



[2021] JMSC Civ 42

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

**[DIVISION]**

**CLAIM NO. 2011 HCV 03995**

<b>BETWEEN</b>	<b>RAPHAEL GEORGE WESTCAR</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>CONSTABLE MARK TOMLINSON</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 for the claimant

Mr. Carson Hamilton instructed by the Director of State Proceedings for the first and second defendants

Heard: November 12, 2020 and February 25, 2021

**Malicious Prosecution – Trespass – Assessment of Damages**

**PETTIGREW-COLLINS: J**

**THE CLAIM**

[1] The claimant filed a Claim Form and Particulars of Claim on the 22<sup>nd</sup> of June 2011 seeking damages for malicious prosecution and trespass against the first and second defendants.

[2] He claims that on or about the 15<sup>th</sup> of October 2009, the first defendant unlawfully, maliciously and/or without reasonable and probable cause, prosecuted him by proffering a false charge against him for the offence of operating a public passenger vehicle without a public passenger licence and that on the 14<sup>th</sup> of June 2010, the charge against him was dismissed for want of prosecution.

[3] He also claims that the first defendant unlawfully, maliciously and/or without reasonable and probable cause seized and detained his motor vehicle, which said motor vehicle was returned to him on the 15<sup>th</sup> of February 2010. He also claims aggravated damages, exemplary damages and vindictory damages.

[4] The second defendant is sued by virtue of the provisions of the Crown Proceedings Act as admittedly, the first defendant was at all material times a member of the Jamaica Constabulary Force who acted or purported to act as the servant and/or agent of the Crown.

### **THE DEFENCE**

[5] The defendants admit that the first defendant charged the claimant with the offence of operating a vehicle as a public passenger vehicle without a road vehicle licence and that the charge was dismissed as alleged by the claimant. It is contended however that the claimant was prosecuted because he was seen picking up passengers, letting them off and collecting money. He had therefore committed the offence for which he was prosecuted and thus the first defendant had reasonable and/or probable cause to prosecute the claimant for the offence. The defendants also admit that the first defendant seized the claimant's motor vehicle but that there was reasonable and/or probable cause to do so.

### **THE ISSUES**

[6] The issues to be decided are whether the first defendant acted without reasonable or probable cause or acted maliciously when he prosecuted the claimant and whether he had reasonable and probable cause to seize the claimant's motor car.

### **THE DECISION**

[7] The claimant is entitled to succeed in his claim for damages for Malicious Prosecution and Trespass.

## **PRELIMINARY MATTERS**

[8] At the commencement of the trial, counsel for the defendant made an application for paragraphs 9, 10, 11, 13, and part of 19 of the claimant's witness statement to be struck out. The basis for seeking to have paragraphs 9 and 10 struck out was that they contained evidence relevant to an assault but that no claim was made in respect of an assault and therefore the evidence was irrelevant.

[9] In relation to paragraphs 11 and 19, it was said that that evidence supported a claim for false imprisonment which was not pleaded, and the defendants therefore had no opportunity to respond to those allegations.

[10] The court declined to strike out any of the paragraphs. I took the view that paragraph 13 would not be admissible as to the truth of its contents but was nevertheless admissible under the Subramaniam principle. The other paragraphs contained the narrative as to what the claimant said transpired and although they contained evidence which could potentially give rise to an additional cause of action, they were not inadmissible.

[11] Upon enquiries made by the court, the claimant's Attorney at Law advised the court that the claim would proceed against the second defendant only.

[12] The first defendant was permitted to amplify his witness statement. In doing so he clarified that the offence for which the claimant was prosecuted was operating his motor vehicle as a public passenger vehicle without a road licence and not operating his motor vehicle as a public passenger vehicle without public passenger vehicle insurance. It was also made clear that the claimant was prosecuted for one offence and not two offences as paragraph 10 of the first defendant's witness statement would imply.

## **THE CASE AGAINST THE SECOND DEFENDANT**

[13] There is no question that the first defendant purported to act pursuant to his duties as a crown servant when he prosecuted the claimant. Section 13(2) of the Crown Proceedings Act in essence, provides that civil proceedings against the Crown

shall be instituted against the Attorney General. The provisions of the Act extend the principle of vicarious liability to the Crown and the Crown's servants where the alleged tortious act is committed by a Crown servant during the course of his employment. It was not strictly necessary that the first defendant be joined as a party. He was however a necessary witness in the matter.

### **THE CLAIMANT'S EVIDENCE**

**[14]** The claimant in his Witness Statement filed on the 15<sup>th</sup> of January 2015, stated that on the 15<sup>th</sup> of October 2009, approximately 8:00 am, he was returning home from the Guy's Hill area. On his way home, he offered a male student a ride to school. While passing the police station, he noticed a marked police vehicle leaving the station with several police officers including the first defendant, Constable Mark Tomlinson, who was the driver. Constable Tomlinson stopped him and told him to park the car on the police station's compound and leave the keys inside the car before he drove off. The claimant said he did as he was instructed by Constable Tomlinson. According to the claimant, he accompanied the male student he had picked up earlier to the taxi stand and placed him on a taxi. He then returned to the police station to check on his motor vehicle.

**[15]** The claimant also stated that when he returned to the police station, his motor vehicle was not on the compound. He was later informed that his vehicle had been taken to the pound. He said that he was given a ticket by Constable Tomlinson for the offence of Operating a Vehicle without a Public Passenger Licence. He stated that he was never asked the circumstances under which the student was travelling in his vehicle. He said Constable Tomlinson then demanded the ticket which he had given to him and when he refused to give back same to him, Constable Tomlinson became angry, grabbed him by the waist of his pants and dragged him to a cell in the view of several members of the public and he was told by Constable Tomlinson that he would remain there until he made up his mind what to do with him. He said he was placed in a cell with another person and he remained there between the hours of 9:30 am and 4 pm.

[16] The claimant further stated that he had known Constable Tomlinson before as someone who attended drink-out events in the Guy's Hill area which he would also attend sometimes.

[17] He said that he tried to retrieve his car from the Lake's Pen pound but was unsuccessful in doing so without a court order. Consequently, he retained the services of Attorney-at-Law Mr. Kinghorn. He said he was charged a fee of \$100,000.00 but to date he has only paid \$20,000. He further stated that he was able to secure the release of his car by court order on the 15<sup>th</sup> of February 2010.

[18] The claimant gave evidence that between the 15<sup>th</sup> of October 2009 and the 15<sup>th</sup> of February 2010, he was inconvenienced because of not having his motor vehicle and he also incurred expenses. He said he expended no less than \$3,000 per day for the loss of use of his vehicle. He said there were instances where he had to pay persons to take things from his farm. He did so 3-4 times weekly and it cost him no less than \$5,000.00 per trip. He spent at least \$1,000.00 each day when he took public transportation.

[19] He said that he attended court on several occasions and finally on the 14<sup>th</sup> of June 2010, the matter was dismissed for want of prosecution. He said the entire incident was embarrassing to him and he further suffered the humiliation of attending court in Linstead on several occasions in the presence of hundreds of persons.

[20] The claimant was cross examined at length regarding his evidence that he was giving a boy previously unknown to him a lift to school that morning. Reference will be made to that evidence at an appropriate juncture.

## **THE FIRST DEFENDANT'S EVIDENCE**

[21] In his witness statement filed on the 19<sup>th</sup> of January 2018, the first defendant stated that at the time of the incident, he was a Constable of Police stationed at the Guy's Hill Police Station. He stated that on the day in question, he was the driver of a marked police service vehicle and that he was parked along the Guy's Hill main road in

the vicinity of Hay's Hardware. He observed that the claimant had six (6) passengers in the motor vehicle, one (1) in the front passenger seat and five (5) persons on the back seat. He observed the claimant letting off passengers, collecting money, picking up passengers and making change. He drove off behind the claimant's motor vehicle and followed behind him to the Guy's Hill High School. There, he saw the claimant let off five (5) school children, then came from the car, collected money from them and made change. He then approached the claimant and indicated to him that he was operating contrary to the terms and condition of his licence and that he would be ticketed for the offence for which he was ultimately prosecuted.

**[22]** He also stated that he instructed the claimant to proceed to the Guy's Hill Police Station. The claimant did so, and at the police station, he issued him with the ticket and confiscated the motor vehicle in question. He said he did not recall getting any summons to attend court.

**[23]** The first defendant further stated that he had known the claimant prior to the incident as he had seen him operating the motor vehicle as a public passenger vehicle and that he had warned him.

**[24]** The first defendant was cross examined at length. It was revealed in cross examination that he had not given quite the same account in his witness statement as he gave in the statement which was submitted to the parish court in connection with the ticket issued to the claimant. The first defendant accepted that what he said in evidence about what the claimant said to him is different from the information in his statement given for the purpose of the prosecution of the claimant in the parish court.

**[25]** Further, cross examination revealed that the first defendant's account was that the claimant had left from the hardware with his passengers and travelled to the high school. He accepted that when one leaves from Hays Hardware going towards the high school, one gets to the town centre, then to the police station before reaching the high school. It was his evidence that the claimant did not stop in the town centre that morning, that his next stop after Hay's Hardware was the high school. When asked if he

had seen the claimant soliciting passengers that day he said yes. When asked if it was at the town centre, his response was “yes but not on the date that the ticket was written”. The whole basis of the prosecution of the claimant was that the offence was committed in the town centre as revealed from the location of the offence as stated on the ticket. He accepted that he had not said in his statement to the parish court the following which was a part of his witness statement in this claim:

- (1) That he saw the claimant at Hay’s Hardware.
- (2) Anything about the claimant carrying passengers to Hays Hardware.
- (3) That he picked up passengers at Hays Hardware.
- (4) That he proceeded from Hays Hardware with students in the vehicle.
- (5) That when the claimant stopped at Guys Hill High School passengers disembarked from the vehicle.
- (6) Anything about passengers disembarking and giving the claimant money.
- (7) Indeed, that he did not mention the Guys High School or Hays Hardware in his statement at all.

**[26]** The first defendant said that the claimant was coming from the Linstead direction when he saw him at Hays Hardware and that he the first defendant was facing the said direction at the time. He later said that he saw students wearing uniform which he accepted based on the description, was the Guys Hill High School uniform, disembarking at the Hays Hardware. He thereafter changed that position to say that the persons who were disembarking at that location were adults. He must have come to the realization that it would have been incongruous that Guys Hill High School students were disembarking at that location at that time of the morning when evidently they would have been on way to school. This in the light of his evidence that the vehicle later travelled to the Guys Hill School which is in fact a distance of over a mile from Hays Hardware.

## THE LAW

### Malicious Prosecution

[27] The elements which are necessary to establish the tort of malicious prosecution were succinctly stated in the case of **Conrad Gregory Thompson v Attorney General of Jamaica** Claim No. HCV 02530 of 2008. The claimant must prove that:-

- (a) The law was set in motion against him on a charge for a criminal offence.
- (b) He was acquitted of the charge or that it was otherwise determined in his favour.
- (c) When the prosecutor set the law in motion against him, he was actuated by malice or acted without reasonable and probable cause
- (d) He suffered damage as a result.

[28] Where the claim is against a member of the JCF who acted or purportedly acted in the execution of his duties, the basis for the need to establish that the defendant acted maliciously or without reasonable or probable cause is the provisions of section 33 of the Constabulary Force Act which states that:

*“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 and probable cause; and if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be nonsuited or a verdict shall be given for the defendant.”*

[29] In the case of **Hicks v Faulkner**, (1878) QBD 167 Hawkins J defined reasonable and probable cause: He said:

*“I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds, of the existence of the state of circumstances which assuming them to be true would reasonably lead any ordinary 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.”*

[30] In the case of **Denese Keane Madden v The Attorney General of Jamaica and Another**, [2014] JMSC Civ 23, Edwards J. (as she then was), opined that the definition of reasonable and probable cause in the case of **Hicks v Faulkner** might be inaccurate to the extent that the prosecutor should have reasonable grounds to believe that the person charged was guilty, observing that the use of the word guilty was misleading. She approved of Lord Denning’s observation in **Glinski v Mclver** [1962] 1 All ER 696 that a police officer

*“cannot judge whether the witnesses are telling the truth. He cannot know what defences the accused may set up. Guilt or innocence is for the tribunal not for him... It is for them to believe his guilt, not for the police officer. Were it otherwise, it would mean that every acquittal would be rebuff to the police officer... no, the truth is that the police officer is only concerned that there is a case proper to be laid before the court.”*

[31] At paragraph 45 and 46 of **Greg Martin v Detective Sergeant Halliman and the Attorney General of Jamaica**, Sykes J (as he then was) observed that:

*“Flemming’s case has authoritatively interpreted section 33 of the Constabulary Force Act. To succeed in a claim for malicious prosecution, the claimant must prove that the prosecution was either malicious or without reasonable and probable cause. It is well established in Jamaica that a police officer, while not required to believe that person is guilty, must have an honest belief founded on reasonable grounds that the person charged or about to be charged may be guilty of the offence charged or about to be charged... There must be the actual belief by the police officer and that belief must be reasonable. To speak only of the subjective part of the test, would have the effect of undermining a very important safeguard against abuse. The objective component is the real and effective protection against arbitrary arrests.”*

He continued at paragraph 46 that:

*“Lord Denning’s judgment in **Glinski v Mclver** [1962] A.C. 726, 759 stated the correct approach:*

*.....Honest belief in guilt is no justification for a prosecution if there is nothing to found it on. His belief may be based on the most flimsy and inadequate grounds, which would not stand examination for a moment in a court of law. In that case he would have no reasonable and probable cause for the prosecution. He may think he has probable cause, but that is not sufficient. He must have probable cause in fact. In this branch of the law, at any rate, we may safely say with Lord Atkin that the words "if a man has reasonable cause" do not mean if he thinks he has." (see Liversidge v Anderson)."*

[32] In *Williamson v Attorney General of Trinidad and Tobago* (2014) 85 WIR, it was said that:

*"To constitute malice, the dominant purpose of the prosecutor had to be a purpose other than the proper invocation of the criminal law – an illegitimate or oblique motive – and that improper purpose had to be the sole or dominant purpose actuating the prosecutor. It had to be shown that the prosecutor's motive was for a purpose other than bringing a person to justice and involved an intention to manipulate or abuse the legal system. Proving malice was a high hurdle for a claimant to pass. Further, the honest belief required of a prosecutor was a belief not that the accused was guilty as a matter of certainty, but that there was a proper case to lay before the court."*

## TRESPASS

[33] Trespass is a remedy which affords compensation for injury to a chattel in a claimant's possession. It exists for any direct and wrongful interference with possession and is actionable per se although a claimant may also recover any loss he actually suffered. See **Clerk & Lindsell on Torts** 22<sup>nd</sup> edition para 17-02.

[34] In **Carl Brown v. The Attorney General of Jamaica and Another** [2013] JMSC Civ. 151, Anderson J quoting from *Salmond on the Law of Torts* (13<sup>th</sup> ed.), observed that "the tort of trespass to chattels consists in committing without lawful justification an act of direct physical interference with a chattel in the possession of another person."

[35] Section 61 of the Road Traffic Act prohibits an individual from using as a public passenger vehicle, a motor vehicle not licensed for the purpose. Section 13(2)(a)(v) of the Transport Authority Act allows a Constable to seize any vehicle which is being

operated or used as a public passenger vehicle without a licence issued for the purpose. Section 13(2)(b) of the Transport Authority Act permits a Constable to take or cause to be taken to the nearest police station or to the nearest convenient place authorized by the police pursuant to subsection (3)(a) any vehicle which is seized pursuant to section 13(2).

**[36]** The first defendant based on his evidence purportedly acted on the basis of those provisions to prosecute the claimant and seize his motor vehicle.

**[37]** As it relates to the nature of the damage necessary to prove that element of the tort of malicious prosecution, proof of damage to character or reputation, damage to person or property may be sufficient. Further, if a person is put to the risk of losing his liberty that is sufficient. Incurring pecuniary loss resulting from having to defend the charge will also suffice.

#### **APPLICATION OF THE LAW**

**[38]** In this case, it is not in dispute that two of the elements required to establish a case of malicious prosecution have been established by the claimant. It was established that the first defendant set the law in motion against the claimant by prosecuting him. It has also been established that the prosecution was terminated in the claimant's favour when the matter was dismissed for want of prosecution on the 14<sup>th</sup> of June 2010 in the St Catherine Parish Court holden at Linstead. The court must now examine whether the first defendant acted without reasonable and or probable cause or with malice and whether the claimant suffered damage.

**[39]** In making submissions, the defendants' Attorney at Law has asked the court to say that the claimant's account is not to be believed. The basis for saying that the claimant should not be believed is that the claimant's evidence was that he was able to identify the school which the child to whom he gave the lift attended because of the pockets on the front of the uniform, this whilst he was driving, and the student's back was turned to the direction from which he was coming. What was ignored by counsel was the claimant's explanation that he was driving very slowly and indeed the claimant

was very clearly to my mind trying to explain how he knew that the child was a St George's student and that he was not really saying that he saw the front pocket of the student's shirt when the student's back was turned. Counsel in cross examination also asked the claimant whether he was asking the court to believe that he was giving a lift to someone he didn't know and then travelled a mile with him to the taxi stand after his motor car was seized. This court finds it quite believable that he did in a rural part of Jamaica such as the area in question. On a balance of probabilities, I accept the claimant's account of the event to be true.

**[40]** I am in agreement with the submissions made on behalf of the claimant that the first defendant provided the court with more than sufficient information not to accept him as a witness of truth. It was conclusively established that the first defendant was not a truthful witness. He was wholly discredited upon cross examination. He gave two very different and inconsistent versions as to what transpired leading to the prosecution of the claimant. He in essence also accepted that the account about seeing the claimant operating in the town centre happened on a different date and not on the occasion in respect of which the claimant was prosecuted, yet that was the information given in his statement which grounded the prosecution.

**[41]** In reviewing the evidence, it will be observed that on the facts of this case, we are not concerned with a scenario where a complaint was made to the police, but with a scenario whereby the police made observations on the activities of the claimant and on the basis of those observations he said he made, decided to prosecute. It appears abundantly clear to me that the first defendant held no honest belief that the claimant was operating as a public passenger vehicle on the morning in question.

**[42]** Even if the first defendant's evidence that he had observed the claimant operating as a public passenger vehicle on previous occasions and had spoken to him is to be believed, that would not be sufficient basis to say that he had reasonable and probable cause to prosecute the claimant on the morning in question. The first defendant could at best be said to have made an assumption that morning, based on what he knew to be prior conduct or habitual conduct of the claimant. In any event he

stated that he prosecuted the claimant based on observations he said he made on the day in question.

**[43]** Based on the claimant's evidence which this court accepts, coupled with the contradictions in the first defendant's own evidence, this court finds that the first defendant had no reasonable and or probable cause to believe on that particular morning that the claimant was operating his motor vehicle as a public passenger vehicle without a road licence. The claimant was put to the expense of having to attend court and defend the charges brought against him although they were ultimately dismissed without a trial being embarked upon. That fact is sufficient to prove the element of damage.

**[44]** It is accepted that if there was no reasonable and/or probable cause to prosecute, then the seizure of the claimant's motor car would in the circumstances be a trespass to the claimant's property. An officer is empowered by virtue of the provisions of section 61 of the Road Traffic Act to seize a motor vehicle which it is suspected is being operated as a public passenger vehicle without the requisite licence. The requirement is that the constable must act where there is reasonable and/or probable cause. This court having found that there was no reasonable and/or probable cause to prosecute the claimant, therefore finds that the seizure of his motor vehicle consequent on the prosecution constitutes a trespass.

## **DAMAGES**

### **Special Damages**

**[45]** The claimant particularized his special damages as \$100,000.00 for legal fees, \$360,000.00 for loss of use for his motor vehicle for a period of 120 days (\$3,000.00 per day) and \$20,000.00 for transportation cost to and from court. The case of **Murphy v Mills** (1976) 14 JLR 119 was cited for the proposition that the onus is on the claimant to prove his loss strictly.

## **Legal Fees**

[46] In relation to the claim for legal fees, the claimant's Attorney at Law submitted that the defendants did not challenge the claimant's evidence that he retained the services of Messrs Kinghorn and Kinghorn and that he was charged \$100,000.00. He observed that the payment of \$20,000.00 that the claimant said he made is supported by a receipt.

[47] The defendants submit that the only sum that the claimant ought to recover is \$20,000.00 for legal fees. In respect of the claim for \$100,000.00, the defendants observed that the only evidence in support of this claim is the claimant's assertion that he was charged \$100,000.00 for legal fees but he has only paid \$20,000.00 and still owes \$80,000.00 but that he has not produced any invoice or any other document from his Attorney at Law to show that he was charged \$100,000.00

[48] It is true that the defendants did not challenge the claimant's claim for legal fees of \$100,000.00. It is the claimant however who must prove his loss. It is noted that there was no indication on the receipt for \$20,000.00 that it represented a part- payment and as the defendants pointed out, there was no other document, for example an invoice evidencing the assertion that the claimant was charged \$100,000.00. The claimant will recover \$20,000.00 in respect of this head of damages.

## **Loss of Use**

[49] Regarding the \$360,000.00, for loss of use, the defendants' Attorney at Law directed the court's attention to the traffic ticket issued to the claimant by the first defendant which was admitted into evidence as exhibit 1. He pointed out that there was an endorsement on the traffic ticket by way of court order, which endorsement bears the signature of the judge of the parish court. He also pointed out that the endorsement shows that the court made an order on the 16<sup>th</sup> of November 2009 for the release of the motor vehicle in question, a white Toyota Corolla motor car registered 1334 FK on a bond of \$100,000.00. He submitted that based on the provisions of Sections 291 and 192 of the Judicature (Parish Court) Act, the endorsement on an information is prima

face evidence of the facts stated therein. He further submitted that based on the provisions of section 2(2) of the Justices of the Peace Jurisdiction Act, the traffic ticket is to be regarded as an information. He argued therefore that if the claimant failed to retrieve his vehicle in a timely way, the defendants ought not to be penalized for his failure to act promptly to secure the release of his motor car upon the making of the court order.

**[50]** It was Counsel's final submission in that regard that no award should be made in respect of the claimant's claim for loss of use for a period of 120 days.

I am of the view that the claimant is entitled to recover for loss of use of his motor vehicle. There is an element of overlap. The measure of damages for trespass equates to what the claimant would be entitled to for loss of use. I will make an award as damages for trespass.

### **Transportation Cost**

**[51]** In relation to the claim for transportation costs, counsel for the defendants acknowledges that even though it is sometimes permissible for a court to make an award for transportation cost without documentary proof, the court should not do so in this case because the claimant did not give evidence as to how many times he travelled to and from court, his mode of transportation or how much he was required to pay.

Regarding the transportation cost to and from court, the claimant did not specifically say what it cost him. He did say however that when he took public transportation, it cost him \$1000.00 per day. This court is mindful that he must have incurred costs travelling to and from court on at least 4 occasions. The defendant's Attorney at Law pointed this court to evidence that the case was before the Linstead Parish Court on four occasions although he did say that there was no proof that the claimant was present on all four occasions. It is reasonable to infer that the claimant attended court on all four occasions and that it cost the claimant \$1000.00 per day on the occasions he took public transportation for the purpose of attending court in Linstead.

## **GENERAL DAMAGES**

[52] The claimant in his particulars of claim sought aggravated damages, exemplary damages and vindictory damages in addition to his general damages. No submissions were made by the claimant's Attorney at Law in relation to exemplary and vindictory damages. Counsel for the defendants made submissions in relation to vindictory and exemplary damages but I do not find it necessary to replicate those submissions. It is assumed that the claimant has abandoned the claims to damages under these heads. In any event, this court is firmly of the view that the circumstances of the case do not warrant an award of vindictory or exemplary damages. Vindictory damages is awarded to show disapproval with infringement of a constitutional right and there is nothing in law to prevent an award in an appropriate case even though the identified tort forming the subject of the claim may also cover the infringement complained of. The claimant did not establish the infringement of any constitutional right.

As it relates to exemplary damages, suffice it to say that there was no evidence on which this court could rely to say that the first defendant's conduct was oppressive, arbitrary or unconstitutional.

### **Damages for Malicious Prosecution**

[53] The claimant is seeking to recover the sum of \$1,500,000.00 as general damages for malicious prosecution. He relies on the case of **Robert Salmon v Senior Superintendent Elan Powell and The Attorney General of Jamaica** [2012] JMSC Civ. 15 where Simmons J. (as she then was) observed that the claimant's case was before the court for 7 months and considered that the offence for which the claimant in that case was prosecuted was a relatively minor one and that in a limited way, it bore similarity to the case of **Maxwell Russell** as far as the length of time the matter spent before the court was concerned. An award of \$500,000.00 was made in **Robert Salmon**. The claimant in that case had been prosecuted for operating his motor vehicle contrary to the terms of his road licence. In October of 2020, that award updated to \$773,516.64.

[54] The defendants cited the case of **Roderick Cunningham v The Attorney General of Jamaica** [2014] JMSC Civ. 30 where Edwards J. (as she then was), enumerated the matters that should be considered when seeking to determine a fair award in a claim of malicious prosecution. At paragraph 16 of her judgment, she said:

*“The factors affecting an award in this category are: the seriousness of the offence charged, length of time the prosecution lasted, number of times he attended court, any damage to reputation or credit, mental distress or anxiety, humiliation and or disgrace and any inconvenience, indignity and discomfort caused from the fact of the charge against him. Any anxiety felt from the arrest or imprisonment up to the hearing of the case is also included and is the same as **would have been recoverable for false imprisonment, the prosecution having** created a risk of conviction and loss of liberty and resulting injury to feeling. See *McGregor and Damages* 17<sup>th</sup> ed para 38-004.”*

[55] The defendants' Attorney at Law pointed out that the offence with which the claimant was charged was not a serious one and that the defendant was not arrested and placed on bail but was instead required to pay a fine of \$15,000.00 or challenge the matter in court. It was said that the prosecution did not last for any significant portion of time as the endorsements on the traffic ticket indicated that there were four court appearances in November 16, 2009, February 15, 2010, April 19, 2010 and June 14, 2010.

[56] It was also submitted that the claimant did not give any evidence about damage to his reputation or credit, there was no evidence that he suffered mental distress or anxiety, that he was caused humiliation, disgrace, inconvenience or discomfort as a result of the criminal prosecution. Counsel asserted that all the claimant has put forward are bald statements, that he suffered humiliation by having to attend court. Counsel urged the court to accept that \$75,000.00 would be a reasonable sum for malicious prosecution.

[57] **Robert Salmon v Senior Superintendent Elan Powell and the Attorney General of Jamaica** [2012] JMSC Civ. 15, bears some similarity to the circumstances of this case. I have reviewed a number of cases to include **Greg Martin v Detective**

**Sergeant Halliman and the Attorney General of Jamaica, Maxwell Russell v The Attorney General of Jamaica and Conrad Gregory Thompson v The Attorney General of Jamaica.** In all three cases, the charges against the claimant were serious charges. In **Martin**, the claimant was prosecuted for possession of dealing in and attempting to export cocaine. The prosecution lasted for some 19 months. **Maxwell Russell** was charged for Assault at Common Law and the prosecution lasted for some 10 months. In January of 2008, he was awarded \$287,060.00. **Conrad Gregory Thompson** was charged with shooting with intent and illegal possession of firearm. The prosecution lasted 3 years and the sum of \$400,000.00 was awarded in May 2011.

[58] In **Robert Salmon v Senior Superintendent Elan Powell and the Attorney General of Jamaica** [2012] JMSC Civ. 15, the claimant was charged for operating contrary to the terms of his road licence in 2006. He was successful in his claim for damages for malicious prosecution and for the seizure of his vehicle. The claimant's case was that on the day in question, he was travelling in his motor vehicle with his mechanic en route to a garage. His vehicle at that time was not licensed as a public passenger vehicle as his road licence had expired although he had applied for renewal. The learned Judge took into consideration the fact that the claimant was a police officer and the length of time during which the prosecution lasted in making the award of \$500,000.00 on the 15<sup>th</sup> of February 2012.

[59] I accept the defendants' submission that in this case there was no evidence of damage to the claimant's reputation or credit and that the offence for which he was prosecuted was a relatively minor one that would hardly have occasioned him any humiliation or embarrassment when he had to attend court on account of that case. The claimant's evidence of being humiliated because he had to attend court in front of hundreds of individuals may be regarded as an embellishment calculated to improve the quantum of damages awarded.

[60] It is to be observed that in narrating his account the claimant explained that he was placed in a cell for hours. While a claim for false imprisonment is not being considered, those circumstances form part of the fact pattern which shows an element

of aggravation, not necessarily to the extent that it would warrant an award of aggravated damages but a factor which should be taken into consideration when making an award of damages for malicious prosecution. From all indications, the claimant made four appearances in court over a period of approximately seven months. From the time he was ticketed until the matter was disposed of in his favour was some eight months. There was no doubt discomfort and inconvenience occasioned by the fact of having to attend court repeatedly. The fact of having to disengage from one's daily activities in order to attend court is undoubtedly an inconvenience. In all the circumstances, I believe that an award of \$800,000.00 is reasonable.

### **Damages for Trespass**

[61] In respect of damages for trespass, the claimant ATTORNEY-AT-LAW pointed to the claimant's evidence contained in paragraph 16 of his witness statement and submitted that loss of use for the period of 120 days amounts to \$600,000.00. It is not particularly clear how this sum was arrived at. The sum initially claimed as particularised was \$360,000.00 which is the aggregate of his claim at \$3,000.00 per day for a period of 120 days.

[62] Given that the motor vehicle was returned to the claimant, the measure of damages would be any consequential loss suffered by the claimant. Consequential damages can also include non-pecuniary interests such as inconvenience and distress occasioned as a result of being deprived of one's property. (**See Butterworth's Common Law Series -The Law of Damages** Second Edition paragraph 15.53)

[63] Based on the evidence given by the claimant, it would be difficult to calculate the precise loss suffered by him on account of being deprived of the use of his motor vehicle. His evidence that he paid \$5000.00 on occasions to transport goods from his farm is not very believable assuming that he was saying that the goods were transported from his farm to his home, given the proximity of his farms to where he lived. It is not quite clear what the claimant means when he says that he expended no less than \$3000.00 per day for loss of use.

[64] Notwithstanding the measure of damages for trespass, since the sum is being awarded as general damages, I am of the view that the inability to ascertain precisely what the loss was as a result of being deprived of the use of his vehicle is not of great significance. I believe in all the circumstances that \$3,000.00 per day for having been deprived of the use of his motor vehicle is reasonable. I however accept the defendants' submission that the claimant should not be awarded for loss of use for the entire 120 days. He is entitled to recover for the period during which he was deprived of the use of his motor vehicle. On the evidence, this period is from the day of the incident, that is the 15<sup>th</sup> of October 2009 to the date the vehicle was ordered released by the court, November 16<sup>th</sup>, 2009. The claimant did not offer any explanation as to why it took all the time it did to retrieve his motor vehicle. If he was tardy in doing so after the court order for the release was made, the defendants should not be penalized. By my reckoning, a period of 32 days elapsed between the time of the seizure and the date of the court order. At a rate of \$3,000.00 per day, the claimant would be entitled to recover \$96,000.00.

[65] The claimant's evidence was that he travelled by public transportation in order to move around prior to the release of his motor vehicle. That was also another source of inconvenience. On account of the inconvenience which the claimant suffered, an additional sum of \$100,000.00 will be awarded. In the interest of clarity, the inconvenience referred to here is separate and distinct from the inconvenience taken into consideration in making an award for malicious prosecution.

### **AGGRAVATED DAMAGES**

[66] The claimant also seeks to recover the sum of \$1,500,000.00 as aggravated damages. The claimant accepted that aggravated damages represent an award as extra compensation for damage to feelings and dignity. He pointed to paragraph 19 of the claimant's witness statement as the evidence supporting the claim that there was damage to and injury to his feelings. He cited the case of **Sharon Greenwood Henry v The Attorney General of Jamaica** CL G 116 OF 1999. In that case, an award of \$700,000.00 was made. In October of 2020, that sum updated to \$1,724,390.24.

[67] Counsel for the defendants stated that it is trite law that aggravated damages are compensatory and are imposed on a defendant whose conduct increased the injury to the claimant and are to be awarded only where there are aggravating features about the defendant's conduct.

[68] The defendants' Attorney at Law commended the dictum of Edwards J. (as she then was) in **Denise Keane-Madden v The Attorney General of Jamaica and Another** [2014] JMSC Civ. 23. At paragraphs 45 and 46 of her judgment she said;

*"[45] Aggravated damages are imposed on a Defendant whose conduct increased the injury to the claimant, causing distress, embarrassment and or humiliation and damage to reputation....."*

*"[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. See **McGregor on Damages** 17<sup>th</sup> edition at paragraph. 11-0001. Damages under this head is compensatory and not to be lumped with exemplary damages which are punitive."*

[69] In the instant case, there was no conduct of the first defendant and consequently of the state which could remotely be considered sufficiently outrageous. There was to my mind no element of malice, fraud or cruelty which merits an award of aggravated damages.

[70] Consequent on the foregoing, I make the following orders:

1. Judgment in favour of the claimant against the second defendant.
2. Damages assessed as follows:
  - a. Special damages in the sum of \$24,000.00 with interest at the rate of 3% per annum from the 15<sup>th</sup> of October 2009 to the date of judgment.

- b. Damages for malicious prosecution in the sum of 800,000.00 with interest at the rate of 3% per annum from the 28<sup>th</sup> of June 2011 to the date of judgment.
  - c. Damages for trespass in the sum of \$196,000.00 with interest at the rate of 3% per annum from the 28<sup>th</sup> of June 2011 to the date of judgment.
3. Costs to the claimant to be taxed if not sooner agreed.