

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

SUIT NO. C.L. F-135/1997

BETWEEN EVERTON FOSTER PLAINTIFF
A N D THE ATTORNEY GENERAL 1ST DEFENDANT
A N D ANTHONY MALCOLM 2ND DEFENDANT

Christopher Samuda instructed by Piper and Samuda for Plaintiff

Mrs. Susan Reid-Jones instructed by Director of State Proceedings for the 1st Defendant.

Heard: 5th, 9th & 13th May and 18th July 2003

Daye, J. (Ag.)

This is an hearing for assessment of damages as a result of the plaintiff obtaining interlocutory judgment in Default of Defence against the 1st defendant. On the 3rd October, 1997 the plaintiff issued a Writ of Summons with general endorsement and Statement of Claim against the first and second defendant. He claimed jointly and severally against then damages for the torts of :-

- (a) assault and battery,
- (b) false imprisonment,

- (c) malicious prosecution,
- (d) breach of constitutional right (added by amendment to writ and to statement of claim dated October 3, 2000.)
- (e) aggravated damages,
- (f) exemplary damages specifically pleaded (added by second amendment to statement of claim) and
- (g) special damages.

Damages are at large for those head of general damages, including breach constitutional of constitutional right which was decided by recent judicial opinion. This means that the damages assessed include compensation for element of loss of reputation, wounded feelings, bad or good character by either party. Thus the quantum of damages cannot be fixed beforehand. (per Lord Hailsham L.C. in Broome v. Cassell [1972] A.C. 1027 at page 1073.)

At this hearing the plaintiff gave evidence on his own behalf and called an attorney-at-law as a witness to support his case. The first defendant, Attorney General who was sued by virtue of the Crown Proceedings Act for the action of the 2nd defendant called no witness. They were unable to do so because the 2nd defendant who was a member of the Jamaica Constabulary Force had terminated his service with the police force

and had left the island some years prior to the hearing. Consequently, there was a little or no challenge to the plaintiff's evidence of the events that gave rise to this claim. Nevertheless counsel for the first defendant Mrs. Susan Reid-Jones did cross examine the plaintiff and his witness closely pertaining to the heads of damages he claimed.

The court having seen and heard the plaintiff's testimony has found him a witness of the truth. In view of the fact that his evidence of the alleged incident was unchallenged the court find he has proven on a balance of probability the following facts:

- (a) The plaintiff was driving his pick up van in heavy traffic along Marcus Garvey Drive, towards downtown Kingston in the vicinity of Tinson Pen Aerodrome on the morning of the 11th July, 1996 at about 10:00 A.M.
- (b) One police officer entered the road and signaled him to stop which he did by pulling to the left hand side of the road and remained seated in his car.
- (c) Another police officer was carrying a sub machine gun over his shoulder and who was standing to the left hand side of the road

asked the plaintiff aggressively to bring his documents for his pick up van. The officer was Constable Anthony Malcolm, the second defendant.

- (d) Immediately after Constable Anthony Malcolm's request to see his car documents the plaintiff told the officer that he was a carrying a licenced firearm.
- (e) Constable Anthony Malcolm then pointed his sub-machine gun at close range at the plaintiff and told him to put his gun on his seat. In the presence of this police officer the plaintiff took his semi automatic firearm from his waist and placed it on the car seat. Before this he removed the ammunition from the gun.
- (f) At gun point and in full view of vehicular traffic and pedestrians on the road Constable Anthony Malcolm instructed the plaintiff to come out of his vehicle which he did and also presented his car documents to the officer.
- (g) Constable Anthony Malcolm inspected the car documents outside the plaintiff's car and asked to check the documents further inside the car. He examined the driver's licence in the car.

- (h) Constable Anthony Malcolm requested to look in the plaintiff's brief case. After plaintiff opened his brief case and took out the magazine from his gun. This was in response to the police officer's enquiry if he had any more shots from the gun.
- (i) The plaintiff then asked the officer what is the grounds he wanted to look in his brief case and the officer responded that he wanted to look for drugs. The plaintiff remonstrated with the police officer about the manner of his search who answered the plaintiff by calling him "**boy**".
- (j) This search was completed without any incriminating result and the officer indicated that the plaintiff was free to proceed on his journey.
- (k) At this point I draw the inference that the plaintiff made some personal offensive comment to Constable Anthony Malcolm.

This series of actions and discussions between the plaintiff and 2nd defendant up to this stage is consistent with the police conducting a routine random road traffic operation. It is general practice for the police to stop motorist driving along the public road and then to investigate their motor vehicle documents in order to enforce compliance with and prosecute breaches of the Road Traffic Act. Such contract of the police with the citizens is lawful

and if confined to such purpose and no more and constitute no infringement of the citizens rights. A citizen who disobey the police or prevents the police or refuse to allow them to carry out this lawful duty may breach aspects of the Road Traffic Act (Section 58) and the Constabulary Force Act. It is only if there is a breach of any of these laws that the police is entitled to arrest and charge citizen who is stopped on the road. They are permitted to do this without detaining the citizen beyond a reasonable time to carry out their duty and using no more force that reasonable force. Any failure of the police to comply with these conditions is likely to result in an unlawful intrusion or invasion of citizen's freedom of the person.

Apart from stopping a motorist and examining his motor vehicle documents under the Road Traffic Act the police often times request to search the motorist, his passengers, motor vehicle and other personal property to detect illegal drugs or illegal firearm and ammunition. This right of search of the citizen or his property is under the authority of the Dangerous Drugs Act and The Firearms Act. It appears that the exercise of this right was at the heart of the turn of events that gave rise to the conflict between the plaintiff and the 2nd defendant. I accept the plaintiff's evidence that the 2nd defendant requested to search his brief case after he the plaintiff took out the magazine from his gun. This was in response to the police

office enquiring if he has any more shots for the gun. This was also at the end of inspecting the plaintiff's documents. I find in relation to this aspect of events that:

- (a) The 2nd defendant searched the plaintiff's brief case in a rough manner and the plaintiff was argumentative about this search.
- (b) Nothing illegal was discovered in the search of the brief case.
- (c) The plaintiff used offensive comments to the officer at the end of the search after he was advise he could proceed.
- (d) The 2nd defendant became infuriated and turned the plaintiff around with his gun and then frisked or body search him inclusive of the area of his groin.
- (e) The plaintiff complained about this body search and then called the officer an idiot. This was provocative.
- (f) The 2nd defendant intentionally and not accidentally punched plaintiff in his right eye. This was an assault and battery.
- (g) The plaintiff sustained marked swelling and tenderness over the supra and infra orbital ridges of right anterior uveitis. The diagnostic of the ophthalmologist Dr. Miller's Medical Report of June 1997 is trauma to the right eye with uveitis is accepted.
- (h) The plaintiff experienced pain in his eye which was swollen for

one week. He had headache. His vision was blurred for three (3) days and was restored to normality within a week.

- (i) The 2nd defendant forcefully draped the plaintiff in waist and dragged him from the sergeant at the back of a police truck where the plaintiff had ran for assistance after being punched in the eye.
- (j) The plaintiff was dragged a distance of 30 to 40 feet from the truck to his pick up van. He was dragged a second time in his waist by the 2nd defendant. He was dragged from the van back to the truck back. He was ordered to go into the truck amidst the police officer calling him "his prisoner".
- (k) The police officer pulled up the plaintiff and squeezed his arm arm when he was climbing in the back of the truck.
- (l) The police officer defied his sergeant effort to restrain him from forcefully holding the plaintiff at the back of the truck. He defied his sergeant instruction when the plaintiff requested a phone call. He called the plaintiff his prisoner from the very time he held the plaintiff by the sergeant.
- (m) At the time the 2nd defendant called the plaintiff his prisoner in the presence of his sergeant he did not inform the plaintiff or

the sergeant of any offence the plaintiff had committed or of any charge against him. Neither did he inform attorney-at-law Mrs. Henlin-Gibson of any charge against the plaintiff.

- (n) The plaintiff was humiliated and embarrassed by this conduct of the officer. The behaviour of the officer towards the defendant was in plain view of the motorist, pedestrians and other police officers.
- (o) The plaintiff drove to Hunt's Bay Police Station under the guard of another police officer.
- (p) The only time the plaintiff was informed of any charges against him was when he received bail at the Hunts Bay Police Station and was advised that he was charged for indecent language.

It is against this background I examined the plaintiff claim for the various heads of damages.

GENERAL DAMAGES FOR ASSAULT AND BATTERY

(A) The Law

I adopt the approach as to the award of damages for assault and battery by Downer, J.A. in **Doris Fuller (administratrix Estate Agana Barrett, (Deceased) v. The Attorney General 56 WIR 357** at page

23. He said quoting McGregor on Damages 13th edition, page 1262, paragraph 1260:

“In so far as an assault and battery results in physical injury to the plaintiff, the damages will be calculated as in any other action for personal injury. Beyond this the tort of assault affords protection not only from physical injury but also from the insult which may arise from interference with the person. Thus a further head of damage is the injury to feelings. i.e. the indignity, mental suffering, disgrace and humiliation that may be caused. Substantial damages may thus be recovered by a plaintiff for assault, with or without a technical battery, which has done him no physical injury at all.”

In the instant case the plaintiff sustained the two types of assault identified in the above passage. Throughout his evidence the plaintiff complained of feeling embarrassed at the treatment of the police. He placed great reliance on the court to compensate him for this type of assault. This is duly taken into consideration by the court.

(B) Facts

I find (a) to (p) above proved on a balance of probability.

Counsel for the plaintiff in his submissions claims the sum of \$500,000.00 for pain and suffering and loss of amenities. Counsel for the 1st defendant in her written submission propose the sum of \$60,000.00 for this head of damages. The plaintiff arrive at their figure on the basis of an

update of the award of damages respectively in the case of **Reginald Stephens v. James Bonfield et al.** Khans Personal Injuries Awards Volume 4, Page 212 and **Daphne Moody v. Berris Wray**, Harrison and Harrison's Assessment of Damages for Personal Injuries page 59 and **Hugh Douglas v. The Attorney General et al.** Khans Personal Injuries Awards Volume 4 – page 210. These three cases deal with relatively moderate blunt injuries to the leg, foot, head, upper limb, right shoulder and forearm of the claimant respectively.

In the first case the claimant experienced pain for four (4) weeks and in the second case the plaintiff experienced blurring vision and swelling to the eyes. These cases are not exactly similar to the trauma to the eye that the instant plaintiff complained of. In any event I did not agree the instant plaintiff injuries were more severe than those of the plaintiff in these three cases. I agree with counsel for the 1st defendant that the reported cases on eye injuries are those in which the plaintiff suffered some percentage loss of vision and are more severe than that of the plaintiff. I accept her interpretation of the medical report that the injury to the plaintiff's eye did not result in any permanent disorder to the plaintiff's vision. Counsel reliance on the moderate personal injuries of the plaintiff in 1990 case of

Paula Yee v. Leroy Grant et al is of limited assistance for the same reason

I gave about the case relied on by counsel for the plaintiff.

My approach then is to look at:

- (a) The extent of the plaintiff's injury. On the basis of the medical evidence this was diagnose as a trauma to the eye with uvitis with no permanent disability. I find the injury falls in the category of minor injuries.
- (b) The nature of the treatment prescribed. This was pain killer and antibiotics and steroids.
- (c) The length of time the plaintiff experienced pain and inconvenience. The evidence is that the plaintiff experience pain for one week to eye and three days of blurred vision. Even though the injury was minor it was painful as it was to a delicate are of the body.
- (d) What was used to inflict the injury? It was the police officer's fist that struck the plaintiff in his eye. No weapon such as a baton or the butt of a gun was used.
- (e) Apart from the physical injury to the plaintiff's eye the instances where the police officers draped, dragged, pulled, squeeze and turned the plaintiff around with his sub machine gun were assault

which caused intense fear and feeling of emotional pain and hurt to the plaintiff.

In all circumstances I award a sum of \$80,000.00 damages as reasonable compensation for the pain and suffering and loss of amenities the plaintiff suffered as a result the 2nd defendant assault and battery.

DAMAGES FOR FALSE IMPRISONMENT

The Law

A definition of false imprisonment is recited in **Clarke and Lindsell** as follows:

“A false imprisonment is complete deprivation of liberty for anytime, long or short, without lawful excuse.
‘Imprisonment is no other thing but the restraint of a man’s liberty, whether it be in the open field, or in the stocks or in the cage or in the street or in a man’s own house, as well as in the gaole and in the places the party so restrained is said to be a prisoner so long as he hath not the liberty freely to go at all times to all places whether he will without bail or mainprise otherwise.’ The prisoner may be confined within a definite space by being put under lock and key or his movement may simple be constrained by the will of another. The constraint may be actual physical force amounting to an assault, or merely the apprehension of such force or it may be submission to a legal process.

I adopt and follow Downer, J A’s approach to an assessment of damages for false imprisonment which he extracted from a passage from McGregor on Damages 13th edition, page 864, paragraph 1263:

“The details of how damages are worked out in false imprisonment are few: generally it is not a pecuniary loss but a loss of dignity and the like, and is left much to the jury’s or judge ‘s discretion. The principal heads of damages would appear to be injury to liberty, i.e. the loss of time considered primarily from a non pecuniary view point, and the injury to feelings, i.e the indignity, mental suffering, disgrace and humiliation with any attendant loss of social status. This will all be included in the general damages which are usually awarded in these cases.”

Downer J.A. applied this statement of the law in the above passage in **Fuller v. The Attorney General 56 WIR 357 (supra)**

Counsel for the plaintiff on one hand submit that \$60,000.00 damages would be reasonable taking in account inflation and the purchasing power of the Jamaican dollar. On the other hand counsel for the defendant submit an award of damages of \$15,000.00 for the three hours false imprisonment of the plaintiff. She base this on **Wilco Cooper v. Detective Sergeant Michael Ellis and The Attorney General** Suit No. C.L. E-451 of 1994. (\$15,000.00) award for $\frac{3}{4}$ hour imprisonment decided March 2000) and **Denton Singh v. The Attorney General** C.L.S. of 1999 (\$20,000.00) awarded for false imprisonment, decided in 2002. She contends that award

of damages for false imprisonment are not updated by the Consumer Price Index (C.P.I) as in the case for personal injury.

Zacca C.J. in Stephens v. The Attorney General 25 J.L.R. 26 at 31 paragraph D to E updated an award for false imprisonment and deprivation of liberty which was made in **Reynold's case**. He took into account inflation and the purchasing power of the dollar.

I took into account the plaintiff's standard of living and loss of his liberty for three hours. There was clearly injury to the dignity which was repeated. In my view the sum of \$40,000.00 damages is a reasonable sum to compensate the plaintiff for this damage.

AGGRAVATED DAMAGES

McGregor on Damages stated the factors to consider for aggravated damages at paragraph 1267, page 848:

“The manner in which the false imprisonment is effected may lead to aggravation of mitigation of the damage and hence of the damages. The authorities illustrate that any evidence which tend to aggravate or mitigate the damage to a man's reputation which flows naturally from his imprisonment must be admissible up to the moment when damages are assessed. A false imprisonment does not merely affect a man's liberty; it also affects his reputation. The damages continues until it caused to cease by an avowal that the imprisonment was false.”

The manner in which the police officer dragged, draped and taunted plaintiff warrants an award of aggravated damages. Counsel for the

defendant concede this in her submission and proposed an award of (\$50,000.00). No sum was claimed separately for the head of damages by the plaintiff as it appears that he either coupled this under his claim for damages for breach of plaintiff's constitutional rights or with claim for exemplary damages. The Court agreed that \$50,000.00 is reasonable sum to compensate the plaintiff for injury to his feelings, for the several unlawful acts intentionally inflicted on him by the policeman.

EXEMPLARY DAMAGES

(A) Law

The House of Lords expressly recognized from the first time exemplary damages in **Rooks v. Barnard**{1964} **A.C. 1169**. Lord Delvin outlined that there are two categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law. He said (at page 1225 to 1227 of the report, supra):

“The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this categoryto oppressive action by private corporation or individuals...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. The second category are those in which the defendants conduct has been calculated by him to make a profit from himself which may well be calculated by him to make a profit from him which may well exceed

the compensation payable to the plaintiff.”

Lord Delvin pointed out further exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.

The first category of exemplary damages included “oppressive, arbitrary or unconstitutional action by persons holding public position eg. Government departments, the police, defence force and local government employees. The typical award would be in a successful action for trespass to the person, false imprisonment or malicious prosecution against the police”.

(per. Rattray, P. **The Attorney General v. Maurice Francis S.C.C.A 13/95** delivered March 199 at page 17). The conduct of the defendant must merit punishment. Conduct which merit an award of exemplary damages should go beyond a mere want of jurisdiction and should be accompanied by arrogance, insolence, humiliation, brutality and the like (per. Carey, J. **Walker v. Attorney General and Millengen v. Attorney General,** delivered February 1976.

Exemplary damages must be specifically pleaded (Rattray, P. **The Attorney General v. Maurice Francis** (supra at page 9 paragraph 2) following White, J.A. in the **Attorney General v. Noel Gravesandy** .SCCA 3/80 delivered December, 1982). The special pleadings of

exemplary damages must be done in the body of the statement of claim and not merely in the prayer and must be in addition to other claim for damages and facts must be pleaded to support the claim. Rattray, P. endorsed this rule of pleading in the Attorney General v. Francis (supra) at page 11, paragraph 2.

Where exemplary damages are appropriate a judge should direct the jury or himself if sitting without a jury that if and only if the sum which they or he has in mind to award as compensation which may be a sum aggravated by the way in which the defendant has behaved to the plaintiff is inadequate to punish for outrageous conduct, to make disapproval of such conduct and to deter him from repeating it then they can award some large sum.” Rookes v. Barnard (supra). Exemplary or punitive damages focus on how much the defendant ought to pay as oppose to compensatory damages which focus on how much the plaintiff ought to receive (per. Lord Reid in Cassell v. Broome [1972] 1 AllER 801 at 839.)

The plaintiff has satisfied the requirement of specifically pleading exemplary damages and the facts relied on. The 2nd defendant a police officer and agent and servant of the crown acted oppressively and arbitrary towards the plaintiff on the public road of Marcus Garvey Drive in the following respect:

- (a) assaulted the plaintiff before he inspected and checked the plaintiff's vehicle, documents, firearm, ammunition and brief case and found him to be within the law,
- (b) forcefully, violently and falsely arrested the plaintiff and placed him in an open police truck,
- (c) injured the plaintiff's feeling by repeatedly verbally abusing and calling him a prisoner,
- (d) flagrantly disregarding the authority of the law by resisting his sergeant who tried to restrain him,
- (e) disregarding the instruction of his sergeant when the plaintiff requested to make a phone call
- (f) disregarding the authority of the law by refusing to inform him what charges if any the plaintiff was arrested for,
- (g) the 2nd defendant's anger, verbal and physical abuse to the plaintiff in the eyes of other police officers who did nothing to restrain the 2nd defendant. His conduct fell within Lord Delvin's first category of exemplary damages. Even though the plaintiff's injuries were not serious and the intrusion and violation of the plaintiff's rights were not for a long period I am of the view that the 2nd defendant's conduct is of the kind that deserve punishment

to vindicate the strength of the law. All the police officers on the scene of this incident need to be reminded that such tort of assault and battery, false imprisonment and malicious prosecution does not pay. The sergeant as the ground commander ought to have exercised more control and management of the 2nd defendant and not defer to him. His duty is not only to command his constables in a quasi military sense but to also ensure that his constables do not breach the rule of law towards the citizen. It is the vindication of this fundamental rule of law that warrant exemplary damages in the instant case. I direct myself that the amount of damages I have in mind is not adequate to show disapproval of the defendant's conduct and therefore I award the sum of \$90,000.00 for exemplary damages.

DAMAGES FOR BREACH OF CONSTITUTIONAL RIGHTS

The specific breach of the constitution which the plaintiff alleges is section 15 (1) of the Jamaica Constitution which prohibit any person to be unlawfully deprived of his personal liberty. Section 15 (4) provides any person who is unlawfully arrested or detained is entitled to compensation.

This claim says Lord Diplock is not claim in private law for damages for the tort of false imprisonment (under which damages recoverable are at

large and would include damages for loss of reputation). It is a claim in public law. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for inconvenience and distress suffered during the incarceration” **Ramesh Lawrence Maragh v. Attorney General** (No. (2) (1978) 30 W.I.R. 310 at 321). In this case the case the Privy Counsel was considering a similar provision in the Trinidad constitution to Section 15 (1) of the Jamaica constitution. Sawyer, J. considered a similar provision in the Bahamas constitution to Section 15 (4) of the Jamaica constitution in **Tynes v. Barr** (1994) 45 W.I.R. 7 at pg. 22 paragraph 9 and pg.23 paragraph f. He said he was required to make a separate assessment in relation to the breach of a plaintiff’s constitution right even though this breach was committed in the course of other torts by a police. In **a dicta** he said damages for breach of plaintiff’s constitutional right ought to be at large as the constitution place no limit on the amount of damages.

Where there are no remedies available for breach of plaintiff’s right in the general law then a citizen may have recourse to the Constitution. This ought to be a last resort (per. Downer J.A, **Fuller v. Attorney General** (supra) at page 50, paragraph 1 and page 59 paragraph 2. In **Mark Brown v. Attorney General and The Director of Public Prosecution** (Suit M-

27/99) delivered May 30, 2000, at page 6 Wolfe C.J. held that under the proviso to section 25 of the Jamaica Constitution the court should not assume jurisdiction for claims of breach of a citizens fundamental right if it is satisfied that adequate means of redress are available under any other law.

I am of the view that injury to the plaintiff is not over and above or beyond any injury for which damages for the torts of assault, false imprisonment and malicious prosecution cannot satisfy. There I made no award for damages for breach of the plaintiff's constitutional rights.

In all the circumstances judgment for the plaintiff as follows:

Special Damages	\$33,000.00
General Damages	
(a) Pain and Suffering/Loss of Amenities	\$80,000.00
(b) False Imprisonment	\$40,000.00
(c) Malicious Prosecution	\$50,000.00
(d) Aggravated Damages	\$50,000.00
(e) Exemplary Damages	\$90,000.00

Interest at 6% per annum on General Damages from July 31, 1997 to July, 2003.

Interest at 6% per annum on Special Damages from July 11, 1996 to July 18, 2003.

Cost to the plaintiff to be agreed or taxed.

