



[2023] JMSC Civ. 11

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2016 HCV 03636**

<b>BETWEEN</b>	<b>CLIFTON FRANCIS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>CONSTABLE TUCKER #13431</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**In Open Court**

**Mr. Sean Kinghorn instructed by Kinghorn and Kinghorn Attorneys-At-Law for the Claimant**

**Ms. Kristen Fletcher instructed by the Director of State Proceedings for the Defendants**

**Heard: November 23, 2022 and January 27, 2023**

**Malicious Prosecution – Trespass to Goods – Section 33 of the Constabulary Force Act – Quantum of Damages**

**CARR, J**

**INTRODUCTION**

[1] On November 24, 2013, the claimant was ticketed for the offence of operating as a public passenger vehicle without a road licence. His vehicle, registered 5171 GD, was seized and transported on a wrecker to a local facility. The claimant maintained his innocence and retained counsel to act on his behalf. The trial of the

matter took place at the St. Catherine Resident Magistrate's Court. A judge ordered the release of the motor vehicle on April 17, 2014 and the case against the claimant was dismissed. On April 17, 2018 he filed this claim for Malicious Prosecution and Trespass to Property. He has asked the court to make an award for damages, aggravated damages, exemplary damages and vindictory damages.

## ISSUE

- [2] Whether the 1<sup>st</sup> Defendant acted maliciously and without reasonable and probable cause when he instituted the proceedings for breaches of the Road Traffic Act and seized the vehicle belonging to the claimant.

## THE LAW

- [3] The tort of malicious prosecution is predicated on the intentional, wrongful institution and pursuit of a legal action, without reasonable and probable cause. The claimant has the burden of proving on a balance of probabilities that the 1<sup>st</sup> defendant maliciously instituted and pursued the case against him for operating as a public passenger vehicle without a road licence and, that at the time, he did not have reasonable and probable cause for doing so. He must also show that the matter was dismissed in his favour.
- [4] Trespass to goods is defined as an act of intentional and direct interference with another person's personal property or goods. In defence of such a claim, as well as a claim for malicious prosecution, a defendant can plead that the act was lawful. Additionally, in cases involving the police, statute provides that it is the duty of the claimant to prove that the officer acted without reasonable and probable cause. At **Section 33** of the **Constabulary Force Act** it states:

*“Every action to be brought against any Constable for any act done by him in the execution of his office, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause - and if at the trial of any such action the plaintiff shall*

*fail to prove such allegation he shall be non-suited or a verdict shall be given for the defendant.”*

- [5] For a claim for malicious prosecution to be sustained the claimant must also establish that he suffered damage. This damage may be to his character, his person or his property. In ***Wiffen v Bailey and Romford Urban District Council***<sup>1</sup>, Buckley L.J. stated as

*“There are three sorts of damage, any one of which is sufficient to support this action. First, damage to a man's fame, as if the matter whereof he is accused be scandalous. Secondly, damage to his person, as where a man is put in danger to lose his life, limb, or liberty. Thirdly, damage to his property, as where he is forced to expend money in necessary charges to acquit himself of the crime of which he is accused. The action is maintainable if and only if it falls within one or other of those three heads.”*

## **ANALYSIS AND DISCUSSION**

*Was a legal action instituted and pursued by the 1<sup>st</sup> defendant?*

- [6] The 1<sup>st</sup> defendant was a police constable employed to the Jamaica Constabulary Force. At the time of his interaction with the claimant he was lawfully engaged in his duties and as such was a servant of the Crown. The 2<sup>nd</sup> defendant by virtue of the Crown Proceedings Act is a proper party to the claim in the circumstances.
- [7] There is no dispute as to the fact that the claimant was ticketed for the offence of operating as a public passenger vehicle without a road licence. That is the evidence of both the claimant and the 1<sup>st</sup> defendant. It is also undisputed that the matter went to court and the officer gave evidence at the trial of the offence. It is evident that a criminal prosecution was instituted and pursued by the 1<sup>st</sup> defendant in respect of the claimant.

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<sup>1</sup> [1915] KB 600 at 606

*Did the 1<sup>st</sup> defendant have reasonable and probable cause?*

[8] The question to be determined on this issue is whether the 1<sup>st</sup> defendant had an honest belief that the claimant was operating as a public passenger vehicle without a road licence. In the case of *Hicks v. Faulknor*<sup>2</sup>, Hawkins J gave the following definition of reasonable and probable cause;

*“an honest belief in the guilt of the accused based upon a conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”*

[9] It is for the claimant to show that the 1<sup>st</sup> defendant had no reasonable or probable cause to charge him with the offence. The evidence of both the claimant and the 1<sup>st</sup> defendant was tested in cross examination and, a determination of the circumstances which led to the charge proffered by the 1<sup>st</sup> defendant is necessary in determining the issue as to his honest belief.

[10] What then are the circumstances upon which the 1<sup>st</sup> defendant relies to say that the claimant was probably guilty of the offence. In his evidence the 1<sup>st</sup> defendant indicated that he observed the motor vehicle being driven by the claimant at about 5:10 pm. He knew the claimant before as he had previously warned him for breaches of the Road Traffic Act and the Transport Authority Act. He travelled behind the vehicle and observed that the claimant stopped at a taxi stand.

[11] From across the road he was able to observe four passengers in the vehicle. A female to the front and a male and two other females on the back seat. He observed one of the women in the back give the claimant a \$500.00 note and he made change for her and handed it to her. The remaining passengers exited the

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<sup>2</sup> (1878) 8 QBD 167, 171

vehicle and the claimant shouted "Charlemont, Ewarton". He also observed the male passenger giving him a \$100.00 note.

- [12]** The sum total of his evidence therefore is; a) that the claimant was given money by passengers who exited his vehicle and, he made change for one of those passengers, b) that the passengers exited at a taxi stand and, c) that the claimant was heard shouting Charlemont, Ewarton.
- [13]** The claimant denied that he was operating as a public passenger vehicle. It is his evidence that on the day in question, he was driving in the town of Linstead with his girlfriend and her sisters in the car. He was shirtless and shoeless because he had been working on his decking at home and did not wish to soil the interior of his vehicle. He was alerted to a police officer calling him and he went over to speak with the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant told him to hand over the papers for the car and he did so. The officer told him that he had seen him in the morning running his car as a taxi.
- [14]** He was told to drive his car to the end of Market Street and park in the vicinity of the National Commercial Bank. He did as he was told. His vehicle was taken on a wrecker and he was given a ticket for operating as a public passenger vehicle without a road licence.
- [15]** With two diametrically opposed accounts of the events of that day the credibility of the witnesses is paramount.
- [16]** I did not find the officer to be a credible witness. He indicated in his witness statement that he observed the vehicle, yet it was only when the vehicle stopped at the taxi stand that he makes mention of the four passengers. He also indicated that he was across the street from the vehicle, and it is from that distance that he was able to make out the denomination of the notes given to the claimant. In his witness statement, he said the passenger was seated in the back of the car and she handed the claimant a \$500.00 note. In cross-examination, he said the passenger had exited the vehicle before handing the claimant the money.

- [17]** If the passenger was in the back of the vehicle, how was the 1<sup>st</sup> defendant able to see any money being exchanged and even more so, the denomination. Further, the evidence of payment of any kind to the claimant is insufficient to establish on a balance of probabilities that the purpose was the payment of a fare for transportation. Without a statement from the passengers this would be mere speculation on the part of the 1<sup>st</sup> defendant.
- [18]** Further, in cross-examination, the 1<sup>st</sup> defendant was asked if he had known the claimant prior to November 24, 2013. He said he had seen him a few months before November. On that occasion he observed him breaching the Road Traffic Act and he was not wearing his seat belt. He stopped him and warned him for prosecution. He also obtained his name.
- [19]** The 1<sup>st</sup> defendant admitted that he could not recall if he had mentioned in the statement he gave to the Parish Court that he had warned the claimant before for a similar offence. He also could not recall if the statement detailed the fact that he knew the name of the claimant prior to November 2013. When confronted with the statement, he accepted that there was no information there as to his previous knowledge of the claimant. The statement, he admitted, was written in February of 2014, the witness statement was signed on August 16, 2022. He said the failure to include that information in his statement was an oversight. I find that the recent recollection of his previous interaction with the claimant is merely a concoction in an effort to strengthen his reason for suspecting the claimant.
- [20]** Additionally, the 1<sup>st</sup> defendant stated that he knew the claimant by name and yet he had to use his driver's licence to confirm that name on November 24, 2013. Then he said he knew him, but needed to confirm his name because the claimant had a brother who looked like him and had the same last name. The brother he said, also runs a taxi. Since he did not want to confuse them he had to check the claimant's identification first. When asked if he knew the brother before he said no he met him on the 24<sup>th</sup> of November 2013.

**[21]** Based on the inconsistencies and discrepancies between his evidence and the statements given in this matter and that given in the court below, I find that the 1<sup>st</sup> defendant has demonstrated that he is not a truthful witness. The claimant was far more credible. He indicated at the commencement of the trial that he could not read and write so good. He had difficulty recalling the dates he attended court and the names of the roads on which he travelled on the day. Apart from that I accepted his evidence. I do not believe that the 1<sup>st</sup> defendant made any observations that day that would give rise to a finding that the claimant was operating as a public passenger vehicle.

**[22]** I am therefore satisfied that the claimant has discharged the burden of proving that the 1<sup>st</sup> defendant acted without reasonable or probable cause.

*Was the action of the 1<sup>st</sup> defendant malicious?*

**[23]** Malice is defined in tort as an act which is done spitefully, with ill will or an improper motive. The absence of reasonable and probable cause is suggestive of an improper motive. In this case, the 1<sup>st</sup> defendant commenced his description of the claimant by indicating that he had warned him for prosecution before for a similar offence. Although this was denied by the claimant, it supports a finding that the 1<sup>st</sup> defendant was less than candid with the court. It is this story, and alleged previous interaction that caused him to follow the claimant's vehicle.

**[24]** It is the 1<sup>st</sup> defendant's evidence that he did not initially observe the claimant committing any illegal act. It is only after the claimant stopped at the taxi stand, as he says, that he stopped on the other side of the road to observe him further. The evidence as to his prior knowledge of the claimant is therefore critical as it goes directly to the credibility of the officer. Having accepted that the officer was not a truthful witness I am satisfied that his actions were based on an improper motive, as it was without reasonable and probable cause.

*Was the case dismissed against the claimant?*

[25] The 1<sup>st</sup> defendant confirmed in his witness statement that he attended court and gave evidence, he was asked to step down and when he returned he heard the Judge advising the claimant that he was free to go. The evidence supports the conclusion that the case was dismissed in favour of the claimant.

*Did the claimant suffer damage due to the malicious prosecution?*

[26] In his evidence, the claimant outlined the damage he suffered. The vehicle was detained by the police for one hundred and fifty-one days and during that period he had to seek alternative transportation at a cost. He lost earnings as a result of jobs that he was unable to accept, and he was unable to transport water for his family as he had no vehicle to do so. Additionally, he spent \$350,000.00 on legal fees in defence of the charges in court.

[27] He did not outline any damage to his reputation or his person as a result of the loss of the vehicle.

### **Trespass to property**

[28] The 1<sup>st</sup> defendant in seizing the vehicle belonging to the claimant, without reasonable or probable cause, committed a trespass upon his property thereby entitling him to an award in damages.

### **Damages**

[29] The claimant asked the court to make an order granting damages, aggravated damages, exemplary damages and vindictory damages. An assessment of damages must take into consideration past, present and if relevant, future loss. In this case there is no evidence of future or present loss. So the focus of the court is on past loss. The claimant must be compensated in such a way as if the tort had not been committed.



[30] Apart from the invoice for legal services, the claimant did not exhibit any document which would speak to his loss of earnings during the period or the amount that he paid for transportation. There was also no indication as to the value of his motor vehicle.

### **General Damages**

[31] Mr. Kinghorn, in his submissions on damages for malicious prosecution, relied on the case of **Greg Martin v. Det. Sgt. Halliman and The Attorney General of Jamaica**.<sup>3</sup> In that case an award of \$1,500,000.00 was made for general damages. Updated that award is now in the region of \$2,800,000.00. Counsel suggested that an award of \$3,000,000.00 should be made under this head.

[32] Ms. Fletcher asked the court to consider the case of **Hubert White v. Constable O'Connor and The Attorney General**<sup>4</sup>. An award of \$600,000.00 was made for general damages.

[33] The case of **Greg Martin** can be distinguished from this case. In that case the conduct of the officers was egregious and it involved assault and battery in the quest for reasonable cause. I find that the case of **Hubert White** is on par with the instant matter. The claimant in that case was also prosecuted for a road traffic offence. When updated using the current Consumer Price Index the award would be \$1,175,135.90.

[34] The claimant in this case suffered from the inconvenience of being without his vehicle for 151 days. Despite not putting any figures before the court his evidence in relation to that inconvenience was unchallenged. Further he attended court on at least three occasions in this matter. When asked in cross examination the number of times he attended court the claimant could not recall. The evidence of the 1<sup>st</sup> defendant however, is helpful. The officer indicated that he attended court

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<sup>3</sup> Claim No. 2007HCV01096 delivered September 19, 2011 (unreported)

<sup>4</sup> [2018] JMSC Civ. 09

and the matter was adjourned for him to provide a statement. On the next date he attended and a trial date was set, he returned on a subsequent date when he gave his evidence and the trial was concluded.

[35] The award made in *Hubert White* is reduced to account for the fact that the claimant's number of court appearances were less than that of the claimant in the former case. In the circumstances an award of \$800,000.00 is made for general damages.

[36] Counsel also submitted on damages for trespass. He asked the court to find that although the claimant did not put forward any proof of special damages the court should make an appropriate award under general damages. I am not minded to accept that submission. This is not a claim for detinue or conversion, in which case, there is case law to suggest how the court is to treat with the quantum of damages. This is a mere trespass to goods which can be subsumed in the claim for malicious prosecution as the court had to consider the loss of use and the inconvenience to the claimant in making a decision as to the appropriate award. Without evidence to support a further claim for loss of use I am not minded to give an award for trespass to property as distinct from the claim for malicious prosecution.

### **Special Damages**

[37] In the amended particulars of claim the particulars of special damages were set out as follows;

i) legal fees	- \$350,000.00
ii) loss of use (103 days @\$3,500.00)	- \$360,500.00
iii) loss of earnings (14 weeks at \$30,000)	- \$420,000.00
iv) Transportation to and from Court	- \$ 20,000.00

As previously indicated the only evidence of special damages was in the form of a receipt which was provided in respect of legal fees that formed Exhibit 1. The

claimant never indicated any of the figures mentioned in the particulars of claim in his witness statement. There is therefore no basis upon which a claim for loss of use, loss of earnings and transportation can be sustained. An award of \$350,000.00 is made for special damages.

### **Aggravated Damages**

[38] The case of ***Denese Keane-Madden v The Attorney General of Jamaica and Corporal T. Webster***<sup>5</sup> sets out the principles that a court must consider when looking at an award for aggravated damages. Edwards J (as she then was) opined at paragraph 46:

*“Aggravated damages are awarded where the defendants conduct is sufficiently outrageous to merit condemnation and punishment. The outrageous behaviour usually carries features of malice, fraud, cruelty, insolence and the like.”*

[39] I am not of the view that an award for aggravated damages ought to be made in this case. The actions of the 1<sup>st</sup> defendant do not fall into the category as described in the ***Keane-Madden*** case. His actions were not sufficiently outrageous to merit condemnation and punishment.

### **Exemplary Damages**

[40] In the case of ***Roderick Cunningham v. The Attorney General for Jamaica and Ors.***<sup>6</sup> Edwards, J, as she then was, addressed the purpose of exemplary damages;

*“The purpose of exemplary damages is to punish wrongdoers for conduct, which, in some cases, is referred to as a contumelious or highhanded disregard of a claimant’s rights, or behaviour described as arrogant, flagrant, oppressive or outrageous.”*

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<sup>5</sup> [2014] JMSC Civ. 23

<sup>6</sup> [2014] JMSC Civ. 30 para. 37

[41] In essence, exemplary damages, are damages that are assessed in order to punish the defendant for outrageous conduct. It acts as a deterrent to a defendant so as to prevent similar conduct in the future. The outrageous conduct is defined as an act which was done wilfully or with malice. In this case, I am not satisfied that such an award should be made. Although I accepted that the officer wasn't speaking the truth I am not of the view that his conduct was outrageous. Further given the nature of the offence and the manner in which the 1<sup>st</sup> defendant went about seizing the claimant's vehicle I do not find that he was abusive or high handed in his approach.

### **Vindictory Damages**

[42] With respect to vindictory damages, *"these are designed to vindicate violations of rights regardless of whether or not the violations resulted in any harm. Here "vindication" means to assert and maintain rights to redress, satisfy and make right the infringement of rights."*<sup>7</sup> It is important to note that this is largely at the discretion of the court and depends on all the surrounding circumstances of the case. I am not of the view that such an award is appropriate in this case. An award of vindictory damages is more suited to a claim for a breach of constitutional rights.

### **DISPOSITION**

[43] In summary, the claimant has established that the 1<sup>st</sup> defendant acted without reasonable and probable cause and is liable for malicious prosecution and trespass to property. The 2<sup>nd</sup> defendant is held liable by virtue of the Crown Proceedings Act.

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<sup>7</sup> Civil Wrongs and Justice in Private Law, Oxford University Press p. 74

**ORDERS:**

1. Judgment for the Claimant.
2. General damages are awarded in the sum of \$800,000.00 with interest at 3% from the 29<sup>th</sup> of August 2016 to the 27<sup>th</sup> of January 2023.
3. Special Damages are awarded in the sum of \$350,000.00 with interest at 3% from the 24<sup>th</sup> of November 2013 to the 27<sup>th</sup> of January 2023.
4. Costs to the Claimant to be agreed or taxed.

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**T. Carr**  
**Puisne Judge**