REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 252 of 2014

BETWEEN

FAAIQ MOHAMMED

APPELLANT

AND

JACK AUSTIN WARNER

RESPONDENT

PANEL:

P. JAMADAR, J.A.

G. SMITH, J.A.

P. MOOSAI, J.A.

DATE OF DELIVERY: Wednesday, 22nd May, 2019.

APPEARANCES:

Mr. A. Ramlogan, S.C., Mr. A. Pariagsingh and Ms. S. Samaroo on behalf of the Appellant.
Mr. K. Scotland, Ms. A. Watkins-Montserin and Ms. J. Chang on behalf the Respondent.

JUDGMENT

Delivered by Jamadar J.A.

INTRODUCTION

"Politics has its own morality."[1]

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[2]

[1] The constitutional rights to express political views and to freedom of thought and expression are not absolute. Neither do they exist in isolation, separate and apart from other fundamental rights and freedoms and constitutional values.[3] Rights carry responsibilities. To achieve peace, progress and stability on the one hand and to avoid anarchy on the other, in a society of free persons each enjoying the benefit of equal and inalienable rights, does require that these "rights would have to be importantly qualified by considerations relating to other people".[4]

[2] Thus, constitutional rights and responsibilities coexist in the overall framework of the law of the land, and while constitutional rights and values are hierarchically supreme,[5] they are intended to function in a harmonious and evolutionary tension with all other laws. They must therefore all serve the common and

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[1] Basdeo Panday, former Prime Minister of Trinidad and Tobago. The statement was first made on a political platform during the 2002 General Election campaign. Panday was at the time the political leader of the UNC. "At the time of the original statement, the UNC had their back against the wall with allegations of corruption flying left, right and centre. I immediately recognised the expression as a signature statement, and actually wrote it down. ... Some statements are immortalised by a community because they capture a certain essence that is almost ontological, or as the French would say "Les mots justes"."
- C.K. Fergus, Department of History, UWI, April 2005. This statement of Panday has entered the political lexicon of Trinidad and Tobago, and is often repeated as: 'politics has a morality of its own'.

[2] Article 1, Universal Declaration of Human Rights, 1948.

[3] **Panday v Gordon** [2005] UKPC 36. **Affaire Radio France et autres v France** [2007] ECHR 127.

[4] The Challenge of Human Rights; J. Mahoney, Blackwell Publishing, 2017, at page 74.

[5] Section 2 of the Constitution.

developmental good of the society. Constitutional rights, in the open ended and unconstrained way in which they are stated in the Constitution,[6] can therefore be legitimately curbed and restrained, even as they also function to shape and fashion the interpretation and application of all other laws and governmental (public authority) actions.[7] Such is the nature and efficacy of the rule of law in a constitutional democratic State like Trinidad and Tobago. Human rights and human responsibilities have to be held delicately in balance, if both are to have any real meaning.

[3] For example, even as the Constitution provides that there is a fundamental right to freedom of movement,[8] persons cannot just go wherever they want. If someone enters onto another's property without consent and is not otherwise justified, that may constitute the tort of trespass to property. So also, freedom of movement would hardly permit an unlawful and unwarranted tortious assault on (trespass to) the person.

[4a] Furthermore, the core Preambular constitutional values and principles of "the dignity of the person"[9] and of 'freedom'[10] and the 'respect for the rule of law',[11] which the Constitution purports expressly to enshrine,[12] are values and principles which can enjoy the implied constitutional status bestowed by section 2 of the Constitution as the supreme law of Trinidad and Tobago. This is because clause (e) of the Preamble reveals the intention of both the People of Trinidad and Tobago and the Constitution itself, that these core constitutional values and

[6] Sections 4 and 5.
[7] See, for example, Sections 6 and 13 of the Constitution. And see also, **Attorney General v Dumas** [2017] UKPC 12, and **Dumas v Attorney General**, Civ. App. No. P 218 of 2014.
[8] Section 4 (g).
[9] Clause (a) of the Preamble of the Constitution.
[10] Clauses (a) and (d) of the Preamble of the Constitution.
[11] Clause (d) of the Preamble of the Constitution.
[12] Clause (e) of the Preamble of the Constitution.

principles be enshrined.[13] Together, these three core constitutional principles intersect and point towards another unarticulated and *a priori* constitutional value, the fundamental right of each human being 'to be'; that is to say, to be as an 'I AM', for whom dignity and freedom are inherent.[14] And these particular Preambular values and principles, also function constitutionally as an aid to informing the content, interpretation and application of the actual declared fundamental rights.[15]

[4b] Additionally, the Constitution expressly declares "the right of the individual to respect for his private and family life".[16] This fundamental entitlement to respect for the individuality of the person, to respect for personhood itself,[17] surely encompasses respect for an individual's character and reputation.[18] This right to

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[13] Omnia praesumuntur rite esse acta.

[14] It is because we are all first and foremost 'I AMs' and free, that any individual can have a right, 'to due process', 'to equality', 'to protection of the law', 'to privacy', indeed, to any fundamental rights. An individual exists as such, not because some other bestows recognition or approval, but because each individual is fundamentally an 'I AM'. This is what must be inferred, when it is declared that "All human beings are born free and equal in dignity and rights". Notice how clause (a) of the Preamble to the Constitution, also links these three values and principles, freedom, dignity and rights, thereby paralleling Article 1 of the UDHR. To be born free and with dignity, is as much an ontological assertion, as it is a statement of observation. This is certainly true from a Kantian perspective on and interpretation of 'dignity' – dignity as inherent to the human and not dependent on any external valuation, that is, ontological dignity. (cf Hobbs, for whom dignity is the value one has to others.) Indeed, what makes Human Rights, **human** rights, is their foundation in the Preambular values of "the dignity of the human person" and freedom. To be human, is to have dignity. To be human, is to be free. To have inherent dignity and freedom, is to have rights. Human Rights thus arise, as rights inherent to the state of being human. See also, Erk, Christian, 'What makes a Right a Human Right? A Theory of Human Rights', in Schweidler, Walter (Ed.), Human Rights and Natural Law. An Intercultural Philosophical Perspective, sections 3 and 4.

[15] See **Dumas**, CA, (supra); and, section 11 of the Interpretation Act, "The preamble to a written law shall be construed as a part thereof intended to assist in explaining the purport and object of the written law."

[16] Section 4 (c).

[17] Which is justifiable, inferentially, by reference to the Preambular value of dignity; understood as ontological dignity.

[18] Existentially, to the extent that freedom of expression is an inherent human right simply because it exists, the right to respect for the dignity and individuality of a person should also enjoy a similar status. Indeed, the individual right to freedom of expression only arises, because there is an individual who is entitled to enjoy that right, an individual with inherent dignity and freedom. See also, **Affaire Radio France et autres v France** [2007] ECHR 127, paragraph 31, "… the right to protection of one's reputation is of course one of the rights guaranteed by Article 8 of the Convention, as one element of the right to respect for private life". Article 8(1), European Convention on Human Rights: "Everyone has the right to respect for his private and family life, his home and his correspondence". The Strasbourg Court has affirmed that an individual's right

privacy is thus not only negatively aimed at prevention of unjustifiable invasion, but also positively to the enjoyment of the fullness of what the right contemplates. This is what the Constitutional principle of the protection of the law intends.[19] In this case, the enjoyment of the fullness of the benefits of freedom and respect, freedom and respect in relation to the autonomy and enjoyment of one's good character and reputation.

[4c] Thus free speech - freedom of thought and expression, even in the political 'Gayelle', is constitutionally to be held in balance with the protection of the freedom and dignity of the person and to the right to respect for the individual. As a matter of principle, all of these sets of constitutional values and rights deserve special, if not equal, constitutional regard and respect.[20] And, it is the task and duty of courts, as the ultimate guardians of the Constitution, to uphold these constitutional rights and values, and in so doing, to uphold the supremacy of the Constitution and thereby the rule of law.[21] Therefore consequentially, though not by virtue of any declared constitutional value or right *per se*, but derivatively, free speech is also subject to the restraint of unlawful tortious assaults on the character of a person by untrue, unwarranted and/or unjustifiable defamation.

[5] The tort of defamation can be no less injurious than that of assault to the person, though in very different ways. Both can cause pain, suffering and distress. Both

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to a reputation is not just a Convention value, it "is among the rights guaranteed by Article 8 of the Convention".

[19] **The Maya Leaders Alliance et al v The Attorney General of Belize** [2015] CCJ 15 (AJ). And see section 4(b) of the Constitution.

[20] Structurally, the right of the individual to respect for his private life (4(c)), follows immediately after the declarations in relation to the right to life, liberty, security of the person and the enjoyment of property (4(a)), and the right to equality and protection of the law (4(b)).

[21] See **AG v Dumas** [2017] UKPC 12, at paragraph 15. Certainly, if there is to be no literal equalization of Preambular values and principles on the one hand, and specifically declared rights on the other (as say, in sections 4 and 5 of the Constitution), there ought, at minimum, to be due recognition of the special constitutional status and function of these core Preambular values and principles. See **Dumas**, CA, (supra); and, section 11 of the Interpretation Act, "The preamble to a written law shall be construed as a part thereof intended to assist in explaining the purport and object of the written law."

can result in irremediable trauma and damage to a person. In a democratic society governed by the rule of law, neither one of these two torts enjoys some utterly special or privileged status, which places either in some unreachable position above or beyond the rule of law. Freedom of expression, even in the political arena, is subject to the rule of law. The law must both protect free speech and also prevent the unjustified (ab)use of free speech to harm and violate others.

BASIC BACKGROUND FACTS

[6] This appeal arises in the context of the October 2013 Local Government Elections in Trinidad, specifically in relation to the Borough of Chaguanas. At that time, the Respondent (Jack Austin Warner) was the interim political leader of the ILP. He had formerly been a member of the UNC, had won the Chaguanas West constituency as such (2010) and had thus been a UNC Member of Parliament, Minister of Government (acting as Prime Minister on occasion) and member of Cabinet, until he resigned in acrimonious circumstances from all portfolios in April 2013. In July 2013 the Respondent formed his own political party, the ILP, and declared himself its 'Interim Political Leader'.[22] His intention was to compete against his former party the UNC and all other political parties in Trinidad and Tobago.

[7] In September 2013 the Appellant (Faaiq Mohammed), a practicing and well known Muslim, who was also a well-known community activist and charitable worker in Chaguanas, was invited to be the IPL's candidate for the Charlieville Electoral District, in the Borough of Chaguanas. He agreed, and this was his first venture into national politics in Trinidad, albeit at the local government level. He was also a young and budding businessman in the manufacturing sector, and with this

[22] Paragraphs 5-6, Appellant's Witness Statement, filed 14th April, 2014. There was no cross-examination of the Appellant; this and all of the Appellant's evidence is therefore unchallenged.

candidacy, now a political neophyte. In October 2013 he won the election and became the IPL representative for Charlieville.

[8] Local government elections in Trinidad are run on a proportional representative basis. As a consequence, the three main competing parties, the ILP, UNC, and PNM, each secured equal (elected and non-elected) representatives to the Chaguanas Borough Corporation (CBC). The election of aldermen and a Presiding Officer for the Council of the CBC therefore had to be done in the context of this deadlocked position. A single vote would make a difference. A difference that would also have implications for who would eventually be appointed Mayor of Chaguanas, and which party would have controlling power in the CBC. Thus the balance of power among the competing political parties was metaphorically on a knife's edge.[23]

[9] The Appellant was sworn in as a Councillor in the CBC on the 1st November, 2013 and on the 6th November, 2013 at a meeting of the CBC, the election of a Presiding Officer for the Council took place. That meeting attracted widespread media coverage and was broadcast live nationally and thereafter repeatedly on both the 6th and 7th November. The drama of the moment captured the attention of the Nation. Indeed, the political stakes were very high. In the end, the Appellant did not vote for the IPL nominee (Ms. Isahak), but did so for the UNC nominee (Ms. Mohit). It is unchallenged on the evidence that the Appellant did so "... having regard to the large number of complaints which I had received against Ms. Isahak from Burgesses while on the campaign trail".[24] And because: "At the said meeting, I voted as my conscience guided me and what I believed to be in accordance with the wishes of the people of the Electoral District of Charlieville."

[23] Historically the UNC controlled Chaguanas and many political pundits considered it a UNC 'safe seat'. Indeed, the Respondent had won the Chaguanas seat in the 2010 General Election on a UNC ticket. And, in 2013 his new ILP and the UNC were locked in a gargantuan battle for control of the Borough of Chaguanas, in what would also be a prelude to a contest for the Chaguanas seat in the upcoming 2015 General Elections.
[24] Paragraph 33, Appellant's Witness Statement, supra.

The Appellant also asserted, unchallenged, that the Respondent's choice of Ms. Isahak had "... attracted much opposition from persons in the Borough of Chaguanas" and had resulted in "a petition to this effect" signed by some 600 persons of the area, and that "this petition was presented to the (Respondent) as interim political leader of the IPL".[25]

[10] The consequence of the Appellant's support for the UNC nominee and his choice not to support the IPL nominee and in so doing break ranks with his own political party, was, as it is said colloquially in Trinidad and Tobago, "all hell break loose!". The IPL interim leader, the Respondent, was furious. He gave public and unrelenting vent to that fury. He did so by defaming the Appellant, alleging that he had voted as he did because he had been "offered $2.5 million."[26] The barrage began on the very day, the 6th November, with a press conference called by the Respondent. At that press conference the Respondent stated,[27] among other things:

> "He (the Appellant) was offered $2.5 million. I have the documents. I have the deed and so on and he was told that if he goes and gives them the Mayorship and support the Presiding Officer he will be given this money. I am advised he was advanced half the sum and the other half after today's meeting ...
>
> I told him this morning 'boy, you are a young man, don't spoil your career ... under Muslim this kind of thing is wrong, son.' He swore to me on the Qur'an it's not true; they have just spoilt a young man, his career is finished, his political career is finished.

[25] Paragraph 23, Appellant's Witness Statement, supra.
[26] Paragraph 34, Appellant's Witness Statement, supra.
[27] Paragraph 34, Appellant's Witness Statement, supra.

> If a Muslim young man sells his soul for money, ... I am sorry for him, not for me, and I am sorry for the UNC ...
>
> When he refuse to vote for our Presiding Officer, it was confirmed and we shall deal with him in the fullness of time."

[11] What in fact transpired thereafter was the fulfilment of the Respondent's threat, made on the 6th November, to "deal with him in the fullness of time" and to do so in order to ensure that "his political career is finished." This the Respondent set about to achieve immediately, by sustained, vicious, untrue and unjustifiable assaults on the character and identity of the Appellant. The effects on the Appellant's reputation were immediate, destructive and long lasting. The trial judge determined this to be so. I agree. The unchallenged evidence supports these findings.[28]

[12] This appeal therefore also concerns the conscious, intentional, wilful and relentless defamation of the Appellant by the Respondent over a continuous period of seven days,[29] in circumstances where there has been absolutely no evidence to show any truthfulness in or justification for the statements made and repeated. And, in circumstances where no offer to apologize or apology has ever been made. Indeed, in circumstances where upon receipt of the Appellant's pre-action protocol letter which called for, among other things, an apology and retraction, the undisputed evidence is that the Respondent at a well-publicised media conference called by him at his political party headquarters, stated: "If I did

[28] See, paragraphs 23, 24, 27, 35, 37, 62 "The defamatory remarks ... were pernicious and of extreme seriousness", 63, 64 "a personal and ad hominem attack", 65 "the sting of corruption may last forever", "there were severe and negative effects on the Claimant", 68 "this defamatory publication had a sinister and poisonous effect", 69, 70 "he was frightened, embarrassed and distressed", 73 "direct personal attacks which continued unabated", 88 "the high handed and oppressive nature of the attacks", "It was an act of revenge and to gain political mileage", of the judgment.

[29] From the 6th to the 12th November, 2013.

not have to give it (the pre-action protocol letter) to my lawyers, I would throw it in the dustbin."[30]

[13] In the final analysis, the Respondent at the trial of this matter conceded liability, chose not to cross-examine the Appellant or his witnesses, produced not an iota of evidence to either support his allegations or to justify them, and ended up only contesting the assessment of damages.[31] Even if politics does have its own morality, so does the law - a morality grounded in the rule of law. Indeed, without due regard and respect for the full benefits of Human Rights, there is in fact no real rule of law.[32]

THIS APPEAL

[14] This appeal is therefore essentially about the review of the trial judge's assessment of damages for defamation. The Appellant contends that both the awards for general and exemplary damages are too low. The Respondent argues that no award should have been made for exemplary damages, and that the award for general damages is too high. He also challenges the judge's order for costs.

[15] The assessment and award of general damages for defamation by a trial judge, being at large, ought not to be too readily interfered with on appeal, and in principle only varied where it has been demonstrated that the trial judge: (i) acted on a wrong principle of law, such as taking into account irrelevant factors and/or disregarding relevant ones; (ii) misapprehended the facts; and/or for these or any other reasons (iii) awarded an amount that was either so disproportionately high

[30] Paragraphs 53-55, Appellant's Witness Statement, supra. And, paragraph 72, judgment.
[31] However, in written submissions filed in this appeal, it is still asserted: "At all times the Respondent actively defended this matter and the assertions of the defence had always been that the Respondent either knew or honestly believed same to be true." - paragraph 47, submissions filed on the 3rd August, 2018. And, paragraph 74, judgment.
[32] Sir Stephen Sedley explains, and I agree, that, "the bedrock of respect for individual rights … is a requisite of the rule of law." See. 'The Rule of Law and Democracy', in World of All Human Rights, Universal Publishing.

or low in relation to all relevant considerations, that it is a wholly erroneous estimate of what is properly due.[33] The award and assessment of costs is generally a matter of judicial discretion,[34] and unless the trial judge can be shown to be plainly wrong this court ought not to interfere with his decision.

ISSUES

[16] The issues are therefore straightforward:

(i) Are there any grounds upon which the trial judge's assessment of general damages can be reviewed, whether upwards or downwards?

(ii) Can exemplary damages be awarded in this case for the tort of defamation? And if so, are there any grounds upon which the trial judge's assessment of exemplary damages can be reviewed and increased?

(iii) Was the trial judge's order for costs plainly wrong? And if so, what is an appropriate order?

DISPOSITION

[17] First, in my opinion the trial judge's award for general damages (TT$200,000.00) was disproportionately and excessively low, having regard to the particular and undisputed egregious circumstances of this case. An appropriate award is TT$500,000.00, which includes an uplift for compelling aggravating factors. Second, the trial judge was right in determining that this is a case in which exemplary damages for defamation can properly be awarded. However in my opinion, the trial judge's award (TT$20,000.00) was also disproportionately and excessively low. An appropriate award is TT$150,000.00, which is intended to serve as both punishment and deterrence, over and above the award for general

[33] See, **Glen Lall and Publishing Co. Ltd. v Walter Ramsahoye** (2016) CCJ 18 (AJ), paragraph 19. And see also, **Barnard v Quashie**, Civ. App. No. 159 of 1992, per de la Bastide CJ, "The gap between what the court of appeal considered to be within the range of a proper award, and the award actually made by the judge, must be so great as to render the latter a wholly erroneous estimate of the loss suffered." (At page 4.)

[34] See Rules 67.2, 67.11, and 67.12, CPR, 1998.

damages. Finally, the trial judge's approach to the issue of costs has not been shown to be plainly wrong, it stands.

GENERAL DAMAGES

18. In July 2014, the trial judge awarded the Appellant TT$200,000.00 in general damages which included an uplift for aggravated damages. The Respondent asserts that the judge erred by: (i) placing the Appellant "in an excessively high range of $150,000.00 - $200,000.00"; (ii) taking into account "extraneous matters with regard to aggravating factors"; and (iii) "failing to properly take into account mitigating factors."[35] The Appellant contends that the errors of the judge were that he: (i) wrongly asserted and assumed that the Appellant "contends that an award of $275,000.00 is a fair award inclusive of aggravated and exemplary damages";[36] (ii) placed the Appellant in too low a range; (ii) inappropriately considered "the realities of our 'political gayelle'" as a relevant factor and consideration in this case;[37] (iv) improperly considered as a relevant self-check in this case "awards in personal injury cases", and in any event failed to disclose which such cases he considered relevant[38]; and (v) lost sight of his responsibility in law to compensate the Appellant in monetary terms in assessing damages for defamation and got disproportionately carried away with his biased consideration of restorative justice principles and the unsuitability of monetary compensation to vindicate a loss of reputation.[39]

[35] Paragraph 11, submissions filed on the 3rd August 2018.
[36] Paragraph 43, judgment.
[37] Paragraph 77, judgment.
[38] Paragraph 83, judgment.
[39] Paragraphs 7, 8, 90 "Here too the damages remedy is quite an ineffective tool for the purpose which it is said to achieve", 91-109, judgment.

CHOOSING AN APPROPRIATE RANGE, DETERMINING QUANTUM

An Appropriate Range

[19] It is agreed that awards of general damages for defamation must be considered in light of prior comparable awards. This allows for the fulfilment of the desirable policy of a measure of certainty and consistency in awards for damages, accepting that every case is unique and that comparable awards are never finally determinative. This is especially so in relation to the tort of defamation, in which injury to reputation is so idiosyncratic, that comparable cases are always only guides. Thus, unless there is a sufficient pool of comparable cases, there may be little real value in the exercise. It is also agreed that on appeal: "It is well settled that before an appellate court will interfere with an award of damages it will require to be satisfied that the trial judge erred in principle or made an award so inordinately low or so unwarrantably high that it cannot be permitted to stand."[40] Furthermore, in determining whether to interfere with a trial judge's award of damages, it is accepted that there is a "generous ambit to be accorded to the judge."[41]

[20] The trial judge's choice of range was all together too low when one takes into account the undisputed material facts in this case and comparable prior awards. To the extent that this choice of range limited the judge's discretion in determining an appropriate quantum of damages, which is apparent from his analysis, the judge took into account an irrelevant consideration and erred in principle.

[21] In this case the central defamatory allegation against the Appellant is one of corruption in public affairs, in that it was alleged by the Respondent that the

[40] **Calix v AG of TT** [2013] UKPC 15, at paragraph 28.
[41] **Glen Lall and Publishing Co. Ltd. v Walter Ramsahoye** (2016) CCJ 18 (AJ), paragraph 26.

Appellant voted for a UNC nominee, against his own ILP party's nominee and its interests, because he was offered and accepted a monetary bribe.[42] It goes without saying that any such conduct as alleged is the antithesis of integrity in public life, undermines the democratic process, betrays the most fundamental premise of representative government, and erodes public trust and confidence in governance. [43] Corruption in public affairs in the form of bribe taking is one of the most egregious forms of public corruption. The allegation however, also had an insidious innuendo, which attacks the Appellants identity as a practicing Muslim and seeks to denigrate him in this regard.[44] Such a sinister attack in multi-religious and multi-ethnic Trinidad and Tobago is both socially and politically divisive and destructive. Both politics and society in Trinidad and Tobago suffer from tensions and long standing historical and sociological divisions along ethnic and religious lines.[45] The trial judge recognised most of this and made several findings and comments about it.[46]

[22] In my opinion, the cumulative nature, extent and effects of the defamatory statements in this case, make the libel a most serious one.[47] One that at the very least is comparable to those in the upper bracket of prior awards in Trinidad and Tobago. Indeed, one that stands out among the recorded cases in Trinidad and Tobago.

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[42] At times it was asserted to be $2.5M, and then on other occasions $5M.

[43] In Trinidad and Tobago there is an Integrity in Public Life Act, which asserts among other things, that public officers "shall not directly or indirectly use their office for private gain", and shall conduct their affairs so "as to maintain public confidence and trust in their integrity".

[44] See section 4 (h) of the Constitution, which affirms freedom of conscience and religious belief as among the bundle of rights that are fundamental to the individual; and see **Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc. et al v Attorney General**, H.C.A. No. Cv. S 2065/2004. Religion is as much a matter of identity, as it is about beliefs, customs and practices. In fact, these latter features inform and shape both personal and group identities.

[45] See **Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc. et al v Attorney General**, H.C.A. No. Cv. S 2065/2004.

[46] See paragraphs 22-23, 62, 64, 65 and 68, judgment.

[47] See also, paragraph 62 "The defamatory remarks ... were pernicious and of extreme seriousness", judgment.

[23] In June 2014 the Court of Appeal delivered a judgment in **Trinidad Express Newspapers & Ors. v Conrad Aleong.**[48] The unanimous judgement was written by Rajnauth-Lee JA (now JCCJ) and I was a part of the panel. The general damages awarded by the trial judge Bereaux J (now JA) were found to be inordinately low and were revised up from TT$450,000.00 (in July 2010) to TT$650,000.00 (the trial judge's award of TT$200,000.00 as exemplary damages was upheld and confirmed). The defamatory statements were contained in seven articles and spread over the course of five weeks. They were part of an investigative journalist series. They concerned Aleong's stewardship as CEO of the National Airline BWIA, a State enterprise. Aleong was an experienced and successful accountant who enjoyed a good reputation. The trial judge summarised the import of the allegations as follows: "The overall impression of the claimant conveyed by the articles to the reasonable reader, was that he was a dishonest and devious man who had manipulated the airline's accounts to declare profits which were in fact fictitious, so as to get an undeserved bonus, who sold the valuable assets of BWIA for his and other persons' private gain, who engaged in deals, smear tactics and personal vendettas."[49] Clearly this was a case of alleged corruption in public affairs.

[24] In April 2014, in **Julien v Trinidad Express Ltd.**, Rampersad J awarded the sum of TT$450,000.00 (as well as exemplary damages of TT$150,000.00), for defamatory statements made about the Chairman of the University of Trinidad and Tobago - UTT (a State entity), which suggested that he was mismanaging public funds in an illegal and corrupt manner.[50] This was also a series of investigative articles (five) which focussed on Kenneth Julien, who was at the time a chartered engineer, President of UTT, had served on several State Boards in the highest capacities, and who had been awarded the Nation's highest civilian award in 2003, the Trinity

[48] Civ. App. No. 122 of 2009.
[49] Paragraph 51, judgment of the trial judge; paragraph 33, judgment of the Court of Appeal.
[50] **Julien v Trinidad Express Ltd & Ors.**, CV 2007-00348.

Cross, for his "leadership role in national economic development". Again this was a case of alleged corruption in public affairs.

[25] In February 2014, in **Rowley v Annisette**, Boodosingh J awarded general damages in the sum of TT$475,000.00 (which included an uplift for aggravation), for defamatory statements published on two consecutive days (8th and 9th October, 2009), that suggested that the then Leader of the Opposition and political leader of the PNM, Dr. Keith Rowley, was involved in corrupt transactions involving abuses of office and improper conduct as a public official.[51]

[26] In July 2013, in **Mohammed v Trinidad Express Ltd**., Gobin J awarded general damages in the sum of TT$325,000.00 (which included an uplift for aggravation), for defamatory statements that suggested that Nizam Mohammed, a senior attorney-at-law, former Member of Parliament and Speaker of the House of Representatives, had been referred to the Disciplinary Committee of the Law Association of Trinidad and Tobago, "which made an order against him". This was in fact not true. It was a one-off publication, and the following day the newspaper published a correction and apology - "It was not Mohammed ... The error is regretted."[52]

[27] In July 2012, in **TnT News Centre Ltd V Rahael**, the Court of Appeal[53] reduced an award of general damages from TT$400,000.00 (made in November 2006) to TT$250,000.00, in a case in which there was no evidence filed by either party and therefore none led as to the extent of the injury to the Claimant's feelings and reputation. The assessment was based on the pleadings, the published article, and a benign agreed statement of facts. The allegation was that the Claimant, John Rahael, who was the then Minister of Health and a Member of Parliament, was

[51] **Rowley v Annisette**, CV 2010-04909.
[52] **Mohammed v Trinidad Express Ltd. & Ors.**, CV 2011-00264.
[53] **TnT News Centre Ltd. v Rahael**, Civ App. No. 166 of 2006.

involved in the drug trade. This was the bald and bare assertion that the courts considered. There was "no evidence that the Respondent had suffered any damage".[54] The allegation was also contained in a single newspaper article. It was considered an extremely serious libel.[55] The assessment was therefor based on the presumption of damage. [56]

[28] Kangaloo JA delivered the unanimous judgement of the Court of Appeal, and at paragraph 21, stated:

> "In my view an award of $250,000.00 would be more appropriate in the circumstances of this appeal. Such an amount would affirm the court's recognition that an allegation that a person is involved in the drug trade is an extremely serious libel. However in the absence of any direct evidence as to the full extent of the injury to the Respondent's feelings and reputation, the award of the judge cannot be justified. ... If there were evidence which demonstrated the full extent of the injury to his feelings and his distress over and above what can be assumed, this award would have been higher and the sum of $400,000.00 or more might have been justified."

[29] Other relevant cases in relation to the upper end of an appropriate range are; **Montano v Harnarine** (March 2012),[57] where an allegation that a senior attorney-at-law, Robin Montano, who was involved in local politics and public affairs, was a racist ("... I will publish a nasty racist letter that Robin Montano write me ..."), justified an award of TT$250,000.00 general damages (no aggravating features, statements made on a single radio programme). And, **Panday v Gordon** (October 2015, PC),[58] where an allegation that a prominent citizen, political activist and

[54] Paragraph 8, CA.
[55] Paragraph 21, CA.
[56] Paragraphs 17 and 21, CA.
[57] **Montano v Harinarine**, CV 2008-03039.
[58] [2005] UKPC 36.

successful businessman, Kenneth Gordon, was a 'pseudo racist', justified an award of TT$300,000.00 (October, 2003, CA; reducing an award of TT$600,000.00 (October 2000). The statement was made once at a public political meeting and re-published in newspapers and the electronic media. The Privy Council upheld the trial judge and the majority of the Court of Appeal in their findings that the statement made was defamatory and constituted a serious libel.[59] There was no evidence of pecuniary loss, no allegation of corruption, and no evidence of any psychological injury.[60] Yet, the Privy Council approved and upheld the Court of Appeal's finding that there was "no doubt whatsoever that (Mr. Gordon's) feelings were seriously injured and his reputation tarnished to some extent."[61]

[30] All of these cases are examples of allegations of corruption and misconduct against persons holding political office, or actively engaged in public life and/or in local politics, which were held to be defamatory (strictly speaking, the **Montano** and **Panday** decisions are not 'corruption' cases *per se*, as they both concern allegations of racism). All were relatively recent, at the time that the trial judge made his assessment (July 2014). Indeed, some were within six months of his decision. Yet the trial judge determined that the upper end of a comparable range was TT$200,000.00. From the cases above, and adopting an objective comparative approach to range determination (there being a sufficient sample to do so), the appropriate upper end of the relevant general damages range (exclusive of any consideration of exemplary damages) should not have been less than about TT$550,000.00. Therefore the trial judge's estimate of an appropriate range was wholly erroneous and excessively low.

[59] Paragraphs 29 and 30, PC judgement.
[60] Paragraph 29, PC judgment.
[61] Paragraph 30, PC judgment.

[31] The Respondent contends that the trial judge's choice of range was too high, and suggests that an appropriate comparative range was TT$50,000.00-TT$150,000.00. I disagree. Certainly the upper limit of the trial judge's range was much too low, as explained above.

[32] The Respondent argues that, using the **Nizam Mohammed** award (TT$325,000.00) as a comparator: "It is noted that the Appellant is relatively early in any form of his professional career, a neophyte in his political career, and will thus receive a nominal amount in comparison to the awarded $325,000 to vindicate his name".[62] He also contends that neither the **Panday** nor the **Rahael** awards are proper comparators, because in both of those cases the persons defamed were of 'greater prominence'.[63] He suggests that the award in **Sakal v Carballo**,[64] (TT$50,000.00, awarded in November, 2012), is the best available comparator.[65]

[33] Gita Sakal was an attorney-at-law and General Counsel/Corporate Secretary of a private financial institution (CL Financial/CLICO), that was in financial crisis at the time and the subject of inquiry. The defamatory allegation was contained in an article published once in a Sunday newspaper. The offensive parts accused her of forgery and fraud in relation to an alleged letter authorising the payment of US$5,000,000.00 to her. The trial judge in his assessment of the evidence presented, detailed his several concerns about the transactions that were written about, [66] and summarised his specific concerns in relation to the US$5,000,000.00 transaction as follows: "What the evidence showed, however, were unsettling features about the nature of communications in the organisation in question, how payments were justified and how instructions were given. The fact that the Claimant would sign off on a US$5,000,000.00 payment to herself is itself

[62] Paragraph 36, Respondents Written Submissions, supra.
[63] Paragraphs 37 and 38, Respondent's Written Submissions, supra.
[64] CV 2009-02468.
[65] Paragraphs 37 and 38, Respondent's Written Submissions, supra.
[66] Pages 17-20, judgment.

remarkably suspicious".[67] Thus, the trial judge clearly had regard to Ms. Sakal's own conduct in relation to the offending allegation.

[34] Indeed, the trial judge in situating the basis for his award, stated: "What this case represents is a decision on a narrow issue relating to a statement by the Defendant which imputed that the Claimant was concerned with the uttering of a specific forged document, which notwithstanding unsatisfactory evidence on both sides, I have determined ... in the Claimant's favour".[68] The trial judge also found that this was not a proper case "for either aggravated of exemplary damages",[69] and that "given all the circumstances, would not attract the level of compensation that some of the cases cited have", referencing by way of example the **Panday** and **Rahael** cases.[70]

[35] The crux of the Respondent's argument on both range and quantum, is that the Appellant in this case was a political neophyte and therefore more like Sakal's case and unlike almost all of the others referred to above. This specific argument is seductively attractive, but flawed.

[36] The trial judge dealt with this submission in the following way:

> "It is said by the Defendant that the Claimant is a political neophyte and his reputation would not have been tarnished by the libel as he has 'no professional reputation'. While I agree that his 'innocence' in public life is a consideration, the difficulty I have with this proposition is an unnecessary elitism that creeps into our assessment of a person's reputation which the law will do well to avoid. ... I am not persuaded to look at Mr. Mohammed for this

[67] Page 20, judgment.
[68] Page 19, judgment.
[69] Page 18, judgment.
[70] Page 20, judgment.

> reason any less than Mr. Gordon or Mr. Rahael or Mr. Aleong. A reputation is a precious commodity and I would not encourage an elitist approach to the question of compensation for something as personal and real as a reputation and self-worth."[71]

[37] I agree. Yet in spite of these observations the trial judge fell into error, when he determined what he considered to be the appropriate comparative range. That is to say, he effectively excluded any consideration of these three cases and others like them (cited above), as all of these awards for general damages were over TT$200,000.00. Thus on his own reasoning, the choice of range was flawed.

[38] This flaw in analysis and reasoning is compounded by two further errors. First, the trial judge asserted that the Appellant had contended "that an award of $275,000.00 is a fair award inclusive of aggravated and exemplary damages."[72] In fact this was not so. In the Appellant's supplemental submissions filed on the 16th June 2014, the submission is made that "the Claimant ought to be awarded damages in the vicinity of $475,000.00 as damages, to include general damages, aggravated damages and exemplary damages".[73]

[39] Second, the trial judge opined that the award in the **Panday** case "can best be understood as an anomaly ...".[74] It is difficult to understand how the trial judge could consider the **Panday** award 'an anomaly'. It was fixed by the court of appeal (reducing the original award) and specifically upheld as apt by the Privy Council. Indeed, it has been cited and used as a guide in similar types of cases ever since. Moreover, the insidious nature and effects of racism in multi-racial and multi-

[71] Paragraphs 66 and 67, judgment.
[72] Paragraph 43, judgment.
[73] Paragraph 2, appellant's supplemental submissions.
[74] Paragraph 79, judgment; and see and compare footnote 6, at page 23, judgment, where the judge says "I agree ... that such a remark (calling Mr. Gordon a 'pseudo racist') in the context of our sociological history pales in comparison to such stigmas as corruption."

religious Trinidad and Tobago and the particularly divisive role its propagation plays in local political life, makes any such unfounded and unjustified accusations a most serious libel or slander. Indeed in Trinidad and Tobago, there are deep seated perceptions that race and religion align generally along ethnic and political lines. In 2005, the Privy Council deemed the Court of Appeal's award of TT$300,000.00 appropriate in law for 2000. Yet, the trial judge, opining that the allegations against the Claimant in this case were more serious and stigmatising than in **Panday's** case,[75] settled on a range and award well below the October 2005 PC, October 2003 CA, and October 2000 First Instance judgments and awards.

[40] It is however true that **Panday v Gordon** dealt with an allegation of racism, and this case does not. It is also true, that there were no allegations of public corruption in **Panday v Gordon**. Therefore, as a comparator **Panday v Gordon** is of limited assistance, and is to be distinguished on that basis, and not because it is an anomaly. That being said, allegations of both corruption and racism are often aligned in the political machinations of political and public life in Trinidad and Tobago. Anyone who lives here, knows how true this is. Both allegations are evils that destroy the fabric of local society, albeit in different ways. But both in common plague local political and public life, comparably eroding public trust and confidence, especially in national institutions. The **Panday** decision nevertheless remains of limited value in this case, because it was not a 'corruption' case, unlike the **Aleong** and **Rahael** decisions.

[41] The net effect of these errors in principle and contradictions in reasoning by the trial judge, allows this court to review and revisit the quantum of general damages due to the Appellant in this case.

[75] Footnote 6, page 23, judgment.

[42] In any event, **Sakal's** case is different from the instant appeal in at least three significant ways. First, this case involves serious allegations of corruption in public office involving the propriety of the democratic process in Local Government elections (**Sakal's** context was a private commercial institution). Second, this case includes an assault of character that implicates personal and public religious identity, belief and belonging (**Sakal's** case had no such or any other equivalent compounding factors). Third, in this case there has been no contest on the facts, not even any cross examination of the Appellant or his witnesses (in **Sakal's** case the evidence was heavily contested and the trial judge was clearly concerned about Sakal's own conduct and the underlying propriety of the factual matrix underpinning the allegation of fraud). The award in **Sakal's** case is therefore not a useful aid as a comparator or otherwise in this matter. The Respondent's submissions as to range are also flawed.

[43] In my opinion, an apt, realistic and relevant range which serves as an aid to assist in the assessment of general damages, would be, between TT$200,000.00 and TT$550,000.00, including any uplift for aggravation (aggravated damages). Of course, ranges function only as a guide, and with justification awards can either be higher or lower depending on the particular circumstances of each case. Each case must be determined on its facts, especially with the tort of defamation.

Finding a Specific Figure

[44] The general legal principles for the assessment of damages in defamation cases are well known and the trial judge properly identified them at paragraphs 3, 5, and 45-52 of his judgment. However, the Appellant criticises the trial judge's articulation of additional so called 'self-checks'; stated by the trial judge as "three further observations on conducting such an assessment".[76] These were: (i) the

[76] Paragraphs 53-59, judgment.

principle of 'conservatism',[77] (ii) the use of "other decided cases ... to bracket the level of award in certain categories",[78] and (iii) "examining comparative awards in personal injury cases".[79]

[45] The criticisms are as follows. First, there is no firm principle of conservatism in defamation cases in Trinidad and Tobago. I agree. Indeed, in 1989, in **Solomon v Trinidad Publishing Co. Ltd.**, the Court of Appeal decided to "raise the bar" in defamation awards.[80] And in **Panday v Gordon** (2005), the Board approved the majority in the Court of Appeal, who had determined that prior defamation awards "tended to be on the conservative side", but that "times have changed" and higher awards are now appropriate.[81] In **Panday's** case, Lord Nicholls explained the Board's approach to the issue of quantum, as follows: "The seriousness of a libel and the quantification of an award are matters where judges with knowledge of local conditions are much better placed (to determine)".[82] Furthermore, the survey of awards above, demonstrates that awards for defamation in this category of corruption in public affairs, are certainly anything but conservative, and certainly have not been so limited following **Panday's** case. If anything, defamation awards in Trinidad and Tobago have increased significantly, and appropriately so, over the last decade.

[46] Second, the trial judge rightly recognised that determining an appropriate range of comparable awards is helpful, but overstated the principle as one by which such a range 'bracketed' the levels of awards possible. In fairness to the judge, the term 'bracket' is used by Lord Reid in **Broome v Cassell**.[83] In any event, the trial judge also stated that "the Court must be alive to the peculiarities of the

[77] Paragraphs 54, judgment.
[78] Paragraph 56, judgment.
[79] Paragraph 57, judgment.
[80] Civ. App. No. 125 of 1987, decision in December, 1989.
[81] Paragraph 29, PC judgment supra.
[82] Paragraph 29, PC judgment supra.
[83] [1972] A.C. 1027, at 1085.

reputation under review and the reasons for the inconsistencies" (presumably meaning the differences in different awards). What is maybe not made clear, and which is important from a developmental perspective (see the discussion on conservatism above), is that comparable awards and ranges are always only guides, and in any case an award can be higher or lower than the comparators and outside of the selected range. Indeed, the idea of 'bracketing' led to a second criticism. In this very paragraph where the trial judge spoke about comparable awards, he stated: "A suitable bracket for a defamatory remark of corruption against a public official from the survey of the cases is from $150,000.00 to $800,000.00".[84] Thus the criticism, how could the judge then decide that in this case an appropriate range was TT$150,000.00 to TT$200,000.00. What is contended, is that this 'bracketing' error, compounded by an assumed principle of conservatism, (as well as a bias against the usefulness of awards of damages in defamation cases, which is discussed below), led to an excessively low comparator range and eventual award.

[47] Third, the trial judge wrongly considered that in defamation actions, "the Court can legitimately make a reality check by examining comparative awards in personal injury cases where the Court has attempted to compensate pain and suffering and hurt feelings" (citing **John v MGN**, (1997) Q.B. 586).[85] I also agree with this criticism of the trial judge's comparative use of personal injury awards. First and foremost, how does one rationally or qualitatively determine what is a 'comparative award' as between, say, a false and unjustified allegation of corruption in public affairs and the "pain and suffering and hurt feelings" in a personal injury claim? Second, what kinds of personal injuries can equate to and be used for this comparison?

[84] Paragraph 56, judgment.
[85] Paragraph 57, judgment.

[48] The CCJ dealt with this issue authoritatively, as follows:[86] "But at their core awards for defamation and personal injuries are incommensurables. ... At the heart of defamation is the protection of a person's reputation, a factor which does not readily feature in personal injury claims." I agree and adopt this statement of the law as applicable in Trinidad and Tobago. See also, **Gordon v Chokolingo**:[87] "This is why it is not necessarily fair to compare awards of damages in this field with damages for personal injuries".

[49] In so far as the trial judge cited **John v MGN** and **Campbell v Cathay Pacific Airways** in support of his approach,[88] he seemingly misunderstood the dicta in those cases.[89] In **Campbell's** case, Lord Nebreger was suggesting that a cross-check with personal injury cases may be appropriate "where it is provisionally decided to award a large sum." He cited in support of this proposition, Lord Bingham in **John v MGN**, where concern was expressed about the public perception of defamation awards, if "damages for injury to reputation (are) greater perhaps by a significant factor than if the same plaintiff had been rendered a helpless cripple or an inconsolable vegetable".

[50] First, this case is not in any way one in which the award of damages for defamation may be "greater ... by a significant factor", than personal injury awards in Trinidad and Tobago for "a helpless cripple or an inconsolable vegetable". Second, neither of these two cases propose a general cross-check with personal injury awards in all defamation claims. Both are specifically addressing contemplated ultimately high-end awards in defamation claims and suggesting that in this limited context, a consideration of awards in the most serious personal injury claims may be a useful cross-check from a public policy perspective. Third, in 2014 the sum

[86] **Glen Lall v Ramsahoye**, at paragraph 37, judgment, supra.
[87] TT 1988 PC 1, at page 14, per Lord Ackner.
[88] [2013] EMLR 6.
[89] Paragraph 57, judgment.

awarded by the trial judge (TT$200,000.00) was not a large sum for general damages for defamation. To the extent then that the trial judge applied this principle at all in this case, he erred.

[51] Furthermore, at paragraph 83 of his judgment, in which he summarised the factors he took into account in determining that the Appellant was entitled to TT$200,000.00, the trial judge stated: "I have also stepped back to take a realistic look at the effect of the award in relation to the awards in personal injury cases ...". Yet, he never disclosed which such personal injury cases he took into account, or what awards in such cases he considered relevant.[90] One must therefore assume that the trial judge took into account irrelevant considerations in coming to his decision, as he has not accounted for what he considered relevant and material to his decision.

Applicable Principles

[52] Awards for general damages in defamation must achieve the objectives of fair and just compensation, sufficient to fully vindicate the damaged reputation to the public at large, to provide consolation for injury to feelings suffered by reason of the wrong done, and to do so effectively and for all times in the context of the local environment.[91]

[53] Kangaloo JA, in **Rahael**, succinctly summarised the purpose of damages in defamation:[92]

> "The purpose of an award of damages ... is threefold in nature: first, to compensate the claimant for the distress and hurt feelings, second, to compensate the claimant for any actual injury to

[90] See also, paragraph 12, judgment, supra: "I conducted a self-check on this award with comparative awards in ... personal injury cases ...".
[91] See, **Gordon v Chokolingo**, PC, pages 13-14, supra.
[92] At paragraph 10, supra.

> reputation which has been proved or may be reasonably inferred, and third, to serve as an outward and visible sign of vindication."

[54] In **Gordon and Chokolingo**, Lord Ackner helpfully pointed out (citing with approval Windeyer J in **Uren v John Fairfax**): "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".[93]

[55] In **Glen Lall v Ramsohye**, the CCJ,[94] summarised this public oriented purpose of damages for defamation, as follows:

> "Damages for defamation are intended to demonstrate to the public that the defamed person's reputation has been vindicated; and if there is no apology or withdrawal of the defamatory publication the award should amount to a public proclamation that the defamation has inflicted a serious injury."

[56] The vindicatory aspect of general damages for defamation, is therefore also intended to justify the injured persons reputation, not just once, or only at the time of judgment, but for all times. Lord Hailsham made this clear in **Broome v Cassell & Co. Ltd.**,[95] when he explained that the purpose of damages, included compensation for the eventuality that "... 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 ... sufficient to convince a bystander of the baselessness of the charge".

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[93] Page 13, supra.
[94] Paragraph 37, supra.
[95] [1972] A.C. 1027, at 1071.

[57] Injury to reputation is thus not just viewed as personal damage to an individual *per se,* but also as damage to the individual's public and social *persona* as a continuing and participating member of the community at large. Indeed, this is how 'reputation' functions in society. Reputation constitutes both personal and social identity, and facilitates social relations and status accordingly. Yet another reason why comparisons with personal injury awards are inappropriate.

[58] It is within these overarching purposes of general damages in defamation, that the well-known 'factors' that a court relies on to assess quantum, including aggravating and mitigating factors, must be understood. "Thus in the assessment of damages several important factors fall to be considered. ... regard must be had to the extent of the publication and the gravity of the allegation."[96] These two factors are often considered highly relevant and important, the latter the most important.[97] In relation to the gravity of the allegation, the Court of Appeal in Trinidad and Tobago has expressly approved and adopted the statement of Sir Thomas Bingham that, "the more closely it touches the plaintiffs personal integrity, professional reputation, honour, ... and the core attributes of his personality, the more serious it is likely to be".[98] This aspect of 'seriousness' is a vital assessment in determining the gravity of the allegation.[99]

[59] Additional factors include, the extent to which the statements were or would likely be believed, the impact on the aggrieved person's feelings, reputation or career, and any role the aggrieved person's own conduct may have had to play in the context of the defamatory statement(s).[100] Further, as Lord Ackner pointed out in **Gordon v Chokolingo**, approving passages of Lords Hailsham and Reid in

[96] Per Kangaloo JA, **Rahael**, at paragraph 10, supra.
[97] **John v MGN**, per Sir Thomas Bingham, at page 607, supra.
[98] **Rahael**, paragraph 10, supra; **Aleong**, paragraph 94, supra**; John v MGN**, page 607, supra.
[99] See, **Panday v Gordon**, 2005, UKPC, 36, at paragraphs 29 and 30.
[100] **Cleese v Clark** [2004] EMLR 3, at paragraph 38, cited with approval in **Rahael**, at paragraph 10, supra.

Broome v Cassell,[101] relevant factors also include "the anxiety and uncertainty undergone in the litigation, the absence of any apology, or the reaffirmation of the truth of the matters complained of, or the malice of the defendant" as well as "the conduct of the defendant. He may have behaved in a high handed, malicious, insulting or oppressive manner in committing the tort...". If this was the case, for Lord Reid: "That would justify ... awarding as damages the largest sum that could fairly be regarded as compensation".

[60] These identified factors are not exhaustive, and the entire circumstances of a case must always be considered. The trial judge analysed the relevant law comprehensively,[102] and very usefully summarised the material factors under four headings, objective features, subjective features, aggravating factors and mitigating factors.[103] No fault can be found with his analysis and re-statement of the law. However, it is in the application of these purposes and factors to the facts of this case, that I find the judge wholly underestimated the damages due to the Appellant.

Quantum - Factors

[61] I consider the gravity of the defamation in this case to be extremely serious and its impact potently destructive. It clearly touches the Appellant's personal and professional integrity. He is first and foremost a human being and a citizen of Trinidad and Tobago. As such he is entitled to the fullness of dignity, respect and freedom that the Constitution bestows upon him and also guarantees, and which are widely acknowledged internationally as core democratic values of universal status.[104] Therefore and as explained in the introduction to this judgment, in a

[101] Pages 13-14, supra.
[102] Paragraphs 3, 5, and 45-52, judgment.
[103] Paragraph 51, judgment.
[104] See, Article 1, Universal Declaration of Human Rights, 1948 - "Article 1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

free and democratic society, where these values are explicitly given constitutional recognition and therefore can impliedly be considered supreme, the right to an identity of choice is integral to personhood and so fundamental. Consequently, and to the extent that reputation is also integral to personhood, the right to one's reputation is also fundamental.

[62] The Appellant is also a member of the Chaguanas community, a small manufacturing businessman, a community activist, a practicing Muslim, a person involved in charitable work and one who ventured into Local Government politics in order to serve his community and Nation. At the time he was also a student at the University of the West Indies, pursuing studies in International Relations. Further, there is no evidence of any smears or blemishes on his character or reputation prior to this egregious and sustained assault by the Respondent.

[63] Therefore, the false allegation that the Appellant was corrupt and accepted a bribe to change his vote, directly attacks his 'personal integrity, professional reputation, honour, ... and the core attributes of his personality.' Linking the assault to his avowed religious faith compounds the gravity of the defamation, especially in the political arena in Trinidad and Tobago. I therefore judge it to be a most serious defamation of the Appellant's character and reputation.

[64] In this case the extent, degree, nature and gravity of the publications stand out in terms of the reported cases in Trinidad and Tobago. No precedent has been produced that is close to the sustained and pernicious types of attacks that the Respondent launched against the Appellant. Moreover, the methods of attack reveal a vitriol and intent that is easily inferred and adjudged to be deliberately malevolent. The trial judge found that this was so on the unchallenged evidence, and I agree.

[65] What is the undisputed evidence? In summary, on the 6th November, the day of the vote, the Respondent held a press conference in the afternoon, made the allegation of corruption, implicated the Appellant's religious values, and threatened to "deal with him in the fullness of time". (Subsequent events would show the extent to which the Respondent set about to made good on his threat.) Several media houses were represented at that press conference of the 6th November and the Respondents allegations were widely reported in the print media on the 7th November, including in the three mainstream and most popular newspapers.

[66] The allegations conveyed the following meanings about the Appellant, which ordinary Trinbagonians would understand and which many believed (as shown from subsequent letters and social media chats and posts): (i) his motive for entering local politics was for personal monetary gain, and not to serve the Chaguanas/Charlieville communities; (ii) he corruptly exploited his public office and betrayed the trust of his constituents, by accepting a monetary bribe in exchange for his vote; (iii) he is unfit to hold any public office or public position of trust; (iv) he lacks personal integrity or dignity; (v) he is a disgrace to his avowed religion, has betrayed its tenets, and is not a true Muslim; (vi) he has committed acts that are objectively corrupt, illegal and/or improper, as well as being immoral, even engaging in criminal conduct; (vii) he is dishonest, unethical, and unfit to hold the office of Councillor or any other public office, or to represent the constituents of Charlieville; and (viii) he is a person of questionable and dubious character, lacking in institutional integrity.[105] The trial judge accepted that all of these meanings were the natural meanings and inferences of the words used by the respondent.[106] I agree. In fact, between the 7th and the 12th November, at least twenty-four (24) different articles appeared in these three mainstream

[105] Paragraph 37, Appellant's unchallenged Witness Statement. The Respondent accepts that corruption, unfitness for public office, and erosion of public trust, are meanings conveyed; see paragraph 23, judgment.
[106] Paragraph 23, judgment.

newspapers, all repeating and/or referencing in different ways the allegation of corruption made against the Appellant.[107]

[67] This barrage of adverse and damaging nationwide publicity was sustained and encouraged by the wilful actions of the Respondent. On the 7th November the Respondent hosted another press conference at his ILP party's headquarters in Chaguanas. At this event the Respondent revisited the issue of the Appellant's alleged corrupt act, seeking to add credibility to the allegation by referring to: "Two Chaguanas constituents (who) came to me as eye witnesses, who saw what took place, who live next to him where the meeting (to pay the bribe) was held, who saw when he came out with a bag ...". To live in Trinidad is to understand the 'bag' innuendo. Common folk lore is that money 'bribes' paid to public officials were often put in proverbial 'brown bags' and handed over as such.

[68] To compound matters, on the 8th November the Council of the CBC convened to appoint a Mayor of Chaguanas. The Appellant again voted for the UNC candidate and not for the ILP candidate. The undisputed evidence is that he did so because "I felt that she (the ILP candidate) had no track record of service to the community".[108]

[69] Following this second press conference and the events of the 8th November, some of the newspaper articles carried the following titles: (i) "Jack: Gov't (UNC) bribes obscene and vulgar." - Guardian, 10th November; (ii) "Jack: ILP councillor offered $5m bribe." - Express, 10th November; (iii) "Faaiq claims home being stalked ..." - Guardian, 11th November; (iv) "Gov't (UNC) middleman made $5m bribe offer." - Newsday, 12th November. Clearly the press and the public understood what was being peddled by the Respondent, that the Appellant had been offered and

[107] Paragraph 38, Appellant's unchallenged Witness Statement.
[108] Paragraph 41, Appellant's unchallenged Witness Statement.

received a TT$5M bribe to vote for the UNC Presiding Officer on the 6th November and the UNC Mayor on the 8th November.

[70] In addition to official party press conferences and the resulting newspaper coverage, the Respondent authorised a unique Trinbagonian form of community communication, used widely and by both State agencies and private institutions, as well as by individuals - motor vehicle, roof-top, 'loud-speaker' announcements. In Trinidad this form of communication is used for announcing everything, from death announcements to store sales, and can be heard throughout the day and night during the 'political season', broadcasting propaganda for competing political parties. These 'loud-speaker' announcements (as they are called), are loud and repeated continuously from street to street in an area, often using a pre-recorded tape recording of the announcement. It is an 'in-your-face' barrage of information. It can be heard easily within a radius of several hundred meters of the actual broadcasting motor vehicle. It is very effective, well established, and in communities great attention is paid to these announcements as they are assumed to broadcast current, relevant and important information.

[71] The unchallenged evidence is that on the 6th, 7th, 8th, 9th and 10th of November (from Wednesday to Sunday), the Respondent's voice was heard continuously broadcasting by motor vehicle, roof-top, loud-speaker, throughout the Charleville and Chaguanas areas, alleging that the Appellant was "a Judas" who had "sold his soul for 30 pieces of silver".[109] This condemnation by the Respondent was also a theme in his press conference of the 6th November, when he alleged that the Appellant was "a Muslim young man" who "sells his soul for money".

[72] It is very difficult to assess the true impact of this nature of attack. It is akin to Blitz Bombing, like the mass air attacks on London in the early 1940s, where the

[109] Paragraph 45, Appellant's unchallenged Witness Statement.

singular goal is to create widespread destruction and place fear in the citizenry. Here the objective was to use the air waves and saturate every place with the destructive vibrations of these heinous allegations. This was the Respondent's war against the Appellant, making good on his threat to "deal with him" - an expression, which in the local parlance is used by thugs to send a sinister threat. It was well planned and strategic, intended to effect maximum damage. Hence it was concentrated in the Charlieville and Chaguanas areas, where the Appellant lived, worked and served. As the Appellant explained, "I looked on and listened helplessly as the Defendant assassinated my good name and reputation."[110] He received calls expressing concern for his safety and well-being, he felt "weak and helpless", he felt afraid and threatened, intimidated and fearful, powerless, bullied.[111] Indeed, the Appellant explained that: "The situation is extremely agonising to me and I am in constant fear for my life and well-being."[112]

[73] And there was even more. The Respondent made several appearances at media houses, appearing on early morning TV shows, which enjoy widespread popularity in the country, repeating his allegations. He appeared on one such programme on the 7th November, with the Interim Chairman of the IPL, and repeated his pernicious allegations. As the Appellant explained: "He has been quoted on almost every media and news broadcast on all television and radio stations."[113] This is the undisputed evidence in this case. It demonstrates an onslaught against the Appellant, led and encouraged by the Respondent.

[74] The extent and effects of the offensive, are evidenced further by the degree to which the "accusations of impropriety which he has levelled against me have also been the subject of radio call-in programmes", and by the "disparaging comments

[110] Paragraph 45, Appellant's unchallenged Witness Statement.
[111] Paragraphs 45 and 46, Appellant's unchallenged Witness Statement.
[112] Paragraph 46, Appellant's unchallenged Witness Statement.
[113] Paragraph 49, Appellant's unchallenged Witness Statement.

by which I have been brought into ridicule, odium and contempt" that have been posted and allowed to remain on the ILP maintained Facebook page[114]. Some of the postings allowed to stand on the ILP Facebook page, included the following: (i) "This man has shown that money is his master and not his servant ... shame on him ... where are his morals, values ... utter shame." (ii) "I hope he knows that $2.5 Million can't buy back his reputation or clear conscience. And to think at 23, he is taking bribes. What would he be doing at 33??? God help us all." (iii) "This guy will sell his own mother if he gets the chance ...". (iv) "Hmmm ... shameless ... lets see how far he reaches with his attitudes 'n values ...".[115]

[75] In addition to all of this, the accusations of the Respondent generated seriously adverse comments against the Appellant on Social Media blogs, which were linked to the Respondent's statements. Some were even obscene. One example, that is admitted, was:[116]

> "A piece of sh--. That is the most fitting term we could find to describe this modern day Muslim version of the biblical Judas Iscariot. ... Faiiq Mohammed is probably the most scorned and ridiculed person in the country today. No decent, right thinking, principled private citizen, regardless of political affiliation or religious persuasion should have any difficulty branding him 'an ethically challenged, political leper and social pariah'".

[76] Notice how the Respondent's 'loud-speaker' association of the Appellant being a 'Judas' has taken root in the psyche of the people, and how the Respondent's references to the Appellant's betrayal of his Muslim religion have seamlessly entered into the public-sphere negative narratives of corruption. This is the

[114] See, Seepersad J., in **DRA and Ors. v Burke**, CV 2016-02974, at paragraphs 28, 33, 38, 41-43; the holder of a Facebook account is presumed to be responsible for what is published, or allowed to remain on it.
[115] Paragraph 50, Appellant's unchallenged Witness Statement.
[116] Paragraph 51, Appellant's unchallenged Witness Statement.

undisputed evidence. The Respondent's Blitz Attacks had the effect of damaging the Appellant's reputation throughout the country, and at all levels, and in every quarter. He was, on a balance and on the available evidence, for those seven days at least, probably "the most scorned and ridiculed person in the country today". Certainly the available evidence shows that this was the view of some. Moreover, the available evidence demonstrates that some persons also believed the accusations. This can be gleaned from the unequivocal condemnatory comments made on call in radio programmes, the ILP Facebook page, and Social Media blogs. The reach of these latter two forms of communication and information dissemination must be presumed to be global. Thus the damage to the reputation of the Appellant must be assumed in this case to have been internationally wide and pervasive.

77. To appreciate the extent of the damage done to the reputation of the Appellant, one must also consider the status and reputation of the Respondent, as well as his conduct throughout this matter. Who is Jack Austin Warner? Locally, the Respondent was at the time a well-known public figure, very popular in some quarters. He was for much of his life involved in local football, then at a regional level and finally at an international level, rising to the status of President of CONCACAF and of a Vice President of FIFA. He was also a businessman and entrepreneur of some repute. In 2007 and again in 2010 he was elected as the Member of Parliament for the constituency of Chaguanas West, in Trinidad. This was on a UNC party ticket. In 2010 he won the seat with the highest national constituency vote total for that election. In fact he was a Deputy Political Leader of the UNC. In 2007 he was a parliamentarian in the Opposition. However, the party in Partnership with other parties formed a coalition government in 2010 and the Respondent held both Cabinet and Ministerial portfolios as a UNC member, including Minister of Works and Transport and Minister of National Security, and acted as Prime Minister on occasion. In 2013 the Respondent fell out with the

UNC leadership, resigning from the party in April 2013 and forming his own party, the ILP. As a consequence, there was a by-election for the constituency of Chaguanas West and in July 2013 the Respondent won the seat under the ILP. He was at the time Interim Political Leader of the ILP. [117]

[78] In 2013, as between the Respondent and the Appellant, the differences in power, status and influence were enormous. The Respondent was, metaphorically, a giant compared to a dwarf. His popularity in Chaguanas was immense. He had won the seat in both 2007 and 2010 and done so by vast margins of the popular vote. Indeed, in 2013, having left the UNC and formed the ILP, he defeated the UNC in the July by-election, and did so in a constituency considered a UNC stronghold. This latter victory had earned him extensive attention locally and regionally, almost mythical in allure. What the Respondent said or did easily and comprehensively attracted national coverage and discussion. Thus when he set about to attack the Appellant, in circumstances of high political drama and intrigue, and when real political power was at stake, the entire country payed keen attention. The Appellant paid the price. The undisputed evidence testifies to this, as the trial judge found.[118]

[79] The Respondent has never apologised. Faced with a pre-action protocol letter of the 7th November, calling for restraint, the Respondent paraded the letter with utmost contempt.[119] He 'dust-binned' the Appellant, publicly and dismissively at yet another media conference at his ILP headquarters, on the 9th November, confidently asserting the truth of his allegations. This was also reported in the newspapers.[120] The Respondent has in fact also never retracted his statements or allegations, and before this court in his attorney's submissions, he has

[117] See paragraph 15, judgment and paragraph 5 Appellant's Witness Statement. The facts stated are also well and widely known and this court takes judicial notice of them.
[118] See paragraphs 63 and 69, judgment, supra.
[119] Paragraphs 53-55, Appellant's unchallenged Witness Statement.
[120] Paragraph 55, Appellant's unchallenged Witness Statement.

maintained that what he asserted was true.[121] Yet, the Respondent never produced the documentary evidence he publicly claimed to be in possession of on the 6th November, or the depositions of the eye witnesses who he claimed had come forward to him and which he publicly proclaimed on the 7th November. Further, his choice not to cross examine the Appellant was driven much more by failure in the litigation, than by any disavowal or benevolence. Indeed, his concession of liability and abandonment of any defence at the trial was similarly motivated.[122]

Quantum - Figure

[80] In my opinion, the Respondent's conduct in relation to the commission of this tort can easily be described as 'high handed, malicious, insulting and oppressive'. Conduct that demands that the 'largest sum that could fairly be regarded as compensation' should be assessed and ordered paid as general damages.[123] In this context, what is an appropriate sum?

[81] Clearly there are significant aggravating factors and an abundance of undisputed evidence as to the damaging effects and impact of the defamation on the Appellant. The trial judge summarised these at paragraphs 72 to 75 of his judgment, and I agree. He also identified three possible mitigating factors, maintaining the status quo for the duration of the trial, abandoning his defence and conceding liability, and not subjecting the Appellant to cross examination.[124]

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[121] See paragraphs 47 and 48, submissions filed on the 3rd August, 2018: "At all times the Respondent actively defended this matter and the assertions of the defence had always been that the Respondent either knew or honestly believed same to be true. What occurred was a legal result wherein the Respondent was not in a position to prove suck (sic) knowledge and/or belief."

[122] See paragraphs 75 and 76, judgment. And see also, paragraphs 47 and 48, submissions filed on the 3rd of August 2018: "At all times the Respondent actively defended this matter and the assertions of the defence had always been that the Respondent either knew or honestly believed same to be true. What occurred was a legal result wherein the Respondent was not in a position to prove suck (sic) knowledge and/or belief."

[123] See, **Gordon v Chokolingo**, supra.

[124] Paragraph 76, judgment.

I have already commented on the latter two, agreeing with the trial judge that they were driven by the expediency of litigation failure more than anything else. As to the restraint in maintaining the status quo, I give very little credit to that. On the 11thNovember, a second pre-action protocol letter was sent to the Respondent threatening court action to seek injunctive relief to restrain any further utterances. Noteworthy, is that it was only after the 12th November, that the Respondent exercised restraint.

[82] The trial judge also thought that the following were mitigating factors, the relatively young age of the Appellant, his lack of 'stock in trade' as a political figure, the limited duration of the publications, the unwitting republication of the libel, and the realities of our 'political gayelle'.[125]

[83] First, the young age of the Appellant. To my mind, in the particular circumstances of this case, this is presumptively an aggravating factor, not a mitigating consideration. I find it difficult to see how, as a general principle, wilful harm to a person of young age, to someone just embarking on a new career or venture, is somehow less injurious than if it is done to an older and more mature and seasoned person. An old well rooted tree can survive and recover from many a storm. It is often more resilient, the almost inevitable consequence of just surviving in life. A sapling however, can be much more vulnerable to tempestuous conditions. Once broken, it may never recover, or in recovering forever suffer the scars of such an assault. And, the effect of the injury can be more intense and traumatic, than it may be for more hardened trees. The Appellant is, in my opinion, in the circumstances of this case more akin to a sapling. In fact he has been consistently described by the Respondent's attorneys as a 'political

[125] Paragraph 77, judgment.

neophyte'. His undisputed evidence documents the intense trauma, distress and humiliation he and his family suffered as a result of the Respondent's assaults.[126]

[84] Second, the lack of any political 'stock in trade'. This seems to be premised on a notion that if a person has nothing (or little) to begin with, then their loss is minimal. The notion does have a tempting attraction. However, this reasoning is flawed in the context of defamation. Reputation and character are less transactional and quantitative in nature, than they are qualitative and integral. While it is true that they are acquired, shaped, formed and developed over time; it is also true that their starting point is not 'nil'. Indeed, every person (based on the constitutional principles of equality and dignity of the person) begins with the same presumptions of a good reputation and good character. This is why libel is actionable per se, and once the defamation is established, damages are at large and damage is presumed. In fact, in the absence of proof of any actual damage, "substantial rather than nominal damages may be awarded".[127] In this jurisdiction **Rahael's** case[128] is one such relatively recent example, in which general damages in the sum of TT$250,000.00 were awarded by the Court of Appeal, in circumstances where absolutely no evidence was given by the Claimant.[129]

[85] To have branded the Appellant corrupt at the very beginning of his political career, even though he may have had little political 'stock in trade', could have the effect of forever tarnishing his reputation with that stigma. No one may be willing to invest in him, politically, anymore. The undisputed evidence supports that this is indeed the case.[130] However in the case of a more seasoned political figure, whose 'stock' is bullish, as in some of the comparable cases, such an individual's

[126] Paragraphs 44-48, Appellant's unchallenged Witness Statement.
[127] See, Gatley on Libel and Slander, 2004, at paragraphs 1.3 and 3.6.
[128] Supra.
[129] The assessment was done on the basis of the pleadings which exhibited the defamatory article and a benign agreed statement of facts.
[130] Paragraphs 44 and 61, appellant's unchallenged witness statement.

reputation may be much more resilient and enduring. In analysing comparable cases this is therefore a relevant consideration, but not one that in the particular circumstances of this case, has any significant mitigating effect.

[86] Third, the limited duration of the publications. As with the age factor and taken in the context of this particular case, I do not consider this to be a mitigating factor. The actual publications lasted for seven continuous days. This was certainly shorter in terms of pure time than, say, in **Aleong's** case.[131] But duration taken in isolation distorts the reality of what occurred in this case. Someone may shoot a single bullet at another once a week, every Sunday, for five weeks, and it would be correct to say that bullets were shot over the course of five weeks. Another may shoot one hundred bullets per day for seven days, and it would be correct to say that bullets were shot over the course of a single week. But what of the damage, assuming that in both examples the bullets hit their mark, each with equal intensity and impact? What is true, is that in the first instance a total of five bullets were shot, and in the second instance a total of seven hundred bullets were shot. What will also be true, is that the damage inflicted will likely be much more severe (even if not 700:5 times more) in the second case. In this matter, the Appellant was subjected to one of the most intense and sustained libellous barrages that the case law in this jurisdiction documents.

[87] Fourth, unwitting republication. It can be inferred on a balance that the Respondent both intended and knew that his allegations would be repeated exponentially in Trinidad and Tobago. Indeed, the Respondent's actions in repeating the accusations himself over several days at multiple press conferences and television interviews, and in presumptively encouraging their repetition (through the use of motor vehicle 'loud speakers' traversing the Chaguanas and

[131] Publications over a five week period, supra.

Charlieville areas) and perpetuation (on the ILP party's Facebook page),[132] demonstrate a strong desire for extensive republication. The undisputed evidence chronicles the extent of the contagion, locally, regionally and internationally. It was extensive.[133]

[88] Fifth, the realities of the local 'political gayelle'. African Kalinda and Indian Gatka infuse the Gayelle - flambeau burning, drums beating, puncheon pouring, batonnieres carraying, chantwells lavwaying, Bois 'a-ou-ray' striking, blood pouring; there have always been rules to govern and control how participants are to play stick-fighting, and how not to do so - what was, and was not, permissible. Stick fighting is ruled by laws!

[89] It is true that in Trinidad and Tobago, political and public life opens one to robust and at times severe criticism, even condemnation. This is a necessary and acceptable virtue in a vibrant democracy. Indeed, it is to be encouraged. I venture to say this is so in any truly democratic society, and Trinidad and Tobago is not unique in this regard, except for the idiosyncratic ways in which it is done and the peculiar language and expressions used to do it. However, the political gayelle, though a place of hard hitting Bois and even of 'Buss Head', is still not an arena that permits the unwarranted and unjustified or malicious defamation of character. The law simply does not permit this. There are boundaries, boundaries that may be stretched, but not crossed. Context is everything. And even as cultures shape the law, they too are bound by it. The political gayelle is no exception.

[90] Thus, for example, there are limits to the defences of honest opinion, justification, fair comment and qualified privilege. One such limitation, in the contexts of fair

[132] See **DRA and Ors. v Burke**, per Seepersad J. (supra).
[133] Paragraphs 34-62, Appellant's unchallenged Witness Statement.

comment and qualified privilege, is proof of malice.[134] In this case, it is clear that the Respondent was unable to pursue any of these public interest defences, defences that are intended to facilitate free speech, especially in the political context. The evidence was simply not there. And so, these defences were abandoned at the trial.[135] Furthermore, the undisputed evidence shows conclusively that the Respondent made allegations that simply were untrue. And the evidence shows that he made them either knowing them to be false or reckless as to their falsity. No documentary evidence has been produced, as he claimed to have; and no eye witnesses have confirmed, what he assured they saw. The evidence all points in one direction, from the very first statement of the Respondent on the 6th November, that he intended to 'deal with the Appellant in the fullness of time'.[136] The evidence shows that the Respondent was thus motivated by the sole or dominant purpose of harming the Appellant, and doing so by completely decimating his character and reputation.[137] The Respondent's declared intention was to crush the Appellant, to obliterate him from the political landscape of Chaguanas, and even of Trinidad and Tobago.

[91] This case, won by the Appellant when the Respondent conceded liability on all counts at the trial, and this appeal, is about compensating the Appellant for the effects of the damage to his character and reputation caused by the Respondent's libels. It is therefore also about consoling him for the immense distress he has suffered,[138] repairing the actual harm done to his character and reputation,[139] and vindicating his good name, his hitherto impeccable reputation.[140]

[134] See, Gatley on Libel and Slander, 2004, at paragraphs 12.1 and 16.1.
[135] Paragraphs 34 and 52, Appellant's unchallenged Witness Statement. Paragraphs 13, judgment.
[136] Paragraph 34, Appellant's unchallenged Witness Statement.
[137] See, Gatley on Libel and Slander, 2004, at paragraphs 16.3 to 16.8.
[138] Paragraphs 44 to 48, Appellant's unchallenged Witness Statement.
[139] Paragraphs 44, 48 and 61, Appellant's unchallenged Witness Statement.
[140] See, Gatley on Libel and Slander, 2004, at paragraph 9.2.

[92] In my opinion, this case is no less egregious than any of the following: **Gordon v Panday** (TT$300,000.00; PC), **TNT News Centre v Rahael** (TT$250,000.00; CA), **Montano v Harnarine** (TT$250,000.00), **Mohammed v Trinidad Express** (TT$325,000.00), **Rowley v Annissette** (TT$475,000.00), and **Julien v Trinidad Express** (TT$450,000.00). The single common distinguishing feature in all of the above and the instant matter, that the Respondent relies on, is the fact that the Claimants in all of these cases were prominent Trinbagonians, who had on the evidence established longstanding good reputations (except arguably in **Rahael's** case, where no evidence was given). Should that make a difference, and if so how much of a difference? In my opinion it is a relevant consideration, but not to the extent that the Respondent contends.

[93] The libel in this case is the false allegation of corruption in public (political) office. The act of corruption was allegedly taking a TT$5M bribe to vote for the UNC (and not the ILP). The ordinary Trinbagonian would have understood this allegation as imputing to the Appellant the several innuendoes identified at paragraph 66 above.[141] To be corrupt, is to be dishonest, to lack integrity, to be unethical, untrustworthy, immoral and of dubious and disreputable character. How is the allegation of corruption less damaging to the Appellant's character, than to any of the public personages in the cases cited above? Is it that they are deemed more honest and of greater integrity, morality and trustworthiness, because they have a higher status and position and have achieved more achievements and accolades over their lifetimes than the Appellant? Surely the principle of equality demands that all persons enjoy presumptively the same entitlement to dignity and respect, and benefit of good character and reputation. Indeed, this was exactly what the trial judge thought: "The Claimant may not have been a high-ranking member of

[141] And see, paragraph 37, Appellant's unchallenged Witness Statement.

society. That does not mean that his reputation was of any less significance than that of those who were".[142] I agree.

[94] Moreover, how are these virtues of honesty, morality, integrity, trustworthiness and ethical living, tied causatively to achievements and accolades? In my opinion they are not. The allegations were an attack on core attributes of every human being, including those of the Appellant, that they are presumed to all have. Station does not confer them, neither does wealth, nor qualifications. Accolades may recognise and pay tribute to them, but they remain *a priori* all achievements and acquisitions.[143]

[95] In June 2014, in **Aleong's** case an award of TT$650.000.00 was made (adjusted upwards from TT$450,000.00 by the Court of Appeal), albeit in a non-political context. And, in July 2015 (after this decision was given), in **Ramlogan v Warner**,[144] the sum of TT$600,000.00 was awarded as general damages for an allegation of corruption in public office, related to the acquisition of several properties by a former first-time ('neophyte') Attorney General of Trinidad and Tobago (while in office).

[96] This case has several additional features that the others cited above do not contain. The most significant one is the aspersion made in relation to the

[142] Paragraph 95, judgment.

[143] The trial judge correctly recognised this, when he critiqued "an elitist approach to the question of compensation for something as personal and real as a reputation ...". At paragraph 67, judgment. See also, the trial judge's subsequent decision in **Ragoonath v Roget**, CV 2015-01184, "It would in my view be wrong to place an undue weight on the anonymity of a person's character as any valid reason to attribute less damage as a result of a public and sustained attack on her character. A person who is rich and famous should not simply by reason of status be entitled to obtain a larger award than one who is not. ... To do otherwise would allow for a creeping elitism in the award of damages ... I see no reason to discount her damage simply because she is a person of relative anonymity in public life." At paragraph 39, judgment. In **Ragoonath**, the trial judge awarded TT$200,000.00 as general damages and TT$160,000.00 as exemplary damages, in May 2016, and did so in a case in which the nature, gravity, extent of coverage and vitriol of the defamatory statements were much less serious and damaging to reputation than in the instant one.

[144] CV 2014-00134.

Appellant's religion. The others have been set out above. These features move this case up the ladder in seriousness and gravity. In addition, the ways in which the attacks were launched and sustained, and the variety of media platforms used to do so, together with the intensity and intent to deliberately harm the Appellant, demand that a most significant award be made if the three primary objectives of compensation (consolation, repair and vindication) are to be achieved. Finally, the aggravating features of this case heavily outweigh any mitigating ones, as explained above, and an appropriate uplift for this is necessary (aggravated damages).

[97] Given the applicable principles and the factors to be considered (supra) and bearing in mind the awards in comparable local cases of public corruption allegations, in my opinion an appropriate sum for general damages in this case is TT$500,000.00, which sum includes an uplift to reflect the contemptible conduct of the Respondent and his reprehensible dominant motives as explained above (as well as the lack of any apology, or withdrawal of the statements, and the deliberate and strategic repetition of the libel with the singular purpose of harming the Appellant's reputation in the greatest possible ways). This award also takes into consideration what the Appellant and his attorneys considered to be a fair and just award.[145]

[145] See, Gatley on Libel and Slander, 2004, at paragraph 9.13. The Appellant in his supplemental submissions before the trial judge, suggested that "damages in the vicinity of $475,000.00" were fair and just, paragraph 38 above.

EXEMPLARY DAMAGES

"There was a wall. It did not look important. … But the idea was real. … Like all walls it was ambiguous, two-faced. What was inside it and what was outside it depended upon which side of it you were on."[146]

"There is culture in law, there is law as culture and there is law in culture."[147]

[98] "The object of exemplary damages is to punish and to deter."[148]

[99] The undisputed evidence is that the Respondent's conduct was an intentional "type of 'badjohn', gangster behaviour and 'hooliganism'", that deeply affected the Appellant because it "has terrified my family and I and has adversely affected our health and emotional well-being."[149] This was not a purely subjective interpretation of and response to the Respondent's conduct by the Appellant. The undisputed evidence is that the Appellant "received several calls from persons in the community who expressed concern for my safety and well-being". Little wonder that he "felt weak and helpless" during the entire seven day ordeal,[150] and that the Respondent's behaviour "caused me to become afraid as I now feel threatened."[151] This libellous assault on the Appellant by the Respondent, intended by the Respondent to "deal with him", left the Appellant feeling "intimidated and fearful", "powerless", "bullied", and "in constant fear for my life and well-being".[152]

[146] The Dispossessed, Ursula LeGuin, 1974 (Chapter 1).
[147] Professor Hollis Liverpool ('The Mighty Chalkdust'), 'The Law and Culture', Address, Ceremonial Opening of the 2016 – 2017 Law Term, Cathedral Church of the Holy Trinity, 16th September, 2016.
[148] Lord Devlin, **Rookes v Barnard**, 1964 A.C. 1129, at 1221.
[149] Paragraph 47, Appellant's unchallenged Witness Statement.
[150] Paragraph 45, Appellant's unchallenged Witness Statement.
[151] Paragraph 46, Appellant's unchallenged Witness Statement.
[152] Paragraph 46, Appellant's unchallenged Witness Statement.

[100] This case has no recent comparator among the many precedents cited involving allegations of political corruption and misconduct in public affairs. None of **Gordon**, **Rahael**, **Montano**, **Mohammed**, **Julien**, or **Rowley** were threatened by the conduct of the tortfeasors to the extent where they felt "in constant fear for ... life and well-being". Neither was there any evidence of this in **Aleong's** or **Ramlogan's** cases (supra), or for that matter in the several other cases cited to this court. This assault on the Appellant's character, reputation and religious identity, reached a level of intimidation and persecution that caused the Appellant to fear for his (and his family's) physical safety and well-being. Such behaviour by politicians and/or public officials in the performance of their public roles is utterly and completely deplorable. It is the antithesis of democratic freedom. It is an abuse of free speech. It is to be unequivocally condemned and deterred.

[101] One purpose that exemplary damages serves is that of punishing a tortfeasor for unacceptable and unlawful egregious conduct. Another is as a deterrent against any future similar conduct (whether by that tortfeasor or anyone else). It is a policy intervention, in the form of an award of damages, to make a public statement that certain kinds of offensive conduct are punishable because of the sense of public outrage that the conduct evokes in the minds of reasonable and law abiding persons. It is a statement that these kinds of conduct are inimical to the common good in a democratic society. Once this is made clear, the concern about its 'chilling' effect on free speech, which is vital in a democratic society, will not arise. This is because, in cases such as this one, exemplary damages begin at the point where the boundary of constitutionally permissible free speech ends.

[102] Thus, even though reputation *per se* is not expressly listed among the fundamental rights and freedoms in Trinidad and Tobago (though I have argued above, that it enjoys an actual derivative status via the Preambular values of freedom, the inherent dignity of the person, and the rule of law, and more directly through the

individual right to respect for privacy and personhood), it is given recognition as an inherent individual (if not fundamental) right, the protection of which justifies limiting absolute freedom of expression - **Panday v Gordon**, PC (supra). The result is a tension between the two and the need for an evolving and responsive balancing between the protection of reputation and the right to freedom of expression in the public political sphere. All of this is of course stated, with recognition that the issue of the 'horizontal' effect of the enforceability of the fundamental rights provisions in the Constitution,[153] as between private citizens, remains a largely unexplored and untested developmental area of the law.[154] However, in so far as Section 2 of the Constitution declares it to be the supreme law of Trinidad and Tobago, then the core values and principles espoused by the Constitution are legitimately interpretative in relation to all other laws, including the common law.[155]

[103] In Trinidad and Tobago exemplary damages can be awarded for the commission of a tort. They can be awarded and have been awarded in defamation cases. There is however a debate as to whether they can only be awarded in the three categories stated as permissible by Lord Devlin in **Rookes v Barnard**.[156] In my opinion, and in principle, there is no such limitation or constraint, and there ought not to be any such limitation or constraint in Trinidad and Tobago. The Common Law has always been, and remains, an evolutionary, responsive, relevant and culturally developmental articulation of the law.

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[153] See Section 14, Constitution.

[154] See also, Gatley on Libel and Slander, 2004, at paragraph 1.2.

[155] See **Dumas v Attorney General**, Civ. App. No. P 218 of 2014, and see also, **Francis and Hinds v The State**, Criminal Appeals Nos. 5 and 6 of 2000.

[156] [1964] A.C. 1129, at 1226-1227. See also, **Torres v PLIPDECO** (2007) 74 WIR 431, at paragraph 102. "To restrict the application of exemplary damages to the **Rookes v Barnard** categories of conduct is to evade the underlying principle of an award of exemplary damages which is in essence to punish outrageous conduct. It is of course now too late to say that in tort cases, **Rookes v Barnard** ought not to apply". (obiter, per Mendonca, J.A.)

The First Category

[104] The three categories in **Rookes** are well known. First, "oppressive, arbitrary or unconstitutional action by servants of the government." Lord Devlin expressly stated that this category ought not to be extended "to oppressive actions by private corporations or individuals."[157] In stating this first principle, Lord Devlin also made this comment: "Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other, he might, perhaps, be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is more powerful. ... It is true that there is something repugnant about a big man bullying a small man and, very likely, the bullying will be a source of humiliation that makes the case one for aggravated damages, but it is not, in my opinion, punishable by damages".[158]

Cultural Considerations[159]

[105] This was a statement of opinion made in 1964, some fifty plus years ago, in England, by one of the then class of members who constituted the House of Lords. Understandably, it was a statement shaped and informed by the dominant cultural and social context perspectives of the House at that time, and by those parameters, legitimate. However, it is certainly open to criticism in the post-colonial social contexts of former West Indian colonies, whose citizens have had historically to endure centuries of British slavery and decades of British indentureship, including being ruled under Crown Colony Government. Caribbean

[157] At page 1226.
[158] At page 1226.
[159] Some judicial officers balk at the idea of including social context in the interpretation and development of the law. For me, the separation of law from culture and social context is an epistemological fiction. Margaret Davies explains 'standpoint epistemology', the multi-perspectival nature of epistemology, and therefore of knowledge, in 'Asking the Law Question', Lawbook Co. 2008, pages 15-23. She also explains why 'epistemic privilege' is ascribed to the 'view from below' (that of the historically disempowered, marginalized and alienated), and why this is especially so, in post-colonial contexts (at pages 16 and 21).

peoples today have quite different views towards power and the powerful, and their accountability, than did the elite classes in Britain in the first half of the 1900s. Indeed, Trinidad and Tobago was granted independence in 1962, and became a Republic in 1976. The idea that 'a big man bullying a small man' and thereby humiliating him, is somehow not deserving of punishment based on an abuse of power – 'simply because he is more powerful', is not a governing sentiment or value in Trinidad and Tobago. It is simply not the way we locals see things in our social contexts.

[106] An actual case that provides some historical context and insight into the strong local resentment against the exercise of any arbitrary and oppressive power, is the trial (and re-trial) of Thomas Picton, for the cruel and inhumane torture of the young female slave, Louisa Calderon. In 1801 Calderón's torture was ordered by Picton (he was the Governor of Trinidad from 1797 to 1803). He ordered torture by 'picketing', and so she was hung, suspended by one hand from the ceiling, with a single foot supporting her placed on a sharpened picket. The other hand and foot were tied together behind her back. She was left in this position initially for 55 minutes. And on Picton's specific orders, even after she had lost full consciousness on the first occasion, tortured this way again the next day for 22 minutes. Convicted at the Kings Bench in 1806, for a misdemeanor, he sought a retrial, and in 1808 he was acquitted. He was subsequently honoured several times and elevated in both rank and status by the British Crown, he was also elected a Member of Parliament in 1813, and upon his death re-interred in St. Paul's Cathedral where a public monument was also erected in his memory. Louisa Calderon remains the victim of oppressive power. Of course, one may argue that this case is one of oppressive and/or arbitrary action by a servant of the State, and that may indeed be so. But for locals, it is also symbolic of what the powerful can do and are experienced as doing to the powerless, 'simply because they are more powerful'.

[107] Lord Devlin's single ideological rationale for the limitation placed on the formulation of his first category (and the exclusion of oppressive and unlawful bullying by the powerful over the powerless in the context of private corporations and individuals), is that "the servants of the government are also servants of the people and the use of their power must always be subordinate to their duty of service".[160] While this is undoubtedly true in the public sphere, in the area of tortious acts of defamation between private persons, an equally legitimate ideological (though different) justification can be found in Article 1, of the Universal Declaration of Human Rights, which asserts the universal and inherent freedom and dignity of all human beings. These fundamental values carry an accompanying duty to act towards all others "in a spirit of brotherhood" - that is, with unconditional respect and comity. These are also constitutional values in Trinidad and Tobago, and so by analogy, what is the duty of care in negligence, becomes the duty of respect for the inherent dignity of all persons in defamation. **The outrageous and oppressive abuse of that duty**, as between private citizens, is therefore arguably sanctionable by an award of exemplary damages.

[108] There is also in Trinidad and Tobago culture a strong sense of objection to 'advantage', "the bullying and exploitation of the weak by the strong, even if it is legal (an attitude that undoubtedly survives from our history and sociology)."[161] The Mighty Sparrow immortalized this cultural value, in the 1960 Road March, 'Ten to One is Murder.'[162] This feature of local society, that actually emerges out of an innate and "native sense of fairness",[163] demands that the courts (re-) consider whether the limitation placed by Lord Devlin on this first category is

[160] At page 1226.
[161] Democracy & Constitution Reform in Trinidad and Tobago, 2008, Meighoo and Jamadar, at page 90.
[162] Dr. Slinger Francisco, CMT, OBE, is more popularly known as the 'Mighty Sparrow', and is considered by many one of the best known and most successful calypsonians. His calypso 'Ten to One is Murder', won the Road March competition in 1960. As Professor Liverpool (supra) has explained: "our popular culture is in fact corroborative of social science theories", and "law does not exist in isolation." He therefore makes the most pertinent point, that: "**We must see law, especially nowadays, as part of culture**."
[163] Democracy & Constitution Reform in Trinidad and Tobago, 2008, Meighoo and Jamadar, at page 90.

appropriate in Trinidad and Tobago in relation to the tort of defamation, and whether it should continue to form any part of our common law. In my opinion, it is not appropriate and should no longer form part of our local common law. 'Advantage' is something we treat with great disdain and there are constitutional imperatives which undergird these cultural values. This category should therefore be extended in relation to the tort of defamation, to include "**outrageous and oppressive actions by private corporations or individuals**". Louisa Calderon is dead, yet still she lives on in us. Now is as good a time as any other, to give new life to what she represents.

The Second Category

[109] Second, "conduct calculated ... to make a profit ... which may well exceed the compensation payable ...". Lord Devlin was of the view that: "This category is not confined to moneymaking in the strict sense. It extends to cases in which the Defendant is seeking to gain at the expense of the Plaintiff some object ... which either he could not obtain at all or not obtain except at a price greater than he wants to put down".[164] Noteworthy however was Lord Devlin's more general statement in this context, that: "Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay."

[110] Indeed, this latter statement by Lord Devlin of the overriding policy underpinning this second category, was seized upon by Hamel Smith J in the case of **Ford v Shah**,[165] in which he filtered the expression 'tort does not pay' through a local lens, to mean 'tort will not be rewarded' (stripping its dependency on any purely economic gain analysis). Hamel Smith J opined, that in awarding exemplary damages, he was "not confined to considering simply whether the Defendants

[164] At pages 1226 and 1227. In **Broome v Cassell**, Lord Hailsham sought to explain Lord Devlin's earlier formulation of this second category as follows: "What is necessary is that the tortious act must be done with guilty knowledge for the motive that the chances of economic advantage outweigh the chances of economic, or perhaps physical, penalty." [1972] A.C. 1027, at 1079 D, supra.
[165] 1 TTLR 73, at pages 99-104.

calculated that, by publishing the libel, they ran a better chance of making a profit in excess of what they may have to pay in compensation", because he was "permitted to look at the issue from the broad perspective that 'tort cannot pay'".[166] This decision is an example of the evolution of our local common law in this area, and I agree entirely with the broader approach articulated by Hamel Smith J (as he then was).

[111] Since this decision, others have followed in its wake, justifying exemplary damages where the calculated intent of the tortfeasor is to gain some advantage (and not necessarily an economic gain). Two recent examples are **Ragoonath v Roget** and **Ramlogan v Warner**, in both of which the motive of seeking political advantage was considered sufficient to satisfy this second limb of Lord Devlin's formulation.[167] Here also, one sees the influence of local social context and culture, influencing and informing the interpretation and application of the law. Taking 'advantage' is generally considered contemptuous in Trinidad and Tobago; to do so for personal gain and to the detriment of another, is worst.

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[166] At page 103, supra; also citing Lord Morris' justification for an award of exemplary damages in **Cassell** (at 1094), "He is prepared to hurt somebody because he thinks that he may well gain by so doing even allowing for the risk that he may be made to pay damages".

[167] (i) **Ragoonath v Roget**, CV 2015-01184, per Kokaram J: "The Claimant in this case is also deserving of an award for exemplary damages in light of the allegations made against her. Exemplary damages are given in instances where a Defendant knowingly commits the tort of defamation *with the intent of gaining some advantage*. ... the Defendant's main aim in making these statements was to augment his image in the eyes of those he represents." (At paragraph 48. Emphasis mine.) "In this case the award of exemplary damages satisfied the traditional criteria ... . The platform grabbing without any iota of truth simply to bolster one's position as union leader can be perceived as bullying ... . While robust speech is important in the Labour market context and in the fight for the rights of workers it ought not to cross the line into reckless speech ... ." (At Paragraph 50.) (TT$160,000.00 exemplary damages awarded in May 2016.); and (ii) **Ramlogan v Warner**, CV 2014-00134, per Mohammed J: "Moreover, I am of the view that this is an appropriate matter for a separate award of exemplary damages. ... Lord Devlin in **Rookes** made it clear that 'profit' was not confined to moneymaking in the strict sense, rather it extended to 'cases in which the Defendant is seeking to gain at the expense of the (Claimant) some object ...". (At paragraph 119.) "In the instant matter, I think that the benefit of the defamatory statements which the defendant uttered at the public political meeting in the midst of the Local Government Elections was indeed *to gain political advantage* for the Defendant's self and his political party ... as against his rivals, namely the Claimant and the Claimant's political party ...". (At paragraph 120. Emphasis mine.) (TT$200.000.00 exemplary damages awarded in July 2015.)

[112] Third, cases in which "exemplary damages are expressly authorised by statute."[168] This category is of no relevance in this case and is anyway uncontroversial.

A Local Common Law

[113] Thus, based on the evolution of the local common law in this area and the developmental inculturation of both of Lord Devlin's first and second categories, exemplary damages can be awarded in this case, and the trial judge had the jurisdiction to do so. Outrageous conduct, intentional oppression and seeking to gain 'advantage', as explained above in the context of **Rookes v Barnard**, are now legitimate bases for awarding exemplary damages for defamation in Trinidad and Tobago. Indeed, in some local cases, significant exemplary damages are being awarded where there is "no proper basis for making the (defamatory) allegations" and where publication was "reckless as to whether or not what was being presented to the public had any validity or truth whatsoever." Recklessness as to truth and/or harm, have also been emerging reasons justifying an award of exemplary damages in defamation.[169] These local reconstructions of the law, are at heart based on the notion that the Caribbean is a unique and distinctive place,[170] over which we, as its citizens, must claim full responsibility. In this way we fulfil the Constitutional mandate of sovereignty (Section 1, Constitution, 'The Republic of Trinidad and Tobago shall be a sovereign democratic State.)

Torres v PLIPDECO

[114] Recently in Trinidad and Tobago, the Court of Appeal has also helpfully examined the general issue of awarding exemplary damages, albeit in the context of breach

[168] At page 1227, supra.

[169] See for example, **Creed v Guardian Media**, CV 2013-05233, at paragraph 53, per Rampersad J; TT$100,000.00 awarded as exemplary damages in December 2016.

[170] CLR James, in his seminal 1963 essay, "From Toussaint L'Ouverture to Fidel Castro', put it this way, "It is an original pattern, not European, not African, (and I would include, 'not Indian, not Chinese, not Syrian',) not a part of the American main, not native in any conceivable sense of that word, but West Indian, *sui generis*, with no parallel anywhere else." ("The Black Jacobins", Randon House, pages 391-92.

of contract. In **Torres v PLIPDECO**,[171] the Court of Appeal confirmed that: "The object of exemplary damages ... is to punish and includes notions of condemnation or denunciation and deterrence". Further, that: "An award of exemplary damages is ... directed at the conduct of the wrongdoer. It is conduct that has been described in a variety of ways such as harsh, vindictive, reprehensible, malicious, wanton, wilful, arrogant, cynical, oppressive, as being in contempt for the Plaintiff's rights, contumelious ... and outrageous".[172] **Torres** thus places conduct at the centre of the test for exemplary damages.[173] **Torres** is also important because it establishes that "the award (of exemplary damages) ought to be proportionate to the Defendant's conduct", aimed at reflecting public outrage and deterring further breaches; while at the same time "the award ought not to be extortionate".[174] And, it is useful because it consolidates some specific factors to be considered in making an award of exemplary damages. That is, the award must be proportionate to the blameworthiness of the wrongdoers' conduct, the vulnerability of the victim, the degree of harm directed at the victim, the need for deterrence, penalties already or likely to be suffered by the wrongdoer, and any advantage wrongfully gained by the wrongdoing.[175] **Torres** therefore, in principle, supports the expansion of the local common law in this area. I join with that court in this decision.

Privy Council Justifications

[115] In 2003, the Privy Council, in a negligence appeal from New Zealand, **A v Bottrill**,[176] described England as "still toiling in the chains of **Rookes v Barnard**".[177] The

[171] (2007), 74 WIR 431.
[172] At paragraph 77, per Mendonca JA.
[173] Warner JA articulated 'The Test' as follows (at paragraph 54): **"I think that the proper approach would be to focus on the conduct of the defendant as a whole: Do the facts disclose reprehensible conduct tending to take advantage … to the plaintiff's disadvantage? Was the misconduct planned and deliberate? …".**
[174] At paragraph 55, per Warner JA.
[175] At paragraph 117, per Mendonca JA.
[176] **A v Bottrill** [2002] UKPC 449.
[177] Paragraph 40, supra.

majority of the Board,[178] in discussing the limits of the jurisdiction to award exemplary damages, articulated "the rationale of the jurisdiction", as follows:

> "In the ordinary course the appropriate response of a court to the commission of a tort is to require the wrongdoer to make good the wronged person's loss, so far as money can achieve this. In appropriate circumstances this may include aggravated damages. *Exceptionally, a defendant's conduct in committing a civil wrong is so outrageous that an order for payment of compensation is not an adequate response.* Something more is needed from the court, to demonstrate that such conduct is altogether unacceptable to society. Then the wrongdoer may be ordered to make a further payment, by way of condemnation and punishment."[179]

> "In principle the limits of the court's jurisdiction to award exemplary damages can be expected to be co-extensive with this broad-based rationale. The court's discretionary jurisdiction may be expected to extend *to all cases of tortious wrongdoing where the defendant's conduct satisfies this criterion of outrageousness*."[180]

[116] The Board, on an examination of several Commonwealth and United States precedents, concluded:

> "Rightly, exemplary damages are associated primarily with intentional wrongdoing. But the ultimate touchstone ... is that of *outrageous conduct by the defendant which calls for punishment*."[181]

[178] Lords Nicholls, Hope and Rodger.
[179] Paragraph 20, supra. (Emphasis mine).
[180] Paragraph 22, supra. (Emphasis mine).
[181] Paragraph 43, supra. (Emphasis mine).

[117] It is noteworthy, that in **Rookes**, Lord Devlin did in fact have some regard to the notion of 'outrageous conduct' as constitutive of conduct justifying an award of exemplary damages. In explaining his "three considerations which ... should always be borne in mind when awards of exemplary damages are being considered",[182] Lord Devlin stated "... If, but only if, the sum ... in mind to award as compensation ... is inadequate to punish him for his *outrageous conduct*, to mark disapproval of such conduct and to deter him from repeating it, then it can award some larger sum."[183]

[118] In **Bottrill's** case, the dissent was based on the view that "exemplary damages should only be awarded in those cases where the Defendant was subjectively aware of the risk to which his conduct exposed the Plaintiff and acted deliberately or recklessly took that risk".[184] This reasoning was justified because, "if the primary purpose of exemplary damages is to punish, it follows that punishment should not be imposed unless the Defendant has intended to cause harm to the Plaintiff or has been subjectively reckless as to whether his conduct will cause harm."[185] For the majority however, "as a matter of principle, intentional misconduct or conscious recklessness is not an essential prerequisite of the court's jurisdiction to award exemplary damages".[186]

This Case

[119] In this case, there is no doubt that the Respondent intended to cause harm to the Appellant, as explained and described above. This intent is a compelling inference that can also be drawn from the totality of the evidence, and in particular from the conduct of the Respondent. Therefore, based on the approach endorsed by

[182] Pages 1227-1228, supra.
[183] Page 1228, supra. (Emphasis mine.)
[184] Paragraph 73, supra. Per Lords Hutton and Millett.
[185] Paragraph 76, supra.
[186] Paragraph 57, supra. And see also the majority view that: "Overall this summary suggests that courts in other countries have not found it necessary in practice to restrict the scope of exemplary damages ... to cases of intentional wrongdoing or conscious recklessness." (Paragraph 43, supra).

the Privy Council in **Bottrill's** case (even if limited to the view of the minority), the court had jurisdiction to award exemplary damages. For completeness and clarity, I support the view of the majority in **Bottrill's** case and consider it to be the appropriate law in Trinidad and Tobago. I also note, that the Court of Appeal in **Torres**, cited **Bottrill's** case with approval, thereby supporting the development of the local common law in alignment with that decision. Exemplary damages, though usually awarded in cases of intentional wrongdoing, as a matter of policy, the jurisdiction to award them depends on whether the tortfeasor's conduct is so outrageous that it calls for punishment (over and beyond any such effect that the compensatory and aggravated damages award may have).[187] All other common law categories are but subsets of this single one.

Other Considerations

[120] It is worth repeating the well-known considerations that a court should also bear in mind in determining whether to award exemplary damages for defamation (and in all cases of tort). First, it is an exceptional order, as it serves to punish and deter, and the primary objective of damages in civil suits is compensatory. Second, cases where there is a lack of intentional wrongdoing or an absence of reckless disregard for harm, will be rare and exceptional. Third, exemplary damages should only be awarded when the award for compensation in and of itself, will not serve to effectively punish or deter the tortfeasor.[188]

[121] This case satisfies all of these elements. The conduct of the Respondent was wilful and intentional. It was outrageous by any standards, even given the permissiveness of the local political gayelle. It was oppressive. It was intended to both 'advantage' the Appellant, and gain political advantage for the Respondent. And in my estimation, the award for compensation (TT$450,000.00), which

[187] See also, Gatley, paragraphs 9.15 to 9.17, supra.
[188] See, **Rookes v Barnard**, at pages 1221, 1227-1228; **A v Bottrill**, at paragraphs 64-65; supra.

includes an uplift for aggravated damages, does not effectively punish the Respondent for his egregious acts. More is needed in the circumstances of this case to both punish and deter.

[122] The 'advantage' taken, the intent shown, the strategy deployed and the harm caused, are all reprehensible. These attacks were a perversion of free speech. They served no purpose other than to "deal with" the Appellant, with the aim in so doing to oppressively and existentially crush his fledgling political and public service career. They denigrated his religious integrity and reputation. They smeared his charitable and community oriented service. They threatened his physical, mental, emotional and psychological health and well-being. Furthermore, having regard to the **Torres**' factors, particularly the blameworthiness of the wrongdoers conduct, the vulnerability of the victim, the degree of harm directed at the victim, the need for deterrence and any advantage wrongfully gained by the wrongdoing (all of which have been discussed extensively above), it is clear that in this case an award of exemplary damages is well justified. In so far as the courts are the conscience of the people and the guardians of their rights, all reasonable persons in this society, no doubt, cry out for such conduct to be roundly condemned.

[123] In my opinion, having regard to exemplary damages awards in comparative cases (especially the awards in **Aleong's** case and **Julien's** case, which were both less intentionally oppressive or outrageous),[189] all of the relevant considerations discussed above, including the particular circumstances of this case, the trial judge's award of TT$20,000.00 was excessively low and completely out of sync with relevant, contemporaneous, comparable local awards. In my opinion, a fair

[189] Recent prior cases: **Aleong's** case, TT$200,000.00, June 2014 CA; **Julien's** case, TT$100,000.00, April 2014; and note that in 1990, in **Forde v Shah**, TT$10,000.00 was awarded for exemplary damages (about 24 years prior to the trial judge's decision in this matter). Recent subsequent cases: **Vitro Chem v Khan** CV 2012-03304, TT$80,000.00, July 2016; **Singh v Trinidad Express Ltd.**, TT$100,000.00, May 2016; **Ragoonath v Roget**, TT$160,000.00, May 2016; **Ramlogan v Warner**, TT$200,000.00, July 2015.

and just award for exemplary damages, in this case, in July 2014, was TT$150,000.00. Such an award would have met the needs of both punishment and deterrence that are particularly justified on the inexcusable and exceptional facts of this case.

THE ISSUE OF A COURT ORDERED APOLOGY OR DECLARATION OF FALSITY

[124] The trial judge felt strongly, even passionately, that monetary awards could not really achieve the goals of vindication and consolation (solace) for injury to reputation. He comprehensively explained his thinking and rationale for this position. I find his discussion engaging and, to a point, compelling.[190] His underpinning ideology is restorative justice and his overarching goal is healing, individually and societally.[191] These are noble objectives and ones to certainly aspire towards, as the law of defamation evolves developmentally, responding to new societal insights and aspirations. The law must always be capable of constructively and effectively (purposefully) responding to real and relevant emerging societal needs. I therefore accept the trial judge's proposition, that particularly in a small close knit developing society such as Trinidad and Tobago, with all of its fragility along so many fault lines, such as race, religion, colour, class, geography, gender, and politics, restorative justice initiatives must be explored and implemented when and where appropriate. I commend the trial judge for leading this exploration.[192]

[125] The trial judge articulated his position as follows:

> "However, for the victim of the defamatory remark the money in hand, though useful, may mean little to restore value to his name and remedy his reputation. ... On the other hand, it would mean

[190] See paragraphs 3 to 10, and 91 to 109, judgment, supra.
[191] See paragraph 7, supra.
[192] See also his subsequent extensive discussion on this subject in **Ragoonath v Roget**, supra, at paragraphs 51 to 69.

> everything if the victim obtains restoration, a public pronouncement to the world that one can explicitly refer to, which in clear terms provides the antidote to the sting of the defamation and truly vindicates the claimant's reputation. The law of damages falls short in its attempt to do so as it is an obsessed conversation of dollar values of reputations. The real healing effect of a public or private apology or a public statement made in open court as recompense may be just as, or more effective, than 'a pound of silver'."[193]

[126] This idea that restoration of reputation is linked to "a public pronouncement to the world that one can explicitly refer to, which in clear terms ... truly vindicates the Claimant's reputation", is a well-established objective of monetary awards in defamation.[194] In deciding upon a suitable monetary award, one consideration is whether the sums awarded can be pointed to by the Claimant in the future, so as to adequately vindicate his reputation at that time. This is because of the insidious, interminable, and persistent nature of defamatory statements and publications.[195]

[127] To the extent that an award of damages achieves this purpose of vindication, apologies ordered by a court may be an additional way of accomplishing the same objective (and not necessarily as a substitute for it; though a coupling of the two may also be the most effective remedy). However, since it is the Claimant's

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[193] Paragraph 7, judgment, supra.

[194] Lord Hailsham made this clear in **Broome v Cassell & Co. Ltd**. [1972] A.C. 1027, at 1071 when he explained that the purpose of damages, included compensation for the eventuality that "... 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 ... sufficient to convince a bystander of the baselessness of the charge."

[195] See, **Hill v Church of Scientology of Toronto**, (1995) 2 S.C.R. (Supreme Court of Canada), 1130, "... a defamatory statement can seep into the crevasses of the subconscious and lurk there ever ready to spring forth its cancerous evil. The unfortunate impression left by a libel may last a lifetime". And see also, Lord Atkin in **Ley v Hamilton** (1935) 153 L.T. 384 at 386, "It is impossible to track the scandal, to know what quarters the poison may reach."

reputation that one seeks to vindicate and console, a court must be careful not to hastily impose its views on what may truly serve that purpose for any given Claimant, in any particular circumstances. A Claimant may not value or even desire an apology ordered by a court, considering that any such compelled apology may have little real effect in vindicating a damaged reputation. A Claimant may legitimately feel that such a contrived apology would lack any sincerity, and thus have very little vindicatory efficacy (whether short or long term) in the eyes of the public. Indeed, it is trite that the lack of a voluntary apology is considered an aggravating factor in the assessment of damages. It is therefore prudent, if not essential, that the Claimant's opinion, preferences and reasons be ascertained before embarking on this course of action, in the exercise of any general power of the court. The Claimant is the victim, and any attempts at restorative justice ought properly and respectfully to consider the views of the wronged party.

[128] Furthermore, it is not agreed by all that court ordered declarations or apologies are even desirable. The authors of Gatley[196] argue that: "An award of damages is the primary remedy for defamation. ... there is no general power to grant ... a declaration: if there were it would be likely to subvert the balance between the protection of reputation and freedom of expression".[197] Gatley also points out that: "There is no general power for the court to order the Defendant to publish a correction or apology".[198] Compelling an apology could also amount to double punishment, two sanctions. And, could lead to further punishment, if say, there was a refusal to comply and contempt proceedings are brought. The trial judge set out the alternative positions in his judgment, traversing a wide cross section of jurisdictions including Jamaica, positions which argue that the remedy of

[196] At paragraph 9.1, Supra.
[197] Particularly in the context of, say, defences of qualified privilege and declarations of falsity; paragraph 9.1, footnote 4.
[198] They however acknowledge that such powers have been conferred by statute under the UK Defamation Act 1996.

damages actually exacerbates the tension between protection of reputation and freedom of expression, and for the value of court ordered declarations and apologies in defamation cases.[199]

[129] He stated his own opinion as follows: "I share the view that the focus on the damages remedy diverts attention from two basic components of defamation law. That the consolation sought is for the injury to a name, honour, dignity and reputation and not to one's pocket. Secondly the court should "where feasible re-establish a dignified and respectful relationship between the parties ... the goal should be to knit together shattered relationships in the community and encourage ... human and social interdependence".[200]

[130] Compensation remains the primary remedy in civil defamation suits. It is nevertheless true, that compensation for the effects of a defamatory statement includes vindication and consolation for damage to reputation, and that these are also central objectives of remedies in defamation. However, when circumstances warrant it, punishment and deterrence are also recognised as necessary remedial components.[201] This remains the general law in Trinidad and Tobago.

[131] What is less recognisable as an established and central objective of defamation law in Trinidad and Tobago at this time, is the objective of re-establishing respectful relationships. This is no doubt a highly desirable goal, and one that should be sought whenever possible. It serves the common good. It may be that in time it will become a recognised legal principle and imperative. For now, I add my support to its status as a desirable aspiration; one that courts can explore, but

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[199] Paragraphs 97 to 103, judgment.

[200] At paragraph 104; citing with approval, Mokgoro J, in **Dikoko v Mokhatla** (2007) 1 BCLR 1 (South Africa); and also at paragraph 112, "Our conversation on the damages remedy should be *refocused to its ultimate objectives of the consolation, vindication and restoration of relationships and the protection of the good reputation and name of claimants*".(Emphasis mine.)

[201] Gatley, paragraphs 9.2 and 9.15, supra.

should only carefully impose, at least until such time as its legal parameters are more fully recognised and developed. In this regard, cultural considerations are very relevant.

[132] Several questions may arise as one undertakes this exploration, as the courts below seem inclined to pursue. Therefore, even though this court has not been called upon to decide this issue, I propose to set out some of the kinds of questions that may be worth considering as this aspect of the law of defamation is developed. Has the Claimant sought a court ordered declaration or apology? If not, why not? Is the imposition of either of these appropriate in the circumstances of the particular case, given the established legal objectives of defamation law in Trinidad and Tobago, including the court's public policy responsibility to punish and deter in appropriate circumstances? Should the remedy of monetary compensation be relegated to a second tier relief, in deference to the pursuit of re-establishing respectful relationships? And if so, in what circumstances? To what extent is consent and/or cooperation (of either or both parties) a factor, if the avowed restorative goal is to be meaningfully and effectively achieved? Is an apology that is compelled, really an apology? And, does such a compelled apology not also carry the stigma of a sanction (which is one of the critiques of a monetary award)? Even of multiple sanctions, contempt proceedings are invoked. All of these are as yet unexplored and unanswered questions in this jurisdiction. Speaking for myself, two things are clear, the views of the victim should always be borne in mind, and cultural considerations are relevant.

[133] In the instant matter, there is no evidence that the Claimant sought or thought helpful a court ordered apology; or that the Respondent was ever willing to agree to one. Indeed, the Respondent has maintained his belief in the truth of his assertions before this court. In these circumstances any such court ordered apology is, in my opinion, unlikely to effectively contribute to the public

vindication of the Appellant's reputation, or to re-establish any respectful relationship between the parties. If anything, in this case it will likely lead to greater resentment between the parties, as there is absolutely no evidence to indicate any movement towards some re-establishment of relationship.

[134] However, in so far as a court of law has the jurisdiction to order mandatory injunctions in tort, which it does, in my opinion it undoubtedly has the jurisdiction to order the publication of an apology. Whether, and if so, in what circumstances and in what form, it should do so, is quite another matter. As I have explained, this is an issue that does not fall for determination in this appeal, and it would not be wise to say more than I have already said, except to say that it is a matter to be approached with care, bearing in mind that this is a policy development.

[135] In so far as the trial judge chose to make a declaration of falsity at the beginning of his judgment,[202] it has not been disputed that he had the jurisdiction to do so.[203] However, it is noteworthy that the Appellant did not seek any declaratory relief, neither did the Appellant on appeal formally seek to have the declarations set aside. Rather, the Appellant criticised the trial judge for granting the declarations that he did, on the basis of his declared bias against awards of damages and his preference for other restorative alternatives as being more appropriate. This sentiment is understandable, given some of the remarks of the trial judge on this aspect of remedies.[204] It may very well be, that the trial judge's ideology did contribute to the wholly erroneous under-estimate of both the general and exemplary damages due to the Appellant.

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[202] Paragraphs 8 to 11, judgment, supra.
[203] Paragraph 106, judgment, citing **Imperial Tobaco Ltd. v AG**, [1980] 1 All ER 866, per Lord Lane: "Anyone is on principle entitled to apply to the court for a declaration as to either rights unless statutorily prohibited expressly or by necessary implication".
[204] See paragraphs 92, 94, 95 and 107, judgment, supra.

COSTS

[136] The trial judge ordered the Respondent to pay prescribed costs quantified on the value of the award.[205] He was not plainly wrong to do so. The Respondent challenged this decision on an erroneous basis that was plainly wrong. This was properly a case where costs fell to be assessed in accordance with Rule 67.5, CPR, 1998 - Prescribed Costs (Rule 67.4 not being applicable). This was agreed. It was contended that the Respondent ought only to have been ordered to pay 75% of the costs due, as liability had been conceded and there was no trial on liability.[206] However, on a closer examination of the proceedings, it was conceded that in fact liability was accepted after the Pre-trial Review, and therefore the percentage of prescribed costs payable under Appendix C, was 100% of the prescribed costs allowed under Appendix B (to Part 67, CPR, 1998). In so far as the judge exercised his discretion in following the rules of CPR, 1998 on costs, he was clearly not plainly wrong in doing so. This challenge therefore fails.

CONCLUSION

[137] The Respondent's cross appeals on general damages, exemplary damages and costs, are all dismissed. The Appellant's appeal is allowed and the trial judge's orders for general and exemplary damages are set aside. In their place, it is ordered that the Respondent pay the Appellant: (i) general damages in the sum of TT$500,000.00, and (ii) exemplary damages in the sum of TT$150,000.00. The judge's declarations and his order for costs remain. On this appeal, the Respondent will pay the Appellant's costs, being two-thirds of the costs below, certified fit for Senior Counsel.

P. Jamadar

Justice of Appeal

[205] Paragraph 111, judgment.

[206] See Rule 67.5 (1) and Appendix C (to Part 67), CPR, 1998.

Delivered by Smith J.A.

[138] I agree that this appeal should be allowed and that (i) the award of general damages should be increased from $200,000.00 to $500,000.00. (ii) the award of exemplary damages should be increased from $20,000.00 to $150,000.00.

[139] As Jamadar J.A. noted at paragraph 19 of his opinion, "**It is well settled that before an appellate court will interfere with an award of damages it will require to be satisfied that the trial judge erred in principle or made an award so inordinately low or so unwarrantably high that it cannot be permitted to stand**."[207] I base my opinion on the narrow grounds that: (a) the trial judge erred in principle by considering irrelevant factors in coming to his decision; and (b) the trial judge's choice of a range within which this case fell was too low, hence the award of general damages which he made was also inordinately low. These 2 issues are dealt with at paragraphs 19 to 51 and paragraph 123 of the opinion of Jamadar J.A.

[140] However, while I agree with the awards as suggested by Jamadar J.A., I find that I am unable to accept his reasoning in the following 3 areas:

a) The apparent conflation of certain recitals in the preamble of the Constitution with fundamental rights.
b) The general socio/political/economic commentary expounded.
c) The creation of a new category of award for exemplary damages.

(a) Apparent conflation of values in preamble recitals with fundamental rights

[141] Fundamental human rights and freedoms are mentioned in section 4 of the Constitution of Trinidad and Tobago and particularised in section 5 of the Constitution. However, these rights and freedoms are not an open charter for all

[207] Citing from **Calix v Attorney General of Trinidad and Tobago** [2013] UKPC 15 at paragraph 28.

derivative or related rights and freedoms. For example, even though an individual has a right to life, liberty and security of the person, there is no related right not to be extradited.[208] Similarly, even though freedom of association is an expressed right and freedom, there is no right to strike.[209]

[142] In the majority opinion, several of the recitals of the preamble of the Constitution are conflated with or given the status of fundamental rights and freedoms. I am of the view that this is not the case in Trinidad and Tobago at present. By way of example, in paragraph 4 of the opinion of Jamadar J.A., the right of the individual to respect of his private and family life allegedly creates inter alia, a right to character, reputation and to "**the restraint of unlawful tortious assaults on the character of a person…**". I do not accept this apparent conflation of preamble recitals and derivative "rights" to the status of fundamental rights and freedoms.

(b**) General socio/political/economic commentary**

[143] I find that I am not able to recognise certain statements of a social/political/economic commentary in the opinion of the majority. That is why I have based my opinion on the narrow grounds mentioned in paragraph 139 above. No useful purpose would be served in cherry picking each such comment and replying to it. However, by way of example, I do not accept that the law should accept the premise that "politics has its own morality"[210] nor that generally, religion aligns along political lines in Trinidad and Tobago.[211]

[208] See **Steve Ferguson and anor v The Commissioner of Prisons** Civil Appeal No. 108 of 2009.
[209] See **Learie Collymore and other v The Attorney General of Trinidad and Tobago** [1978] AC 538.
[210] See the introductory quote; note 1 and paragraph 13 of the opinion of Jamadar J.A.
[211] See paragraph 39 of the majority opinion delivered by Jamadar J.A.

(**c) No new category of award for exemplary damages**

[144] Since **Rookes v Barnard**[212] in 1964, the law has recognised 3 categories of cases for which exemplary damages may be awarded, they are:

i. oppressive, arbitrary or unconstitutional action by servants or agents of the State;

ii. conduct calculated to make a profit which may well exceed the compensation payable; and

iii. cases where statute allows this.

[145] In relation to category (ii) above (conduct calculated to make a profit which may well exceed the compensation payable), as Jamadar J.A. correctly noted at paragraph 109 of his opinion, "**This category is not confined to moneymaking in the strict sense. It extends to cases in which the Defendant is seeking to gain at the expense of the Plaintiff some object ... which either he could not obtain at all or not obtain except at a price greater than he wants to put down**"

[146] Jamadar J.A. also was of the view that category (i) (oppressive, arbitrary or unconstitutional action by servants or agents of the State) should be expanded to oppressive actions by private corporations or individuals. In summary, he opined that the expansion of category (i) was appropriate since we in Trinidad and Tobago (and other former British West Indian colonies) feel a particular aversion to the concept of "advantage" by the strong over the weak because of our history of slavery, indentureship and colonial rule.

[147] I find that the law on exemplary damages as it stands, sufficiently caters for any such perceived "advantage" and there is no need to expand category (i) as suggested. I say so for the following 3 reasons.

[212] [1964] A.C. 1129

[148] Firstly, relations between private individuals and entities are primarily covered by other areas of law such as the law of contract, tort, trusts and companies. Perceived "wrongs" are catered for by awards of damages. Punishment and deterrence (which are essential features of exemplary damages) over and above recognised awards of damages are further unaccepted intrusions into the freedom of parties to deal with each other in free and open societies.

[149] Secondly, awards of exemplary damages already cater for special "advantage" situations between private individuals. Indeed, the second category of **Rookes v Barnard** can and does achieve this objective. Further, recent developments in the law have expanded the second category beyond the law of tort to areas such as the law of contract and libel, to cater for this type of "advantage" where one party seeks to obtain some gain beyond the normal penalty that would be incurred.
In fact, Jamadar J.A. accepted that this current libel matter could properly fit into a category (ii) **Rookes v Barnard** situation to justify an award of exemplary damages.

[150] Third, the concept of "advantage" in private law situations introduces unacceptable vagueness and uncertainties into the law. So for instance, even district, local and regional customs may have to be weighed up and given values as against each other in deciding what is "advantage". For example, what may seem like "advantage" in a region, district, ethnic or religious group may be perfectly acceptable in another group. Is the court to become the arbiter of which group's social, political or religious views should prevail over the other? I suggest that this venture into "advantage" is best left for social, political or economic specialists rather than the courts.

[151] I am of the view that there is no need to expand the categories of **Rookes v Barnard** to include oppressive actions by private corporations or individuals.

[152] In conclusion, like the majority, I too agree to increase the awards of general damages and exemplary damages as they suggest. However, I do so on the narrow grounds as mentioned in paragraph 139 above.

G. Smith
Justice of Appeal

Moosai J.A.

[153] Save and except for the expansion of category one in **Rookes v Barnard**, which is discussed at paragraphs 104 to 108 above, I agree with the analysis and reasoning of Jamadar JA, and concur with his decisions. In relation to the expansion of category one in **Rookes**, I agree with the reasoning of Smith J.A. as set out at paragraphs 144 to 151 above.

P. Moosai
Justice of Appeal