Seminar held on September 28, 2009 - Views on the Direction of Recommendations made in the Justice Hugh Small Report "Review of Jamaica's Defamation Laws".

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ADDRESS:

INTRODUCTION

I am asked to analyse the report and recommendations of the Small Committee on the reform of the law of defamation in Jamaica. I have chosen to do so based on the assumption that these recommendations will be accepted in whole by the Jamaica legislature; and my present concern is what implications such an acceptance will have for freedom of expression for the media in Jamaica.

We must first bear in mind however that, as laudable a notion it is in and of itself and despite its indispensable utility in the context of good governance, the nature of the freedom of expression enjoyed in a given society is not only a function of its constitutional and defamation and other laws, but is also influenced to a significant extent by the litigation culture which exists in that jurisdiction.

By litigation culture I mean both the extent to which individuals who consider themselves victims of media disparagement are prepared to tolerate this without seeking either threatened or actual redress and the extent to which the alleged wrongdoer is prepared to defend its freedom of expression by resisting a claim for redress. Of course, as in all matters of litigation, financial resources will be a cogent factor in the final decision.

In an address some years ago to the Barbados Bar Association, I made this same point by reference to the tolerance recorded to the calypso art form in T & T which is rich in its satire of public figures, a cultural trait somewhat lost in translation to Barbados; where one relatively recent case tested the claim that the calypso enjoyed some immunity in the area of defamation. Williams CJ did not agree.

The television programmes “Spitting Image” in the United Kingdom and “Saturday Night Live” in

the US are further examples of this tolerance.
Similarly, a media house might choose to settle all claims for defamation made against it, whatever the merits of these, especially when the claim is made by some state official. Conversely, you have the Times of London newspaper company which seems prepared to fight to the highest court on a point of legal principle. Of course, as I intimated earlier, money has a role to play in the ability to litigate. There is therefore a cost, in more ways than one, to exercise of the freedom of expression, it seems.
I need not reiterate the importance of this freedom however. The various literatures are replete with observations of its value to good governance. This "deadliest enemy of tyranny" has been stated in the Supreme Court of Canada to be "of fundamental importance to a democratic society and should only be restricted in the clearest of circumstances …"
And in a telling rejection of the right of a local government authority to maintain an action for defamation, Gleeson CJ in New South Wales stated:
"The idea of democracy is that people are encouraged to express their criticisms, even their wrong-headed criticisms, of elected governmental institutions, in the expectation that this process will improve the quality of (governance) … To treat governmental institutions as having a "governing reputation" which the common law will protect against criticism on the part of citizens is, to my mind, incongruous …"
Still, it is recognized and accepted and, I should say, enacted, in our Constitutions that this freedom of expression can only be exercised subject to protection for the reputations and private lives of persons concerned in legal proceedings. In this regard, the law of defamation may be rightly viewed as the outcome of the tension between freedom of expression and protection of the reputations of entities. The founding fathers have chosen, however, to cast the latter as an exception to the former, which has assumed the status of a guaranteed fundamental freedom. Hence, the critical task for any attempt at legislative reform of the defamation law must be a reduction in this tension in favour of freer expression, in the public interest, while not losing sight of the fact that one's reputation is a significant asset. It should be noted, however, that reform may also be achieved through development of the common law as the recent phenomenon of the defence of responsible journalism demonstrates. Similar considerations should also apply in this context.

THE RECOMMENDATIONS

I am going to assume further that most of you present have read or heard of the recommendations of the Small Committee. I shall not, in the interests of time, read them out, but I have classified them into three categories – Cosmetic, Modern and Radical – for the purposes of analysis. These are not mutually exclusive.

(1) **Cosmetic** – These suggested reforms have only a slight impact, if any, on increased freedom of expression for the Jamaica media. However, they are also in keeping with modern

Commonwealth defamation standards. I have included under this head -
• The abolition of the distinction between libel and slander and the institution of a single action for defamation.
• The defence of justification to be replaced by the defence of truth.
• The introduction of the defence of triviality
• The statutory defence of innocent dissemination

(2) **Modern** – Here, I have placed those reforms which are in keeping with modern Commonwealth positions but, in addition, they will loosen to some extent the restrictions on a media defendant's freedom of expression so far as defamation is concerned.
• Reduction of limitation period to one year from date of defamatory publication
• A "defence" of offer of amends for unintentional defamation
• Publication of an apology not to be construed as an admission of liability
• New remedies of declaratory and correction orders
• Jury's role to be reduced.

(3) **Radical** – These proposals go beyond any provision in the region with regard to defamation and, perhaps, the Commonwealth. These would significantly impact on media freedom of expression in Jamaica. It should be noted that only the first is included in the Small Committee's report itself, the second and third come from a letter made available to me and dated March 6, 2008, addressed to Mr. Hugh Small, QC, and Chairman of the Libel Review Committee under the names of Messrs. Oliver Clarke, Lester Spaulding and Desmond Richards.
• Abolition of criminal libel
• The institution of a " Wire-service defence"
• The capping of non-economic losses in an award of damages for defamation

I propose to commend on each one of these in turn.

1. **Abolition of the distinction between libel and slander**
Barbados effected this abolition in 1996 – section 3(1) of Defamation Act 1996 – though not in the absolute way proposed by the Committee. In Barbados, it is still necessary to prove special damage in two instances – (i) where the action is brought by certain entities; a trading corporation, a non-trading corporation, a statutory board or an unincorporated body; and (ii) in a survival action for defamation by a personal representative on behalf of a deceased person who has died without bringing an action – section 25(3).
Given the fact that all alleged media defamatory publications would have been categorized as

libel anyway, this reform is really of no significant concern for you. The distinction arose from a series of historical accidents– slander was actionable first at common law and required proof of damage unless the allegation was of such a nature that damage could be presumed – hence the slander actionable per se. Libel was at first only a crime, but then in 1670 it became actionable since, according to one case "words writ or published contained more malice than if they had been spoken …" Subsequent decisions somehow interpreted this to mean that damage was to be presumed when defamatory matter was written and published.
The major argument against reform in this area is that it might lead to a plethora of trivial actions for spoken words but this has certainly not been the subsequent experience in those jurisdictions that have abolished the distinction.

2. **Defence known as justification to be replaced by the defence of truth**
The law presumes, some argue wrongly so, that every man has a good reputation and, subject to proof to the contrary, every statement which impugns this good reputation is false. But this presumption is rebuttable, and a defendant may win its case by showing that the imputation made is true. Again this reform, at least nominally, is unlikely, in my view, to have any great impact on the current freedom of expression of the Jamaican media.
The addendum proposed by the Committee seeks to avoid the restriction posed by section 7 of your Defamation Act 1961, which provides that the defence of justification shall not fail where two or more charges are sued on by the plaintiff; if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the charges which are proved to be true in whole or in part. Now, in accordance with Barbados Act, section 7(2), the defendant would not be restricted to the charges sued on by the plaintiff but may seek to justify (or prove the truth) any of the charges contained in the publication, whether the plaintiff seeks to sue upon these or not. This is more facilitative of freedom of expression.
It should also be mentioned in this context that Barbados has changed the name of the common law defence of "fair comment" to "comment" ("honest opinion" in Ireland. No such recommendation has been made by the Committee.

Triviality
This is not a common law defence and finds expression in the Barbados Defamation Act, section 6 and the New South Wales Defamation Act 1974. It already exists in Jamaica under section 14 of the Libel and Slander Act where it serves as a mitigating factor in punishment for criminal libel by newspapers. In the civil action, it appears from the case law to be restricted to a circumstance where the defendant can show that the plaintiff was not likely to suffer any harm to his reputation at all; that is that the persons to whom the material was published already knew the facts which were disclosed. It would seem that the pre-existing bad reputation of the plaintiff is not a relevant consideration in this context. If this ruling is accepted, then the defence will usually be successful only where there is a fairly restricted and intimate publication of the defamatory material to those already in the know. It seems clear that this is not a media

defence. See King v. McKenzie (1991) 24 NSWLR 305.

Innocent dissemination

This is a common law defence which provides mechanical distributors of of defamatory material such as a bookseller, newsagent or librarian with a defence if one disseminates the work in the ordinary course of business and can establish
(a) that she did not know or ought reasonably to have known that it contained a libel; and
(b) this lack of knowledge was not due to any negligence on her part.
The Barbados Act merely extended this defence to printers who were not covered at common law – section 21. The Jamaican proposals go much further by extending the defence to, inter alia, (c) broadcasters of live programmes on the electronic media "in circumstances in which the broadcaster has no effective control over the person" who makes the defamatory statements. Of course, this means that if there is a delay system for live broadcasts, the broadcaster will not be protected under this provision and so must be doubly sensitive to defamatory statements. Barbados has dealt with this by providing that the broadcaster is not primarily responsible for the statement – section 15(5) (d) – which means that he cannot be held liable at all unless the plaintiff shows that he knew or had reason to believe that the statement was defamatory of the plaintiff AND that he had no reasonable grounds for believing that the statement could be justified or was otherwise excusable.
Clearly the Barbadian provision is more protective of the freedom of expression of the electronic broadcaster by treating it as not primarily responsible, rather than, as the Small Committee recommends, an innocent disseminator. The former goes to immunity from liability; the latter is merely a defence to liability.

MODERN

(1) **Limitation period to be reduced to one year**

This proposal is in keeping with best practice in the cosmopolitan jurisdictions. I endorse the view that the short limitation period is "supportive of freedom of expression and legitimate debate". In the information age, with the large mass of material to be absorbed on a daily basis, the idea that "right-thinking members of society" are likely to read published material many months after it is first published seems unlikely. You may have heard of the Duke of Brunswick who, on hearing that he had been defamed in a London newspaper 18 years earlier, sent a servant to find a copy in the British Museum and then sued successfully for libel. This is clearly an extreme position, but the problem for free speech in such a holding is clearly recognised. This is why there are now policy moves in the UK to reform the law in this regard so far as concerns an Internet publication. Currently, each download of defamatory material triggers a new one year limit for the victim to sue. However, it is being proposed in the UK that either only one libel suit can be brought against a newspaper or, that after 12 months online, a publication will acquire an automatic "archive" defence of qualified privilege.

(2) **Offer of amends**

The "Offer of amends" is an option available to anyone who is alleged to have unintentionally

published a defamatory statement of another UNLESS the publisher knew or was reckless that the statement referred to the aggrieved party or was likely to be understood as referring to him AND was both false and defamatory of that party. There is a rebuttable presumption that a defamatory publication was unintentional. It involves (1) the publication of a suitable correction of the statement and a suitable apology to the aggrieved party; (2) the taking of reasonably practicable steps to notify these to whom copies of the statement have been distributed that the statement is alleged to be defamatory of the party aggrieved; and (3) the payment of compensation to the aggrieved party.
Certain formalities must however be observed in the making of an offer of amends – sections 16(4)-(7) Defamation Act 1996.
Acceptance of the offer means that no proceedings for defamation in respect of the publication concerned may be brought. The amount of compensation is to be determined by a judge on the same principles as damages for defamation, taking account of the correction, apology and other steps taken by the defendant.
Non-acceptance of the offer by the victim entails that the offer may be used as a defence in any proceedings brought or relied on in mitigation of damages if not relied on as a defence at all, or not successfully relied on – see section 18(2) Defamation Act 1996 (Barbados).

(3) **Apology not to be treated as an admission of liability**
Though this goes some way in reducing the susceptibility to defamation liability of the media, a bolder step might have been to permit a retraction and/or the right of reply by an aggrieved party as a complete defence to defamation in some instances or entitled a plaintiff to only actual damage.

(4) **The declaratory order and the correction order**
While the declaratory order requires no action on the part of the alleged defamer, the correction order requires publication by the defendant of a suitable correction of the defamatory statement. Since neither of these orders involve accompanying financial consequences for the publisher of the defamatory statement, there would be little objection to their institution. In any case, application for either order is in the discretion of the aggrieved party. Consideration should perhaps be given to a circumstance whereby a judge may determine that either a declaratory or correction order suffices as redress for an alleged defamatory statement and that there is no further entitlement to damages.

(5) **Reduced role of a jury**
I am not aware to what extent the jury trial for defamation is still generally the practice in Jamaica, although the jury's presence can be rationalised on the basis that issues such as whether words are in fact defamatory and whether the defendant was actuated by malice essentially depend on the views of the ordinary person; as a member of the jury is thought to

be. However, I am not persuaded that the assessment of non-economic damages is wholly an issue of fact and in my view this should be left up to the judge alone. It is to be noted that in New South Wales the jury's role is limited to deciding whether the imputation in question was published and whether it is defamatory – section 7(A)(3) and (4), Defamation Act 1974 (N.S.W.).

See per Russell LJ in Broadway Approvals Ltd. v. Odhams Press [1965] 2 All ER 523, 540 H; "To the comparative newcomer, the law of libel seems to have characteristics of such complication and subtlety that I wonder whether a jury on retiring can readily distinguish their heads from their heels…"

RADICAL

(1) **Abolition of Criminal Libel**

Despite the strong feelings that this should be abolished, its constitutionality was relatively recently upheld in the Judicial Committee of the Privy Council in the Grenadian case of George Worme and Grenada Today Ltd. v. The Commissioner of Police. There, the Board reasoned:
"The protection of good reputation is conducive to the public good. It is also in the public interest that the reputation of public figures should not be debased falsely. Their Lordships are therefore satisfied that the objective of an offence that catches those who attack a person's reputation by accusing him, falsely, of crime or misconduct in public office is sufficiently important to justify limiting the right to freedom of expression …"
They also found that the offence was nationally connected to that objective and was limited to situations where the publication was not for the public benefit. To the argument that the tort of libel already provides a civil remedy for damages against those who make such attacks, the JCPC responded that this no more showed that a crime of intentional libel is unnecessary than the existence of a tort of conversion showed that a crime of theft is unnecessary. And to the assertion that the law had not been invoked in recent years demonstrated that it was not needed:
"After all, prosecutions are in one sense a sign not of the success of criminal law, but of its failure to prevent the conduct in question …"
Finally, they concluded that it was reasonably justifiable in a democratic society since, although some democratic societies got along without it, it was still to be found "in the law of many democratic societies such as England, Canada and Australia …"
Again, while I am not aware of the incidence of prosecutions for criminal libel in Jamaica, I am of the opinion that the existence of this offence can have a chilling effect on freedom of expression and I agree with the Committee's recommendation to abolish it.

(2) **The wire-service defence**

Given the proposed constraints on the applicability of this defence, I am in support of its inclusion in a reformatted defamation law for Jamaica. In effect, it would equate to an innocent

dissemination by the media house. Of course, in such an event, the media house must not add to, or subtract anything from the news item in such a way as to make it defamatory in a way that it was not originally. This defence may also be treated under the exculpatory rubric "Responsibility for Publication."

(3) **Capping of non-economic damages**

It may be open to question whether, in any but the most egregious cases, a large award of damages for defamation may be considered necessary and reasonably justifiable in a democratic society. The proposal for the capping of economic damages thus seems appropriate, at least in theory. The idea of a "cap" on damages for defamation was also rejected in New South Wales. Among the reasons which were found persuasive was that it might encourage excesses on the part of the media which could balance expected profits from the sale of defamatory material against a known maximum liability in damages. In Barbados, the 1996 Act provides that the judge may direct the jury and, presumably, himself, that regard may be had to the quantum of damages awarded in personal injury cases. Comparisons, as they say, are odious and perhaps in this context they are, but the general idea is the same – that there should be a limit on the award of damages for defamation.

CONCLUSIONS

The Committee did not find it within themselves to recommend the "public figure defence" for Jamaica. Although I disagree with some of their reasons for not doing so, I am of the view that the adoption of this defence achieves nothing that could not be effectively attained by a judicious application or enactment of the emerging common law concept of 'responsible journalism', familiarly known as "the Reynolds privilege".

For example, on page 31-32 of my copy of the Report, the Committee argues that "[t]he defamation law which is designed to protect the reputations of all persons in Jamaica is based on the assumption that a defamatory statement is false unless the contrary is established". This is unexceptionable. But it continues – "any legislation therefore, that seeks to identify a class of persons – such as public officials – whose reputations are not subject to the same assumption as in the case of other members of society, would deprive them of the equal treatment that section 13 of the Constitution guarantees". It is a pity that the Committee did not recognise, firstly, that section 13 does not by itself guarantee a right to equality in the methods by which reputation is to be protected and that section 20 which guarantees protection of the law only relates to those charged with criminal offences.

Similarly, at page 28, it is stated that "to apply N.Y. Times v. Sullivan, without a change in the defamation laws, would … be unconstitutional given [section 22(2) of the Constitution] which adopt the current laws of defamation and thereby entails freedom of expression to the extent of the same …" This is not immediately clear, in that it comes close to an inaccurate assertion that the Constitution fixes the common law at the time of its enactment. This is plainly not the case. It is correct to say that if the freedom of expression is limited for the purpose of protecting the reputation of others then such action would not be unconstitutional, but it does not necessarily hold the other way that if freedom of expression is broadened with the consequential effect of

reducing the protection afforded to people's reputations, then it is perforce unconstitutional. Indeed, that is the very exercise we are currently engaged in.
I agree however, that the Reynolds privilege does strike a fair balance between protection of reputation and the freedom of reputation in that it is restricted to matters of "public interest". This is adequate to cover much of the behavior and actions of that most public of our public figures, the politician.
Finally, while the Committee must be applauded for producing what I consider to be the skeleton of a modern defamation law which corresponds with international best practices and significantly broadens the freedom of expression guaranteed to the Jamaican media, some regret may be expressed at the omission to tackle the bugbear of defamation media defendants, the absence of a speedy, cheap and effective mechanism to resolve disputes.

In such an environment as we have now, the "gagging writ" will thrive, and the mere threat of a defamation action, no matter its merits, will suffice to keep the media in line. Consideration should perhaps be given to the summary disposal of a defamation suit against a media house if a claim that publication was in the public interest was made; once this issue is resolved there should be there prompt resolution of whether the publication was protected. But these, along with the right of reply in the aggrieved party are issues, I believe, for future discussion. The struggle continues.