



[2020] JMSC Civ. 91

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 04534

BETWEEN	SHAYNE M^CCALLA	CLAIMANT
AND	THE ATTORNEY GENERAL FOR THE ISLAND OF JAMAICA	DEFENDANT

IN OPEN COURT

Mr. Leonard S. Green and Mr. Makene Brown instructed by Chen Green & Company for the Claimant

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

Heard: March 2 and 3, and July 7, 2020

Civil Practice and Procedure– False Imprisonment– Malicious Prosecution – Assault and Battery– Claim for Exemplary Damages–Assessment of Damages

STEPHANE JACKSON-HAISLEY, J

BACKGROUND

[1] The Claimant, Mr. Shayne M^CCalla seeks Damages against the Defendant the Attorney General for the Island of Jamaica for Malicious Prosecution, False Imprisonment, and Assault. Specifically, the Claimant has sought, in said claim, to recover general damages, special damages, aggravated damages and exemplary damages arising from his arrest, detention, and prosecution by members of the Jamaica Constabulary Force attached to the Green Island Police Station in the parish of

Hanover. The police officers involved in the matter and whose actions are in question are Sergeant Wilbert Jones, Corporal Rohan Reid and Constable Trevece Jenkinson.

[2] The Defendant is being sued in its representative capacity by virtue of the Crown Proceedings Act as the representative of the crown and so would be liable for the acts of the officers once they acted in the performance of their duties as members of the Jamaica Constabulary Force.

[3] It is the Claimant's account that on the 23rd day of February, 2013 at about 11:00 pm he was on the Green Island Main Road when he was approached by officers of the Green Island Police Station and asked to transport a passenger for them. He alleged that he explained to the officers that he was not in a taxi business and an argument ensued between the officers and himself. Further, that during the argument, one of the officers became angry and proceeded to grab him by his shirt whilst he was still sitting inside his vehicle and used a baton to inflict injuries all over his body.

[4] The Claimant further averred that the said officer was joined by two (2) other officers who dragged him outside of his vehicle, kicked him and used their batons to beat him. He claims that at the time he was being beaten by the officers he was not armed nor did he attack the officers. He was subsequently taken to the Green Island Police Station and kept in custody until around 6:00 am the following day when he was charged and released following pleas from his relatives for him to be taken to the hospital to receive medical attention for his injuries. He indicated that he was prevented from obtaining medical treatment for the injuries he sustained while he was detained. He was charged with the offences of Assault Occasioning Actual Bodily Harm, Unlawful Wounding, Abusive Language and Resisting Arrest.

[5] He was ultimately brought before the Hanover Resident Magistrate's Court, now Hanover Parish Court and on the 24th day of May, 2014 he was found not guilty for the Assault Occasioning Actual Bodily Harm and Unlawful Wounding. Of note is that he also appeared before the Hanover Petty Sessions Court and the charges against him for Abusive Language and Resisting Arrest were dismissed for want of prosecution.

[6] The particulars of Aggravated and Exemplary damages were itemized as follows:

- “- Unlawfully and wrongfully beating the Claimant in a public place and by so doing caused the Claimant grave and severe humiliation.
- Causing the Claimant to be unlawfully detained and transported to the Green Island Police Station and placed in police custody in circumstances when the Claimant was pursuing his lawful business.
- Unlawfully detaining the Claimant in custody for over 6 hours thereby denying him the opportunity to obtain medical treatment for his serious injuries.
- Unlawfully detaining the Claimant at the Green Island Police Station without any lawful justification for doing so.
- The police officers abused their authority by fabricating false charges against the Claimant and maliciously pursuing a prosecution while being aware that the Claimant did not act in a manner that was unlawful or did he act in a manner that amounted to a breach of the law.

[7] The Claimant also claims constitutional relief by virtue of sections 13 (a) and (c) and 15 (4) of the Constitution and states that at all material times he was unlawfully detained and deprived of his right to freedom of movement.

[8] The Defendant vehemently opposes the Claimant's claim and denies that he was falsely imprisoned, assaulted and maliciously prosecuted by the Crown.

[9] The Defence filed on the 19th day of November 2014 disclosed that at the material time, members of the Jamaica Constabulary Force attached to diverse police stations in the Parish of Hanover were on mobile patrol duties in a marked service vehicle. While carrying out these duties, at or around 11:30 pm they were stopped by a senior citizen who reported that the Claimant, being the sole taxi at the taxi stand in Green Island had refused to transport her. Upon receiving this report, they took the senior citizen to a section of the Green Island main road that was used as a taxi stand. Upon arriving at the taxi stand, the senior citizen pointed the Claimant out as the driver of the taxi who refused to transport her.

[10] The police officers then approached the Claimant and instructed him to transport the senior citizen home. According to the officers, in response to the police officer's request, the Claimant became boisterous both towards the senior citizen and the police

officers. It was further asserted that the Claimant, upon being asked to produce his document used "*indecent and calumnious language*" and he was asked to exit his vehicle. The Claimant refused to do so and he assaulted one of the officers when his hand was caught between the door and the frame of the vehicle and the Claimant tried to close the door. They went on to say that the Claimant continued to assault the officer by hitting him in the stomach. This officer drew his service issued baton to hit the Claimant twice on his hand. Another officer that came to the assistance of the first officer was bitten on the left hand by the Claimant. It is the Defendant's contention that this arrest did not involve any excessive use of force in apprehending the Claimant.

[11] The Defence further revealed that a report was made to the Green Island Police Station and as a result of the report, Constable Trevece Jenkinson went to the scene by foot where a large crowd was gathered and subsequently assisted in removing the Claimant from the vehicle. During the course of walking to the Green Island Police Station, the Claimant threw himself to the ground and refused to move. Constable Jenkinson left the Claimant and his colleagues and went back to the Green Island Police station where he sought further assistance from other police officers. He returned to the scene with a fourth police officer and they made further requests for the Claimant to walk to the police station.

[12] It was also proffered by the Defendant that it was not until the fifth police officer, Corporal Johnson came to the scene and instructed the Claimant to walk to the station that he did so. The Defendant was also resolute that no one involved in the incident either kicked or violently beat the Claimant and that it was the officers who came under attack from the Claimant. It was also revealed that a person unknown had punctured the right wheel of the service vehicle.

[13] Learned Counsel for the Claimant and the Defendant made extensive oral and written submissions. I am grateful for their assistance. The parties should rest assured that in order to arrive at my decision I considered all the material presented however I will reference the evidence and submissions only to the extent necessary to explain my findings and decision

THE EVIDENCE OF THE CLAIMANT

[14] The Claimant was the sole witness for his case. His witness statement filed on the 18th day of February 2019 was admitted into evidence and permitted to stand as his evidence in chief. He was vigorously cross-examined.

[15] In his evidence he indicated that he is the holder of a Team Jamaica Certificate from the Tourism Product Development Company Limited which gives him the right to offer services to tourists. He stated that his job usually includes transporting tourists around Jamaica to various attractions and to the airports. He further stated that at the material time he was not a taxi operator.

[16] The Claimant revealed that after the initial exchange with the police officers, he was asked to produce his car papers and he indicated to the officers that he did not have them with him. He was sent to retrieve them and as a result he went to his car to call someone to take the car papers to him. At that time one of the officers came over to him, grabbed him by his shirt collar causing it to tear and demanded the car papers with the use of expletives. His response was *“you tear mi shirt, let me go”*. The said officer released him, went to the service vehicle and returned to where he was with a baton and started hitting him. He struck him on his right hand which resulted in it being broken. He was also kicked in the right thigh, the chest area and he was hit in the mouth causing him to suffer two (2) broken teeth. Some of his hair was also torn out.

[17] He said it was a fourth officer who was driving by that assisted him to the Green Island Police Station. Whilst at the station the officers refused to take him to get medical assistance despite the request of his girlfriend. Upon his release from the station the Claimant indicated that he went straight to the Noel Holmes Hospital in the parish of Hanover where he was treated for his injuries which consisted of a broken right arm, wound on the head and cuts and bruises all over his body. He subsequently sought treatment at the Cornwall Regional Hospital where he was scheduled to do surgery on his broken right hand but was prevented from doing so due to the lack of equipment and

the shortage of beds. He concluded his evidence in chief by detailing the loss of amenities sustained due to the assault of the police officers.

[18] Under cross-examination he was asked whether he had attempted to go to any other hospital or medical facility to get the surgery done and his answer was that he did not. The crux of his evidence remained unchanged under cross examination.

THE EVIDENCE ON BEHALF OF THE DEFENDANT

[19] Three (3) witnesses gave evidence on behalf of the Defendant. They were Sergeant Wilbert Jones, Corporal Rohan Reid and Constable Trevece Jenkinson. Their evidence mirrored that of the Defence filed and their witness statements were similar with the exception of the respective role each officer played in the circumstances. Each witness was cross examined.

[20] The evidence of Sergeant Jones was that subsequent to the report made by the senior citizen and after making enquiries of the Claimant he was asked to produce his papers for the car. The Claimant stated that it was a policeman's car and that he had the papers. He was told to call the owner of the vehicle to get the papers so they could inspect them. The Claimant thereafter started to verbally assault the senior citizen who was in the back of the service vehicle. He stepped out of the service vehicle and instructed the Claimant to leave the lady alone. He again asked the Claimant to call the owner of car to take the papers for the car to him. Sergeant Jones averred that the Claimant's response to that instruction was to the effect that he will not produce the papers and that they should "stop tek set on him". This statement included an expletive and this resulted in an exchange between Corporal Reid and the Claimant.

[21] His evidence disclosed that subsequently, a struggle ensued between Constable Reid and the Claimant whereby the Claimant began to attack Constable Reid and as a result Constable Reid used his service baton to hit the Claimant twice.

[22] He said he intervened in the struggle between Corporal Reid and the Claimant by using his right hand to hold the Claimant on his shoulder and told him to come with the police. Sergeant Jones stated that the Claimant used his left hand to grab his right hand and bit him on his index finger causing it to bleed. He stated that at no time during the struggle did he hit the Claimant. The struggle still ensued between the officer and the Claimant and it was not until Constable Johnson came on the scene and instructed the Claimant to go with the police that the Claimant cooperated. He indicated that Corporal Johnson and himself escorted the Claimant to the Green Island Police Station on foot.

[23] Sergeant Jones also averred that during the struggle a crowd of thirty (30) persons gathered on the scene. Some persons from the crowd were using abusive language and shouted at the police to "leave the man alone". He subsequently discovered that someone had punctured the right rear wheel of the service vehicle.

[24] He stated that when they got to the station the car papers were produced and he gave the Claimant a ticket for operating a public passenger vehicle without the proper road licence and offered him bail for the offences for which he was charged.

[25] Sergeant Jones stated that he went to the Noel Holmes Hospital in the parish of Hanover to seek medical attention. Further, that he was a witness at the trial for the charge of unlawful wounding wherein the Claimant was eventually found not guilty.

[26] Under cross examination he was asked why he did not give evidence in his witness statement of efforts on his part to pacify the situation. His response was that he was not sure if he gave evidence in this witness statement. After his memory was refreshed he indicated that it was not in this witness statement. Sergeant Jones also indicated that it was not the Claimant's verbal abuse of the senior citizen that led him to make the decision to take the Claimant out of his car, but rather the Claimant's negative behaviour was what led him to do so. He also denied that the Claimant was holding on to the steering wheel during their attempt to restrain him.

[27] Corporal Rohan Reid indicated that he was the driver of the service vehicle at the material time. He averred that before the tussle, he had stepped from the service

vehicle and stepped between the Claimant and the senior citizen and had asked the Claimant to move away from the vehicle and leave the lady alone. Upon the Claimant using expletives, he went over to the Claimant's car, opened the door, informed him of the offence of abusive language and that he will be charged for same. The Claimant tried to close the door, thereby squeezing him and he held on to him with his left hand and on to the door with his right hand trying to keep it open. The Claimant then started to hit him on his left hand and in his stomach causing him to feel pain.

[28] Corporal Reid indicated that he drew his service baton and hit the Claimant in the direction of his hands after which the Claimant stopped hitting him. The struggle of trying to get the Claimant to the station continued for over fifteen (15) minutes. He indicated that after Constable Jenkinson arrived at the scene and tried to assist with getting the Claimant under control, the Claimant began hitting him again to the upper region of his body causing bruises and swelling to the right side of his head, above his ear and to the left side of his neck.

[29] She stated that he was unable to stop the Claimant from hitting him at this juncture as someone from the crowd that had converged on the scene identified as "Wilbert" had held on to his hand. He stated that the crowd had gotten aggressive and he described it as like a riot on the scene.

[30] Under cross examination, he revealed that he does not remember seeing blood over the Claimant's body or clothing. He maintained that his actions of hitting the Claimant with the baton was not aggressive and uncalled for as suggested by learned Counsel for the Claimant.

[31] He was questioned about "Wilbert" holding on to his hand and if he had charged him for obstructing his duties. Initially he could not recall making mention of a "Wilbert" but when confronted with his witness statement, he recalled same and indicated that he had in fact charged "Wilbert".

[32] Constable Trevece Jenkinson stated that he received reports that officers on patrol needed assistance at the intersection of the Salt Spring Green Bay main road

which is located about fifty (50) meters away from the station. He then proceeded to the scene by foot where he saw a crowd and Corporal Reid and Sergeant Jones trying to restrain the Claimant who wore a dreadlocked hairstyle. He was then informed of what transpired prior to his arrival and he subsequently started to assist Sergeant Jones and Corporal Reid in their efforts to pull the Claimant from the vehicle.

[33] He further indicated that the Claimant refused to leave and became boisterous towards them. He then left the scene and went back to the station where he secured the help of Constable Newman. They both went back to the scene and he pleaded with the Claimant to walk to the station but he refused to move. Constable Jenkinson stated that about five (5) minutes later he saw Corporal Johnson, who was passing by, stop and assist with directing the Claimant to the station and the Claimant complied.

[34] Constable Jenkinson stated that when they arrived at the station, based on the report he received and seeing the wound of Sergeant Jones, he subsequently informed the Claimant of the offence of Unlawful Wounding and charged him with same. He also observed the bruises on Constable Reid and he commenced an investigation for the offence of Assault Occasioning Actual Bodily Harm and eventually charged the Claimant with said offence. He indicated that at the end of the trial for both offences the Claimant was found not guilty.

[35] Under cross examination he agreed with Counsel that he was the arresting officer in the case against the Claimant and during that trial he testified that he saw the Claimant with blood on his forehead. His evidence remained unshaken under cross examination.

SUBMISSIONS ON LIABILITY & QUANTUM ON BEHALF OF THE CLAIMANT

[36] Learned Counsel for the Claimant commenced his submissions by indicating that there seems to be no dispute that the Claimant sustained injuries. The main issue is whether under the circumstances, the actions of the officers were justified. Mr. Green

submitted that the police officer in the exercise of his duties is entitled to use reasonable force however the question is whether the force applied was reasonable. He cited paragraph 24 of **Halsbury Laws of England/Criminal**, Volume 25 in support of this submission and placed emphasis on the following: -

“...but it would not be reasonable to use even slight force to prevent very trivial offences.”

[37] He contended that it is an established fact that some degree of force might be necessary in the execution of a police officer’s duty, but for trivial offences, no force at all ought to be used. When a citizen comes in contact with a police officer, it is not acceptable that he ends up in the hospital with broken bones for trivial offences. Mr. Green submitted that the subject offences are moderately trivial offences.

[38] Mr. Green submitted that the circumstances which were described by one witness as almost a riot came about because the officers failed to use good judgement in the management of the circumstances. He stated that if it is accepted that it was the indecent language that caused the officers to remove the Claimant from his vehicle, it therefore means that the assault of Corporal Reid could not be lawful in the circumstances. It was unnecessary and plainly unjustifiable.

[39] Learned Counsel highlighted the inconsistency that the officers other than Constable Jenkinson denied that they saw blood coming from the Claimant’s forehead. He also stated that there is a material discrepancy in the evidence of Corporal Jenkinson who stated that he saw officers trying to restrain a man holding on to the steering wheel against the evidence of the other officers who stated that the Claimant was attacking them. This discrepancy was not reconciled on the case of the Defendant. Corporal Reid was asked on several occasions if the Claimant was holding on to the steering wheel and he denied it.

[40] It was also highlighted that the person identified as ‘Wilbert’ intervened and held on to Corporal Reid’s hand and this is significant as it shows that Corporal Reid was the one who was inflicting the injuries on the Claimant. It was further argued that even if it is accepted that the police officers have injuries, the circumstances are such that could

result in them sustaining injuries and it would not necessarily mean that it was the Claimant who inflicted these injuries. The Claimant would be entitled to resist persons raining blows to his body.

[41] It was submitted that the Claimant gave a credible account of the incident and he was not discredited and that the Court ought to find that the actions of Corporal Reid and Sergeant Jones were unreasonable in the circumstances.

[42] In relation to the issue of damages for assault and trespass to the person, learned Counsel for the Claimant cited the case of **Leeman Anderson v The Attorney General & Christopher Burton** (unreported), Supreme Court, Jamaica, Suit No. CL A 017 of 2002, judgment delivered on the 16th day of July 2004. He submitted that the Court took into account the subjective and objective components relative to an award of this kind in circumstances where the Claimant was assaulted by police officers. Learned Counsel summarised the facts as follows: -

“In that case, the Claimant, “put up his right hand to ward of the blows rained on him by Constable Burton. He was struck in the head and over his body. The medical certificate in support of the claimant's case showed that he received an undisplaced fracture of the right ulna. The report also showed swelling, deformity and tenderness over the right forearm. He was placed in an above elbow plaster of paris which was removed on February 27, 2001. There is no permanent partial disability of the right hand and neither is there any whole person disability.”

[43] The Court made an award of Four Hundred Thousand Dollars (\$400,000.00) and this sum excluded any amount for either aggravated or exemplary damages. This sum now updates to One Million and Three Hundred and Seventy-Nine Thousand, Six Hundred and Thirty Dollars and Forty-Seven Cents (\$1,379,630.47) and so it was submitted that with these “objective components” in mind, an award for Two Million Dollars (\$2,000,000.00) would be reasonable in the circumstances.

[44] In relation to an award that should be made for pain and suffering and loss of amenities, the cases of **Eric Gordon v Attorney-General et al** [2016] JMCA Civ 17 and **Debra Sanfarraro v Bay Roc Limited (T/A Sandals Montego Bay)** (unreported), Supreme Court, Jamaica, Claim No. 2004HCV000220, judgment delivered on the 24th day of March, 2004 were cited.

[45] The Claimant in the instant case suffered a fractured distal radius, pain and stiffness in the wrist, impaired grip strength and plaster of paris had to be applied. Additionally, his whole person impairment was assessed at three percent (3%). It was argued that the Claimant herein suffered more severe injuries and ought to be awarded a higher sum and so an award of Two Million Dollars (\$2,000,000.00) would be reasonable in the circumstances.

[46] Under the head damages for False Imprisonment, the Claimant relied on the cases of **Maxwell Russell v The Attorney General for Jamaica and Corporal McDonald** (unreported), Supreme Court, Jamaica, Claim No. 2006 HCV 4024 judgment delivered on the 18th day of January 2008 and **Earl Hobbins v The Attorney General and Constable Mark Watson** (unreported), Supreme Court, Jamaica, Claim No. CL 1998/H196 judgment delivered on the 29th day of September 2007.

[47] It was submitted that the Claimant in the instant case was falsely imprisoned for seven (7) hours and suffered damage to his reputation in the community, experienced feelings of injury and indignity and certainly ought to be awarded much more than the Claimants in both cases cited above. It was urged that an award of Eight Hundred Thousand Dollars (\$800,000.00) would be reasonable in the circumstances.

[48] Counsel further submitted that special damages were particularised and made a request for an award in the amount of Two Million and One Thousand Five Hundred Dollars (\$2,001,500.00) was made.

SUBMISSIONS ON LIABILITY & QUANTUM ON BEHALF OF THE DEFENDANT

[49] Learned Counsel for the Defendant Ms. Fletcher highlighted that the issues are reduced to the credibility of the witnesses. She stated that in relation to the claim for Malicious Prosecution, the officers would have a basis to arrest the Claimant by virtue of sections 3 and 4 of the **Town and Communities Act** based on the language he used. In addition, the Claimant's abusive behaviour would give the officers probable cause to

approach him and both warn him and arrest him for the offence. Learned counsel also cited section 33 of the **Constabulary Force Act** which provided that any action brought against a constable must be shown to have been done either maliciously or without probable cause. She stated that in the circumstances, the officers had probable cause to arrest the Claimant. She also contended that the suspicion of Constable Jenkinson, the arresting officer was supported by the evidence and submitted that there was reasonable basis on which to continue the prosecution of the Claimant.

[50] She further maintained that the efforts and force used to detain him were reasonable and not excessive given that they had cause to defend themselves from the attack of the Claimant. The officers outside of saying that they received injuries at the hand of the Claimant produced independent evidence in that they went on to procure medical certificates confirming their injuries.

[51] With respect to the time frame within which the Claimant was detained, counsel stated that the evidence of the Claimant that he was held for six (6) hours should not be accepted. The evidence of the Defendant's witness, Trevece Jenkinson was that the Claimant was processed and was out of custody by 3:30 a.m., which would have been approximately three (3) hours after the incident transpired. Constable Jenkinson's further evidence was that, at 5:00 a.m., after he received Corporal Reid's report that he had suffered injuries on account of the Claimant, the Claimant had already left the station and had to be served with the summons in relation to that charge at some other time. Furthermore, he was offered station bail immediately after the charges were brought.

[52] In support of her submissions for an award that should be made under the heading Assault, learned counsel relied on the cases of **Jermaine Jerome Newman v Marva Andrea Chambers and Donovan Chambers** [2014] JMSC Civ 32 and **Leroy Robinson v James Bonfield and others** [Consolidated claims] (unreported), Supreme Court, Jamaica, Suit No. C.L. 1992/R116.

[53] It was submitted by Ms. Fletcher that in light of Dr. Gilbert's recommendation for the Claimant to have the surgery done, he ought to have made a greater effort to do same despite deficiencies at the Cornwall Regional Hospital as advanced in the medical report and in the evidence of the Claimant. It was submitted that the Claimant did not act reasonably and that it was his failure to mitigate his loss that resulted in his diagnosis of 3% permanent impairment of the whole person. He ought to have taken all reasonable steps to mitigate the loss, which he sustained, and having failed to do so, damages for the loss which he ought reasonably to have avoided should not be allowed.

[54] Ms. Fletcher proffered that in any event, in light of the injuries averred and proven by the medical reports, it is submitted that the injuries sustained by the Claimant appear to be more in line with the **Leroy Robinson v James Bonfield and others** (supra) case. The Claimant in the instant case sustained a single laceration to the head, however, the Claimant in **Leroy Robinson v James Bonfield and others** (supra) sustained multiple abrasions to other parts of his body. It is therefore submitted that a reasonable award for general damages for assault, if it is found to have been proven, in this case, would amount to One Million Six Hundred Thousand Dollars (\$1,600,000.00).

[55] In relation to False Imprisonment, it was submitted that the Court should find that the Claimant was held for about three (3) hours. In any event, having regard to the cases, the difference in the quantum of damages between three (3) hours and six (6) hours is not significant. In the circumstances, if it is found that the Claimant has proven his claim for damages for False Imprisonment, an appropriate award would be in the sum of Two Hundred Thousand Dollars (\$200,000.00).

[56] In relation to Malicious Prosecution the case of **Leonard Miller v Constable Raymond Ricketts and the Attorney General of Jamaica** (unreported) Supreme Court, Jamaica, Claim No. 2004HCV3084, judgment delivered on the 19th day of April 2010 was relied on by the Defendant.

[57] Ms. Fletcher indicated that the Claimant in his pleadings claims damages for malicious prosecution in relation to his prosecution for the offences of assault occasioning actual bodily harm and unlawful wounding. Despite the fact that the Claimant, in his evidence, made reference to the fact that he was charged for other offences, the pleadings do not suggest that the Claimant was claiming damages for malicious prosecution in relation to those charges. It is therefore submitted that the Claimant's claim is limited to what he has pleaded, so that, if it is found to be established, the Court should only consider awarding damages for malicious prosecution in relation to the charges of assault occasioning actual bodily harm and unlawful wounding. The Claimant in his evidence did not indicate how many times his charges were called up, however, the pleadings and evidence led at trial show that the Claimant was charged on or about the 24th day of February 2013 and that the prosecution was discharged on the 24th day of May 2016, just over three (3) years later.

[58] Learned Counsel for the Defendant admitted that the charges in the case of **Leonard Miller v Constable Raymond Ricketts and the Attorney General of Jamaica** (supra) were not as serious as the charges of assault occasioning actual bodily harm and unlawful wounding as pleaded and supported by the evidence of the Claimant in the case at Bar. In the circumstances, it is submitted that an appropriate award for malicious prosecution, if it is found to be proven, is Three Hundred and Fifty Thousand Dollars (\$350,000.00).

[59] For Aggravated and Exemplary damages, the case of **Denese Keane-Madden v The Attorney General of Jamaica and Another** [2014] JMSC Civ 23 was relied on. With respect to Aggravated damages, learned Counsel argued that an award of Aggravated damages would not be appropriate as the Claimant led no evidence to suggest that the actions of the police caused him any significant distress, embarrassment and/or humiliation, and damage to his reputation.

[60] It was submitted that, if the Claimant is to be awarded any damages for False Imprisonment and Malicious Prosecution, said damages would be sufficient to compensate him for any distress, embarrassment or humiliation and damage to

reputation, as those elements are contemplated by the court in awarding damages for those torts. In circumstances where the Claimant alleges that ordinary damages would be insufficient, he should lead evidence to support that position. No such evidence has been advanced in this case, which is testament to the fact that an additional award to compensate the Claimant is unnecessary. If however, the court is of the view that aggravated damages are appropriate in this case, it is submitted that only a nominal sum of Fifty Thousand Dollars (\$50,000.00) would be appropriate.

[61] For Exemplary Damages, Ms. Fletcher stated that the actions of the police in the instant case cannot be said to have been oppressive, arbitrary or unconstitutional. the situation, which unfolded was as a result of the unwarranted actions of the Claimant. It has not been shown by the Claimant in the instant case that the officers exhibited unacceptable and/or outrageous behaviour toward him such as would connote malice, ill-will, cruelty, insolence or fraud. If the court is minded to award exemplary damages, it is submitted that the sum of One Hundred Thousand Dollars (\$100,000.00) would be sufficient, in these circumstances, to vindicate the strength of the law.

[62] Learned Counsel urged that if the Claimant is successful on liability, the court should award special damages only in respect of those items that have been specifically pleaded and proven by the Claimant by way of receipts and other evidence deemed satisfactory. It is submitted that the items not specifically pleaded in the Amended Particulars of Claim but which were included in the Claimant's witness statement should not be allowed as no application to amend the claim was made at the trial. Learned Counsel further indicated that in relation to the Claimant's evidence that he used to do electrical work and would earn between Fifty Thousand Dollars (\$50,000.00) and One Hundred and Fifty Thousand Dollars (\$150,000.00) monthly, it is submitted that this was not foreshadowed by the pleadings.

[63] In the circumstances, it is submitted that special damages, if the Claimant is successful on liability, should be awarded for no more than Sixty Thousand Dollars (\$60,000.00) for attorney's fees and travel expenses.

ISSUES

[64] The issues for my determination are as follows: -

1. Was the Claimant falsely imprisoned by the police officers or was his arrest lawful and justified in the circumstances?
2. Was the period of detention reasonable in the circumstances?
3. Were the actions of the police in arresting and charging the Claimant activated without malice and with reasonable and probable cause?
4. Were their actions towards the Claimant, done in lawful execution of their duties?
5. What is a reasonable quantum of damages, if any, for the cause/s of action for which there is liability?

THE LAW

[65] There are three causes of action under which the Claimant grounds his Claim. They are Malicious Prosecution, False Imprisonment and Assault and Battery.

[66] As it relates to Malicious Prosecution, the Claimant in order to succeed must satisfy me that the law was set in motion against him on a charge for a criminal offence by the Defendant or an agent of the Defendant, that he was acquitted of the charge or that otherwise it was determined in his favour, that when the prosecutor set the law in motion he was actuated by malice or acted without reasonable and probable cause and that he suffered damage as a result. As it relates to the first limb, there is no contest that the proceedings were instituted by the police officers who were then agents of the Defendant. There is also no issue taken with the fact that the proceedings against the Claimant were determined in his favour. The issues touch and concern whether or not the police acted without reasonable and probable cause and whether they acted

maliciously. The burden of proving the existence of malice and the absence of reasonable and probable cause rests on the Claimant.

[67] In determining this issue, the test is one of credibility. I have assessed the evidence of the Claimant especially that during cross-examination. There were some inconsistencies in his testimony. Even with respect to the very basic issue as to whether he was a taxi driver or not he was inconsistent. He was inconsistent as to whether he spoke to the senior citizen, in that he at first denied it but when confronted with a previous statement admitted speaking to her. Having considered all the inconsistencies as well as the demeanour of the Claimant, I found him less than truthful in some respects.

[68] I have assessed the case of the Defendant and the evidence of the three witnesses. Whereas, they supported each other in material ways there were points of divergence which has caused me to question their veracity in some respects. However, I am cognizant of the standard to which the issues must be judged and that I have to determine on a balance of probabilities which version is more credible. On a whole, I found the version of the police officers to be more credible with respect to the fact that the Claimant did in fact use indecent and calumnious language and he was told that he would be locked up for this. I also accept that whilst he was being arrested for same he resisted arrest and in fact, caused injury to the officers.

[69] The officers have alleged the commission of an offence in their presence so this would provide them with reasonable and probable cause to arrest the Claimant. I therefore accept that in arresting and charging the Claimant, there existed reasonable and probable cause to do so. That leaves me to consider the question of whether there was malice on the part of the police officers.

[70] In order to establish malice, the Claimant would have to prove that there was 'some improper or wrongful motive, that is to say an intent to use the legal process in question for something other than its legally appointed and inappropriate purpose'. (See Salmon on Tort page 418 paragraph 3). The evidence of the Claimant does not disclose

any elements of this malice on the part of the police. I do not find any evidence to support the fact that they acted with malice. The Claimant has failed to establish that he was maliciously prosecuted.

[71] With respect to False Imprisonment, in order to succeed the Claimant is required to prove that he was detained against his will without any lawful justification. See **Flemmings v Myers and the Attorney General** (1989) 26 JLR 525 where Carey J.A. enunciated as follows at page 527:

“The action of false imprisonment arises where a person is detained against his will without legal justification. The legal justification may be pursuant to the valid warrant of arrest or where by statutory powers a police officer is given a power of arrest in circumstances where he honestly and on reasonable and probable grounds believes a crime has been committed...”

[72] Additionally, at page 530 of the judgment Carey JA went on to say this:

“In my respectful view an action for false imprisonment may lie where a person is held in custody for an unreasonable period after the arrest and without either being taken in custody for an unreasonable period after the arrest and without either being taken before a Justice of the Peace or a Resident Magistrate”.

[73] In these circumstances, I have already found that the officers had reasonable and probable cause to arrest the Claimant for the offence of Using Abusive or Indecent Language and had advised him of that. Therefore, there would be legal justification to arrest the Claimant.

[74] The Claimant has also failed to prove that the other limb of False Imprisonment has been satisfied. This is where a person is held in custody for an unreasonable period after arrest. In the case of this Claimant he was offered bail within a few hours after he was taken into custody. There is equally no basis here to say he was held for any unreasonable period of time.

[75] Both sides are at logger heads with respect to how the incident transpired. However, they appear to both agree that the Claimant sustained some injury. With

respect to the injury sustained by the Claimant there was some inconsistency on the part of the police officers. Constable Jenkinson spoke about seeing blood coming from the Claimant's forehead whereas the other officers denied this. I also find it quite telling that Constable Reid admitted hitting the Claimant whilst he was still "partially" in his car. He justifies this act by saying that the Claimant was squeezing his hand with the car but yet there was no mention of this in the station diary. I did not believe this. He also did not recall the Claimant holding on to the steering wheel whereas Corporal Jenkinson spoke about seeing the Claimant holding on to the steering wheel of the car. I find the account painted by the officers to lack veracity in this respect and prefer the account of the Claimant as to how he sustained his injuries.

[76] The next question for me is whether or not in all the circumstances it was reasonable for the officer to cause such an injury. Constable Reid agreed to using a baton to hit the Claimant. According to him he merely struck him in the direction of his hands but yet the injuries sustained extended to other areas of his body. I had assessed his account and although I find the Claimant's evidence to be exaggerated in some respects I do accept that he sustained serious injuries. I accept that it was while he was sitting in the driver seat of his car that Constable Reid hit him with the baton. Although I accept that the Claimant was acting in defiance of the order of the officer to produce car documents as well as to get out of the car, however, that does not justify Constable Reid's use of force in this manner. A police officer is permitted to use some degree of force in the apprehension of a wrong doer however the force used must be reasonable. In all the circumstances, I do not find that the force used was reasonable.

[77] Judgment for the Claimant against the Defendant for Assault and Battery. The Claim for False Imprisonment and Malicious Prosecution fails.

ASSESSMENT OF DAMAGES

Special Damages

[78] On an examination of the Claim Form and Particulars of Claim there is no specific mention of medical expenses. It is trite that Special Damages must be specifically pleaded and proven. These items were not pleaded so the Claimant cannot recover the costs associated with medical treatment.

[79] The items specifically pleaded were Attorney-at-law fees for representation before the Lucea Resident Magistrate's Court in the sum of \$300,000.00, transportation expenses in the sum of \$50,000.00 and lost income for one year in the sum of \$60,000.00 per month totalling the sum of \$1,070,000.00.

[80] The Claimant has tendered into evidence receipts for legal services rendered amounting to \$156,000.00 so I find that sum to be proven. He gave evidence of transportation expense of \$30,000 which I find to be reasonable and I am prepared to make such an award. With respect to loss of income he claimed for a period of one year and continuing and in fact in his witness statement speaks to a period of two years and four months. In all the circumstances, I do not find this to be reasonable as I am of the view that the time it took for him to recuperate was extended by his own failure to do the surgery. The Claimant is required to take steps to mitigate his loss and I do not accept he did so in these circumstances. I find a period of six months to be a reasonable period over which to award loss of income. I accept based on the letter that spoke to his income that he earned \$15,000.00 weekly. As such the sum of \$360,000.00 has been proven.

General Damages

[81] The Claimant's injuries are supported by medical certificates. They reflect that he was treated at the Noel Holmes Hospital in Hanover on the day following the altercation. According to the Doctor who treated him, he suffered swelling of distal forearm, a 4.5

laceration in the middle of his head and tenderness over the right anterior chest present. An x-ray of his right forearm showed a fractured distal radius. The wound of his scalp was sutured and plaster of paris backslab was placed on his radius fracture. He was sent home with antibiotics and analgesics. He was referred to the orthopaedic clinic at Cornwall Regional Hospital for expert management. A report from Cornwall Regional Hospital revealed that he suffered from a mal-united fracture of the radius which resulted in subluxation of the distal radio-ulnar joint.

[82] In relation to the issue of damages for assault and trespass to the person, learned counsel for the Claimant cited the case of **Leeman Anderson v The Attorney General & Christopher Burton** (supra) where the Claimant was struck in his head and all over his body. His medical report reflected an undisplaced fracture of the right ulna, swelling, deformity and tenderness over the right forearm. He had no permanent partial disability of the right arm and there was no whole person disability. The Claimant was awarded a sum which now updates to One Million and Three Hundred and Seventy-Nine Thousand Six Hundred and Thirty Dollars and Forty-Seven Cents (\$1,379,630.47). The **Debra Sanfarraro v Bay Roc Limited (T/A Sandals Montego Bay)** (supra) was also cited. Ms. Sanfarraro suffered from a fractured right distal radius with a dorsal displacement and volar angulation and was incapacitated for some thirteen weeks. She was awarded a sum which updates to \$1,436,040.00.

[83] Despite a reliance on these cases the Claimant submitted that an award of three million dollars is appropriate and placed emphasis on the whole person impairment of the Claimant. Similar to those cases relied on, the Claimant suffered a fractured distal radius, pain and stiffness in the wrist, impaired grip strength and plaster of paris had to be applied. Additionally, his whole person Impairment was assessed at three percent (3%). However, I find some merit in the Defendant's contention that the gravity of the Claimant's injuries was aggravated based on his failure to abide by the recommendations of his doctor and undergo a surgery and that that should be taken into account. The Defendant placed reliance on the case of **Leroy Robinson v James Bonfield and others** (supra) case. The injuries sustained are also similar to those of

the Claimant in the instant case and that Claimant was awarded a sum which updates to some One Million Six Hundred Thousand Dollars (\$1,600,000.00).

[84] All the cases which have been cited provide useful guidance. It appears to be that injuries of this nature attract a sum in the region of One Million Six Hundred Thousand Dollars (\$1,600,000.00) which is what has been suggested by counsel for the Claimant. However, I am of the view that despite his failure to mitigate his loss some consideration should be given to the diagnosis of 3% permanent impairment of the whole person. Taking that into account, I am of the view that the sum of Two Million Dollars (\$2,000,000.00) is an appropriate award for the Claimant herein.

Aggravated, Exemplary and Vindictory Damages

[85] The Claimant has claimed Aggravated, Exemplary and Vindictory Damages. In order to succeed in the claim for Aggravated Damages the Claimant has to establish that there exist some aggravating features about the case. This position was observed by Lord Woolf MR in the case **Thompson v Commissioner of Police of the Metropolis** (supra) as follows:

“... 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.”

[86] A similar position was taken by the Court in **The Attorney General of Jamaica v Gary Hemans** [2015] JMCA Civ. 63 where 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.”

[87] What is clear is 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.

[88] An example of a case in which an award was made for Aggravated Damages is that of Maxwell **Russell v The Attorney General of Jamaica and Corporal McDonald** Cl. no 2006 HCV 4024, where 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. This was a case in which the Claimant 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.

[89] The Claimant herein alleges that he was arrested and injured in the presence of other persons who had converged on the scene. However, I have found that the officers were justified in taking him into custody. With respect to the assault, although this was done in public view, the conduct of the police did not demonstrate any 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 and in my view was prolonged due to the Claimant’s own behaviour. There was nothing done to warrant an award for Aggravated Damages.

[90] The position is similar as it related to the Claim for Exemplary Damages. In order to succeed the Claimant would have had to establish that the conduct of the defendant

merits punishment, that the conduct went beyond mere want of jurisdiction and was accompanied by arrogance, insolence, humiliation and brutality.

[91] In the case 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 purpose of Exemplary Damages is to punish and deter conduct which could be classified as being “oppressive, arbitrary or unconstitutional”. 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

[92] Vindictory Damages also referred to as Constitutional Damages is viewed as a unique and special kind of award. It was aptly stated by Sykes J as he then was in the **Sharon Greenwood** (supra) case, that it is not every case of abuse that attracts this kind of award. The Claimant’s claim here is based on being unlawfully detained and deprived of his right to freedom of movement. I have already found that this was not the case here. Such an award is not appropriate in these circumstances.

[93] My orders are as follows:

- (1) Judgment for the Claimant for Assault and Battery;
- (2) Special Damages awarded in the sum of Five Hundred and Forty-six Thousand Dollars (\$546,000.00) plus interest at a rate of three percent from February 23, 2013 to today’s date;
- (3) General Damages awarded in the sum of Two Million Dollars (\$2,000,000.00) plus interest at a rate of three percent from October 14, 2014 to today’s date; and
- (4) Cost to the Claimant to be agreed or taxed.