

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007 HCV 02436

BETWEEN	FABIAN GORDON	CLAIMANT
AND	THE ATTORNEY GENERAL OF JAMAICA	1ST DEFENDANT
AND	CONSTABLE SEAN JOHNSON	2ND DEFENDANT

Mr. Charles Campbell for the Claimant.

Ms. Carole Barnaby & Ms. Alicia McIntosh, instructed by the Director of State Proceedings for the Defendant.

Assessment of Damages – False Imprisonment- Malicious Prosecution- Assault and battery – Claim for Exemplary Damages.

Heard: July 8 & September 24, 2009

F. Williams, J (ag.)

1. The claimant, Mr. Fabian Gordon, was shot by the second defendant, a member of the Jamaica Constabulary Force, on March 27, 2004. Mr. Gordon had gone to the Sangster International Airport in the parish of St. James to transact business. He avers that he was assaulted as a result of the second defendant “placing his firearm on window (sic) of the passenger’s door and thereafter shot the Claimant in his neck while he was seated in the driver’s seat of motor vehicle (sic)”.
2. Apart from being thus shot by the second defendant, the claimant avers that he was also falsely imprisoned for some four (4) hours at the Mobay Hope Hospital, St. James, where he had been taken for treatment of his gunshot injury. Additionally, and to add further insult to

(his) injury, he was, later the same day, prosecuted by being ticketed for the offences of dangerous and careless driving.

3. By his witness statement dated the 17th February, 2009, he states that his prosecution for these offences lasted for some two years – having commenced on the said 27th March, 2004, and not ending until the 19th day of May, 2006, when the charges were dismissed without his giving evidence, or any witness testifying in the cases.
4. The claimant avers that these acts against him were done by the second defendant either maliciously or without reasonable or probable cause.
5. He has brought this action seeking to be compensated for his personal injuries as well as for false imprisonment and malicious prosecution. He has also included a claim for exemplary damages.
6. The Director of State Proceedings filed a defence to the claim on behalf of both defendants on September 18, 2007 and an amended defence on April 28, 2008. The essence of the defence was that the second defendant had lawfully discharged his firearm, after the claimant had hit him to the ground with his vehicle and thereafter manoeuvred it in his direction. The matter thereafter had been set down for trial over two (2) days: - July 8 & 9, 2009. However, when the matter came on for trial on July 8, the representatives of the first defendant, with commendable candour, admitted liability and agreed that the matter be dealt with as an assessment of damages. It was, therefore, on this basis that the matter proceeded.
7. However, even if this position had not been taken by the representatives of the defendants, it appears that they could not have advanced their defence on the said trial dates. The reason for this is to be found in the defendants' non-compliance with case-management orders for the filing of witness statements. An extension of time was granted for compliance with these case-management orders – from November 14, 2008 to April 30, 2009. This extension came in the form

of an “unless order”, striking out the defendants’ statement of case for failure to comply. To all intents and purposes, therefore, on July 8, 2009, the defendants’ statement of case (that is, their defence), stood struck out.

8. The Claim for Damages for Assault

In his witness statement, (at paragraphs 9 – 11), the claimant describes the circumstances under which he was shot:-

“9. I saw this man put his hand under his shirt and came up with a gun in his right hand. He then rested it on the window of the left passenger door pointing it at me. I was horrified.

10. In response I immediately pushed back my seat and eased back in anticipation. I heard a loud explosion and the sound of shattering glass. I then felt blood gushing out of my neck and throat. I was suddenly covered all over in blood, and splinters were all over the seat and dashboard.

11. I held unto (sic) my neck and felt a hole on the left side. After a few seconds I felt another wound, a hole about the size of a fingernail on the right side.”

9. In a very tersely-worded medical report, Dr. R. A. Ueker confirms the existence of an entry wound to the left side of the neck and an exit wound to the right side of the neck. He also mentions an injury to the left shoulder. (“The bullet hit the left shoulder and went through the neck”). He further speaks of “a remaining hoarseness of the voice which indicates a lesion to a nerve of the voicebox”. Dr. Ueker recommends a final assessment two years after the trauma. However, there is no evidence that such an assessment was done.

10. Mr. Campbell cited a number of cases in support of his submission that an award under this head should be in the sum of between one million and one million, one hundred thousand dollars (\$1,000,000, to \$1,100,000). Among these cases were: - (i) **Clarke v Scott & the Attorney-General**, reported at volume 5 of Mrs. Ursula Khan's **Recent Personal Injury Awards** at page 129; and (ii) **McDermott v Lewis & the Attorney-General**, reported at volume 5 of **Khan** at page 287. Both these cases involved gunshot injuries. The award in the **Clarke** case, which involved an injury to the elbow, amounted to some \$210,000 at the time of the award in February, 2000. In today's money, it converts to some \$555,000. The **McDermott** case, which involved an entry and exit wound to the thigh of a female, was some \$956,000 at the time of the award. Mr. Campbell submits that the instant case is worse than the **McDermott** case as the instant case features three points of injury (the shoulder and two points in the neck), whereas in the **McDermott** case there are only two points of injury. Hence his request for a higher award.
11. Miss Barnaby, on the other hand, sought to persuade the court that there were important points of difference between the instant case and those two cases (**Clarke and McDermott**). For example, in the **Clarke** case, the award made was a global one for general damages. In that case, apart from being injured, the claimant had been thrown in a car trunk and driven around for hours. That aspect of the case would be reflected in the award. The similarity between the two cases, however, (she submitted) lies in the fact that there are three points of injury in the two cases. This award, in her view, is closer to what an award in this case should be.
12. In the **McDermott** case, the main important point of difference from the instant case, Miss Barnaby submitted, was that Miss McDermott, a female of the age of some 23 years, was left with an unsightly scar on her thigh. The court notes that in the summary of that case in **Khan**, it

is noted that: "Scarring on her thigh scarred her psychologically given the importance of that area for sexual attraction. Dr. Batchelor thought that this damage was incalculable". Also noted in that case is that: "She had problems with prolonged standing or walking". She also testified that she was ashamed "by where" she was shot. There is an additional notation about Miss McDermott in the case note that bears mentioning. It is as follows: "On review in June 1998 healed entrance and exit wounds were noted as unsightly and the area below these wounds was slightly tender suggesting the presence of scar tissue below the skin". The quantum of the award (Miss Barnaby submitted) would have reflected these factors, which are absent from the instant case, thus making the **McDermott** case unsuitable as a guide.

Additionally, the medical evidence concerning the lesion to the nerve of the voice box is, at best, inconclusive. Hoarseness, by itself, she submitted, could be caused by any one of numerous factors.

13. Her submission for an appropriate award for the assault and battery is the sum of \$551,000.
14. The court is of the view that there is considerable merit in Miss Barnaby's observation (and, indeed, submission) about the differences between the instant case and the **McDermott** case. In the court's view, the resultant cosmetic blemish, coupled with all the other previously-mentioned factors would have been taken into consideration in deciding on the quantum of that award and would have had the effect of increasing it beyond what it otherwise would be.
15. Having regard to these important differences and similarities among the three cases, it appears to the court that an award that would be fair and reasonable in the circumstances is \$600,000.
16. The Claim for False Imprisonment

The claimant's contention is that, whilst at the Mobay Hope Hospital, he was effectively prevented from leaving there for a period of some

four (4) hours by an Inspector of Police. He was interrogated by this Inspector for about forty-five (45) minutes, after which he was given a traffic ticket to sign. He further relates what happened in paragraphs 19 to 20 of his witness statement:-

“The Inspector then left the hospital room and Instructed me to wait until he returned. At that stage I was in fear of the Police and followed his instructions. I remained in the room, although I was in pain and discomfort and my wife was waiting to take me home.

20. About an hour and a half later the Inspector came back to the hospital. I was resting in a bed in the emergency room. The Inspector took back the ticket and gave me another and I signed again in acknowledgement. I was not feeling well and did not pay attention to the tickets. Later on in the evening I realized that the charges were for the offences of Dangerous and Careless Driving allegedly committed by me at the Sangster International Airport. I was surprised. The process which eventually led to my prosecution ended at after five o’ clock that afternoon. When the Inspector left I was able to leave the Hospital for my home”.

17. The cases relied on by the claimant in support of his claim for false imprisonment were: (i) **Kerron Campbell v the Attorney-General**, suit no. C.L. C. 385 of 1998 (delivered on January 6, 2005); and (ii) **Maxwell Russell v the Attorney-General**, volume 6, page 205 of **Khan**. The former case had to do with a period of imprisonment of some 2½ to 3 hours; and the latter case involved a period of

imprisonment of some 12 days. The award in the former is \$116,500 in today's money. In the latter case, the award at the date of judgment was \$515,000. Mr. Campbell urged the court to consider making an award under this head of damage in the sum of between \$120,000 and \$150,000, relying primarily on the **Kerron Campbell** case.

18. For the defendants, Miss Barnaby, on the other hand, sought to distinguish the cases cited by Mr. Campbell on the basis that the circumstances of the imprisonment fall properly to be considered under the head of exemplary damages. Her submission in respect of an appropriate award is a sum not exceeding \$60,000. She based this submission on the Court of Appeal decision of **The Attorney-General for Jamaica and Constable Ransford A. Fraser v Harvey Morgan** – S.C.C.A. # 11 of 2003. In that case, an award of some \$124,172.30 was made in respect of ten (10) hours of false imprisonment. Updated, the award is now \$141,449.32. The period of imprisonment in the instant case is only some two-fifths (2/5 ths) of the period in the case of **Harvey Morgan**, she submitted, hence her submission as to quantum.
19. A simple definition of the tort of false imprisonment is: "...the infliction of bodily restraint which is not expressly or impliedly authorized by the law", (see **Winfield and Jolowicz on Tort**, twelfth edition, 1984). In relation to exemplary damages, a discussion of passages from **McGregor on Damages** (16th edition), follows in this judgment at paragraph 30. This discussion, it seems to me, lends support to the contention of counsel for the defendants. It seems that the conduct of the defendant would more appropriately fall within a consideration of the circumstances of the imprisonment, and so is a matter to be considered under the head of exemplary damages.
20. Having considered all these matters, the court observes that no two cases are ever exactly alike. The cases cited to the court are cited as a guide, and the court, in its judgment, has to arrive at what it considers

to be a fair award. The court is of the view that an appropriate award for false imprisonment in this case is the sum of \$100,000.

21. Malicious Prosecution

The essence of a charge of malicious prosecution is as follows:-

“It is the wrong known as malicious prosecution to institute criminal proceedings against anyone if the prosecution is inspired by malice and is destitute of any reasonable cause”. (See **Salmond and Heuston on the Law of Torts**, nineteenth edition, 1987; at page 462).

The elements to be proved are:-

- (1) The proceedings must have been instituted or continued by the defendant;
- (2) He must have acted without reasonable and probable cause;
- (3) He must have acted maliciously;
- (4) The proceedings must have been unsuccessful – that is to say, must have terminated in favour of the plaintiff now suing. (Loc cit; at pages 464-465).

Of significance, too, is what the learned authors of that work say at page 470 in relation to point (4) above:-

“... if the prosecution has actually determined in any manner in favour of the plaintiff it matters nothing in what way this has taken place. There need not have been any acquittal on the merits. What the plaintiff requires for his action is not a judicial determination of his innocence but merely the absence of any judicial determination of his guilt. Thus it is enough if the prosecution has been discontinued, or if the accused has been acquitted by reason of some formal defect in the indictment, or if a conviction has been quashed, even if by

some technical defect in the proceedings.”

22. In this case, therefore, it matters not if the charges were dismissed for want of prosecution (as it seems they were – from the claimant’s witness statement). Additionally, it would equally be of no moment even if some technical point had been successfully taken about the bringing of charges of careless and dangerous driving by means of traffic tickets (see, e.g., **R v Anthony Lewis** – RMCA # 2/’05, delivered February 16, 2006).
23. In this case, apart from the matters rehearsed at paragraph 16 of this judgment, the claimant was subject to a prosecution which lasted for some two (2) years. The evidence is that the charges were laid against him on March 27, 2004 and dismissed on May 19, 2006.
24. As a guide for an appropriate award, Miss Barnaby cited the case of **Fidel Holding v Everal Mark and the Attorney-General for Jamaica** – Claim Number 2007 HCV 02352 – an oral judgment of Straw, J, delivered on July 2, 2009. In that case, the claimant was prosecuted on charges of illegal possession of firearm, illegal possession of ammunition and shooting with intent. The prosecution lasted for over twenty (20) months. He was awarded three hundred thousand dollars (\$300,000) for malicious prosecution. As the cases are fairly similar (Miss Barnaby argues), a fairly similar award should be made in the instant case.
25. For the claimant, Mr. Campbell submitted that an award of \$450,000 would be in order.
26. In the court’s view, taking into account the nature of the charges, (more serious in the **Holding** case than in the instant case); the circumstances in which they were instituted and the length of the prosecution, a fair and reasonable award is one of \$250,000.
27. Exemplary Damages

The best point of reference for a consideration of an award under this head is, of course, the case of **Rookes v Barnard** [1964] A. C. 1129. It will be recalled that in that case Lord Devlin opined (at page 1226) that: -

“...where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might, perhaps, be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service”.

It will be seen, therefore, that the facts of this case fall squarely within the first of the three categories in which awards of exemplary damages are permissible: - that is, oppressive, arbitrary or unconstitutional conduct by government servants.

28. In the instant case, the appropriateness of an award of exemplary damages on these facts is not in dispute. However, Miss Barnaby for the defendants submitted, first, that no award should be made under this head if the court accepted her submissions in respect of the quantum of awards for the other heads of damages. The reason for this, she argued, is that the claimant would have been adequately compensated in every respect by these amounts. If the court should still be minded to make an award under this head, however, then an award of some \$400,000 would be appropriate – in keeping with the award made in the **Maxwell Russell** case.

29. Mr. Campbell, on the other hand, sought to persuade the court that an award of not less than \$600,000 would be appropriate. The actions of the Crown servant in this case, he submitted, clearly demonstrated an intention to kill, maim or cause grievous bodily harm.
30. Among the matters that the court might properly consider in deciding on the quantum of an award of exemplary damages are discussed in **McGregor on Damages**, sixteenth edition, 1997, at page 306 et seq. They include the following: (i) such awards are to be moderate; (ii) the conduct of the parties may properly be taken into account; (iii) the quantum of a compensatory award may influence the quantum of an exemplary award; (iv) the relevance of any criminal penalty (on the basis that “Punishing twice for the same misconduct offends against the basic principles of justice ...” p. 310, para 467).
31. In considering these factors, **McGregor on Damages** is again instructive. At page 308, paragraph 465, the following is stated in relation to the conduct of the parties:-
- “Thus the court may take into account, according to the decision in **Praed v Graham**, the conduct of the defendant right down to the time of judgment... [P]ersistence in the charge might increase exemplary damages. Similarly, the conduct of the plaintiff may be material to the assessment. Thus if the plaintiff has provoked an assault by the defendant, and assuming circumstances which would admit of an exemplary award, then, as was said in **Lane v Holloway**, the provocation would be “relevant to the question of whether or not exemplary damages should be awarded, and, if so, how much”.’

32. In the instant case, there is no evidence of any provocation on the part of the claimant. There is, however, evidence of persistence in the charge – a defence having been filed in this matter, which was not resiled from until the very day of trial/assessment. There also is no evidence before me as to whether any criminal charge was brought against or any criminal sanction imposed on the Crown servant. I have also considered (as urged by Miss Barnaby) the amount of the awards in respect of compensatory damages. I have also given consideration to the difference in the nature of the charges imposed in this case (dangerous and careless driving) as compared with the **Maxwell Russell** case (shooting with intent and illegal possession of firearm and ammunition), the latter being much more serious, in my view. I have also considered Mr. Campbell's submission as to the apparently deliberate manner of the assault.
33. Considering all of these factors, it seems to me that an award of exemplary damages is apposite in the instant case. The award that, in my view, is appropriate is \$500,000.
34. Special Damages
The damages under this head were agreed in the sum of \$35,641.74, Mr. Campbell for the claimant candidly conceding that the other items claimed for loss of earnings were not supported by the presentation of any evidence of the required standard.
35. **In the result, the damages in this case are assessed as follows:-**
- (i) Special damages in the sum of \$35,641.74 with interest thereon at the rate of 6% per annum from the 27th March, 2004 (the date of the incident) to the 21st June, 2006; and at the rate of 3% per annum from the 22nd June, 2006 to the 24th September, 2009;
 - (ii) False Imprisonment in the sum of \$100,000.00 with interest thereon at the rate of 3% per annum from the 5th July, 2007 (the date of acknowledgement of service) to the 24th September, 2009;

- (iii) Malicious Prosecution in the sum of \$250,000.00 with interest thereon at the rate of 3% per annum from the 5th July, 2007 (the date of acknowledgement of service) to the 24th September, 2009;
- (iv) Assault and Battery in the sum of \$600,000.00 with interest thereon at the rate of 3% per annum from the 5th July, 2007 (the date of acknowledgement of service) to the 24th September, 2009;
- (v) Exemplary Damages in the sum of \$500,000.00.
- (vi) Costs to the claimant to be taxed, if not agreed.