

Clerk to the Houses
House of Parliament
Gordon House
81 Duke Street
Kingston

Attention: Mrs. Marion John

Dear Madam,

Re: Presentation to the Joint Select Committee to consider and report on the review of Jamaica's defamation laws.

Reference is made to your letter dated May 18, 2009 in which both the Media Association of Jamaica (MAJ) and the Press Association of Jamaica (PAJ) were asked to submit written comments on the report of the Small committee, and in particular, on recommendations 7, 10 and 12.

In November 2007, the Prime Minister of Jamaica appointed a committee of persons from a wide cross section of society to review the defamation laws of Jamaica

Representation on the committee included Attorneys-at-Law, the Press Association of Jamaica, Jamaicans for Justice, the Opposition, Jamaica Bar Association and the Media Association of Jamaica.

The terms of reference of the committee was to review the libel laws of Jamaica and to recommend such changes as may be necessary to ensure transparency and accountability and in particular to:

- o Support the principle of freedom of the press;
- o Provide reasonable protection against false and damaging publication;
- o Prevent the use of defamation laws to suppress information to which the public is reasonably entitled
- o Impose appropriate burden of accountability on public officials holding positions of trust, and
- o Evaluate the actual damages caused by slanderous or libelous publications and determine appropriate remedies

Although the interest groups represented on the committee were varied and the terms of reference, many, it is important to note at the very outset, that the committee was nevertheless

able to agree on most of the issues it looked at. The areas of agreement are enumerated at pages 24-25.

The areas of agreement were as follows:

Recommendation #1: abolition of the distinction between libel and slander

Recommendation # 2: Limitation Period (p. 24)

The limitation period in Jamaica derives from the 1623 Limitation Act of England and is six years from the date that the defamatory statement was published.

In England, the limitation period has been reduced to one year from the date of publication (section 5, The Defamation Act 1996 and s. 37 of The Defamation Bill, 2008, Ireland). Australia also has a one year limitation, while, New Zealand, Canada and Barbados all have two year limitation periods.

One year represents a fair balance between the interests of plaintiffs, who need sufficient time to prepare their cases and the interests of defendants, who ought not to have the threat of legal proceedings hanging over their heads for an inordinate period of time

Journalism is a very migratory profession and with the passage of time, journalists migrate, witnesses and writers memories fade and records may be misplaced or destroyed.

In Australia, Ireland and Barbados, to name a few, one of the most important developments of the new regime of defamation in those countries, is the emphasis given to the resolution of disputes without the parties resorting to litigation. As such, the slate of remedies open to a person claiming to be defamed has been considerably expanded. Recommendations 5, 6, 8 & 9 are features of this new dispensation.

Given the length of time that matters take to move through the Jamaican Courts, recommendations 5, 6, 8 and 9 present viable and attractive ways of resolving defamation matters without restricting the freedom of either party to still pursue traditional remedies.

Recommendation # 5 - Offer of Amends

If an aggrieved person alleges that he has been defamed, the publisher has an opportunity to make amends by taking some remedial action to offset the negative implications of the publication in question and address the issue directly, this could include, for instance, publishing another article apologizing for or clarifying the defamatory information. An offer of amends may include monetary compensation.

The offer of amends has to be offered within a particular time frame and in any event cannot be offered after a defence is served.

Recommendation # 6 – Apology

To facilitate Recommendation #5, in Australia, they have provided that where a publisher makes an apology, it is not deemed as an admission of liability or fault and indeed is irrelevant for determining the fault or liability of the publisher. This provision is similar to s. 29 of the Defamation Bill 2008 in Ireland.

Defamation law addresses damage to reputation and redress where appropriate. Where damage to reputation is alleged, the law should provide measures that are conducive to expeditious redress to contain the impact of the defamation.

The Small committee was of the view that the best way to contain the impact of an alleged defamatory statement was for a clarification/apology to be published as soon as possible thereafter. The committee, however, also recognised that under the current laws of Jamaica, a publisher would not be encouraged to publish an apology/clarification as it could be used against him in a court of law.

The Small committee felt that it would be neither fair nor practical to ask publishers to apologise/clarify expeditiously without any form of guarantee and, therefore, recommended the adoption of the Australian treatment of the “apology/clarification ” as stated above.

Recommendation # 8 – Declaratory Order

This remedy would apply to a situation where the plaintiff feels that their primary issue is a restoration of their reputation by the said apology

Under the Irish Defamation Bill, 2008, which the Small committee considered, Provision is made for an aggrieved party to apply to Court for a Declaratory Order that a statement was defamatory. This is a “speedy remedy” procedure and allows for a defamation case to be heard by a judge sitting alone who will make the Declaration if s/he sees fit. No damages can be awarded. [s.26]

Recommendation # 9- Correction Order

A correction order would operate as an additional remedy to declaratory judgments. It would allow the courts to direct the terms of any correction that may be made in favour of a plaintiff be established.

Under s. 28 of the Defamation Bill 2008 (Ireland), a Correction Order may be applied for by the Plaintiff in the course of the trial of a defamation action. The Plaintiff must notify the Defendant at least 7 days before start of the trial that s/he intends doing this. The judge would then be entitled to make an order directing the publisher who is found to have no defence to a defamation action, to publish a correction in a manner and on a date to be specified in the order.

The Small committee also looked at the innovation that had been made to existing defences to a claim of defamation and thought it desirable to adopt a few. It should be noted that the Small committee did not agree on the imposition of any new defences but thought it prudent for the laws to be amended to simplify and codify existing defences. The areas of amendments agreed were as follows:

Recommendation # 3 – The Defence of Justification to be renamed, “Truth”

Included in the “defences” available to a claim in defamation, under the current laws of defamation in Jamaica, is the defence of “justification.”

The term “justification” is a term of art with various implications. The word also suggests that something other than “truth” may suffice by way of defence. We agree with the simplification of the language away from “justification” to “truth.”

Recommendation # 4 - Triviality

- o This Defence would apply only where the Defendant is able to satisfy a court of law that the circumstances of publication were such that the defendant was unlikely to suffer harm to his reputation e.g. gagging writs.

- o The MAJ/PAJ supports this recommendation. The Small committee in introducing the defence of triviality emulated the approach used in the Australian and Barbadian legislation.

- o By way of prescript, it should be noted that in the United Kingdom, under Part 24.22 of the present CPR, the Court has power to give summary judgment against a Claimant or Defendant on the whole claim or on a particular issue if either party has no real prospect of success (see also s. 8 of The Defamation Act, 1996).

- o Regrettably, the above-mentioned procedure of the summary disposal or summary judgment is not applicable under the present 2002 CPR of Jamaica. On the contrary, Part 15 of the CPR expressly provides at 15.3(d) that the Court may give summary judgment in any type of proceedings except defamation. It, follows, therefore, that under the Current CPR rules in Jamaica, a summary judgment cannot be entered into a libel action. If therefore, it is desirable to have summary disposal or summary judgment in matters that are trivial, then certain the rules will have to be accordingly amended.

Recommendations # 7 - Innocent Dissemination /Responsibility for Publication

Both the United Kingdom and Australia have enacted provisions to provide a defence to persons who have physically published or distributed defamatory material but who are not the authors or originators of the materials and had no effective control over the contents of the publication.

The category of persons that would typically be covered by this defence, includes book sellers, news paper vendors, librarians, wholesalers or retailers of material, postal or communication service providers and broadcasters of live programmes where the broadcaster is not in effective control of the speaker.

This is known in the Australian legislation as, “innocent dissemination,” in the proposed Irish legislation as “innocent publication’ and in the United Kingdom law as “responsibility for publication’. The essence of the defence is that a person ought not to be liable for defamation if he is merely a subordinate distributor of the material and is not the author of it or has no input or control of the content of that which he distributes.

Attached to the Small report, at Appendix 1, is a copy of the wording employed in the Australian legislation. The MAJ and PAJ representatives on the Small committee, differed from the

majority in so far as the former felt that ss. 1(b) and 1(c) of Appendix imposed such an onerous burden on subordinate distributors that if those two subsections were included in any amendments, there would be no advance whatsoever on the common law position. The MAJ and PAJ representatives, while agreeing to the expansion and codification of this defence, did not agree to the inclusion of ss. 1(b) and (c) of Appendix I.

Recommendation 10 – Role of the Jury

Recommendation #10 speaks to the abolition of the assessment of damages by juries in defamation cases. Presently, the law provides for trial by jury at the option of either party to the suit. [See: s.25 of the Jury Act]. It is to be noted that the right to trial by jury is available at the option of both claimant and defendant.

The members of the Small committee were agreed that the role of the jury in the assessment of damages should be abolished, however, the MAJ and PAJ were of the view that the role of jury in defamation matters should be abolished altogether for the reasons set out below:

1. Jury trials have been abandoned in other areas of civil law. Today only defamation suits are tried by the jury in civil matters such as fatal accident claims.
2. Jury trials are far more costly than proceedings before a single judge in chambers as several steps are added to the process and for that reason it is also more costly.
3. Unlike Criminal Law, there is no risk of loss of the constitutional right to liberty of the subject which trial by jury aims to protect. Whereas there is a constitutional right to liberty and freedom of expression, the right to reputation is not a fundamental human right enshrined in our constitution and therefore by removing trial by jury from defamation suits is not infringing any fundamental rights. That is not to say a man's reputation is NOT important, it is. However, in seeking to balance the right to reputation and freedom of expression greater credence MUST be given to that which is a constitutional right.
4. Libel is an extremely technical area of law. Issues such as aggravated, exemplary and punitive damages can be a challenge even for trained lawyers furthermore the average juror who has no legal training and must learn and appreciate the ramification of each principle generally within a matter of only a few days. Juries are expected to understand and apply multiple areas of law to the facts of the case.
5. Juries are required to assess damages in circumstances where judges are not permitted in law to guide them in terms of an appropriate "range" for the award of damages. Consequently, our juries have repeatedly returned exorbitant awards of damages which the Court of Appeal has always reduced significantly. Cases on point include:

- i. Leymon Strachan v. Gleaner Company & Dudley Stokes – May 16, 1995 – a jury assessed damages at \$22.5m in general damages and \$510,726 for special damages – which Downer, JA described as being “unprecedented in Jamaica”.
 - ii. The Gleaner Company Limited and Dudley Stokes v. Eric Anthony Abrahams - in 1996 the action was heard by Smith J and a jury. The jury awarded J\$80.7 million, The Court of Appeal set aside the award and substituted J\$35 million,
 - iii. CVM Television v Fabian Tewarie – June 23, 2003 – a jury awarded the claimant \$20m in general damages with costs amounting to \$150,000.00. The Court of Appeal reduced the award to \$3.5m.
 - iv. Gladstone Wright v. Jamaica Observer Limited – 2008 – A special jury awarded the Claimant \$20m for General Damages and \$10m for Exemplary Damages in circumstances where Exemplary Damages was not pleaded as required by law.
 - v. Harper v. Seaga -2007 – award reduced on appeal from \$3.5million to \$1.5million.
6. The majority of our citizenry are not interested in serving as jurors. The reasons for this lack of interest range from:
- a. The negative economic impact of jury duty on their lives
 - b. Fear for their lives
 - c. Fear of the court house itself
 - d. The perception that the courts waste their time

The reluctance becomes apparent when the Special Jury list is returned. On average 150 persons are served and of that number only 50 persons will attend court to be interviewed. Of the 50 who attend 10 will submit medical reports in order to be excluded from service. The situation is similar in criminal trials. The quality of the jury pool is therefore sadly lacking and this becomes even more apparent when a jury is faced with technical cases such as fraud and defamation.

Recommendation # 11- Guidelines for Assessment of Damages

The suggestion under this recommendation is that guidelines be included in the libel laws for the benefit of the judge (and in the case of a jury, the judge would have to direct the jury) on the criteria to be considered in assessing damages.

The MAJ and PAJ support the Australian approach which is to set out guidelines which must be followed.

It is ultimately the judge who will decide how much weight is to be given to a particular guideline but codified guidelines take away the elements of uncertainty and arbitrariness.

Recommendation # 12- Publication by various means

In the existing legislation enacted in 1961, there is reference to such dated technology as re-diffusion and wireless telegraphy, the members of the Small committee thought it prudent to recommend that the existing legislation be so amended that publication can take place by other means.

The recommendation, therefore, was simply to broaden the scope by which publication can take place in including in the revised legislation, a few identified media.

Recommendation # 13 - Criminal Libel

o This still remains an offence under the Libel and Slander Act of Jamaica and essentially what that means is that a citizen of Jamaica could be imprisoned for exercising his constitutional right to freedom of expression. . This is clearly untenable and should be abolished.

The offence was generated in medieval times when defamation laws were used to restrict freedom of expression and has no place in modern democracy which enshrines freedom of expression. It was the view of the Small committee that such laws are incompatible with the constitutional right to freedom of expression.

AREAS OMITTED FROM THE SMALL REPORT

There are two areas which were not included in the recommendations cited on pages 24-26 but for which there was majority agreement (see Appendix 1). These are the areas of “capping of damages” and the imposition of a “wire-services defence”

Damages (p. 14)

o The issue of damages was included in the terms of reference given to the Small Committee, however, one will note from the Small report that this matter was not included in the recommendations listed on pages 24-26.

o The Small committee did, however, agree that the libel laws should be amended to include a cap on non-economic losses but did not feel that it was competent to work out how the formula should be arrived at to account for factors such as inflation and devaluation of the dollar. The committee felt that the amount of the cap would best be left to the technocrats in government to work out.

o In Australia they have imposed a cap of \$250,000.00 for non-economic losses and this sum can be exceeded if the court decides there is a good reason for aggravated damages. Of course established economic losses would remain uncapped.

o To take the uncertainty out of this area of the law, the MAJ and PAJ are further of the view that it should be mandatory for personal injury awards to be relied on in determining damages. There is no good rationale to explain why a claimant who has suffered intangible damage, i.e., damage to reputation, should recover substantially more by way of damages than a Claimant who has suffered the loss of a limb or the family who has suffered the loss of a love one. The disparity among the different areas of tort just outlined is undisputable.

o A cap on non-economic damages, generally, is desirable as: 1) new and emerging media (the majority of the Jamaican landscape) are very susceptible to even modest awards of damages, 2) insurers after the Abrahams case, largely shy away from providing defamation coverage for the media and where available it is prohibitively costly, 3) it is absolutely desirable in a democracy to encourage the existence of an independent press.

The Wire Service Defence

This refers to the provision of a defence where the publisher is reprinting or distributing verbatim or near verbatim text from a reputable wire service. Where it exists, it generally operates if:

1. You republish a news item from a reputable news agency;
2. You did not know the information was false;
3. The news item on its face does not indicate any reason to doubt its veracity; and
4. You do not substantially alter the news items when republishing it.

There was majority agreement within the Libel Review Committee that such a defence should be introduced into Jamaican law although the matter was inadvertently omitted from the report (see Appendix 1).

The thinking behind this defence is that the established wire services such as the Associated Press and United Press International have been proven to be so reputable and accurate in their reporting that other publishers should reasonably be able to depend upon the accuracy of their reporting.

In today's world, the public clamours to get global information as soon as the information is available and media houses are "pelted" with complaints when news is "stale." Where information is picked up from a reputable source, the law should provide protection for the secondary publisher.

Appropriate Standards for Public Officials - Adopt the NY Times v. Sullivan Approach (pp. 27-35)

On the question of the appropriate standard for public officials, the MAJ and the PAJ are firmly joined in the view that the New York Times v. Sullivan approach should attain the force of law in Jamaica. This is discussed further below.

1. The essence of the Sullivan Approach:

Public Officials often misinterpret the Sullivan approach to mean the media and the public are free to defame public officials, that is not so. The rationale behind the decision is 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." [Sullivan Case]

- a. Damages cannot be awarded to a public official for defamation relating to his official conduct in the absence of proof of actual malice.
- b. The case shifts the burden of proving actual malice to the public official before the article is determined to be defamatory.

2. Public Officials and persons who are agents of the people should be freely criticized by citizens to whom they are accountable. They must tolerate a greater degree of criticism. This is essential to the concept known as "democracy". In the absence of the freedom to openly criticize government bodies and officials what is left is a breeding ground for corruption and the

abrogation of other Constitutional Rights.

a. Public Officials oftentimes offer themselves for the post held thus making himself a servant. It should be understood at the time of taking office that the public interest supersedes the right to privacy.

b. Public Officials are trustees of the power, authority over national resources and authority over the citizenry. Any abuse of those powers would have catastrophic consequences.

3. Advantages of the Sullivan Approach:

a. Promotes good governance and performance of public officials by encouraging transparency and accountability.

b. Promotes a reduction in corruption

c. Aids in the preservation and advancement of democracy

d. Preserves freedom of expression and uninhibited public debate.

e. Sullivan Approach stands to benefit the public most. It is the public's interests which will be protected.

f. Removes the fear of defamation suits being initiated against media houses by public officials, thereby strengthening the media's role as "watch dog" of the tenets which underpin our democracy.

Just who should constitute a "public official" is of course a matter that would have to be clearly defined or left to our capable Jamaican judges to determine over time. The issue of who constitutes a public official is an area that has been litigated over and over and there is much guidance in the literature. Below the MAJ and PAJ attempts to offer some guidance.

EXISTING DEFINITIONS OF "PUBLIC OFFICIAL"

"Public official" means any person holding a legislative, executive, administrative or judicial office, whether appointed or elected; any other person who performs a public function or provides a public service; any other person defined as a public official in the domestic law."

[See: United Nations Convention against Corruption – Article 2(a)]

Public official means any official or employee of the State or its agencies including those who have been selected, appointed or elected to perform activities or functions in the name of the state or in the service of the State at any level of its hierarchy [See: African Union Convention on Preventing and Combating Corruption – Article 1]

Public official shall be understood by reference to the definition of "official", "public officer", "mayor", "minister" or "judge" in the national law of the state in which the person in question performs that function and as applied in its criminal law. The term judge shall include prosecutors and holders of judicial offices. [See: Council of Europe Criminal Law Convention on Corruption - Article 1(a)]

"Public official", "government official, or "public servant" means any official or employee of the State or its agencies, including those who have been selected, appointed, or elected to perform activities or functions in the name of the State or in the Service of the State, at any level of its hierarchy.[See: Inter-American Convention Against Corruption – Article 1]

The American position is attractive to the MAJ and PAJ. The American definition of the term embraces government officials, politicians, at least some entertainment celebrities, media personalities and heads of influential organizations. We believe that the definition should not be restricted merely to persons holding political power but also to those who occupy positions with the ability to influence public affairs by virtue of their positions and who have the capacity to effectively respond to defamatory allegations via the use of the media. This would include heads of the PSOJ, MAJ, PAJ, JTA and so on.

In the United States of America, the term, “public officials” includes not only elected public persons, but also non-elected persons who have a substantial role to play in making decisions that will affect the public. In addition, the US Supreme Court has said that public figures including political candidates, and ex-officials, must meet the same burden of proof, to succeed in a claim of defamation that is, showing the defamatory material has been printed or broadcast with knowledge of falsity or reckless disregard for the truth.

Self Regulation of the Media (p. 22)

Most media houses have in-house code of ethics.

The MA and the PAJ recognize the need for a uniformed Code of Ethics for the Media. For this reason we are in the process of finalizing a draft Code of Conduct. This draft is to be reviewed by the PAJ and finalized in short order (see Appendix 2).

The MAJ and PAJ is of the view that the reformation of the libel laws should not be dependent on the existence or non-existence of a Code of Conduct because the libel laws affect the freedom of expression of all citizens. Freedom of expression is not a right of media houses only.

The objective of libel laws is to strike a balance between the constitutional right of each citizen to Freedom of Expression with the qualified right to reputation. In that context, it is respectfully submitted that amendments proposed by the Media should not be contingent on the existence of a Code of Conduct for media practitioners.

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GARY ALLEN

CHAIRMAN OF THE MEDIA ASSOCIATION OF JAMAICA
PRESS

.....
BYRON BUCKLEY

ASSOCIATION OF JAMAICA

PRESIDENT OF THE