



[2017] JMSC Civ. 41

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014HCV05762

BETWEEN	CLAYTON TYNDALE	CLAIMANT
AND	CORPORAL ORVILLE CLARKE	1ST DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	2ND DEFENDANT

IN OPEN COURT

Mr. Andrew Irving for the Claimant

Ms. Gail Mitchell instructed by the Director of State Proceedings for the 1st and 2nd Defendants

December 20, 2016 and March 24, 2017

Assessment of Damages - Defence Limited to Quantum - False Imprisonment - Aggravated Damages - Exemplary Damages - Loss of Earnings.

JACKSON-HAISLEY J. (AG.)

[1] The Claimant, Clayton Tyndale, a bus driver claims against the first Defendant, Corporal Orville Clarke and the second Defendant, the Attorney General of Jamaica, General Damages for False Imprisonment, Special Damages, Aggravated and/or Exemplary Damages, Interest and Costs. The claim arises from his imprisonment on the 23rd day of September, 2014. He claims that the first Defendant maliciously and without reasonable and probable cause wrongfully imprisoned and deprived him of his liberty for thirty-five days whilst

acting in the performance or purported performance of his duty as a member of the Jamaica Constabulary Force. The second Defendant is sued pursuant to the Crown Proceedings Act. The Claim Form and Particulars of Claim setting out the details of his claim were filed on November 26, 2014.

[2] With respect to the claim for General Damages he avers that on the 6th day of March, 2014 he was granted bail in the sum of \$400,000.00 with 1 or 2 sureties in respect of a Rape charge and that one Crystal Anderson stood surety for him, following which he was released on bail. Further, that a disagreement with Crystal Anderson resulted in her turning in the bail bond which led to him being arrested and taken into custody by the first Defendant on the 23rd day of September, 2014. Although he was offered bail on the 23rd day of October, it was not until the 28th day of October 2014 that he was able to take advantage of this. He is claiming that he was maliciously and without reasonable cause imprisoned and deprived of his liberty for thirty-five days.

[3] The particulars of the Aggravated and Exemplary Damages are that, the first Defendant failed to investigate the allegations of the surety, Crystal Anderson or to ascertain that she was released from her obligations before taking him into custody, thereby depriving him of his liberty. Further, that he was falsely imprisoned without charge and placed in lock ups that were dirty, filthy and which caused him great distress, discomfort, humiliation and indignity. In addition he avers that he was taken into custody in full view of the passengers on the bus he was driving and persons in the bus park thereby resulting in embarrassment and damage to his reputation. The Claimant contends that the first Defendant's actions were in breach of the provisions of sections 19(2) and (3) of the Bail Act which set out how a surety ought to be released from his obligations.

[4] Special Damages is claimed under the following heads:

Attorney-at-law's fees	\$40,000.00
Loss of Earnings	\$80,000.00
Total	\$120,000.00

- [5] On October 2, 2015 the Defendants filed a Defence Limited to Quantum but put the Claimant to strict proof in relation to Damages.
- [6] At the hearing of the Assessment of Damages on December 20, 2016 the Claimant's witness statement filed November 16, 2016 was allowed to stand as his evidence-in-chief. He gave further evidence by way of amplification and was thereafter cross-examined by counsel for the Defendants.
- [7] His evidence is that he was on a Rape charge and on the 6th of March, 2014 he was offered bail in the sum of \$400,000.00 with 1 or 2 sureties and his then girlfriend, Crystal Anderson stood surety and so he was released on bail. Further, that sometime in August 2014, he and Crystal Anderson had an argument and she subsequently threatened to turn in the bail bonds and have him arrested by the police. The Claimant stated that he was not in breach of the condition of his bail requiring him to report to the Duhaney Park Police Station. Further, that on or about the 23rd day of September 2014 at about 4:55 p.m. he drove into the Pechon Street Bus Park in Downtown Kingston, where he loaded his bus. At about 5 pm. when he was about to exit the gate of the said bus park he was stopped by the first Defendant and asked for his driver's license and upon compliance he was told to unload the bus and that he was being arrested. This incident, he says took place in front of his passengers and other persons present in the bus park. This, he states, caused him to be embarrassed, distressed and humiliated.
- [8] He states further, that on arrival at the Darling Street Police Station he saw Crystal Anderson and heard her telling the police that he was not going to Court or reporting to the Duhaney Park Police Station. The Claimant stated that he immediately responded that this was a lie. According to him, the allegations made by Crystal Anderson were never investigated and he was simply placed into a cell at the Darling Street lock up. He was placed in the cell next to the bathroom for one hour with other detainees and it was small, filthy, and dirty and smelled bad. Following this, he was taken to the Duhaney Park Police Station,

then to the Hunts Bay Police Station where he was placed in lock up for two days and was later transported to the Horizon lockup. Further, that while at this lock up he shared a cell with four other detainees who were on murder charges, and so he was afraid and did not eat for two days.

[9] It was not until the 23rd day of October that he indicates that he was finally brought to the Resident Magistrate's Court, where an order was made releasing Crystal Anderson from her obligations and he was offered bail which he took up on the 28th day of October, 2014 with his employer Richard Daley standing surety for him.

[10] The Defendants called no witnesses to challenge the evidence of the Claimant. In cross-examination of the Claimant it was suggested to him that it was because of his inability to take up his bail from the 23rd October to the 28th October why he was in custody up to the 28th October. He was also questioned in relation to his claim for loss of earnings. It was suggested to him that apart from a document that alleges that he was employed to a Mr. Daley, he has put forward no proof as to his earnings in 2013. He disagreed with these suggestions.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[11] Counsel for the Claimant submitted that the principal heads under which the Court should consider Damages for False Imprisonment are "injury to liberty, injury to feelings, physical injury, illness or discomfort resulting from the detention, injury to reputation and any pecuniary loss which is not too remote a consequence of imprisonment". He submitted further, that the sum to be awarded for False Imprisonment should be at the Judge's discretion and should be calculated using comparable awards and adjusting same using the Consumer Price Index. He pointed out the circumstances concerning the Claimant's imprisonment including the fact that he was taken to different police stations and the poor conditions under which he was kept. Further, that the manner in which he was arrested caused him humiliation and embarrassment.

[12] He directed the Court's attention to the following authorities:

Herwin Fearon v The Attorney General of Jamaica & Constable Brown C.L. 1990/F-046- where an award of \$280,000.00 was made to a minibus operator for 31/2 days in March 2005 at a daily rate of \$80,000.00. This award when updated using the CPI for November 2016 amounts to \$220,909.52 per day.

John Crossfield v The Attorney-General of Jamaica [2016] JMCA Civ 40 - where an award of \$600,000.00 was made to a security guard for 4 days in July 2016 at a daily rate of \$150,000.00. This figure updates to \$241,558.44 per day.

Winston Thomas v The Attorney General of Jamaica (Consolidated with Jervis Blake et al v The Attorney General of Jamaica) [2016] JMSC Civ. 159 - where an award of \$750,000.00 was made to a businessman for 3 days in September 2016 at a daily rate of \$250,000.00. This award when updated using the CPI for November 2016 amounts to \$251,494.45 per day.

Claudette Hamilton v The Attorney General of Jamaica (Consolidated with Jervis Blake v The Attorney General of Jamaica) [2016] JMSC Civ. 159- where an award of \$950,000.00 was made to an employee for a little over 4 days in September 2016 at a daily rate of \$237,500.00. This award when updated using the CPI for November is \$238,919.73 per day.

[13] Counsel submitted that the **Herwin Fearon** (supra) case and the **Claudette Hamilton** (supra) case were similar to the case of the Claimant herein but that the circumstances in which the Claimant was unlawfully detained in the instant case are in fact worse than those in the **Herwin Fearon** case. In the **Herwin Fearon** case the allegations are that the Claimant who is a minibus operator was accosted in a public and busy area in the town of May Pen, pushed to the police station some 150 metres away, humiliated, detained for a period of 3 ½ days at the May Pen Lock up and subsequently charged with receiving stolen property. The discomforts resulting from the detention are set out on page 9 of the judgment and are similar to the discomfort suffered by the Claimant in the instant

case. The judge in fact found that the initial arrest and charge of the Claimant was lawful and justifiable but that there was unreasonable delay in releasing him whereas in the instant case the Claimant is a minibus driver who was detained in the Pechon Street bus park in Downtown Kingston in the presence of over 15 passengers some of whom knew him and regularly travelled on the bus. He contended that with respect to the claim for loss of earnings that the sum of \$80,000.00 was an appropriate amount.

He submitted further, that the Claimant should be awarded Aggravated Damages in the sum of \$1,000,000.00 for mental distress owing to the manner and circumstances in which the Defendant had committed the tort. Further, he should be awarded the sum of \$250,000.00 for Exemplary Damages.

SUBMISSIONS ON BEHALF OF THE DEFENDANTS

[14] In respect of Damages for False Imprisonment, counsel representing the Defendants submitted that in determining the duration of imprisonment that the Court should only make an award for the period prior to the date he was unable to take up his bail and not for the period after the bail offer was made to him. It was argued that once the Claimant was taken before the court, he was no longer unlawfully detained and any unlawful detention by the police officer would have come to an end by virtue of being brought before a court of law. It was submitted that the Claimant is only entitled to recover damages for 30 days.

[15] Reliance was placed on the following cases:

Cornel McKenzie v The Attorney General of Jamaica Suit No. C.L.M. 022/2002 where Campbell J awarded the sum of \$442,000.00 for a period of 26 days. During the period of his incarceration he was forced to sleep on the cold concrete, a fact which has a bearing on the per diem award made. When updated this figure amounts to \$1,524,738.68.

John Gaynor v Cable and Wireless and Ors., Suit No. C.L. 2000/G-124 where an award was made on December 1, 2005 in the sum of \$120,000.00 where the

Claimant was imprisoned for four days. “Mr. Gaynor” as His Lordship, Justice K. Anderson cited in the case of Claim No. 2007 HCV 03684 **Delroy Thompson v Attorney-General of Jamaica and Detective Douglas Taylor**, para. 46, “only received compensation, arising from the loss of his liberty for a period of four days, not for humiliation, distress, illness, or anything of that nature” he having made a distinction between Gaynor and the circumstances that obtained in Thompson. That award is now worth \$299,746.30.

- [16] It was submitted that the compensation for False Imprisonment ought to be one for loss of the Claimant’s liberty only, bearing in mind that the Claimant was no stranger to the penal system and that the features of injury to hurt feelings and reputation are absent. It was submitted that the updated sum as reflected in the case **Cornel McKenzie** should be reduced and that the sum of \$1,400,000.00 was an appropriate award.
- [17] A challenge was raised with respect to the claim for Loss of Earnings. It was contended that the document tendered as Exhibit 5 does not meet the standard for authenticity or credibility. As a consequence it was submitted that the Court should use the Minimum Wage Guideline of \$5000.00 per week up to January 6, 2014 and \$5600.00 after that date, compensating him for a period of 10 hours each day for 6 days each week. This would amount to between \$6500.00 to \$7000.00 per week. As a consequence it was submitted that the sum of \$27,000.00 was a reasonable sum representing compensation for 30 days.
- [18] With respect to Aggravated Damages, it was contended that this was not a proper case for an award for Aggravated Damages as this should be imposed on a Defendant whose conduct increased the injury to the Claimant causing distress, embarrassment and or humiliation and damage to reputation. Reliance was placed on the judgment of Her Ladyship Ms. Justice Edwards in **Denese Keane Madden v The Attorney General of Jamaica and Corporal T. Webster-Lawrence** delivered on February 14, 2014. It was also argued that this approach was adopted by Sykes, J in the unreported judgment of **Leeman**

Anderson v The Attorney General of Jamaica CLA017 of 2002 decided July 16, 2004.

ANALYSIS

GENERAL DAMAGES

- [19] The purpose of an assessment of damages is to arrive at a figure that will provide adequate compensation to the Claimant for the damage, loss or injury suffered. This principle was enunciated by Lord Blackburn in **Livingstone v Rawyards Coal Co. [1880 Appeal CAS.25]** in these terms:

“I do not think there is any difference of opinion as to it being a general rule that, where any injuries to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get that sum of money which will put the party who has been injured, or who has suffered in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation”.

- [20] It has been highlighted in cases such as the **Herwin Fearon** case (page 5) and the case **Maxwell Russell v The Attorney General of Jamaica et al.** (paragraph 15), that a claim for False Imprisonment is maintainable where a person is detained without lawful justification. Mangatal J. in the **Maxwell Russell** case went on to highlight the dicta of Lord Woolf M.R. in **Thompson v Commissioner of Police of the Metropolis** 1998 QB 498, where he pointed out that damages for false imprisonment, i.e. for loss of liberty, and damages for malicious prosecution, are compensation for something which is akin to pain and suffering. Mangatal J. used the formula recommended by Lord Woolf M.R. and awarded damages for the first 24 hours and thereafter at a progressively reducing scale.

- [21] It is this formula that counsel for the Claimant suggests should be utilized. Counsel for the Defendants on the other hand contends that there should be no award for the initial shock as he had already been in custody. I find favour with the submissions of counsel for the Defendants in this regard, particularly

because the Claimant had already spent time in custody for the Rape charge. With respect to the number of days for which compensation should be awarded I am guided by the unreported decision of **Conrad Gregory v AG**, CI. No. HCV 02530 of 2008 in which F. Williams J. in considering the consequences of the Claimant's inability to take up his bail said this at paragraph 36:

"In the court's view the false imprisonment and the malicious prosecution in this regard are inextricably intertwined. If he has not been detained and then prosecuted on a false charge, he would likely have continued to enjoy his liberty. The defendant must be held responsible for all the consequences of that detention, malicious prosecution and the resultant false imprisonment. In the court's view the claimant must be compensated for all the days he remained in custody."

[22] In the circumstances, I find that but for the False Imprisonment that took place on September 23, 2014 this Claimant would not have been in custody for that period of time and so I am prepared to make an award for the 35 days.

[23] I have considered all the cases to which I have been referred as well as the submissions advanced. The cases relied on by the Defendants do not seem to reflect the prevailing trend in relation to awards for False Imprisonment as seen in cases like the **John Crossfield** case and the consolidated cases of **Claudette Hamilton and Jervis Blake**. I find the cases submitted by the Claimant useful although I am of the view that the injuries sustained in those cases were more severe. The **Herwin Fearon** case for example, although similar, was made worse by virtue of the fact that the Claimant was pushed to the Police Station, in the busy town of May Pen, which was some 150 metres away and by the fact that he had to sit on the concrete floor during the period of his detention.

[24] I am particularly attracted to the recent decision of the Court of Appeal in the **John Crossfield** case in which the first instance judge made an award of \$60,000.00 per day for 4 days amounting to \$240,000.00. The Court of Appeal found this award to be inadequate and substituted an award of \$600,000.00 thereby awarding \$150,000.00 per day which when updated amounts to \$241,558.44 per day. It is noted that the circumstances of the imprisonment of Mr. Crossfield were more severe than in the instant case. In particular Mr.

Crossfield spoke about being handcuffed in his uniform, he being a police officer and indicated that he even developed skin fungus and chicken pox. I accept that Mr. Tyndale suffered some embarrassment, having been arrested at his place of work. However, I find Mr. Crossfield's injury to be worse than that complained of by Mr. Tyndale, which was made worse by virtue of the fact that he was a security officer. Therefore, I am of the view that Mr. Crossfield's injury is about twice as severe as that of Mr. Tyndale.

- [25] I find that award of \$121,000.00 per day to be appropriate. The award should be the same for each day incarcerated. This amounts to \$4,235,000.00 representing General Damages for False Imprisonment.

AGGRAVATED DAMAGES

- [26] In addition to General Damages a party may claim Aggravated Damages. In the often cited decision of **Rookes v Barnard** [1964] A. C. 1129 Lord Devlin pointed out some elements required for a claim for Aggravated Damages to succeed by saying at page 1221:

'It is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite of the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of pride and dignity...'

- [27] In the case **Thompson v Commissioner of Police of the Metropolis** (supra) Lord Woolf MR in considering the appropriate conditions for an award of Aggravated Damages observed that:

"... Such damages can be awarded where there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award. Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high-handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution."

[28] In **The Attorney General of Jamaica v Gary Hemans** [2015] JMCA Civ. 63, a decision of the Jamaican Court of Appeal which considered the approach to a claim for Aggravated Damages, the Court of Appeal at paragraph 22 observed the following:

“It is to be assumed that by identifying these factors, the learned trial judge recognized that aggravated damages are to be awarded only where there was some feature in the behaviour of the appellant that required the respondent being additionally compensated beyond what he would have received for the assault, false imprisonment and malicious prosecution. ”

[29] The Court in discussing Aggravated Damages went on to highlight at paragraph 29, that the fact that this award is one which is compensatory, as distinct from being punitive, must be borne in mind and that there is a risk of over compensation arising out of double counting. This is so since it would be legitimate for a judge to include in an award for False Imprisonment and/or Malicious Prosecution an ingredient for humiliation, distress and such other injuries to the feelings of the Claimant. The cases have made it clear that when claiming Damages on the footing of Aggravated Damages, it is not an additional award but rather one award taking into account all aggravating circumstances which should only be awarded separately when damages are not able to adequately compensate the Claimant. What is also clear is that the object of an award of Aggravated Damages is compensatory and that such an award is intended to reflect the fact that the particularly egregious nature of the defendant’s conduct has been such as to cause greater – or “aggravated” – damage to the claimant.

[30] In the case **Maxwell Russell v The Attorney General of Jamaica and Corporal McDonald** Cl. no 2006 HCV 4024, the Court made an award for Aggravated Damages based on the degree of humiliation, indignity and injury to the Claimant’s feelings suffered at the hands of the Defendants under circumstances where he was beaten up in prison, and was handcuffed in full view of patients and visitors to the ward in the hospital and thereby suffered distress, depression and great discomfort.

[31] The Claimant in the instant case was taken into custody in view of fifteen (15) passengers that were on his bus at the time of the arrest which would obviously cause him embarrassment and humiliation and I took this into account in the sum awarded for False Imprisonment. It is noted that according to the Claimant the police told him to unload the bus and then told him to drive to the Darling Street Police Station. The conduct of the first Defendant did not show that he behaved in a high-handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment, even though the arrest was unjustified. There is also no allegation of any exceptional or contumelious conduct or motive on the part of the first Defendant. The arrest of the Claimant by the first Defendant was done under normal circumstances. There was nothing done to warrant an award for Aggravated Damages. I find that the award of General Damages for False Imprisonment is adequate in order to compensate the Claimant for the injury suffered.

EXEMPLARY DAMAGES

[32] In **Rookes v Barnard** (supra) Lord Devlin sets out the circumstances under which an award for exemplary damages should be made where he opined (at page 1226) that: -

“...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’s, 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 the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service”.

[33] Lord Devlin distinguished between Aggravated Damages and Exemplary Damages and pointed out that Exemplary Damages focus on how much the Defendant ought to pay as opposed to compensatory damages which focus on

how much the plaintiff ought to receive. In the Jamaican decision of **The Attorney General v Maurice Francis SCCA 13/95 delivered March 1999** at page 17, Rattray, P. in discussing the basis for an award for Exemplary Damages indicated that the conduct of the defendant must merit punishment and that the conduct should go beyond mere want of jurisdiction and should be accompanied by arrogance, insolence, humiliation and brutality. The purpose of Exemplary Damages is to punish and deter conduct which could be classified as being “oppressive, arbitrary or unconstitutional”.

[34] It is noted that in the **Herwin Fearon** case which was relied on by the Claimant and which bears some similarity to the instant case, the circumstances under which Mr. Fearon was taken into custody were quite egregious, as he was dragged to the Police Station in a busy town, yet there was no award for Exemplary Damages.

[35] In the instant case there is no evidence of any oppressive, arbitrary or unconstitutional conduct on the part of the first Defendant herein which would warrant punishment and as such an award of exemplary damages is not appropriate.

SPECIAL DAMAGES

[36] No issue has been taken with the figure claimed for Attorney’s fees and I find that the sum of \$40,000.00 has been proven. The sum claimed for loss of earnings has been contested. A letter signed by a Mr. Richard Daley was tendered into evidence as Exhibit 5. Mr. Daley was not called to give evidence. It is therefore for me to consider what weight I place on Exhibit 5. Mr. Daley purports to be a Managing Director and the employer of the Claimant, however he doesn’t state of what entity he is the Managing Director. Having assessed the letter I do not place much weight on it. I find favour with the submissions of counsel for the Defendants that the minimum wage rate should be utilized. It has been indicated that the minimum wage at the time was \$5600.00 for a five day work week of 8 hours per day. The Claimant at the time was a bus driver and so his work hours

would not necessarily be limited to 8 hours per day nor would his work week be limited to 5 days per week. Taking into account the minimum wage requirements I find that a reasonable sum to award in the circumstances is \$10,000.00 per week for a period of four weeks. This amounts to \$40,000.00.

DISPOSITION

[37] Damages are assessed as follows:

- I. General Damages awarded to the Claimant in the sum of \$4,235,000.00 with interest at a rate of 3% per annum from 16th December, 2014 to 24th March 2017;
- II. Special Damages awarded to the Claimant in the sum of \$80,000.00 with interest at a rate of 3% per annum from 23rd September, 2014 to 24th March 2017;
- III. No award is made for Aggravated Damages or for Exemplary Damages; and
- IV. Cost to the Claimant to be agreed or taxed.