[2015] JMSC Civ. 184

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 HCV 05266

BETWEEN	**JOHN PLANTER**	**CLAIMANT**
A N D	**THE ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT**

Mrs. MarvalynTaylor-Wright instructed by Taylor-Wright & Company for the Claimant

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

Damages-assessment-False Imprisonment-Assault and Battery-Principles governing the award of Aggravated, Exemplary and Vindicatory Damages

Heard: September 18 and 22, 2015

Laing, J.

[1] On 24th January 2012, the Claimant, a Jamaican national arrived at the Norman Manley International Airport on a flight from Guyana. While in the queue at the immigration section, he was approached by a police officer who asked him where he was coming from and what was the purpose of his trip abroad. He advised the officer that he had gone on vacation and was also shopping around for a water pump for his farm. The Claimant was removed from the line and taken along with his suitcase to a room where the suitcase was searched. The suitcase was passed through a scanning machine and two searches of the Claimant's person were conducted. He was accused of being a "cocaine mule" (drug courier) and advised that it was suspected that he was transporting drugs in his stomach. The Defendant did not file a defence

within the time prescribed by the Civil Procedure Rules (2002) and there is no evidence before the Court as to what might have provided the basis for this suspicion.

[2] The Claimant was placed in handcuffs and taken in a police vehicle to the Kingston Public Hospital (the "**KPH**") where an X-ray of his body was conducted. The Claimant's evidence is that after the results of the X-ray came back "*She said she saw something inside of my belly*". It is not entirely clear whether the Claimant heard a female doctor say that she (the doctor) saw "something" or whether this was what the female police officer told the Claimant, but much does not turn on this particular detail. What is important, as I will develop later in this judgment, is that the opinion was formed by a medical doctor that there was something (and one can infer something unusual or abnormal) in the Claimant's stomach. The flawed opinion, based on the X-ray result that there was "something" unusual inside the Claimants stomach, which was potentially illegal drugs, explains in part what took place next.

[3] The Claimant was required to drink a liquid, which one can reasonably infer was a laxative. He says that he initially refused to drink the liquid but consented after being told that he would not be released if he did not. After consuming the liquid the Claimant was told to pass his stool in a bedpan which he did under the watchful eyes of a female police officer. Nothing unusual was found in the stool. Thereafter the Claimant was required to ingest a liquid six more times. In the end no illegal drugs were discovered in the Claimant's stool. The Claimant was again subjected to an X-ray after which the Claimant says the doctor advised that "*the X-ray was clean*".

[4] The Claimant was discharged from the KPH at about 8:30 a.m. on the following morning, the 25th January 2012, but notwithstanding the results of the hospital visit, he remained in the custody of the Police who took him to the Narcotics Department and was only allowed to go free at about 2:30 pm that day.

[5] The evidence of the Claimant is that at the Narcotics Department he felt pains in his stomach and he felt weak and nauseous. He felt as if he was going to defecate on himself but he did not. After leaving the Narcotics Department he still felt weak and "faintish". He says he

had diarrhoea over the course of the next 10 days and the pain in his stomach together with the frequent trips to the bathroom, affected his ability to sleep over this period, forcing him to seek the aid of sleeping pills. The Claimant's evidence is that he visited Dr. Raymoth Notice on 27th February 2012 because of the pain and diarrhea (about a month after his release from the hospital) and Dr Notice diagnosed him as having gastritis, post-traumatic stress disorder and depression. The Claimant says the purchased the medication prescribed by Dr Notice.

[6] The Defendant was refused an extension of time within which to file its defence and judgment was entered for the Claimant

THE ASSESSMENT

False Imprisonment

[7]. In **The Attorney General v Glenville Murphy SCCA No 126/2007** our Court of Appeal observed as follows:

> "*The fact that a successful claimant is entitled to reasonable compensation for damages for false imprisonment is not open for debate. Nor can it be disputed that injury to his liberty, his feelings and reputation are relevant. In making an award, each of these heads of damages must be considered but only a single award should be made.*"

[8] Counsel for the Claimant referred the Court to the cases of **Sharon Greenwood-Henry v The Attorney General of Jamaica Claim No CL G 116 of 1999** and **Nicole Ann Fullerton v The AG unreported Claim No 2010 HCV 1556**. Counsel submitted that the quantum of damages awarded in **Greenwood-Henry** when adjusted to create an hourly rate is at the lower end of the scale for cases of false imprisonment and that a more appropriate rate would be that reflected in the more recent **Fullerton** case which Counsel submits evidences the more modern and liberal approach of these Courts.

[9] As indicated earlier, an award of compensation is comprised of a number of heads including damages for injury to reputation, although as a matter of practice one composite sum

is usually awarded. This was the course correctly adopted by my learned sister Williams J. in **Fullerton**. At paragraph 20 of the Judgment the learned Judge states:

> "*In assessing the award to be made under this heading, the factors that the Court have considered important are principally the injury to liberty i.e. the loss of time and further the injury to feelings i.e. the indignity , mental suffering, disgrace and humiliation with any attendant loss of social status and injury to reputation".*

[10] It is clear from the judgment that Williams J. considered and was influenced by the damage to the reputation of Ms. Fullerton who had completed a law degree in 2006. At paragraph 26 the learned judge refers to the "public humility" of Ms. Fullerton's arrest which was televised on the news as well as in the written media on the front pages of both the Jamaica Gleaner and the Jamaica Observer. Williams J, also noted the submission that national attention had been drawn to an alleged defiance of a court order and contempt of Court by Ms Fullerton.

[11] At paragraph 48 of the Judgment Williams J. stated:

> *"It is noted that the fact of the great publicity surrounding her detention was proven by the exhibiting of the various newspaper articles printed reporting the incident. It is recognised that this must be factored in when considering the overall effect the false imprisonment must have had and will continue to have on the claimant".*

There is therefore no doubt as to the impact of the damage to reputation element in the award.

[12 In **Glenville Murphy** (supra) the Court of Appeal found that there was no evidence of the Claimant's social standing in the community, and consequently he should receive no damages for injury to his reputation.

[13] In this case there is clearly ample evidence of injury to the Claimant's liberty and feelings. He was wrongfully imprisoned for 26 hours. He was removed from the queue at the airport

(which could have been viewed with suspicion by observing members of the public), subsequently handcuffed and taken to the hospital where he was treated as a suspected drug courier. He stated that the ordeal was very hard for him and he will never forget the incident for the rest of his life. He said that while going to the hospital and going in and out of the bathroom to defecate, the police officers and nurses made remarks such as "he is a drug mule", "is where him put the drug up into his bottom?" and other comments, which caused him to feel embarrassed and belittled. He said he cried and he felt helpless as if he was not a human being, like he was not a man.

[14] As in the case of **Glenville Murphy** there is no evidence in the instant case of the Claimant's social standing or how it has been affected by the Defendant's conduct and accordingly there is no basis for him to receive any damages for injury to his reputation.

[15] Whereas the Court should avail itself of the guidance contained in earlier authorities each case must be taken on its own facts. It is the view of this Court that the quantum of damages awarded in the **Fullerton** case must be viewed in the context of the obvious impact of the damage to Ms Fullerton's reputation in the consideration of what was an appropriate quantum. I am not of the view that the **Fullerton** case reflects a more modern or perhaps a more liberal or generous trend of these courts to the quantum of an award for damages for false imprisonment.

[16] By way of example, in the Case of **Glenville Murphy,** on 19 February 2009 (the written judgment was delivered 20 December 2010), the Court of Appeal set aside an award of $600,000.00 for false imprisonment as being excessive and substituted therefor a sum of $180,000.00. The Claimant in that case had been wrongfully imprisoned for 25 hours and there was evidence in that case that he had suffered injury to his reputation, having been accused of incest and as a consequence of these allegations he was forced to leave the community in which he resided. This award updated, using the most recent Consumer Price Index of 229 as at August 2015, and adjusted for the additional hour wrongfully imprisoned by the Claimant in this case, would amount to an award of $312,682.72 in today's terms.

[17] Counsel submitted that the award $100,000.00 in the **Greenwood-Henry** case updated using the most recent Consumer Price Index of 229 as at August 2015 and adjusted for the additional 10 hours spent by the Claimant in this case, would amount to an award of $394,618.24 today. I do not agree that an award in this amount would be on the lower end of the scale. The Claimant is a male farmer of the Cockpit District in Clarendon. His residence in the rustic interior of Jamaica does not necessarily make him a more emotionally rugged individual. His evidence is that he cried during the ordeal. On the other hand, it was not suggested and the Court is not of the view that he is any more emotionally sensitive than the Claimant in the **Greenwood-Henry** case. However, in view of the general similarity of some of the facts in this case with those of the **Greenwood-Henry** case, (some of the important differences will be subsequently highlighted); the Court is of the opinion that an award of $500,000.00 is adequate to compensate the Claimant for his claim for False Imprisonment and I make this award.

Assault and Battery

[18] The Claimant gave evidence as to the pain and discomfort which he suffered as a result of the assault and battery he experienced at the hand of the agents of the Crown, (the details of which are chronicled earlier in this judgment). He also adduced a medical report prepared by Dr Raymoth Notice, a general practitioner, which indicates that the claimant suffered injuries including, gastritis, depression, post traumatic stress disorder ("**PTSD**") as well as pain and soreness. The Court was not provided with any evidence as to the professional qualification of Dr Notice which would cause the Court to be able to reasonably rely on his diagnosis of PTSD. Given the nature of this condition, the Court is therefore unable to accept, without more, that the Claimant suffered the effects of PTSD.

[19] Counsel for the Claimant quite correctly recognised that the damages for assault and battery in the **Greenwood-Henry** case took into account the medical/psychiatric evidence of the Claimant having experienced PTSD. Counsel took the sensible course of submitting for the Court's consideration in the alternative, the case **Openiah Shaw v The Attorney General for Jamaica Claim No HCV 05443 of 2005 Judgment delivered March 13, 2008**. The Court accepts that the assault and battery in **Openiah Shaw** where a laxative was administered to

the Claimant without her consent is comparable to this case. The Court also accepts that the award in **Openiah Shaw** of $1,000,000.00 under this head of damages, which if updated to account for inflation amounts to $1,863,303.00 in today's terms, provides a useful guide. The Court is of the view that an award of $1,800,000.00 to will provide adequate compensation to the Claimant under this head of damages and this sum is awarded.

Aggravated Damages

[20] Guidance on the award of aggravated damages is contained in case of ***Thompson & Another v The Commissioner of Police for the Metropolis*** **[1998] QB 498** (Court of Appeal UK) where at page 516 Lord Wolfe expressed the view that:

> *"Aggravated Damages are awardable where there are aggravating features of the case which would result in the plaintiff not receiving sufficient compensation for the injury is the award were restricted to the basic award"*

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[21] Our Court of Appeal in the case **Attorney General and Burton v Anderson SCCA 76 of 2004** (delivered 17 March 2006) quoted with approval Lord Wolfe's formulation and there have been a number of awards of aggravated damages by these Courts over the years.

[22] I accept that there have been aggravating features of this case arising from the humiliation and embarrassment which the Claimant was forced to endure, for example, having to defecate in a bedpan under the watchful eye of a female police officer and the taunts which were directed at him by the police officers and nurses.

[23] In **Obidiah Shaw** the Claimant was awarded $600,000.00 for aggravated damages which updated to today using the August CPI of 229 amounts to $1,117,982.10. The award of $700,000.00 for aggravated damages in the case of **Greenwood-Henry** updated to today amounts to $1,699,893.95. It is to be noted that one distinguishing feature of the **Greenwood Henry** case is that the Claimant in that case was also subjected to invasive body cavity searches, firstly in the bathroom of the Police Station and again at the hospital. It does not require much thought to appreciate the humiliation and embarrassment which this would have

caused her. The aggravating features of the **Greenwood-Henry** case are clearly greater than in this case and it is appropriate to apply a discount to the sum awarded in that case. I am of the view that an award of $1,200,000.00 in this case will provide adequate compensation for the Claimant under this head of damages and this sum is herby awarded.

Exemplary Damages

[24] The Principles governing an award of exemplary damages were set out in the case of **Rookes v Barnard 1964 AC 1129** and have been applied in numerous cases in this jurisdiction and elsewhere in the Commonwealth. It is therefore settled law that exemplary damages may be awarded where there is oppressive, arbitrary or unconstitutional acts by servants of the Government, the appropriate category for purposes of this assessment.

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[25] At page 1228 of **Rookes v Barnard** lord Devlin highlighted the following point:

> *"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".*

[26] Although I have found that the treatment of the Claimant is deserving of aggravated damages I am not of the view that exemplary damages are appropriate in this case. One reason for this view is that a large component of the physical and emotional injury suffered by the Claimant flowed from his forced laxatization. Unfortunately, since no evidence was filed on behalf of the Defendant, the Court does not have the benefit of the evidence of the medical professionals who were intimately involved in this matter. What appears to be clear from the evidence of the Claimant that the decision to administer a laxative to him was based on the doctor's opinion following his viewing of the X-ray photograph, that is, that there was "something" present in the Claimant's stomach (inferentially a unusual foreign substance which

could be illegal drugs). The doctor is also an agent of the Crown but I find that at worst his error was negligent and no higher.

[27] Counsel for the Claimant submitted that a laxative was administered to the Claimant seven times but the evidence does not support this assertion. The Claimant's evidence is that about an hour after the first liquid was ingested he was "*given more substance to drink*" and he says the process was repeated. There is no evidence as to the similarity in taste, colour, odour or consistency of the liquids ingested subsequent to the first drink, which would enable the Court to reasonably infer that all the liquids were the same and that they were therefore all laxatives. Whereas the Court can infer that the first liquid ingested was a laxative based on the Claimants evidence that he passed stool within an hour of its administration, there is no evidence from which the Court can reasonably infer that the liquids which the Claimant was required to drink six separate times thereafter were laxatives (or the same laxative).

[28] It also does not appear that administering 7 separate doses of a laxative would have been was necessary because, on the Claimant's evidence the laxative administered initially had had the desired effect. The liquid or liquids ingested thereafter could have been a rehydrating fluid, and the Claimant's subsequent bowel movements could have been a natural result of the laxative which was first administered continuing to be effective.

[29] On the evidence before the Court the police officers did not have a reasonable belief that the Claimant had committed an offence. He ought not to have been deprived of his liberty at the airport and ought not to have been taken to the KPH. The decision to transport the Claimant to the KPH made matters worse because of what transpired there. The explanation for this decision appears to be partly captured in the words of the female officer when the Claimant asserted that he had been vindicated and his innocence was confirmed. The Claimant reports the officer as saying "*My youth it is not my fault. It is because the machine is not working so I have to follow procedure and send you to Kingston Public Hospital if I suspect you"*. Unfortunately, what appears to have been an inaccurate and perhaps negligent analysis of the initial X-ray photograph or photographs by a medical doctor at the KPH, set in chain a

series of events which caused additional breaches of the Claimant's rights and resulted in further unnecessary injury to him.

[30] Counsel for the Claimant sought to rely on the **Greenwood-Henry** case in support of her submission that there ought to be an award for exemplary damages in this case. However, notwithstanding the general similarity of the facts of that case with the case under consideration, there are a number of important factual differences which makes the **Greenwood-Henry** case distinguishable. I am of the view that the conduct of the agents of the Crown in the **Greenwood-Henry** case was several degrees worse than in this case, in terms of their callous and flagrant disregard for the claimant's constitutional rights. This Court certainly agrees with the award of exemplary damages on the facts of that case. I have previously referred briefly to the invasive body cavity searches which had to be endured in the **Greenwood-Henry** case. The vaginal cavity search which Sykes J. in that case found was conducted at the police station by a police officer, had no basis in fact or law. It was conducted by non-medical personnel in a bathroom which was in general use and which, as the learned judge observed, raised questions as to the level of hygiene observed by the female officer performing the examination.

[31] What may be considered to be particularly egregious in the **Greenwood-Henry** case is the fact that at the hospital, even though the doctor who read the X-ray photograph stated that he did not see any evidence of drugs the Claimant in that case was subjected to a search of both her vaginal cavity and anus. Illegal drugs not having been found, she was still required to drink a laxative and had to endure the effects of its operation. Blood samples were also taken from the Claimant in that case on three separate occasions without her being advised of the purpose for which it was intended to use those samples, nor was she advised of the results of any examination of the blood taken.

[32] The conduct of the Crown's agents in this case was oppressive and unconstitutional, (which I will develop in greater detail when considering vindicatory damages) but could not be described as highhanded, callous or any of the other epithets frequently used to describe the conduct which is usually deserving of exemplary damages.

[33] In any event, I also find that the amount of damages which is being awarded to the Claimant, including aggravated damages, is adequate to punish the Crown for the conduct of its agents, to mark the Court's disapproval of such conduct and to deter the Crown and its agents from repeating it.

Constitutional /Vindicatory Damages

[34] In the case of **Attorney-General of Trinidad and Tobago v Ramanoop** [2005] UK PC 15 the Privy Council reviewed the, the purpose of constitutional damages in the context of the Constitution of the twin island state of Trinidad and Tobago, of which there are comparable provisions in the Jamaican Constitution and for that reason the decision provides useful guidance. The analysis by the Court is captured in paragraphs 17 to 19 of the judgment and is set out hereunder as follows:

> *"17. Their Lordships view the matter as follows. Section 14 recognises and affirms the court's power to award remedies for contravention of chapter I rights and freedoms. This jurisdiction is an integral part of the protection chapter I of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of state power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional right. This jurisdiction is separate from and additional to ("without prejudice to") all other remedial jurisdiction of the court.*
>
> *18. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of compensation. But this measure is no more than a guide because the*

award of compensation under section 14 is discretionary and moreover, the violation of the constitutional right will not always be coterminous with the cause of action at law.

19. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award.

[35] In the case of **Mershon v Drexel Cartwright and the Attorney General of Bahamas [2005] UKPC 38** (15 March 2005), the Privy Council affirmed the approach to the award of constitutional damages which was laid down in ***Ramanoop*** in the paragraphs quoted above and went on to offer further guidance as follows:

"... The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary.

[36] In **Mershon,** the Privy Council noted that there is often a potential measure of overlap between the nominate torts and the breaches of a Claimant's constitutional rights. Their lordships acknowledged that in some cases there may be a complete overlap, but in other cases there may be only a partial overlap.

[37] The Claimant's constitutional rights in this case have been breached. By way of example without necessarily identifying an exhaustive list, his detention without reasonable cause for 26 hours is in breach of the Section 14(1) protection of freedom of the person and in breach of the Section 13(3)(f) right to freedom of movement. The searches of his person and subjecting him to X-rays are in breach of the Section 13(3)(j) right to protection from search of his person. The administration of a laxative to him and forcing him to defecate in a bedpan in full view of a female police officer is a breach of the Section 13(3)(o) right to protection from torture or inhuman or degrading punishment or other treatment as provided by section 13(6).

[38] I will take the liberty of adopting the methodology adopted in **Mershon** in attempting to identify the areas of overlap, and I find that in the present case there is a substantial overlap between the facts giving rise to the tort of assault and battery on the one hand and the actions which would amount to a breach of the Section 13(3)(o) right to protection from torture or inhuman or degrading punishment or other treatment as provided by section 13(6) on the other hand. There is also an overlap between the facts giving rise to the tort of false imprisonment on the one hand and the conduct which would be in breach of Section 14(1) protection of freedom of the person and in breach of the Section 13(3)(f) right to protection of freedom of movement on the other hand. If there is not a complete overlap in each case then the areas of Constitutional breaches which do not overlap and which would not be covered by the tortuous breaches are limited. For example the touching of the Claimant during the physical searches of his person would constitute a battery and be covered by those damages but the x-ray searches, although a constitutional infringement would arguably not be so covered.

[39] In **Mershon** the plaintiff was arrested in order to force her father who had been named in a search warrant to return to the Bahamas to check on her welfare. This was described by the

judge at first instance as "*a Gestapo-type tactic if ever there was one"*. She was also subjected to other breaches of her constitutional rights. The Privy Council found that a substantial award of damages was justified to vindicate Ms Merson's rights that had been so grievously infringed. As the Court put it:

> "*Moreover the wholesale contempt shown by the authorities, in their treatment of Ms. Merson, to the rule of law and its requirements of the police and prosecution authorities, makes this, in our opinion, a very proper case for an award of vindicatory damages.*"

[40] The Court is fully cognisant of the purpose of vindicatory damages as identified by the Privy Council in **Mershon** and **Ramanoop** and as quoted in this Judgment. I have earlier examined the conduct of the agents of the Crown against the background of the incorrect X-ray analysis and the consequences of that. This is not a case of wholesale contempt being shown to the rule of law as in **Mershon** and **Greenwood-Henry**. The conduct amounting to breaches of the Claimant's constitutional rights substantially, overlaps with the torts for which this Court is awarding adequate compensation. Taking all these factors in the round the Court is of the opinion that an additional award is not needed in this case *"to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches" (see* **Ramanoop** supra*)* and will accordingly not exercise its discretion in favour of awarding constitutional/vindicatory damages.

Special Damages

[41] The Court finds the Special Damages proved and will award the sum of $15,000.00 as claimed.

[42] I therefore make the following orders:

(1) Special Damages awarded in the sum of Fifteen Thousand Dollars ($15,000.00) with interest at 3% per annum from 24th January 2012 to today's date.

(2) General Damages awarded in the sum of $3,500,000.00 comprised as follows:

False Imprisonment -$500,000.00

Assault and Battery -$1,800,000.00

Aggravated Damages-$1,200,000.00

with interest at 3% per annum from 24th September 2012 to today's date

(3) Costs to the Claimant to be taxed if not agreed.

Kissock Laing

Puisne Judge