IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2004 HCV 3084

BETWEEN	**LEONARD MILLER**	**CLAIMANT**
AND	**CONSTABLE RAYMOND RICKETTS**	**1ST DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**

Heard: February 11, 2010 and April 19, 2010.

Appearances: Mr. Sean Kinghorn instructed by Kinghorn & Kinghorn for the Claimant; Ms. Tamara Dickens and Mr. G. Kelly instructed by the Director of State Proceedings for both defendants

Claim for Assault and Battery – Malicious Prosecution – Complaint made to police constable – defendant constable also responsible for function out of which complaint arose – Whether inference of malice "collateral purpose" may be drawn

ANDERSON J

1) On the 23rd September 2001, a football match took place in the district of Lawrence Park near to Browns Town in the Parish of St. Ann. Among the spectators were Leonard Miller (o/c "Bagga"), the Claimant in this action, and District Constable Raymond Ricketts, ("D/C rickets) the first defendant. The Claimant said during the match he ordered some drinks for himself and some friends from the vendor of those drinks, a lady later identified as Ms. Pauline Lawrence. At some point having run out of money, the Claimant said that he had asked that Ms. Lawrence credit him 'on trust', a crate of mixed liquors including "beers and Guinness". It was his evidence that Ms. Lawrence agreed and he told her that he would pay her the following Monday as he was expecting some money to be delivered at his home.

2) According to the Claimant, when he was ready to leave the match, he said he asked the D/C Ricketts, whom he had known quite well and who he knew was a police officer for a ride to his home in Ricketts' motor car. He said D/C Ricketts who drove a white deportee motor car, agreed. On the way D/C Ricketts made a quick stop by his house and then stopped at the Claimant's house in Retirement District. It is the evidence of the Claimant that he then went inside his house to inquire whether the money that he was expecting had been delivered and he was told by his common law wife and 'baby mother', that the money had not arrived. He then went back to the gate to advise Ricketts that the money had not been received and so he could not pay Pauline Lawrence on that day. According to him, Ricketts was upset and started using expletives. He went over to the constable to try to get him to stop cursing. However, Mr. Ricketts draped him by the collar and removed his gun from his pocket and then proceeded to use the handle of this gun to hit him three times in the face causing his mouth to be injured. He said Ricketts then returned the firearm to his pocket and threatened to push him over the gully which was near to the entrance to the Claimant's gate. He said his baby mother who had by then come out of the house begged Ricketts not to do and Ricketts finally released him and drove off.

3) The next day he said he reported the matter to the police and also attended his doctor at the Brown's Town Health Clinic where he received medical attention for his injuries. He also received a medical report dated the 19th May 2004, some two and half years later concerning the injuries. The Claimant said that subsequent to the incident and his report thereof he had received three summonses to attend court on charges of using indecent language, resisting arrest and obstruction of justice. These three were issued by Mr. Ricketts for the incident of September 23rd. He subsequently received a fourth summons from Mr. Ricketts for the use if indecent language for another incident in 2001. He said that the summonses were called up in the Court in St. Ann's Bay on more than fifteen (15) occasions and eventually in the month of July 2004, the Resident Magistrate Court for the parish of St. Ann dismissed all maters for want of prosecution. He claims to have been embarrassed and humiliated by this incident and the numerous court appearances, and he now claims

against D/C Ricketts and the Attorney General (under the Crown Proceedings Act) for damages for assault and battery and for malicious prosecution.

4) The Defendant, a District Constable Ricketts, on the other hand states that on the day in question, Miss Pauline Lawrence, the bartender at the football game at which he was a spectator made a complaint to him. She stated that the claimant (whom he knew by the name of "Bagga") had taken drinks from her and had refused to pay the amount due which was One Thousand Four Hundred and Forty Dollars, ($1440.00). He said that he was off duty but he approach Bagga to inquire as to why he had not paid Miss Lawrence the amount in question. He was then told by the Claimant that he would have money at his home. It was common ground that he took the Claimant in his car to the Bagga's home. The Claimant went inside and returned to indicate that there was no money there and so he would be unable to pay that evening. According to D/C Ricketts an altercation developed when he advised the Claimant that he needed the money to give to Ms. Lawrence the following morning. He said the Claimant used threatening language to him and he, the Constable, was assaulted by the Claimant and his common law wife who had come out of the house. He said he defended himself and the Claimant fell and injured himself on the ground which was "rocky".

5) Subsequently, there was another incident between the two men. Both parties speak of an incident. The Claimant places this in October 2001 while Ricketts puts it in January 2002 when apparently swearing was exchanged between them. After the September 2001 incident, there summonses were laid against the Claimant and a further summons was issued after the second incident, although Ricketts is unable to say when they were served. According to a pleading in the defence those charges were adjourned sine die in August 2003 but the summonses had been re-laid before the court and were due for mention on 9th March 2005.

6) It is not apparent from the evidence presented by the first defendant before me what transpired as a result of the re-listing of the summons. It seems clear therefore that

nothing happened as a result and I accept the evidence of the Claimant in this regard, that the matter was discontinued for want of prosecution in July 2004.

7) It should be noted that in the Witness Statement given by Cons. Ricketts, he alleges that he took the claimant to the Claimant's house which is where the altercation took place. When one looks at the Defence pleadings however, it appears from paragraph 5 that the altercation between the Clamant and the Defendant took place at the playing field at Lawrence Park when the 1st Defendant approached the Claimant to inquire why he had not paid, Miss Pauline Lawrence for the drinks he had taken. There is nothing in those pleading to suggest that the altercation of the 23rd September 2001 took place, as is set out in both the Claimant's and the D/C's Witness Statement, at the home of the Claimant.

8) D/C Ricketts also denied having a gun on the incident. He says that he was not issued with an official firearm that day and if he were, it would have been recorded in the appropriate station documents, and there is no evidence of such issue. He also said he did not have a licence to carry a private firearm.

Submissions for the Claimant on credibility

9) On behalf of the Claimant it was submitted that he should be accepted as a witness of truth. The first defendant has produced no evidence of having been hurt in the manner he claimed to having his finger twisted and being held in the collar by the Claimant's common law wife. Despite the injuries D/C Ricketts did not seek to charge the Claimant with assault occasioning actual bodily harm. D/C Ricketts also admitted to hitting the Claimant in the forehead, although he says it was with his hand and nothing else.

10) He does not have a record of when the summonses were served and he has not been able to say when the matters were finally disposed of. It should also be noted that there was a discrepancy between the account in the witness statement of the first defendant his evidence in cross examination. In the former he said he saw the

Claimant fall and hit his face and being injured in the process. Under cross examination he said he did not see the Claimant sustain any injury.

The submissions on behalf of the 1st Defendant

11) It was submitted by counsel for the D/C Ricketts that on the day in question, D/C Ricketts was merely acting in the lawful execution of his duties in seeking to recover sums owned to the bartender, Ms. Pauline Lawrence, that the Claimant had refused to pay. It was contended that it was the Claimant who had assaulted the first Defendant who had been forced to defend himself, and that the injuries, if any, suffered by the Claimant was the result D/C Ricketts defending himself.

12) The submissions o behalf of the 1st Defendant point to some discrepancies in the account of the incident given by the claimant. For example, in his Witness Statement he claimed to have been embarrassed by several people seeing him being beaten by the 1st Defendant. Later, however, in cross examination, he conceded that he only persons on the scene when the alleged assault took place were D/C Ricketts, his girlfriend, the Claimant's baby mother and the couple's son. It was also submitted that there were also inconsistencies in his account of his ordering of drinks for his friends at the football match at Lawrence Park. Counsel submitted that the evidence of D/C Ricketts should be accepted over that of the Claimant whenever there was a conflict.

13) However, the submissions for the 1st Defendant do not try to explain the major difference between the account of the Witness Statement of D/C Ricketts which puts the incident at the site of the Claimant's home in Retirement district, and the defence which places it at the site of the football game. No attempt was made to amend the pleadings.

14) For the first defendant, it was also submitted that in any event to succeed in a claim for malicious prosecution, the Claimant had to show that D/C Ricketts' action was

actuated by malice or that there had been no reasonable or probable cause for the prosecution. It was for the Claimant to show that the first defendant either was malicious or did not have reasonable or probable cause for the prosecution.

15) The accounts given by the Claimant and by the Defendant in their respective Witness Statements are in many respects diametrically opposed to each other and cannot both be true. There is therefore a threshold issue of credibility which this Court must determine. Apart from the evidence of the Claimant which I definitely found to be more credible, I was struck by the payment for the drinks provided at he match, and which he had taken on consignment. As this evidence is unchallenged, I feel that I am able to infer that this was the basis for D/C Ricketts special interest in the Claimant making payment therefor.

16) The Court had the benefit of seeing both witnesses, the Claimant and the 1st Defendant, and assessing not only their testimony but their demeanour. It is fear to say that neither of these witnesses inspired a great deal of confidence, but at the end of the day, I believe on a balance of probability that the statement as delivered in the evidence in chief of the Claimant, is to be believed over the witness statement of the 1st Defendant Raymond Ricketts. Having determined the issue of credibility in favour of the Claimant, I now turn to the question of the assault and malicious prosecution which are set out in the claim form and particulars of Claim by the Claimant.

The Assault

17) It is clear that there is in Tort Law, a difference between an assault, (the reasonable apprehension by a person that a battery is about to be committed on his person), and battery the direct applicant of force to the person. However, as Straw J noted in **Devon White v Lenworth Cammock and the Attorney General of Jamaica (unreported) HCV 00787 of 2006**, Gilbert Kodylinye in Commonwealth Caribbean tort Law, Second Edition page 14, has argued that courts in the Caribbean and in

other jurisdictions have tended to blur the distinction and to describe as an "assault", conduct which in strict law amounts to a battery.

18) The Claimant alleges that the Defendant hit him in the face with the handle of his firearm which he had taken from his pocket. He does in fact produce a medical certificate which indicates that he did have some soft tissue injury and this in my view would be consistent with being hit in the face as is alleged in the Particulars of Claim. In that regard, I reject the evidence of the 1st Defendant that it was during the struggle at the gate of Claimant that the Claimant fell and hurt himself on rocks which were on the ground.

19) Pursuant to a Notice of Intension, the Claimant tendered into evidence hearsay statements made in a document, the records of his complaints made to the Police Public Complaints Authority including a statement which he gave on the 9th October 2001. This statement is consistent with the Witness Statement which has been tendered as his Evidence in Chief in this matter. Also tendered into evidence as hearsay were letters from the Police Public Authority Executive Chairman dated January 5, 2002 in which it was stated that the complaint which Mr. Miller had made against Cons. Ricketts had been referred to the Director of Public Prosecutions for a ruling on whether criminal charges should be brought against the District Constable. Subsequently, on June 7th 2002 by way of another letter tendered into evidence as hearsay, the Director of Corporate Services writing on behalf of the Executive Chairman of the Police Public Complaints Authority indicated that Director of Public Prosecutions had ruled that departmental proceedings be instituted against Dist. Cons. Ricketts for his behaviour on the day in question. In light of the evidence which I have accepted I come down in favour of finding that the evidence given by the Claimant is in fact credible and I reject as untruthful the evidence of D/C Ricketts.

20) I reject D/C Ricketts' version of the facts, and as a witness of truth and hold that on a balance of probabilities the Claimant was assaulted and battered by the 1st Defendant in the manner claimed by the Claimant.

21) Next I turn to the question of whether there has been malicious prosecution of the Claimant.

Malicious Prosecution

22) Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution. The four-part test for malicious prosecution was born and evolved in England in the 18th and 19th centuries at a time when prosecutions were conducted by private litigants and the Crown was immune from civil liability. Indeed, all of the early English and Canadian cases of malicious prosecution involved disputes between private litigants. These cases included **Hicks v Faulkner** [1881] 8 QBD 167 referred to below.

23) In delimiting the elements of the tort, I can do no better than to adopt the words of His Lordship Mr. Justice Brooks in the case of ***Keith Nelson v Sgt. Gayle & the Attorney General of Jamaica, Claim No. C.L. N120 of 1998***. There His Lordship stated:

> **"In an action for malicious prosecution, in order to succeed the Claimant must prove on a balance of probability the following:**
> 1. **that the law was set in motion against him on a charge for a criminal offense**
> 2. **that he was acquitted of the charge or that otherwise it was determined in his favour.**
> 3. **that when the Prosecutor set the law in motion he was actuated by malice or acted without reasonable or probable cause.**
> 4. **that he suffered damage as a result.**

I respectfully adopt the formulation of his Lordship for these purposes.

Was the Claimant charged with a criminal offence?

24) There is no issue that in fact the claimant was charged with a number of offenses for which he was summonsed before the Resident Magistrate's Court. In that regard it is his evidence that he attended court on over fifteen occasions on which the matter failed to proceed and that ultimately in or around July 2004, the matter was dismissed for want of prosecution.

Was the Claimant acquitted of the charge or were they otherwise determined in his favour?

25) In so far as the evidence of the dismissal of the charges is concerned, the version of the facts given by the Claimant is that the matter was disposed of in July 2004 when it was dismissed for want of prosecution according to the defendant's version of the fact, the matter had been adjourned in August 2003 but was re-listed for March 9, 2005. There is no evidence that there was any further trial on March 9, 2005 or at any time thereafter and I accept the Claimant's version that the matter was discontinued for want of prosecution. This clearly amounted to a disposal of the matter in the Claimant's favour. I also accept the reasoning of Justice Brooks in the same case, the defence which was filed on the 7th march 2005, stated at paragraph 4 that though the matter had been adjourned sine die on August 27, 2003, the summons had been re-laid before the Court and was set for mention on March 9, 2009. There is no evidence before me that that matter ever came back before the court and certainly it is not mentioned in the Witness Statement of Ricketts. On the other hand, the Claimant's evidence is that the matter was dismissed for want of prosecution sometime in July 2004. I accordingly hold, based on authority, that the matter has ended in favour of the Claimant.

Was the defendant actuated by malice or is there evidence of lack of reasonable or probable cause for the charges?

26) The next question is whether the charge of the Claimant was actuated by malice or whether the 1st Defendant acted without reasonable or probable cause. On the evidence of the 1st Defendant himself, there was no statement or complaint made to him which would suggest that there had been a criminal offence committed. It also did not appear that there was any likelihood of conduct giving rise to a breach of the peace. On DC Ricketts own story, the complaint was made in relation to some defrauding of the bartender, Pauline Lawrence by the Claimant. It is clear that while it is up to the Claimant to establish malice or lack of reasonable or probably cause, it may be possible to infer malice from the lack of such reasonable or probable cause, it

may be possible to infer malice from the lack of such reasonable or probable cause along with the conduct of the defendant.

Was there reasonable or probable cause for the charges laid? Was there malice?

27) In the celebrated and oft-cited case of **Hicks v Faulkner** (188) 8 QBD 167 at 171 Hawkins J. in the often quoted passage has defined reasonable and probable cause as: "...an honest belief in the quilt 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 of the crime imputed". Malice is said to have a "wider meaning than spite, ill will or a spirit of vengeance, and includes *any other improper purpose, such as to gain a private collateral advantage*" or a primary purpose other than carrying the law into effect. (My emphasis) In this regard, it seems to be a reasonable inference to be drawn from the fact that D/C Ricketts said that he was overall in charge of the activities and responsible for the payment for the drinks which had been taken on consignment, that the laying of the charges was for the collateral purpose of punishing the Claimant.

28) It seems that D/C Ricketts had accepted that the Claimant did intend to pay the money on the evening of September 23, 2001, which is why he took him to the Claimant's home. The charges which were laid clearly arose out of the failure to collect the money and in my view it seems a reasonable inference, on a balance of probabilities, that the action of D/C Ricketts was either malicious or it was without reasonable or probable cause.

Did the Claimant suffer damage?

29) It is also clear that the Claimant did suffer some damage as a result as the medical report indicates that there was some soft tissue injury although there was not likely to be any long term consequences of that. In the circumstances I find that the charge of

malicious prosecution is made out of a balance of probabilities and I find in favour of the Claimant in that respect. I shall turn now to the question of damages.

Damages

Assault

30) Having found in favour of the Claimant both for assault and for malicious prosecution I now have to determine the extent the extent of the damages to which he is entitled. The Claimant's attorney has referred the Court to a number of authorities. He starts by directing the Court's attention to a dictum from Downer J.A. in **Doris Fuller (Administratrix of the Estate Agana Barrett) v The Attorney General** 56 WIR 357 where His Lordship said: "Insofar as an assault and battery result in physical injury to the plaintiff, the damages will be calculated as in any other action for personal injury. Beyond this the tort of assault affords protection not only from physical injury but also from the insult which may arise from interference with the person"

31) The Claimant cites **Aston Dennis v the Attorney General of Jamaica and McBean**, Claim No. HCV 1823 of 2003. In that case, the Claimant was beaten with a baton on his face and ears, and was kicked in his chest, side and in his back. He also suffered injuries fingers. In a decision given on January 30, 3006, the Court awarded the sum of Four Hundred and Fifty Thousand Dollars ($450,000.00) which when updated to the CPI Index of 150.4, would now yield the sum of Seven Hundred and Fourteen Thousand Five Hundred and Twenty Seven Dollars ($714,527.00)

32) It is conceded by the Claimant that the injuries in the **Aston Dennis** case were much more serious than in the instant case and so the Claimant suggests that a figure of Five Hundred Thousand Dollars ($500,000.00) would be appropriate.

33) Turning to the malicious prosecution, the Plaintiff cited the case of **Maxwell Russell v The Attorney General and Corp. McDonald** decided by Mangatal J. in January 2008. In that case, the learned judge awarded the sum of Two Hundred and Fifty

Thousand Dollars ($250,000.00) a figure which when updated would now yield approximately Three Hundred and Fifteen Thousand Dollars ($315,000.00) the Claimant also cited **Keith Nelson v Sgt. Gayle & Attorney General** decided by Brooks J in April 2007. In the **Keith Nelson** case, the Claimant only made three Court appearances before acquittal and he was awarded the sum of Four Hundred Thousand Dollars ($400,000.00) which when updated would yield approximately Five Hundred and Seventy Seven Thousand Dollars ($577,000.00). It was submitted that given that the Claimant here attended Court on more than fifteen (15) occasions and had the charges hanging over his head for more than three years, a reasonable award would be Seven Hundred and Fifty Thousand Dollars ($750,000.00)

34) In addition to those heads of damages, the Claimant also sought aggravated damages as extra compensation for damages to feelings and his dignity. It was submitted that it would be appropriate to update the award made in the case of **Everton Foster v the Attorney General and Anthony Malcolm** Suit No. CL. F-135 of 1997 where Daye J. on the 18th July 2003, awarded a figure of Fifty Thousand Dollars ($50,000.00). The figure updated would now amount to One Hundred and Eight Thousand Two Hundred Dollars ($108,200.00).

35) In addition to the aggravated damages claimed the Claimant also sought exemplary damages. It was submitted that the conduct of D/C Ricketts had been so egregious that it warranted an award of exemplary damages. In that regard, he suggested that a figure of Two Hundred and Fifty Thousand Dollars ($250,000.00) would be appropriate.

36) On behalf of the Defendants it was submitted that the case of **Cornilliac v St. Louis** reported at [1965] 7 WIR 491 a decision of Wooding C.J. provided guidelines for assessing general damages. These were set out as follows:

a) the nature and extent of the injuries sustained;
b) the nature and gravity of the resulting physical disability;
c) the pain and suffering which had to be endured;

d) the extent to which, consequently, the plaintiff's pecuniary prospects been materially affected.

37) Given the nature of the injuries as recorded in the medical certificate presented to the Court, it was the submission of the Defendants that the Claimant had merely suffered bruising or minor injuries as a result of the assault and battery. The case of **Verta Scott v Tankweld equipment Limited** Suit No. C.L. S-267 of 1990 (Harrison' page 59) was said to be instructive. In that case, the Court awarded damages for a blow and would to the head of the plaintiff which caused pain in the head and neck. The sum awarded was Nine Thousand Dollars on January 17, 1992 a figure which when updated would amount to One Hundred and Three Thousand One Hundred and Seventy Dollars ($103,170.00). It was, accordingly, the submission of the Defendants that the injuries in the **Verta Scott** case were more serious and the Claimant should only be awarded a maximum of Eighty Thousand Dollars ($80,000.00) for the injuries suffered here.

38) Insofar as the malicious prosecution was concerned, counsel for D/C Ricketts was of the view that the case of **Keron Campbell v Kenroy Watson & the Attorney General** decided by Sykes J (acting as he then was) on January 6, 2005 was instructive. There the Court had awarded the sum of Ninety Thousand Dollars ($90,000.00). When updated this would give rise to a sum of approximately One Hundred and Sixty One Thousand Dollars ($161,000.00). It was further submitted that since in **Keron Campbell** the charges which the Claimant faced were more grave than the charges faced by Mr. Miller in the instant case, the figure of $161,000 should be discounted, although allowing for the fact that the period during which the prosecution was pending was much longer, and the number of times to court about twice as many, the figure of $150,000 would be reasonable.

39) Counsel for the Defendants further submits that this is not an appropriate case for aggravated damages as the criteria for the award of such damages had not been met. In that regard counsel cited **Halsbury's Laws of England 4th Edition Vol. 12** where

it was suggested that there were two senses in which it can be said that the plaintiff's damages had been aggravated by the Defendant:

A. in the first and strict sense of the word the defendant's motives, conduct or manner of inflicting injury may have aggravated the plaintiff's damages by injuring his proper feelings of dignity and pride;
B. In the second and wider sense of the word, the plaintiff may be able to point to aspects of the defendants conduct which have aggravated or increased his damage or caused additional heads of damage such as incontinence.

40) Counsel for the defendants further submitted that this was also not a proper case for the award of exemplary damages. Citing **Rookes v Barnard** [1964] AC 1129 it was submitted that it was now settled law that exemplary damages are only available where there has been oppressive arbitrary or unconstitutional conduct by a servant of the government. It was submitted, further that exemplary damages ought only to be awarded if compensatory damages are inadequate to punish the defendant for his outrageous conduct and to mark the court's disapproval of such conduct. This was not such a case.

41) I have formed the view that, given the nature of the injuries disclosed in the medical report provided by the Claimant, the injuries were not serious. In fact, the report does refer to the injury as a soft tissue injury and no residual effect was anticipated. As between the cases of **Aston Dennis** and **Verta Scott** cited by the Claimant and the First Defendant respectively, I do believe that **Verta Scott** is the more appropriate **Dennis** was beaten by a baton and kicked by his assailant, while **Scott** only received a "blow" to the head. However, there is all the difference between receiving a "blow" to the head causing pain to the head and neck, and being hit in the face with the handle of a gun. I would hold that in that the circumstances, a sum of One Hundred and Fifty Thousand Dollars ($150,000.00) is a reasonable amount for pain and suffering.

Malicious Prosecution

42) The case cited, **Maxwell Russell** and **Keith Nelson** by the Claimant and **Keron Campbell** by the defendant, provide quite different results in the awards by the Court for the tort of malicious prosecution. In **Russell** the award then made would now be worth $315,000.00. In **Nelson**, the amount awarded would now be updated to $577,000.00 although it should be noted that in that case the period during which the threat of the charges hung over the claimant was shorter and the appearances in court were less than in the instant case. On the other hand, in **Keron Campbell**, the $90,000.00 awarded by Sykes J. (Ag) would be worth $161,000.00. Notwithstanding the difference in the circumstances between the claimants, I believe that an appropriate sum for the tort of malicious prosecution would be no more than Two Hundred Thousand Dollars ($200,000.00) and so I hold.

Aggravated and Exemplary Damages

43) Counsel for the Claimant has submitted that he is entitled to both aggravated and exemplary damages. I shall deal firstly with aggravated damages.

Aggravated Damages

44) Insofar as the approach which this court should adopt, is concerned, I would refer to and adopt the views I had expressed in **Openiah Shaw v The Attorney General** HCV 5443 of 2005 judgment delivered March 13, 2007. I noted there that: "In **Thompson v Commissioner of Police of the Metroplis [1997] 3WLR 403** the UK Court of Appeal expressed the view at page 417 that: "Aggravated damages are awarded where there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award". "The Court clearly accepted that (i) aggravated damages are compensatory; (ii) that an award of compensatory damages (which includes aggravated damages) will, incidentally, have some adverse (or punitive) effect on the defendant who must pay the award; and (iii) that this incidental adverse (or punitive) effect should be taken into account when deciding whether exemplary damages should be awarded (the if but only if test). Hence juries should be told that:

...if [they] are awarding aggravated damages those damages will have already provided compensation for the injury suffered by the plaintiff as a result of the oppressive and insulting behaviour of the police officer and, inevitably, a measure of punishment from the defendant's point of view.

... exemplary damages should be awarded if, *but only if*, they consider that the compensation awarded by way of basic or aggravated damages is in the circumstances an inadequate punishment for the defendants".

45) While I have determined that the Claimant should receive One Hundred and Fifty Thousand Dollars ($150,000.00) for the assault and Two Hundred Thousand Dollars ($200,000.00) for malicious prosecution, I believe that the affront to his dignity because of the assault which took place before his common-law-wife and child should be compensated by a further payment of Fifty Thousand Dollars ($50,000.00) for aggravated damages and I so do order.

Exemplary Damages

46) Finally, I turn to the question of exemplary damages. Again I turn to the views I expressed in the **Openiah Shaw** case referred to above. In considering the issue in that case I said:

> "What of the submission of counsel on exemplary damages? In **Rookes v Barnard**, (the case in which, for the first time, a critical analysis of the conceptual differences between aggravated and exemplary damages was carried out) Lord Devlin articulated the circumstances in which or the categories for which exemplary damages should and could be awarded. There, Lord Devlin, in a part of his speech adopted by the other members of the Appellate Committee, held that for the court to have a discretion to award exemplary damages in tort, either the facts of the case must fall within one or other of two broad factual categories, or the award of exemplary damages in the circumstances of the case must be expressly authorized by statute. The two factual categories are:
>
> 1. Oppressive, arbitrary or unconstitutional actions by servants of the Government; and
> 2. Conduct (by the defendant) calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff.

In **Kuddus (AP) v Chief Constable of Leicestershire Constabulary [2001] UKHL 29** Lord Nicholls of Birkenhead said:

> Exemplary damages or punitive damages, (the terms are synonymous), stand apart from awards of compensatory damages. They are additional to an award which is intended to compensate a plaintiff fully for the loss he has suffered, both pecuniary and non-pecuniary. They are intended to punish and deter".

I also said in Shaw:

> "I accept the position articulated by the English House of lords in ***Kuddus v Chief Constable of Leicestershire Constabulary*** [2001] UKHL 29 (delivered June 7, 2001), where Lord Slynne of Hedley had this to say about exemplary damages:
>
> > It is equally accepted by the parties that exemplary damages are not precluded by the fact that aggravated damages may be awarded though it is clear that before the decision of the House in Rookes v Barnard [1964] AC 1129 the distinction between the two was not fully appreciated. In that case Lord Devlin, at p 1228, drew attention to the difference of purpose of compensatory damages and punitive or exemplary damages.
> >
> > "In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum." (My emphasis)

47. I consider that this is a correct approach and in the instant case, I am prepared to hold that the conduct of the first defendant was calculated and designed to make a profit for himself thus achieving a "collateral purpose" referred to above, that of benefiting him in relation to his obligation to pay for the drinks which had been taken on consignment. This clearly brings the conduct within the principle stated above. I hold that this is an appropriate case for the award of exemplary damages and I award the sum of two Hundred Thousand Dollars ($200,000.00).

48. The Claimant in his particulars of claim did not identify any specific items of special damages apart from the cost of a medical report in the sum of One Thousand five Hundred Dollars ($1,500.00). He did not give evidence of any other expenditure with respect to the report or this incident, and accordingly his special damages are limited to $1,500.00. He is to have interest on special damages at the rate of 6% from September 23, 2001 to 21st June 2006 and 3% from June 22, 2006 to the date of judgment. He is also awarded general damages in the sum of Six Hundred Thousand Dollars ($600,000.00) with interest on Four Hundred Thousand Dollars ($400,000.00) (that is, the $600,000.00 less the $200,000.00 for exemplary damages), from January 19, 2005, at 6% until June 21, 2006 and 3% from June 22, 2006 to the date of judgment. I also award costs to the Claimant to be taxed if not agreed.

ROY K. ANDERSON
PUISNE JUDGE
APRIL 19, 2010