



[2016] JMSC Civ. 78

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2007 HCV 03684**

BETWEEN	DELROY THOMPSON	CLAIMANT
AND	THE ATTORNEY GENERAL OF JAMAICA	1ST DEFENDANT
AND	DETECTIVE DOUGLAS TAYLOR	2ND DEFENDANT

Marc Williams and Aprill Lawson, instructed by Williams, McKoy and Palmer, for the Claimant

Dale Austin, instructed by the Director of State Proceedings, for the Defendants

Heard: February 3, 2016 and March 18, 2016

FALSE IMPRISONMENT – MALICIOUS PROSECUTION – WHETHER CLAIM AGAINST CROWN MUST BE PURSUED AGAINST ATTORNEY GENERAL ONLY – DEFENDANT ENTITLED TO DAMAGES FOR FALSE IMPRISONMENT ONLY FOR THE PERIOD OF TIME HELD IN CUSTODY BEFORE HAVING BEEN ARRAIGNED/BROUGHT BEFORE A COURT – ELEMENTS REQUIRED TO BE PROVEN IN CLAIM FOR DAMAGES FOR FALSE IMPRISONMENT – ELEMENTS REQUIRED TO BE PROVEN IN CLAIM FOR DAMAGES FOR MALICIOUS PROSECUTION – PROOF OF MALICE OR ABSENCE OF REASONABLE AND PROBABLE CAUSE FOR PROSECUTION OF CLAIMANT – LACK OF REASONABLE AND PROBABLE CAUSE FOR ARREST IS NOT TO BE EQUATED WITH LACK OF REASONABLE AND PROBABLE CAUSE FOR PROSECUTION – BURDEN OF PROOF OF REASONABLE AND PROBABLE CAUSE FOR ARREST RESTS ON THE CLAIMANT IN CLAIM FOR DAMAGES FOR FALSE IMPRISONMENT – BURDEN OF PROOF OF LACK OF REASONABLE AND PROBABLE CAUSE FOR ARREST OR MALICE UNDERLYING PROSECUTION RESTS ON THE CLAIMANT IN CLAIM FOR DAMAGES FOR MALICIOUS PROSECUTION – NEED TO PROVE LOSS OF EARNINGS

ANDERSON, K. J

- [1] This is a claim for damages for false imprisonment and malicious prosecution.
- [2] The claim concerns/surrounds an incident which occurred during September, 2005, while the claimant was then employed to Worldwide Flight Services as a ramp attendant responsible for loading, offloading and cleaning American Airlines' aircraft stationed at the Norman Manley International Airport. On or about September 12, 2005, the claimant was asked to report to the Norman Manley Airport's Police Station whereupon he was interviewed by the 2nd defendant, acting in the execution of his duty as a police officer and the 2nd defendant, after having conducted that interview, allegedly maliciously and without reasonable and/or probable cause, wrongfully and falsely and/or maliciously detained, imprisoned and prosecuted the claimant.
- [3] The defendant filed a defence, but at trial, no evidence was called or led, on their behalf. Counsel for the Director of State Proceedings represented both defendants.
- [4] The claim against the 2nd defendant cannot succeed. The claim is against the Crown arising from the allegedly tortious actions of Crown servant or agent, that being the 2nd defendant committed in the execution of his duty as a Crown servant or agent. In the circumstances, the only proper defendant, is the 1st defendant, that being the Attorney General.
- [5] **Section 13 (2) of Crown Proceedings Act**, mandates that, '*Civil Proceedings against the Crown shall be instituted against the Attorney General.*' Where a claim is brought against the Crown, the only proper defendant, is the Attorney General, as the Attorney General is the Crown's legal representative for the purposes of any such claim. See: **The Attorney General and Gladstone Miller** – Supr. Ct. Civil Appeal No. 95 of 1997, esp. at p.14, per Bingham, J.A.
- [6] Judgment must and will therefore, be entered in favour of the 2nd defendant and the costs of the claim against him, awarded in his favour.

[7] In respect of the claimant's claim for damages for false imprisonment, the following is, at common law, the only element of that tort, which must be proven by the claimant, on a balance of probabilities:

(i) That the claimant was detained by a Crown servant or agent in or about September, 2005 – The claimant has duly proven this element.

[8] Once the claimant has led before the trial court, sufficient evidence to prove that he was detained/arrested and thus, not able to move about freely, then, at common law, the burden of proof shifts to the defendant, to prove that there was lawful cause for that detention of the claimant, by the Crown's servant or agent. In other words, the burden was on the Crown, to prove that the arresting officer had reasonable cause to suspect that the claimant had committed the crime in respect of which he has been arrested for. In that regard, see: **Dallison v Caffery** – [1965] 1 Q.B 348, esp. at 365, per Ld. Denning, M.R and **Dumbell v Roberts** – [1944] 1 ALL ER 326, at 331; and Clerk and Lindsell on Torts, 16th ed. [1989], at paras. 17 – 29.

[9] That is the position at common law and rightly so, since at common law, in civil cases, the burden of proof on a particular issue, lies upon the party who affirmatively asserts that fact in issue and to whose claim or defence, proof of that fact in issue, is essential. See: **Joseph Constantine Steamship Line v Imperial Smelting Corporation Ltd.** – [1942] AC 154, esp. at p. 174, per Viscount Maugham.

[10] As stated in the text – Murphy on Evidence, 11th ed. [2009], at p. 79 –

'If the claimant fails to prove any essential element of his claim, the defendant will be entitled to judgment. The position of the defendant is somewhat different. Since the claimant affirmatively asserts his claim, he bears the burden of proving the claim, and the defendant assumes no legal burden of proof by merely denying the claim, However, if the defendant asserts a defence which goes beyond a mere denial (sometimes referred to as an 'affirmative defence') the defendant must

assume the legal burden of proving such defence. An affirmative defence is most easily recognized by the fact that it raises facts in issue which do not form part of the claimant's case.'

- [11] In the case at hand, the defendant has raised an affirmative defence. That affirmative defence is as follows: *'The 2nd defendant contends that the claimant was arrested upon reasonable suspicion of possession, dealing and taking steps to export cocaine and conspiracy.'* (para. 3 of defence)
- [12] At common law, the burden of proof would have rested squarely on the defendant's shoulders, to prove the aforementioned affirmative defence.
- [13] The legal position in that respect though, for Jamaica, has been modified by statute, in particular, **section 33 of the Constabulary Force Act**. That statutory provision is as follows: *'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.'*
- [14] As such, the modification arises because, in Jamaica, by virtue of statutory provision, the burden is cast on a claimant, in a claim against the Crown, arising from the tortious conduct of a police officer who is carrying out his duties in that capacity, to prove that such tortious conduct was committed either maliciously, or without reasonable or probable cause.
- [15] That being so, it would not be for the defendant, in a claim such as this, to establish that that claimant was arrested by police officers for reasonable or probable cause. Though that is the position at common law, it has been modified by **section 33 of the Constabulary Force Act**, to the extent that, in claims pertaining to the allegedly tortious conduct of police officers acting in the execution of their duty, in particular, where there is an allegation of false

imprisonment, the burden of proof rests on the claimant to prove that he was arrested without reasonable or probable cause, or maliciously, or alternatively, that even if he was initially lawfully detained, for reasonable cause, he was thereafter detained and kept in police custody, prior to having been arraigned before a judicial officer, for a period of time which properly enables a trial court to conclude, that the length of his detention was a consequence of the malicious actions of police officers, or it arose without any reasonable or probable cause.

[16] If that burden were to be shifted to the defendant in a claim for damages for false imprisonment, arising from the allegedly tortious conduct of police officers while executing their duties as such, then this court would be disregarding **section 33 of the Constabulary Force Act** and making the common law in that particular respect, superior to the pertinent statutory provision. This court had in its judgment in the case – **Radcliffe Myles and Attorney General** – [2013] JMSC Civ. 193, made this same legal point.

[17] The legal burden of proof therefore rested on the claimant in this claim, from beginning until end, since, as will be seen further on in these reasons, **section 33 of the Constabulary Force Act** has also modified the common law as regards proof of the elements of the tort of malicious prosecution.

[18] This does not mean though, that the defendant had no burden whatsoever. The defendant had a burden of placing before the trial court, sufficient evidence capable of rebuffing the claimant's credible evidence that he was arrested without reasonable or probable cause. If the defendant has failed to lead such evidence and in cross-examination of the claimant, has not sufficiently discredited the claimant's evidence on that particular issue, then, it is evident that the claimant would have proven his claim, on a balance of probabilities.

[19] That is exactly what transpired at the trial of this claim. The claimant provided credible evidence to the trial court, as to his having been arrested without reasonable or probable cause. During cross-examination, his evidence in that

respect, was not discredited. In fact, no suggestion was ever made to him by defence counsel, that could, by any stretch of anyone's imagination, have properly enabled this court to conclude that there existed reasonable cause for police personnel to have suspected him of the offence (s) that he was criminally charged for.

[20] To make it worse for the defence, they called no evidence whatsoever, before the trial court.

[21] In assessing whether the claimant has proven his claim for damages for false imprisonment, this court must next consider what is reasonable or probable cause for arrest by a police officer. In **Hicks v Faulkner** – [1878] 8 Q.B.D 167, Hawkins J. defined same as –

'...an honest belief in the guilt of the accused based upon a full 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. There must be: first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly such secondly-mentioned belief must be based upon reasonable grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused.'

That definition later received approval in the House of Lords: See: **Herniman v Smith** – [1938] 1 ALL ER 1 and see also: **Irish v Barry** – [1965] 8 W.I.R 177.

[22] In the case at hand, as aforementioned, no evidence was proffered to the trial court, on behalf of the defence. Having failed to meet their evidentiary burden,

this case fell to be decided, as far as the claimant's claim for damages for false imprisonment is concerned, on the claimant's evidence, which was uncontested in any significant respect. In the circumstances, this court has concluded that the claimant has proven his claim for damages for false imprisonment, on a balance of probabilities, in so far as he has satisfied this court that there existed no reasonable basis for having suspected that he may have committed, or in some way, participated in the commission of the alleged criminal conduct. Reasonable cause to suspect ought to be distinguished from mere speculation.

- [23] In the case at hand, the claimant gave evidence that he was detained on September 10, 2005 and that he was taken to the gun court lockup, where he was detained until September 16, 2005. He was then placed before the Half Way Tree Resident Magistrate's Court on September 16, 2005 and was then granted bail, but did not take up the bail offer, until September 22, 2005.
- [24] Once he was taken by the arresting officer, before the court, the claimant was no longer, unlawfully detained. His unlawful detention by an agent/servant of the Crown, came to an end, once he had been brought before a court of law.
- [25] The claimant was arrested without a warrant. That arrest, having been carried out without reasonable and probable cause, was unlawful and damage is presumed, as that arrest constituted a trespass to the person. Once taken before the court though, the imprisonment on remand, can only be redressed through the courts, upon a claim for damages for malicious prosecution. See: Clerk and Lindsell on Torts, 20th ed. [2010] at para. 15.42, wherein the learned authors have stated, '*... if a party is arrested without a warrant and taken before a magistrate, who thereupon remands him, he must seek his remedy for the first imprisonment in an action of trespass and for the imprisonment on remand, in an action for malicious prosecution.*' See: **Lock v Aslton** – [1848] 12 Q.B 871; and **Diamond v Minter** – [1941] 1 K.B 656; and **Donovan McMorris v Maurice Bryan** – [2015] JMSC Civ. 203, at para. 26, per Anderson, J. This court therefore, wholly agrees with the oral submission of counsel for the Crown, that

the claimant can only recover damages for the period of his imprisonment, prior to the date and time when he was remanded by the court, arising from his inability to meet his bail. The claimant therefore, is entitled to recover damages for his detention for six (6) days. The Consumer Price Index (CPI) can be used in updating damages awards made in prior cases. See: **Allan Currie v The Attorney General of Jamaica** – Claim No. CL1989/C-315, per Rattray J., esp. at para. 42; and **Maxwell Russell and The Attorney General for Jamaica and Corporal McDonald** – Claim No. 2006 HCV 4024, per Mangatal J. at para. 14.

[26] The claimant gave evidence of his having been detained in wholly filthy, and overall, unhygienic conditions. That evidence was unchallenged by the Crown, in any way whatsoever and rightly so. The claimant gave evidence that as a consequence of his imprisonment, he suffered from periods of anxiety, depression, mental anguish and also, from feelings of abandonment, loneliness and mental disorientation. The claimant is entitled to recover, as general damages, as a consequence of all of these things/experiences. The claimant did not however, give any evidence of there having been any damage to his reputation having ensued as a consequence of his unlawful imprisonment, as is typically, the evidence given by claimants in false imprisonment claims. Accordingly, his damages award may not be, 'on all fours' with the typical damages award in a claim of this nature.

[27] The claimant has claimed special damages, for loss of earnings which he has wholly failed to prove. He has also claimed for attorney's fees in respect of his representation, while he was criminally charged before the Magistrate's Court. In addition, he has claimed for travelling expenses, to and from the Magistrate's Court. The claimant has wholly failed to prove any of these special damages claims. The burden was on him to prove each of same. Special damages must, as a general rule, be specially pleaded and specially proven. There exists no evidentiary basis, in the case at hand, for departing from the general rule. See:

Central Soya Jamaica Ltd. and Junior Freeman – SCCA 18/84, per Rowe, P. and Hepburn Harris v Carlton Walker – Supr. Ct. Civil Appeal No. 40/90.

[28] As regards the claimant's claim for damages for malicious prosecution there are four (4) elements that need to be proven. At common law, there are five (5) elements. This is not so in Jamaica though, because of the provisions of **section 33 of the Constabulary Force Act**, which has served to modify the common law, as regards the elements to be proven in respect of a claim for damages for malicious prosecution. In that regard, see: **John Gaynor and Cable and Wireless Jamaica Ltd. and Supt. G.C Grant and the Attorney General – Suit No. C.L. 2000/G-124, esp. at paras. 18 and 19, per Jones J.**

[29] The four elements to be proven, are as follows:

- (i) That the law was set in motion against the claimant on a criminal charge; and
- (ii) That the claimant was acquitted of that criminal charge, or that the same was otherwise determined in his favour; and
- (iii) That the prosecutor set the law in motion, either without reasonable and/or probable cause, or, that in having so set the law in motion, the prosecutor was actuated by malice; and
- (iv) That the claimant suffered damage as a result.

[30] In the present case, the claimant's evidence has established, on a balance of probabilities, that the law was set in motion against him, on a criminal charge. His evidence in that regard, was that on September 14, 2005, the 2nd defendant had charged him with the offences of possession, dealing, taking steps to export cocaine and conspiracy.

[31] His evidence has also, equally established to the requisite standard, that he was acquitted of those charges. In that regard, he gave evidence that he attended court on over forty (40) occasions and that, on each occasion, the prosecution failed to lead evidence connecting him to the drugs on the aircraft and on

January 23, 2007, he was acquitted of all of the charges that had been laid against him, thereby, 'vindicating his innocence.'

[32] The claimant's evidence has also established to the requisite standard, that he suffered loss as a consequence of his having been prosecuted as aforementioned. In that regard, this court has noted that the claimant was remanded until September 22, 2005, because it was not until then, that he was able to meet the court's bail offer. He was, during that period of time, detained in terrible conditions. If he proves his claim, that would be, 'loss' for which he would be entitled to recover, by award of this court, by means of an award of general damages.

[33] The claimant gave no evidence as to his having lost his employment with Worldwide Flight Services, where he was employed, at the time of his arrest, as an airport ramp attendant, as a consequence of his having either been arrested or prosecuted. He did though, give evidence of having been unable to get a job for the one and a half (1 ½) years – September, 2005 to January, 2007, that the prosecution was ongoing and, as he termed it, 'drawn out.' The reason that he proffered though, as to why he could not get a job during that period of time, has not assisted him in proof of his claim. That reason was that all of the job positions that he was interviewed for, over that period of time, required him to provide a police report stating that there were no convictions against him and, according to him, he could not obtain such a report, because there was an active case against him. This court has found itself unable to accept the claimant's evidence that he could not get a police report that he had no prior convictions recorded against him, because he had a case ongoing. In any event, the claimant has given no evidence that he could not get a job after the criminal case that had been brought against him, had been determined in his favour. It would only have been at that stage and thereafter, that ensuing loss could properly be claimed for, because, the legal wrong of malicious prosecution would not have

been committed until the prosecution had been determined in his favour and thereafter, loss occurred.

[34] The claimant has not proven that there was any malice in the institution of the prosecution against him, or that there was a lack of reasonable and probable cause for having instituted that prosecution against him.

[35] Even if this court were to accept that the claimant is entirely innocent of the charges brought against him, that does not mean, a fortiori, that there was malice in having prosecuted him, or that there was a lack of reasonable and probable cause for having prosecuted him. This court does not know what information/materials/witness statements the prosecutor had in his/her possession at the time when the claimant was acquitted. That is what this court would need to know in order to properly be able to conclude that said element of the tort of malicious prosecution, has been duly proven by the claimant. Mere proof of acquittal, just as mere proof of either no evidence, or no sufficient evidence having been led by the prosecution against the accused, at trial, is not enough. In that regard, see: **The John Gaynor** case (*op. cit.*) at para. 22.

[36] It should be noted by potential claimants and potential claimants' counsel, that there can be many reasons why no evidence is led against a defendant, at any time during the course of a criminal prosecution and one of those reasons could simply be that a witness has died, or cannot be found as at the date of trial, or even, as is often the case, that a witness or witnesses are unwilling to testify. Thus, the mere failure to lead evidence cannot, in and of itself, suffice to prove, either that the prosecutor was actuated by malice, or that there did not exist reasonable and probable cause for the prosecution. In respect of that particular element of the tort of malicious prosecution, a great significance must be given to what was the material that was before the prosecutor when the accused was acquitted, or when the criminal charge (s) was/were determined in his/her favour.

[37] As has been stated in the text – Clerk and Lindsell on Torts, 13th ed. [1969], at para. 1898, with respect to the element of proof of lack of reasonable and probable cause for the prosecution of the claimant –

'The question of reasonable and probable cause frequently occasions no little embarrassment in the conduct of a trial, not so much from its own inherent difficulty as from the manner in which it presents itself: since, first it involves the proof of a negative, and second, in dealing with it, the judge has to take on himself, a duty of an exceptional nature. The plaintiff has, in the first place, to give some evidence tending to establish an absence of reasonable and probable cause operating on the mind of the defendant. To do this he must show the circumstances in which the prosecution was instituted. It is not enough to prove that the real facts established no criminal liability against him, unless it also appear that those facts were within the personal knowledge of the defendant. If they were not, it must be shown what was the information on which the defendant acted, which is sometimes done by putting in the depositions which were before the magistrate.'

See: **Walker v South Eastern Ry.** – [1870] L.R. 5 C.P 640. As to what interrogatories may be admissible, which would now be substituted for, by a request for information, see: **Maass v Gas Light and Coke Co.** – [1911] 2 K.B 543.

[38] As to that quotation above, I would, for my part, only add, firstly, that in the Jamaican context, the claimant could and should have placed before the trial court, the witness statements which should have been disclosed to him, prior to his discharge/acquittal. If even the same were not duly disclosed, then the same could and should have been subpoenaed, via the Supreme Court, by means of a subpoena *duces tecum*.

[39] Secondly, I differ somewhat, from the view that the relevant information available to the prosecutor must have been of an adequate nature such as to constitute

reasonable and probable cause for the institution of the prosecution. I take the view, instead, that since the tort does not crystallize and become established until the prosecution has been determined in the claimant's favour and since the prosecutor should not necessarily be expected to have, at the onset of the prosecution, all expected materials/exhibits and/or witness statements expected to be relied on, in prosecution of the case against the then accused claimant, there is no legal reason why the nature of the material available to the prosecutor, should not be considered by the trial court, as at the time when the prosecution was terminated and accordingly, concluded in the accused claimant's favour. The material to be advanced before the court by way of evidence in support of the prosecution, may very well, at that stage of determination of the criminal proceedings, not be the same as at the initial stages of the prosecution. To my mind, it is that which existed at the latter stages of the criminal proceedings which must be the most pertinent, since the tort does not crystallize until the prosecution has been terminated. This particular legal point though, is of no direct relevance to this claim.

[40] In this claim, the claimant's evidence has fallen significantly short of establishing, on a balance of probabilities, that as at the time when the prosecution began, the prosecutor was either actuated by malice, or lacked reasonable and/or probable cause for the prosecution.

[41] Mere evidence that there was no reasonable cause to suspect and thus, to have arrested the claimant would not be enough to establish that requisite third element of this tort – malicious prosecution and equally, mere evidence of acquittal would not be enough, just as it would also not be enough to place before the trial court, in an effort to prove that particular element, which incidentally, is typically, the most difficult of the three (3) elements of the malicious prosecution tort, to prove, evidence that during the pendency of his/her prosecution, very limited evidence or indeed, no evidence at all, was presented to the trial court. See: **Flemming v Myers** – (*op. cit.*), at 539 and **Earl Hobbing**

and The Attorney General of Jamaica and Constable Mark Watson – Claim No. 1998/H 196.

- [42] This court will not and should not be expected to either presume malice, or the absence of reasonable and probable cause for the institution/conduct of a prosecution.
- [43] As such, the claimant's claim for damages for malicious prosecution, has not been successfully proven and judgment in respect of same, will be entered in favour of both defendants.
- [44] Regarding the claimant's claim for damages for false imprisonment, the aim of the court's awarded of damages to the claimant will be to, as far as possible to do so by means of a monetary award, put the claimant on the position that he would have been in, had the tort not been committed by the 1st defendant.
- [45] This court has relied on two (2) claims for the purpose of assessing damages for false imprisonment, these being: **John Gaynor and Cable and Wireless and ors.** – Suit No. C.L. 2000/G – 124; **and Maxwell Russell and The Attorney General of Jamaica and anor.** Claim No. 2006 HCV 4024. The latter – case was decided on by this court, in January of 2008 and the award of damages for false imprisonment was, in that case, inclusive of an award for aggravated damages, in the sum of \$715,000.00. In that case, the claimant had been falsely imprisoned for 12 days.
- [46] In the **John Gaynor** case the award was made in December 1, 2005 and was in the sum of \$120,000.00 arising from his having been falsely imprisoned for four (4) days. In that case Mr. Gaynor only received compensation, arising from the loss of his liberty for a period of four (4) days – not for humiliation, distress, illness, or anything of that nature. The case at hand, would be different, in that particular respect.

[47] The claimant in this case, should be awarded as general damages and aggravated damages – \$650,000.00 with interest at the rate of 3% with effect from September 16, 2005 to date of judgment – March 18, 2016.

Orders

- (1) The claimant is awarded judgment in his favour as against the 1st defendant only, with respect to his claim for damages for false imprisonment and is awarded the sum of \$650,000.00 as a composite award for general and aggravated damages, with interest at the rate of 3% with effect from September 16, 2005 to date of – judgment – March 18, 2016.
- (2) The defendants are awarded judgment in their favour with respect to the claimant's claim for damages for malicious prosecution and the costs of that claim are awarded to them and such costs shall be taxed if not sooner agreed.
- (3) The costs of the claimant's claim against the 1st defendant for damages for false imprisonment are awarded to the claimant and such costs shall be taxed, if not sooner agreed.
- (4) The 2nd defendant is awarded judgment in his favour, with respect to the claimant's claim for damages for false imprisonment and the costs of that claim are awarded to him, with such costs to be taxed, if not sooner agreed.
- (5) The claimant shall file and serve this order.

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Hon. K. Anderson, J.