injury to his reputation although he has produced no proof of such injury."

A party libelled may recover a general loss of trade, custom or earning; whereas, a particular loss or specific contract may have to be specifically pleaded. As to such damages in general in defamation cases, Mahoney, J.A. in ***Andrews v. Fairfax & Sons Ltd.*** [1980] 2 NSWLR 225, said at page 255:

> "Damages for injury to reputation as such are, in my opinion, different in nature from, and are calculated upon a different basis (and require different evidence) from damages for the other kinds of injuries caused by defamatory material. Damages for injury to reputation as such are in the nature of a solatium; they are not, in the ordinary sense, restitution. I would, with respect, adopt as correct the statement of the law made in this regard by Windeyer J in ***Uren v John Fairfax & Sons Pty Ltd***. His Honour said: 'When it is said that in an action for defamation damages are given for an injury to the plaintiff's reputation, what is meant? A man's reputation, his good name, the estimation in which he is held in the opinion of others, is not a possession of his as a chattel is. Damage to it cannot be measured as harm to a tangible thing is measured. Apart from special damages strictly so called and damages for a loss of

> clients or customers, money and reputation are not commensurables.'
> ...
> The tribunal is allowed to award what, on proper community standards, is a proper solatium to a man whose reputation as such has been injured. In the assessment of that solatium, evidence of actual monetary loss is not essential and, in the strict sense, it may perhaps not be relevant. In so far as actual monetary loss is to be taken into account, that for which the damages are awarded may, I think, best be seen as something other than damage to reputation..."

The quantum of damages in defamation cases has not always followed a predictable pattern, and consequently the courts in England, after some hesitation, directed the path that juries trying such cases or the judge sitting alone should follow. In ***Rantzen v. Mirror Group Newspapers (1986) Ltd. et al*** [1994] Q.B. 670, the Court of Appeal reduced an award of £250,000 to £100,000 for libel, on the ground that it was "excessive because it was not proportionate to the damage suffered by the plaintiff." Following Lord Hailsham in ***Cassell v. Broome*** (supra), the notion of referring to awards in cases of personal injuries in making awards in defamation cases was not embraced. Neill, L.J. said at page 695:

> "We therefore feel bound to reject the proposal that the jury should be referred to awards made in actions involving serious personal injuries."

However, the idea of referring to comparable awards by the Court of Appeal in defamation cases was accepted.

In ***John v MGN Ltd.*** [1997] Q.B. 586, the Court of Appeal endorsed the practice of referring to previous awards in defamation cases. It said (per Sir Thomas Bingham, M.R.) at page 612:

> "We agree with the ruling in the ***Rantzen*** case that reference may be made to awards approved or made by the Court of Appeal. ... It is true that awards in this category are subject to the same objection that time can be spent by the parties on pointing to similarities and differences. But, if used with discretion, awards which have been subjected to scrutiny in the Court of Appeal should be able to provide *some* guidance to a jury called upon to fix an award in a later case."

Furthermore, the court was of the new view that awards in personal injury cases could then be looked at in making awards in defamation cases not for the purpose of equating such awards but:

> "...as a check on the reasonableness of a proposed award of damages for defamation."

I am also of the view that no rational assistance can be obtained from looking at awards in personal injury cases, as a guide to awards in defamation cases. The loss of a limb or major body functions, on the one hand, contrasted with the loss of one's reputation and hurt to dignity, on the other hand, although each would amount to a major deprivation and lessening of one's quality of life, will not necessarily relate to each other to attract comparable awards. By the same method that the courts have developed the practice of utilizing previous comparable awards in personal injury case in making awards, this court could well now develop its own measure in seeking to provide a future guide in the compensation of persons defamed causing hurt to their reputation and feelings, and the consequent distress and taint to their integrity. In order, therefore, to

arrive at an appropriate sum as compensation, a court must consider what sum would suffice to satisfy continuing hurt, loss and pain. The status of the individual and how well he is known, the extent of the publication in which the libel was published and the general loss suffered and what the sum awarded would represent by way of value and all factors to be taken into consideration. In addition, the sum awarded must be reasonable.

In the instant case, the respondent having been an assistant Director of Tourism in 1967, Chairman of the Jamaica Tourist Board and the Director of Tourism would have gained great experience and extensive exposure in that field. He was at some stage employed by a public relations firm in the USA to obtain consultancy work on their behalf in the Third World because of his wide contact with persons in those countries, and whom he had known at university in Jamaica and England. In addition, he worked in a consultative capacity for the OAS or a Commonwealth Fund for technical co-operation. He resigned from the Jamaica Tourist Board in 1974 and was employed to Eastern Airlines, during which period he was the first executive director of the Private Sector Organisation in Jamaica. He was appointed a Senator in the Jamaican Parliament in 1976. He later resigned and joined the OAS at its regional office in Barbados as a consultant. He returned to Jamaica and was elected to Parliament and appointed Minister of Tourism in 1980, a post he held in 1984 when he resigned. He remained as a Member of Parliament until 1989. He had returned to his private consultancy business in tourism in 1984. He was so

engaged on September 19, 1987, when the libellous article was published in the ***Star***.

The respondent was, therefore, both a high level public figure and an experienced and well-known personality in the field of tourism.

The respondent said, in cross-examination, that in 1987 he earned US$146,000 and the lowest earning he had as a tourism marketing consultant was US$70,000.

The evidence of the respondent's witness Marcella Martinez, the proprietor of a company, itself a consultant in tourism market, was summarized by Smith, J. to the jury at page 90 in his summing up:

> "She told you that Mr. Abrahams, being successful, commanded a lot of loyalty and affection. He was dynamic in leadership and was charismatic. And remember she told you that Jamaica enjoyed successive years of record tourism growth in the early Seventies when the Plaintiff was Director; as a result she told you that when he ceased being Director of Tourism, he was quickly hired by the OAS to work as a high level consultant of tourism based in the Eastern Caribbean, and he revolutionized the work of Jamaica Tourist Board and took the first major step that she was aware of to increase the involvement of all categories of Jamaicans in the tourism industry. Because of the Plaintiff's long-standing contacts and friendship with leaders of the North American, Canadian private sector tourism industry, he was able to travel there, meet personally with and get them committed to help Jamaica come back."

The respondent's evidence was that after the publication of the libel, "...everywhere (he) went people were talking about (him)..." He described how he was called a thief by a real estate man in a supermarket and also by a businessman who, in addition, had him searched and also being taunted on the

streets. There are clear instances of humiliation, which must have caused him immeasurable stress. Contrary to the contention of counsel for the appellant, evidence of the respondent being called names by people as a result of the libel, is admissible: ***Garbett v. Watson*** [1943] 2 All E.R. 359.

Thereafter, the respondent's tourism consultancy business was severely affected and "financial problems set in". There was a "general impact on my marketing career". He lived by the generosity of his family and was avoided by his "friends".

There was ample evidence of substantial loss to the respondent in his consultancy business and the jury correctly so found.

Compensation for libel being directed on the one part to hurt feelings, damages for injury to health are not awarded. Awards for such injury, in order to be recoverable must be recognised as referable to "mental distress or illness", in the context of hurt feelings. The author in ***Gatley on Libel and Slander*** said of mental distress or illness at paragraph 1461:

> "Where the action is brought in respect of a libel or slander actionable *per se*, the jury may take into their consideration in assessing the damages any mental distress or illness caused to the plaintiff as the result of the publication. ***Goslin v. Corry*** (1844) 7M. & Gr. at p. 346. But the jury cannot take into consideration mental suffering or illness caused, not to the plaintiff, but to his wife, ***Guy v. Gregory*** (1840) 9 C. & P. 584, as the result of the publication, or mental distress caused to the plaintiff by sympathy for the suffering endured by others. ***Bishop v. New York Times*** (1922) 233 N.Y.R. 446."

A note to the above paragraph reads:

> "But there has never been a case in England where damages have been recovered for injury to health."

The learned trial judge quite properly directed the jury that there was no medical evidence available for them to consider that "...the publication caused the stress which caused overeating, which caused obesity."

The jury was directed to the evidence of Dr. Irons for the respondent. Dr. Irons had said that he found that the publication caused to the respondent: (1) severely reduced self-esteem and self-perception, (2) severe anxiety with phobic response avoidance, (3) depression with hypersomnia, and (4) social withdrawal and isolation, as a consequence. The jury was then directed [at page 31 of the summation]:

> "Dr. Irons went on to tell you that before July 1995, coming back to what Mr. Spaulding says, he was seeing him too for weight reduction. He told you that before Mr. Abrahams came to him, he was able to detect a social withdrawal, and you remember he told you that he was invited to some Breakfast Club and he noticed that and so on. And he told you members of the jury, that he had no way of saying the Plaintiff's health was due solely to the publication.
>
> So here again, you have to look; remember Mr. George's argument as to what really caused the state of his health. If you accept it and Mr. Spaulding's argument too, I am not going to re-ash (sic) those members of the jury, I don't think I need to go into any more at this point, but later on if I see fit I will remind you of any other thing that I think can assist you in dealing with the issues in the case as I go along. So that is the evidence of Dr. Irons, you must say what you make of it, members of the jury."

The evidence of Dr. Irons, in particular the finding that the respondent was suffering from "depression", refers to a specific mental illness. This should have

been specifically pleaded. Otherwise, the learned trial judge should have directed the jury that such evidence should be considered in the context of hurt feelings, and no more. To direct the jury that "you must say what you make of it" was unhelpful and, in my view, a misdirection that may have led the jury into error in this award.

In assessing damages for libel, the jury may take into consideration the conduct of the defendants from the date of the publication down to the trial itself. (See ***Praed v. Graham*** (1880) 24 Q.B.D. 53 at page 55). In the instant case, the appellants complain that the learned trial judge failed to direct the jury that the publication, subsequent to that of September 17, 1989, should not result in additional damages, but aggravate the damages allowed. The learned trial judge told the jury:

> "Republication of libel, that is the repeat of the article with the omission of the three sentences in the 'Gleaner' of the 18th and the publication of a clarification in the 'Gleaner' of the 19th September. Now, if the Defendants knew that the article was libellous or was reckless, whether his action was wrong or not, this may aggravate damages, members of the jury."

Republication of a libellous article is evidence of malice (***Fielding v. Variety Inc.*** [1967] 2 Q.B. 841; [1967] 2 All E.R. 497). Such a subsequent publication could cause an aggravation of the damages (***Darby v. Ouseley*** [1856] 156 E.R. 1093).

The evidence before the jury was that the respondent spoke to the appellant Dr. Stokes, after the first publication on the 17th and handed to him his respondent's statement, and Dr. Stokes made a promise to the respondent that

his statement would be published and that there would be no republication of the libellous article in the ***Gleaner***. Despite this, there was a publication in the ***Gleaner*** on the 18th with one omission, and a further publication with a "clarification" on the 19th . The learned trial judge directed the jury further:

> "Dr. Stokes, if you are satisfied that what went before was Abrahams speaking to him, telling him about the talk that he had with Miss Marie Peterson and the grounds that he gave Miss Peterson to show that what was in the 'Star' couldn't be true, and Miss Peterson promised to amend the statement and so on, if you believe Mr. Abrahams that he told Dr. Stokes this and you conclude that Dr. Stokes knew that the article was libellous or was reckless, whether his action in publishing it was wrong or not, this, members of the jury, may aggravate damages."

This was the proper direction to give to the jury on the manner in which they should treat the subsequent publication. I see no basis to fault the learned trial judge in this respect.

Lack of an apology or an inadequate apology is evidence of malice which may aggravate damages. The appellants complain that the learned trial judge erred in inviting the jury to view the conduct as persistence in the libel, and the jury should have viewed the apology as an honest one. The appellant, Dr. Stokes, said in evidence of the apology, published on July 10, 1995, eight years after the libel:

> "I did not think an apology was necessary since he had sent me a statement denying it."

The apology was in these terms:

> "In September 1987 the story of which complaint is made concerning Mr. Anthony Abrahams, former Minister of Tourism of Jamaica came from the Associated Press of the United States in the ordinary regular course of business. At the time we honestly believed the information to be true and accurate, considering the usually reliable source from which it came. This agency has supplied us with material suitable for publication over a number of years and is responsible and reputable. Accordingly, we published the information in the issue of this newspaper on the 17th of September, 1987. We were sued by Mr. Abrahams in libel and in our defence we pleaded justification and qualified privilege, sincerely and honestly believing that we could obtain evidence to support these defences. As it turned out, the Court of Appeal dismissed these defences since the evidence was not forthcoming. We now realize that we cannot sustain these allegations. Accordingly, we hereby withdraw the allegations. In the circumstances we tender our sincere apologies to Mr. Abrahams and are very sorry for any embarrassment or discomfort arising from the article."

It is noteworthy that this apology was issued by the appellants after a period of eight years.

The learned trial judge directed the jury: [see page 41 of the summation]

> "Now, if you find that there was an unreasonable failure to apologise in time and adequately, that may be evidence of malice. It is for you to say, but you must say whether you find that there was an unreasonable failure to apologise adequately, in time and in the form of the apology, then it is open to you to say that that is evidence of malice. Further, the manner of an apology may tend to increase rather than diminish the damages, and you may ask yourselves, members of the jury, were the Defendants' persistence in the defamation sufficiently met by this tardy apology. If you find that it was tardy and if you find that it was meagre too, you can ask yourselves, were the Defendants' persistence in the defamation... If you find that the apology was such as to add any degree of bitterness to the original libel, then, of

> course, it may go to aggravate damages, make it worse. So we look at that, members of the jury, and when we come to deal with mitigation, I will tell you what to find."

The learned trial judge correctly left this issue of the persistence in the libel and the apology to the jury. It was for the jury to determine whether or not the apology was full and complete, genuine and honest in the circumstances. It seems to me that the jury may well have thought that the manner in which the "apology" was drafted was unorthodox and less than sincere but moreso "tongue-in-cheek", causing greater hurt.

The loss of earnings on which the respondent bases his claim would be subject to tax, if he had in fact so earned it. The rule in ***British Transport Commission v. Gourley*** [1956] A.C. 185, which was specifically referable to a case of personal injuries, is that an award for loss of earnings is subject to the tax the person would have paid if he had earned it. In considering the incidence of the payment of tax on earnings, in the context of the general loss of earnings in a claim of libel, Lord Reid in ***Lewis v. Daily Telegraph Ltd.*** [1964] A.C. 234 said at page 262:

> "There can be no difference in principle between loss of income caused by negligence and loss of income caused by a libel.
>
> But damages for libel have to be assessed by a jury, and juries are not expected to make mathematical calculations, so they can only deal with this matter on broad lines. I think that a jury ought to be directed to the effect that if they think that the plaintiff company has proved that it has suffered or will suffer loss of profit as a result of the libel they must bear in mind that the company would have had to pay income tax at the standard rate out of that

> profit if it had been earned and would only have been entitled to keep the balance. So in assessing damages they ought not to take into account the whole of that profit, but should make allowance for the obligation to pay income tax out of it.
>
> The position with regard to an individual plaintiff is rather different. He may be entitled to very substantial damages although his income has not been affected by the libel. But if he does attempt to prove loss of income as a result of the libel, then I think that a similar direction must be given to the jury, and it may be necessary to mention surtax as well as income tax."

In the instant case, the loss of earnings was a live component of the respondent's claim. The learned trial judge omitted to direct the jury that in making the award they should take into account that the "earnings of the respondent would have been subject to taxation". In that regard also, I am of the view that the award to that extent is excessive.

Exemplary damages, awarded in damages to punish the defendant for his conduct, received its current classification as particularized in ***Cassell v. Broome*** (supra). In defamation cases, the relevant category arises in circumstances where the defendant publishes the offending articles with a view to profit, probably with a view that his profits will outweigh any damages awarded. Lord Wilberforce, dissenting on some points, supported the retention of aggravated damages in civil law as a form of civil punishment. Lord Reid, despite the acknowledgement of the retention of the categories of exemplary damages, was critical of such awards by the jury of exemplary damages, because in criminal law it was not left to the jury to decide punishment. There are various contrasting views as to the place of exemplary damages in the field

of civil law. Our courts have acknowledged the power of juries to award exemplary damages. In the instant case, the learned trial judge left to the jury the fact that they could award exemplary damages, but only where they were of the view that the award for compensatory damages was insufficient. He said: [see page 135 of the summation]

> "So, members of the jury, if having come to a figure for your compensatory damages, inclusive of aggravated damages if you think that this is sufficient, then you need not award, or go to consider exemplary damages. If you think that is sufficient, when you look at the compensatory, inclusive of aggravatory damages, if you think it is sufficient then I don't have to go to exemplary damages."

In the light of such a direction, which in my view correctly stated the law, I see no basis to find that the decision of the jury not to award exemplary damages was unreasonable. In ***John v. MGN*** (supra) the court cautioned, at page 619:

> "It is plain on the authorities that it is only where the conditions for awarding an exemplary award are satisfied, and only when the sum awarded to the plaintiff as compensatory damages is not itself sufficient to punish the defendant, show that tort does not pay and deter others from acting summarily, that an award of exemplary damages should be added to the award of compensatory damages."

A man's reputation is a valuable asset. It is all that some men possess, or wish to possess to take them successfully and contentedly through life. Some men, on the other hand, spend their early life accumulating wealth by questionable and dubious means and then desperately grope around seeking to "buy back" with such wealth their "lost integrity" and good name, in vain. A man's integrity, once tainted, is almost invariably lost forever. The freedom of

expression and dissemination of information is guaranteed by the Constitution of Jamaica [section 22(1)]. However, a balance must be maintained between such freedoms and the laws which protect the individual. The said section 22(2) of the Constitution reads:

> "**22.—(2)** Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—
>
> (a) which is reasonably reguired—
>
> ...
>
> (ii) for the purpose of protecting the reputations, rights and freedoms of other persons..." [Emphasis added]

No media, and in particular the printed media, should ever so lightly and recklessly and unjustifiably besmirch a man's character – that prized possession – and proceed unchecked and "unrewarded". This is more so in respect of a man who has given himself to the service of the public.

The author Kodilinye, in the ***Law of Torts in the West Indies, Cases and Commentary*** (1992), said at page 228:

> "It is a fact of modern life in the West Indies, as elsewhere, that newspapers thrive on sensationalism, so great is the appetite of the reading public for gossip, scandal and sensation, especially where it concerns well-known personalities in politics and show business. The greatest risk of such journalism is, of course, the libel action in which an award of massive damages against a newspaper can spell financial disaster for its proprietors. Notwithstanding this obvious danger, newspaper editors appear to be willing to run the gauntlet of the libel laws in the quest for improved circulation."

In respect of the quantum of awards, juries may now be referred to previous awards in libel cases, as is done in personal injury cases [***John v. MGN***, (supra)]. I respectfully embrace this view. However, there are no awards of this court in libel actions, in recent times, to which we could refer for guidance in considering the level of this award. The rationale that one may look at personal injury awards, not for assistance as to a comparable quantum, but as an indication of a ceiling, seems to be a paradox and, is in practical terms, unhelpful. As I indicated previously, both may not necessarily correlate. Furthermore, although medical prognosis can determine, with reasonable certainty, the long-term psychological and physical effect of a personal injury, I greatly doubt that a sum of money can comfortably erase the stigma and recurring hurt attaching to a person, wrongly and unjustifiably libelled.

In view of the misdirections that arose, and in all the circumstances of this case, I find that the award of the jury, being excessive, an award of $35M is appropriate, with costs to the appellant, to be agreed or taxed.

LANGRIN, J.A.:

This is an appeal against an assessment of damages by Smith J, and a jury between May 6, 1996 to July 17, 1996 in which the jury found that the plaintiff is entitled to General Damages in the sum of $80,700.000.

Mr. Anthony Abrahams at the relevant period was a Tourism and Marketing Consultant, a member of the House of Representatives in the Parliament of Jamaica, a Company Director and during the period from November 1980 to August 1984 held the post of Minister of Tourism in the Government of Jamaica. After graduating from Jamaica College he attended the University of the West Indies where he was vice president of the student body and chairman of the Student Union. He became a school teacher and was awarded the Rhodes Scholarship to Oxford University in England. There he became president of the Oxford Union. On leaving Oxford University he worked with the BBC as a television reporter and his assignments took him to Africa, the Caribbean and other parts of the world. On his return to Jamaica he took up an assignment with the Jamaica Tourist Board and three years later he became the Director of Tourism. He left the job as Director and opened his tourism consultancy with contracts from the Organisation of American States, Government of El Salvador and Eastern Airlines Ltd.

The Gleaner Company Ltd. is the proprietor, printer and publisher of the "Daily Gleaner" and "Star" newspapers, then the only daily newspapers in

Jamaica, both of which have wide circulation throughout Jamaica and both enjoy circulation in the Caribbean, North America and the United Kingdom.

The action was filed on 24th September, 1987 in relation to articles published in the **Star Newspaper** of 17th September, 1987 and the **Gleaner** of 18th and 19th September, 1987. An appearance was entered on 2nd October, 1987 but no defence was filed. The failure to file a defence within the required time caused the respondent Abrahams to enter judgment in default on 23rd October, 1987. As a sequel to this the appellants brought interlocutory proceedings to set aside the default judgment but on the 14th December, 1988 Edwards J. refused the application. This Court on 11th December, 1991 set aside the Order of Edwards J. and gave the appellants leave to file a defence. The respondent Abrahams then sought leave to appeal to Her Majesty in Council to restore the default judgment but the application was refused on the 18th February, 1992. The appellants by then had filed their defence and the respondent Abrahams sought "further and better particulars" with respect to the issues of justification and qualified privilege . The summons for further and better particulars was dismissed on 13th October, 1992 and from this order the appellants appealed. This court comprising (Wright, Downer, Patterson (Ag.) JJA on January 24, 1994 allowed the appeal and ordered the defence to be struck out and the case remitted to the Court below to be proceeded with on the basis that there was no defence.

On the 25th of November, 1994, Ellis J set aside leave for the issuance and service out of the jurisdiction of a Third Party Notice on behalf of Associated Press, a United States media organisation.

The Articles

On page 2 of the Star newspaper dated September 17, 1987 under the heading "Author says his diary sparked kickbacks investigation", the following appeared:

> "AUTHOR Robin Moore says his personal diary and files contributed to Federal authorities suspicions that New York business executives paid kickbacks to Jamaica officials for lucrative tourism promotion contracts. 'All I can say is I suspected the Minister of Tourism was exacting a toll,' the writer, Robin Moore of Westport, told the Advocate of Stamford in a copyright story published Tuesday. 'Call it a bribe, call it anything you want,' said Moore, the author of 'The French Connection', a novel on drug smuggling.
>
> The Advocate reported Sunday that Federal authorities in Connecticut are investigating public relations and advertising executives suspected of paying Jamaica officials one million dollars for contracts worth $40 million from 1981-1985.
>
> The Advocate, quoting anonymous sources close to the probe has said five or six executives of the public relations firm Ruder Finn and Rotman and the advertising firm Young and Rubicam are the focus of the investigation.
>
> Officials of both firms have denied any wrongdoing and said they are co-operating with investigators.

KEY FIGURE

Moore said Monday that his files helped lead Federal agents to suspect that Anthony Abrahams, Jamaica's former Tourism Minister was being paid by American businessmen for the multi-million-dollar tourism contracts.

Sources close to a federal grand jury have said Abrahams is a key figure in the investigation, the newspaper said. Abrahams, however, has not testified before the grand jury empanelled in New Haven, the Advocate reported. The newspaper said efforts to reach Abrahams and his successor, Hugh Hart, during the past two weeks were unsuccessful, and Hart didn't return telephone calls to his office on Monday.

Moore, 61, said the notes in his diary are impressions of what was going on between Abrahams and the United States companies. The subjects also appeared in letters between him and friends in Jamaica.

'I have no definitive proof that this ever happened - it was just a suspicion of mine', Moore said. 'People were talking. There were certain things everybody know. There was no secret about the situation with the (former) Minister of Tourism'.

Moore said IRS agents seized his diary and other documents in June, 1983, when he was being investigated for his part in phony literary tax shelters. Moore is now awaiting sentencing on his 1986 conviction of evading taxes.

Moore, who has lived in Jamaica periodically for the past 27 years, said that in 1981, he volunteered his services to the Jamaican government to find advertising and public relations companies that would help the country's tourist trade.

'I was sort of a self-appointed liaison although I asked to help. I said, 'Let's try to do something about the image here, which is very bad at the

> moment'. I did, indeed help introduce the advertising agency of Young and Rubicam to Jamaica, but I certainly had nothing to do with any kickbacks, if indeed they did happen'.
>
> U.S. attorney Stanley Twardy Jr., has refused to confirm or deny the existence of the kickbacks investigation."

On page 2 of the Daily Gleaner newspaper dated September 18, 1987, under the heading "Robin Moore: I suspected Jamaica Tourism Minister". The Article was again published except that the following words were left out.

> "There were certain things everybody know.
> There was no secret about the situation with the (former) Minister of Tourism".

On page 3 of the Daily Gleaner dated September 19, 1987, under the heading "Clarification", the following statement was published:

> "Absolutely no reference was made, or intended to be made, to the current Minister of Tourism in the headline: 'Robin Moore: I suspected Jamaica Tourism Minister', in the second paragraph of the Associated Press (AP) story, 'All I can say is I suspected the Minister of Tourism was exacting a toll, the writer Robin Moore of Westport, told the Advocate of Stanford...' which was published on page 2 of yesterday's Gleaner, Sept. 18, 1987".

In essence, Mr. Spaulding, Q.C. Counsel for the respondent contended that the words in their natural and ordinary meaning meant or was reasonably understood to mean that Mr. Abrahams had committed criminal offences. As a result of the publication of the articles, Mr. Abrahams has been gravely injured in his character and reputation as a Businessman, Tourism and Marketing Consultant and Member of Parliament.

The Gleaner did not deny the publication of these articles. There was no prior apology. It denied any defamatory meanings and pleaded qualified privilege and justification. Great reliance was placed on the affidavit evidence of John Gentles which is conveniently summarised in the record at page 23 as follows:

> "I served as Director of Tourism in Jamaica from about December, 1980 until February, 1983. In about the month of April 1981 I was also appointed Chairman of the Jamaica Tourist Board.
>
> I have read the words set out in paragraphs 3,4 and 5 of the Statement of Claim herein.
>
> The words set out in each of those paragraphs are true in substance and in fact. New York business executives in fact paid kickbacks to Jamaican officials for lucrative tourism promotion contracts. Included among these payments were cheques either made payable to the Plaintiff or negotiated to the Plaintiff and received by the Plaintiff and further negotiated by him.
>
> It is true that the United States of America federal authorities in Connecticut are investigating public relations and advertising executives suspected of making payments to Jamaican Government officials for the award of contracts by Jamaican Government agencies to the firms of those executives.
>
> The matters involved are currently being investigated by a Federal Grand Jury in Connecticut aforesaid and I have given evidence before the said Grand Jury. I was asked to identify a number of documents and the signatures therein and these included public relations and advertising contracts and cheques either drawn by or made payable to the plaintiff or negotiated to the plaintiff and on which the plaintiff's signature appeared. I identified the plaintiff's signature on those cheques".

The fulcrum of the defendant's defence on justification is that the words in the articles are true in substance and in fact.

The writ was issued on 24th September, 1987 and an apology was published in the newspaper dated 11th July, 1995. It is appropriate to set out the apology in full:

STAR APOLOGY

> "In September, 1987, the story of which complaint is made concerning Mr. Anthony Abrahams, former Minister of Tourism of Jamaica came from Associated Press of the United States, in the ordinary and regular course of business. At that time we honestly believed the information to be true and accurate considering the usually reliable source from which it came. This agency has supplied us with material suitable for publication over a number of years, and is responsible and reputable.
>
> Accordingly, we published the information in the issue of this newspaper of the 17th September, 1987. We were sued by Mr. Abrahams in libel. In our defence we pleaded justification and qualified privilege, sincerely and innocently believing that we could obtain the evidence to support these defences. As it turned out the Court of Appeal dismissed these defences since the evidence was not forthcoming. We now realise that the defences were unsupportable. Accordingly, we hereby withdraw the allegations.
>
> In the circumstances we tender our sincere apologies to Mr. Abrahams and are very sorry for any embarrassment or discomfort arising from this article."

This apology coming approximately eight (8) years after the publication of the offending articles lacked sincerity. What it has in fact indicated is that they received evidence which they honestly believed and expected to get support from Gentles. Indeed at the trial Dr. Stokes, the Editor said he believed what

Gentles said on oath. There was obviously no clearing of the plaintiff's name by the apology.

The following passage in the judgment of Nourse L.J in ***Sutcliffe v Pressdram Ltd.*** [1991] 1 Q.B 153, 184; is apposite:

> "The conduct of a defendant which may often be regarded as aggravating the injury to the plaintiff's feelings, so as to support a claim for aggravated damages, includes a failure to make any or any sufficient apology and withdrawal..."

THE TRIAL

At the trial before the jury, the counsel for the plaintiff referred to the interlocutory judgments of the Court of Appeal and in particular criticised counsel for the defendants on the basis that justification should not have been pleaded unless the "defendants had clear and sufficient evidence of the truth of the imputation". However, in the case of ***McDonald's Corp. and Another v Steel & Ors*** [1995] 3 All E.R. 615 the English Court of Appeal held that a plea of justification was not required to be supported by clear and sufficient evidence before being properly placed on the record since such a test would impose an unfair burden on a defendant. Nevertheless, a defendant was warned that before pleading he should have reasonable evidence to support the plea or reasonable grounds to suppose that sufficient evidence to prove the allegation would be available at the trial. When one considers that this plea of justification came after the Prosecutor and Court in the United States of America had dismissed charges against Abrahams, then there could be no basis of obtaining

evidence of Abraham's guilt which the defendants were actually admitting they did not have.

Plaintiff's Counsel, Mr. Spaulding Q.C. made it clear to the jury that the Gleaner would have been aware of and covered the PNP Conference which lasted from the 17th September to the 20th September, 1987. By holding back the plaintiff's statement and publishing it in the Sunday issue of the Gleaner of the 20th September, 1987, the effect of the defamatory matter was brought to the attention of a wider readership of some 750,000 persons. The plaintiff Mr. Anthony Abrahams himself gave evidence and the effect the articles had upon him was correctly summarised by the judge in his summation which is stated as follows:

> "You remember Abrahams had gone on to tell you that he had appointed Gentles as Director of Tourism and later on you remember he told you that there was some enquiry and he dismissed Gentles. I have here 'witness cries', and you remember during his evidence when Mr. Abrahams told you that friends were avoiding him and he said a number of really humiliating things happened, hard to explain things like that to his children and his father, and it was then. - -
>
> He cried. Everywhere he went people were talking about him and he remembered one occasion in a supermarket, Family Pride Supermarket, he said he was standing in the line with his basket, a man, a real estate agent came up and started taunting him and said, 'look what in you basket after you thief the money' or words to that effect. Remember how he looked, injured feeling, and so on and so forth. Those are things you can think of.
>
> Remember he had gone to Royalty for an idea of a video which he had with a businessman and they could not quite agree and the businessman ran him out of the office, saying he did not need any thieving consultant.

He told you that he never felt so badly before. Closest he told you he had ever come to having heart attack. You remember he gave you too, some other occasions. He said stoplight or stop signs, bad place for him, people would be jeering and taunting him. Well, let me continue about this businessman, he said the businessman sent his security guard to search him. He went on to tell you that people were avoiding him and it was then he told you about the stress caused the asthma to return. Remember I told you about that already. Jobs that he was negotiating did not materialize. So he was negotiating jobs and they did not materialize. Remember we looked at the general loss of business. His resources were run down and so financial problems set in. He said he was not exactly starving because of the generosity of his fiancee. That is in terms of basic necessities, he told you, and he said his divorced wife took care of the children, but he told you that that was really humiliating to him. He continued by saying there was a general impact on his marketing career and he said he asked himself who wants a thief.

He told us that part of the duty as tourism consultant was to advise clients how much of the tourism budget to spend on advertising, and he asked, would someone seek such advice from a person who has a habit of taking kickbacks? You see, this he said, was the real dilemma that he faced in his career, nobody wanted him, he was avoided by people who he thought were good friends. Invitation to parties and functions and weddings, et cetera, dried up, stopped. He felt ostracized...

I mentioned about the Taste of Jamaica affairs, that includes a particular person, and based on that Mr. Gentles was dismissed. Gentles was immediately hired by the General Manager of 'the Gleaner' at the time. Let me just mention this, he says, referring back, I should say, to this businessman, he said it was the closest he had ever come- I mentioned that already, I am sure I did. Gas station incident, the heart attack incident, I am quite sure I did.

He said even some people refused to accept telephone calls from him and he told you about job opportunities in

Cyprus and so on, other countries, that he lost. And he told you that a man was brought in from abroad to do feasibility study, redevelopment of land on the North Coast, although he was in discussion with the businessman before, the person who was doing that, he was in discussion with that person, but he brought in somebody from abroad.

Members of the jury, importantly he told you he did not work for about five years after the publication, except, of course, as MP. And he told you that he did some writing but he did not get paid- for some paper, but he did not get paid for it. I think it was the 'Record', he was writing for. I was inclined to mention what he called unspeakable hurt, members of the jury. I will go over that, he told you that he didn't really start to work until 1992. That is important, remember that, that he started to work in 1992. He said he was isolated, depressed, deserted, frequent breakdown and crying, withdrawn, could not sleep and then afterwards he was eating, sleeping, eating and I mentioned that to you already, the obesity and the diabetes. Remember I mentioned no medical evidence as to diabetes.

Members of the jury, he told you he was totally shattered and destroyed by the time the indictment came on the 6th October, 1989. That is some two years after the publication. You must say what you make of it. You heard Counsel address you on that. He told you that he was more concerned with what people in Jamaica thought than with what people abroad thought. He said that within twelve weeks the indictment charges against him were withdrawn and that is in February the indictment was withdrawn and...

Remember he told you about the articles during the meantime and the effect these articles had on him, the effect he said was to keep those libellous articles in his mind and keep alive the hurt; remember that, members of the jury. And he told you that with all of this he felt helpless, couldn't do anything about it. And he mentioned that as devastating as the effect of the indictment was, he felt that at last somebody was bringing something and he could deal with it. And remember he told you about cross-examination, I think, in Canada before U.S. Attorneys and that had to be

done in court before the indictment was lifted and he mentioned that in spite of all this, 'The Gleaner' was still persisting in the charge that he was guilty, and you remember he complained about articles, members of the jury, the decision of the Court of Appeal which had – I think it is Exhibit 17, you remember members of the jury, this was a report in the 'Gleaner' of the Court of Appeal's judgment, and this was December 24, 1991, which he referred to, and it is said the effect of this was that 'The Gleaner' was telling all its readers that the appeal was saying that they had entered a plea of justification and it was true that the publication was true. So you can look at it, because this is really the judgment of the court, but looking at this case you see that this is purely editorial, it is true and the effect was to let everybody know what the 'Gleaner' was saying and so on.

Remember he said – well I mentioned the apology, what his views were on that and I won't go back to that, members of the jury.

He told you by the end of 1991 he had given up getting a job. He was not going out, socializing and he told you that what clothes he had could not fit him. And he mentioned this and the effect on him. He had gone to a party, the judgment, I think, the Court of Appeal had already given the judgment, but it was not published in 'The Gleaner', but people were talking about it and then after this Christmas party now, this came out and everybody was talking about it. And here again, he said he nearly gave up and deep despair set in. He told you that he had witnessed, or he was in the Court of Appeal when there was the appeal by his attorneys for Further and Better Particulars and he mentioned what Mr. George said and the effect it had on him, and I don't need to go through that. He said that Mr. George stood up and said in court that reason why we were objecting was because I did not want the Grand Jury evidence to be opened up, because I was afraid of what would come out of the Grand Jury evidence and I had to sit there and hear it..."

Dr. Irons, Consultant Psychiatrist and Senior Medical Officer of Bellevue Hospital saw the plaintiff sometime in 1993 and carried out mental status examination. He found the plaintiff to be someone who was previously high-drive, high-functioning, self motivated and relatively successful In all these areas he thought the plaintiff was negatively affected by a severely internalized trauma arising from a slur on his character.

Dr. Duncan, a former General Secretary and Minister of Government gave evidence on behalf of the plaintiff. He was associated with the plaintiff at school and the University of the West Indies, as well as in his career in politics. He spoke glowingly of Abraham's reputation and integrity. When the news broke of the scandal against Abrahams the Annual Conference of the PNP was in progress at the National Arena with guests from all over the world. He described the intensity of interest generated by the news and particularly so because Abrahams was a member of the JLP.

Mrs. Martinez, Consultant in Marketing, Tourism testified of the plaintiff's competence and reputation . She worked with him while he was Director of Tourism and again while he was Minister of Tourism. The plaintiff was hired by the OAS to work as a high level consultant on Tourism based in the Eastern Caribbean. A career Tourism Consultant she deponed can easily earn between US$200,000 and $500,000 per annum.

Dr. Stokes, the editor of the Gleaner gave evidence for the defence. He said part of the policy of the Gleaner was to ensure that the people of Jamaica are informed in relation to their leaders or any matter that will be of interest to

them. There was no malice towards Abrahams. A significant aspect of his evidence at the trial is when he said "up until now he regarded Mr. Abrahams as being guilty, just that they cannot get the evidence".

An analysis of the facts clearly shows that the Gleaner had not been prepared to check the facts as to the allegation of the kick-backs which was removed after the Grand Jury hearing. There was therefore no foundation for linking the plaintiff with the fraud.

The threat of proceedings by the plaintiff had no inhibiting effect on the Gleaner's decision to proceed with its own view of the guilt of the plaintiff of the fraud. Mr. Abrahams was portrayed as one who was involved with fraud. The Gleaner pleaded justification. Having regard to these outrageous features this case was in a "class by itself".

Against this background the jury may well have accepted that a substantial award was necessary, not to inhibit responsible investigative journalism but to have an enormous impact on what they may well have thought to be a baseless way of defending an indefensible position.

SUMMING UP AND VERDICT

The main issues in the judge's summation to the jury are (a) Compensatory damages, (b) Aggravated Damages, (c) Exemplary Damages. The issue of Compensatory and Exemplary Damages were considered separately by the judge. He directed them that should they come to a figure for compensatory damages inclusive of aggravated damages which they considered

adequate they need not award or consider exemplary damages. The jury retired for 90 minutes and returned with a unanimous verdict as follows:

"**Registrar**: Madam Foreman and members of the jury, have you arrived at a decision?

Madam Foreman: We have.

Registrar: In respect of question one, what sum do you award for compensatory damages?

Madam Foreman: After very careful consideration the sum we have arrived at is Eighty point seven million dollars ($80.7m).

Registrar: In respect of question two, is the plaintiff Mr. Abrahams entitled to exemplary damages?

Madam Foreman: No".

Grounds of Appeal

The grounds of appeal are stated as follows:

(1) That the award of the jury is so manifestly excessive that no jury properly applying their minds to the relevant evidence could reasonably have awarded the same.

(2) The sum awarded by the jury for General Damages is out of all reasonable proportion to any sum that could be awarded to the Plaintiff/Respondent for compensation having regard to the evidence and all the circumstances of the case.

(3) That the award of General Damages by the jury represents a wrong measure of damages and is so manifestly unreasonable and excessive, and cannot represent a true measure of any damage the Plaintiff/Respondent may have sustained as a consequence of the Defendants/Appellants action.

(4) That the award of the jury contravenes Section 22 of the Jamaica Constitution which guarantees to the Defendant/Appellants the right to freedom of expression and the right to hold opinions and to receive and impart ideas without interference.

(5) The Learned Trial judge erred in failing to direct the jury that they should take into account awards in personal injury cases in this jurisdiction".

There were supplementary grounds of appeal which may be summarised as follows: Evidence was to be put before the jury which had not been pleaded and which could only have been put to the jury if specifically pleaded and particularized; the judge should not have permitted evidence to be put to the jury of the effect of the libel complained of on the physical health of the plaintiff's son, in that such alleged damage was too remote; failure to point out to jury that there was no evidence to connect any loss of income, arising from his tourism consultancy to the publication of the libel: failure to give jury warning about subsequent statements which may lead to aggravated

damages but not an award of additional damages; the jury ought to have been directed that the allegations complained of involved the plaintiff in his capacity as a Minister of Government only and not as a Tourism Consultant; the award was out of all proportion to any sum that could be reasonably awarded to the plaintiff because the report complained of emanated from a reputable international wire service and was not a story based on the Gleaner's internal sources; failure to direct the jury as to any range of damages which had been laid down by the judges in Jamaica, either in defamation cases or in personal injury cases; failure to direct the jury that they ought to make allowances for the obligation to pay income tax out of it, had it been earned.

Rule 19 of the Court of Appeal Rules, 1962 reads as follows:

> "19(1) - On the hearing of any appeal the Court may, if it thinks fit, make any such order as could be made in pursuance of an application for a new trial or to set aside a verdict, finding, or judgment of the Court below."

Then turn to paragraph (3) which reads:

> "A new trial may be ordered on any question without interfering with the finding or decision upon any other question; and if it appears to the Court that any such wrong or miscarriage as is mentioned in paragraph (2) of this rule affects part only of the matter in controversy, or one or some only of the parties, the Court may order a new trial as to that part only, or as to that party or those parties, only, and give final judgment as to the remainder".

Paragraph (4) reads as follows:

> "(4) In any case where the Court has power to order a new trial or that damages awarded by a jury are excessive or inadequate, the court may, in lieu of ordering a new trial –

> (a) with the consent of all parties concerned, substitute for the sum awarded by the jury such sum as appears to the Court to be proper;
>
> (b) with the consent of the party entitled to receive or liable to pay the damages, as the case may be, reduce or increase the sum awarded by the jury by such amount as appears to the Court to be proper in respect of any distinct head of damages erroneously included in or excluded from the sum so awarded;
>
> but except as aforesaid the Court shall not have power to reduce or increase the damages awarded by a jury".

Both appellants and respondent have given consent to this Court to exercise the power under the rule to substitute its own award in lieu of ordering a new trial of the assessment of damages without prejudice to any further appeal to the Privy Council.

DAMAGES- PRINCIPLES OF LAW IN DEFAMATION

Compensatory Damages

The aim of an award of damages in tort is to put the claimant in the position which he would have been in had the wrong not been committed. The damages are at large.

In **Gatley on Libel and Slander 8th Edition** at paragraph 1453 the learned author said 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".

Lord Hailsham in ***Cassell & Co. Ltd. v Broome*** [1972] A.C. 1027 at 1071 had this to say:

> "In actions of defamation and in any other actions where damages for loss of reputation are involved, the principles 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".

In ***Margaret Morris & Gleaner Co. Ltd etal v Hugh Bonnick*** SCCA No. 21/98 (Forte P, Downer & Bingham, JJA) (unreported) judgment delivered April 14, 2000, Forte, P in dealing with the question of damages said at page 22:

> "In determining the question 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."

The jury was not bound by any previous assessment as to quantum. The jury would have taken into consideration the conduct of the appellant.

There was clear and abundant evidence that the libel did significant damage to Abraham's earning capacity as a Tourism and Marketing consultant. Until his "lucky break" as part-time Talk Show Host he had to be subsidized in

his income by his fiancee, his father and amicable arrangements with his former wife concerning the children.

However, the judge correctly encouraged the jury to be reasonable in making the award for compensatory damages.

On the subject of general damages, I have examined the defamatory statement, the extent and circumstances of its publication and its effect on Anthony Abrahams. On any view the false statements amounted to allegations of fraud calculated to cause in the minds of those who read them that they were credible. Accordingly, a substantial award of general damages by the jury would be justified to compensate Mr. Abrahams for damage to his reputation and injury to his feelings.

AGGRAVATED DAMAGES

In relation to Aggravated damages the factors to be taken into account in assessing damages are clearly set out in ***Gatley on Libel and Slander*** 8th Edition. At pages 593 –94 where this appears :

> "1452 **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 at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are 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".

It cannot be gainsaid that in applying these principles to general damages in the instant case it must be observed that the reports in the Gleaner were widely circulated and moreso they came at a time when the People's National Party were having their annual conference in which foreign delegates from other countries were present.

The misconduct of the plaintiff continued after the first publication and throughout the interlocutory hearings and appeals right down to the assessment of the damages, spanning a period of about 12 years.

I accept the Respondent's submissions that the overall conduct of the appellants at the time of publication, after publication, in the conduct of the case generally and at the trial indicate an attitude of malice and contempt for the respondent's rights, reputation and feelings and was clearly intended to cause him harm.

In my view there was ample evidence upon which a jury could properly base their finding of aggravated damages.

DAMAGES IN PERSONAL INJURY CASES

Smith J, refrained from addressing the jury on the question of damages awarded by the Courts in personal injury cases.

Mr. Emil George Q.C. submitted that judges should be required to address juries on the conventional compensatory scales of damages awarded in personal injury actions not as a precise correlation but as a check on the reasonableness of their proposed award. It was further submitted that indications by counsel, and the judge as to the sum or award appropriate to the particular case should be given so as to avoid excessive awards. Reference was made to ***John v MGN Ltd.*** [1997] QB 586 and ***McCarey v Associated Newspaper Ltd.*** (No. 2 [1965] 2 QB 86 at 109.

It is of significance that apart from the previously cited cases the courts in England have rejected the comparison of libel and personal injury cases. In this regard reference must be made to ***Cassell & Co v Broome*** [1972] 1 All ER 801 (HL) at p.824, ***Blackshaw v Lord*** [1983] 2 All ER 311 (C.A) at pp. 337, 340; ***Suttcliffe v Pressdrum Ltd*** [1990] 1 All ER 269 (C.A) at pp. 281-82, 289; and ***Rantzen v Mirror Group Newspapers*** [1986] Ltd. [1994] Q.B. 670. In the latter case it was said that there is no satisfactory way in which conventional awards in personal injury actions could be used to provide guidance for an award in a libel action. Personal injuries would not be relied on as any exact guide but juries might properly be asked to consider whether the injury to reputation of which the plaintiff complained should fairly justify any greater compensation than conventional awards for loss of a limb or of sight or for quadriplegia. The Court said it was rightly offensive to public opinion that a defamation plaintiff should recover damages for injury to reputation greater, perhaps by a significant factor than if that same plaintiff had been rendered a quadriplegia.

What is gleaned from the cases is that there is an enormous difference between the nature of the tort of defamation and negligence. One is intentional while the other is not. In a defamation action the plaintiff ought to recover not merely the estimated sum of his past and future losses but in case the libel driven underground emerges at some future date he must be able to point to a sum awarded which gives satisfaction.

I am not persuaded that there is any meaningful relationship between personal injury and loss of reputation. Health is not necessarily of greater importance than reputation. Accordingly, I do not accept the submission that jurors should be addressed on scales of damages in personal injury cases in the assessment of damages in libel cases. Judges presiding over defamation trials should confine their jury directions to a statement of general principles avoiding any specific guidance to an appropriate level of general damage in the particular case.

I would also reject the range approach. An appropriate range would be the subjective view of the judge and there would be no legal basis for any range which a judge might suggest.

In concluding his directions to the jury the learned judge admirably stated his final charge:

> "Let me remind you that in making an award you should consider the purchasing power of that award. You should consider the purchasing power of that award, I mentioned it to you before, which you make. You should ensure that any award you make is proportionate to the damages which the plaintiff has suffered as a result of the libel, and is a sum which is necessary to award him so as to provide adequate

> compensation; the word is compensation, and to re-establish his reputation, vindicate his good name and take account of the distress, the hurt and the humiliation which the defamatory publication with which you are here concerned have caused. You must decide whether it caused these things, and if you so decide, you take it into account. You take into account too, that the Plaintiff was a public figure, a man with an international reputation in the field of tourism, if you accept that. Probably every reader of the newspapers knew to whom the article referred".

EXEMPLARY DAMAGES

There was consent between the parties to argue this ground.

Mr. Spauldings Q.C. in a respondent's notice in relation to exemplary damages submitted that the conduct of the appellant in this case is so extreme as to warrant significant exemplary damages. He argued that the malice was extreme and the evident intention was not only to harm the respondent but also to be sensational, to stir up public interest, and to profit thereby from the sale of the newspapers. Smith, J in his definition of exemplary damages directed the jury thus:

> "Exemplary damages can only be awarded if the plaintiff proves that the defendant when they made the publication knew that they were committing a tort , that is a civil wrong, or were reckless whether their action was tortious or not and decided to publish because the prospects of material advantage outweighed the prospect of material loss".

Exemplary damages are available where the defendant's conduct has been high-handed to an extent calling for punishment beyond that inflicted by an award of compensatory damages including aggravated damages.

The ordinary practice in England and which was adhered to by the judge is to direct a global award, even if the jury are satisfied that an added punitive element should be reflected in it. See ***Cassell & Co. v Broome*** [1972] AC 1027, 1072 per Lord Hailsham. A consequence of this practice is that it is not possible to conclude with any degree of certainty that the jury awards have included something for punitive damages.

Such damages should be added to the compensatory award only where the conditions for making an exemplary award were satisfied and only when the sum awarded as compensatory damages was not itself sufficient to punish the defendant to show that tort did not pay and to deter others from acting similarly.

In any event the plaintiff has not made out a case for exemplary damages and he has failed to show that the defamatory statement was done with the calculated motive that the chances of profit to the defendant exceeded the possible damage that he could be called upon to pay. In my view the jury having made a substantial compensatory award inclusive of aggravated damages did not find it appropriate to make an added award for exemplary damages.

ALLEGED MISDIRECTIONS BY JUDGE

It was submitted on behalf of the appellant that certain misdirections which appear in the judge's summation may have contributed to the jury's excessive award.

Pecuniary Loss

The evidence disclosed that the plaintiff's business had dried up in 1987 after the publication of the libel two years before the indictment was preferred in the USA. Within months Young and Rubicam stated they had not in fact bribed the plaintiff and there was no evidence that the plaintiff received any "kick-back". The harm to the plaintiff commenced in 1987 and continued for two years before the indictment was preferred in 1989. The indictment was withdrawn in 1990 within a year of its being preferred.

The learned author of **McGregor on Damages**, 16th Edition, paragraph 1900 at page 1230 states:

> "General damages does not have to be pleaded by the plaintiff. As to its proof he starts off with presumption of damage operating in his favour which entitles the Court to award substantial damages for injury to his reputation although he has produced no proof of such injury. However, there will usually be evidence given in support of the plaintiff's claim's for general damages, since a plaintiff offering no evidence of damage at all may find himself awarded small or nominal damages only. As to what evidence is admissible in proof of general damage, this should normally consist of evidence of general losses, such as the general falling off of the plaintiff's custom or the general decline in the circulation of the plaintiffs' newspaper".

Evidence of particular transactions lost or particular customers lost cannot be given with a view to showing specific loss as part of the general damage. However, it may be possible to give evidence of specific losses, even where these have occurred after the issue of the writ in the action, not with a view to

recovering damages for such specific losses as such but in order to assist the court in assessing the general damages.

Mr. George Q.C. submitted that only loss which was expected to flow naturally from the libelous statement can form part of general damages. Further that any loss peculiar to the plaintiff such as loss of particular customers in his business consultancy should have been pleaded. Such evidence which was given was tenuous and the trial judge should warn the jury of the weight that ought to be given to the evidence.

Smith J, dealt correctly with this contention in the court below by pointing out to the jury that there was no claim for special damage and any reference to a special sum of money is not a basis for awarding that special sum. Further he told them that any reference to any special sum should only be a factor to assist the jurors in assessing general damages.

INJURY TO HEALTH

In assessing damages the jury can take into account the distress, hurt and humiliation the libel has caused to the plaintiff. The reaction and feelings experienced by the plaintiff as a consequence of the publication can be addressed in evidence. Evidence of mental suffering or illness caused by the publication, not to the plaintiff, but to his son is not admissible if its purpose is to prove injury to his son. But it has been held that the plaintiff can give evidence of the effect upon him of such distress as he observed of his son. See **Gatley on Libel & Slander 9th Ed**. p. 823.

The Learned Trial Judge was unduly generous to the defendant when he advised the jurors that they could not take into account the injury to the plaintiff's feelings due to the noticeable effect of the libel on his children.

The judge correctly told the jury that there was no medical evidence to link the asthma , obesity and diabetes to the libel and he gave adequate directions to the jury in relation to the injury to the plaintiff's feelings.

INCOME TAX

Learned Counsel for the appellant submitted that the trial judge failed to direct the jury that they ought to make allowances for the obligation to pay income tax out of the income had it been earned.

The trial judge went out of his way to caution the jury that this was not a case in which special damages had been claimed. It is trite law that in cases in which there is an award of damages based on a quantifiable basis there can be a specific figure to apply such tax considerations.

In the instant case there is no specific award for loss of income. Consequently there is no identifiable sum in the award which could attract tax considerations. It even becomes more difficult when one considers the variable features of this case including damages for loss of reputation, injury to feelings damage to income earning potential and other aggravating factors involved in this case.

In such circumstances the more prudent course in my view in order to avoid any risk of injustice would be for the plaintiff to receive the full sum, leaving

the question of liability to tax if any, to be adjusted thereafter between the plaintiff and the Commissioner of Income Tax.

In summary, the directions of the learned trial judge to the jury were considered adequate by Counsel in the case who did not request any additional directions or variations to the directions about which he now complains. In any event, the directions were on the whole not unfavourable to the appellants.

I therefore find the appellants' arguments on misdirection without merit.

A judge should in his summation offer comments on the amount claimed by plaintiff if the judge considers that the amount is plainly excessive. The Court of Appeal in ***Satcliffe v Pressidram Ltd.*** (supra) recommended that a trial judge should draw the attention of jurors to the purchasing power of any award they were minded to make. Practical illustrations of purchasing power should be helpful and was done in this case.

Without trespassing improperly on the jury's sphere, a judge can find ways of helping them in order to reduce the risks of excessive awards. The duty of fairness between the parties may indeed require the judge to play a constructive role. In the end the judge must make it clear that while he or she can make suggestions for their consideration the decision is always theirs.

Constitution of Jamaica – Section 22 and Article 10 of European Convention

Section 22 of the Jamaica Constitution provides freedom of expression and freedom from interference with the means of communication. It is important to set out the section:

"**22.** – (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence and other means of communication.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

(a) which is reasonably required –

(i) in the interests of defence, public safety, public order, public morality or public health; or

(ii) for the purposes of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibition or public entertainment; or

(b) which imposes restrictions upon public officers, police officers or upon members of a defence force ".(emphasis supplied).

Article 10 of the European Convention of Human Right is similar to Section 22 of the Constitution of Jamaica in so far as they both protect the reputable rights and freedoms of other persons This article is set out hereunder:

"**10.2** - The exercise of these freedoms since it carries with it duties and responsibility, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial

> integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".(emphasis supplied)

Mr. George Q.C. then submitted that the award of the jury in the instant case constituted a breach of the defendant's rights to freedom of speech as stated in section 22 of our Constitution by reference to the interpretation of Article 10 of the European Convention on Human Rights. He referred to ***Rantzen v Mirror Group Newspaper Ltd.*** (supra). Here the Court of Appeal substituted an award of £110,000 for the jury's assessment of £250,000 in the exercise of their power under Section 8 of the Courts and Legal Services Act, 1990. In light of article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms the judges took the view that an almost unlimited discretion given to a defamation jury toward damages "was not necessary in a democratic society, nor was it justified by any pressing social need" Neil L.J. had this to say at 997:

> "It is to be hoped that in the course of time a series of decisions of the Court of Appeal will establish some standards as to what are, in the terms of Section 8 of the 1990 Act 'proper' awards. In the meantime the jury should be invited to consider the purchasing power of any award which they make. In addition they should be asked to ensure that any award they make is proportionate to the damage which the plaintiff has suffered and is a sum which is necessary to award him to provide adequate compensation and to re-establish his reputation".

In ***Tolstoy Miloslawsky v The United Kingdom*** [1995] (8/1994/455/536) the defendant had accused Lord Aldington who was then

Headmaster of Winchester College (one of England's most prestigious public schools), of having committed serious war crimes involving deaths of many innocent people when he was Brigadier Toby Low, Chief of Staff to a certain General during World War II. The plaintiff was subsequently enobled and became Baron Aldington. He later became Chairman of a very large insurance company. This case was taken before the European Court by the defendant in a libel action after having gone before the English Court where the plaintiff was awarded £1.5Million, which is approximately equivalent to J$90Million. The European Court for Human Rights examined the relevant law and came to the conclusion that the award of £1.5Million was disproportionately large and was in violation of the defendant's rights under Article 10 of the Convention.

Freedom of speech is a cherished constitutional right and this court will always seek to ensure its protection to the citizens of Jamaica. Obviously it can be abused and this is clearly illustrated by the publication in the newspaper by the appellants.

This Court must always bear in mind that there are the competing underlying value of the protection of a person's reputation on the one hand and freedom of expression on the other. In balancing these competing interests the Court ought to consider whether a manifestly excessive award is reasonably required for the purpose of protecting the reputation, rights and freedoms of other persons as is stated in Section 22 of the Constitution.

In ***Reynolds v Times Newspapers Ltd.*** [1999] 4 All ER 609 Lord Nicholls who delivered the leading speech had this to say at p. 621:

> "The freedom to disseminate and receive information on political matters was essential to the proper functioning of a parliamentary democracy. The media played an important role in the process, for without freedom of expression by the media, freedom of expression would be a hollow concept".

However, protection of reputation was also an important public good. But the plaintiff will not wish the jury to think that his main object is to make money rather than clear his name. The crux of the matter therefore lay in identifying the restrictions which are fairly and reasonably necessary for the protection of his reputation.

Having regard to the peculiar circumstances of this case and the facts which have come to light a very substantial award was justified for the reasons already explained. The jury were entitled to conclude that the publication of the article and its resultant consequences were an ordeal for the plaintiff. As has been shown, the plaintiff now enjoys a successful career as a Talk Show Host. He is a highly respected personality in broadcasting. In light of what has been submitted to us as an excessive award, I am forced to the conclusion that this court must intervene. Judged by any reasonable standards of what is reasonably required, as compensation to protect the fundamental right of freedom of expression the question to be asked is this:

> Could a reasonable jury have thought that this award was reasonably necessary to compensate the plaintiff and to re-establish his reputation?

While it must be recognised that for the most part there is no valid public interest to be served by defaming someone else's character an award may be more than what is reasonably required to protect the reputation and rights of others. The

enjoyment of the general fundamental rights and freedoms of the individual must be subject to the rights and freedoms of others and also for the public interest. See section 13 of the Constitution.

In my judgment this Court applying the objective standards of proportionality and reasonable compensation or what is "reasonably required' should reduce the award of $80.7M to $40M. In my view this award will ensure that justice is done to both sides and the 'public interest' under the Constitution will be secured.

Accordingly, the appeal should be allowed in part with the award to the respondent reduced to $35M. The appellant should pay half the cost of the appeal to be taxed if not agreed.

ORDER:

FORTE, P:

The appeal is allowed in part. Order of the Court below varied to substitute for a sum of $80M awarded a sum of $35M. Half costs to the appellants to be taxed if not agreed.