

Ames

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 76 OF 2004

**BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A. (Ag.)**

BETWEEN: THE ATTORNEY-GENERAL

AND: CONS. CHRISTOPHER BURTON APPELLANTS

AND: LEEMAN ANDERSON RESPONDENT

Miss Carlene Larmond instructed by Director of State Proceedings for appellants.

Mrs. Jacqueline Samuels-Brown and Miss Keisha McDonald for respondent.

March 17, 2006

PANTON, J.A.

1. I have read the reasons for judgment written by McCalla, J.A. (Ag.). I agree that there was no error on the part of the learned trial judge in making an award in respect of both aggravated and exemplary damages in this case. However, I am of the view that an award of an amount which is equivalent to that awarded for pain and suffering and loss of amenities is inordinately high. Accordingly, I agree that the amount should be halved.

2. I cannot allow the moment to pass without noting the fact that this is the very first case that the Court itself, as distinct from a single judge, has determined wholly on the basis of written submissions. This type of appeal is ideal for such determination. I urge litigants and their attorneys-at-law to embrace this method where possible, in order to save time and to assist in the Court's efforts to dispense justice expeditiously.

SMITH, J.A.

I have read the judgment of Panton, J.A. and McCalla, J.A. (Ag.). I agree with their reasoning and have nothing further to add.

McCALLA, J.A(Ag.):

1. On July 16, 2004, Sykes J, (Ag) (as he then was) made an order entering judgment for the Respondent Leeman Anderson in the sum of \$800,000.00 for general damages. The Respondent had commenced proceedings to recover special damages and general damages including aggravated and exemplary damages for assault and battery. This was as a result of injuries inflicted by the second appellant, Constable Christopher Burton, whom he alleged was at the time the servant and/or agent of the first appellant, the Attorney General.

The appellants now appeal to this Court against the decision of Sykes J that the claimant be awarded \$400,000.00 for both aggravated and exemplary damages.

The appellants seek the following orders:

(a) That there be no award for exemplary and aggravated damages.

(b) In the alternative, that the quantum of damages be reduced.

(c) That the costs of this appeal be the applicants'.

2. The narrative of events as summarized by the learned trial judge on pages 2 and 3 of his judgment is as follows:

"His testimony is that on December 14, 2000, after 7 o'clock in the evening he was in his shop when he saw three police officers walking along

West Bay Farm Road. He heard them telling persons to close their shops. Three officers entered his shop. Of the three he only knew Constable Burton. He describes the uniforms they were wearing and adds that the two whom he did not know had guns in their waists. According to him, Constable Burton had on the regular police uniform while the other two were in 'blue police uniform.

The three officers entered his shop and gave him the same instructions that they had given the other shop operators along West Bay Farm Road. He declined to follow them. He said Constable Burton cursed him. A war of words ensued which culminated in Constable Burton using a crutch to beat the claimant over his head, arm and the rest of his body."

Sykes J found that the conduct of the police officer fell within the first category of cases outlined by Lord Devlin in the case of **Rookes v Barnard** [1964] A.C. 1129, formulated by that distinguished jurist as being:

" oppressive, arbitrary or un-constitutional actions by servants of the government."

3. In the instant case the learned judge found that:
 - a. The police were on West Bay Farm Road in December, 2000;
 - b. Mr. Anderson was in his shop on West Bay Farm Road;
 - c. Three police officers, including Constable Burton entered his shop;
 - d. Mr. Anderson declined to close his shop on the instructions of the police;
 - e. Constable Burton beat Mr. Anderson with his crutch;

- f. Mr. Anderson at the time had only one leg. The other was amputated above his knee;
- g. The other police officers blocked the door so Mr. Anderson could not leave;
- h. After he was beaten he was again ordered to close the shop and as the police officers left Constable Burton drew the door close;
- i. The police officer pointed his gun at the claimant when the claimant opened his door; and
- j. There was no lawful justification or excuse for the conduct of the police officer;

4. These are the grounds of appeal on which the appellants rely:

- (a) The trial judge erred in awarding exemplary damages as the evidence adduced at the trial did not warrant such an award being made.
- (b) The trial judge erred in awarding a sum that represented damages for both aggravated and exemplary damages and failed to appreciate and assess the different legal considerations and evidence which should guide the awards of both heads of damages.
- (c) The trial Judge erred in determining an appropriate award for exemplary and aggravated damages in that the amount awarded was excessively high.
- (d) The trial Judge erred in determining an appropriate award for exemplary and aggravated damages, he failed to have any regard for the fact that the award of compensatory damages was of such a quantum that it was punitive in nature.
- (e) The trial Judge erred in the estimate of exemplary and aggravated damages in that he did not take into consideration the range of previous awards with regards to the existing social and economic conditions.

Ground "f" was not pursued.

5. **Grounds (a) and (b)**

These grounds deal with the issue of whether or not the evidence adduced at trial warranted the award of aggravated and exemplary damages made. They also address the question as to whether or not the learned judge had failed to appreciate and assess the different legal considerations and evidence which should guide the making of an award under each head of damages.

In ***Attorney General v Delroy Parchment*** SCCA 7/2003 delivered on July 30, 2004, the sole issue which arose for the determination of the Court was the correctness of an award made for exemplary damages which the appellant contended was inordinately excessive. The principles adumbrated in ***Rookes v Barnard*** (supra) relating to the categories of circumstances in which an award of exemplary damages may be appropriate were considered in ***Parchment*** as well as in the earlier case of ***Douglas v Bowen*** [1974] 12JLR 1554. At page 1226 of the judgment in ***Rookes v Barnard*** Lord Devlin stated that an award of exemplary damages "serves a valuable purpose in restraining the arbitrary and outrageous use of executive power". He said that "such an award can serve a useful purpose in vindicating the strength of the law and thus

affording a practical justification for admitting into civil law a principle which ought logically to belong to the criminal".

6. Cooke J.A. in **Parchment** at page 4 of the judgment in referring to the rationale for an award of exemplary damages made reference to the case of **Francis v Baker** and **Bentley** and **Attorney General** (1992) 29J.L.R 424. In the latter case the headnote accurately states in part that:

" (iii) exemplary damages ought to be awarded in a case where the servants of the government have acted in an oppressive, arbitrary and unconstitutional manner. In the instant case the first and second respondents had in addition behaved maliciously and there is every need to punish them for their acts in order to deter not only them but others from acting like them."

Cooke J.A. observed in **Parchment** that notwithstanding criticisms that have been leveled at the existence of this head of damages, "the demise of exemplary damages is not at hand". He alluded to the speech of Lord Nicholls of Birkenhead in the case of **Kuddus (A.P) v Chief Constable of Leicester Constabulary** [2001] U.K.H.L. 29 at paragraph 63 where that learned judge summarized the reason for its existence as follows:

"The availability of exemplary damages has played a significant role in buttressing civil liberties, in claims for false imprisonment and wrongful arrest. From time to time cases do arise where awards of compensatory damages are perceived as inadequate to achieve a just result between the parties. The nature of the defendant's conduct calls for a further response from the courts. On occasion conscious wong-

doing by a defendant is so outrageous, his disregard of the Plaintiff's rights so contumelious, that something more is needed to show that the law will not tolerate such behavior. Without an award of exemplary damages, justice will not have been done. Exemplary damages, as a remedy of last resort, fill what otherwise would be a regrettable lacuna."

7. With regard to the award for aggravated damages Counsel for the appellants cited the case of ***Thompson v Commissioner of Police of the Metropolis*** [1998] Q.B. 498 at page 516 paragraphs B-C where Lord Woolf said:

"Such damages can be 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."

Miss Larmond also submitted that there was no evidential basis for making such an award. The averments in the pleadings to the effect that the respondent was badly beaten at his place of work "in the presence of numerous persons" were not borne out by the evidence. In my opinion having regard to the conduct of the police and the facts relied on by the respondents, the learned judge was justified in making an award of aggravated damages as further compensation because of the humiliation and embarrassment suffered by the respondent.

Referring to the award of exemplary damages, Counsel emphasized that the mere fact that a case falls within that category does not give rise to an award purely exemplary in character.

In **Parchment** (supra) at pages 7 – 8 Cooke J.A. said:

"The fact that exemplary damages may be appropriate does not necessarily compel an award under this heading. Exemplary damages, and the quantum in respect of such award is (sic) dependent on whether or not and to what extent the compensatory award is adequate to punish and deter state agents as regards their outrageous conduct. In this case, there was an award for aggravated damages. The global award cannot be said to have been parsimonious – it was substantial. To reiterate, the award of exemplary damages is not to provide windfalls to plaintiffs at the public expense."

8. In the circumstances of this case, the police without legal authority entered the premises of the appellant, a paraplegic and inflicted a beating on him. Sykes, J was driven to observe at page 16 of his judgment that "if this does not fall within what Lord Devlin would describe as the 'arbitrary and outrageous use of executive power' then it is difficult to see what could".

I am constrained to reject the submissions of the appellant that the learned judge was in error when he found that an award of exemplary damages was appropriate. There was in my view, abundant evidence to justify the making of an award under both heads of damages.

9. I now turn to the complaint by the appellants that Sykes J erred in making one award for both exemplary and aggravated damages. Miss Larmond submitted that the correct approach was outlined by Lord Reid in **Cassell & Co. Ltd. v. Broome** [1972] 1 All ER 801 at page 839 where he states thus:

"The only practical way to proceed is first to look at the case from the point of view of compensating the plaintiff. He must not only be compensated for proved actual loss, but also for any injury to his feelings and for having had to suffer insults, indignities and the like. And where the defendant has behaved outrageously very full compensation may be proper for that. So the tribunal will fix in their minds what sum would be proper as compensatory damages. Then if it has been determined that the case is a proper one for punitive damages the tribunal must turn its attention to the defendant and ask itself whether the sum which it has already fixed as compensatory damages is or is not adequate to serve the second purpose of punishment..."

Miss Larmond contended that as separate awards were not made under each head, this Court is unable to determine whether the judge made a reasonable assessment in arriving at the composite award.

In **Parchment** the Court, in considering the award of exemplary damages, took into account the fact that an unspecified amount had been awarded for aggravated damages. There is no merit in the complaints made in these grounds of appeal.

10. **Grounds (c), (d) and (e) - the quantum of damages.**

The thrust of the submissions advanced under these grounds was that the cases of **Francis** and **Parchment** establish that compensatory damages is punitive and compensatory damages in the instant case was awarded at the upper end of the scale in terms of the range of compensatory awards that the learned judge considered and used as a guide. She said that the learned judge failed to appreciate that damages for humiliation could be sufficiently met in an award of compensatory and aggravated damages.

11. I am of the view that Sykes, J did not fall into error in using the cases he did as a guide. However, the award of compensatory damages cannot be described as modest.

I bear in mind the principles enunciated in **Francis** and **Parchment** that in making awards for exemplary damages there should be moderation. As Cooke JA said in **Parchment**:

"The award for exemplary damages is not to provide windfalls to plaintiffs at the public expense."

In **Parchment** the circumstances were as follows:

"(i) The police were aware that the respondent had a broken left leg which had been placed in a cast.

- (ii) The respondent consequent on the pain he was experiencing bawled out begging for medical attention.
- (iii) His fellow prisoners also sought of the police that the respondent receive medical attention.

The deterioration in the condition of the respondent's leg was such that it emitted a foul odour.

- (iv) The foul odour was so offensive that prisoners who shared the cell with the respondent asked to be removed – which request was granted.
- (v) The respondent's plea for medical attention was ignored. Detective Inspector Campbell told him that he was a thief and should stay in the cell and suffer.
- (vi) The respondent remained in the cell for five days after which he was taken out in a wheel-barrow put in a jeep and taken to the Kingston Public Hospital where his leg was subsequently amputated."

There, this Court reduced an award of \$500,000.00 for exemplary damages to \$100,000.00.

12. In the case at bar, I have already stated that I am of the opinion that Sykes J was justified in making awards for both aggravated and exemplary damages, the latter being for punishment and deterrence. However, having regard to the approach of the Court in **Parchment**, the award of \$400,000.00 must be considered to be inordinately high.

In the circumstances an award of \$200,000.00 for aggravated and exemplary damages would be appropriate.

PANTON, J.A.

ORDER:

Appeal allowed in part. Award for aggravated and exemplary damages reduced to \$200,000.00. Appellant to have one-third costs to be agreed or taxed.