



[2021] JMSC Civ 158

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2017HCV01408**

|                |   |                                 |
|----------------|---|---------------------------------|
| <b>BETWEEN</b> | <b>ETTA MAY KELLY</b>                         | <b>CLAIMANT</b>                 |
| <b>AND</b>     | <b>ATTORNEY GENERAL OF JAMAICA</b>            | <b>1<sup>st</sup> DEFENDANT</b> |
| <b>AND</b>     | <b>SPECIAL DISTRICT CONSTABLE JANET GRANT</b> | <b>2<sup>nd</sup> DEFENDANT</b> |

**IN OPEN COURT**

Mr Jason Jones for the Claimant

Mr Dale Austin instructed by Director of State Proceedings for the Defendant

Heard: June 9<sup>th</sup>, 2021 and September 24<sup>th</sup>, 2021

**Assessment of Damages - False imprisonment – Malicious Prosecution – Loss of Earnings – Calculation to determine award of damages – Aggravated Damages – Exemplary Damages**

**HUTCHINSON, J**

**INTRODUCTION**

[1] The Claimant in this matter is a business woman who specialises in the exportation of manufactured products such as car parts and processed food from the Norman Manley Airport to the Cayman Islands. On the 3<sup>rd</sup> of March 2015, she was at the Norman Manley airport when she was informed by the second defendant that she was being arrested for failing to leave the airport. Ms Kelly was then taken to the

police station where she was charged for this offence. She was kept in the custody of the police for approximately one hour after which she was informed that she was free to go.

- [2] On the 20<sup>th</sup> of May 2015 at about 6:45 am, Ms Kelly was again at the airport when she was taken into custody by another officer on the complaint of a third party and transported to the police station. While at the station the 2<sup>nd</sup> Defendant instructed the arresting officer to charge the Claimant for failing to leave the airport. On the refusal of the officer to lay this charge without a proper basis, the 2<sup>nd</sup> defendant proceeded to arrest and charge the Claimant for same. Ms Kelly was prevented from leaving the police station for several hours and was eventually allowed to leave at 4:30 pm. In August 2015, she was detained at the Fort Augusta Prison for 5 days in relation to these charges. In 2016, the charges in respect of the 3<sup>rd</sup> of March and 20<sup>th</sup> of May 2015 were dismissed before the Half Way Tree Parish Court on a no case submission.
- [3] It is the Claimant's contention that the 2<sup>nd</sup> Defendant never had a proper basis for arresting her on either occasion. She stated that these arrests had their foundation in an ongoing feud between the 2<sup>nd</sup> Defendant and her common law husband. She gave evidence that as a result of her arrests and imprisonment, she was traumatized and humiliated. She stated further that she was also shunned by friends and associates who had heard of her arrest. Ms Kelly testified that as a result of her detention she suffered a loss of income and incurred legal fees which had to be paid in order to defend herself against these charges.
- [4] On the 1<sup>st</sup> of May 2017, Ms Kelly filed this suit against both Defendants, in which she seeks an award for special and general damages in respect of her losses. The special damages relate to the recovery of the cost of her legal fees as well as transportation expenses associated with visits to meet with her attorneys. Under the heading of general damages, the Claimant specifically seeks damages for false imprisonment, aggravated damages, exemplary damages and loss of income. In respect of the loss of income, this claim was grounded in her being instructed by

the Court to keep away from the airport until the matter was disposed of. She also claimed interest on these sums as well as her costs. An acknowledgment of service was entered on behalf of both defendants on the 27<sup>th</sup> of June 2017 and on the same date an application was filed for an extension of time to file defence. No defence was filed however and on the 15<sup>th</sup> of December 2017, judgment was entered in favour of the Claimant in default of this defence. The matter was then set down for assessment of damages.

**[5]** On the 9<sup>th</sup> of June 2021, the Court heard from Ms Kelly who was the sole witness called by the Claimant. A number of documents were also agreed by the respective Counsel which were noted as follows;

- a. Receipts issued by Counsel for legal fees paid in respect of the matter at Half Way Tree.
- b. A letter from H&P Automotive Co Ltd in the Cayman Islands in respect of the Claimant's loss of earnings.
- c. Report from Dr Terrence Bernard, Psychiatrist in respect of his diagnosis of the Claimant.
- d. Receipt for medical services issued by Dr Terrence Bernard.
- e. Copy of Letter from Jampro confirming that the Claimant was a registered exporter at the time of her arrests in 2015.

**[6]** On my review of the receipts presented in respect of sums paid for legal fees, I found that the Claimant had proved these expenses in the sum of \$132,000. In respect of the costs associated with transportation from St Thomas to Kingston, I note that no documentation was produced by the Claimant in support of same and her viva voce evidence on this point was challenged by Mr Austin who questioned the need for her to visit her attorneys on 34 different occasions in respect of 'a minor offence'. Mr Austin submitted that no more than \$20,000 should be awarded for this loss as opposed to the \$92,000 which was being sought by the Claimant.

- [7] While it is acknowledged that no documents were submitted in respect of this claim, the Court is fully aware that operators of public transportation are not in the practice of providing receipts to passengers in respect of fares paid. It was the Claimant's evidence that she was assisted by 3 Attorneys at different points in the course of her matter. Her first attorney was Mr Hamilton following which she was assisted by Mr Champagne as well as Mr Robinson who she stated would fill in whenever Mr Champagne was unavailable.
- [8] She testified as to the number of occasions on which she had to meet with her attorneys and stated that this required her travelling from St Thomas utilising 2 different vehicles on each occasion. I found her account as to these visits and the reason for them to be credible and I was not persuaded by the Defence's contention that these visits were not corroborated by the receipts provided as there was nothing to suggest that the visits were strictly tied to the payment of legal fees. In light of this finding, I am satisfied that an award in the sum of \$92,000 for this expense is justified.
- [9] The claim for loss of income is in respect of a 15-month period during which the Claimant states she was 'barred' from the Norman Manley International Airport by the order of the Parish Judge. She was cross examined extensively in respect of this loss and it was suggested to her that it had been open to her to mitigate same by having someone else attend at the airport on her behalf to export her items. Ms Kelly explained that this possibility was not open to her as she could only engage in transactions by virtue of the permission granted to her in the letter from Jampro. She added that she was required to personally attend the Ajas counter at the airport with her ID and Jampro letter in order to obtain the export forms which she would complete same and submit it along with her goods to the Cargo section at Port Royal Road.
- [10] In respect of the amount that was lost this figure was stated to be in the amount of US \$1000 monthly or above as outlined in the documentation produced by H&P Automotive. The letter also made reference to the parts usually exported and the

selling price which would have been obtained in respect of same. In her witness statement Ms Kelly reported earnings between US \$1500 and \$1800. She then claimed the sum of US \$27,000 as being the income lost for the 15-month period that she was unable to work. While it is a truism that a Claimant should not be rewarded for sitting idly by but has a duty to mitigate his or her loss, in this situation, the Claimant offered what I found to be a credible explanation.

- [11] Although Mr Austin asked the Court to find that it had been open to Ms Kelly to have someone act in her stead, he presented no evidence that such an option actually existed. I am satisfied that the direct impact of the Court's directive was at a financial cost to Ms Kelly and she would be entitled to be compensated for same. In terms of the appropriate award, I am of the view that the document from H&P presents the best evidence as to the actual loss incurred. Accordingly, I award the sum of US \$15,000 for this claim, this is calculated at US \$1000 per month for the 15-month period.
- [12] In respect of the claim for damages for false imprisonment and malicious prosecution, Mr Austin relied on the authorities of ***Rayon Wilson and Howard Hassock (consolidated) 2006HCV3368*** and ***2006HCV4368*** and ***Winston Hemans v Spl Cons Anderson and AG [2015] JMSC Civ 94***. He asked, based on the awards given in those cases, that the award for false imprisonment be no higher than \$588,547.99 and \$98,092.77 for malicious prosecution.
- [13] The facts in the ***Winston Hemans*** case are somewhat similar to the instant claim. Mr Hemans, however, was placed in custody for a period of 5 1/2 hours after his arrest and his matter was before the Court for less than 2 months before the charges against him were withdrawn. In considering whether malicious prosecution had been proved, careful note was taken of the Learned Judge's reference to the four ingredients which must be proved as stated in ***Wills v Voisin (1963) 6 WIR 50, 57***, namely;

- a. That the law was set in motion against the individual on a charge of a criminal offence.
- b. That he was either acquitted or the matter was otherwise determined in his favour.
- c. That the defendant set the law in motion without reasonable and probable cause
- d. That in setting the law in motion the defendant was actuated by malice.

[14] Useful guidance was also found in the decision of ***Peter Flemming v Det Cpl Myers and the Attorney General (1989) 26 JLR 525***, which was also referenced by the Learned Judge, with specific reference to page 535 where Forte JA, as he then was, stated as follows;

*".....However, by virtue of Section 33 of the Constabulary Force Act (supra) in Jamaica, a plaintiff suing a police officer for malicious prosecution as a result of an act done in the execution of his duty is required to prove that the defendant acted either maliciously or without reasonable and probable cause."*

[15] In the ***Hemans*** decision, the Court noted that Mr Hemans had been detained for a period of 51/2 hours. In making the award he adopted the approach taken by Mangatal J in ***Maxwell Russell v Attorney General and Cpl McDonald 2006HCV4024*** in reliance on ***Thompson v Commissioner of Police of the Metropolis [1998] QB 298*** where a sliding scale approach was recommended. The practical outworking of this approach is that a base figure would be awarded for the first hour/day in which the subject was deprived of his liberty and thereafter lower additional sums awarded for additional hours or days. In respect of malicious prosecution, a similar approach was taken in respect of the calculation of damages.

[16] The Learned Judge then made an award of \$45,000 for the first hour and \$100,000 for the remaining 41/2 hours that the Claimant had been incarcerated. For the malicious prosecution claim, in which the prosecution lasted under two months, an

award of \$80,000 was found to be appropriate taking into account the indignity, humiliation and dignity suffered by the Claimant.

- [17] In the consolidated matter of **Rayon Wilson and Howard Hassock v the Attorney General and Anor** to which Mr Austin also made reference, the Court acknowledged the hourly/sliding scale approach but opted not to follow same in considering the award for the 7-day period over which the Claimant had been detained. The decision of **The Attorney General v Glenville Murphy [2010] JMCA Civ 50** was also considered. In delivering the decision of the Appeal Court, Harris JA observed that the Judge at first instance had relied on the principles laid out in **Thompson v Commissioner of Police**, she then went on to state as follows;

*[20] It has always been recognized that there may be some difficulty in deciding on a reasonable compensatory amount to be awarded to a claimant for damages suffered. However, the practice in the courts in using comparable awards as the basis in making an award and applying the Consumer Price Index thereto, has not in any way worked prejudicially to a claimant. The object of applying the Consumer Price Index is to take care of inflation. We see no reason to depart from the usual practice and cannot say that we are in agreement with the learned trial judge that the suggested approach of Lord Woolf should be adopted.*

- [18] Applying the principles enunciated by the Appellate Court to the instant claim, I am persuaded that in order to arrive at an appropriate award, the better course would be to consider comparable cases and apply the CPI where necessary. In respect of the **Hemans** decision, while the circumstances are similar, it is evident that the period of detention and length of the prosecution were greater for the Claimant herein, being 10 ½ hours and 15 months respectively, as such any award that would be made would be significantly higher.

- [19] On the subject of False Imprisonment, Mr Jones made reference to a number of decisions, the first being **Earl Hobbins v the Attorney General et al CL1998/H196**. In that matter, the Claimant was a businessman who had been involved in the trading of motor vehicles. He was taken into custody by the 2<sup>nd</sup> Defendant in respect of a failed business transaction which involved a third party

and detained for 28 hours. Mr Hobbins was placed before the Court on a charge of fraudulent conversion and this prosecution was ended 6 months later when no order was made. The awards made were \$600,000 for malicious prosecution and \$400,000 for false imprisonment. Applying the CPI for June 2021, the award for false imprisonment updates to \$1,142,945.

[20] The decision of *Fullerton v The Attorney General 2010HCV1556* which was delivered in March 2011 was also cited. In that matter, the Claimant was detained for more than 28 hours which spanned two separate incidents. In the first she was detained for over 24 hours. After her successful appeal of her conviction she was again detained for an additional two hours. Ms Fullerton was also a business woman and she made claims for the damage to her reputation and humiliation suffered. She also presented medical evidence of the trauma suffered as a result of the public nature of her detention factors. In that matter an award of \$1 million was made for false imprisonment. Applying the CPI for June 2021 to that figure this sum updates to \$1,709,119.01.

[21] Having carefully examined the authorities cited, I am of the view that although the circumstances of the instant Claimant were more serious than obtained in the *Hemans* matter, they were not as egregious as in the *Fullerton* case. Additionally, although Ms Kelly was detained on two separate occasions, Mr Hobbins had been deprived of his liberty for a far longer period. In light of these observations, I am persuaded that any award which ought to be given would have to reflect these differences. As such, I am the view that an award in the sum of \$1 million would be appropriate in the circumstances of this case.

[22] In respect of the claim for malicious prosecution, I note that the prosecution of Mr Hemans lasted for a mere two months, whereas Ms Kelly was before the Court for over a year and endured the agony of a trial before the charges were dismissed. In an effort to assist the Court on this point, Mr Jones made reference to the authority of *Stephen Bell v The Attorney General 2013HCV00430*. In that matter Mr Bell was initially detained by police officers on November 5<sup>th</sup>, 2010 and his



license, bike and helmet confiscated. He was in custody for over two weeks before being charged and placed before the Court. He was eventually granted bail over 3 months after he was first detained. The charge against him was eventually dismissed in August 2012. In March 2016, an award of \$1,400,000 was made for malicious prosecution, using the June 2021 CPI, this sum updates to \$1,763,234.62.

- [23] Mr Jones also relied on the **Earl Hobbins** decision, he highlighted that for a prosecution which lasted for 6 months the appropriate award identified was \$600,000 which would update to \$ 1,714,418.60. He submitted that in light of the authorities on the point an award of \$1.7 million would be appropriate. Having given careful consideration to the authorities cited, I am of the view that although the prosecution of Mr Bell was for a longer period, the award made in the **Earl Hobbins** decision for a 6-month period updates to a comparable sum and the award sought would not be unreasonable. As such, I am of the view that the appropriate award to meet the justice of this case is \$1.7 million.
- [24] The Claimant also sought an award of aggravated damages for the injury to her dignity as well as the trauma and humiliation suffered as a result of her arrest and prosecution. In this regard evidence was provided that she was arrested in the full view of others, she was also shunned by friends and associates once this became public knowledge. Counsel asked that consideration be given to the report of Dr Bernard, particularly his diagnosis that Ms Kelly suffered Post Traumatic Stress disorder and major depressive disorder. He highlighted the award of \$800,000 which was made in the **Stephen Bell** case which updates to \$1,007,562.64 and argued that the effect of her arrest was far greater on this Claimant and justifies a higher award in the sum of \$2 million.
- [25] In respect of this claim Mr Austin conceded that aggravated damages are warranted. He submitted however that the sum of \$2 million was too high an amount as the circumstances were not as egregious as in the **Fullerton** case. In arriving at my decision as to what would be an appropriate award in this case, I

note that the Claimant was a business woman whose good standing and reputation would have been integral to her profession. She was publicly arrested on two separate occasions at the airport where she conducted an important part of her business. She was then shunned by friends and associates. It is clear from the report of Dr Bernard that these factors had a serious impact on her mental health as seen in her diagnosis.

- [26]** It is the unchallenged evidence of the Claimant that the 2<sup>nd</sup> Defendant was motivated by malice as there had been an ongoing feud between herself and the Claimant's spouse. It was the 2<sup>nd</sup> defendant who arrested the Claimant on the first occasion and she was the officer who continued the detention of the Claimant on the 2<sup>nd</sup> occasion, even after the arresting officer had indicated that there was no basis for same. In these circumstances, it is evident that the 2<sup>nd</sup> defendant engaged in oppressive and questionable conduct which was likely motivated by this feud. For these reasons, I am of the view that an award for aggravated damages would be justified. In light of this conclusion and taking into account the aforementioned factors, I award the sum of \$1,500,000.
- [27]** In addition to aggravated damages, the Claimant also asked for an award of exemplary damages. While I am of the view that the conduct of the 2<sup>nd</sup> defendant was egregious and a blatant abuse of power, I am persuaded that in light of the awards made for false imprisonment, malicious prosecution and aggravated damages, these would be sufficiently punitive in all the circumstances, as such, I make no award under this heading.
- [28]** Mr Jones also asked that an award be made for future medical expenses, this request was based on the recommendation of Dr Bernard that Ms Kelly engage in further therapeutic sessions to address her issues. On a review of the Claim Form and Particulars of Claim however, I noted that this was never pleaded and no application was made to amend the Claim to have this head of damages included. As a result of the absence of this claim from the pleadings, no award is made under this heading.

**[29]** In respect of the claim for costs and interest, no opposition was raised by Mr Austin and I am of the view that these claims would be justified in the circumstances. Accordingly, the award to Ms Kelly is as follows;

**Special Damages**

- a. Medical Expenses \$88,000
- b. Reimbursement of legal fees \$132,000
- c. Transportation expenses \$92,000

**[30]** This award which totals \$312,000 is with 3 % interest from the 3<sup>rd</sup> of March 2015 to today's date.

**General Damages**

- False Imprisonment \$1,000,000 with interest of 3% to apply from the 5<sup>th</sup> of May 2017.
- Malicious Prosecution \$1,700,000 with interest of 3% to apply from the 5<sup>th</sup> of May 2017.
- Aggravated Damages \$1,500,000 with interest of 3% to apply from the 5<sup>th</sup> of May 2017.
- Loss of Income US \$15,000 with interest of 3% to apply from the 5<sup>th</sup> of May 2017.

**[31]** The Claimant is also awarded her costs in the amount of \$100,000.