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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 3/80

Judgment Book.

BEFORE: THE HONOURABLE MR. JUSTICE KERR, J.A.
THE HONOURABLE MR. JUSTICE WHITE, J.A.
THE HONOURABLE MR. JUSTICE ROSS, J.A.

BETWEEN	THE ATTORNEY GENERAL	
AND	CONSTABLE DAVID LUE	DEFENDANTS/APPELLANTS
AND	NOEL GRAVESANDY	PLAINTIFF/RESPONDENT

R. Langrin and Miss McDonald for Defendants/Appellants.
R.M. Millingen for Plaintiff/Respondent.

July 7, 8, 1981 & December 20, 1982

WHITE, J.A.:

These are our reasons for judgment which was delivered on July 8, 1981.

Noel Gravesandy, the Plaintiff/Respondent brought an action against the Defendants/Appellants claiming damages for trespass, malicious prosecution, false imprisonment and assault. He was successful in his claim and he was awarded damages in the sum of $5,050.00 with costs to be agreed or taxed. That award comprised (a) $500.00, being expenses incurred by the plaintiff in defending himself against the criminal charge of malicious destruction of property laid against him by the second-named Defendant/Appellant, from which charge he was dismissed by the Resident Magistrate for the parish of Saint Andrew; (b) the sum of $3,000.00 "for his night in the lock-up in circumstances described by him against a slop pail with two others in the cell, could not sleep." (c) $50.00 for trespass, and (d) the sum of $2,000.00 as Exemplary Damages. The learned trial judge made no award for assault which he said was not proved. He awarded nothing for injuries to the feeling of the Plaintiff/Respondent as there were none. This was based on the finding

that "there was no risk of conviction here as this did not form part of the plaintiff's case." The award for exemplary damages was made on his description of the second defendant's conduct as being "oppressive and arbitrary throughout." This last phrase evaluated the evidence relating to incidents of the 6th of November, 1974, which was the sequel to persistent wrangling between the plaintiff/respondent and his family on the one hand and their neighbours, the Munroes, on the other. They occupied respectively, adjoining premises No. 38 and 36, Toronto Avenue, Kingston 10.

On the 6th November, 1974, when he returned home from work, the plaintiff/respondent was invited by a Corporal of Police to go next door to No. 36, to inspect damage allegedly done by members of his family. This invitation was declined. The Corporal of Police left, as he did not pursue the matter any further. According to the evidence some two hours after the respondent saw the second appellant in his premises. He was in the company of two other men, and all three men, who had drawn firearms in their hands, identified themselves as policemen. The plaintiff/respondent gave his name to the second appellant who then informed the respondent that he was arresting him for malicious destruction of property. The plaintiff submitted to this action of the police, not only by changing his clothes, but by requesting his wife to open the gate into the premises. She did this and the respondent was taken away in what he described as a private car. On the journey to Half-Way-Tree Police Station, he sat between two of the policemen. During the journey he requested Constable Lue, the second appellant, to stop at No. 19, Sandringham Avenue so that he could contact someone to stand bail for him at the station. He complained that his request was refused, with the significant remark by Constable Lue that he "did not like to take sides but he was going to be hard on the man who was facety to the police." It so happened, at the police station, bail was

refused. And it was the further complaint of the respondent that he spent the night in a cell in which the "only room was against the slop pail nowhere else."

The respondent's case all along was that he never at any time was involved in any act causing malicious destruction of property, and, indeed, was acquitted thereof after attending the Resident Magistrate's Court at Half-Way-Tree on nine occasions.

The second appellant was not called as a witness at the trial before Vanderpump J. so that there was no evidence from him to support the pleading in paragraph 6 of the Defence:

> "The defendants say that on receiving reports from Carlyle Munroe, the second defendant visited premises, 36 Toronto Avenue. At the aforesaid premises the second defendant saw a mattress and a bedspread which were saturated with some fluid which smelled like pickled water and he also saw several broken glass louvre blades and heard the sound of objects being thrown on the house. The second defendnat whilst on the premises received a further report from Carlyle Munroe and based on what he saw and heard he arrested the plaintiff having suspected him of committing the offence of malicious destruction of property."

However, despite the evidence of Carlyle Munroe, which was intended to show that the plaintiff was engaged in stone throwing even while the police was present, the learned trial judge accepted the plaintiff's evidence that there was no stoning and found that, as a fact:

> ".... the defendant Lue did not investigate the matter at all and made not the slightest effort so to do, if he did (he) would have ascertained that the plaintiff was elsewhere on the 5th November, indeed the police themselves refer to damage as being done by the plaintiff's people. He thus acted without reasonable and probable cause in arresting the plaintiff and in prosecuting him for this offence: Clerk and Lindsell on Torts 14th Edition paragraph 1902. I can draw the reasonable inference that this motive in so doing could not have been with a desire to secure the ends of justice, but an improper motive, hence he acted maliciously."

> "As regards false imprisonment, it does appear as well that Defendant acted through spite, ill-will in refusing Plaintiff to get someone to bail him on more than one occasion, 25 Hals., 3rd Edition,

> "paragraph 696 trying to rely on what I find as founded allegation that Plaintiff had been facety to the Police.
>
> In all the circumstances I find defendant's conduct oppressive and arbitrary throughout - Broome v. Cassell (1972) 2 W.L.R. 645, 684."

Before the Court of Appeal, the argument for the appellants was firstly, that a claim for exemplary damages must be pleaded; secondly, in any event, the award of exemplary damages in this case was wrong. We agreed with these two grounds of appeal. As regards the point of pleading we held that a claim for exemplary damages must be specifically pleaded. Although the Judicature (Civil Procedure Code) has not been amended, we are inclined to this view in the light of sec. 686 of the Civil Procedure Code which provides:

> "Where no other provision is expressly made by Law or by Rules of Court the procedure and practice for the time being of the Supreme Court of Judicature in England, shall so far as applicable be followed, and the forms prescribed shall, with such variations as circumstances may require, be used."

Consequent on the judgment in the House of Lords in Cassell & Co. Ltd. v. Broome (1972) A.C. 1027, (1972) 2 W.L.R. 645, 684, the Rules of the Supreme Court in England were amended, so that exemplary damages must be specifically pleaded together with facts relied on. The object of the Rule is to give the defendant fair warning of what is going to be claimed with the relevant facts and thus prevent surprise at the trial, to avoid the need for any adjournment of the trial on this ground, and at the same time, extend the ambit of the discovery before trial (Notes to R.S.C. r8 (3)).

The Court of Appeal in Jamaica has by their decision in Douglas v. Bowen (1974) 12 J.L.R. 1544 adopted the categories of cases in which exemplary damages might be awarded, and as set out by Lord Delvin in Rookes v. Barnard (1964) A.C. 1129; (1964) All E.R. 367, and explained in Cassell & Co. Ltd. v. Broome (1972) A.C. 1027. The category which

may be considered relevant to the instant case is defined:

> ".... oppressive, arbitrary or unconstitutional action by servants of the Government ..... for the servants of the Government are also servants of the people and the use of their power must also be subordinate to their duty of service."

The description by the learned trial judge that the conduct of Constable Lue was "oppressive and arbitrary throughout," does not ipso facto lead to an award of exemplary damages.

Lord Delvin warned against this approach in his judgment in Rookes v. Barnard (supra). At p. 1229 he said:

> "It would not be right to take the language that Judges have used on such occasions to justify their (an appellate court's) non-intervention and treat their words as a positive formulation of a type of case in which exemplary damages should be awarded. They have used numerous epithets - wilful, wanton, high-handed, oppressive, malicious, outrageous - but these sorts of adjectives are used in the judgments by way of comment on the facts of a particular case. It would, on any view, be a mistake to suppose that any of them can be selected as definitive, and a jury directed, for example, that it can award exemplary damages whenever it finds conduct that is wilful or wanton."

Lord Hailsham in Cassell & Co. Ltd. v. Broome (supra) exegetically reiterated the views o f Lord Delvin. At page 678 H - 679C he sets out the steps that a judge should take in dealing with the vexed question of exemplary damages. To begin with "A judge should first rule whether evidence exists which entitles a jury to find facts bringing a case within the relevant categories." This is of importance when one notes his specific warning,

> "(ii) That the mere fact that the case falls within the categories does not of itself entitle the jury to award damages purely exemplary in character."

The judge has to be careful to understand that nothing should be awarded unless he is satisfied that the punitive or exemplary element is not sufficiently met within the figure which has been arrived at for the plaintiff's solatium which is the subject of the compensatory damages in the assessment

of which aggravated damages will be awarded. At p. 671 Lord Hailsham said:

> "In awarding aggravated damages the natural indignation of the Court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and, as the result of the conduct exciting the indignation demands a more generous solatium."

Viscount Dilhorne in Cassell & Co. Ltd. v. Broome at p. 706 dealt with the factors of malice or misconduct:

> "While in some cases it may be evidence that malice or misconduct has added to the injury, there may be other cases, where, although it is clear that there has been malice and misconduct it cannot be said that the injury inflicted is any greater than it would have been if there had been no malice or misconduct. In such cases it would seem from Rookes v. Barnard that the compensatory damages should not be increased. Nor, in such cases would it seem that exemplary damages as there identified could always be awarded for they are only to be awarded if the sum given in compensation is inadequate to punish for outrageous conduct to mark the jury's disapproval of such conduct and to deter repetition. The existence of malice may not make the defendant's conduct outrageous, and yet, it is, I think, established beyond all doubt that before Rookes v. Barnard a jury was always entitled to award larger damages than they otherwise would have given if satisfied that the libel was actuated by malice."

Those comments must certainly have some relevance to a case such as the instant case where the issue of malice, and reasonable and probable cause is the focal point of the action, and which must be pleaded and proved by the plaintiff.

Notwithstanding the fact that all the judges of the High Court of Australia criticised the decision of the House of Lords in Rookes v. Barnard, Windeyer J. in Uren v. John Fairfax & Co. Ltd. (1965-67) 117 C.L.R. 119 at pp. 153-4 welcomed the emphasis by the decision that:

> "... exemplary damages must always be based upon something more substantial than a jury's mere disapproval of the conduct of the defendant. This is of course old doctrine. The decision (in Rookes v. Barnard) makes clear, too, that all matters that may aggravate compensatory damages do not of themselves justify the addition or inclusion of a further purely punitive element. But we should not, I think, treat the decision as excluding exemplary

> "damages from any of those forms of wrong-doing for which in the past, the court has said they might be given. It is, however, not enough and this court has never said that it was enough to justify an award of exemplary damages that the tort should be of a kind for which such damages are permissible. The wrong must be of a kind for which exemplary damages might be given and the facts of the particular case must be such that exemplary damages could properly be given. Quite apart from anything that has recently been said in the House of Lords and the Court of Appeal, there must ..... be evidence of some positive misconduct to justify a verdict of exemplary damages. There must be evidence on which the jury could find that there was at least, a 'conscious wrong-doing or contumelious disregard of another's right.' "

In so far as the instant case is concerned, it was contended by Mr. Langrin that before the learned trial judge could have made the award of exemplary damages he should have considered whether, having regard to the facts and circumstances before him compensatory damages were adequate to compensate the plaintiff and punish the defendant. He argued that the conduct of the second defendant was not so outrageous and oppressive as to bring him within the enunciations of Lord Delvin. The conduct of the second defendant in this case did not fall outside of conduct of policemen in their investigation of cases which arise from time to time. The conduct and behaviour, he said, was not overly unreasonable. The finding of the learned trial judge was that the case was not properly investigated. There was no finding that a report of malicious damage to property was not reported to the police.

A perusal of the judgment of the trial judge discloses that the above criticism is valid in the light of the principles set out above. For instance, although as regards malicious prosecution he awarded the plaintiff $500.00, being expenses incurred by him in defending himself against the criminal charge, he went on to find that "as a matter of interest as this did not form part of the plaintiff's case I find that there was no risk of conviction here so I award nothing to the injuries to his feeling as there were none. McGregor on Damages 13th edition paragraph 1273." We did