Full text of paper presented at breakfast seminar hosted by Media Association of Jamaica at Terra Nova hotel on July 12, 2010. Presenter Kathy Ann Waterman is a Trinidadian journalist and editor who is also an attorney at law.

"IS MR. SULLIVAN MR. RIGHT?"

INTRODUCTION

The Media Association of Jamaica ought to be congratulated for keeping alive the issue of freedom of the press and engaging the region in the discussion. The last time we in Trinidad and Tobago had any public debate about libel law reform was 1997 and it all ended in a huge row between then PM Basdeo Panday and Ken Gordon, head of Caribbean Communications Network, publishers of the Express newspaper. The government had published a Green Paper outlining its proposals for reform and Ken Gordon heavily criticised the Green Paper and Mr Panday's administration. This led to Mr Panday accusing Mr Gordon of being a pseudo-racist which led to Mr Gordon launching a defamation suit which went all the way to the Privy Council and was concluded in Mr Gordon's favour. Since then, no one has been talking about libel law reform.

But on to today's discussion.

One of the primary issues is whether Jamaica should adopt the American approach to libel as established in the case of *New York Times v Sullivan* instead of following what has become known as the Reynolds "responsible journalism'' standard.

American libel law is considered so less restrictive than the English that "libel tourism'' became a new export.

Plaintiffs who were aggrieved by a report in a US paper, which also happened to be circulated in England, would take action in England because they could win more easily.

That's just what fugitive film maker Roman Polanski did to Vanity Fair magazine. Though living in France, he sued the American publication in an English courtroom. (He won, too, in 2005.)

In America, when a public official or public figure files a libel action, in order to succeed, he has to prove that the newspaper acted with malice. And he has to do so with "convincing clarity''—which is a high standard of proof.

In England and the English-speaking Caribbean, the burden is on the defendants, to show that while they made some errors in the report, they acted responsibly by, for example, carrying the gist of the plaintiff's response to the allegation.

The changes wrought by the *Reynolds* line of cases gave hope but journalists still gaze longingly at the green American pastures. But should we abandon
Reynolds
and through legislative measures embrace
Sullivan
?

Is Mr Sullivan Mr Right?

This paper briefly analyses the *Sullivan* and *Reynolds* cases and questions whether the Sullivan approach is the best option.

Qualified Privilege (Social and Moral Duty)

The law has long recognised that there are occasions when people have a social or moral duty to speak up, even when they may not be able to prove the accuracy of their remarks. Communications between people who share a common interest in the subject matter of the communication will attract qualified privilege. For example, a reference by an employer, a circular published to shareholders of a company, an inter-office memorandum. To be protected, the communication must be made to a person who has a duty to receive and act upon it, such as a police officer investigating a crime or a public health official.

But the difficult question always nagged away at us: to what extent are journalists under a social and moral duty to communicate unproven allegations of wrongdoing to the world.

Lord Denning, who was brilliant and eccentric and often ahead of his time, remarked in his book *What Next in Law?* that “if newspapers and television receive or obtain information fairly from a reliable source, which it is in the public interest that the public should know, then there is qualified privilege to publish it. They should not be liable in the absence of malice.’’ That was in 1982.

Without that kind of protection, journalists usually had to resort to the truth or justification defence. And every journalist has had the experience of believing something to be true, to have done reams of research, to have the information confirmed by a highly reputable source but one who is not prepared to go on record and not prepared to hand over the necessary evidence to us—and we have to back down. We write a wimpier version of the real story we were working on or we don’t publish at all. Because our lawyers and editors wring their hands and say if you can’t prove it, you can’t write it.

We all know that even though a plaintiff knows we are telling the truth, he will still sue if he thinks he can get away with it. It is very rare that liars meet as dramatic an end as did Conservative MP Jonathan Aitken in 1995.

Johnathan Aitken, a former journalist, war correspondent and Conservative MP, sued the *Guard ian*
and Granada television for alleging that his 1,500 pound hotel bill at the Paris Ritz was paid by a businessman who was a close friend of the Saudi royal family, at a time when one of Aitken’s jobs was to see through a defence deal with the Saudis. Aitken self-righteously declared he intended to “cut out the cancer of bent and twisted journalism with the simple sword of truth’’. The libel trial collapsed dramatically when the defendants proved Aitken was lying when he testified that his wife had paid the bill because she had been in Switzerland that weekend.

Aitken was sentenced to 18 months in prison for perjury and perverting the course of justice. He declared bankruptcy and was stripped of his Rolex and cufflinks by debt collectors.

If only all crooks got their come-uppance like that.

In 1999, a beacon appeared on the distant horizon with the decision of the House of Lords in *R eynolds v Times Newspapers*
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The newspaper lost the case but journalism gained so much more.

Reynolds arose out of an article in the British edition of *The Sunday Times* concerning the collapse of the coalition government in Eire in 1994. It accused Albert Reynolds, who only days before had resigned as prime minister, of deliberately misleading the Dail and his coalition partners.

The Law Lords decided that, in certain circumstances, the media did have a duty to impart information to its readers and that there was certain information that the public at large had a legitimate interest in receiving. The *Reynolds* judgment clarifies the application of the common law defence of qualified privilege.

Lord Nicholls, delivering the leading judgment, said, "The court should be slow to conclude that a publication was not in the public interest and therefore the public had no right to know, especially when the information is in the field of political discussion.''

The House of Lords laid down the criteria (the list is not exhaustive) by which a judge presiding over a libel trial would decide whether the story was protected by common law privilege:

• The seriousness of the allegation. The more serious the charge the more the public was misinformed and the individual harmed if the allegation was not true.

• The nature of the information and the extent to which the subject matter was a matter of public concern.

• The source of the information. Do informants have direct knowledge of the events? Or do they have their own axes to grind or are they being paid for their stories?

• The steps taken to verify the information.

• The status of the information. The allegation might already have been the subject of an investigation which commanded respect.

• The urgency of the matter. News is often a perishable commodity.

• Whether comment was sought from the plaintiff. He might have information others did not possess or had not disclosed. An approach to the plaintiff would not always be necessary.

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

• The tone of the article. A newspaper could raise queries or call for an investigation. It need not adopt allegations as statements of fact.

• The circumstances of the publication, including the timing.

In practical terms this means:

• We must set the scene and flag up the public interest point (i.e exposing a crime, protection of public health and safety, misleading statements and/or hypocrisy by those in public office etc)
• The article should not be written from a first-person point of view but rather state the facts, with a finishing call for a further or fuller investigation into the matters/allegations contained in the article.
• We should not include material which is pure rumour and suspicion and for which there is no

basis of any kind other than pure conjecture.
• Most importantly, we must be able to say we made every effort to get a full response from the claimant.
• We must obtain all or any supporting documents (particularly from confidential sources) prior to publication of the article.

The *Reynolds* defence was clarified in *Jameel v Wall Street Journal (Europe)* . The article, published in 2002, had stated that Mohammad Jameel's family and their businesses (Jameel's family owned Harwell Motors in Oxford) had been monitored by the Saudi government on request of the United States to ensure no money was siphoned off to support terrorists. The thrust was to inform the public that the Saudis were co-operating with the United States. It could not be proved true because it would have been impossible to prove covert surveillance material in open court. But that did not mean it did not happen.

Lord Hoffmann also said that judges, with "leisure and hindsight", should not second-guess editorial decisions made in busy newsrooms. "That would make the publication of articles which are . . . in the public interest too risky and would discourage investigative reporting," he added.

The House of Lords said that the 10 factors listed in Reynolds were not hurdles that journalists had to scale along an obstacle course but rather each case ought to be assessed on its own facts. It ruled that the defence should not be withheld simply because the newspaper did not delay publication of its allegation to allow the subject of the article to comment. The paper had reported that the plaintiff "could not be reached for comment''.

Baroness Hale also remarked that "we need more such serious journalism in this country and our defamation law should encourage rather than discourage it."

By contrast, The *Sun's* campaign against former Liverpool goalkeeper Bruce Grobbelaar is an example of how not to get on the right side of the qualified privilege defence. The newspaper had secretly filmed Grobbelaar talking to Chris Vincent in a sting operation set up by the paper with his former business partner. In one conversation, Grobbelaar is told he could choose the game he wants to throw. Vincent told him he would receive 2,000 pounds every fortnight until the end of the football season and 100,000 after the match. The newspaper filmed him receiving an initial payment of 2,000 pounds and Grobbelaar told Vincent on tape that he would throw the game between Southampton and his former club, Liverpool. The tape also showed Grobbelaar talking about throwing three other games. In 1994, two reporters approached Grobbelaar at Gatwick Airport and put to him a number of allegations. The following day the paper ran a series of articles charging the player with corruption. Grobbelaar and his alleged co-conspirators were

charged by police which led to two criminal trials in which they were acquitted.

The paper pleaded the defence of qualified privilege but the Court of Appeal, considering Reynolds, held that the paper had deprived itself of that defence by adopting the roles of police, prosecuting authority, judge and jury.

However, it was an empty victory for Grobbelaar. In 2002, a jury had awarded him 85,000 pounds in damages but the House of Lords reduced it to the derisory sum of one pound.

Their Lordships' distaste for the way the paper conducted its investigation was exceeded only by their scorn for Grobbelaar. "The articles, in short, were calculated to embarrass not only Mr Grobbelaar but also his wife and children. There can be no doubt that considered as a whole this newspaper campaign carried prejudgment of guilt to its uttermost limits.''

The *Reynolds* defence was applied in the Jamaican case of *Bonnick v Margaret Morris*, *the Gleaner Co*
and
Ken Allen
. Hugh Bonnick, the managing director of a government-owned company, which was involved in a dispute with a Belgian milk exporter over certain payments. Bonnick was dismissed shortly before the company entered into a second contract with the exporter. Bonnick contended that the article imputed a connection between his dismissal and the irregularities in the company.

The defendants did not plead justification but relied on qualified privilege as set out in *Reynolds*. The reporter had only an anonymous source who did not provide a factual basis for the allegations of irregularities and she did not include Bonnick's versions of events regarding his dismissal in the article. But, overall, the article was even-handed, leaving readers to make up their own minds and the defamatory imputation was not high up on the scale of gravity. Had the article expressly stated that Bonnick had been dismissed because of the irregularities, the defence of qualified privilege would have been unavailable. The Privy Council described Bonnick as a borderline case but on the balance, the defence of qualified privilege was available to the publisher because the subject matter was in the public interest and the newspaper had satisfied the standards of responsible journalism.

More light was shed on the *Reynolds* defence in *English and the Others v The Insurance Insider and Other* . This is believed to be the first libel trial concerning the activities of the insurance market. The managing director and property underwriter at an international underwriting firm, called Trenwick International, were the subject of allegations that they were unlawfully interfering with the contract of a third party and diverting business from that third party to companies in which they had an undisclosed interest. The claimants sued when those allegations were published in the Insurance Insider and on its website. The allegations were contained in legal papers (draft statement of claim and opinion of counsel) which had been leaked anonymously to the offices of the Insider. The principal defence was the *Reynolds* defence—there was sufficient public interest and a right of the public to know the information. Gray J found the defence was not made out.

“The allegations were serious, albeit they did not impute guilt on the part of the claimants of the misconduct mentioned in the article. I accept that the article raised issues of some public concern. Even so it was incumbent on Mr Hastie, as a responsible journalist, to proceed cautiously before publishing such allegations because it should, objectively speaking, have been apparent to him that the allegations emanated from someone with an agenda of his own. Yet, the allegations were published with barely any attempt having been made to verify them or seek comments from the claimant about them. The article said nothing of the claimants’ side of the story that they had, or were suspected of having, surreptitiously diverted funds to companies in which they or their associates had a beneficial interest.’’

The jury awarded 10,000 pounds to each claimant, which probably reflected the modest extent of publication of the offending article (about 1500 recipients in all). It probably also reflected the view of the judge that the article in effect meant there were reasonable grounds to suspect the claimants of the wrongdoing which was the subject of the allegations, rather than they were actually guilty of that wrongdoing.

APPLYING REYNOLDS

Although *Reynolds* was a landmark decision, it is not that easy to apply successfully.

Lord Hoffmann in *Jameel* commented on the difficulties in applying the responsible journalism defence in practice. English judges had been applying the 10-point test rigidly.

"In the hands of a judge hostile to the spirit of Reynolds, [the ten points] can become 10 hurdles at any of which the defence may fail. And that in my opinion is not what Lord Nicholls meant. As he said in Bonnick, the standard of conduct required of the paper must be applied in a practical and flexible manner. It must have regard to practical realities."

Trinidad and Tobago experience

There is only one case I have been able to find in T&T in which *Reynolds* was successfully pleaded.

It concerned allegations that the chairman of a board was corrupt and other board members were incompetent and weak, which led to a million-dollar loss when a faulty crane was purchased.

The judge said it fell within the ambit of responsible journalism but not by a wide margin. The journalist did not impress anyone with the depth of her research but relied on one source who did not provide the crucial document because he was fearful it would be traced back to him. Instead, he read out over the telephone an excerpt of the report which was supposed to contain the evidence. Attempts to contact the chairman were minimal and non- existent in the case of board members.

What saved the reporter—barely—is that she did contact one of the persons mentioned in the article and he declined to comment but he told the chairman that the newspaper was working on a story. The chairman sent a warning letter, saying he would get an injunction unless the newspaper gave an undertaking that the article did not allege corruption or impropriety. And the judge found that such a letter meant the journalist would not have got any useful information from the plaintiff anyway—and there was no point in delaying publication.

The learned judge found that the chairman would have suffered pain and hurt at the untrue allegations and if he had to award damages he would have done so in the amount of TT$450,000, which is considerably more than the $300,000 awarded to Ken Gordon.

In another action, Conrad Aleong, who was contracted in 1993 to restructure the failing national airline BWIA, sued the *Express* over eight articles. The journalist did considerable research and conducted a lengthy interview with the CEO but the judge found that the most serious allegation against the CEO was not put to him. The judge also was concerned that the sources of the information were persons who had their own interest to serve. The defence was not made out. (We await a written judgment to better study it.) But so far, we can see that *Reynolds* holds journalists to a high standard. And while sensible journalists have always know they need to get all sides of a story and we must be suspicious of sources who have axes to grind, the process by which we put together a report has been placed under intense scrutiny.

A friend of mine who represents a news media organisation in Trinidad likens it to maths. You may not always arrive at the correct answer but you get points for showing your working.

New York Times Co. v. Sullivan

The case arose out of the backdrop of the civil rights movement. *The New York Times* published an editorial advertisement in 1960 titled "Heed Their Rising Voices" by the Committee to Defend Martin Luther King. The full-page ad detailed abuses suffered by Southern black students at the hands of the police, particularly the police in Montgomery, Ala.

Two paragraphs in the advertisement contained factual errors. For example, the third paragraph read:

In Montgomery, Alabama, after students sang 'My Country, Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and teargas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

Nine students were expelled for demanding service at a lunch counter in the Montgomery County Courthouse, not for singing “My Country, 'Tis of Thee’’ on the state Capitol steps. The

police never padlocked the campus-dining hall, neither did they "ring" the campus. In another paragraph, the ad stated that the police had arrested Dr Martin Luther King Jr seven times but King had been arrested four times.

Even though he was not mentioned by name in the article, L.B. Sullivan, the city commissioner in charge of the police department, sued *The New York Times* and four black clergymen who were listed as the officers of the Committee to Defend Martin Luther King.

The jury awarded Sullivan $500,000. After this award was upheld by the Alabama appellate courts, *The New York Times* appealed to the US Supreme Court.

Justice Brennan stated:

 “Thus, we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.’’

The court reasoned that "erroneous statement is inevitable in free debate" and that punishing critics of public officials for any factual errors would chill speech about matters of public interest. The court established the new rule for defamation cases:

“The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice” — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.’’

The court required a public official to show evidence of actual malice or reckless disregard for the truth by "convincing clarity" or clear and convincing evidence. This threshold has meant that many publications have stopped defamation suits in their tracks. The standard of “convincing clarity’’ is higher than the usual “balance of probabilities’’ standard in civil cases and Justice Brennan probably was concerned that racist judges would bluntly declare a finding of malice

and so made the standard as high as he could.

The public official category was later expanded to include public figures—persons who were not government employees but who had a certain prominence or influence.

OTHER JURISDICTIONS

Commonwealth jurisdictions have been modifying the qualified privilege defence as they too grapple with the difficulties of balancing the right to scrutinize governments with a person's right to protect his reputation.

England specifically rejected *Sullivan* in the *Reynolds* decision and says there is no special category for political expression.

Canada declined to follow *Sullivan* in *Hill v Church of Scientology*, stating that the unique circumstances of Sullivan did not arise and the court did not find the current standard unduly restrictive. (Before we judge the Canadians too harshly, do read the case. It would have been difficult to see things the defendant's way.) Just last year, though, the Supreme Court held that the Reynolds defence could be relied upon by defendants in libel actions.

The New Zealand and Australian struggle is of particular interest because it was long and drawn-out but comprehensive because the superior courts considered decisions from all over the globe, including South Africa , India and Pakistan.

NZ and Australia took what might be called the "category approach''. They have placed political expression in a special category. The defence does not turn on whether the plaintiff is a politician or public figure.

David Lange who had been the Labour party prime minister of New Zealand sued the Australia Broadcasting Corporation ; as well as Dr Joe Atkinson, a poltical scientist at the University of

Auckland; and a current affairs magazine. Mr Lange was keeping the courts busy. He complained the publications made him look lazy, incompetent, and manipulative.

The Australia court expanded the qualified privilege defence and included a reasonableness test. The “Lange’’ form of qualified privilege will operate where the defamatory material concerns government and political matters that affect the people of Australia. The court will consider whether it was reasonable for the defendant to publish the defamatory material. Reasonableness would include efforts to verify the accuracy of the article and whether the plaintiff’s response was included.

In NZ, the Lange case went from the High Court to the Court of Appeal and then to London, where the Privy Council sent it back for further consideration by the Court of Appeal. Eventually, the NZ Court of Appeal adopted the political expression category—within certain parameters.

“In particular, a proper interest does exist in respect of statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities.”

So the ruling extended the scope for criticism of parliamentarians, including those retired or standing for election, as long as the writer could not be shown to be reckless or motivated by malice.

Mr Lange abandoned his libel action, saying he could no longer afford to keep it up.

DIFFICULTIES WITH SULLIVAN

One of the difficulties with *Sullivan* is deciding who was a public figure—it’s not only government officials. So a retired army general and football coach have been deemed public figures. “Public figure’’ was later expanded into two categories—public figures for all purposes and public figures for limited purposes. Defining who is which has been described as trying to nail a jellyfish to the wall. The state of the law on this issue has been called chaotic. There has

also been criticism of how the “actual malice’’ test is applied.

David Kohler, professor of law at Southwestern University School of Law, writing in the *Oregon Law Review*, said it is often quite difficult to predict how the court will view a plaintiff.

While he shudders to think what America would have been like without *Sullivan*, he nevertheless likens libel litigation in the wake of *Sullivan* to the question Clint Eastwood as Dirty Harry issues when he squints famously and snarls, “Do ya feel lucky?’’

He says that judges have taken a narrow and rigid approach to the distinction. He is baffled by the court’s failure to accord public-figure status in circumstances which clearly implicate the kind of issues which are at the heart of *Sullivan*. One example is a scientist who received a federal grant to study the emotional response of animals and one commentator, a US Senator, ridiculed him and complained about wasteful spending. The court said no, the scientist is not a public figure; it was the defendant who put him in the public eye by targeting him.

Another analyst, Susanna Frederick Fischer, writing in the *George Washington International Law Review* contends that the US Supreme Court took a wrong turn by not going the *Reynolds* route—“by ignoring the existing defence of qualified privilege and its inherent flexibility, arising from the public interest rationale’’. This has been compounded by later cases which built a “complex maze of rules based on overly rigid categories of plaintiff, for liability, damages and procedure in libel actions’’.

Professor Kohler recommends a solution: the neutral reporting test. This is the reporting of defamatory accusations involving an issue of pubic concern levelled by a credible source and attributed to that source. The defendant says, “Don’t shoot the messenger! I am not saying the allegations are true or not but I am under a duty to report the issue because it is in the public interest for me to do so.’’ This eliminates the issue of determining whether there was actual malice—which is proven where the publisher knew the report to be false or demonstrated reckless disregard of whether it was false or not.

And that closely resembles the *Reynolds* defence—setting the scene, raising a flag, calling for answers, not offering an opinion.

The American courts have been inconsistent in applying this defence. Several states have rejected it with Florida accepting it. Kohler writes that the neutral reporting concept is designed to solve the problems created by Sullivan's actual malice standard when the press simply reports allegations that are newsworthy but which the publisher may not believe to be true. This is already commonplace with court reporting and the conduct of public meetings and other government activities which involve the press function of informing the public about a particular controversy.

For example, what if a council member and the mayor had an argument and one party made outrageous statements about the other outside of the council chamber? What if the report accurately published the allegations and also included the aggrieved party's response that the allegations are bizarre and the person making them needed help? What if the tone of the article was the effect this quarrel was having on the town itself?

To report the issue without repeating the slurs and insults would mean a sanitizing of the incident to the point that the article becomes unreal. This actually happened in Pennsylvania with the council member calling the mayor and council president "queers and child molesters'' The article was headlined, "Slurs, insults drag town into controversy.''

The defendant in such a scenario cannot get past the actual malice test because the journalist is not trying to find out if the allegations are false.

So while we may be looking over the fence longingly at the American libel landscape, the Americans are also looking our way.

Neither approach has the answer to all our challenges. Flexibility is the key—which is the appeal of the incremental approach advocated by *Reynolds*. We can evolve and continue to hammer out solutions on a case-by-case basis.

The *Reynolds* defence was never intended as a general shied to protect a free press. As noted by the House of Commons committee on press standards, it will always be a defence of a last resort—"first, because it will only be used by defendants who are unable to prove that their facts are correct and second because it transfers scrutiny to the journalistic process'' and the conduct of the journalist.

I am not convinced that abandoning *Reynolds* for *Sullivan* is going to make us happier. *Reynolds* has the advantage of flexibility—the flaw is that we lose some certainity. But the problem with setting up categories is the rigidity that we abhor.

So what is the way forward:

1. Continue to examine the libel landscape in other jurisdictions. It would be useful to study more closely how Australia and New Zealand have been getting on since *Lange* and *Atkinson*. How have they been determining what is "reasonable''?
2. Make *Reynolds* work for you by incorporating its principles extensively throughout the planning and execution of investigative reports. Alan Rusbridger, editor of the *Guardian*, said to a House of Commons media committee: "We use Reynolds pretty extensively. There are three or four reporters who have learned to use it and if you asked them they would say they rely very heavily on the legal department, you have to work extremely thoroughly in the way you phrase questions and it is a long, drawn-out rather arduous way of processing stories, but I do not think it is all bad. I think it has enabled us to print a lot of stories that we could not have published in the past in a different kind of voice, raising questions, rather than asserting things, but we have got a lot of information in the public domain using *Reynolds*.''
3. Continue to encourage, motivate and cajole media managers to invest in the training of journalists. Not every media house has the resources to keep late-night lawyers and hire fact-checking departments as obtains at many United States newspapers but probably in the region as a whole more could be done to support our journalists.
4. Keep up the public education. One gets the impression sometimes that people fear that when journalists speak of libel reform they want freedom to fling mud at people. Show them that what you seek is freedom to protect the public from abuses and to provide the people with the information they need to make the best choices.

ADDITIONAL NOTES ON OTHER REFORMS

Time limit for instituting proceedings.

I support the proposal to reduce the time limit. Two years is sufficient time in which to make up one's mind, to seek legal advice, to exhaust other avenues of redress, for example, persuading the paper to publish the plaintiff's response to the offending article or to agree to a retraction or apology. Journalists also should not constantly have to operate with threats and sabre-rattling. Are we to be like the child who is told, "Wait till your father gets home!'' and so we spend the rest of the day wringing our hands, waiting for the footfall of his boots on the back steps. Example: The *Daily Express* in 2000 published a story about a man who kept a four-year-old boy in a cage. The police were informed and the man was charged for child neglect. The magistrate, however, ruled in favour of the defendant, and everyone thought that was the end of it. In 2004, just under the time limit, the man sued the *Daily Express* for libel. The attorney for the newspaper was then left frantically trying to find the reporter who had long left the job.

Abolition of criminal libel

This offence can be traced back to 13th century England as a means of protecting the government from stories which might arouse the people and lead to breaches of the peace. This offence is now considered to be an unnecessary relic of the past with no place in modern jurisprudence. Nevertheless, it is resurrected from time to time.

In Trinidad, in the Seventies, the late Irwin Sandy, editor of the *Bomb* weekly, was charged with the offence but died before the case could ever come to trial.

In Grenada, George Worme, editor of *Grenada Today*, a weekly newspaper, was prosecuted for the criminal offence of intentional libel, after publishing an open letter in two issues of the paper which accused the Prime Minister of Grenada of winning the election by bribing voters in disregard of the law. The crime of intentional libel (similar to the criminal libel provision) is committed where a defendant published any false defamatory matter, imputing to another person a crime or misconduct in public office, with the intention of damaging the reputation of

that person, in circumstances where the publication was not for the public benefit.

The defendants argued, among other issues, that the provision of the criminal code was inconsistent with their right of freedom of expression under the Constitution. The Privy Council did not agree. In a 2004 ruling, the Privy Council decided that the “objective of an offence that caught those who attacked a person's reputation by falsely accusing him of crime or misconduct in public office was sufficiently important to justify limiting the right to freedom of expression.’’ Further, it was held that the crime was reasonably required in Grenada to protect people's reputations and did not go further than was necessary to accomplish that objective. And after all, criminal libel was still part of the law in England and other democracies.

However, criminal libel was removed from the statute books in England and Wales last year. Geoffrey Robertson QC, who successfully defended Salman Rushdie in the last sedition case held in Britain, over Rushdie's book, The *Satanic Verses*, said, "The abolition of sedition is long overdue. This law is still used throughout the Commonwealth by repressive governments to jail their opponents. Its abolition here ensures that those governments can no longer use the excuse that they are merely following British law."

Abolition of jury trials

Jury trials are held for criminal matters in Trinidad and Tobago. Libel suits are heard by a single judge. The effectiveness of jury trials has been questioned—and by judges no less. We often wonder how we expect people of different levels of education, to absorb and comprehend all the evidence which they hear only once and to apply the law which sometimes even lawyers and judges have difficulty with. In 2005, a high court judge, after a jury returned with a not guilty verdict, commented that the system seemed not to be working and it frightened him.
You have made out a good case—the cost, the time involved, the difficulty of a jury grasping complex legal matters, the reluctance of people to serve on juries.